41ST CONGRESS, 3d Session. } HOUSE OF REPRESENTATIVES. { REPORT No. 3, Part 2.

SHEAFE vs. TILLMAN.

JANUARY 30, 1871.—Laid on the table and ordered to be printed.

Mr. DOX, of the Sub-committee of Elections, made the following

MINORITY REPORT.

The Sub-committee of Elections, to whom this case was referred, by permission of the House, respectfully submits the following report, which expresses the reasons for his dissent from the conclusions of the majority.

Although dissenting from the majority of the committee in the conclusion which they have reached in this case, the undersigned is gratified in finding so much in the report of the majority to which he can give his assent.

He concurs with the majority of the committee in the opinion that the notice given by the contestant (Sheafe) was sufficient.

He concurs with the majority of the committee that contestant received 1,156 more votes than the contestee, Mr. Tillman, for Representative in Congress at said election.

He also concurs with the majority of the committee in regarding the action of the then governor of Tennessee, (W. G. Brownlow,) in throwing out the entire vote of Lincoln County; the votes of districts numbered 1, 3, 7, and 10 of Coffee County; the votes of districts numbered 1, 4, 7, 13, and 15 in the county of Marshall, and certain districts in the county of Franklin, whereby contestant loses 1,690 votes, and contestee 102 votes, as an unlawful and arbitrary exercise of executive power, and to be disregarded by the committee. In the language of the report of the majority of the committee—

> There is no law of the State of Tennessee that gives authority to the governor to reject the vote of any county or part of a county; his duty is only to compare the returns received by him with those returned to the office of the secretary of state, and upon such comparison being made, to "deliver to the candidate receiving the highest number of votes in his district the certificate of his election as Representative to Congress." (Code of Tennessee, sec. 935, page 239.) If illegal votes have been cast, if irregularities have existed in the elections in any of the counties or precincts, if intimidation or violence has been used to deter legal or peaceable citizens from exercising their rights as voters, to this House must the party deeming himself aggrieved look for redress. This great power of determining the question of the right of a person to a seat in Congress is not vested in the executive of any State, but belongs solely to the House of Representatives. (Constitution United States, art 1, sec. 5.)
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> The action of the governor, so far as he has thrown out the votes of counties or parts of counties, is to be disregarded, and the matters in dispute are to be settled upon the actual returns and the evidence introduced, independent of the doings of the executive.

The denial of the certificate of election to Mr. Sheafe, the contestant in this case, by the governor of Tennessee, was an act of usurpation committed, and a wrong done to the prejudice of that gentleman, without a shadow of authority by the laws of either the State of Tennessee or of the United States.

Had the law been respected by the governor, Mr. Sheafe, who was elected by the people, and whose *prima facie* right to the certificate cannot be questioned, would have been returned to this House, (which alone has the right and power to determine the questions involved in this case,) and not Mr. Tillman, who comes here elected and accredited alone by the governor of Tennessee, after being defeated by a large majority at the polls.

But while all of the members of the committee agree in the sufficiency of the notice of contest given by the contestant, and that contestant had a majority of the votes polled, and also in the unauthorized action of the governor in "setting aside" the vote of the county and parts of other counties at his pleasure, yet a majority of the committee have found reasons which escaped even the vigilance and scrutiny of the then governor of Tennessee for denying to Mr. Sheafe the seat in this House, to which he was, in the opinion of the undersigned, most clearly and lawfully elected.

It was certainly not through inadvertence that Governor Brownlow, in determining who was elected to represent the fourth congressional district of Tennessee in the Forty-first Congress, in his proclamation omitted to notice the causes, to wit, intimidation of voters by Ku-Klux and other lawless bodies, which the majority of the committee have regarded as sufficiently established by the testimony taken in the case to warrant them in taking from the contestant 1,493 votes, and enough to elect his competitor (from whom but 41 votes are taken) by a majority of 296 votes.

An examination of Governor Brownlow's proclamation, dated the 11th day of February, 1869, more than three months after the election, will show that as ardent a republican as Governor Brownlow, who certainly cannot be charged with any lack of zeal in the service of his party, had not then learned that the intimidation of voters was sufficient to justify him in electing Tillman, who had been defeated by 1,156 majority of the popular vote in favor of Mr. Sheafe.

In order to effect that object he was compelled to resort to a revision of the returns made by his own appointees, (not one of whom has anything to say about intimidation in his return,) and to a general expurgation of the votes, rejecting the vote of one entire county (Lincoln) and of parts of divers other counties throughout the district.

That it was not through inadvertence that intimidation was not assigned by the governor as a cause for defeating the choice of the people in the election of their Representative in Congress, is evident from the fact that in the same proclamation intimidation is charged to have prevailed in another district, (the 8th,) yet it is not mentioned as a cause for disregarding the will of the people, as expressed through the ballot box in this, the 4th district.

(See proclamation of Governor Brownlow, Exhibit A, at the conclusion of majority report.)

The undersigned therefore concludes that the charge of intimidation of voters, and of Ku-Klux outrages, affecting the election in this case, was not thought of by the governor of Tennessee, nor by Mr. Tillman, the contestee, as sufficiently sustained to warrant its use for the purposes of this contest until many months after the election in November, 1868.

The undersigned would respectfully call the attention of the House to the following propositions, which will not be controverted, and which make it impossible for him to assent to the conclusions reached by a majority of the committee in this cause:

1. No person could vote at the election in question unless authorized

to do so by an officer called a commissioner of registration, who could only be appointed by the governor, W. G. Brownlow.

2. All of the officers, judges, and clerks (except in the county of Lincoln) who held this election, were either appointed by the same governor or by his said appointees, the said commissioners of registration.

3. The governor claimed and exercised the power of setting aside and annulling the registration of voters made by his own appointees as aforesaid, at his mere option and pleasure.

4. In no case did a commissioner of registration (all of whom were republicans and appointed as aforesaid by the governor) assign as a reason for the rejection of the vote of certain civil districts which gave contestant large majorities, that force or intimidation had been used to obtain said majorities.

5. The whole congressional district was occupied by Federal troops, at the request and subject to the direction and control of the said governor.

6. In Marshall County, where the majority of the committee reject five hundred and fifty-nine votes given for contestant to nine votes given to the contestee, Captain E. L. Huntington, commanding the post, with his company stationed at the county seat, (Lewisburg,) certifies as follows:

LEWISBURG, MARSHALL COUNTY, TENNESSEE,
November 21, 1868.

To all whom it may concern:

Company A of the Twenty-ninth United States Infantry came to Lewisburg on or about the 6th day of October, 1868, and remained until to-day. We were in Lewisburg on the 3d day of November, and witnessed the election for President and member of Congress from this the fourth district of Tennessee. The election was very quiet; every one voted his sentiments, without disturbance or threats, both white and colored; and no one in the county, so far as we are advised and believe, voted except those who had certificates to vote under the franchise law of Tennessee. The citizens of the county are quiet and law-abiding, and treated my command with kindness and due respect.

E. L. HUNTINGTON,
Captain Twenty-ninth Infantry, Commanding Post and Company.

(See evidence, page 70.)

In the opinion of the undersigned, Captain Huntington is sustained by the weight of testimony in the cause.

7. That in Coffee County, where the majority take 87 votes from contestant to 24 from contestee, it does not appear from the testimony that there had ever been a Ku-Klux, or that a single outrage had ever been committed, or that there had ever been the least intimidation of any voter in either of the two civil districts rejected, but the proof is directly to the reverse. (See depositions of P. C. Cunningham, page 5; W. P. Ford, pages 5, 6, and 7; H. S. Emerson, pages 9 and 10; and D. E. Mead, pages 13 and 14, evidence.)

8. That at Winchester, in Franklin County, where the majority of the committee reject 293 votes given for contestant to 3 votes given for contestee, for the alleged reason that "some persons voted without proper certificates, and that the frauds perpetrated at the election were so flagrant that the crowd about the ballot-box regarded it as a huge joke, and seemed to enjoy it as such," when contestee's own witness, who was one of the judges of the election and an officer in the Federal Army during the rebellion, in his deposition, denies each and every one of the above reasons for rejecting said vote as given by the majority;

(see the deposition of N. W. Wilcox, page 156 of the evidence; and he is sustained by Albert Ringle, page 77, and Nathan Frizzell, pages 82, 83, and 84;) while the majority is not sustained by any witness in the cause, and can only be based upon the testimony of one witness, who had but little opportunity of knowing the facts, as he himself swore. (See deposition of J. G. McCutcheon, pages 141, 142, and 143, evidence.)

THE ELECTION IN LINCOLN COUNTY.

But it is claimed that in Lincoln County the election was held by the coroner, and that it could have been lawfully held only by a commissioner of registration. Upon this point the majority of the committee report as follows:

It is not necessary to discuss the question of the constitutional powers of the governor to set aside a registration, for if this act of his was unconstitutional, and he had no power to set aside a registration and remove a commissioner, then there was no vacancy; the commissioner had not been deprived of his office, and he was the only person by law authorized to hold the election. But if this act of the governor did have the effect of removing the commissioner, the county court had no right under the statute to appoint an election officer; the act of February 26, 1867, (ch. 26, sec. 2,) above referred to, vested the appointing power of these officers wholly in the executive, and repealed all laws in conflict therewith. Wilson, therefore, held his office under no color of legal authority; was not even an officer *de facto*, but was a mere usurper, and all acts done by him as such officer were illegal and void.

But the commissioner of registration for that county was removed by the governor, W. G. Brownlow, who neglected and refused to appoint a successor for that office, the governor alone having the power to make such removal and appointment, as has been more than once decided by the supreme court of Tennessee, the judges composing the bench having been appointed by the same governor. The power of the governor to annul a registration is another question, and will be hereafter considered.

Under the laws of Tennessee, as they stood at the time of the election in question, could the people of Lincoln County be deprived of all opportunity to vote for a representative in Congress, in the way above indicated?

It was provided by the code of Tennessee, page 226, section 839—

The sheriff, or, if he is a candidate, the coroner, or, if there be no coroner, some person appointed by the county court, shall hold all popular elections; and said officer or person thall appoint a sufficient number of deputies to hold said elections.

This section of the code was modified by an act of the general assembly passed February 26, 1868, page 67, acts of 1867–'68, without, however, any reference to the code in said act, and the same provision is contained in the last franchise act, which is as follows:

That it shall be the duty of the commissioner of registration of voters to hold all elections, now required by law to be held by sheriffs, and that, for that purpose, he shall have all of the powers and rights that sheriffs now possess, and be subject to like responsibilities and liabilities, and have fifty dollars per annum for his compensation, as is now allowed by law to sheriffs for similar services; all to be paid out of the county treasury.

Section 841 of the same code provides that—

The county court, at the session next preceding the day of election, shall appoint three inspectors or judges for each voting place, to superintend the election.

SEC. 842. If the county court fail to make the appointment, or any person appointed refuse to serve, the sheriff, with the advice of three justices, or, if none be present, three respectable freeholders, shall, before the beginning of the election, appoint said inspectors or judges.

SEC. 843. If the sheriff or other officer whose duty it is to attend at a particular place of voting under the foregoing provisions fail to attend, any justice of the peace present, or, if no justice of the peace be present, any three freeholders may perform the duties prescribed by the preceding sections, or, in case of necessity, may act as officers or inspectors.

It will be observed that neither the act of February 26, 1868, nor the franchise act repeals said section 839, or any other of the above sections of the code of Tennessee. Those acts simply provide that it shall be the duty of the commissioner of registration to hold the elections, have the powers and rights, be subject to the same responsibilities and liabilities, and receive the same compensation as sheriffs in discharging that duty. But if the sheriff was a candidate, or there was no sheriff, or if he refused to hold the election, then the coroner was the proper officer to hold it; and, as the commissioner of registration was, by the terms of the acts above referred to, simply substituted to the place, powers, and duties which had formerly devolved upon sheriffs, it follows that, as the office of commissioner of registration was vacant, that the coroner was the proper officer to hold said election, and that the same was properly held by him.

KU-KLUX.

But it is claimed that there were in some of the counties of this district organized bands of men, who sometimes made their appearance in disguise, calling themselves Ku-Klux, and that the effect of this organization, and of certain outrages perpetrated by them, was to deter many of the legally qualified voters from voting, and to cause others to vote contrary to their inclinations; and this alone is assigned by the majority of the committee as a reason for rejecting the vote of certain civil districts of the counties of Marshall and Coffee.

It is submitted that, upon the evidence in this case, it is a matter of doubt which party was most benefited or injured by the operations of these men; but, yielding the benefit of this doubt to the majority, how many votes is it claimed were thus intimidated? What proof is there in the record that, if there had been none of this intimidation, the majority of 1,156 for contestant could have been overcome?

Again, it does not appear from the proof that these disguised men ever attempted to influence any voter to vote for contestant and against contestee, except in one solitary instance, and that instance ought not to be an exception, because it is more than doubtful that any good was intended to contestant by the parties perpetrating this outrage, and it is certain that if it was thus intended it had a contrary effect.

But the proof does show very conclusively that contestant was an officer in the Federal Army during more than three years of the rebellion, while contestee was in neither army, and that contestant, both before and after the election, both publicly and privately, denounced and condemned this organization. This being so, why should they desire his election? And it is admitted by contestee that there was no intimidation in the election of his successor; and yet it will appear, from the abstract of the secretary of state of Tennessee of that election, which I have appended to this report, marked "Exhibit A," that Bright, the democratic candidate, received 11,827 votes, while Mr. Mullins, the republican candidate, received but 1,843 votes. It is true that many of the citizens of Tennessee have been enfranchised since the election in controversy, but all can vote now who could vote then, and yet Mullins's vote in 1870 is 2,055 less than the vote for Mr. Tillman in 1868.

"SETTING ASIDE" THE REGISTRATION.

Furthermore, the proof shows that in one county alone (Lincoln) there were between 1,500 and 2,000 voters excluded from the polls by the action of the governor in "setting aside" the registration of voters

by proclamation; and that many more were prevented from voting in two other counties, (Franklin and Coffee,) by the same cause. It is admitted by the contestee in his answer, that these voters thus excluded from the polls, if they had been allowed to vote, would have voted for contestant. *Was the governor authorized thus to "set aside" the registrations and exclude these voters from the polls?* The supreme court of Tennessee—each of the three judges who composed the bench having been appointed to his high office by Governor Brownlow—each in a separate opinion, and all concurring, decided in the case of the *State of Tennessee* vs. *William Staten*, (6th Caldwell's Reports, page 234,) that—

The statute which empowers the governor in his discretion practically and effectually to abrogate the right to vote of any and every qualified citizen of the State, and at any time, and for all time, and in any and all elections, is repugnant to that portion of the constitution which is expressly ordained to secure to the people the right to elect the officers of their government.

The statute which practically and effectually empowers the governor to determine who of the qualified citizens shall vote and who shall not vote, and who shall elect and who shall not elect the officers of the government, himself included, is repugnant to that portion of the organic frame of the government which was ordained to establish and maintain a republican form of government.

The statute which empowers the governor practically and effectually to divest out of any and every qualified voter his right to vote, not only once, but from time to time and without end, is repugnant to those provisions of the organic law which are ordained to invest the courts with judicial power, and to exclude the executive head of the government from the exercise of such power.

For these reasons the court is constrained to hold that the statute which confers on the governor the power to set aside and annul the registration of a county, in whole or in part, is unconstitutional and void.

In this determination are included the act of March 8, 1867, chapter 36, sections 4 and 5, and that part of the act of February 26, 1868, chapter 52, so far as it authorizes the governor to set aside registration, and undertakes to confirm his acts of this kind done before the passage of the act; and to punish persons who vote or who attempt to vote "by virtue of certificates issued from a registration declared null and void" by the governor.

Again: the contestee admits (see his "Reply to Contestant's Argument," page 9) that if the supreme court decided that the governor had no power to "set aside" these registrations, that "not only the contestee in this case *is not entitled to a seat*, but perhaps only a few of the sitting members from Tennessee of the present or any preceding Congress since the rebellion are or were entitled to seats."

That the court so decided does not admit of debate. Now, which does the majority of the committee propose to overrule, the unanimous opinion of the supreme court of the State, thus solemnly pronounced by a bench thus appointed, or the equally deliberate and solemn conviction and admission of the sitting member? Indeed, to sustain the resolutions recommended by the majority is to ignore both the court and the contestee.

From the report of the majority of the committee in thus overruling the decision of the supreme court of Tennessee, and the confession of judgment thereupon by contestee, the undersigned, for the reasons hereinbefore given, makes his appeal to the Representatives of the nation, and submits for their determination the following resolutions:

Resolved, That C. A. Sheafe was duly elected, and is entitled to his seat in the Forty-first Congress as the Representative of the fourth congressional district of the State of Tennessee.

Resolved, That Lewis Tillman was not elected, and is not entitled to a seat in the Forty-first Congress as the Representative of the fourth congressional district of the State of Tennessee.

P. M. DOX.

EXHIBIT A.

SECRETARY OF STATE'S OFFICE,
Nashville, Tennessee, January 12, 1871.

Official vote for member of Congress from the fourth congressional district of Tennessee:

Counties.	John M. Bright.	Jas. Mullins.
Rutherford	2,099	610
Cannon	833	83
Coffee	693	35
Franklin	1,392	27
Lincoln	2,364	48
Bedford	1,449	634
Marshall	1,208	163
Giles	1,789	243
Total	11,827	1,843
	1,843	
Bright's majority	9,984	

STATE OF TENNESSEE:

I, Thomas H. Butler, secretary of state of said State, hereby certify that the foregoing is a true statement of the election for member of Congress in the fourth congressional district of said State, at an election held on the 8th day of November, 1870, as the same appears of record in my office.

In testimony whereof I hereunto set my official signature, and, by order of his excellency the governor, affix the great seal of the State of Tennessee, at the executive department in Nashville, on this 12th day of January, 1871.

[GREAT SEAL OF TENNESSEE.]

T. H. BUTLER,
Secretary of State.