CONCLUDING ARGUMENT BY M. L. RICE, ESQ., BEFORE SELECT COMMITTEE ON ARKANSAS AFFAIRS.

Mr. CHAIRMAN AND GENTLEMEN OF THE COMMITTEE: It becomes necessary for me to present some points in the case that have not already been presented, from the fact that I appear peculiarly as the attorney of Mr. Brooks. I am not like the gentlemen on the other side who occupy so disinterested a position that they do not know whom they represent, except that they claim to be speaking for the public good, while they are advocating the overthrow of constitutional government and the establishment of the uncertain results of revolution in its stead. I am not only the attorney of Mr. Brooks, but I am his friend and one of his earnest partisans, as I have been all through this matter, from the commencement of the campaign to the present time; and I shall speak from that standpoint. I shall confine myself in the argument in the case to the testimony in this record, and if I allude to a matter outside that is of such public notoriety that the committee can take judicial notice of it, I shall call the attention of the committee to that fact, so that it may not be mixed with my statement of the testimony.

Much has been said about the affairs of the South, and much cheap prejudice has been sought to be raised against this investigation by repeating and re-repeating that the South has been afflicted with bad governments, and the nation was getting tired of the manner in which southern matters have been conducted. We often hear the remark that the people of the Southern States ought to be permitted to manage their own affairs. In these remarks the word "people" means the rebel element, to the exclusion of every republican in those States.

Now I shall not discuss this question. I admit that the reconstruction governments in the South have not been what their friends expected them to be, or what they ought to have been; but there are forty-five thousand republicans in Arkansas (as well as a large number of democrats, who supported Mr. Brooks, and still, in their hearts, adhere to his claims) who have never participated in politics other than to vote; who never had anything to do with the government of that State, and who have never been in the least at fault in the mismanagement of its affairs; and it certainly looks a little unreasonable for Congress to say to them that, because they have suffered the inconvenience of a bad administration of their government under reconstruction, that therefore it will allow them to be deprived of all lawful government, and hand them over for their legal and political rights to the rule of an illegal, unauthorized, self-constituted class of individuals, erroneously styled a State government.

In the first place, I insist that if that were a good defense as to those who had mismanaged their trusts; if that were a reason as to them, why the Government should withhold its powerful arm in the maintenance of lawful government in that State, it could not be urged against the client whom I have the honor to represent, because not one single error of that State administration can be laid to his charge, or one sin-

gle fault in it traced to any act of his; and although he is an earnest and zealous republican, and has always adhered to that faith, yet the platform on which he ran, and the able and thorough canvass which he made in favor of reform in the administration of State affairs, so impressed the masses of the people of the State with the soundness of his theories, and with the hope of better government under his administration, that three-fourths of the democratic party laid aside their feelings of dislike on account of his republicanism, and almost hatred on account of his long-cherished anti-slavery sentiments, and in the hope of securing a good administration of State affairs which the character of his campaign seemed to promise, supported him with an enthusiasm seldom witnessed in a State election.

They adhered to Mr. Brooks, not only as against Elisha Baxter, but they adhered to him as against one of their own men, as popular a man as there was in the State, by the name of Andrew Hunter, who was put in nomination for a short time; but the democratic masses refused to take their support from Brooks and give it to Hunter, because they were satisfied with Brooks's views of State policy, and hoped through it to secure the general reform in State affairs which they desired. This applies to the masses of the democratic party. There was about one-fourth of the party, including in the number the supposed leaders and politicians of the party; the same men that inaugurated the Garland movement, and are now its principal supporters; the same men who brought out Hunter for the purpose of defeating Brooks, and intrigued with the Baxter leaders, and finally supported Baxter, after Hunter's name was taken down; the same men who carried the State of Arkansas into rebellion in 1861. They never were for Brooks; they did not like the plain, straightforward manner in which he proposed to administer the State government. They wanted all the intrigue, all the maneuvering and the short-comings, errors, and corruptions about which they had complained so much, but they did not want other parties to have the fruits of them; they wanted them all retained, with simply a transfer of the government to them, without any reform in the manner of its administration.

I take this occasion to say that, notwithstanding all the misrepresentation that has attended this case, there is not an intelligent, honest man in the State of Arkansas who ever doubted Mr. Brooks's capacity, who ever doubted his integrity, or the soundness of his principles on State administration.

I will say further, that although he has been robbed of the fruits of his victory, and been unlawfully and fraudulently deprived of the highest right which a citizen could claim from the voice of the people, expressed at a State election, yet I boldly assert that he was never guilty of a dishonest or dishonorable act in securing that election, and has never since taken an unlawful or dishonorable step to secure the franchise of which he has been robbed; he has, however, pursued the right with which the people had clothed him, in order to perform a duty which he believed devolved upon him by reason of his election by the people of that State.

THE ISSUE PRESENTED BY THE RESOLUTIONS.

Under the resolution which we are considering, the first proposition, as I understand it, is to ascertain who was elected governor of Arkansas at the election in 1872. The next proposition is for the committee to ascertain and report whether there was a republican form of government

in the State of Arkansas; and the third proposition is to report who should be recognized as governor. That seems to be the issue which we are here to-day, and have been for several days, discussing, and which the committee has to decide in its report. I understand that it is stated that the committee cannot go into any matter which has arisen since its appointment. Now, that is a system of special pleading inconsistent with the magnitude of this case. As to the question of who is elected governor, it is true that that was anterior to the appointment of this committee; but, based upon that, comes the question whether there was a republican form of government there at that time; whether there was afterward, and whether there is now; and incidental to and dependent upon both of these, is the question as to who should be recognized as governor of the State. If any event has transpired since that time which makes it necessary to inquire into the claims of some other person, that inquiry is certainly within the purview of the resolution under which this committee is acting. But the House, at its last session, extended the time of this committee, and, of course, it extended the inquiry over the period of time to which that extension applied. Therefore I take it that we are investigating this whole case. I know that the other side (and I concede to them the right, because I never was oppressive to the poor) has a right to stand upon any quibble, however contemptible in law it may be.

MR. BROOKS WAS ELECTED GOVERNOR.

As to the question of whether Mr. Brooks was elected governor of the State, it has been said, since we have been before this committee, that that might be a disputed question. If it is disputed here, it is the first time that it has ever been disputed since the close of the polls at the election in 1872. No human being whom I ever heard of ever claimed that Mr. Brooks was not elected. The litigation in this whole case, from the beginning to the end, has been on the assumption that Mr. Brooks was elected, and Mr. Baxter's pretense of being governor was only on the ground that he had been counted in. He was thwarting Mr. Brooks in presenting and establishing his right to the office. Mr. Baxter has been a witness in this case, but he never claimed in his testimony that he had been elected governor. In every petition, in every statement, in every correspondence which this record develops there is not an assertion or an insinuation that, in point of fact, Baxter was elected governor of the State of Arkansas. The gentlemen on both sides must excuse me for omitting the word governor before the names of Mr. Brooks or Mr. Baxter. I am too feeble to use complimentary titles, especially toward one man who has been robbed of the title for two years, and to another man to whom the title should never have been applied. I therefore shall call them Brooks and Baxter, without meaning any disrespect to either.

I listened to Mr. Baxter himself here the other day, although I was then in considerable pain, on purpose to see whether there was really enough, even in the death-throes of a played-out politician, to make one assertion consistent with his pretensions, and I found that he never claimed that he had been elected governor; he never intimated it; he simply claimed that he held the office by that sort of royal prerogative which arises from his having been counted in; and that there was no tribunal on earth or known to men by which the matter could be investigated. He said that if the question could have been brought up in a legal manner, and Mr. Brooks could prove before a tribunal that

had jurisdiction that he was elected, he (Baxter) would make reparation to him; but, if Baxter is carefully traced through all his dubious ways, it will be seen that, in his opinion, (excepting his counted-in and purchased legislature,) there is not a tribunal on earth which has that jurisdiction (?), and the question can only be settled at the great day when the secrets of all men are made known; but I apprehend that, after Elisha Baxter has atoned for the errors and wrongs of having robbed Mr. Brooks of this office, and for the despotic, lawless, and fraudulent course which he has pursued to deprive him of it, he will have but little left with which to make a personal atonement to Mr. Brooks. The testimony in this case shows that a general conspiracy was entered into previous to the election of 1872, for the purpose of installing Baxter and those who ran on the ticket with him, regardless of the number of votes received; that in pursuance of that, one of the first steps taken was disfranchisement after registration; the striking off the registration-books, after the registration was closed, the names of thousands of legal voters of the State of Arkansas, which striking off was purely arbitrary, and for no other reason than that the voters whose names were thus struck off would vote for Mr. Brooks. The whole election-machinery was in the hands of Baxter. After that was done, still a large majority would be for Brooks, as was apparent from public sentiment. The entire country was for him. The town and the little circles of seven-by-nine politicians were for Baxter; but the great mass of the people, whether rebel or Federal, whether Union or secession, whether democratic or republican, who wanted a peaceable, honest, and strong government, were for Brooks. Therefore it was necessary to do something else that would defeat Brooks. They next resorted to the stuffing of the ballot-boxes at the election, (I distinguish between that and the stuffing after the polls were closed.) This testimony shows that in some instances they had voting-places where the tickets were handed in at a window which was so high from the ground that unless a man was as tall as I am, he would have to send up his ticket in the notch of a stick. When the ticket was taken from the stick, if it were a Brooks ticket, (and the tickets were so marked that they could be distinguished from each other, and if they were not so marked, they would open and read them,) they would throw the Brooks ticket into the stove, and take a ballot from a pile of Baxter tickets which they had on the table, and put it in the ballot-box, so as to have the number of ballots and the poll-books correspond. The testimony is further (and I only speak of a few instances which are shown in the record) that in another case the ballot-box was arranged, and a certain number of ballots—say fifty—were put in the box, all for Baxter, before the polls opened, and then when the polls closed, a corresponding number of fictitious names was added to the poll-book, so that they would tally; and there were those fifty fraudulent votes to be counted for Baxter. Another very striking instance occurred in which they pretended to be very magnanimous, and agreed that the Brooks men might all vote first. They were going to be very polite to them, and they voted until the count reached to 350. Just as they got to that number the judges looked at their watches and ascertained that it was dinner-time. These officers that were taking the vote were very exclusive, nobody else was allowed in, and in some instances even the United States supervisor was excluded. They retired for dinner, and, when they had gone, the ballot-box with the 350 Brooks votes was taken off by one of their number selected for that purpose, and another box exactly the counterpart of it was introduced, containing 350 Baxter votes. After dinner the Baxter votes were received on top of those that were already in, so that they finally counted all the

Brooks votes for Baxter. That is a sample of the beautiful expression of the will of the dear people.

Another instance of the changing of votes was by means of an old paper hat-box, in which they had a lot of Baxter tickets, and these tickets were taken out and substituted for Brooks tickets in the counting of them. This and like frauds, sufficient to take a man three days to describe, have been proved, and yet not one-tenth of the instances of fraud that occurred at that election have been attempted to be proved. Enough, however, were proved to establish this case.

THE RIGHT TO THE OFFICE DERIVED FROM RECEIVING A MAJORITY OF THE VOTES.

Notwithstanding all the disfranchisement, all the stuffing of the ballot-boxes, and all the frauds in receiving and changing ballots during the day of election, yet, when the contest was over and the polls were closed, and the grantors of the franchise of the office of governor had done and completed all which it was necessary for them to do, and all that they were capable of doing, to convey and vest that franchise, Mr. Brooks, by reason of having received a large majority of the votes, became vested of that franchise, and became and was from that moment the *de jure* governor of the State of Arkansas, with the right of occupancy of the office postponed until the end of the term of the then incumbent. An office derived from an election is a franchise; it is an incorporeal hereditament which cannot stand in abeyance for a single moment, but vests the very moment the franchise is cast, which, in the case of an elective office, is the closing of the polls; it must vest instantly, although the enjoyment of it may be postponed, as, in the case of a person dying intestate, the estate passes to his legal heirs at the moment of his death; although an only son upon whom this estate is cast may be years in establishing his identity by proof and showing that he is the person entitled to the estate, yet, in contemplation of law, the estate became vested in him from the moment that the intestate ceased to exist. So, in this case, however long Mr. Brooks may be fraudulently or forcibly kept from the enjoyment of the office, yet the franchise vested in him when the acts of the grantors were completed, which was at the closing of the polls on the night of the election. But we are not left to conjecture, or even argument, upon this question; it is settled by high authority outside of our own State, and in our State, by a decision of the supreme court, which is law unto us, the question is settled beyond controversy. I read from State *vs.* Johnson, (17 Ark., p. 407.) This was a case of *quo warranto* brought in the circuit court by the prosecuting attorney against Johnson, requiring him to show by what authority he exercised the office of mayor of Fort Smith. He had run for the office against Rogers, and claimed to have received the most votes; the judges of the election gave him the certificate of election, and he was commissioned; Rogers contested the election before a board created by statute for that purpose, which board decided in favor of Rogers, and he was commissioned and entered upon the duties of the office. It was not claimed that the decision of the board who decided the contest was conclusive, but the case was treated as one which the courts must finally decide, and the court, on page 413, use this language:

> But at last, after all this has been done, and the party thus commissioned, he derives his authority as an officer, not from the proclamation of the judges; not from the certificates of the election; not from the abstracts made out for the governor, and not from the commission, but from the free choice and election of the people—not the people in the popular sense of that word, but the people who are competent and qualified electors when the votes were polled and the election held.

4th Selden, page 67, People *vs.* Cook. The court decided as follows, (see page 82:)

It is by the popular expression by the voters through the ballot-box that a title is derived to an elective office. The certificate of the board of canvassers is mere evidence of the person to whom a majority of the votes were given. The certificate may, indeed, be conclusive in a controversy arising collaterally or between the party holding it and a stranger, but when this proceeding is instituted in the name of the people it loses its conclusive character, and becomes only *prima-facie* evidence of the right.

The same question is decided in California, in People *vs.* Holden, 28 California. The court decided as follows, (see page 129 :)

Title to office comes from the will of the people as expressed through the ballot-box, and they have a prerogative right to enforce their will when it has been so expressed by excluding usurpers and putting in power such as have been chosen by themselves. To that end they have authorized an action to be brought in the name of the attorney-general, either upon his own suggestion or upon the complaint of a private party, against any person who usurps, intrudes into, or unlawfully holds or exercises any public office, civil or military, or any franchise within this State.

THE RETURNS WERE "DOCTORED."

Now, we go along a little further. Appearances were very much against Mr. Baxter's election, and it was deemed important and necessary to raise the returns, to forge the evidence on which Mr. Baxter's pretended title rested, and to establish by proof the existence of that which, in point of fact, did not exist—that was, that Baxter had received the most votes. In order to accomplish that they adopted the system of raising the returns, as it is called in common parlance. That was called "doctoring the returns," and the officials on Baxter's side used that expression and are entitled to the credit of having originated it. They sent out men with the returns first received in order to get the willing officials to make changes in the result and to send in false, fraudulent, and forged returns, showing a different state of facts from that which were first reported. That is in testimony in the record.

Well, I have heard it said that Baxter knew nothing of them, and that if it was all fraudulent, and all false, and all put up in this way, as he was an innocent party, those returns gave him as good a title as if they were all right. I presume that I must have read the law to very poor purpose, for I never understood that a man could, on false testimony, acquire an honest right to a thing which did not belong to him. But there is evidence that Baxter was not entirely blameless in this matter. I will cite one or two instances: Tom Martin testified that he was coming down to Little Rock, from some of the rural districts, with the clerk of his county, and met Baxter at Prospect Bluff. He was a strong partisan of Baxter's. Baxter had gone to bed, but Martin went up to his room, and told him that the clerk of the county was with him and had the county returns made out, so that they were flexible and that they could be fixed up and raised to any extent which was necessary; and if he wanted the returns raised he would like to have him indicate to him how much they should be raised. He says that Baxter told him to go and see them at the Little Rock and squeezed his hand. Martin said that he understood the significance of that squeeze, and he went to Little Rock and the thing was fixed up. Baxter, however, came on the stand and testified that the same conversation occurred. He told it about as it was. He said that he was tired and did not want to be disturbed; but, it seems that instead of resenting Martin's suggestion in such a manner as to show that he did not approve of it, he told him that he had nothing to do with it—to see them at the Rock; he

says he did not recollect the squeezing of Martin's hand. Now, I would suggest that in these days of morbid sentiment on the subject of sensational literature, if a distinguished lady in this or any other city were to receive a suggestion of evil, and, instead of resenting it in a manner which became a virtuous woman, were to say "O, no; go and see somebody else; I am not that kind of woman," and should squeeze the hand of the man who made the suggestion, my impression is that upon those facts alone, the newspapers would actually pronounce such conduct imprudent. I am not sure but that there are persons within the sound of my voice who are so prone to suspicion that they would actually suspect her virtue, based on that statement; and yet the innocent Baxter would have us believe that he was not a party to those frauds. A western editor, an old bachelor, far advanced in life, alluding to this testimony, said that it was the only romance which he had seen in the whole Arkansas muddle; and that all the romance in that was that it brought to his memory a song which he had heard in early life; and that all of the song which he remembered was "If you love me, Sally, squeeze my hand." He said that while there was not much in the thing when taken by itself, yet he presumed that the balance of the song was in harmony with that idea. Now, this transaction of Baxter and Tom Martin, taken by itself, did not prove much; yet, inasmuch as it was in harmony with this greatest of all human frauds, I take it that it proves a great deal.

After all the disfranchisement, the changes in the ballots, the stuffing of the ballot-boxes, and all the doctoring of the returns, still the returns which were last sent up to the seat of government showed that Mr. Brooks was elected. With all that they had done they could not get rid of this one result. And here Mr. Baxter comes in again. Colonel Hill swears that he was one of the friends of Baxter and one of the figurers for him in this contest; and, that as fast as they got the returns from anywhere (he did not speak of official returns, but of information as to what the vote was) he and Baxter and the secretary of state would meet in a room which was taken for the purpose, and would there figure up the returns, and that Baxter's own figures, made on all the most favorable returns, even after they had been doctored, still showed that Brooks had been elected by a considerable majority. Something else had to be done.

THE RETURNS OF THREE COUNTIES AND FORTY-EIGHT PRECINCTS IN OTHER COUNTIES SUPPRESSED.

They then resorted to another system of settling this question. That was to reject and exclude from the returns which were to be sent to the presiding officer of the senate the returns of three whole counties which had given large majorities for Brooks. They pocketed these, and turned their attention to the balance, and when they were figured up, they showed that Mr. Brooks was still elected. They then went to work and excluded from the returns which were to be sent to the senate the returns of forty-eight precincts in other counties, which precincts had also given large majorities for Brooks. When that had been accomplished, when they had excluded the three counties and suppressed their vote, in violation of law, and had fraudulently and unlawfully suppressed the vote of forty-eight precincts of other counties in the same manner, then they had finally succeeded in doing what they had never done before—that is, in getting the result in favor of Baxter. The vote, as officially counted, stood—

Baxter	41,784
Brooks	38,673
Majority for Baxter	3,111
Brooks's gain on the returns	6,113
By ballot-box stuffing and raised returns	3,843
Side-poll	3,327
Leaving a majority for Brooks on the vote, of	10,173
In addition, Brooks was deprived, as shown by the proof, of	3,617
The total majority for Brooks, as shown by the proof, should be	13,789

Leaving out here those which were stricken from the registration books, and did not vote, (for I do not insist that they should be counted as a part of this case,) it still leaves a majority of 10,173 for Brooks. Therefore, after all their other frauds, in order to produce a balance in favor of Baxter, they were compelled to suppress those returns; and they sent to the president of the senate the returns, after deducting from them those that had been suppressed as before stated. All this was done under the supervision of Mr. Baxter, according to the testimony of Hill. The computation was even made in Baxter's own handwriting, and, according to the proof which we have taken, (only a portion of what we might have taken,) we have established that Mr. Brooks was over 10,000 votes ahead at the close of the polls on the day of election; that he was largely ahead when the first returns were sent to the seat of government, was ahead when the "*doctored*" returns were received, and was ahead, as shown by the full returns, the day the presiding officer of the senate declared the result.

During all these times Baxter was plastering up his weak pretensions by fraud and forgery, and every other means which his feeble ingenuity could invent to get a balance in his favor.

THE LEGISLATURE WAS ORGANIZED BY FRAUD AND VIOLENCE.

We now come to the organization of the legislature, and the same suppressed returns and fraudulent votes entered into the election of a considerable portion of that legislature. By virtue of these very frauds by which Baxter was put in office, at least twenty-five members of the house and ten of the senate were sent into the legislature, who were never elected by the people, and who had no claim or pretence to be elected. That is established by the testimony. Twenty-five members of the house and ten of the senate were sent to the legislature by the same frauds and the same violation of law by which Baxter was to be declared governor. There is no question but that Brooks's friends had a majority of the persons who were legally elected to both branches of the legislature. They had on foot a proposition to organize this legislature at O'Hara's Hall, in the city of Little Rock, and thus to have the question of the election brought before Congress. The bottom fell out of that proposition, and I was, for months, unable to tell how it happened. Finally I ascertained it. Some of the persons who ran on the Brooks ticket for Congress were democrats, and some of their partisan friends in town were anxious to have Baxter give them certificates of their election. Hadley would not give them, except to one candidate, and he was a republican. Smithee, who figures in this case, swears, and some other witnesses swear, that they went to Baxter and made a statement to him of those other cases—perhaps Gunter's and Gause's—and told Baxter that if he would give those men certificates of their

election to Congress, as soon as he was installed, they would get all the democrats in the legislature who ran on the Brooks ticket to go into the Baxter legislature, and thus deprive Brooks of a quorum in his separate legislature. Baxter agreed to do it upon that basis, and twenty-five or thirty of those men who had run on the ticket with Brooks, and who never would have been elected but for that fact, abandoned Brooks for the sake of procuring for their political friends a certificate of election to Congress, and went over to the Baxter legislature. The organization was thus effected, and Mr. Brooks and his friends were defeated in their effort to organize a separate legislature. The thing went on, and after Baxter had got the benefit of that trade, so far as he was concerned, (he had got the legislature all in his own hands,) he turned around and told Gunter and Gause that he did not see their case as distinctly as he did at the time that proposition was made, and, therefore, he declined to give them the certificates. He declined to perform his part of this contract. The legislature, as arranged after this trade was made, was organized, supported by the State militia. The State-house was surrounded by armed men; the doors of both chambers of the legislature were guarded by bayonets, and the secretary of state made out a list of such men as he, in his wisdom, thought proper to have in that legislature, without any regard to whether they were elected or not. They were picked and culled from the crowd. That list was prepared to be furnished to the legislature, and sentinels were placed at the door of each chamber, and passes, signed by the secretary of state, were the only means by which any man could get in there to present his credentials or to assert his claim. These are supposed to be some of the evidences of a republican form of government. Baxter made some remark in his argument here about the heel of oppression having been on the people of Arkansas, and if he was here now, I would take pains to see if I could not identify that heel. This guard, placed at the doors of the legislature, kept out every man who was legally elected unless his name was on the list prepared by the secretary of state, and let men in who had no pretense of being elected, if they were so fortunate as to get their names on the list, for such only could get the necessary pass. That legislature assembled, as was stated in the opening argument, with the tacit understanding and arrangement that the persons whose names were on the list, and who went into the legislature, should remain in it all through the term; that no contests for their seats were to be allowed, or that no man was to be allowed to be unseated on such contest. All this explains why it was that Mr. Baxter has been so exceedingly anxious to have all those questions submitted to that legislature, which was as fraudulent in its organization as he was in his pretension.

Now, I wish to call the attention of the committee especially to one or two points in the testimony which sustain this view of the case. I read from Judge Warwick's testimony, on page 238:

Q. It has been stated that there was an understanding at the commencement that no member was to be unseated; what do you know about such an arrangement?—A. I cannot say that there ever was a positive arrangement to that effect. When the lower house was organized, we (I mean the republicans) had an active working majority in it. There were a number of democrats whose seats were contested, and there were also some republicans whose seats were contested. Mr. Tankersley's district was contested, and so was Mr. Sarber's, and so was Mr. Turner's. A large number of the contests for seats, if investigated, would have been against republicans.

Q. The contests would have succeeded?—A. That I cannot say.

Q. But if they had succeeded, it would have been against the republicans?—A. Yes. There was no agreement, but there was a *quasi* understanding between Mr. Tankersley, Mr. Sarber, and myself at the beginning, (perhaps at my own suggestion,) that if

all those seats were contested it would take up one-half the time of the legislature to determine them, and might perhaps develop some things which we did not care to have developed at that time. But my own reason for it was that these contests would take up one-half or two-thirds of the time of the legislature. There was a *quasi* understanding that we would do all we could to prevent any change being made in the complexion of the house, whether by republicans or democrats.

Q. That is, you would prevent, as far as possible, the success of any contests on either side?—A. Yes.

Q. You and Sarber and Tankersley were all republicans?—A. Yes.

Q. And the majority of the house were republicans?—A. Yes. The seat of Mr. Sumpter, a democrat from Hot Springs County, was in contest, and I think we gave him to understand at the beginning that he need not have any apprehension, as we did not propose to have any changes made in the organization of the house.

Q. That house was organized on the list furnished by the secretary of state?—A. Yes.

Q. The members went in under passes?—A. I believe we all had passes.

Q. Nobody else was allowed in at the preliminary organization?—A. No, sir.

Q. And afterward you and Tankersley and Sarber, three republicans, with a republican majority there, had a *quasi* understanding that no contests would be allowed to succeed, and that no changes should take place in the body?—A. I think we had that understanding before we went in.

Q. That you would go in on that roll, and that no changes of members should be made?—A. Yes, sir.

Q. And you gave Sumpter to understand that that was the fact?—A. My recollection is that Sumpter was given to understand that that would be the case.

Q. When the resolution to that effect was adopted afterward, was it not voted for by republicans and democrats almost unanimously?—A. I have not thought about the matter since, but my recollection now is, that there was no dissenting vote against the resolution.

Of course not. They were all in. The poor fellows who were entitled to their seats, and who were trying to get in, did not have a chance to vote. I presume unanimity can be secured in that way easier than in any other in the world, unless it is under Governor Lowe's theory of the unanimous expression of public sentiment at the last election in Arkansas, with 40,000 armed men to make the balance unanimous.

Mr. Warwick's testimony proceeds:

Q. You agreed that the ins should stay in, and the ins all voted for it?—A. Yes; my recollection is that that resolution was adopted somewhat late in the session.

Q. The understanding, however, was made before you organized?—A. Yes.

Q. Did Secretary Johnson know of that understanding?—A. Not that I know of.

Now, that is the organization of the house to which Mr. Baxter says he was willing to submit this case, and which he believed did have jurisdiction of the matter, if it was willing to take it—a legislature counted in partly by the same frauds by which he was himself counted in; and most of those who ran on the ticket with Mr. Brooks, and who were elected, were induced to abandon the side they had run upon, and to join the Baxter side, under the promise and contract made with Baxter. It was a close corporation which would let none of its seats be successfully contested; and that is the legislature, with all the fraudulent members in it, to which Mr. Baxter was willing to submit the question whether his election was free from fraud. The testimony shows a great many cases where men who had overwhelming majorities for the legislature, and who attempted to contest for their seats, were defeated on some trivial, contemptible ground, which it was a disgrace even to that legislature to insist upon.

I will now read to the committee one or two extracts from the testimony to show how the house was organized. I read from Sheriff Oliver's testimony, on page 338:

Q. State what you know about the election of 1872.—A. I know so much about the election of 1872 that it would take me a week or two to tell it.

Q. What do you know about the organization of the legislature on the first Monday

of January, 1873?—A. If I remember right, I think they furnished me with a list of members, and wanted me to let in only those who were elected. I was door-keeper of the house.

Q. Who furnished you with the list?—A. I think Secretary Johnson himself. I know I had two or three talks with Baxter about that before that.

Q. Did Baxter ask you to act as door-keeper?—A. I talked with him a good many times about that and about his getting possession of the house. I had a great many talks with him. In fact I talked with him nearly every night about getting possession of the State-house and keeping men there and holding possession of it. The reform party was about to hold a convention there, and it was agreed that all State conventions should be held in the State-house. I think this convention was to meet on a Saturday, and we were afraid that the members of the convention and the Brooks members of the legislature would get in together and hold the hall, and it was in order to prevent that that I was there, and had conversations with Brooks and Johnson, and also, I think, with Bowen.

Q. You ran on the Baxter ticket?—A. Yes, sir.

Q. And that was your theory of defense up there?—A. Yes.

Q. That convention met and organized in another place in town?—A. Yes.

Q. The convention had adjourned on Monday?—A. Yes.

Q. Then on Monday you did not expect any convention in the State-house?—A. No.

Q. Were you not, in point of fact, put there as door-keeper to keep out everybody except those who were on the list?—A. On Monday I had a lot of special deputies and kept them there, but the house was really in possession of General Upham.

Q. Were any persons allowed to pass in except those whose names Secretary Johnson had put on the list as persons whom he called members of the legislature?—A. Not till after the organization of the legislature, until they took charge themselves by their own sergeant-at-arms and door-keepers.

There is the legislature as organized for the purpose of making this declaration of the vote for governor. There is a legislature organized as part and parcel of the same general programme of fraud by which the result of that election was to be declared, without regard to the votes. There is a large amount of testimony on that point, but I will not trouble the committee with reading it.

After that legislature was thus organized, the next thing was the canvassing the vote for governor, and as we have to go over the whole of that ground, I will call the attention of the committee to the provisions of the law on that question.

THE COUNTING THE VOTES BY PRESIDENT OF THE SENATE, MERELY MINISTERIAL.

Section 19, of article 6 of the constitution, provides that—

> All the returns of each election for governor, lieutenant-governor, secretary of state, treasurer, attorney-general, auditor, and superintendent of public instruction shall be sealed up and transmitted to the seat of government by the returning-officers, directed to the presiding officer of the senate, who, during the first week of the session, shall open and publish the same in the presence of the members then assembled.

Now, the reason I speak of that is that much stress has been placed on the question that the legislature there solemnly decided that Baxter was elected. Importance has been given to the fact that the president of the senate made a ministerial count. The newspapers have been full of it; and the attorneys on behalf of Baxter's fraudulent government have insisted that that was a declaration of the right of Baxter; and, in the voluminous documents which Baxter sent to the President, and which have been perhaps more voluminous than substantial on legal points, he has invariably urged that argument as if that was conclusive.

Now, in the first place, under this section (19) of article 6 of the constitution, the senate has nothing to do with it. There need not be a quorum present at the time. It does not say that the president of the senate should open the returns in the presence of the senate. It says

that he should open and publish them in the presence of the members then assembled. Three members would answer the purpose as well as a quorum, so far as the reading of this section is concerned; for, all through the constitution, whenever the house or the senate is spoken of, it is spoken of as a body, as a quorum of each house—after having defined what a quorum should be. Therefore, it is simply a personal act of the president of the senate to make that count and publication, and the senate has nothing on earth to do with it. The act is purely ministerial. The president of the senate has no right to do anything except to compute, to add up, the returns from the different counties as they are sent to him sealed, and to declare who, as appears from those returns, has the most votes. Now, to contend that that would settle the question of who was governor of Arkansas, would be to say that the people did not elect the governor, but that it all lay with the president of the senate; or, we might go still further and admit (as I presume was the case in this instance) that the president of the senate was innocent in this matter, that he knew nothing at all about it, (as is the testimony,) but that the question of who was the governor was to depend on the secretary of state or on the former president of the senate, (as was the case here,) who sent the returns to that presiding officer; or, we might carry it still further and say that the people of Arkansas are beholden, not to their own free choice, but to the careful discharge of duty on the part of the porter who carried in those returns; and, if he dropped one by the wayside, which changed the result, or if he stole one out, he could, by any of these acts, destroy the franchise of the people of the State; that would be carrying the doctrine further than anybody on the other side but Baxter himself would carry it. He would carry it that far, but I do not suppose that any lawyer on the other side but himself would do it.

I will now read a short extract from the testimony of the president of the senate on that point. Mr. John M. Clayton testifies, on page 145, as follows:

Question. Were you the presiding officer of the senate that was organized on the first Monday of January, 1873?—Answer. I was.

Q. Were you the presiding officer of the senate previous to the assembling of the senate in that session?—A. No, sir; I was not. I was elected on the first day of the session as president of the senate *pro tem.*

Q. Mr. Hadley, who had been president *pro tem.*, was acting as governor at that time?—A. Yes.

Q. Leaving the presidency of the senate *pro tem.* vacant?—A. I suppose so.

Q. Did you receive the returns from the executive officer of the senate as presiding officer of the senate?—A. Yes, they were handed to me.

Q. You did receive them through the mail?—A. No, sir; I did not take them out of the post-office.

Q. By whom were they handed to you?—A. By Governor Hadley's private secretary.

Q. Did you open those returns?—A. Yes; I opened them in the presence of both houses of the general assembly, on the same day that I received them, and probably less than two hours after I received them.

Q. What did you do with them?—A. I simply tore open the envelopes, took out the returns, opened them, and handed them to the secretary of the senate, who read them aloud, and the results were taken down by two tellers, one elected by the senate and one by the house, and on their figures I, as presiding officer, declared the result.

Q. Look at those papers (handing to the witness a bundle of returns) and see how much you know about them being the same ones.—A. (After examining the papers.) These look to me like the same ones.

Q. They were in envelopes similar to these?—A. Yes; I have no doubt that they are the same returns.

Now as an evidence that they did not regard that as a judicial or legislative action on the subject, the journal of this joint meeting of the legislature shows that Mr. Thrower, a member of the legislature from Ouachita

County, offered a resolution before that body, and a point of order was raised upon him, that the two houses had met for the simple purpose of counting up those returns, and declaring the result, and that they had no right to do any other business. The point of order was sustained, and his resolution was ruled out of order. The question has been mooted that there was a full and fair chance to discuss the whole of the subject-matter at that time before both houses, but that is not true. There was no opportunity to discuss anything. They held there, (and, I think correctly, according to law,) that they were not acting in a legislative capacity at all; that they were simply there as witnesses and bystanders, to see the president of the senate not declare who was elected from the whole vote cast, but compute the numbers on such returns as had fallen into his hands, and to make the declaration of what that computation amounted to.

The CHAIRMAN. Was this resolution of Mr. Throwers in relation to the election?

Mr. RICE. Yes, sir; it is in testimony that he offerred a resolution in reference to the election. He was a friend of Brooks; and they silenced him on the ground that there was no jurisdiction in the joint meeting of the two houses.

BROOKS'S PETITION FOR CONTEST BEFORE THE LEGISLATURE.

The next point which we come to in the investigation of this case is the presentation of Mr. Brooks's petition to the legislature. There has been a good deal said about that. I will now read the concluding portion of section 19, article 6, of the constitution of 1868:

> Contested elections shall, in like manner, be determined by both houses of the general assembly in such manner as is, or may hereafter be, prescribed by law.

Under that section Brooks presented his petition for contest. A vast amount of misrepresentation has been indulged in on that question. It has been said that the legislature solemnly considered that case; that the petition was received and read and acted upon; and that its rejection amounted to a foreclosure of Brooks's rights. Now, such is not the fact. Not one word of it is true, except that the petition was offered, and that it was rejected. I admit here that the record (the legislature being then in the Baxter interest) shows that the petition was read; and yet the testimony in the case, even by the officer who made the record, and by other persons who were present, shows conclusively that it never was read. However, I attach no importance to that except that I propose to state the facts correctly. That petition was presented to the lower house of the legislature by Mr. Thrower, (the same man who had undertaken to raise the question at the time the count was made;) that petition concluded with a prayer for leave to introduce proof. I may as well read from Gould's Digest the provisions in regard to contested elections. It is—

> 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.
>
> SEC. 102. If a majority of the whole number of votes of both houses shall be in the affirmative, they shall appoint a joint committee to take the testimony on the part of the petitioner, and also on the part of the person whose place is contested, with power to send for witnesses; who may issue warrants, under the hand of the chairman, to any judge or justice of the peace, to take the deposition of witnesses, at such time and place as the warrant shall direct; and the points to which the testimony is to be taken shall be set forth in such warrant.

Thus it is left discretionary with the legislature, as to whether it will entertain the contest or not. Mr. Thrower did not read, but he introduced, that petition, and he moved that the prayer of the petition be granted. According to the oral testimony in this case, it was never read. Some other member then moved, as a substitute for Thrower's motion, that the petition be rejected, and the petition was rejected, and there the matter ended. This took place in the lower house; it never appeared in the senate. Now we are told with all seriousness that that was a settlement of this whole question: that the great principles of constitutional government; that the rights of the people of the State; that the franchise of Mr. Brooks as the legally elected governor of the State, are all swept away by the refusal of a legislature to entertain a petition to contest the election and to investigate these frauds. That would seem to be a pretty strong proposition. Now, in the first place, if the legislature is, by section 19 of article 6 of the constitution, clothed with judicial authority to try this question if the judicial power of the courts has been vested in the legislature for the purpose of trying such a case, then we must apply the rules of judicial proceedings to it; we must apply the forms and principles of law to it, and see what this amounts to. Does the presentation of a petition to one house of the legislature and the summary rejection of that petition amount to an adjudication of the case? Even that has been urged. I understand that it was urged in the argument on the other side that it does amount to a settlement of the whole case. If that is an adjudication, it is not upon the principles of the common law. The most that can be said of it is that the proceeding was commenced in that tribunal, (created as a tribunal under the nineteenth section of article 6 of the constitution,) and that tribunal struck the plaintiff's petition from its records. Does that bar the right? But go still further, and say that the rejection of that petition amounts to deciding that it did not state facts sufficient to constitute a cause of action or to entitle the petitioner to the relief demanded. It would be simply like a general demurrer to a declaration in court. Now, I will submit to the gentleman on the other side whether there is a lawyer here who claims that, if a plaintiff brings a suit and is defeated and thrown out of court upon a general demurrer to his declaration or complaint, that that is a bar to his cause of action. I never heard of such a proposition until I heard it here. I grow wiser as I grow older. Was the petition ever decided upon its merits? Not at all. The practice differs in the various States according to the statutory regulations. In the State of New York, (whose practice we have undertaken to follow in Arkansas,) my recollection of the law is that, even after issue is joined, if the attorney for the plaintiff in opening his case makes a defective statement which does not show him entitled to recover, the court has a right to non-suit him on his statement. And nobody would contend that that is a bar. Under the principles of the common law, the plaintiff has a right to go on to trial, to argument; and, at the conclusion of the argument, he has a right to suffer a non-suit. That is so in every State of the Union, and that non-suit is not a bar. In most of the States of the Union he has a right to dismiss his case, or suffer a non-suit at any time before the verdict is announced.

The CHAIRMAN. I see by reading that statute of yours that it does not seem to have been the intention of the legislature to give a man who desires to contest the right to file his petition as a matter of right, but it goes on to say that he may file a petition, and the vote shall be taken by yeas and nays, as to whether he shall have leave to contest. Now, suppose that that petition had been read, and that the legislature

had gone on with the discussion of it fairly, and that then the question had been taken, in the manner provided by law, as to whether he should have leave to file his petition and present his proofs, and suppose the legislature decided against it, would that have made any legal difference in the result?

Mr. RICE. I think not. Even if the legislature act judicially in such matters, I don't think it would amount to a bar. The authorities are conclusive that before a claim is barred, *res adjudicata*, so as to foreclose the rights of the plaintiff, there must have been an adjudication, not upon technical points raised in the case, *but an adjudication upon the merits of the controversy.*

In this case the merits of the controversy were not investigated before the legislature. The house of representatives refused to allow Mr. Brooks to file his petition and refused in any manner to enter upon the investigation of his case.

The CHAIRMAN. Suppose he had been permitted to file his petition and to take his proofs, and that there had been a decision upon the merits, as you call it, by the legislature, do you concede that that would be a bar to him?

Mr. RICE. If the legislature acts judicially in these contests and had tried and adjudicated this case upon the merits, deciding against Mr. Brooks, (unless the tribunal could have been impeached for fraud in its organization,) it would have been a bar so far as to preclude Mr. Brooks from presenting his case to any other judicial tribunal; but I do not admit that it would preclude Congress from securing to the people of Arkansas a republican form of government, administered by the officers lawfully chosen by themselves; and that body would not be estopped from looking into the frauds by which the people of a State had been robbed of their suffrages, simply because the question had been decided by a tribunal whose existence depended upon sustaining these frauds. Mr. Baxter says that if there was anything wrong or unfair in the rejection of Mr. Brooks's petition for contest, it was no fault of his; that he was anxious to get rid of the office of governor whenever he could do so honorably. This is a strange statement, taken in connection with the proof in this case. If he had wanted to get rid of the office of governor, which he knew he fraudulently and wrongfully held, it would seem that he might have devised some means to have transferred it to Mr. Brooks, the person to whom he knew it rightfully belonged, and that he could have accomplished this with far less labor and expense than he bestowed upon his dishonorable efforts to prevent Mr. Brooks from asserting his claim to the office. But Baxter says upon his honor that he had nothing to do with preventing the contest before the legislature. Now I propose to read a little testimony upon that subject and see what we can gather from it. We are investigating a conspiracy, and all who have ever had the misfortune to be employed as counsel to develop a conspiracy know the very great inconvenience of establishing the case when it has to be proved by witnesses who are unwilling to disclose what they know. Judge Stephenson, who has figured considerably in this case, who was a strong Baxter adherent and one of his private counsellors and friends, says, on page 269:

Q. State what you know in reference to the contest of Brooks, so far as anything that Governor Baxter did to prevent an investigation.—A. It would be very difficult for me to do so in that shape of the question. I know that there was a concerted action on the part of leading republicans here to prevent that contest, and I know that Governor Baxter was a party to that concerted action. There never has been any dispute on that point.

Yet Baxter in his argument here pledges himself, on the honor of a gentleman, that he had nothing to do with preventing that contest, but would lead us to infer that in that matter he was as placid as the unmoved surface of a summer sea. He was perfectly indifferent to the question, and the legislature could do as it pleased; yet there is the testimony of one of his then most active supporters, aiders, and abettors, and he swears that there is no dispute upon the point; that there was what we would term, in plain language, a conspiracy to prevent that investigation, and that Baxter was a party to that conspiracy. In the face of that testimony and of a vast amount of like testimony, Mr. Baxter must excuse me if I take the statement of the witnesses, even against his word on the honor of a gentleman.

After the legislature had voted with such singular unanimity in favor of rejecting Mr. Brooks's petition, which has often been alluded to as showing that the whole State rose up and called Baxter blessed, and that the people were all for him with a devotedness unknown even to the ancient apostles, yet, to cover up or bridge over some real or supposed difficulty growing out of the transaction, Baxter appointed forty-one members of that legislature to office, every one of whom had voted to reject Brooks's petition. Now, it is difficult to explain how, with his honor as a gentleman, and consistent with fair dealing in the transaction, such a thing occurred, unless it was based upon the well-received maxim, that "the laborer is worthy of his hire." All these members are to-day, or were until they went the way of all flesh under the new constitution, performing duties and drawing salaries as a compensation for violating the rights of Mr. Brooks.

THE LEGISLATURE DOES NOT ACT JUDICIALLY IN CONTESTED ELECTION CASES.

But I will remark here, that I have serious doubts whether the legislature perform any *judicial* functions in determining a contested election under section 19 of article 6 of the constitution. That section provides that the presiding officer of the Senate, during the first week of the session, shall open and publish the returns in the presence of the members then assembled. This is merely a primary ascertainment as a basis for a *prima facie* case for the person in whose favor the result is declared. If the person against whom the declaration is made is not satisfied with the declared result, he may contest the same; and the same section provides that "contested elections shall *likewise* be determined by both houses of the general assembly in such manner as is or may hereafter be prescribed by law." Is this determination parliamentary or judicial? The declaration by the president of the senate was not judicial, and the section provides that contested elections shall *likewise* be determined, &c.; that is, they shall be determined for like purpose, and with like effect. If this be correct the determination of a contested election by the legislature is only a parliamentary determination for the purpose of establishing a *prima facie* case, and is not a judicial determination. The constitution of 1836, section 3, article 5, provides that, "contested elections *for governor* shall be determined by both houses of the general assembly in such manner as shall be prescribed by law." This was not regarded as a judicial proceeding, as is evident from the fact that in the act carrying into effect this provision of the constitution of 1836, the legislature left it discretionary whether or not they would entertain the contest. This discretion is seldom, if ever, extended to judicial tribunals.

Section 19 of article 6 of the constitution of 1868 was evidently taken

from section 3, article 5, of the constitution of 1836, which limits the contest to the office of governor; and as that limitation is omitted in the constitution of 1868, it is fair to presume that the convention intended to authorize the legislature to determine contests, not only for the office of governor, but for every other elective office. It certainly did not intend to clothe the legislature with that much *judicial* power, either exclusively or concurrent with the courts.

Section 1, article 4, constitution of 1868, provides that "the powers of the government are divided into three departments, the legislative, the executive, and the judicial."

Section 2 of the same article provides that "no person belonging to one department shall exercise the powers properly belonging to another, except in the cases *expressly* provided in this constitution."

Section 1, article 7, provides that "the judicial power of the State shall be vested in the senate sitting as a court of impeachment, a supreme court, circuit courts, and such other courts, inferior to the supreme court, as the general assembly may, from time to time, establish."

Section 5 makes the circuit courts superior courts of general jurisdiction, and provides that the legislature may change their jurisdiction.

Section 522 of the civil code provides that in lieu of *quo warranto*, or information in the nature of *quo warranto*, actions may be brought to prevent the usurpation of office.

And section 4 of article 7 expressly gives the supreme court original jurisdiction of *quo warranto*. Now, aside from cases of impeachment, every conceivable judicial power is vested in the judicial department, where, in the language of the constitution, it properly belongs.

The legislature cannot exercise any judicial power unless it is *expressly* given by the constitution. The provision in section 19, article 6, that the legislature should determine contested elections, does not necessarily raise the implication that judicial power was intended to be conferred, and certainly the language of that section does not *expressly* confer on the legislature judicial power in hearing that contest, when the language would more reasonably imply that it was intended as a legislative act.

Much stress has been laid on the word "determine," as used in the nineteenth section, but that word, as used in the constitution of 1868, has much more of a legislative than judicial significance.

Section 14, article 5, authorizes each house to *determine* the rules of its proceedings.

Section 35, article 5, that upon veto, the vote of both houses upon reconsideration shall be *determined* by yeas and nays.

Section 3, article 7, provides that the terms of the judges of the supreme court shall be *determined* by lot.

Section 2, article 15, provides that the legislature may *determine* the mode of filling all vacancies in all offices. None of these were judicial determinations, and the word *determine*, as used, implies legislative ascertainment rather than a judicial decision. Therefore we insist that the legislature had no judicial power over the question, and especially no such exclusive judicial power as would oust the judicial department, which has been universally recognized and acted upon by the courts of England and America for nearly a century. There is not a State in the Union but what recognizes that the judicial department has jurisdiction to pass upon and decide the result of an election.

The next point that occurs in this case is the *quo warranto*. It will be remembered that the constitution expressly confers upon the supreme court jurisdiction to issue the writ of *quo warranto* and hear and determine the same.

THE QUO-WARRANTO CASE AGAINST BAXTER IN SUPREME COURT, AND PROCLAMATION OF MARTIAL LAW.

This *quo-warranto* proceeding has frequently been spoken of as a case of Brooks against Baxter. Such was not the fact. No such case was ever pending in the supreme court. The petition for a *quo warranto* was filed by the attorney-general, on behalf of the people of the State, against Elisha Baxter, charging him with having usurped the office of governor, and asking that a writ issue requiring him to show by what authority he exercised the functions of the said office. This jurisdiction is expressly given to the supreme court by section 4, article 7, of the constitution.

The petition recited that it was on the relation of Joseph Brooks, which was afterward either stricken out, or treated as stricken out. Mr. Baxter says in his argument that he employed counsel to defend the *quo warranto* on behalf of the State. The people of the State claimed that Baxter had usurped the office of governor, and through their attorney-general instituted this proceeding to oust him. The State was represented by the attorney-general, and not by the attorneys employed by Baxter.

Baxter employed counsel to defend his personal suit, and paid them out of the funds of the State. He was not sued as governor. That *quo warranto* was not against him because he was governor; it was against him because he was not governor, and was attempting to perform the duties of the office, and was acting therein as a usurper.

But as that *quo warranto* cuts a considerable figure in this case, and much has been claimed for the decision rendered in it, I may be excused for speaking of the surroundings of that case.

Up to the time of that decision nothing had ever been decided in Arkansas on the question of the construction of the constitution and acts of the legislature conferring jurisdiction on the courts, or as to the exact nature of that provision of the constitution. The question of whether the legislature acted judicially in cases of contested elections, and, if so, whether the jurisdiction was concurrent with the courts, or was exclusive, was not an adjudicated question, but rested simply upon construction of the constitution and statutes.

It has been supposed by the profession that the construction of the constitution and statutes of a state devolved upon the courts, and not upon a party litigant, but this case seems to have proceeded upon the theory that Baxter had a right to decide these questions for himself in his own case and resort to force to resist any decision not in accordance with his views.

Mr. Harrington's testimony shows the atmosphere that surrounded the court when the case was decided. On page 36 of the testimony taken in Washington he says:

> I am United States district attorney for the eastern district of Arkansas. I do not know that I can state anything which will be in the nature of evidence before this committee. But the chairman asked one of the other witnesses why those who voted for Baxter in the election were now all supporting Brooks, and why those who are supporting Baxter were all Brooks men at the last election. Prior to the time of the application for a *quo warranto*, of which Judge McClure spoke, I discovered by the morning papers that Baxter had summoned a body-guard to the executive office. Being a political and personal friend of the governor, and, in fact, on confidential terms with him, I immediately went down to his office and there found a body-guard of about thirty men. It was not constituted of the Arkansas State guard, but was composed of the class of young men to which the last witness referred—reckless young men, without any visible means of support, gamblers, unreconstructed men who have a bitter feeling to all northern men, and to all law and order, in fact. Such is their

public reputation. As soon as I got through them and into the governor's room, being subjected to a great many insults by them, I asked the governor what it meant. He said he had learned that the attorney-general was going to apply for a writ of *quo warranto* against him, and that he was not going to submit to it. I told him I thought he must be misinformed; that I did not think the attorney-general would apply for any such writ, as he was elected on the same ticket with him; that such a course would not be to his advantage; and that no one else but the attorney-general could apply for it. Governor Baxter said that he was reliably informed that such was the case. I asked him why he had taken for a guard those men, and why he had not taken the old governor's guard; and I referred to their captain, Captain Rose, as a good soldier, and asked him why he did not call upon him. His answer was, "Because this is policy, and I want men who will resist the officers of the court, and the court itself, if necessary; because I do not intend to let them interfere with me at all." We had considerable conversation on the subject. I tendered him my services, and said that I would select men as his guard, if he had no confidence in Captain Rose's company. I said I would select men who were republicans. I said that it would injure him throughout the State. I said that Judge English represented the element of the democratic party, from which we could not hope to recruit. He said that English represented the element which would resist the decree of the court; and he said that if he was not interfered with he would call the legislature together and afterward have the constitution amended. The court decided at the time that it had no jurisdiction, and the guard was discharged. I still kept on friendly relations with him. He said that I was the only republican who had come to see him for some time, while he was sustained by this guard. His reliance seemed to be on the democratic party. Judge English is usually their representative. As late as ten days prior to the decision of the case by Judge Whytock, Governor Baxter used to say that if they attempted to interfere with him, he would call the legislature together and have a convention and overturn the government. I said to him that that would turn himself out, and that they would have no use for him. He said, "Yes, they will; they agree to run me for governor, and, if I desire, they will elect me to the Senate to succeed Powell Clayton." These things are well known in Arkansas. I betray no confidence of the governor in this remark. That is why republicans who supported Baxter are willing now to take anybody in preference to him with that element behind him; and that is why that element is supporting Baxter, because they want a new deal and reconstruction reconstructed. They are the outs now, and they are against the ins.

I read now from the testimony of Mr. Baxter, page 410:

Judge McClure, in his testimony, says: "Mr. Baxter never at any time recognized this thing as a question for the courts." That is true. He says further: "During the pendency of the *quo-warranto* decision, which he thought might affect his right to hold the office, he had perhaps eighty or ninety men in the state-house, armed with muskets"—that is not true, nor any part of it—"and said that he would not submit to the judgment of the court in any event." That is true. I have said that frequently. "He assumed to himself the right to say that the court had no jurisdiction in the case." That is correct. "I have been informed that on the day when the decision was rendered he had his brigadier-general in the supreme-court room with a proclamation of martial law, and with instructions to disperse the court in case it granted the writ." No brigadier-general ever had such proclamation in his pocket. I confess freely and frankly that I had prepared a proclamation of martial law, and had it in my own pocket, and that I did intend, in the event of a court assuming jurisdiction, to disperse it, on the ground that it had no jurisdiction of the case, as it has itself decided. I regarded it as revolutionary, and I looked upon the whole matter as being intended to revolutionize the government.

Up to that time no court had decided that question. I will now read from his testimony, on page 420, on the same subject:

Q. I understood you to say that previous to the trial of the *quo-warranto* case you had determined to pay no attention to the decision of the court.—A. I had determined not to be ousted by the decision of the court.

Q. You intended to break up the court?—A. Not exactly to break it up. I had intended to declare martial law.

Q. Had there been, up to that time, any decision on that question by any court?—A. No, sir.

Q. You had determined it on your own judgment of the law?—A. On my own judgment, as I do always.

Q. You stated that you intended to file an answer in that case—in Judge Whytock's case.—A. I so instructed my attorneys—to prepare an answer and have it ready.

Q. And to litigate the question?—A. Yes, sir.

Q. Did you intend, if the case were decided against you after litigation, to abide by that decision?—A. I intended to take it to the Supreme Court, and if a fair and proper decision were given, that would put an end to the matter. I did not intend at any time to be ousted by the judgment of any State court.

I will now read from Colonel Oliver's testimony, page 338:

Q. In reference to this *quo-warranto* proceeding, did you, as sheriff, attend on the supreme court in person?—A. I was there in person.

Q. Previous to the meeting of the court was not this city quiet?—A. Yes, sir.

Q. There were no disturbances?—A. No, sir.

Q. There was no militia in service?—A. The militia had been all mustered out prior to that time, until suddenly, one night about 12 o'clock, I was informed that Baxter had surrounded himself with a lot of militia. That was just before the meeting of the court. At first I did not believe it. I thought that some of the folks were joking with me, and wanted to fool me. I went around and came down the street and I saw some of the guns and bayonets. The first man that I recognized was Blocher, who was on duty. I looked around and saw that they were all democrats, and that most of them were members of the Knights of the White Camelia. I thought it was a queer kind of militia.

Q. State whether, about that time, the militia, which had been organized in the State, was not disbanded.—A. It was disbanded under the proclamation of Governor Baxter.

Q. The old militia was disbanded and this new one mustered in?—A. I do not know whether these men were ever mustered in or not. They were there with guns, and they took possession of the two cannon in the state-house yard, which belonged to myself and Senator Clayton, and refused to give them up to us.

Q. Was the state-house surrounded with armed men after that?—A. There were armed men there until some time after the decision in the *quo-warranto* case.

Q. What conversation did you have with Baxter, or what do you know in reference to what those armed men were there for, in connection with the *quo-warranto* proceeding?—A. Shortly after Governor Baxter had made his Fourth of July speech in Lewisburgh, in which he is reported as having said that no court should decide in his case, I had a conversation with him, in which he told me that the court had nothing to do with the matter whether he was elected or not, and that he did not propose to pay any attention to the court, and he asked me whether, if the court issued a writ, I would serve it. I said, if the court should issue any writ, I should certainly serve it.

Q. That was before the opinion was filed in the clerk's office?—A. Yes; it was shortly after the Lewisburgh speech

Q. What time was this new militia called into service?—A. If I recollect rightly it was in June, 1873.

Q. What time of the day or night?—A. It was about 12 o'clock at night when I heard of it first.

Q. During the day the men were not there?—A. No, sir. I left the office about 4 o'clock, and I was out riding in the evening, and I did not see any militia around. The first I heard of it was about 12 o'clock at night, and the next morning I found cartridges around the windows of my office. Then he had them up-stairs after that in the day-time. Baxter himself said that I should not come up there to serve any writ, (that was before the decision,) and Brigadier-General Shaver told me that if I attempted to do so they would kill me on the stairs.

Q. State what you know about the expected resistance to any action of the court, and what you did upon it.—A. Mr. Baxter himself told me that the court should not take jurisdiction of that matter; that the court had nothing to do with it, and he asked me plainly the question whether I would serve any writ that the court should issue to me. That was before the case was heard. The day that the case was heard the court-room was pretty well crowded with men, and Brigadier-General Shaver was there (as he told me himself) with a proclamation of martial law in his pocket, and he said that, if the court had issued a writ to oust Baxter, they would have had this county under martial law, and would have hanged Judge McClure and myself. I simply remarked that I would be there at the hanging.

Q. Did you inform Judge McClure or any other member of the court of that?—A. I heard of it through another before Shaver talked with me. I heard of it from a friend, who was near the throne, and I went and told Judge McClure what he might expect. I told him that I thought I was capable of keeping order in the court, and that if there was any disturbance all I wanted was for him to tell me to keep order in the court.

Q. Was General Shaver in court at the time the decision was announced?—A. I think he was. I think the judges got off the bench and counseled by themselves apart. I do not know whether Shaver remained there or not.

Q. Were armed soldiers in the state-house yard at the time of that hearing—men of the new militia?—A. Yes; I do not know that they were militiamen; they were armed men. It was a new crowd that Baxter had surrounded himself with.

Q. It was this democratic militia which was there at that time?—A. Yes; there was not a republican in the crowd that I recollect, and I knew nearly all of them.

There is a vast amount of testimony on that point, but I will not trouble the committee with reading any more of it. We now approach

the trial of that *quo warranto* under these peculiar circumstances. As I think I shall show, the courts of common law have jurisdiction over the subject-matter of elections, of offices, and of franchises secured by election. I will show that that jurisdiction has existed for years in England, and in every State in this Union. It exists in Arkansas, and has been exercised there ever since the State was organized. If that jurisdiction was excluded, it was excluded by the provisions of section 19, article 6, of the constitution of 1868, which provides that the legislature shall determine the question of contested elections. If the jurisdiction was excluded by that section, it was excluded by implication, by a construction of that section of the constitution. No court had given it a construction. No court had, up to that time, passed upon it. It was an open question, about which it might be said that lawyers might differ, but about which, it seems to me, that lawyers who would examine the subject, would say that at least the probabilities were in favor of the jurisdiction remaining still in the judicial department of the government. It is the province of the courts to construe the constitution and laws of a State; and litigants are bound to submit to that construction. If that construction, by a court from which an appeal can be taken, is not satisfactory, the party may prosecute his appeal, and have the question decided by a higher court. Mr. Baxter, a litigant in this matter, instead of pursuing that remedy, without which we can have no government; without which the judicial tribunals of the country would be prostituted, and their decisions subjected to the caprice and whim of every mob, and of every disorderly assembly, arrogated to himself the right to decide that question, and undertook to enforce his decision by the arbitrary use of military power. That is the attitude in which we come to that case. He was going to decide it. Instead of submitting to the courts a controversy in which Mr. Brooks claimed a legal franchise which was of value, the party who was seeking to deprive him of that franchise proposed to decide the question for himself, and that the rest of the world should obey his decision. He demurred to the jurisdiction of every other tribunal. To be sure he was willing to submit to a court, if the court would certainly decide it in his favor; but if the court were to decide it against him, he would resist the decision. He sought to establish, for the first time in America, the doctrine that a litigant, a party to a suit, is higher than a tribunal in which the suit is pending. He was willing to submit the question to no judgment except to the judgment of Elisha Baxter, rendered in his own cause, and executed by his White League militia. That is the atmosphere, and these are the surroundings, with which we approach what happened in the trial of that case. The trial and the subsequent proceedings are more singular, and perhaps more in violation of our ideas of legal and judicial propriety, than even Baxter's notions. I read from Judge Gregg's testimony, page 185:

Q. Did you write the opinion of the majority of the court?—A. Yes, sir.

Q. Did you bring that opinion to the adjourned term, or did you send it here before the adjourned term?—A. I sent it by mail.

Q. To whom did you send it?—A. I think to Judge Searle or Judge Stephenson.

The testimony shows that when the oral announcement of the decision was made, it was agreed that the judges would meet at the adjourned term, and would then have the written opinion entered.

Q. What induced you to send it at an earlier period than was first contemplated?—A. I was induced to do so by various letters which I received from parties here indicating that there was likely to be a misconstruction of the ruling of the court, and calling my attention to it, and urging me to file my views of the law of the case in order to prevent some misconstruction, perhaps in the lower courts; some of the judges so wrote to me, and some other individuals.

Q. Did Mr. Baxter's attorneys write to you on the subject?—A. No, sir; I do not think they did.

Q. Did Judge Caldwell write to you?—A. Yes, sir; and Mr. Wilshire wrote to me. I think that perhaps the auditor of state wrote to me, and I think I had other letters. Judge Stephenson and Judge Searle both wrote to me, I think. They were my associates on the bench.

Q. Was not the case of Brooks against Baxter commenced in the circuit court after that decision was rendered?—A. I do not know when it was commenced.

Q. Did the letters to you insist that you should hasten the opinion with a view of cutting off the jurisdiction of the circuit court?—A. I do not think that that was stated in any letter. I think that the substance of the letters was that parties seemed not to understand the point decided by the supreme court, and that they were misconstruing the decision, and that it was of importance to the public that we should file the written opinion. That was my recollection. I do not think it was stated that it was desired to affect the decision of other judges, or anything to that effect.

Q. Look at that opinion (aside from the paragraph on the fly-leaf) and see whether it is the opinion which you prepared and sent to Judges Searle and Stephenson.—A. I think so. This is my handwriting.

Q. Did you sign it previous to sending it?—A. Yes.

Q. This paragraph on the fly-leaf was not to it when you sent it?—A. No, sir; it was not to it.

Q. It is in your handwriting?—A. Yes, sir.

Q. How did you come to attach it?—A. I attached that paragraph at the request of one or both of my brother judges whom I have mentioned.

Q. Was it not sent up to you in those exact words for you to copy it in your own handwriting, and to attach it to the opinion?—A. It was very nearly in the same words. I forwarded this opinion as my view, with a request that the other judges would file their opinions also, and when we met at the adjourned term the records would still be under our control, and we could withdraw these temporary opinions, and prepare a proper opinion for record. I think I requested them to file their opinions, and I sent this as mine. Then I received a communication from one or both of those gentlemen, (Judge Searle and Judge Stephenson,) requesting that I would insert this additional paragraph immediately preceding the last clause of my opinion, and urging that it would be more satisfactory to them, or something to that effect.

Q. Did they send the opinion back to you?—A. No, sir; they sent this paper, requesting that it should be copied in my handwriting and inserted before the last clause in my opinion.

Q. And you sent that paper back to whichever one of the two judges you wrote to?—A. Yes, sir.

Q. Did you sign the opinion after that paper was attached to it?—A. No, sir; I did not see that opinion any more.

Q. Has the court met since then?—A. O, yes; we held court after that.

Q. Did you meet at the adjourned court?—A. Yes; that is my recollection.

Q. And the regular term was held afterward?—A. Yes, sir.

Q. In whose handwriting was the paper which was sent to you?—A. It was in the handwriting of one of the judges. I am not distinct in my memory as to which, but I think it was Judge Searle. They were both communicating with me. The paper, I think, was in the handwriting of Judge Searle.

Q. At the time of the hearing of the *quo warranto*, was there not a positive threat of martial law being declared in case the supreme court took jurisdiction in the matter?—A. It is a little difficult to answer that question directly. I heard something said about martial law, but I never heard of it from any source which caused it to attract my attention at all as amounting to anything of importance. I heard it mentioned, perhaps on the street, but never in a way which made me consider it a serious proposal at all.

Q. At the time that that decision was announced, was not Mr. Baxter's adjutant-general in the court-room?—A. I declare I do not know.

Q. Were you not aware of the fact, or notified of the fact, or did you not believe the fact to exist, that he was there with a declaration of martial law, which was to be announced in case the court took jurisdiction?—A. If you ask my opinion, I say that I do not believe it. I heard something about it. I did not apprehend that there was any danger of martial law, or that it was likely to be declared.

Q. Were not armed men in the State-house yard, and in the other end of the State-house at the time—State militia?—A. I do not recollect distinctly.

Q. What is your recollection about it?—A. I do not recollect to have seen any armed men there.

Q. Was there not a number of armed men, at the time that you held court, in the State-house or in the State-house grounds?—A. I do not recollect. If they were there I do not recollect. I do not recollect to have seen any armed men about the premises during the time we were holding court.

Q. Did you concur in that memorandum-amendment made to your opinion?—A. The objection which I had to adding it was that it seemed to me to savor more of *dictum* than of legal ruling. On that ground I had some objection to it. I did not think it was announcing any incorrect principles of law, but I thought that it was rather *dictum*, as the matter then stood before the court; but as my brother judges insisted upon it, and as I had not an opportunity of communicating with them in person, I consented to insert that paragraph.

Q. The question before the court was a motion for a petition for a *quo warranto*?—A. Yes.

Q. And this *dictum*, or whatever it was termed, which was added to this opinion, is a decision that no person has jurisdiction of the controversy?—A. It is an assertion to that effect.

Q. You thought that on the mere question of a motion whether a man should have a certain writ, the decision of what other courts might do, or might not do, was rather *dictum*?—A. So far as that motion was concerned, although it was only a motion to file, yet it was put upon the same grounds as if the merits of the question were under consideration. We heard two days' discussion of the question, which extended to the merits as well as to the mere application to file. That, of course, extended to the jurisdiction of the court. If the court had jurisdiction at all it would have received the petition and considered it; but if the court was without jurisdiction, it was proper to cut off the petition, and we considered that we were deciding really the case of jurisdiction on that application.

Now on that last testimony Judge Gregg is contradicted by four or five witnesses who testified that the announcement was that the judges would not decide the question of jurisdiction, but would simply decide the question before them on the motion to file a petition for a *quo warranto*.

Mr. BAXTER. Who put Judge Gregg on the stand?

Mr. RICE. We did.

Mr. BAXTER. And now I understand you to say that he is contradicted by four or five other witnesses?

Mr. RICE. Yes; I say so.

Mr. BAXTER. Then they contradict your own witness?

Mr. RICE. Yes. We had to use some materials in which we did not believe very much ourselves; but this testimony was extracted from an unwilling witness, and under the rule of law it is very good testimony, as against you. I continue to read from Judge Gregg's testimony:

Q. State whether, since that opinion was filed, you have not stated in the presence of most or all of the judges, that if you had been here before the filing of that opinion you would not have allowed it to be filed with that addition to it?—A. I do not remember the conversation. I have expressed opinions on it; and I think I have stated to some of the judges that if I had been here I should have insisted not to have put it in. The idea was that if we had had an opportunity for personal consultation I should have objected to putting it in, because I regarded it as *dictum*.

Q. I ask you if you do not know the fact, from your correspondence and other sources, that that paragraph was written out for the purpose of influencing the circuit court, and with the understanding that if it was added to the opinion the circuit court would perhaps be governed by it?—A. I cannot assert that from my knowledge, except as it might be inferred from circumstances. No one spoke anything to that effect, while I might have my own private opinion as to what the other judges who wrote that paragraph expected it to effect.

Q. I ask you if Judge Caldwell did not substantially give you to understand that the object of having that opinion filed was for the purpose of embarrassing the circuit court?—A. I think there were no words to that effect. My remembrance of the substance of Judge Caldwell's letter (I can produce it if need be) is that he urged me to send a written opinion, as he regarded it as a matter of great public interest that our written opinion should be filed, and that it should not be delayed any longer.

Q. Why did you understand it to be a case of such public interest if the question was disposed of?—A. The reason I gave awhile ago was that the court was misconstruing the ruling which we had made.

Q. Do you mean the court, or Brooks's attorneys?—A. My understanding was that the judges feared that there would be a misconstruction of our opinion.

Q. Was it as mild as misconstruction; or was it the idea that they wanted to close in the Brooks fight a little closer?—A. I think that their letters were pretty well guarded. It was put on the ground that it was a matter of public concern, and that

there was likely to be a misconstruction of the ruling of the court, and hence they wanted the written opinion filed.

Q. I was merely trying to get at their idea.—A. I do not know that the idea in those letters was any different from what I have stated.

Q. Was there any interest whatever in the filing of that opinion, except as far as it would affect the suits which were pending in the circuit court?—A. I think that my impression at the time was, and yet is, that the object of having the opinion filed was to use it in the lower courts.

Q. Then the public interest of Judge Caldwell and those other gentlemen was to get that opinion filed in order to affect the decision of other courts?—A. I think that the desire expressed was to have that opinion filed so that it could be used in the other courts for the purpose of conforming their ruling to the ruling of the supreme court.

D. Did you expect that the other courts would regard that additional paragraph as *dictum*?—A. I did not care anything about that. I did not think that that cut any figure in the case. I would have preferred not to have put it in on that ground.

Q. Do you regard that now as law, or as *dictum?*—A. I regard it in the main as *dictum*. That was my opinion at the time, and is yet. I think, however, that the substance of the opinion conveys the same meaning as there is in that paragraph; but I looked on that as *dictum*.

There is the statement of Judge Gregg, one of the judges who tried that case. There is the high disinterested judicial attitude which he occupies in this case. I will now read from the testimony of Judge Stephenson, page 267:

Q. Was it understood that you were to meet and agree upon the opinion when you got together at the next meeting?—A. Yes; we were to meet on the 20th of November, and then submit our views.

Q. You adjourned with that understanding?—A. Yes.

Q. Was there ever any consultation afterward in the entering-up of the opinion as was then contemplated?—A. The proceedings afterward were somewhat irregular. Shortly after the adjournment of the court, I went to Michigan and Illinois to spend the summer. Judge Searle, who concurred in the opinion, went to Illinois, I think, and Judge Gregg went home to the northwestern part of the State. Perhaps a week or ten days afterward I received a letter from Governor Baxter——

He, a judge, received a letter from a party litigant—

containing a general statement of the condition of affairs here, and expressing a wish that I would return to the State. About two weeks after that I received a letter from Mr. Compton, one of Governor Baxter's counsel, who wrote, as he said, on behalf of the governor, urging me to return to the State immediately, as there were some matters which were considered of great importance to the public interest, and which demanded that I be here. I wrote in reply to Mr. Compton that I would go to Normal, Ill., and make a short visit to my friends, and that my post-office address would be at Normal. When I arrived at Normal I received a telegram from Mr. Wilshire, who was also counsel for Governor Baxter, urging me to return immediately. I staid there till the next day, and then started home. On the way—I think at Atlanta, or some station on the road—I met Judge Searle, who told me that he had also received a similar request by telegraph to come back. On our arrival here I was informed by several gentlemen, who were my friends, and the friends of Governor Baxter, that a suit was pending in the circuit court (I may have known that before I started) of the same nature as the one which had been decided in the supreme court, and that it was apprehended, on the part of Governor Baxter and his friends, that unless the opinion of the supreme court was reduced to writing and put on file, Judge Whytock, of the circuit court, on the plea that he did not know what the opinion of the supreme court was, would take jurisdiction of the case, and render some kind of judgment in it; and it was considered of great importance that the opinion of the supreme court should be reduced to writing and placed on file, so as to be authoritative on Judge Whytock's court. I understood that Judge Gregg had been also written to to come to the capital. The difficulty then was to get the concurring members of the court together for consultation and to reduce the opinion to writing. After consultation, it was agreed that we should correspond with Judge Gregg, and, if he were not able to come, that we would by mail interchange our views, and arrive at a conclusion.

Q. When did you first see this opinion?—A. I wrote to Judge Gregg, and he submitted his views. He draughted that opinion and sent it down here.

Q. When was that?—A. That was in the early part of September, I think. Perhaps the opinion, as perfected, was not received until the latter part of September. It took some time in correspondence.

Q. Had he signed the opinion?—A. Yes.

Q. Go on and state what you know about the slip of paper which is annexed to it; where was it written, and by whom?—A. I was very intimate with Judge Caldwell,

judge of the United States district court, and when I got Judge Gregg's opinion I took it up to Judge Caldwell and showed it to him, or rather read it to him. He made some suggestions about it. The particular objection which he had to the opinion was that nowhere in it was there an epitomized statement of the facts in short form, so that the public and everybody interested would readily grasp it; and he suggested a change, or that there be interpolated at the end of the opinion a short summarized statement of the points contained in it. Judge Caldwell met Judge Searle and myself in the library of the supreme court the next morning, perhaps, after I had the consultation with him. I sat down and embodied what I conceived to be Judge Caldwell's ideas, telling him, however, that I thought they were all in the opinion already. He admitted that they were, but said that they were not in such a concise form as that they could be understood generally by the public. He was not exactly satisfied with what I had written, and he wrote himself a statement of what he desired to go to the public, I suppose, and in that Judge Searle and myself agreed. It was substantially what the opinion was. I sat down and copied the statement of Judge Caldwell in my own handwriting, and wrote to Judge Gregg, telling him what the object and desire of his friends here in reference to it was, (perhaps I mentioned Judge Caldwell's name;) and I asked him, if it met his views, to copy it in his own handwriting and send it to me with authority to add it to his opinion. I sent that statement to Judge Gregg, who copied it in his own handwriting, and I appended it to the opinion. That is the history of the fly-leaf.

Q. Had you signed the opinion before that was appended?—A. No, sir.

Q. Had Judge Searle?—A. I think he had. I think he signed it with the understanding that that should go in. I know that he was present when it was sent to Judge Gregg, and we agreed that if he should concur and send it down it would be appended to the opinion.

Q. What correspondence had you with Judge Gregg in regard to the extraordinary mode of getting that opinion into the clerk's office?—A. None at all.

Q. What correspondence had you on the general subject?—A. This agreement was entered into by Judge Gregg, Judge Searle, and myself at the time of the adjournment: that the opinion was not to be filed until the November meeting; and, as a reason why that agreement should be departed from, I stated to him that it was considered absolutely necessary by Governor Baxter and his friends that the opinion be placed on file, and I gave him the reasons for it. Governor Baxter had frequently said that he considered the question settled, first by the legislature and second by the opinion of the supreme court, and that if any other court should attempt to interfere with his office he would consider it revolutionary, as it would involve the State in turmoil, and he would consider it to be his duty to protect himself from the judgment of that circuit court by the means which he had in his hands at the time. I think that Mr. Wilshire and myself and several others frequently talked over that matter. I know that I did with Governor Baxter, and I think, also, with Mr. Wilshire as to Governor Baxter's being justified in using the means at his command to prevent any interference with his office by the circuit court.

Q. What means?—A. The militia. The object was to avoid that catastrophe, and to avoid the necessity of drawing out the militia to prevent the execution of such a judgment. I know that such a thing was apprehended by those who were interested in preserving the peace and quiet of the community; and I think that all the gentlemen who were operating with me at that time had the same desire to quiet the affairs of the State. We concluded that it was better to have that opinion go on file at that time.

Q. State whether Judge Caldwell was an active partisan of Mr. Baxter.—A. He was certainly very friendly to Mr. Baxter, as I myself was at that time.

Q. Was he not rather an active partisan?—A. I do not wish to be misunderstood as to what I might say in that matter, but I will say that he was a very warm friend to Mr. Baxter, and I regarded him as one of Baxter's chief advisers in the affairs of the State.

Q. Was the wording of the opinion, the so drawing it as to attempt to exclude the jurisdiction of the circuit court, influenced in any way by the desire to prevent martial law?—A. There is no question but that the intention of framing the decision was that the circuit court could not take jurisdiction.

Q. It was done on purpose to effect that?—A. Yes, sir; it was, most emphatically.

Q. Was that idea put into the opinion in order to prevent military disturbance or to preserve quiet?—A. Our idea at that time was that if the opinion went on file it would preserve the peace of the State, and the opinion was drawn with reference to the then pending action in the circuit court. The object of filing it at that time was to prevent any action on the part of the circuit court.

Q. Did you consider that you had before you in that case any question as to the jurisdiction of the circuit court?—A. We no doubt intended at that time to confine the decision strictly to the case before us.

Q. What made you depart from that intention?—A. The reason that actuated me was to preserve the peace and to avert any impending danger in the State.

Q. What do you know as to Judge Gregg being actuated by the same feeling?—A. I have a letter from Judge Gregg, but I dislike to produce it without first having a conversation with him, as the matter is one of private correspondence between Judge Gregg and myself.

Q. It was on this public subject?—A. Yes; I wrote to him and explained the reason why it was desired to have the opinion and the appendix both. Several letters passed between us. Judge Gregg said that while he desired so to restrict himself as not to strike down any other case that might be pending, still he agreed with us that if the fly-leaf would bridge over the emergency he was willing to have it go on file.

Judge Searle, in speaking of this decision, testifies as follows, page 278:

Q. You heard Judge Bennett's testimony in regard to the kidnapping, &c.?—A. Yes.

Q. Do you concur generally in that testimony?—A. Yes; with the exception of two or three things that are perhaps immaterial.

Q. Do you concur in his statement in reference to the disposition of the *quo-warranto* case?—A. Not exactly.

Q. What was the question there submitted to the court?—A. It was as to whether the petition for *quo warranto* should be filed or not.

Q. What was the question that was decided?—A. The argument extended back to the jurisdiction of the court, and the opinion of the court extended back still farther.

Q. I am asking for the announcement that was made.—A. It was that that was the only question which should be considered.

Q. You mean as to whether the petition should be filed?—A. Yes.

Q. What was the agreement in reference to the opinion—as to whether it was to contain anything beyond that announcement—I mean as to what the opinion which was to be written up afterward should contain?—A. I think that the understanding at that time was that the opinion was to contain nothing more than that question—that is, that it should relate to nothing more than to that question. I do not know that there was any special understanding in regard to it.

Q. When was the opinion to be filed?—A. It was to be filed when we met again, on the 20th of November following.

Q. Were you to have had a consultation when you met?—A. Yes.

Q. When you parted it was with the understanding that you would meet in November and have a consultation upon this opinion and file it?—A. Yes.

Q. Was any such consultation ever had?—A. Those of us who agreed in Judge Gregg's oral opinion, just before the court adjourned on this case, had some talk in regard to the opinion which should be written up, and the understanding seemed to be that Judge Gregg should write up the opinion specially. It was also understood that the rest of us were to write our views, and then when we met again in November were to compare notes, so to speak.

Q. When you signed the opinion was the fly-leaf attached to it?—A. No, sir.

Q. After you went away who wrote to you to come back here?—A. When the court adjourned I was quite unwell, and I went North to rest. I received a telegram while visiting my father's, near Rock Island, to hasten immediately to Atlanta, Illinois, where some of my folks were. This telegram was simply on another telegram which they had received from Mr. Wilshire, requiring me to come here immediately. I remained there four or five days, and received another telegram from Mr. Wilshire, requesting me to come immediately to Little Rock. I immediately started for here, and on the train I met Judge Stephenson, who stated that he had received a similar telegram.

Q. That is all the communication which you had from here in reference to your coming back?—A. I believe that is all, except a letter from Judge Gregg, saying that he did not desire to come; that he had been requested to do so, and that he would write his views and send them anywhere that I should be. Shortly after I arrived here he sent his opinion to me, or to Judge Stephenson and me jointly. (I do not know which.) I examined the opinion and signed it, and then handed it to Judge Stephenson. The next day, about 9 o'clock in the morning, I was in the supreme-court room, when Judge Stephenson and Judge Caldwell came into the room with this opinion. They consulted in regard to the matter and wrote something, and Judge Caldwell and Judge Stephenson appeared to be agreed. Then they spoke to me and asked me to hear what they had written. They read it to me and asked me what I thought of it. I told them that I regarded it as dictum; that I thought it unnecessary; that the rest of the opinion was substantially the same as that, and that there was enough dictum in the opinion without that. But they talked over the necessity of making the thing strong and condensing it, and of giving a kind of summary of the opinion, and I finally agreed to it. The writing was copied by Judge Stephenson or myself, and was sent by myself to

Judge Gregg. I inclosed it in a letter, which I had already written on other subjects, to Judge Gregg. I put this thing as copied into the letter, and then I made an additional statement in regard to it.

Q. What was the motive that induced you to agree to that dictum?—A. Policy, to some extent.

Q. Do you agree substantially with Judge Gregg in regard to the reason for putting in that dictum and for filing the opinion at that time?—A. Yes, sir; substantially.

Judge Bennett testifies as follows, page 257:

By Mr. RICE:

Q. When was the opinion to be prepared in writing?—A. It was to be prepared at the next meeting of the court.

Q. When was that?—A. I think that that was in the June term. I think we adjourned to a set day. Our regular term was on the first Monday of December, and I think it was on the Monday or two before that first Monday.

Q. Was it agreed as to who was to write the opinion?—A. Yes; it was generally understood that Judge Gregg, by his being appointed and delegated to announce the oral opinion, would prepare the written opinion, and I supposed it would be brought in at our next meeting for general consultation.

Q. Was the opinion presented at an earlier day?—A. I do not know that it was ever presented in court. I never saw it presented in consultation at all.

Q. Did you ever sign the opinion?—A. No, sir.

Q. Did you ever refuse to sign it?—A. No, sir; it never was presented to me for my signature.

Q. Was it ever presented in court for action?—A. Never, that I know of.

Q. You have been on the bench at every meeting of the court since?—A. Yes.

Q. It was simply filed in the clerk's office?—A. I do not know whether it was filed or not; I do not know anything about it. I think I saw the manuscript of it once when a question of controversy as to what it contained brought it out; but as to whether it was filed in the clerk's office or not I do not know. The first I knew of its being in existence was when it was published in the papers.

By Mr. SAYLER:

Q. How many judges of the supreme court are there?—A. Five.

By Mr. RICE:

Q. The appointed consultation over the opinion drawn by Judge Gregg was never had?—A. No, sir. It was, as I consider, a general assent. I did not suppose that any announcement would be sent forth as to the opinion of the court without a fair and general consultation. Such a thing had never been done before, and it was my understanding that the written opinion was to be prepared and ready for submission to the whole court, or to the majority that had coincided with the oral opinion, at the adjourned term of the court, and not before.

Q. Did you concur in that opinion, and would you have signed it if it had been submitted to you?—A. No, sir.

I will read a letter from Judge Gregg to the other two judges which was put in evidence, page 326:

FAYETTEVILLE, ARK., *September* 18, 1873.

DEAR JUDGES: Your letter did not reach me soon as it ought to have come.

I inclose what you suggest. I aimed to be sufficiently explicit before on that subject, and, as you intimate, I think none but the most prejudiced could misconstrue our intention. But perhaps it is better as you suggest. I care nothing about the form of words conveying the idea that this question belongs to another department and not the courts, only I did not want to use undignified or unbecoming language, and such as would indicate that we were attempting especially to strike down a case not yet before us; but you are very right, in matters of so much importance, to require that the language be so plain that none can mistake.

You are guilty of gross flattery in your kind note. I was not at all satisfied with what I had written when I mailed it to you. It is certainly not worthy of the occasion, but I intended to revise and rewrite it before we allowed it to go to press. I then thought, and still hope, it will answer a temporary emergency and save me a hard, expensive trip, and at a time when my health is not very good, &c.

Truly, yours,

L. GREGG.

Hons. E. J. SEARLE and M. L. STEPHENSON.

Judge Gregg says in this letter that Judge Stephenson is guilty of gross flattery. I am glad that he was, for if any man could flatter a

judge who was guilty of such conduct, he was the man to engage in that enterprise.

Now, here is a letter from Baxter to one of the judges:

EXECUTIVE OFFICE,
Little Rock, Ark., July 16, 1873.

MY DEAR JUDGE: I had a long interview last evening with our mutual friend, Judge Caldwell, in whose judgment I have unbounded confidence; and, among other things, he suggested that the opinion in the *quo-warranto* case ought to be prepared, signed, and filed before the meeting of the Pulaski circuit court in the fall. I hope you will give (as I know you will) due attention to this matter; and if convenient for you to do so, I hope you will at once call the attention of Judge Gregg to this matter.

The enemy are as bitter as ever, and the last dodge is an open declaration by McClure and the reform central committee in favor of a constitutional convention. I shall be pleased to hear from you often.

Respectfully, yours,

ELISHA BAXTER.

Now, this is the opinion thus obtained that has been talked of all over this land as settling the question of jurisdiction of the judicial tribunals of Arkansas—a decision that was rendered in a military camp, when a party to the suit, and who was to be affected by it, was surrounded by armed men, with a proclamation of martial law in his pocket, bullying that court into acquiescence or obedience to his dictation, threatening the court with destruction almost if it did not decide as he dictated. Under those circumstances, the court rendered a decision which cannot be sustained upon any principle of law; and that is, that, if Mr. Brooks saw fit not to contest Mr. Baxter's election, his failure to do so precluded the sovereign people of the State from reclaiming to themselves a franchise which was usurped.

A decision which is a disgrace to any court upon earth, was there rendered, and the only excuse for it is that it was compelled by force, and the court yielded through fear. Two of the judges who concurred in this decision were gentlemen who had been counted in in the same manner as Baxter had been, so that only one of the regularly-elected judges decided the case. It has been said—and even the Attorney-General of the United States, who did not know of those surroundings, has said—that that was a well-considered opinion. Yes, it was the best-considered opinion that I ever heard of. It was considered by the judges, each of them at home, or traveling over the country; it was considered by Baxter's attorneys; it was considered by Baxter himself; and then it received a very considerable amount of consideration from that intermeddling district judge, Henry Clay Caldwell. It *was* a well-considered opinion. It was a disgrace to any country. And when they talk about bad government and about bad things that have occurred in Arkansas, I say that this eclipses all of them. The case is on trial in the supreme court, and a majority of the judges are counseling, and corresponding, and intriguing with one of the parties and his attorneys and friends—counseling, not as to how they shall arrive at an honest decision of the case, but as to how they shall so word their decision as to cut off the jurisdiction of any other tribunal and deprive Mr. Brooks of his right to apply for a remedy in a court of justice. That is a rare specimen of the decisions of the courts which we used to read about in youth, and which were spoken of as some of the great bulwarks of liberty, and of the rights of the people. Here is a court supposed to be impartial, or which ought to have been impartial, trying this case. The judges never held a consultation upon the opinion, as the testimony shows. Judge Gregg wrote it out, and then they handed it around and

signed it just as they would a circular-letter. Two of the judges had been counted in like Baxter, so that there was only one of them who can really be said to have fairly decided the case—the chief-justice dissenting, and Judge Bennett took no action whatever in it. But there are these three judges with Baxter writing to them, and Baxter's lawyers writing to them, and Judge Caldwell and Baxter's partisan friends writing to them, and caucusing and corresponding together, the whole resulting in what this testimony shows to be a programme decision. To say that that is a judgment which is to be taken as a construction of the constitution of the State is simply preposterous. It is a sad comment on the kind of good government which the gentlemen on the other side say has dawned upon the people of Arkansas—a government where one of the parties to a litigation runs the court and dictates what the judges shall decide. Added to that was a United States district judge holding a high and responsible position, whose duty it was to maintain the integrity of the law, and who, instead of doing so, commenced intriguing with the judicial department of the State, commenced putting up schemes that were to be ground through in the form of a judicial decision, commenced corrupting the judiciary, and I may say that the suspicious will always believe that when he started out on that mission he was only doing unto others as he would that others should do unto him. When a judge will engage in corrupting other tribunals there is ground to suspect that the procuress is not more virtuous than the procured. Here is the result of their disgraceful labor. Here is this addition, this appendix to the decision of the supreme court, (page 145.) Upon this they base their claim that the judgment of the circuit court is a nullity. It reads as follows:

> Under this constitution the determination of the question as to 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 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.

That is the fly-leaf written by Judge Caldwell. And to show that they were acting very honestly and disinterestedly in the matter, he got Judge Stephenson to copy it, and Judge Stephenson sent it up to Judge Gregg and got him to copy it; and then, as they could not incorporate it into the opinion, they pinned it on to the opinion, and filed it; and all those certified copies of the opinion which have come to Washington have come with that appendix to it, as if it was part of the original decision. There never was such a prostitution of justice developed in any case where a party litigant, with his attorneys, friends, and adherents, connived with the majority of the court, and put up such a weak subterfuge, worked up a scheme of this kind to thwart justice, and corruptly cut off the jurisdiction of another court.

PROHIBITION CASE OF BERRY VS. WHEELER IN SUPREME COURT.

About the time Brooks brought his suit in the circuit court against Baxter, Berry brought an action in that court against Wheeler to recover the office of State auditor, which was an executive office under the constitution, and stood the same in that respect as the office of governor. To this suit Wheeler filed a demurrer to the jurisdiction of the court, accompanied by an answer upon the merits. Soon after the *quo warranto* case was decided, Judge Whytock overruled the demurrer,

and decided that he had jurisdiction of the case. It stood upon the issue of fact raised by the answer, and Wheeler applied to the supreme court for a writ of prohibition against Judge Whytock and Berry to prevent further proceedings in the case. The writ was awarded by three judges, the chief-justice and the two "counted-in" judges, the odds being against the legally-installed judges; Judge Gregg, the champion of the opinion in the *quo-warranto* case, one of the gentlemen of the *fly-leaf* notoriety in connection with that remarkable opinion, disregarding his own dictum, reversed his decision (being a friend of Berry's) and held in the prohibition case that the circuit court had jurisdiction.

I have never attached any importance to the supposed decision in this case; but as it seems to be relied upon, I will say a few words upon it. The awarding of a writ of prohibition is not a judgment nor an adjudication of the questions upon which the application for the writ is founded. It is no more an adjudication than the granting of an injunction by a court in term-time upon an application made for that purpose; it is to that extent a decision of that question; but it is only a preliminary, *prima-facie* decision, such as the court must make when it determines to award the writ. The court may decide the same way in the final hearing, or it may decide exactly the reverse, and is not in the least embarrassed by the fact of having awarded the writ. In England it was the practice for the court that had been prohibited to suspend further action in the case until the questions involved in the petition for the writ could be adjudicated by the court that awarded it. And to present a case upon which the court could make an *adjudication* and render a *judgment*, the practice allowed the party suing out the writ to institute an action against the opposing party, charging by fiction that he had disregarded the writ. This allegation (being only a fiction) was not traversable; and upon the issue thus presented between the parties to the original suit the question was heard and determined; and that determination amounted to an *adjudication*—it was a *judgment*.

Section 4, article 7, of the constitution confers upon the supreme court jurisdiction to issue remedial writs and *hear and determine* the same, showing that the awarding of a writ of prohibition was not regarded as an adjudication, *but the determination upon the hearing is the adjudication*, and that authority is expressly given by the constitution.

In the case we are considering the writ was issued, but it was never heard or determined; it still stands upon the docket as it stood when it was issued; therefore, so far as any importance is attached to the prohibition case, no decision that rises to the dignity of an authority has been made in that case.

THE QUO-WARRANTO AND PROHIBITION CASE NOT AUTHORITY.

Judge Pratt once said in the court of errors in New York that the decisions of the court were not law, they were only evidence of what the law was, and the strength of their evidence depended upon the unanimity of the court, the uniformity of the decisions, the soundness of the reasoning, and the fair, deliberate, and impartial consideration that was given to the question; and that the absence of any of these greatly weakened the force of the decision as an authority. Tested by this rule the opinion in the *quo-warranto* case and the awarding of the writ of prohibition are utterly valueless upon the question as to whether or not the courts had jurisdiction of this case, and especially whether or not the circuit court had jurisdiction of the case of Brooks against Baxter, in which the judgment of ouster was rendered.

That leaves the question without any authoritative adjudication, except the decision of Judge Whytock, rendered at the time of overruling the demurrer in the case of Berry *vs.* Wheeler, in which he held that the circuit court had jurisdiction. This opinion was published in the daily papers and was well known to be the view of the circuit judge at the time the case of Brooks against Baxter was submitted on demurrer.

THE QUESTION PROPERLY BELONGS TO THE COURTS.

The question of the result of an election to an elective office properly belongs to the courts of the State. This was the opinion of the Attorney-General, as shown by his telegram to Mr. Baxter, which will be found in House Ex. Doc. No. 229, page 4, and reads as follows:

[Telegram.]

DEPARTMENT OF JUSTICE,
Washington, April 16, 1874.

Hon. ELISHA BAXTER,
Little Rock, Ark.:

I am instructed by the President to say in answer to your dispatch to him of yesterday, asking for the support of the General Government to sustain you in efforts to maintain the rightful government in the State of Arkansas, that, in the first place, your call is not made in conformity with the Constitution and laws of the United States, and in the second place, as your controversy relates to your right to hold a State office, its adjudication, unless a case is made under the so-called enforcement acts for Federal jurisdiction, belongs to the State courts.

If the decision of which you complain is erroneous there appears to be no reason why it may not be reviewed, and a correct decision obtained in the supreme court of the State.

GEORGE H. WILLIAMS,
Attorney-General.

In Dillon on Municipal Corporations, vol. 1, page 263, section 141, we find the following:

Common-law courts of general and original jurisdiction have the admitted power to inquire into the regularity of elections, corporate and others, by *quo warranto*, on an information in that nature, and in certain cases, by mandamus.

* * * * * * *

The principle is, that the jurisdiction of the courts remains, unless it appears, with *unequivocal certainty*, that the legislature intended to take it away.

Cooley, in his work on constitutional limitations, page 623, uses the following language:

As the election-officers perform for the most part ministerial functions only, their returns, and the certificates of election which are issued upon them, are not conclusive in favor of the officers who would thereby appear to be chosen, but the final decision must rest with the courts. This is the general rule, and the exceptions are of those cases where the law under which the canvass is made declares the decision conclusive, or where a special statutory board is established, with powers of final decision. And it matters not how high and important the office, an election to it is only made by the candidate receiving the requisite plurality of the legal votes cast; and if any one without having received such plurality intrudes into an office, whether with or without a certificate of election, the courts have jurisdiction to oust as well as to punish him for such intrusion.

In the case of The People *vs.* Cook, 4th Selden, page 83, the court use the following language:

In The People *vs.* Vail, (20 Wend., 12,) the case of The People *vs.* Ferguson is expressly recognized as sound law, and Bronson, J., says that in those legislative bodies which have the power to judge of their own members, it is the settled practice, where the right of the sitting member is called in question, to look beyond the certificates of the returning officers, "And I think," he observes, "a court and jury with better means of arriving at the truth may pursue the same course." * * *

Nor is there any danger to be apprehended to the security of our institutions by pursuing this practice; the right to an office is no higher than the right to life, liberty, or property; there is no principle that should withdraw the first from the cognizance of a court and jury to the exclusion of the last. Both will indeed be safe under the administration of the ordinary tribunals.

The same doctrine is expressly held in the 17th Ark., 407, to which I have referred. Also in the case of The People *vs.* Holden, 28th Cal., page 123, and a vast number of other authorities to which I might refer. I do not know of a State in which the jurisdiction of contested elections and usurpation in office growing out of elections has been taken from the courts; and the King's Bench has exercised this jurisdiction for more than a century.

CIRCUIT COURTS OF ARKANSAS ARE SUPERIOR COURTS.

The circuit courts of Arkansas are superior courts of general, original jurisdiction. It is true they are called inferior courts, because they are inferior to the supreme court, but it is their jurisdiction and not their name that determines their character.

Section 5, of article 7, constitution, provides that the circuit courts should have the same jurisdiction that they then possessed, and gave the legislature power to change their jurisdiction. The statute in force at the adoption of the constitution of 1868, and which fixed the jurisdiction of the circuit court, provided that they should have exclusive original jurisdiction in all cases, real, personal, and mixed, which shall not be cognizable before the county and probate courts and courts of justice of the peace.

Section 18 of the civil code of practice, as amended, provided as follows:

> Circuit courts have original jurisdiction in all actions and proceedings for the enforcement of civil rights or the redress of civil wrongs, except when exclusive jurisdiction is given to other courts. When such proceedings are not expressly provided for in this code or by statute, the same may be had and conducted in accordance with the course, rules, and jurisdiction of the common law.

Section 522 provides that in lieu of *quo warranto* and information in the nature of *quo warranto* a civil action may be brought to prevent the usurpation of an office or franchise.

From which it will be seen that the circuit courts of Arkansas correspond with the court of King's Bench, in England.

In Beaubien *vs.* Brinckerhoff, (2d Scam.,) the supreme court of Illinois use the following language:

> The circuit courts are the only superior courts in the State that possess original and unlimited jurisdiction. They exercise, within their respective counties, all the powers and jurisdiction of the courts of King's Bench and common pleas in England; and, although these courts are inferior to the supreme court, because appeals and writs of error lie from their decisions to the superior court, yet this circumstance does not constitute them inferior courts in the common-law sense of the term. Courts not of record are denominated inferior courts, because if their proceedings are questioned in the superior courts, they must specially show that they acted within their jurisdiction. The circuit courts are pre-eminently the superior courts of this State.

In *ex parte* Watkins, (3 Peters, 205,) the Supreme Court use the following language:

> All courts from which an appeal lies, are inferior courts in relation to the appellate courts before which their judgments may be carried, but they are not therefore inferior courts in the technical sense of those words.

In view of these authorities, I cannot conceive how gentlemen can call the circuit courts of Arkansas courts of inferior or limited jurisdiction.

Mr. LOWE. It was not used on this side at all.

Mr. RICE. It was used directly in the briefs on file in this case.

The CHAIRMAN. As we understand the theory of your courts in Arkansas, I do not think we shall have any difficulty in regarding the

circuit court as a court of superior jurisdiction in the legal sense of the term.

Mr. BAXTER. There is no doubt about it. I will here take occasion to say that if I ever used the term of inferior courts, in reference to the circuit court of Arkansas, it was used in comparison only with the supreme court.

THE JUDGMENT OF THE CIRCUIT COURT WAS NOT VOID EVEN IF THE COURT HAD NO JURISDICTION IN THIS CASE.

Mr. RICE. I next submit the proposition, that inasmuch as the Pulaski circuit court was a superior court of general original jurisdiction, and questions growing out of contested elections and usurpation in office were within the general scope of the jurisdiction of this court, a judgment rendered in such a case is never void, but is valid and binding, and a protection to all persons acting under it, until it is reversed, even if in that particular case the court had no jurisdiction.

The CHAIRMAN. You claim that there may be such a thing as a court of that character, taking cognizance of a question over which it has no jurisdiction, and that if its action is erroneous, it can be reversed.

Mr. RICE. I go farther than that. I take the ground that it is not void and cannot be disregarded, and that all parties are bound to respect it until it is reversed.

Mr. LOWE. There is no doubt at all about that, if the court had jurisdiction.

Mr. RICE. I say that there is no doubt about it, even if the court had not jurisdiction. That is where we differ. I take this position, that notwithstanding the general rule that the decisions of a court that has no jurisdiction are void, still when a court of general jurisdiction decides a matter within the general scope of its jurisdiction, when, in fact, it has no jurisdiction in that particular case, yet the judgment is not void, but is binding until it is reversed, although it may be decided afterward on appeal that the court had no jurisdiction. There was a certain class of cases cognizable under the general jurisdiction of the court of King's Bench in England. Afterward certain statutes were passed excepting certain persons and cases from that jurisdiction, and making the jurisdiction local in the local court. Still the court of King's Bench took jurisdiction of those cases, and it was there decided (and the uniform current of authorities sustained the decision) that if it is a question within the general scope of the jurisdiction of the court, the fact as to whether certain cases or persons were privileged and exempt from its jurisdiction or were embraced in the exclusive jurisdiction of some other court, is a question of construction; and the court must make that construction, and its decision in giving the construction is not void, although it may be erroneous.

In the case of Borden *vs.* The State, 11th Ark., 519, which was decided upon the question as to what judgments were void, the court review the whole doctrine and expressly decide that the judgments of a court of general jurisdiction upon a matter within the general scope of their jurisdiction is not void even though the court did not have jurisdiction of that particular case. They cite approvingly Priggs *vs.* Adams, 2 Salk., 674, and use this language:

> Then the act of Parliament erected the court of conscience in Bristol, provided that if any action shall be brought in any of the courts of Westminster upon any cause of action arising in Bristol, and it appear upon trial to be under forty shillings, that no

judgment shall be entered for the plaintiff; and if one be entered it should be void. Nevertheless the court of King's Bench held that the judgment in the common pleas in this case for five shillings on such a cause of action was not a nullity, but was only voidable by plea on error; because the common pleas was a superior court. In this case the want of jurisdiction of the subject-matter was apparent on the face of the record, and yet the judgment was held not to be a nullity. * * *

Again, on page 547, the court proceeds:

The result of this mode of reasoning, then, from the premises that superior courts are invested by the law with the power to decide upon their own jurisdiction, is simply the same that is announced by the authorities that we have first cited, that the judgment of such courts are not void but only voidable by plea on error; and this is in exact harmony with the other doctrine, that the protection in regard to the judges of these courts is *absolute and universal.*

This is a decision of our own court, of long standing, which has never been overruled, and it seems to me that it ought to have much weight in determining the validity of the judgments of our circuit court.

In Vermont what correspond to our circuit courts are known as county courts. A case had been taken from one of these courts to the supreme court. After it was so taken to the supreme court a statute was passed which, it was claimed, took the jurisdiction from the supreme court and vested it in the county court. The supreme court rendered a judgment, which was not set aside or reversed, and the defendant, Hall, was imprisoned upon an execution issued upon this judgment. He brought suit for false imprisonment, and Walbridge, the defendant in this suit, pleaded the judgment and execution in bar. Hall contended that they were no protection, as the court had no jurisdiction to render the judgment. (See Walbridge *vs.* Hall, 3 Vermont, 119.) The court, in their decision, use this language:

If the proceedings of this court, in rendering the judgment and awarding execution under which the defendant justifies, are void, then neither the court nor the parties are protected by them, but are trespassers, and are liable, as such, to the parties injured; and if we render a judgment for the plaintiff we must subscribe to this position, however unpalatable it may be. We believe, however, that the highest tribunals of law and equity in this State cannot be impeached in that way. The judgments of a superior court are never considered void, and the judges of a superior court are never liable for acts done in a judicial capacity.

* * * * * * *

When courts of special or limited jurisdiction exceed their powers their whole proceedings are *coram non judice*, and all concerned in such void proceedings are trespassers. But this principle has never been and cannot be extended to *superior tribunals*, and especially those which have the ultimate jurisdiction in all cases arising in other courts. If the judgment here complained of was either erroneous or irregular, the court, on a proper application, would set it aside; but, until set aside, it is to be considered a regular judgment for every purpose.

In Yates *vs.* Lansing, 5 Johnson, Judge Kent, in delivering the opinion of the court, says:

Where courts of special and limited jurisdiction exceed their powers, the whole proceeding is *coram non judice*, and all concerned in such void proceedings are held to be liable in trespass; but I believe this doctrine has never been carried so far as to justify a suit against a member of the superior courts of general jurisdiction for any act done by them in a judicial capacity. There is no such case, or decision, which I have met with, and I find the doctrine to be decidedly otherwise.

In the case to which I have already referred, (*ex parte* Watkins, 3 Peters, 205,) the court say that—

The courts of the United States are all of limited jurisdiction, and their proceedings are erroneous if their jurisdiction is not shown upon them. Judgments rendered in such cases may certainly be reversed, but this court is not prepared to say that they are absolute nullities, which may be totally disregarded.

Now, if the judgment rendered against Baxter is a protection to Judge Whytock, if he is not liable for acts done under it, it must arise

from the fact that the judgment is not void; that it is valid until reversed; if this is so, if it is valid as to Judge Whytock, it is valid as to all mankind, so long as it remains unreversed.

There is another view of this case. Mr. Baxter appeared in the circuit court, and filed a demurrer to the jurisdiction of that court, by which he tendered an issue of law for the decision of the court. The court was bound to decide that issue, and it was his duty to decide it according to his honest convictions of the law.

That issue is one that the law authorizes to be made before him, and he certainly has jurisdiction to try and decide that issue, and when he does decide it, whether correctly or not, if he decides wrong the decision is not void, because he has jurisdiction to make the decision; it is only voidable for error, and while it remains unreversed it is the law of that case, and the judgment in the case follows as a necessary consequence, and is not of itself even erroneous, based upon the decision on the question of law presented by the demurrer. Therefore, if the case has been decided incorrectly the error is not in the judgment, but is in the decision of the question of law arising on the demurrer, and as the court had jurisdiction to decide that question, neither the decision upon that point, nor the judgment rendered upon and necessarily resulting from that decision, can be treated as a nullity, but are valid and binding until reversed. Any other view of the subject would place the judge in a singular attitude. If he decided that he had no jurisdiction, no harm could come to him from that decision; but he was compelled to decide, and if he honestly believed that he had jurisdiction, and decided according to his convictions, if he erred he would be liable in trespass for acts done under that judgment.

It seems to me that such cannot be the law, either upon principle or authority.

But our own court has again decided this question. After Brooks was in possession of the franchise of the office of governor, under the decision of the circuit court, and in possession of the archives, and was administering the government, Baxter interposed an ineffectual resistance to the government so administered by Brooks, whereby it became necessary for Mr. Brooks to keep a military force to protect the State-house and archives from Baxter's insurrectionary assemblage.

To defray these expenses Mr. Brooks, as governor of Arkansas, made a requisition on the treasurer, under an existing statute, for a certain sum for that purpose. Colonel Page, the treasurer, refused to honor the requisition, and Mr. Brooks applied to the supreme court for a *mandamus* to compel him to do so.

Upon the trial of this case Mr. Brooks's attorneys produced the judgment of the Pulaski circuit court in the case of Brooks against Baxter as evidence of his right to make the requisition as governor. The court decided (as in the case in the 11th Arkansas, to which I have referred) that the judgment was valid and binding until reversed, and compelled the treasurer to honor the requisition. The attorney-general says, in his opinion, that the treasurer had previously recognized Mr. Brooks as governor, and that his refusal in this instance was evidently for the purpose of making a case upon which a decision could be obtained, and that such a decision was not authority. This conclusion of the attorney-general is not only erroneous, but it is wholly unsustained by the facts. Colonel Page recognized the fact that there was a controversy about the office of governor, and while he fully recognized Mr. Brooks he was unwilling to involve his bondsmen by paying out a large sum of money upon his own judgment as to how that controversy would result, and

consequently declined to act until such proceedings were taken as would amount to a protection to him and his securities in any event, and Mr. Brooks sued out the *mandamus* because he needed and was compelled to have the money.

The attorney-general says also, in that opinion, that the supreme court of Arkansas had rendered a decision at variance with this, growing out of the election matters in Arkansas, and that the government had a right in such a case to decide which decision it would recognize as authority; but the facts do not sustain this conclusion; the decision upon the *mandamus* was not a decision upon the election, or upon any matter growing out of it; it was simply a decision in harmony with the authorities in that State, and sustained by the decisions of other States, and in England, to the effect that the judgments of a superior court of general jurisdiction *were not void, but were valid and binding until reversed.*

The judgment of the circuit court ousting Baxter and deciding that Mr. Brooks was entitled to the office of governor, and the decision of the supreme court in the *mandamus* case, deciding that the judgment of the circuit court was binding and valid until it was reversed, were not presented to the executive department of the government as authorities merely, as evidence of what the law was, but as an adjudication and settlement of Mr. Brooks's right to the office, so long at least as the judgment of the circuit court remained unreversed, and as an adjudication that Baxter no longer possessed any color of official authority. This adjudication was binding alike upon the parties—the Federal authorities and all persons whatsoever—and no department of the Government of the United States had the power to set it aside, nor the right to disregard it.

CIRCUIT COURT HAD JURISDICTION.

But we insist that the Pulaski circuit court had ample and complete jurisdiction to try the case of Brooks against Baxter, involving the right to the office of governor, and to render the judgment therein.

We have seen that the trial of a case involving an election to an office properly belongs to the courts; the authorities to which I have referred settle that point; there are many other authorities to the same effect. I will refer to the opinion of Judge Whiton in the case of Attorney-General *vs.* Barstow, 4 Wis., page 790.

We have seen also that the circuit courts are superior courts of general original jurisdiction. The subjects of contested elections and usurpation of office are within the general scope of their jurisdiction.

Besides, the legislature, under the provisions of the constitution, has expressly conferred upon them under their general jurisdiction complete jurisdiction over the subject of usurpation in office in State as well as county offices.

Section 522, Civil Code, provides that—

> In lieu of the writs of *scire facias* and *quo warranto*, or information in the nature of *quo warranto*, actions, by proceedings at law, may be brought to vacate or repeal charters, and prevent the usurpation of an office or franchise.

Section 525 provides that—

> 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 either by the State or the party entitled to the office or franchise, to prevent the usurper from exercising the office or franchise.

Section 527 provides that—

> For usurpation of other than county offices or franchises the action by the State shall be instituted and prosecuted by the attorney-general.

By which it will be seen that State offices are embraced.

But it has been insisted in argument that these proceedings did not apply to a person who took the office upon a certificate or declaration at the commencement of the term, but only to one who usurped an office that had been occupied by another. But as this action was given in lieu of *quo warranto* and information in the nature of *quo warranto*, it follows that all cases which could be tried by either of those proceedings are embraced within the remedy which was substituted for them, and it was peculiarly the province of those proceedings to oust a usurper who attempted to discharge the duties of an office to which he was not legally elected. These provisions of the Arkansas code are taken from the Kentucky code, and that was taken from the New York code, so that our law is similar to that of New York.

From all of which it is perfectly apparent that the circuit court had complete jurisdiction over the subject-matter of the suit of Brooks against Baxter, unless that jurisdiction is taken away by section 19 of article 6 of the constitution. We have already given our reasons for denying that the section referred to confers any judicial power on the legislature; but, if it did, the presumption would be that the framers of the constitution intended it as cumulative, having jurisdiction concurrently with the courts but not exclusive of them.

The courts have jurisdiction, concurrent at least, with the legislature, unless the section referred to expressly takes that jurisdiction from them; therefore we should gather as far as we can what the intention of the framers was in that respect.

The constitution of 1836, (section 3, article 5,) after providing for the counting of the votes, and declaring the result in the exact words of the constitution of 1868 upon that subject, provides that—

> Contested elections for governor shall be determined by both houses of the general assembly, in such manner as shall be prescribed by law.

Now, if the legislature had believed that this language gave the legislature exclusive jurisdiction of these contests, it would have provided in the statute putting this provision in force a certain and uniform remedy such as is always expected to be found in a judicial tribunal, but instead of that it left it optional with the legislature to entertain the contest or not in its discretion; or, in other words, the legislature could, if it chose, entertain the contest, or, if unwilling to be burdened with the investigation, it could refuse to entertain it, and remand the party to the courts of the country, which the legislature evidently regarded as having jurisdiction.

The passing of this statute amounted to a legislative construction of that language. Afterwards the legislature passed an act providing that, if a vacancy occurred in the office of governor, when more than eighteen months of the term was unexpired, the president of the senate should call a special election to elect a governor. Section 85 of the act (Gold's Dig., 477) provides that if such election is contested it shall be decided by the supreme court, which amounted to another legislative construction of section 3, article 5, to the effect that the jurisdiction in contested-election cases was not vested exclusively in the legislature.

Section 19 of article 6 of the constitution of 1868 was borrowed from section 3, article 5, of the constitution of 1836, and as the convention took it after the language had received that legislative construction,

we are bound to presume that they used the language as thus construed. This view of the case is confirmed by the fact that the legislature at the first session after the adoption of the constitution of 1868, many of whose members were in the convention, especially conferred this jurisdiction on the courts, which they would have known was unconstitutional if they had construed section 19, article 6, as conferring exclusive jurisdiction on the legislature.

There is nothing in the language of section 19, article 6, or the section from which it was borrowed, which tends in the least to show that the framers intended to vest exclusive jurisdiction in the legislature, unless it arises from the use of the word *determine* as used in the sentence which provides that "contested elections shall be determined by both houses," &c.

I have already said that the word *determine* was used more in a parliamentary than judicial sense; it seems also to be so used in the constitution of 1836. It becomes necessary to ascertain what meaning was given to it when used in a judicial sense.

The constitution of 1836 says that contested elections shall be *determined* by the legislature, &c., from which it is claimed that no other tribunal had any jurisdiction in such cases; yet in section 2, article 6, of the same constitution it is provided that the supreme court shall have jurisdiction to issue writs of error and *supersedeas*, *certiorari* and *habeas corpus*, *mandamus* and *quo warranto*, and other remedial writs, and hear and *determine* the same. Now if the use of the word *determine* confers exclusive jurisdiction on the legislature in contested-election cases, then the same word confers exclusive jurisdiction on the supreme court in all cases of remedial writs; yet it has never been construed to have that effect, and there is not a court in the State that does not exercise some of that enumerated jurisdiction, and it has been sanctioned by all the courts ever since the State was organized.

The language of section 19, article 6, of the constitution of 1868, upon contested elections, was borrowed from the constitution of 1836. The meaning and significance with which the framers of that constitution used the word *determine*, as shown by the use of the same word in the same instrument in conferring on the supreme court jurisdiction over remedial writs, and as interpreted by the legislature in the two acts I have cited, was also borrowed with the language, and when that word was used in the constitution of 1868 it was used simply to confer upon the legislature the power to try contested elections, but was never used or intended to deprive the usual and proper tribunals of their jurisdiction over that subject. The same language is used in the constitution of 1868, in conferring jurisdiction upon the supreme court in cases of remedial writs, but it was not used with the intention of depriving the other courts of jurisdiction over those writs, and has never been understood to have that effect; the other courts daily exercise that jurisdiction. That language is used in this connection, to confer jurisdiction upon the supreme court, to be exercised concurrently with the other courts, within the scope of whose general jurisdiction this class of cases is embraced.

The word *determine*, as applied to the supreme court, in cases of remedial writs, or as applied to the legislature, in cases of contest, has no negative meaning whatever, and is not used in that sense.

We challenge the other side to produce a respectable authority upon earth that sustains the assumption that section 19 of article 6 of the constitution deprived the circuit court of its jurisdiction over the case of Brooks against Baxter. But we will produce authorities to show that

such language can never deprive a superior court of its jurisdiction; even negative words will not ordinarily have that effect.

I refer to and adopt so much of the opinion of Judge Whytock, in the case of Berry *vs.* Wheeler, (to which I have referred,) and the authorities there cited, as bears upon this point, which is as follows:

The general and elementary rules applicable to the construction of constitutions and statutes are the same. (Dwarris on Statutes and Constitutions, Potter's ed., chap. 19, p. 654.)

Judge Dillon, in his treatise on Municipal Corporations, discussing the subject, thus deduces the rule in regard to these special remedies: "The principle is that the jurisdiction of the courts remains, unless it appears with unequivocal certainty that the legislature intended to take it away." "A provision that no court should take cognizance of election cases by *quo warranto*, &c., would doubtless divest the jurisdiction of the judicial tribunals, and so perhaps of a provision that a council should have the sole or the final power of deciding elections." Hence Judge Dillon remarks that provisions in city charters to the effect that the common council of cities "shall be the judge of the qualifications, or of the qualification and election of its own members," will be construed to be a cumulative or primary tribunal only—not an exclusive one. (Dillon's Municipal Rep., sections 141 and 715.)

The rule as thus explained is supported by the best English authorities. In the case of Rex *vs.* Morely, an early one, (2 Bur., 1040,) Lord Mansfield presiding, the statute was in these words: "No other court shall intermeddle with any cause or causes named in the statutes, but they shall be finally determined in the quarter sessions only." The court said: "The jurisdiction of this court is not taken away unless there be express words to take it away." In another early case (1 Holt, N. P., 147,) a similar statute was construed in like manner. The same rule was announced in chancery, (2 Mylne and Craig, 613.) In Holt, N. P., defendant's counsel insisted that a special remedy having been provided by statute, this ousted the jurisdiction of the court. The court did not agree with him.

In Iowa it was held, (in the State *vs.* Funk, 17 Iowa Rep., 365,) where a city charter provided that the common council should be the "judge of the election and qualifications of its own members," but no ordinance had been passed prescribing any method of trial, that the mere provision in the charter did not preclude a contestant from a resort to an information in the nature of a *quo warranto*. In The State *vs.* Wilmington, (3 Harring, Delaware, 294.) a provision in a city charter that the common council "shall be the judge of the election, returns, and qualifications of their own members and other officers of the corporation," was held by the supreme court of Delaware not to oust the jurisdiction of the courts. In 3 Hill, (N. Y.,) 42-52, the supreme court, composed of Judges Nelson, Bronson, and Cowen, held the following language: "If the words of the charter had, or could afterward have, the force of a statute, still it might be answered that it contained no clause expressly denying to the king's bench, or the court holding its place, the exercise of its general powers in the particular case." Numerous other authorities might be cited in support of this construction.

In a more recent case, decided in California, under a similar statute, (The People *vs.* Holden, 28 Cal. Rep., 123,) the principle and rule expounded in the cases in Iowa, Delaware, and New York is substantially re-asserted.

In analogy to the question the court is considering, the construction given by the supreme court in Tucker *ex parte*, (25 Ark.,) when reviewing the force and effect of section 20, article 8, of the constitution, may be cited. This section provides "that in criminal causes the jurisdiction of justices of the peace shall extend to all matters less than felony for *final* determination and judgment." The supreme court held that this language did not exclude the jurisdiction of the circuit court in criminal causes less than felony, but that it was concurrent. The same principle, involving a *quo warranto*, was decided by the supreme court in the case of The State *vs.* Johnson, (17 Ark., 407,) before referred to.

But if we were to concede all that is claimed for the word "determine," in section 19, and that the legislature had exclusive jurisdiction of contested elections, it does not affect the jurisdiction of the circuit court to try the case then presented.

Whatever may be the popular or parliamentary meaning of the term "contested election," in legal parlance it means a case where a party at the close of the polls did not have a majority of the votes, but claims

that a sufficient number voted for his opponent who were not entitled to vote to change the result, and for that reason seeks to contest and correct the election itself. Such is not the case in the suit which Brooks brought against Baxter, upon which he recovered judgment for the office.

Although he had been defrauded in registration and by ballot-box stuffing while the election was progressing, still, at the close of the polls, he had received largely the most votes, and was elected. Consequently, he did not wish to go behind that event or in any manner to contest what had transpired up to that time; he was willing to abide by it. Upon it he rested for his title to the office of governor, but conspirators in the interest of Baxter were destroying and suppressing the evidence of his title; they were forging false evidence to be used against him. He was compelled to go to the courts to supply the testimony which had been destroyed, to prove his title and recover the franchise. He sought to enforce the case as it stood at the close of the polls. Instead of contesting the election, he sought to give force and validity to its results, upon which he based his right to recover the franchise from the usurper who fraudulently held it contrary to law.

But we can go farther. On the morning when the declaration was made by the president of the senate the full returns showed that Mr. Brooks was elected, and in order to produce the desired result they suppressed the returns of three whole counties and forty-eight precincts in other counties. Mr. Brooks went into court to supply the proof of which he had been thus fraudulently deprived, and to claim a legal right based upon the testimony in the case.

Counsel have criticised the proceedings in the circuit court, all of which amounts to nothing, because any irregularities such as they speak of would only amount to error, and would not invalidate the judgment; yet, as these matters have been misrepresented, it is due to the judge and Mr. Brooks that I make a brief statement of what occurred.

The action was regularly brought, process was served on Baxter, and Baxter filed a demurrer to the jurisdiction of the court. Mr. Brooks took his testimony establishing his right to the office, Baxter failed to cross-examine Brooks's witnesses, and took no testimony on his own behalf, but stood upon his demurrer; a short time before the judgment was rendered, Mr. Whipple, one of Brooks's attorneys, moved to submit the case upon the demurrer; Baxter's attorneys asked to have it laid over for the present, to which Mr. Whipple consented, which, according to our practice, left the case standing upon his call, and he had a right to bring it up at any time he saw fit. It has been asserted that there was an agreement that the case was not to be called up. I am prepared to say that that assertion is absolutely false; no such agreement was ever made, none such has been proved.

But if such an agreement had been made and violated, it would not affect the validity of the judgment. Baxter's remedy would have been by motion to set aside the judgment, which, upon proof of such a state of facts, would have been granted. But it is contended that upon the overruling of the demurrer there should have been a judgment *respondeat ouster*. That is not the practice in Arkansas. When a demurrer is overruled it stands as if no demurrer had been filed, so far as the future steps in the case are concerned, and leaves the complainant without defense, and the plaintiff had a right to move to take the complaint for confessed and have judgment upon it. When demurrer was submitted the fact was published in the two daily papers in Little Rock, and the fact was well known. Judge Whytock's views as to the jurisdiction of the cir-

cuit court over these cases was also well known, because his opinion in the case of Berry *vs.* Wheeler had been published in the Little Rock Daily Republican, and he swears that he had been apprised that the decision in the *quo-warranto* case was the result of a programme and conspiracy, and he did not regard it as authority to him.

The case took the usual course of other cases in that court. My former partner, Mr. Benjamin, had an important case standing upon a demurrer about that time. He was not in court when the demurrer was decided and judgment was rendered against his client. He, however, instead of declaring martial law and resisting the judgment, tendered, within a reasonable time, an answer setting up a meritorious defense, with an affidavit of merits, and an excuse for not having previously filed an answer, and the judgment was set aside. But the truth is, Baxter could not make an affidavit of merits; he could not swear that he had a meritorious defense; he had no excuse to offer for not having filed an answer, except that he intended to defy the decision of the court. But the various attorneys who have acted for Baxter in this matter appear to have conceived the idea that the proper mode of showing that a judgment is not valid is to indulge in low, personal abuse of the judge who rendered it, in answer to all of which I will take this occasion to say that Judge Whytock is the equal of any of them in integrity, capacity, and character, and if all of them were put together, he would far exceed the aggregate in all the attributes of a man, a lawyer, and a gentleman.

Mr. Baxter says he intended to defend that suit in the circuit court. In his letter to the President, written some time before that, he winds up by saying that he has interposed a demurrer, or shall do it, (I forget which expression he used,) and that if the court took jurisdiction he should resist, even to the extremity of martial law, and he advised the President to send re-enforcements down to the barracks at Little Rock, thinking, I suppose, either that the President might need his aid, or that he might need the President's aid in resisting the judgment of the court. It is a notorious fact that he did not intend to defend the case, and the proceedings in the case show it. His weak pretext that he intended to defend it is simply ridiculous in the face of all these circumstances. He had avowed, time and again, that he would never submit to the decision of any court, supreme or circuit; that he would resist any adverse decision by martial law and violence. But if the circuit court would decide for him and the supreme court would decide for him, he would abide by their decision; but if they decided against him, he would resist. That is a kind of "honest submission to the law" which is really commendable. But the truth on the subject is, that Baxter had proceeded on the idea that there would have to be a writ issued to put Brooks in possession of the office, and that while that writ was in the hands of the sheriff he would have time to get his White-League militia together and put down the civil authorities, and ride rough-shod over the people of the State, and trample under foot the constituted authorities of the law.

But in this Baxter was disappointed. No process was necessary, and none was issued; consequently, Brooks took possession before Baxter had opportunity to resist the law.

THE JUDGMENT EXECUTES ITSELF.

But it has been seriously contended that some kind of a writ or process should have been issued to execute the judgment and deliver the franchise recovered, and that such process should have been executed

by an appropriate officer; but a moment's reflection will show the absurdity of this position. Mr. Brooks had by that judgment recovered a franchise which existed only in law; it was an *incorporeal hereditament* that was wholly incapable of manual delivery, and when the judgment was rendered vesting the right to the franchise in Mr. Brooks, the possession instantly passed. The judgment executed itself, and when he took the oath of office he was, to all intents and purposes, governor of Arkansas *de facto* and *de jure*.

In the case of Welch *vs.* Cook, State treasurer, &c., published in 7 How. Pr. Reps., (N. Y.,) the court, on pages 284–5–6, uses the following language:

> It becomes important, therefore, to inquire what this judgment settles. It is admitted on all hands that it settles the question between these parties that Mr. Cook is a usurper of the office, and not entitled to hold the same, and that the petitioner, Mr. Welch, is entitled to the office. It is claimed by the counsel for the petitioner that the rendition of the judgment operates *per se* to oust Mr. Cook and exclude him from the office and also to establish the right of Mr. Welch thereto; and that upon taking the official oath, and filing the bond required by the statute, he becomes virtually installed into the office. The counsel for Mr. Cook insists that the judgment has no such effect. * *
>
> The statute therefore is, if judgment be rendered upon the right of the party, he shall be entitled, upon taking the oath and executing the bond, *to take upon himself the execution of the office;* and it makes it his duty, immediately thereafter, to demand of the defendant the books and papers belonging to the office from which he shall have been excluded. From which he shall have been excluded from what? The statute itself furnishes the answer, for it speaks of nothing but the rendition of the judgment, and gives to the party entitled, upon the rendition of the judgment, the right at once to take upon himself the execution of the office, on taking the oath, &c.

After remarking that the courts of England treat the judgments as actually ousting and removing the defendant from the office, the court says:

> But whatever may be the effect of such a judgment in England, I apprehend that under our statutes the rendition of the judgment operates as an actual *ouster and exclusion from office.* And such being the effect of the judgment in this case, I take it to be very clear that the appeal from it cannot re-instate Mr. Cook. The judgment stands in full force and effect pending the appeal, and until reversed.

This case was affirmed by the court of appeals in 4 Seld., page 220.

In the case of The People *vs.* Conover, 6 Abb. Pr. Rep., 222, the court says:

> This court held in Welch *vs.* Cook, 7 How. Pr. Rep., 262, that upon the rendition of a regular judgment of ouster in the suit of the people against a public officer, and in favor of another individual for the office, the officer becomes actually ousted and excluded from office, and the party declared to be entitled, upon taking the official oath and filing his bonds, when required, becomes, *eo instanti*, invested with the office. It would seem, therefore, to be settled in this State, that in a suit like the present, the party declared to be entitled to the office takes it upon judgment being rendered. The judgment, so far as the office is concerned, executes itself. * * * There is nothing, so far as the office is concerned, which the sheriff can seize and deliver to the plaintiff.

The same principle was decided by the supreme court of Georgia, in the case of Fulgham *vs.* Johnson, 40 Ga., 166. So it will be seen that Mr. Brooks became *de jure* governor by having received the grant from a majority of the legal votes cast at the election. He having recovered the franchise from Baxter, a usurper, by a binding and valid judgment of a superior court of general and competent jurisdiction; the judgment executed itself. Mr. Brooks took the necessary oath of office, and, in the language of the court in the case in 7th Howard, took upon himself the execution of the office, and was regularly administering the government, as completely invested with all the rights, powers, and prerogatives of the office, as was the governor of any State in the Union.

AFTER THE JUDGMENT ALL OFFICIAL ACTS OF BAXTER WERE VOID.

All of which deprived Mr. Baxter of all *color* of authority, even as a *de facto* governor, and all official acts which Baxter attempted to perform, after that judgment was rendered, are absolutely void, and of no more force than if done by a person who had never claimed to be governor.

This question is expressly decided in Rochester and Genesee Valley Railroad *vs.* Clarke National Bank, 60 Barb., 234. On page 249 the following language is used by the court:

> When the color of authority notoriously ceases, the reason for sustaining the acts as the acts of officers *de facto* ceases. We think that when by a judgment of the court of last resort, in a direct proceeding to determine the title of officers *de facto*, it has been adjudged that they had no rightful title to the office, but are mere usurpers, then, at least, as to all who have notice of such proceeding and judgment, the color of authority has ceased; and this without regard to whether any body else has been inducted into the office or not. As officers *de facto* there must be at least a presumption that they are rightfully in office. Such presumption cannot be said to exist after the decision of a competent tribunal to the contrary. To hold that persons who, according to the decision of the court having jurisdiction to decide so as to bind the parties and the public, are mere usurpers, may still exercise the powers and discharge the duties of the usurper's office, is to deprive the judgment of ouster of all force or effect.

Therefore, after that judgment was rendered and Mr. Brooks had taken the oath of office, and entered upon the duties of administering the government, he was to all intents and purposes governor of Arkansas, and Baxter was to all intents and purposes a private citizen without color of official authority—he was out of possession and was not governor either *de jure* or *de facto*—and all his pretended acts were absolutely void.

BAXTER CONVENING LEGISLATURE A NULLITY, AND PROCEEDINGS UNDER IT VOID.

The legislature could be convened only upon the call of the governor. Baxter's call, which was after the judgment was rendered, and when he was out of possession, was absolutely void, and that extra session of the legislature had no legal existence; and the pretended act calling the constitutional convention was of no more legal force than if it had been passed by any other assemblage of men.

We have here presented to us the same case that was presented in Rhode Island under the Dorr constitution, a case in which the theory that the people, of their own volition, without regard to the forms of law, had a right to change their constitution, was entirely and forever exploded.

The vote of the people in Arkansas upon the call of a convention, or upon the ratification of the constitution, did not give vitality to the proceedings. The same was done in Rhode Island by a most decisive vote, and yet it was held in that case that no majority, however large, could, in such a manner, change the organic law of the State, or overthrow an existing and recognized government. The supreme court of that State, in its instructions to the grand jury, say that the question is not how many votes were given upon these propositions, but what right had the people to vote on them at all.

Therefore there can be no serious pretext that the pretended constitution of 1874 sprung from a legal source. If it is sustained, it must be on the ground, which was rejected in the Rhode Island case, that a majority of the people of a State possess the inherent power to throw off

their government and establish another at will, and that the minority are bound by the lawless act of the majority; but constitutions which are made to protect the minority, and to guard against hasty and unwise legislation, would afford but little protection if they could be set aside with more ease and less formality than would attend the repeal of an act of the legislature. But the Baxter and Garland dynasty are precluded from claiming validity for their constitution on that ground. The fact that they attempted to bring it into existence under legal authority is a confession on their part that it is void, unless it was originated, prepared, and adopted in pursuance of the forms of law.

I presume, however, that no one seriously contends that the people have the inherent and inalienable right, in their natural or individual capacity, to throw off the government under which they live in any manner other than that provided in express terms, or by clear implication, in the incorporated government. However the precedents and authorities may differ upon other matters, they all agree that nothing short of a legal act of the legislature will authorize the assembling of a convention to frame a constitution. To displace the existing organic law of the State the convention must be legally called, must have legal existence, and the constitution must be legally ratified. I know of no precedent or authority to justify the claim that less than that can displace an existing constitution. If the people, in their individual and natural capacity, have the legal right to throw off and absolve themselves from an existing government, it would follow that secession was legal, and every act of the Government in suppressing the rebellion was an invasion of the legal rights of the people of the seceded States. Such a doctrine cannot be urged with much hope of success.

Something has been said about the large vote that was given for the constitution. We have shown that that amounts to nothing, and it is more than probable that the importance that was thought to be attached to that circumstance contributed much to the unprecedented vote that was reported. There is a population of about 500,000 in the State; the assessment for poll-taxes shows about 105,000 males over twenty-one years of age. In the race of Brooks and Baxter, in 1872, the reported vote was about 80,000. A large number of voters were refused registration, but a much greater number of fraudulent votes were stuffed in the ballot-boxes, so that that election is really no test of the voting strength of the State, and, although the campaign was very thorough and exciting, there were probably not more than 70,000 votes cast. Previous to the election, upon the ratification of the Garland constitution the republican State convention issued an address, advising the republicans not to participate in that election, and most of the leading and active republicans were absent from the State when the election was held. Yet at that election the board of canvassers appointed by the convention reported that there were about 103,000 votes cast. It is almost preposterous to contend that in a sparsely settled country, with a population of 105,000 male inhabitants, 103,000 votes could have been cast, even if the republicans had actively participated in the election. This election was held on the 13th day of October. On the first Tuesday in November the congressional election was held, which was overlooked by United States supervisors, and although closely contested, but little over 65,000 votes were cast, showing a falling off of about 45,000 votes from the other election held about three weeks before. This shows but little significance can be given to that election, or any other election not held in accordance with law.

THIS NOT A CONTESTED-ELECTION CASE.

It is suggested on the other side that the case which is presented in this record is a mere contested election, over which Congress has no jurisdiction. I have endeavored to show that this never was a case of contested election. Aside from the judgment, it is a case where the legally elected governor was kept out of the office by fraud and force, and a usurper was pretending to discharge the duties of the office. That usurper has overthrown the government and established another in its stead, and has transferred this to another person, who is administering it upon the people of the State without any authority of law. It certainly would seem that Congress in carrying out the provisions of the Constitution, in guaranteeing to every State a republican form of government, would have the right, at least, to secure to the people of Arkansas their legal and recognized government, administered by officers of their own choosing.

But if this was ever a case of contested election, it has long since ceased to occupy that attitude. The State courts mentioned in the telegram of Attorney-General Williams to Baxter have settled and disposed of that question, and Mr. Brooks's right does not depend upon contesting the election, but it rests upon the valid and binding judgment of the Pulaski circuit court. A pretended government, unknown to the Government of the United States, brought into existence by unauthorized parties, and contrary to the forms of law, has sprung into existence, and its adherents are in insurrection against the recognized government established in 1868, of which Mr. Brooks is the lawful governor; and when this case is presented to Congress, and relief is demanded under the fourth section of article 4 of the Constitution of the United States, we are told that Congress is powerless to grant the necessary relief. If this be so the Federal Government is weak indeed, and its guarantees afford but little protection.

FEDERAL INTERFERENCE WITH THE SOUTH.

Much is said in a certain class of newspapers about Federal interference in the affairs of the South. This complaint is not new. In 1861 the Federal Government felt compelled to interfere with the affairs of the South, for the reason that a large number of persons in that section violated the laws and disregarded the rights of citizens of the United States. The same class of papers complained then that complain now.

It is more than probable that hereafter, for the same reason, the Federal Government may, from time to time, find it necessary to so far interfere with their affairs as to secure to loyal citizens, in those locations, as much protection, at least, as would be afforded them on foreign soil.

But any prejudice that may exist upon this subject cannot properly be applied to Mr. Brooks. He only asks the Government to restore him to the position which he rightfully occupied at the time when the Government did interfere in Arkansas affairs, in May last. He only asks to be restored to the position he then occupied, from which he was removed by the Federal Government. All he asks of the Government is to put him *in statu quo*.

THE GARLAND LEGISLATURE ESTABLISHING PEON SERVITUDE.

The legislature under the Garland government have introduced bills establishing the *peon* system of servitude; also a bill creating a large

number of sub-penitentiaries, with permission to hire out the convicts on farms, and abolishing the distinction between grand and petit larceny; also making vagrancy a felony punishable in the penitentiary. Under this bill the planters could combine and refuse to hire any of the colored people for a given length of time, whereby every negro that did not own land would become a vagrant, or near enough one to be convicted by a jury composed of persons that expected to cultivate their plantations with convict labor. Many persons are unwilling to believe that they would avail themselves of such laws for such purposes; but they certainly would, or they would not pass them. Soon after the war closed, almost every southern State adopted this system of legislation, and they have not changed their views upon that subject since. Besides, it is perfectly natural that they should do so; they have been raised from childhood to believe that the negro existed to labor for them without compensation; they believe that the amendments to the Constitution, and all legislation securing to the negro freedom and political rights, are not only void, but infamous; and that the Government has robbed them in freeing their slaves, and they will avoid the consequences of this supposed robbery whenever they can safely do so. They feel justified in resorting to almost any means to secure that which they believe is rightfully theirs; that is, the labor of the colored race without compensation. That they should do so, with their opinions, ought not to excite wonder. They are far less at fault for pursuing such a course than the men who gave to the negro his freedom would be, if they were now to remand the freedmen, for their civil and political rights, to a class of persons who deny that he has any such rights, and honestly believe that he is adapted only to the condition of servitude. If the Government is going to sustain a system of revolution and violence in the southern States by which the State governments are to be placed in the hands of those who carried them into rebellion in 1861, freedom to the colored race will be a curse, rather than a blessing. In slavery the property-interest of the owner would protect them from the lawless, against whose violence they have no protection as freemen; and whenever they have to rely upon that class of persons to enforce the laws that protect them in their civil and political rights, those laws will become a dead letter, and those rights will exist alone in theory.

IMPORTANCE OF THE QUESTION, AND THE REMEDY.

This case presents to Congress some grave questions, which it must decide, because a failure to act amounts to a decision. If in this case the precedent should be established that the lawfully-elected officers of a State government can be kept out of office by fraud and force, and the judgments of the courts awarding to them their offices can be disregarded and resisted by a usurper who has obtruded himself into the office, and that usurper can conspire with others and overthrow the government in a manner unknown to the constitution and laws of the State, it seems to me that it would lead to a destruction of constitutional government, and in the southern States would amount to a surrender of all the fruits of the war to those who were supposed to have been defeated in the conflict.

If I am correct in the view I have taken in this case, the only remaining question is, What is the remedy? I see but little difficulty in that. If Mr. Brooks was legally elected governor in 1872, that constituted him governor *de jure*. When he qualified and took possession of the office, under the judgment of the Pulaski circuit court, and was dis-

charging its duties, he became governor *de jure* and *de facto*, and was as perfectly invested with a complete title to the office as was the governor of any State. Baxter ceased to have any color of office, and his act in convening the legislature, and all other pretended official acts of his, were void; and all acts done under or by virtue of his pretended authority were also void; and the Garland constitution, and the acts which lead to it, or have been done under it, are of no validity whatever.

Therefore Mr. Brooks is the legal governor of the State, and the constitution of 1868 is still in force, and those who are administering the Garland government, or sustaining it, are in insurrection against the lawful government of Arkansas.

Section 4 of article 4 of the Constitution provides that the United States shall guarantee to every State a republican form of government. First, it is to guarantee to every State a government; second, that government must be republican. The government under the constitution of 1868 is the only legal government in Arkansas, and that government must be guaranteed. The Executive can only act upon a *prima-facie* or apparent case; different persons claim to be governor of Arkansas; the President can only determine who appears to be governor. Congress can investigate and determine the whole case—can determine who is actually governor, and what is actually the true government; and, according to the doctrine in the Luther-Borden case, when Congress has made that determination, it is binding upon the Executive and other departments of the Government.

And if Congress should decide by resolution or otherwise that Mr. Brooks was the lawful governor of Arkansas and that the constitution of 1868 was still in force, it would follow that Garland's pretended government was an insurrection against the lawful government. The Executive would thus be apprised upon whose requisition for aid he should act, and upon the requisition of Mr. Brooks as governor, thus recognized, it would be the duty of the President to put down the insurrection existing in Arkansas against the legal government, and to maintain the lawful government of the State.

This is the case which Mr. Brooks presents to Congress. He presents it in his own name, as the lawful governor of Arkansas, who has been wrongfully deprived of the office, and compelled to give place to a usurper. He presents it in the name of a large majority of the people of that State, whose rights have been outraged, and who have been robbed of their suffrage. He presents it in the name of the law, whose tribunals have been stricken down by arbitrary power. And he presents it in the name of two hundred thousand freedmen in Arkansas, who shudder at the thought or being turned over to the tender mercies of a class of men that regard them as only fit for servitude or assassination—who are now awaiting the result of this case with the same painful solicitude and suspense with which, in former years, they awaited the falling of the hammer upon the auction-block.

With such a case we are unwilling to believe that Mr. Brooks is to be deprived of his legal rights by a government of whose burdens and dangers he has borne his full share, and to whose welfare, in its hour of peril, he has contributed more than his portion of sacrifice and sorrow, and to which he has never left a duty unperformed.

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