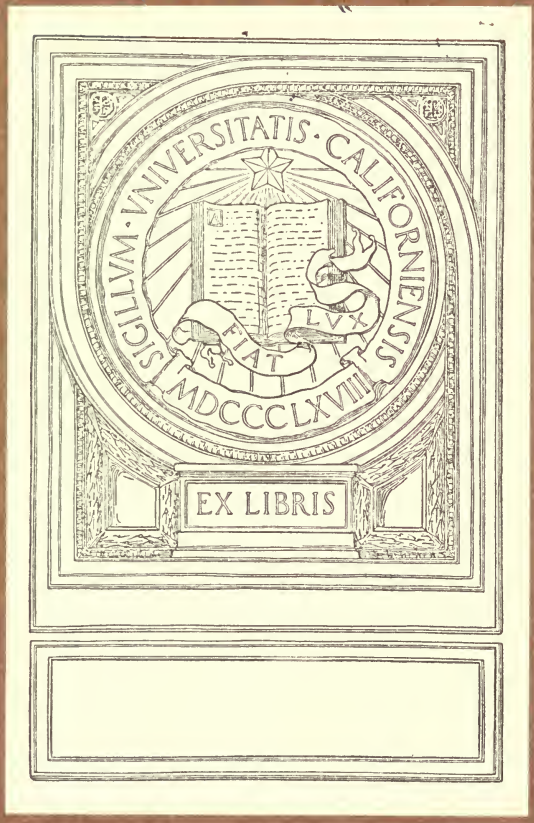
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THE

ELECTORAL VOTES

OF 1876:

WHO SHOULD COUNT THEM, WHAT SHOULD BE COUNTED, AND THE REMEDY FOR A WRONG COUNT.

BY

Judge DAVID DUDLEY FIELD.

NEW YORK:
D. APPLETON AND COMPANY,
549 & 551 BROADWAY.
1877.

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THE electoral votes of 1876 have been cast. The certificates are now in Washington, or on their way thither, to be kept by the President of the Senate until their seals are broken in February. The certificates and the votes of thirty-four of the States are undisputed. The remaining four are debatable, and questions respecting them have arisen, upon the decision of which depends the election of the incoming President. These questions are: Who are to count the votes; what votes are to be counted; and what is the remedy for a wrong count? I hope not to be charged with presumption if, in fulfilling my duty as a citizen, I do what I can toward the answering of these questions aright; and, though I happen to contribute nothing toward satisfactory answers, I shall be excused for making the effort.

The questions themselves have no relation to the relative merits of the two candidates. Like other voters, I expressed my own preference on the morning of the election. That duty is discharged; another duty supervenes, which is, to take care that my vote is counted and allowed its due place in the summary of the votes. Otherwise the voting performance becomes ridiculous, and the voter deserves to be laughed at for his pains. His duty—to cast his vote according to his con-

science—was clear; it is no less his duty to make the vote felt, along with other like votes, according to the laws.

The whole duty of a citizen is not ended when his vote is delivered; there remains the obligation to watch it until it is duly weighed, in adjusting the preponderance of the general choice. Whatever may be the ultimate result of the count, whether his candidate will have lost or won, is of no importance compared with the maintenance of justice and the supremacy of law over the preferences and passions of men.

It concerns the honor of the nation that fraud shall not prevail or have a chance of prevailing. If a fraudulent count is possible, it is of little consequence how my vote or the votes of others be cast; for the supreme will is not that of the honest voter, but of the dishonest counter; and, when fraud succeeds, or is commonly thought to have succeeded, the public conscience, shocked at first, becomes weakened by acquiescence; and vice, found to be profitable, soon comes to be triumphant. It is of immeasurable importance, therefore, that we should not only compose the differences that, unfortunately, have arisen, but compose them upon a basis right in itself and appearing to be right also.

WHO SHOULD COUNT THE VOTES?

This is the first question. What is meant by counting? In one sense, it is only enumeration, an arithmetical operation, which in the present instance consists of addition and subtraction. In another sense it involves segregation, separation of the false from the true. If a hundred coins are thrown upon a banker's counter, and his clerk is told to count the good ones, he has both to select and to enumerate. He takes such as he finds sufficient in metal and weight, and rejects the light and counterfeit. So when the Constitution ordains that "the votes shall then be counted," it means that the true ones shall be counted, which involves the separation of the true from the false, if there be present both false and true. In regard to the agency by which this double process is to be performed, the words of the Constitution are few: "The President of the Senate shall, in the presence of the Senate and

House of Representatives, open all the certificates, and the votes shall then be counted." What would one take to be the meaning of these words, reading them for the first time? It is, that somebody besides the President of the Senate is to count, because, if he was to be the counting officer, the language would naturally have been that *the President of the Senate shall open all the certificates and count the votes.* There must have been a reason for this change of phraseology. It should seem to follow, from these words alone, that, whoever is to count, it is not the President of the Senate. It should seem also to follow, that the counting is to be done, not in the presence of Senators and Representatives as individuals, but in the presence of the two Houses as organized bodies. If their attendance as spectators merely was intended, the expression would naturally have been, in the presence of the Senators and Representatives or so many of them as may choose to attend. The presence of the Senate and House means their presence as the two Houses of Congress, with a quorum of each, in the plenitude of their power, as the coördinate branches of the legislative department of the Government. And inasmuch as no authorities are required to be present other than the President of the Senate and the two Houses, if the former is not to count the votes, the two Houses must.

The meaning which is thus supposed to be the natural one has been sanctioned by the legislative and executive departments of the Government, and established by a usage, virtually unbroken, from the foundation of the Government to the present year.

The exhaustive publication on the Presidential Counts, just made by the Messrs. Appleton, leaves little to be said on this head.

The sole exception suggested, in respect to the usage, is the resolution of 1789, but that is not really an exception. We have not the text of the resolution. We know, however, that there was nothing to be done but adding a few figures. There was no dispute about a single vote, as all the world knew. But taking the resolution to have been what the references to it in the proceedings of the two Houses would

imply, it meant only that a President should be chosen for that occasion only. The purpose was not to define the functions of any officer or body, but to go through the *ceremony* of announcing what was already known, and to set the government going. No decisions between existing parties were to be made; no selection of true votes from false votes, but only an addition of numbers. Individual members of Congress have undoubtedly in a few instances expressed different views, but these members have been few, and they have always been in a hopeless minority. If any one can read the debates, the bills passed at different times through one House or the other, the joint resolutions adopted, and the accounts of the votes from time to time received or rejected, and doubt that the two Houses of Congress have asserted and maintained, from 1793 until now, their right to accept or reject the votes of States, and of individual electors of States, all that I can say is, that he must have a marvelous capacity of doubting. He must ignore uniform practice as an exponent of constitutions, and set up his individual misreading of words, reasonably plain in themselves, against the opinions of almost all who have gone before him.

The joint resolution of 1865 is of itself decisive, if a solemn determination of the two Houses of Congress, approved by the President, can decide anything. That resolution was in these words:

"*Whereas*, The inhabitants and local authorities of the States of Virginia, North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, Texas, Arkansas, and Tennessee, rebelled against the Government of the United States, and were in such condition on the 8th day of November, 1864, that no valid election of electors for President and Vice-President of the United States, according to the Constitution and laws thereof, was held therein on said day: therefore—

"*Be it resolved*, by the Senate and House of Representatives of the United States of America, in Congress assembled, That the States mentioned in the preamble to this joint resolution are not entitled to representation in the electoral college for the choice of President and Vice-President of the United States for the term commencing on the 4th day of March, 1864, and no electoral votes shall be received or counted from said States, concerning the choice of President and Vice-President for said term of office."

In approving this resolution President Lincoln accom-

panied it with the following message, parts of which I will italicize:

"*To the Honorable the Senate and House of Representatives:*

"The joint resolution entitled 'joint resolution declaring certain States not entitled to representation in the electoral college,' has been signed by the Executive, in deference to the view of Congress implied in its passage and presentation to him. In his own view, however, *the two Houses of Congress, convened under the twelfth article of the Constitution, have complete power to exclude from counting all electoral votes deemed by them to be illegal*, and it is not competent for the Executive to defeat or obstruct that power by a veto, as would be the case if his action were at all essential in the matter. He disclaims all right of the Executive to interfere in any way in the canvassing or counting electoral votes, and also disclaims that by signing said resolution he has expressed any opinion on the recitals of the preamble, or any judgment of his own upon the subject of the resolution."

If this resolution of the two Houses was authorized by the Constitution, there is no ground for maintaining the power of the President of the Senate to decide the question of receiving or rejecting votes. For, if he has the power under the Constitution, he cannot waive it, nor can any action of Congress take it away. The resolution of 1865 had the sanction of each House, was signed by the President of the Senate and the Speaker of the House, and was approved by the President. It should set the question of the power of the two Houses forever at rest.

The joint rule, first adopted in 1865, and continued in force for ten years, asserted the same control. It should not have been adopted if the pretensions now set up for the President of the Senate were of force; and he might at any time have disregarded it as worthless. But he did not disregard it; he did not question it; he obeyed it.

The action of the present Houses, moreover, is an affirmance of their right to eliminate the false votes from the true. Else why these committees of each House, investigating at Washington and in the North and South? Are all the labor and expense of these examinations undertaken solely in order that the results may be laid before the President of the Senate for *his* supreme judgment in the premises? It is safe to say that there is not a single member of either House who

would not laugh you in the face for asking seriously the question.

Assuming, then, that the power to decide what votes shall be counted belongs to the two Houses, how must they exercise it? Here, again, let me take the illustration with which I began, of the coins upon a banker's counter. Let us suppose that, instead of one clerk, two were told to count them together. When they came to a particular coin upon which they disagreed, one insisting that it was genuine and the other that it was counterfeit, what would then happen, if they did their duty? They would count the rest and lay that aside, reporting the disagreement to their superior. The two Houses of Congress have, however, no superior, except the States and the people. To these there can be no reference on the instant; and the action of the two Houses must be final for the occasion.

There can be no decision of the Houses if they disagree, and, as no other authority can decide, there can be no decision at all. The counting, including the selection, is an affirmative act; and as two are to perform it, if performed at all, no count or selection can be made when the two do not concur. Two judges on the bench cannot render a judgment when there is a disagreement between them. No more can the two Houses of Congress. There is here no pretense of alternative power, playing back and forth between the President of the Senate and the two Houses. If the former has not power complete and exclusive, he has none. The result must be that, what the two Houses do not agree to count, cannot be counted.

What Votes should be counted.

This is the second question. The votes to be counted are the votes of the electors. But who are the electors? The persons appointed by the States, in the manner directed by their Legislatures respectively. How is the fact of appointment to be proved? These are the subordinate questions, the answers to which go to make up the answer to the main question.

What are the means of separating the genuine from the counterfeit? Where are the tests by which to distinguish the true votes from the false?

The words of the Constitution are not many: "Each State shall appoint, in such manner as the Legislature thereof may direct, a number of electors," who shall meet and vote, "make distinct lists of all persons voted for as President" . . . "and of the number of votes for each, which list, they shall sign and certify and transmit sealed to the seat of the Government of the United States, directed to the President of the Senate."

The State must appoint, and the appointment must be made *in such manner* as *the Legislature* thereof may direct. Here are the two elements of a valid appointment, and they must concur. An appointment not made by the State, or not made in the manner directed by its Legislature, is no appointment at all.

There must be *State* action in the *manner* directed. If, for example, an appointment were made by a State authority, such as the Governor, without the sanction of the Legislature, it would be void. If it were made by the people in mass-convention, but not in a manner directed by the Legislature, it would be void also. And if, on the other hand, it were made in such manner as the Legislature had directed, but not made by the State, it would be equally invalid. Indeed, the Legislature may itself have given a direction in contravention of the State constitution, and thus the direction prove a nullity. So, too, the Legislature may have acted in contravention of the Federal Constitution, and for that reason its direction may have been void. The appointing power is the State, the manner of its action is prescribed by the Legislature; the valid authority and the valid manner of its exercise must concur, to make a valid appointment.

If, therefore, the persons assuming the office are not appointed *by the State*, and *in the manner* directed by the Legislature, they are not electors; that is to say, they are not electors *de jure;* electors *de facto* they can hardly become, since their functions exist but for a moment, and with one act they perish. What is an appointment by the State? How can *a State* appoint? I answer, by the people, the corporators of

the body politic and corporate, or by one of the departments of its government, as established by its constitution. The power to appoint cannot be renounced or divested. It must ever remain in the State, a living power, to be called into action at each recurring election. It cannot be delegated, except as the different powers of the State are by its constitution delegated to its great departments of government. If it were otherwise, it might be delegated to a foreign prince, and delegated in perpetuity. It is no answer to say that such a delegation *would* not be made; the question is, whether it *could* be made, without violating the Constitution of the country? I insist that it could not; and that if the Legislature of New York were to authorize our friend the Emperor Alexander, or our excellent neighbor the Governor-General of Canada, to appoint the thirty-five presidential electors to which New York is entitled in the sum total of the electoral colleges, and the electors thus appointed were to receive the certificate of the Governor of New York, and to meet, vote, and transmit their certificates to Washington, the votes might be lawfully rejected. Such an occurrence is in the highest degree improbable; but stranger things than that have happened. The Empress Catharine intervened in the election of the kings of Poland, and the interference led to the downfall of the government and the blotting of the country from the map of Europe. Indeed, I venture to express my belief, that such an intervention of foreign influence in our elections would have been hardly more startling to the imaginations of our fathers than the spectacle which our own eyes have seen; federal soldiers removing representatives from the Capitol of one State, and stationed at the doors of another, to inspect the certificates of members elected to its Legislature.

Not to go abroad, however, for illustrations, let us suppose that the General Court convened in the State-House at Boston were to depute the State of New York or the State of Virginia to appoint electors for the State of Massachusetts, no man would be wild enough to pronounce such a deputation valid. It should seem to be certain, for a reason hardly less satisfactory, that the Legislature of Massachusetts could not authorize the Mayor of Boston or the town council of Worcester

to appoint her electors; and, if that be so, and the rule is to prevail that, in law, what cannot be done directly cannot be done indirectly, it should follow that the State could not delegate to any other agency the power of appointment. If a body called a returning board be so constituted as that, in certain contingencies, it may depart from the inquiry what votes have been cast, and cast the votes itself, or by *any sort of contrivance* do the same thing under a different name, or by a roundabout process, it is, to that extent, an unlawful body under the Federal Constitution. Assuming, then, that a returning board has among its functions that of rejecting the votes in particular districts, for the reason either that they were affected by undue influence, or that other voters were led by like influence to refrain from voting, can such a function be valid under the Constitution of the United States? There is no question here of throwing out particular votes for vices inherent in themselves, such as that they were illegible, or were cast by disqualified persons, and the like; but the question is of rejecting the votes of a certain number—say a thousand voters—either because they were unduly influenced, or because another thousand, who might have voted, were, by undue influences, prevented from voting at all.

Whatever may be the law of a State in respect to the choice of its own officers, it seems most reasonable to hold that, under that common Constitution which governs and provides for all the States alike, when the only legitimate inquiry is whom has a particular *State* appointed, in the manner directed by its Legislature, and the Legislature has directed the appointment to be made by a general election, that is, by the votes of all qualified persons, the only valid office of a returning board must be to ascertain and declare how the State has actually voted, not how it might or would have voted under other circumstances, or, in other words, what is the number of legal votes actually cast; not how many have been unduly influenced, or how many other votes would have been cast in a different state of affairs. I use the expression undue influence, as more comprehensive than riot, bribery, or intimidation, and including other forms of improper influence, such as that of capital over labor. The

question should be put in a general form to be correctly answered, because there is nothing in intimidation by violence which would make it a good cause for exclusion, more than that other kind of intimidation, which is social or financial. If, in ascertaining the state of the vote, it be lawful to inquire whether certain voters were frightened by a rifle-club to stay away from the polls, or to vote as the club dictated, it must also be lawful to inquire whether the same number of voters were induced to vote or not to vote by fear that their discounts might be lessened at the village bank, or their employment discontinued at the neighboring factory. I state the proposition, therefore, as one covering all kinds of undue influence. I refrain, however, from going into the question whether this influence was or was not exerted, for I am inquiring into the law as applicable to certain alleged facts, leaving the truth of the allegations to be dealt with by others.

The sole object of all the machinery of elections, the ballots, the ballot-boxes, the canvassers and supervisors of elections, the returns and the returning boards, is, to ascertain the will of the people. Nobody supposes that that will is ascertained to a certainty. An approximation only is possible under our present system. To say nothing of the exclusion of women from an expression of their will, a portion only —though it may be a large portion—of the men express theirs. The sick, the infirm, the absent, say nothing. The registration is always in excess of the vote, and the number of voters falls short of the registration. The reason is patent: many voters are absent at the time of registration, or are otherwise unable or unmindful to register; and when the time of voting arrives many of those who are registered are absent or prevented from attendance. The registration may generally be had on any one of several days, while the voting is to be done on one day. The machinery is imperfect and clumsy at best; but that is not a reason for making it worse, or depriving ourselves of the advantages which it yields, notwithstanding its imperfections. The nearest approach to absolute justice that we can now hope to make is to *take the votes* of all the voters who offer themselves, and *count the votes that are taken.* Every scheme of counting out legal

votes cast, or counting in votes not cast, must result in confusion, uncertainty, and fraud. No matter how specious the argument may be, it will always mislead, for the reason that it must in its nature substitute conjecture for fact. The vote must, of course, be legal, it must be intelligible; but such a vote when offered must be taken, and when taken counted.

The throwing out of all the votes of certain districts is but another mode of accomplishing the same result as would be effected by the rejection and addition of votes in the cases supposed: for, if there be 10,000 voters in the district, and 5,000 only vote, it can make no difference whether the 5,000 be rejected, or be allowed to remain and the same number be added to the other side.

If the Legislature of a State were to resolve beforehand that no votes should be taken in certain counties or parishes, should we not say that the vote of the remaining counties or parishes would not express the vote of the State? If, in a particular parish, with twenty polling-precincts, ten of the precincts are so disturbed by violence that no votes can be taken, and in the other ten there is no violence, should the votes of the latter be taken as the net result, or should no result be declared because half of the voters are prevented from voting? The practice of a State must be consistent with itself. When the votes of three-fourths of a State are proffered as the vote of the State, the votes of three-fourths of a parish must be received as the vote of the parish. If there was not a "fair and free election" in one-fourth of the parishes, there was not a "fair and free election" in the State; and the just result should be, that, instead of rejecting the votes of those parishes because a portion of the voters were intimidated, the votes of the *State* should be rejected altogether.

But why, let me ask, should lawful votes in any case be rejected, because other lawful votes might have been given? If they, whose votes were cast, had prevented other votes from being also cast, that might be a reason for punishing the former. But if the former were blameless, where is the justice of punishing them for the faults of others? Suppose a parish with 10,000 persons entitled to vote, and divided into ten precincts.

Ordinarily only 8,000 will register and 6,000 vote; the vote of the 6,000 being assumed to be an expression of the will of the 10,000. At a particular election 3,000 persons vote in five of the precincts. In the other five only 1,000 vote, there being disturbances on or before the day of election. It is alleged that the last 1,000 votes should not be counted. Why not? Because, say the objectors, 2,000 persons did not vote, and it is to be presumed, first, that they were kept from the polls by fear, and, next, that if they had voted at all, they would have outvoted the 1,000. Are not these the merest assumptions? You cannot get the truth without knowing the motives which kept voters away, and how they would have voted if they had come. You cannot know either with certainty, without examining all the voters. And the theory which would lead you to call them for examination should also lead you to call all who in other cases have not voted, to ask why they kept away, and how they would have voted if they had been present. The argument which justifies the exclusion in case of intimidation would include all cases of absence and of inquiry into what would have been the result if there had been no absence. Intimidation is one kind of undue influence; expectation of benefit is another; fear of social ostracism is another: will you go into them? There seems no middle course between excluding all inquiry into the causes of absence and the probable votes of the absent, and allowing it in every instance where persons entitled to vote have not voted. To my thinking, a certificate given after the elimination of votes, in the manner indicated, certifying that the electors have been chosen by the people of the State, is a palpable falsehood. *It should have certified that they had been chosen by the people of so many parishes or counties, out of the whole number.*

It is impossible, without deranging our system of election, either to reject votes actually cast, out of consideration for the motives with which they were cast, or to add to them the supposed votes which might have been cast. The ballot itself is a standing protest against inquiry into motives. It enjoins and protects the secret of the hand; much more should it enjoin and protect the secret of the heart. And as for add-

ing votes, on the supposition that they might or would have been cast but for untoward circumstances, no plausible reason can be given for it which would not apply to any case of disappointment in the fullness of the vote. A rainy day of election costs one of the parties thousands of ballots. If it happen to rain on that day, why not order a new election in better weather; or, to save that formality, make an estimate of the number who would have attended under a cloudless sky, and add their ballots to one side or the other? The rejection of the votes of a parish can be justified, if justifiable at all, only on the ground that the votes cast do not give the voice of the parish, either because they did not express the real wishes of the voters, or because they would have been overborne by other votes if they could have been cast.

Does not the foregoing reasoning lead to this conclusion, that whether the charges of intimidation in certain counties or parishes of a State be founded in fact or in error, they do not warrant the rejection of the votes actually cast in those counties or parishes; and, furthermore, that they who insist upon such rejection must accept, as a logical conclusion, the rejection, for a like reason, of the votes of the whole State? I submit that such are the inevitable conclusions.

It is insisted, however, that this is an inquiry which cannot be gone into in the present state of the canvass. Certificates have been sent to Washington, purporting to give the result of the election. The question will probably arise, at the meeting of the two Houses, in this manner: Two certificates are required, one signed by the electors, pursuant to the Constitution, certifying their own votes; and the other signed by or under the direction of the Governor of the State, pursuant to act of Congress, certifying the appointment of the electors. Both certificates are sent to the President of the Senate, in one envelope. It may indeed happen that two envelopes come from the same State, each containing two certificates of rival governors, and rival electors. If there is but one envelope, one of the certificates which should be there may be omitted, or may be imperfect. In all these cases, it is manifestly incumbent upon the two Houses to receive or reject, in

the exercise of their judgment. But if one envelope only is presented, containing the two certificates, both in due form, and objection is nevertheless made that the certificate of the appointment of electors is false, can the objection be entertained? There are those who affirm that it cannot. They reason in this wise: The States are to appoint the electors, and may therefore certify such as they please. But is not that a *non sequitur?* The States may appoint whom they please, in such manner as their Legislatures have directed; but an appointment and a certificate are different things. The latter is, at the very best, only evidence of the former. The fact to be determined is the appointment; the certificate is produced as evidence; it may be controvertible or incontrovertible, as the law may have provided, but there is nothing in the nature of a certificate which forbids inquiry into its verity; it is not a revelation from above; it is a paper made by men, fallible always, and sometimes dishonest as well as fallible; and, if honest, often deceived. It is made generally in secret and *ex parte*, without hearing both sides, without oral testimony, without cross-examination. Of such evidence it may be safely affirmed, that it is never made final and conclusive without positive law to that express effect.

Now, it may be competent for the Legislature of a State, under its own constitution, to determine how far one of its own records shall be conclusive between its own citizens. It may enact, that the certificate of a judge of a court of record, of a sheriff, a county commissioner, a board of tax assessors, or a board of State canvassers, shall or shall not be open to investigation. There is, however, no act of Congress on the subject of the present inquiry, and we are left to the Constitution itself, with such guides to its true interpretation as are furnished by just analogy and by history. If it can be shown that the certificate was corruptly made, by the perpetration of gross frauds in tampering with the returns, must it nevertheless flaunt its falsehood in the faces of us all, without the possibility of contradiction? A President is to be declared elected for thirty-eight States and forty-two millions of people; the declaration depends upon the voice, we will suppose, of a single State; that voice is uttered by her votes;

to learn what those votes are, we are referred to a certificate, and told that we cannot go behind it. In such case, to assert that the remaining thirty-seven States are powerless to inquire into the getting up of this certificate, on the demand of those who offer to prove the fraud of the whole process, is to assert that we are the slaves of fraud, and cannot take our necks from the yoke. I do not believe that such is the law of this land, and I give these reasons for my belief.

In the absence of express enactments to the contrary, any judge may inquire into any fact necessary to his judgment. The point to be adjudged and declared in the present case is, who has received a majority of the electoral votes, that is, of valid electoral votes, not who has received a majority of certificates. A President is to be elected, not by a preponderance of certification, but by a preponderance of voting. The certificate is not the fact to be proved, but evidence of the fact, and one kind of evidence may be overcome by other and stronger evidence, unless some positive law declares that the weaker shall prevail over the stronger, the false over the true. There may, as I have said, be cases where, for the quieting of titles, or the ending of controversies, a record or a certificate is made unanswerable; that is, though it might be truthfully answered, the law will not allow it to be answered. Such cases are exceptional, and the burden of establishing them rests upon him who propounds them. Let him, therefore, who asserts that the certificate of a returning board cannot be answered by any number of living witnesses to the contrary, show that positive law which makes it thus unanswerable. There is certainly nothing in the Constitution of the United States which makes it so, as there is no act of Congress to that effect.

A certificate of a board of returning officers has nothing to liken it to a judicial record of contentions between parties. The proceeding is *ex parte;* or, if there be parties, the other States of the Union are not represented, however much their rights may be affected; the evidence is in part at least by one-sided affidavits; the judges may be interested and partial. What such a board has about it to inspire confidence or command respect, it is hard to perceive. If there be any presump-

tion in its favor, or in favor of the justice of its judgments, the presumption is as far from indisputable as a disputable presumption can ever be.

To recapitulate, we may formulate the question in this manner: *Whom has the State appointed to vote in its behalf for President?* The manner of appointment is the vote of the people, for the Legislature has so directed. Who, then, are appointed by the people? To state the question is nearly equivalent to stating what evidence is admissible; for the question is not, who received the certificate, but who received the votes; and any evidence showing what votes were cast and for whom is pertinent and must therefore be admissible, unless excluded by positive law. The law by which this question is to be decided is not State, but Federal. If it were otherwise, the State officers might evade the Constitution altogether, for this ordains that the appointment shall be by the State, and in such manner as its Legislature directs; but if the State certificate is conclusive of the fact, the State authorities may altogether refuse obedience to the constitution and laws, and save themselves from the consequences by certifying that they have obeyed them. And they may in like manner defraud us of our rights, making resistance impossible, by certifying that they have not defrauded. Indeed, they might make shorter work of it, and *omit the election altogether, writing the certificate in its stead.*

If the Governor of Massachusetts were to certify the election of the Tilden electors, and their votes were to be sent to Washington, instead of those which the Hayes electors have just given in the face of the world, must the Tilden votes be counted? Must this nation bow down before a falsehood? To ask the question is to answer it. There is no law to require it; there can be none until American citizens become slaves. The nature of the question to be determined, the absence of any positive law to shut out pertinent evidence, the impolicy of such an exclusion, its injustice, and the impossibility of maintaining it, if by any fatality it were for a time established—all these considerations go to make and fortify the position, that whatever body has authority to decide how a State has voted, has authority to draw information

from all the sources of knowledge. The superstitious veneration of a certificate, which would implicitly believe it, and shut the eye to other evidence, is as revolting as that of the poor negro in the swamps of Congo, who bows down before his fetich. The idolaters, mentioned in Scripture, who took a tree out of the wood, burned one part of it, hewed the other, and then worshiped it, were only prototypes of the men of our day, who bow down before a piece of paper, signed in secret fourteen hundred miles away, asserting as true what they know or believe to be false.

It were useless, therefore, to inquire how far the laws of a State make the certificate of a board of canvassers or of returns conclusive evidence of the result of an election held in the State. It may be admitted that the Supreme Court of Louisiana, for example, has denied its own competency to go behind the certificate of the board; but even that decision is entitled to no respect, being made in contravention of an express provision of the State statute, as the dissenting opinion of one of the judges clearly shows. Every other State of the Union, save perhaps one, has decided that the certificate is impeachable, even in a case where the statute declares that the canvassers shall "determine what persons have been elected." The opinion of the Supreme Court of Wisconsin, an extract from which is given in the Appendix, states and decides the point with clearness and unanswerable force.

If what has been said be founded in sound reason, the two Houses of Congress, when inquiring what votes are to be counted, have the right to go behind the certificate of any officers of a State, to ascertain who have and who have not been appointed electors. The evidence which these Houses will receive upon such inquiry it is for them and them only to prescribe, in the performance of their highest functions and the exercise of their sincerest judgment.

The Remedy for a Wrong Count

is the remaining question. Hitherto, I have endeavored to state in a popular manner the existing law, as I understand it. I will now ask a consideration of the needs of future legislation. If there be anything obscure in the present law,

Congress has the power to make it clear; if there be danger in our present condition, Congress can remove the danger. There are various ways of doing it.

One is to provide for a judicial committee of the two Houses, to sit in judgment, as if they were judges, and pronounce upon the result of the evidence. The English House of Commons used to reject or admit members, from considerations of party. Englishmen have thought that they had at last succeeded in establishing a tribunal which would decide with impartiality and justice. We should be able to devise means equally sure of arriving at a result just in itself, and satisfactory to all. The considerations in favor of a judicial committee of the two Houses are cogent, though they may not be conclusive. They are, the necessity of a speedy decision, and the desirableness of keeping, if possible, the ordinary courts out of contact with questions of the greatest political significance.

But if it be found impossible to agree upon the formation of such a committee, then a resort to the courts should certainly be had. The public conscience must be satisfied that the person sitting in our highest seat of magistracy is there by a just title; and it can be satisfied of that, in doubtful cases, only by a judicial inquiry.

An act of Congress might provide either for the case of a double declaration of the votes, one by each House of Congress, or of a single declaration by the two Houses acting in concert. In either case the Supreme Court could be reached only by appeal, and the court of first instance might be either the Supreme Court of the District of Columbia or any of the Circuit Courts. The Court of the District should seem to be the most convenient, the most speedy, and the most appropriate, as being at the seat of Government.

For the case of a double declaration it might be provided, that if, upon the counting of the votes the Senate should find one person elected and the House another, an information should be immediately filed in the Supreme Court of the District, in the name of United States, against both the persons thus designated, alleging the fact, and calling upon each to sustain his title. The difficulty of this process would be

how to expedite the proceedings so that a decision should be had before the 4th of March, in order to avoid an interregnum. But I think this difficulty could be overcome. To this end, the time of the courts engaged in the case should be set apart for it. The rival claimants would naturally be in Washington, prepared for the investigation. The evidence previously taken by the two Houses—for they would assuredly have taken it—could be used, with the proper guards against hearsay testimony, and any additional evidence necessary would probably be ready, if the claimants or their friends knew beforehand that a trial was likely to be had. It might indeed happen that the questions to be decided would involve little dispute about facts; as, for example, the present Oregon case. It should be provided that the trial must be concluded and judgment pronounced within a certain number of days, either party being at liberty to appeal, within twenty-four hours after the judgment, to the Supreme Court of the United States, by which the appeal should be heard and decided before the 4th day of March.

In case of a single declaration, and consequent induction into office, an information might be filed in the Supreme Court of the District in the names of the United States and the claimant, against the incumbent, and proceedings carried on in the ordinary manner of proceedings in the nature of *quo warranto.*

Any lawyer could readily frame a bill to embrace these several provisions. An amendment of the Constitution would not be necessary. The provisions would operate as a check upon fraud. They would furnish a more certain means of establishing the right. The objection that the courts would thus be brought into connection with politics is the only objection. But the questions which they would be called upon to decide, would be questions of law and fact, judicial in their character, and kindred to those which the courts are every day called upon to adjudge. The greatness of the station is only a greater reason for judicial investigation. The dignity of the presidential office is not accepted as a reason why the incumbent should not be impeached and tried. It can be no more a reason why

a usurper should not be ousted and a rightful claimant admitted. The President is undoubtedly higher in dignity and greater in power than the Governor of a State, but the reasons why the title of a Governor should be subjected to judicial scrutiny are of the same kind as those which go to show that the title of a President of the United States should be subjected, upon occasion, to a like scrutiny. The process was tried and found useful in the Capitol of Wisconsin, and, for similar reasons, it may be tried and found useful in the Capitol of the Union. So far from degrading the office, or offending the people to whom the office belongs, it can but help to make fraud less defiant and right more safe, and add a new crown to the majesty of law. That triumph of peace and justice in Wisconsin has, to the eye of reason, given an added glory to her prairies and hills, and a brighter light to the waters of her shining lakes.

APPENDIX.

Observations of Chief-Justice Whiton, of Wisconsin, respecting the force of a certificate of canvassers:

"Before proceeding to state our views in regard to the law regulating the canvass of votes by the State canvassers, we propose to consider how far the right of a person to an office is affected by the determination of the canvassers of the votes cast at the election held to choose the officer. Under our constitution, almost all our officers are elected by the people. Thus the Governor is chosen, the constitution providing that the person having the highest number of votes for that office shall be elected. But the constitution is silent as to the mode in which the election shall be conducted, and the votes cast for Governor shall be canvassed and the result of the election ascertained. The duty of prescribing the mode of conducting the election, and of canvassing the votes was, therefore, devolved upon the Legislature. They have accordingly made provision for both, and the question is, whether the canvass, or the election, establishes the right of a person to an office. It seems clear that it cannot be the former, because by our constitution and laws it is expressly provided that the election by the qualified voters shall determine the question. To hold that the canvass shall control, would subvert the foundations upon which our government rests. But it has been repeatedly contended in the course of this proceeding that, although the election by the electors determines the right to the office, yet the decision of the persons appointed to canvass the votes cast at the election, settles finally and completely the question as to the persons elected, and that, therefore, no court can have jurisdiction to inquire into the matter. It will be seen that this view of the question, while it recognizes the principle that the election is the foundation of the right to the office, assumes that the canvassers have authority to decide the matter finally and conclusively. We do not deem it necessary to say anything on the present occasion upon the subject of the jurisdiction of this court, as that question has already been decided, and the reasons for the decision given. Bearing it in mind, then, that under our constitution and laws, it is the election to an office, and not the canvass of the votes, which determines the right to the office, we will proceed to inquire into the proceedings of the State canvassers, by which they determined that the respondent was duly elected."—(4 *Wis.*, 792.)

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