ARGUMENT BEFORE THE SELECT COMMITTEE OF THE U.S. SENATE, THURSDAY, JUNE 10TH, 1852

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BEFORE THE

SELECT COMMITTEE OF THE U. S. SENATE,

THURSDAY, JUNE 10th, 1852,

BY

EDWIN M. STANTON,

OF COUNSEL FOR THE COMPLAINANT.

REPORTED BY ROBT. SUTTON.

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1852.

FLORIDA CONTESTED ELECTION OF UNITED STATES SENATOR.

The Special Committee of the Senate of the United States met on the morning of Thursday, June 10th, 1852, in the Supreme Court room, at the Capitol, Washington city.

Present, Mr. Bright, Mr. Mason, Mr. Davis, Mr. Pearce.

Sitting member, Hon. S. R. Mallory; contestant, Hon. D. L. Yulee.

ARGUMENT.

EDWIN M. STANTON, on behalf of Mr. Yulee, the contestant, addressed the committee as follows:

Mr. CHAIRMAN, and gentlemen of the Committee: I deeply regret that the illness of my associate counsel compels me to proceed with this argument in his absence. In undertaking to discuss the grave and important question under consideration, I beg leave to disclaim the presumption of supposing that your judgments can be influenced by any observations of mine, except so far as they may be supported by reason and authority. My sole aim, therefore, will be to present the claimant's case briefly and plainly as I can, with the precedents and authorities on which it rests; thereby to relieve the Committee from some portion of the labor of research that might otherwise be encountered in this investigation.

On the 4th of March, 1851, a seat in the Senate of the United States from the State of Florida, became vacant. That seat is held by Mr. MALLORY. It is claimed by Mr. YULEE. To which of them it rightfully belongs is the question for your judgment. In considering that question a preliminary inquiry presents itself as to the jurisdiction of the committee, its nature and extent, and the law by which the exercise of that jurisdiction is to be governed.

The Constitution provides that "each *House* shall be the judge of the election, return, and qualification of its members." The convenience of deliberative bodies has sanctioned the practice of referring important questions to a select number of their body, in whose wisdom and judgment confidence can be placed. This is now the universal practice in all election cases. The decision of the election committee of the House of Commons is said to be final and conclusive. Although such is not the case here, yet great weight and consideration is justly due to the opinion of a committee so organized.

The jurisdiction of this Committee, then, being derived from the Senate, under the Constitution, its nature and extent, and the law that governs it, must be the same that regulates the action of the Senatorial body. It is, in its nature, strictly judicial. This is manifest by analogy to similar acts of other deliberative bodies, by the opinion of

jurists, and by the import of the Constitution. "Besides its legislative capacity," says Sir William Blackstone, speaking of parliamentary elections, "each House has a judicial capacity for the maintenance, among other purposes, of its own authority and independence, and it is in its judicial capacity that it takes cognizance of elections." "The Commons, in their House," says Lord Coke, speaking of the same subject, "have a power of judicature. The rule, the only rule, to regulate this power of judicature, is a part of the law of the land." So, in his commentaries, Chancellor Kent observes: "Each House is made the sole judge of the election, return, and qualification of its members. The same power is vested in the English House of Commons, and in the State legislatures, and there is no other body known to the Constitution to which this power might be safely trusted. It is requisite to preserve a pure and genuine representation, and to control irregular, corrupt, and tumultuous elections. As each House acts in these cases in a judicial character, its decisions, like the decisions of any other court of justice, ought to be regulated by known principles of law, and strictly adhered to, for the sake of uniformity and certainty." 1 *Kent's Comm.*, 235.

The question of Senatorial membership, in the Rhode Island case, was said, by the distinguished parliamentary jurist who now presides over that body, to be "a judicial question." And the Constitution, by its very terms, declares that each House shall be "the judge." The judicial nature of the question is not only indicated, but its limits are defined by the Constitution, embracing the election, the return, and the qualification of members. It had been seen, by the experience of Parliament, that important questions might arise with regard to each of the enumerated particulars. By accident, by mistake, or by fraud, seats might be obtained by persons not elected, persons duly elected might not be returned, and others returned who were neither elected nor qualified. Hence, the framers of the Constitution, when the foundations of this Government were laid, not only declared the judicial nature of the question, and the capacity in which it should be decided, but enumerated its subjects, and established over them the sole judgment of each House as a constitutional function.

From its judicial nature it follows that this jurisdiction must be guided, directed, and controlled by law. This is manifest by the authorities before mentioned, and also by the import of the Constitution. To judge, implies a known standard of judgment, distinguished from arbitrary will or mere discretion. While, in a legislative capacity, con-

siderations of convenience, temporary expediency, party interest, or personal feeling, may, and sometimes legitimately, become the rule of action; yet judicial functions must ever be governed by rule, guided by law. This is eminently the case in a question of membership in a body vested with the supreme attribute of sovereignty the law-making power, and to which, by the Constitution, the official conduct of other judges is made amenable. It would be a strange solecism to impose upon such a tribunal the duty to judge, with no law to guide its judgment, or to clothe it with power of judgment above and beyond the law.

Since, then, this committee, representing the Senate as judges in the exercise of a high constitutional function is a judicial tribunal of special jurisdiction, regulated by law, it is obvious that the rule of its action must be—first, the Constitution of the United States, and the common law which, as its basis, forms the rule of its construction and interpretation; and, secondly, the State constitution and laws, so far as they are not controlled by acts of Congress and the Federal Constitution. These furnish the rule of this judicature. And this view will exhibit the ground on which the claimant presents his case, sundered from all extrinsic feelings and interests, to be measured by the Constitution and laws by which alone he seeks favorable judgment.

The history of the case is briefly this: Florida being admitted into the Union as a State in 1845, two Senators were then elected, of whom the term of one would expire on the 4th of March, 1851. Anticipating this event, the legislature of that State, in the preceding January, undertook to fill the vacancy. Mr. Yulee claims that it was filled by his election on the 13th of January. Mr. Mallory claims that it was filled on the 15th by his election; and he, being in possession of the seat, the burthen is, in the first instance, on the claimant. But if it be shown that there was a valid election on the 13th of January, then that burthen is discharged, for there would, in that case, be no vacancy to be filled on the 15th, and all legislative action in that regard would be void. So that the case resolves itself into the simple inquiry, whether there was a valid election on the 13th of January. If there were, it is not disputed that Mr. Yulee is the person elected; if there were not, he makes no claim to the seat. The legislative acts of that day being set forth in the journals produced by both parties, there is, in respect to them, no dispute. So that the case comes finally to the single point of judgment upon the legal effect of those acts, whether in law they constitute an election. To that question I now beg to direct the atten-

tion of the committee; and in discussing it I shall confine my observations strictly to the matters appearing on the record, without regard to the extrinsic facts and statements presented by either party.

The Federal Constitution provides that Senators in each State "shall be *chosen* by the legislature." That choice is to be by what is technically termed "election," as is signified by the use of that expression in connexion with the choice of Senators, Representatives, and other officers. When, where, and how that election shall be held, whether upon view, or by poll, by *viva voce* vote, or by ballot; by the concurrent vote of both Houses, each acting in its own chamber, or by a joint meeting, is left to the legislature, which may prescribe the time, place, and manner of holding the election. But the Constitution being an instrument of enumeration, and not of definition, what will constitute an election, when held, is not defined, and can only be ascertained by reference to the common law, which, being in existence at the formation of the Constitution, is regarded by judges and jurists as the great basis of American jurisprudence—the guide, expositor, and rule of constitutional construction.

There was, at an early day, a dispute in reference to the influence of the common law upon Federal institutions; but that soon ended, for it is now agreed on all hands, that, while the common law is not a source of jurisdiction or power, they being derived only from the Constitution, yet, upon subjects over which the Constitution has conferred jurisdiction, the maxims and rules of proceeding of the common law, in similar and analogous cases, are to be adhered to where the Constitution is silent. In such cases the common law governs the course of proceeding, affords the rule of decision, and is to be regarded as a part of the law of the land. This is now the doctrine of jurists of both schools, being equally the sentiment of Tucker, Kent, and Story, and daily acted upon in every department of the Government.

By the common law, *election* signifies "a choice by the major part of those who have a right to choose, and who exercise that right." It has two essential elements—the *right* to choose, and the *exercise* of that right. This signification of election is established by elementary writers, and by parliamentary and judicial decisions, which, being cited at large in the claimant's printed brief, I need only here refer to *Male on Elections*, 100, 101; *Simeon on Elections*, 128; *Chambers on the Law and Practice of Elections*.

By the constitution of Florida this rule of the common law is a part of the fundamental law of that State, and is the only rule that deter-