ARKANSAS.

SPEECH

OF

HON. MILTON SAYLER,

OF OHIO

IN THE

HOUSE OF REPRESENTATIVES,

MARCH 2, 1875.

WASHINGTON:
GOVERNMENT PRINTING OFFICE.
1875.

SPEECH

OF

HON. MILTON SAYLER.

The House having under consideration the report of the select committee to inquire into the condition of affairs in the State of Arkansas—

Mr. SAYLER, of Ohio, said:

Mr. SPEAKER: I approach the discussion of the matter now before the House with a full sense of its gravity and importance. It is no ordinary political question now pending for decision, and by no means a question that should be determined by mere considerations of party policy or by party prejudice and passion. It is a far-reaching question, involving the fundamental principles of our American system and affecting the right of the people of a great and sovereign State of the Federal Union to make their own laws and to have them interpreted, applied, and executed by officers of their own choice. It is a question that forces upon the House directly the decision whether the government of a State which the people have almost unanimously adopted, in accordance with all law and precedent, and which is administered to the satisfaction of very nearly the entire body, with peace and quietness, shall be permitted to stand, or whether it shall be overthrown and destroyed and a government obnoxious to the people forced upon them by Federal arms and sustained by military power. I bespeak for this question, therefore, a fair and deliberate consideration, and shall endeavor to discuss it, not as a partisan, but as one who loves his country and seeks to do justice in his public acts.

The facts in this case, Mr. Speaker, are so fully and distinctly set forth in the report of the committee that I shall not repeat them, except so far as may be necessary for the purpose of the argument I propose to present.

On the 27th day of May, 1874, a select committee was appointed to inquire into the disturbed condition of governmental affairs in the State of Arkansas, and all the facts relating thereto and the causes thereof, and whether said State has now a government republican in form, the officers of which are duly elected, and as now organized ought to be recognized by the Government of the United States.

At the time of the passage of this resolution two different men, Joseph Brooks and Elisha Baxter, each claimed to be the lawful governor of the State of Arkansas; each had surrounded himself with a military force and appealed to arms in vindication of his cause; and each had applied to the President of the United States for aid. The Legislature, then assembled in extraordinary session, under the

call of Elisha Baxter as governor, had also passed a joint resolution applying to the President to protect the State against domestic violence, and the President had issued his proclamation on the 15th day of the same month recognizing Mr. Baxter as the lawful executive of the State and commanding the insurgents to disperse and submit themselves to the lawful authority of said executive.

I propose to inquire, first, into the propriety of this recognition of Mr. Baxter on the part of the President, and what right or power to interfere beyond this exists either in Congress or in the executive department of the General Government. Mr. Brooks and Mr. Baxter had been opposing candidates for the office of governor at an election held on the 5th day of November, 1872, in accordance with the provisions of the constitution of 1868, adopted by the people of Arkansas under the reconstruction acts of Congress. Mr. Baxter was the candidate of the republican party and Mr. Brooks of what was known as the reform or liberal party, the democrats having no distinct candidate of their own, but generally supporting Mr. Brooks. In accordance with the provisions of the constitution referred to above, the returns of this election were sealed and transmitted to the seat of government by the returning officers and directed to the presiding officer of the senate, which assembled in January, 1873, and who during the first week of the session thereof opened and published the same in the presence of the members then assembled. The result of these returns of the election for governor was declared to be, for Mr. Baxter, 41,684, and for Mr. Brooks, 38,726; whereupon the president of the senate announced that Mr. Baxter was duly elected governor of the State of Arkansas. The oath of office was administered to him by Chief-Justice McClure, and he entered upon the discharge of the duties of the office and was fully recognized as governor by the Legislature of the State. He continued to discharge the duties of his office without question until the 19th day of the following April, after the Legislature had been in session three and a half months, and within six days of the adjournment thereof, when Mr. Brooks filed his petition, in accordance with the constitution and laws of the State, to contest the election of Mr. Baxter as governor, and praying for leave to introduce proof.

The provision of the constitution of 1868 in this behalf is as follows:

> Contested elections shall be determined by both houses of the General Assembly in such manner as is or may hereafter be prescribed by law.

And the provision of the law in this behalf is:

> SEC. 100. All contested elections of governor, except as herein provided, shall be decided by the joint vote of both houses of the General Assembly.
>
> SEC. 101. If any person contest the election of governor, he shall present his petition to the General Assembly, setting forth the points on which he will contest the same and the facts which he will prove in support of such points, and shall pray for leave to introduce his proof; and a vote shall be taken by yeas and nays in each house whether the prayer shall be granted.

The petition thus filed by Mr. Brooks, upon a motion that he shall have leave to introduce his proof, was rejected by the house of representatives by a vote of 53 yeas to 9 nays, notwithstanding the fact that thirty-six members of that body had been elected upon the ticket with Mr. Brooks and were identified with the party of which he was the candidate.

It is somewhat remarkable that the filing of this petition should have been so long delayed, and equally so that the vote should have been so nearly unanimous in support of Mr. Baxter and against

Mr. Brooks. That Mr. Brooks had strong grounds on which to contest the election of Mr. Baxter there can be no reasonable doubt. The testimony abounds in a detail of most disgraceful frauds upon the rights of the people and upon the rights of Mr. Brooks as one of their candidates. These frauds are the more fully developed, because those who had been the friends and partisans of Mr. Baxter, and by whom these frauds had been committed, had become his enemies, and came before the committee as willing witnesses, unblushingly divulging the rascalities and outrages of which they themselves had been the perpetrators, and by which they themselves, in one way and another, in high station and low station, hoped to profit.

The entire election machinery of the State—and it was perhaps as unfairly constructed by the constitution of 1868 as that of any State could possibly be—had been in the hands of the republican party, whose candidate Mr. Baxter was. The governor had appointed the registrars, and the registrars had appointed the judges and clerks of election in the various voting precincts; and it is in many instances charged, by those who themselves had been the actors, that registration was refused to large numbers, that large numbers properly registered were stricken from the rolls, that others were not allowed to vote, that the ballot-boxes were stuffed, and that the returns were tampered with. The democrats and conservatives of Arkansas certainly had great reason to complain, for, as the report of the committee well states—

> The whole proceeding by many of those having official charge of the registration voting, and returning the votes is characterized by the grossest unfairness and dishonesty, and instead of an honest effort to ascertain the will of the voters, they endeavored by every possible means to secure the ascendency of their own party friends.

As a matter of justice to Mr. Baxter, however, I am compelled to assert that the testimony is singularly free from any evidence connecting him personally with these frauds. He seems to have been then, as he proved himself afterward, an honester and truer man than some of his supporters supposed him to be.

I have no disposition whatever to palliate or excuse these frauds, and the committee has had no disposition to conceal them in their report. I denounce them as a gross outrage upon the rights of the people of the State and upon the rights of Mr. Brooks, and as an everlasting shame and disgrace to the men who themselves perpetrated them, or caused them to be perpetrated by others. I must say, however, that one's sympathy with Mr. Brooks is very much diminished by his present evident alliance with the very men whom he charges with having cheated him out of his office, and through whom he most persistently seeks to perpetrate a greater outrage upon the people than was perpetrated upon himself—

> Resolved to ruin or to rule the State—

by his alliance with the very men for whom he had so great affection, that he is said to have declared publicly during the campaign if the people "would only elect him governor he would fill the penitentiary so full of them that their legs would stick out of the windows."

But suppose these statements of frauds are all true, and suppose everything is true that is charged even by the bitterest enemies of the Baxter administration, what case does it present for the interference either of Congress or the President? It is after all but a case of contested election, and not at all different in its essential character from other cases of that kind. Mr. Brooks is not the only man that was ever counted out in a contest for governor; he is not the only

man who, by the frauds of those managing the elections, has been cheated out of his just rights. Arkansas is not the only State in which these things have been done. Frauds have been perpetrated in other States, and in other States cases of contested election have arisen. But that Congress has any power to interfere in such cases is too absurd a proposition for grave argument. Congress has no powers except under the Constitution of the United States. These powers are enumerated in the eighth section of the first article thereof, and it will not be pretended by any one that the right to determine the result of a State election is found among them. The proposition that any such right exists, and especially if there be added to it the right to enforce such determination by military power, would be utterly subversive of our whole system of government, and an utter annihilation of all the constitutional rights of the States. I do not believe that in this instance the representatives here assembled, under political pressure of whatever kind, will establish a precedent so fatal and pernicious.

Each State provides for itself a tribunal before which cases of this kind shall be determined. By the constitution of Arkansas, adopted in 1868, as I have already quoted it, and in which respect it resembles the constitutions of most of the other States of the Federal Union, the Legislature had been vested with complete and final authority in the premises; and the Legislature having acted under this authority, their decision, whether right or wrong, is binding upon the State and upon the United States as well as upon the parties to the contest, and cannot be called in question by the Federal Congress or the Executive, nor is it even subject to judicial review by the courts of the State. This latter proposition has often been held by the courts, and is as well established as any other principle:

> Contested elections, like all other controversies, must be submitted to the determination of some competent tribunal, and, satisfactory or not, right or wrong, the decision must be sustained or there can be no end to controversy and no settled government. It is far more important to the people that the executive power should be unquestionable than that any particular person should wield it.

This is a summary of the whole question made by Mr. Cooley, the author of the able work on constitutional limitations.

When on the 19th day of April, 1873, Mr. Brooks filed his petition in the lower house of the General Assembly of Arkansas, contesting the election of Mr. Baxter, he acted entirely in accordance with the constitution and laws of the State. This was the manner of making the contest specifically prescribed by the constitution and by statute. The adjudication then made was final and the mode of it exclusive. This adjudication once made, the courts of Arkansas could neither interfere with nor review. The books are full of authorities to this effect, and I know of none to the contrary. In The State *vs.* Marlow, 15 Ohio State Reports, 134, it was held that—

> A specific mode of contesting elections having been provided by statute, according to the requirements of the constitution, that mode alone can be resorted to in exclusion of the common-law mode of inquiring by proceedings in *quo warranto*. The statute which gives the special remedy and prescribes the mode of its exercise binds the State as well as individuals.

So, too, in 28 Pennsylvania State, 9, The Attorney-General *vs.* Garragues, and elsewhere in the decisions of that State, it was held—

> That when there are two claimants under the same election for the same office which only one of them can have, it constitutes a case of contested election, which is to be tried in the mode specially provided for in such cases, and not by the ordinary forms of judicial process.

I need not refer to other cases. The doctrine is well established, and has become part of the ordinary teaching of the text-books, that where jurisdiction is specially conferred by the Constitution and laws of a State upon other tribunals, and the mode of its exercise prescribed, it cannot be differently exercised by a proceeding in *quo warranto*, as at common law, nor by the supreme court and district courts under a more general ground of jurisdiction in *quo warranto*. But in this case we are not without the decision of the supreme court of the State of Arkansas itself. Mr. Brooks was not satisfied with the decision of the Legislature in the manner prescribed by the constitution and laws of his State, but determined, against all precedent and all law, to push his case through the courts. Accordingly, after the adjournment of the Legislature, on the 2d day of June of the same year, he procured the presentation of a motion for a writ of *quo warranto* to the supreme court of the State by the attorney-general upon his relation. The filing of this motion was resisted, and after extended argument was, on the 4th day of June, denied by the court, though the written opinion was not filed until the 29th day of September. The refusal of the permission to file the petition for the writ was based upon the ground I have already suggested as general in such cases, that there was no jurisdiction in the court. To use the very clear and concise language of the judge who delivered the opinion:

> Under this constitution the determination of the question as to whether the person exercising the office of governor has been duly elected or not, is vested exclusively in the General Assembly of the State, and neither this nor any other State court has jurisdiction to try a suit in relation to such contest, be the mode or form what it may, whether at the suit of the attorney-general or on the relation of a claimant through him, or by an individual alone claiming a right to the office. Such issue should be made before the General Assembly; it is their duty to decide, and no other tribunal can determine that question. We are of the opinion that this court has no jurisdiction to hear and determine a writ of *quo warranto* for the purpose of rendering a judgment of ouster against the chief executive of this State, and the right to file the information and issue a writ for that purpose is denied.

To this opinion Judge McClure dissented.

It has been charged that the judgment in this case was extorted from the court by threats and intimidation of the governor and by the presence of armed men; but the facts in the testimony not only do not show this to have been true, but affirmatively show that the charge is entirely without foundation. More than that, the decision is in entire accord with all the decisions of the courts of other States upon similar questions, and there is no allusion to any intimidation whatever in the long and elaborate dissenting opinion of Judge McClure. There was no necessity for the court to take any action if they were apprehensive of any interference with the dignified and independent discharge of their high prerogative. They might have remained silent. Furthermore, the testimony of Judge Gregg expressly disclaims any impression made by military interference.

The judgment of the court referred to above is elaborately discussed and fully sustained by the Attorney-General of the United States in his opinion addressed to the President on the 15th day of May, 1874, and shortly after it was rendered it was affirmed in the case of Wheeler *vs.* Whytock, known as the "prohibition case." On the 1st day of October, 1873, Stephen Wheeler filed a petition in the supreme court of the State of Arkansas for a writ of prohibition against the circuit judge, John Whytock, commanding him to refrain from considering further a case for the recovery of the office of auditor of the State. This case grew out of the same election as the case of Brooks against Baxter, and the facts were identical. The su-

preme court affirmed in direct terms the decision given in the case of Brooks against Baxter and granted the writ, all the judges concurring in the reasoning upon this point. Even Chief Justice McClure, who had dissented in the former opinion, uses the following language:

As to all matters of contested election for the offices of governor, lieutenant-governor, secretary of state, auditor, treasurer, attorney-general, and superintendent of public instruction, I am of the opinion that it can only be had before the General Assembly. I do not believe the Legislature intended to give the circuit court jurisdiction of contested elections, which, by the constitution, were cognizable only before that body. The right to an office comes from the people, and they have the unquestioned power to determine and prescribe the terms upon which it may be enjoyed. When the office of auditor was created, the people declared, as they had an unquestionable right to do, that a contest for it should only be made before the Legislature. To hold that the circuit court has no jurisdiction is not denying the plaintiff in the court below a remedy, nor is he in any manner deprived of a constitutional right.

And Judges Searle and Stephenson, in the same case, use the following language:

The office of auditor being one of those enumerated in the constitution in connection with that of governor, as one the contest for which shall be determined by the General Assembly, we are clearly of opinion that this case falls within the rules of decision laid down in the case cited above. It is true there exists in the case of the governor a statutory mode of procedure relative to such contest, but it is idle to insist that because the Legislature has failed to provide the mode by which the right to the other offices, mentioned in section 19 of article 6 of the constitution, that this neglect on the part of the Legislature can vest the courts with jurisdiction to determine such a contest. If that body had ever desired to do so, and had in terms enacted a law conferring upon the courts of the State the jurisdiction to try and determine such cases, it would have been wholly unwarranted by the organic law, and must, necessarily, have been so decided. The trial of the right to these offices is, in terms, enjoined upon another department of government, and must be exercised by it; and the attempt to impose the duty upon the courts would be as much a violation of the constitution as a failure to perform it altogether.

These two opinions are direct and conclusive of the whole subject-matter. Under the decisions of the Supreme Court of the United States (2 Peters, 492; 1 Wallace, 175) they are binding upon the legal tribunals of the State and upon all the legal tribunals of the country, and even upon the Supreme Court of the United States itself, and were so recognized by the Attorney-General in his elaborate opinion to the President referred to before. In Arkansas they were acquiesced in by all parties in the State. A case that had previously been brought by the Attorney-General in the Pulaski circuit court, under section 525 of the Arkansas code, was promptly dismissed. All parties regarded the question as settled. Even the republican State central committee issued an address on the 8th day of October, 1873, congratulating the people on this settlement of all vexed questions, and using the following words:

By the decision to which reference has been made it is distinctly held that the determination of the question whether a person exercising the office of governor has been duly elected or not, is vested exclusively in the General Assembly of the State, and that neither the supreme nor any other State court has jurisdiction to try a suit in relation to such contest, be the mode or form what it may, whether at the suit of the attorney-general, or on the relation of a claimant through him, or by an individual alone claiming a right to the office. This decision was promptly followed by the dismissal of the suit brought in the circuit court of Pulaski County by the State of Arkansas against Elisha Baxter, and now at last we can congratulate the people of the State upon the undoubted termination of this gubernatorial warfare. The Legislature has acted in the premises; its decision is final; and Governor Baxter's tenure of the office he holds is fixed and irrevocable. The action of the supreme court and the Legislature settles all vexed questions calculated to disturb the peace of the State; and Governor Baxter, reflecting the policy of the republican party, to secure peace, quiet, and order, seized upon this, the first opportunity presented since the organization of the State government, to muster out the entire militia force of the State.

No well-disposed citizen, whatever his political faith may be, can fail to indorse

nd commend this action of the governor. It attests the good faith and high purposes of the republican party on all questions affecting the interests of the people, and is an earnest of the efforts that Governor Baxter and the republican party are making to bring the State of Arkansas to as high a condition of peace, law, and order as is enjoyed by the most favored State in the Union.

All citizens are therefore called upon to preserve peace in their respective localities. Let no man be jeopardized in property or life. Let the expression of opinion on matters of public concern be free and unrestrained, and the laws vigorously and impartially enforced.

This address is signed by POWELL CLAYTON as chairman, and by STEPHEN W. DORSEY as one of the members of the committee, now and then Senators of the United States from the State of Arkansas.

But Mr. Brooks was still not satisfied, notwithstanding the direct decision of this contest by the General Assembly of the State and notwithstanding the explicit decision of the supreme court that neither it nor any other court of the State had jurisdiction in the case; and on the 16th day of June he entered a suit for the office of governor and the emoluments thereof in the Pulaski County circuit court, under the following provisions of the code of Arkansas:

Whenever a person usurps an office or franchise to which he is not entitled by law, an action by proceedings at law may be instituted against him by the State or the party entitled to the office or franchise, to prevent the usurper from exercising the office or franchise. (Code of Practice, 525.)

To this action, on the 8th day of October, 1873, and after the filing of the written opinion of the supreme court in the case of Brooks against Baxter, a demurrer was interposed. This demurrer was not considered until six months afterward, and the case was allowed to sleep until on the 15th day of April, 1874, in the absence of Baxter and his counsel, at a time when the bar generally understood that no business during the week would be taken up, after a similar case brought by the attorney-general before the same court had been dismissed, and in utter and reckless disregard of the decision of the supreme court, upon the pretense of the submission of the demurrer, this judge of a mere circuit court, whose judgments are subject to review and bound by the decisions of the supreme court, overruled the demurrer to the jurisdiction, and immediately rendered judgment of ouster against Baxter, and declared that the contestant, Brooks, was entitled to the office of governor of Arkansas. This, too, upon the determination of the technicality of the jurisdiction, without testimony heard on the question of the contest for the office of the chief executive of the State; this, too, in direct violation of the laws of Arkansas, that upon the determination of the demurrer "the party demurring may answer or reply;" this, too, after the decision of the supreme court upon the same question, and between the same parties, the *quo warranto* case having been at the relation of Brooks. And this action was taken under the pleadings filed in the case upon the ground that Baxter had usurped the office which he held.

Whatever may be the facts with regard to the election of 1872, whatever frauds may have been perpetrated, and however clearly it might subsequently be shown that at that election Brooks received a higher number of votes than Baxter, yet Baxter can in no possible legal sense be regarded as a usurper. He held his office under all the forms of law. A usurper is one who seizes an office without right or holds it without color of title.

Of this action of the circuit judge the Attorney-General well says

That this circuit court should have rendered a judgment for Brooks under these circumstances is surprising, and it is not too much to say that it presents a case of judiciai insubordination which deserves the reprehension of every one who does not

wish to see public confidence in the certainty and good faith of judicial proceedings wholly destroyed.

It is well enough to add here that even in this very case relied on by Brooks as establishing his right to the office of governor, taken from the Pulaski circuit court on *certiorari* to quash the judgment declaring Brooks governor of Arkansas, the supreme court of that State has recently decided that this circuit court had no jurisdiction over the subject-matter nor of any of its incidents, and that its proceedings and judgment were void, and that the judgment must be quashed. Yet upon this decision thus rendered by the circuit court, and claiming that the judgment executed itself, Mr. Brooks, in April, 1874, immediately proceeded to the State-house, and unlawfully and with force ejected Mr. Baxter, and took possession of the office and records. Then it was that the two parties surrounded themselves with armed forces; then it was that those terrible scenes of violence and bloodshed began which have disgraced the State; and then it was that the two parties made their application to the President for relief against domestic violence.

Matters remained in this condition until the 11th day of May, 1874, when the Legislature, convened in extraordinary session under the proclamation of Governor Baxter, recognized him as governor, and passed a joint resolution calling upon the President for protection; and accordingly, on the 15th day of the same month, the President issued his proclamation recognizing Baxter as the lawful governor and commanding the insurgents to disperse. That proclamation is in the following words:

By the President of the United States of America.

A PROCLAMATION.

Whereas certain turbulent and disorderly persons, pretending that Elisha Baxter, the present executive of Arkansas, was not elected, have combined together with force and arms to resist his authority as such executive, and other authorities of said State; and whereas said Elisha Baxter has been declared duly elected by the General Assembly of said State, as provided in the constitution thereof, and has for a long period been exercising the functions of said office into which he was inducted according to the constitution and laws of said State, and ought by its citizens to be considered as the lawful executive thereof; and whereas it is provided in the Constitution of the United States that the United States shall protect every State in the Union, on application of the Legislature, or of the executive when the Legislature cannot be convened, against domestic violence; and whereas said Elisha Baxter, under section 4 of article 4 of the Constitution of the United States, and the laws passed in pursuance thereof, has heretofore made application to me to protect said State and the citizens thereof against domestic violence; and whereas the General Assembly of said State was convened in extra session at the capital thereof on the 11th instant, pursuant to a call made by said Elisha Baxter, and both houses thereof have passed a joint resolution also applying to me to protect the State against domestic violence; and whereas it is provided in the laws of the United States that in all cases of insurrection in any State, or of obstruction to the laws thereof, it shall be lawful for the President of the United States, on application of the Legislature of such State, or of the executive when the Legislature cannot be convened, to employ such part of the land and naval forces as shall be judged necessary for the purpose of suppressing such insurrection or causing the laws to be duly executed; and whereas it is required that whenever it may be necessary, in the judgment of the President, to use the military force for the purpose aforesaid, he shall forthwith by proclamation command such insurgents to disperse and retire peaceably to their respective homes within a limited time:

Now, therefore, I, Ulysses S. Grant, President of the United States, do hereby make proclamation and command all turbulent and disorderly persons to disperse and retire peaceably to their respective abodes within ten days from this date, and hereafter to submit themselves to the lawful authority of said executive and the other constituted authorities of said State; and I invoke the aid and co-operation of all good citizens thereof to uphold law and preserve public peace.

In witness whereof I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the city of Washington, this 15th day of May, in the year of our Lord 1874, and of the Independence of the United States the ninety-eighth.

U. S. GRANT.

By the President:
HAMILTON FISH,
Secretary of State.

That the President was entirely right in the position taken by him in this proclamation there can be no reasonable doubt. Baxter had been declared elected by the presiding officer of the senate, and had been inducted into office in all due and legal form. He had been recognized as governor by the Legislature of the State, which had submitted to him all its enactments for approval or rejection. He was likewise recognized as governor by all the other officers of the State, and the subordinate officers in the State and in the counties were discharging their duties under commissions received from him. He had been recognized as governor by the supreme court of the State, and with general consent and acquiescence he had discharged all the functions of that office for a period of sixteen or seventeen months. Under these circumstances, that he was not a usurper but governor *de facto* there can be no possible question. I cannot conceive of a stronger case. Acting under this high color of authority his acts are valid and binding upon all, even though in point of fact he may not have received the highest number of votes at the election. (The people *vs.* Cook, 14 Barbour, 259; Ohio *vs.* Jacobs, 17 O. R., 151; Trustees of Vernon *vs.* Hills, 6 Cowen, 23.) This would simply present a case of contest to be decided by the State authorities, and until it is so decided adversely to him by a proper tribunal he remains the true and lawful executive of the State.

That decision as we have already seen in this case had been made. The Legislature of the State had solemnly passed upon the question in accordance with the constitution and laws, and from that date and at the time of his recognition by the President Mr. Baxter was not only *de facto* but *de jure* governor of Arkansas. It was not the duty of the President and it is not within the power of Congress to decide the contest between Brooks and Baxter upon its original merits. Neither the one nor the other has in any way been constituted a tribunal for that purpose. The President could do nothing as Congress can do nothing but recognize the existing *status*. Baxter had been declared elected, had for a long time discharged the duties of the office, had been sustained in the contest before the Legislature, whose decision was recognized as final and conclusive by the supreme court, and the President could not do otherwise nor could Congress do otherwise than recognize him as governor, notwithstanding the decision of an inferior court and which was also void for want of jurisdiction. The President was so advised at the time by the Attorney-General of the United States, who stated explicitly in his opinion that—

> When the people of a State declare in their constitution that a contest by State officers shall be determined by the General Assembly, they cannot be understood as meaning it might be determined in any circuit court of the State. To say that a contest shall be decided by a decision, and then to say after the decision is made that such contest is not determined, but is open as it ever was, is a contradiction in terms. Brooks appears to claim that when a contest for Governor is decided by the General Assembly, the defeated party may treat the decision as a nullity and proceed *de novo* in the courts. This makes the constitutional provision as to the contest of no effect, and the proceedings under it an empty form. When the house of representatives dismissed the petition of Brooks for a contest, it must be taken as a decision of that body on the questions presented in the petition. Doubtless the makers of the constitution considered it unsafe to lodge in the hands of every circuit court in the State the power to revolutionize the executive department at

will; and their wisdom is forcibly illustrated by the case under consideration, in which a person who had been installed as governor according to the constitution and laws of the State, after an undisturbed incumbency of more than a year, is deposed by a circuit judge, and another person put in his place upon the unsupported statement of the latter that he had received a majority of votes at the election. Looking at the constitution alone it appears perfectly clear to my mind that the courts of the State have no right to try a contest about the office of governor, but that exclusive jurisdiction over that question is vested in the General Assembly. This view is confirmed by judicial authority. (See opinion of Attorney-General, Executive Document No. 51.)

I cannot close this part of my argument, sustaining the action of the President and showing the validity of Mr. Baxter's title to the office of governor, without quoting the peculiarly apposite words of one who stands deservedly high in the councils of the republican party, and who upon another occasion and referring to another matter "presented the consideration that this question involved a great fundamental principle vital to the existence of our Government, which was, that where a question arose under a State law or under a State constitution, it was to be decided by the State tribunals; and that the decision of the tribunals of the State upon questions arising under their own laws was binding not only upon the people of the State but upon the Government of the United States; that this was the necessary result from our form of government; and that any alleged irregularity, or, if you please, fraud in a State election in the election of a governor or of a State Legislature was cognizable and was determinable by the tribunals of the State, and when the State tribunals had passed upon such questions their decision was binding upon the Government of the United States; and that if the Government of the United States assumed to go behind the decision of the State tribunals to examine into the questions arising in a State election under State laws, if it assumed the right to set aside a State government because of alleged frauds or irregularities in a State election, the assumption of such power was the end of the State governments, and placed every State government in this Union at the will and caprice of the Government of the United States, and that State governments thereafter would exist only by sufferance."

Such, Mr. Speaker, was the condition of affairs in Arkansas up to the time of the appointment of the committee, and such are the grounds justifying the action of the President in his recognition of Mr. Baxter as the lawful governor of the State.

I come now to consider important events which have occurred since that time in that State, and which have resulted in the adoption of a new fundamental law, the election of new officers, and the establishment of a general condition of peace and harmony throughout the State.

At the extraordinary session of the General Assembly of the State which met, as before stated, on the 11th day of May, 1874, there was passed an act providing for a convention of the people of the State of Arkansas to frame a new constitution, and providing for the submission of the question of its adoption to a vote of the people. This election was held on the 30th day of June, 1874, and resulted in a vote of 80,959 for the convention and 8,607 against the convention, being a majority of 71,652. The delegates who were elected at the same time met in convention at the city of Little Rock on the 14th day of July following, and proceeded to frame a new constitution for the State, which was submitted to a vote of the people on the 13th day of October, 1874, and ratified by a vote of 78,697 in its favor to a vote of 24,807 against it, being a majority for the new constitution of 53,890. At this same election were also

chosen all the officers provided for under the new constitution, and including the State, district, county, and township officers, and members of the General Assembly. A. H. Garland was the conservative candidate for the office of governor, and received a vote of 76,453. To him there was no opposing candidate. The other candidates on the same ticket received about the same number of votes. The Legislature chosen at this time assembled at Little Rock on the 11th day of November, 1874, when Mr. Garland was duly inaugurated as governor, and all the State, circuit, county, and township officers, chosen at the same election, entered upon the discharge of their duties. All the former officers gave way peaceably to those who were thus chosen under the new constitution with the single exception of Volney V. Smith, who had been elected lieutenant-governor on the same ticket with Mr. Baxter in 1872, and who at the time of the retirement of Mr. Baxter and the inauguration of Mr. Garland, issued a proclamation calling upon the people to support and obey him as governor. He also made an appeal to the President for military power to enforce his pretensions, to which appeal no attention seems to have been paid. Friends who urged him to this foolish course seem all to have deserted him; no one has appeared before the committee in advocacy of his claims; no one pretends that he has any claims; and his unwise and absurd assumption of right seems to have fallen into merited contempt.

There can be no pretense raised from the facts in the case that the call for the constitutional convention was not made, and the constitution as framed by that convention adopted, and the officers provided for under it chosen, not only by a very large majority of the vote cast, but by a very large majority of the legal voters of the State. There is no pretense, indeed, of unfairness in either of these elections, or that the announced result is not substantially correct. The only objection urged to the election adopting the new constitution and choosing the officers provided for under it was that the formerly existing registration and registration and election officers had been set aside and new ones created. Whatever may be said of the propriety or impropriety of this change of registration and election officers, yet those who served as such officers at this election were certainly officers *de facto*, and as such all acts done by them were good and valid. Acting under this color of authority their acts were binding, even though we may admit the most extreme position of the other side, that in point of law and right they were no such officers. It is not disputed that both of these elections were a fair and full expression of the will of the voters, and, consequently, the technical objection to the character of the election officers, under all the decisions of our courts, falls to the ground. (See 8 New York, 67; 11 O. S. R., 511; 6 Cowen, 23; 12 O. S. R., 16.)

But deeper and more important objections were urged to the validity of the new constitution and of the State government organized under it. It is claimed, in the first place, that Governor Baxter at the time of issuing the call for the convention which framed the constitution of 1874 was neither *de jure* nor *de facto* governor of the State, and consequently that no rightful and lawful authority existed in him to issue such call. This objection has been fully answered in the preceding portion of my argument, in which I have shown that he was in the highest sense governor *de facto et de jure*, not only exercising all the duties of the office of governor and declared to be such by the solemn adjudication of the General Assembly of the State, but also recognized as such by the President of the United States.

It is also claimed that the Legislature itself, which convened on he 11th day of May, 1874, and passed the act providing for the submission to the people of the question of calling a convention to revise the constitution, was not a lawful body, and consequently that its proceedings were void. The objection more particularly urged against it is the fact that subsequent to the election in 1872 and during and subsequent to the session held in 1873 between forty and fifty of its members had been appointed by the governor to executive offices and their places filled at a special election held on the 4th day of November, 1873.

It is not disputed that the governor under the constitution had entire authority to make these appointments. Indeed, this large appointing power vested by the constitution of 1868 in the chief executive was one of its most glaring defects, and one which the people had long desired to have remedied. It is not disputed that the appointments were made, and that the offices were accepted by these several members, nor that the persons accepting them were ineligible under the constitution to have a seat in either branch of the General Assembly. It is not disputed that in case of a vacancy occurring in either house it is made the duty of the governor, under the laws of Arkansas, to issue a writ of election to fill these vacancies. It is indeed urged that there was no evidence of the election of the members who appeared to fill vacancies. This objection is based upon the assumption that, Mr. Brooks having seized the archives of the State and retained them in his possession, no sufficient data could be reached to determine who had been elected. It is a sufficient answer to this that the secretary of state, in accordance with the law, made out the lists of elected members, and returned them to each house, giving the members thus returned a *prima facie* right to their seats, and which lists, upon comparison with the records in the office of the secretary of state subsequently recovered, are found to be entirely correct. The members thus chosen at the special election appeared at the extraordinary session, presented their credentials, and were admitted to seats in the upper and lower houses respectively. The constitution of Arkansas then in force, like the constitutions of all the other States, provided that "each house should determine the rules of its proceedings, and judge of the qualifications, election, and return of its members." No contest arose as to the seat of any one of the newly-elected members, and of the former members who had accepted other offices no one appeared to assert his right to a seat in the Legislature. This, under all law and all the usages of all the States, was final and conclusive of the whole matter.

There is no evidence whatever and no claim made of fraud at the election of these new members. The election seems to have gone pretty much by default, no one supposing at the time that the Legislature would be convened in extraordinary session.

It is also urged against the validity of the acts passed at this extraordinary session that the Legislature met within the military lines of Governor Baxter. This was indeed true during the early part of the session. But there is no evidence of any attempt being made to control the action of the Legislature by the military power, nor to interfere in any way with the attendance of the members. I cannot do better than quote the words of the report:

> As to the fact of the existence of martial law, and that the Legislature met within Baxter's lines the committee have to say that although these circumstances cannot be considered as favorable to wise and careful legislation, still as no attempt appears to have been made to prevent the attendance of members, or to control in any way their action by military force, they do not consider these facts sufficient to deprive the acts of that Legislature of the ordinary force of such action.

There was no other body of men in Arkansas claiming to be the Legislature of the State except that body chosen at the election of 1872, which first assembled in January, 1873, and subsequently in extraordinary session in May, 1874. There was no contest between rival Legislatures to decide. This was the only body claiming to act in that capacity. All attempts to question the validity of its acts seem puerile and absurd, and no such attempt has been made as to any other one of its acts, except the single one of the submission to the people of the State of the question whether they would revise their fundamental law. Its members passed laws which were signed by the governor, construed by the courts, and obeyed by the people. They elected a United States Senator, who was received without question, and now occupies a seat in that body equally with the Senators from Ohio or the Senators from Massachusetts. There is a general and continuous recognition of it as the Legislature of Arkansas. It discharged all the functions of such a body, and its right to do so was never otherwise called in question. No power can now examine its organization or question the validity of its action.

There can be no question, therefore, as to the validity of the act of Mr. Baxter as governor of the State of Arkansas, calling the extraordinary session of the Legislature in March, 1874, and there can be no question as to the validity of the act of that Legislature submitting the matter of the formation of a new constitution to a vote of the people.

I come now to consider what might be regarded as the most important objection to the validity of the constitution framed by the convention organized in the manner I have indicated, were that question a new one, and had it not already been settled by the decisions of the courts and the usages of the States for a period of more than a half century.

It is objected that the constitution of the State could neither be altered, amended, nor revised, except in the manner expressly prescribed in the then existing constitution, and that consequently the mode adopted for its revision in this instance was revolutionary and void. Article 13 of the constitution of 1868 provides that "amendments to this constitution may be proposed in either house of the General Assembly, and if the same shall be agreed to by a majority of the members elected to each of the two houses, such proposed amendment shall be entered on their journals, with the yeas and nays taken thereon, and referred to the Legislature to be chosen at the next general election, and shall be published as provided by law for three months previous to the time of making such choice. If in the General Assembly so next chosen as aforesaid such proposed amendment or amendments shall be agreed to by a majority of all the members elected to each house, then it shall be the duty of the General Assembly to submit such proposed amendment or amendments to the people, in such manner and at such time as the General Assembly shall provide. And if the people shall approve and ratify such amendment or amendments by a majority of the electors qualified to vote for the members of the General Assembly voting thereon, such amendment or amendments shall become a part of the constitution of this State." This constitution is silent as to any other method of amendment, alteration, or revision; and it is claimed by the enemies of the new constitution that no other method could therefore be adopted, on the principle of the maxim *expressio unius est exclusio alterius*. But the courts have always held that this maxim is not applicable to the provisions of a constitution, and applies rather to deeds and contracts between private individuals.

Sovereign rights cannot be disposed of in this way. The will of the people cannot be thus hampered in an instrument of limitations. It is contrary to the whole theory of the American system of government. The specific mode set forth in the Constitution for its amendment is permissive merely, and not mandatory or exclusive. A reasonable construction of the thirteenth article would be that it was intended to be confined to changes which are simple or formal, of small importance and few in number, and that it was not intended as a method for a general revision, or even as a method for effecting single, important, and radical changes in the fundamental law of the State. Notwithstanding the presence of a specific mode of amendment in the constitution of any State, the power is still inherent in the people to amend and revise it, through the medium of a constitutional convention. That this power exists and abides with the people of any State, without an express affirmation of it in their fundamental law, is a principle as well established by the decisions of the courts and the law and usages of the country as any other principle of our Government. Indeed, it is a fundamental principle. Says Mr. Webster:

> The people are the source of all political power.

Says Mr. Justice McLean:

> The theory of our political system is that the ultimate sovereignty is in the people, from whom springs all legitimate authority. (1 McLean, 347.)

And again:

> The States are equal, inasmuch as each has by its own voluntary will established its own government and has the power to alter it. This is the principle upon which State governments are established, and consequently they all stand upon an equal footing. They have the same basis, have been framed according to the will of the people, and may be changed at their discretion. (1 McLean, 348.)

The same principle is directly affirmed in the first section of the bill of rights of the constitution of Arkansas of 1868, in these words:

> All political power is inherent in the people. Government is instituted for the protection, security, and benefit of the people, and they have the right to alter or reform the same whenever the public good may require it.

It being impossible, however, for the people to meet in one place and act without organization, and this power to alter and reform their government being inherent, the question arises, how can they act to this end? To this I answer that the method adopted by the usage of the States almost from the beginning of the Government is that of the constitutional convention, convoked and assembled by the call of the people through the agency of the Legislature.

Says Mr. Webster again:

> When in the course of events it becomes necessary to ascertain the will of the people on a new exigency or a new state of things or of opinion, the legislative power provides for that ascertainment by an ordinary act of legislation.

Mr. Cooley, in his able work on Constitutional Limitations, (page 30,) lays down these two propositions as settled principles of American constitutional law:

> 1. In the original States and all others subsequently admitted to the Union the power to amend or revise their constitutions resides in the great body of the people as an organized body-politic, who, being vested with ultimate sovereignty and the source of all State authority, have power to control and alter the law which they have made at their will. But the people in the legal sense must be understood to be those who by the existing constitution are clothed with political rights, and who while that instrument remains will be the sole organization through which the will of the body politic can be expressed.
>
> 2. But the will of the people to this end can only be expressed in legitimate modes by which such a body-politic can act, and which must either be prescribed by the constitution whose revision or amendment is sought, or by an act of the leg-

islative department of the State, which alone would be authorized to speak for the people upon this subject and to point out a mode for the expression of their will in the absence of any provision for amendment or revision contained in the constitution itself.

It is not necessary to stop here to discuss two very interesting questions that might arise, to wit, the effect of an absolute prohibition against alteration or amendment save in the manner prescribed by the constitution itself, and the validity of an alteration which has been sanctioned by the people after a fair and orderly submission provided by the legislative power without any other form or ceremony whatever, even though the fundamental law has prescribed a different mode by which amendments may be made and which has not been followed. Very eminent authority maintains the power of the people as against either prohibition or direction. The questions do not arise in this case and therefore need not be discussed; but we are emphatic that the people, convoked by the legislative authority of the existing government, have the inherent power, through the agency of the constitutional convention, to alter or reform their constitution, even though that constitution not only does not specifically give the power and does provide a specific manner in which amendments to it may be made.

Twenty-five conventions in the several States of Georgia, South Carolina, New Hampshire, New York, Connecticut, Massachusetts, Rhode Island, Virginia, North Carolina, Pennsylvania, New Jersey, Missouri, and Indiana, under the general legislative power of these States, without the special authorization of their constitutions, have been called by the people between the years 1789 and 1850, and how many have been so called in these and other States during the last quarter of a century I know not, but do know that it has become a well established and settled usage. Mr. Jameson, in his elaborate work on The Constitutional Convention, in a complete and most satisfactory discussion of this subject, lays down these two distinct and general principles:

1. That whenever a constitution needs a general revision a convention is indispensably necessary; and if there is contained in the constitution no provision for such a body, the calling of one is, in my judgment, directly within the scope of the ordinary legislative power.

2. That were it not a proper exercise of legislative power, the usurpation has been so often committed with the general acquiescence that it is now too late to question it as such. It must be laid down as among the established prerogatives of our General Assemblies that, the constitution being silent, whenever they deem it expedient they may call conventions to revise the fundamental law.

The convention which assembled in July, 1874, to revise the constitution of Arkansas was called by a large majority of the people of the State, upon the question being regularly and formally submitted by the Legislature thereof, in accordance with all former precedents and the established usage of the country, and is therefore not only not revolutionary, as claimed in the minority report, but is in the highest sense constitutional; and the constitution framed by that convention and adopted by the people of the State government organized under it are as legitimate and well established as those of Illinois or New York. And Mr. Garland, who under this constitution was chosen by the people, is as regularly and legitimately the governor of the State, and as much entitled to recognition as such, as any other chief executive of any other State.

As to certain irregularities complained of in the matter of registration and of registration and election officers, and of the mode provided for the submission of this constitution to the vote of the people in the instrument itself, I can only say that they are of very

slight importance of themselves, and inasmuch as it is not only not shown that they did interfere with the popular will, but inasmuch as it is positively shown that the general and almost universal will of the people has in this whole matter been effected, they do not deserve that I should stop to discuss them, and they certainly would constitute most extraordinary grounds on which to overturn and revolutionize an established State government.

It only remains to speak briefly of the constitution itself, which was adopted as the fundamental law of the State by the people of Arkansas on the 13th day of October, 1874. That in many respects it is an improvement on the constitution of 1868, I think no one who will examine the two instruments will pretend to deny. It has diminished the former number of officials, it has taken away the large appointing power before existing in the executive, and has imposed restraints as to the imposition of taxation of the greatest importance to the people. That it is republican in form, and that in this respect it fully meets the requirements of the Constitution that "the United States shall guarantee to every State in this Union a republican form of government," is beyond all controversy or question.

Some of the professions of loyalty contained in the old constitution may not be found in the new, but, as the report made in this matter states, "the substance has been retained." There is certainly nothing in it either monarchical or aristocratic; and the authority of the United States in this guarantee, as Mr. Madison says in No. 43 of the Federalist, "extends no further than to a guarantee of a republican form of government, which supposes a pre-existing government of the form which is to be guaranteed. As long, therefore, as the existing republican forms are continued by the States, they are guaranteed by the Federal Constitution. Whenever the States may choose to substitute other republican forms, they have the right to do so and to claim the Federal guarantee for the latter. The only restriction imposed on them is that they shall not exchange republican for antirepublican constitutions, a restriction which it is presumed will hardly be considered a grievance." That this constitution meets in this respect every requirement of the Federal Government and that it does not conflict with the limitations made by the Constitution of the United States and the power of the people to amend or revise their constitutions, as I have said before, is so plain upon its face that no one pretends to question it.

Mr. Speaker, if I have accomplished what I proposed to myself in this discussion, I have shown that the merits of the original contest between Mr. Brooks and Mr. Baxter are not subject to decision by Congress or the Executive, but must be determined by the proper State tribunal; that this contest has been so decided by the General Assembly of the State of Arkansas, which decision has been affirmed by its supreme court; that Mr. Baxter was both *de facto* and *de jure* governor of the State, and, therefore, properly recognized as such by the President; that he had a full and complete right as governor to issue the call for an extraordinary session of the General Assembly, and that that body was the duly elected and lawful Legislature of the State, being also the only body claiming authority as such, and had a full and complete right to submit to the people the question of a new constitution; that the convention to frame such an instrument was called and acted in accordance with law and usage; and that the constitution framed by them being ratified by the people became their proper and legitimate fundamental law as much so as the constitution of any other State, and consequently that the officers elected

under it by the people are fully and completely entitled to recognition as such.

Moved by what process of reasoning, therefore, or influenced by what considerations, the President should have sought to reverse his opinion, and should have reached the conclusion suggested in his message to the Senate of February last, I certainly am at a loss to conjecture.

Under this constitution and the officers chosen by the people in accordance therewith, the blessings of peace and good government have been restored to Arkansas, and anarchy, lawlessness, and bloodshed have become things of the past. The people are contented and at peace, because they feel that they are living under their own laws executed by officers of their own choice. This, Mr. Speaker, is, in my judgment, the only key to the difficulties existing in connection with the reconstructed States of the South. The people who live in these States must be trusted, and they must be permitted to govern themselves. Harmony can never be restored by arms and hostile legislation. We should seek to elevate these people and not to debase them, to cultivate their high instincts and manly pride and not to humiliate them, to make them in the broadest sense freemen and not slaves. Then shall these States be restored to peace, and prosperity return to them and to us.

What constitutes a State?
  Not high-rais'd battlement or labor'd mound,
Thick wall or moated gate;
  Not cities proud with spires and turrets crown'd;
Not bays and broad-arm'd ports,
  Where, laughing at the storm, rich navies ride;
Not starr'd and spangled courts,
  Where low-brow'd baseness wafts perfume to pride.
No; MEN, high-minded men,
  With powers as far above dull brutes endued,
In forest, brake, or den,
  As beasts excel cold rocks and brambles rude;
Men, who their duties know,
  But know their rights, and knowing dare maintain,
Prevent the long-aim'd blow,
  And crush the tyrant while they rend the chain;
These constitute a State.

Sir William Jones.