THE

ELECTORAL COUNT

OF 1877,

TESTED BY THE RULES

OF

COMMON LAW

AND

CONSTITUTIONAL JURISPRUDENCE.

A NOTE ADDRESSED TO

Senators Conkling and Kernan,

BY

HON. A. B. CONGER.

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To the Honorable

Messrs. CONKLING and KERNAN,

Senators from New York.

Reared and trained under the conservative institutions of the Empire State, you are justly proud of the privilege, of representing them as part of its sovereign self, in the Senate Chamber of the Union. And that you have, in the present exigencies, been true to them, is best illustrated in the earnestness and unanimity, with which you have advocated and supported a measure for the true ascertainment of the voice of the people of the United States, in the recent Presidential Campaign.

However, as touching her material interests whether sole, or related to those of sister Commonwealths, you hold those differing maxims, which express your several political creeds and alliances; you are at one in challenging for the high type of comity towards those States which her jurisprudence has fostered, their admiration and just regard. Was challenging the word? Rather let it be justifying, and as is apparent, by the same wise procedures which your predecessors in the councils of the nation first inaugurated, and thereafter persistently labored to secure. They filled their role of glory in cementing the bonds of union, by wise concessions, tempered by firm adherence, to the principles of justice and liberty.

Is it too much to say, that in the part they played, they have secured such esteem for the elements of the civilization they sought to perfect, as to commend them, and with them the statesmanship and jurisprudence they have developed; so that the one passes as of the true stamp of patriotism, and the latter has been adopted, as far as the westward march of her bright exemplar has borne its sway?

Bating what is due, urging nothing in the shaping of local customs or special habitudes of various fatherlands and ancestries, there is no idle boasting in saying, that it ought never to be forgotten, (or if it is, it may be allowed in the statement that in schemes tending to discord or anarchy, it has been) that in sterling love for freedom, and firm hold of the sure ways favoring its exercise and permanence, New York, through her civil heroes of the revolutionary period, secured to the Union those amendments to its common bond, which best gave proof, that they had not imperilled store and estate, honor and happiness, life and liberty, to surrender the fastnesses of personal, or the reserves of home or communal rights, ever again to the domain of unjust or arbitary power. They laid well the security of the person, the locality and the commonwealth, against the encroachments of local tyranny, or the more enlarged and skilful plottings of centralizing dominion. And in what they thus sought to do, they wisely consulted the oracles of eternal justice, and expressed clearly what was right, between fellows under a common political tie, and what was due between them and their office bearers.

There is nowhere more clearly imprinted than on the laws and jurisprudence of New York, that jealous vigilance, which secures her offices from intrusion, or if haply an unlawful lodgment is momentarily gained, ejects by summary, yet equable rule, the unauthorized occupant. And it may be safely affirmed, that in no State is there a more wisely matured body of laws, regulating the tenure of political office, securing just responses to organic law, and exacting due obedience to the will of its political sovereigns, when the right of office is questioned or contested. This will be found a happy circumstance, alike in the vindication of your concurrent counsel, against the further unchecked movement of partisan strife, and of that common State pride

which so truly prompted it; and more evidently so, when it is remembered, that but little help can be gained from the organic, enacted or expository law of the general Government. Most of its offices are held by appointment. Of those which are elective, the greater part are subject to the sole cognizance of the constituent bodies of the National Legislature; and as to the residue, which seek fresh incumbents once only in regular periods of four years, no serious question has arisen until now in the opening of its second centennial.

Remembering that what has been stated of congressional, is true also of State legislative bodies, it is to be observed, first, that most of the decisions which expound what the organic or statutory law intends, would be acknowledged in cases of contest over representative offices; and perhaps* with special instances added, illustrate vexed questions in other contested elections: and secondly, as to the residue, they evince it to be equally operative in the simplicity of its aim, and in determining by its canon, the will of the electoral body; and this, whether the subject of contest is projected on the ground plan of society, or culminates near the highest and most commanding part of its superstructure. In other words, the rules are the same, when the method of enquiry is once duly instituted, whether the office in plaint is that of a supervisor of the poor or State Treasurer, or of a town supervisor or Chief Executive Magistrate. The cases are of less or greater rarity, as the segregation or massing, in what may be regarded as political casualties, of the electoral bands in trained opposition and by unforeseen combinations permit, unless in some given instance, what would ordinarily pass as a casualty.

* Whatever use of parallel exposition may be made in the discussion of similar cases, it should be remembered that parliamentary cases (decisions of the House of Commons) are no authority in courts of law.

1 Deac. & Chitty, 449.

must be confronted as a plot; and the combinations show themselves when closely scanned, not only to have been premeditated, but brought into movement, by scoundrels under fair disguises.

If you question the actors, the motives of complicity which first actuated them, express themselves by evasions or perjuries; and if these are shared by each knot of conspirators against the public honor, as credence is gained for this or that tissue of falsehoods, the minds of those innocent of all such nefarious strategies, are perverted with crude or sophisticated judgments, and soon public opinion is a mere phantasmagory. What in the case of a single concerted movement of this kind, and with two parties in a State, may be treated as a binary combination, and as such, a sufficiently formidable antagonism to thorough adjustment, becomes, in the event of its being promoted under various devices, and in several Commonwealths, a study for the most patient of experts, and so intricate, as to render almost hopeless, any means of solution competent to the common mind. And thus, as in the present tri-lemma, where the political intention and action of the electors in these States have been brought into vexed question, in one from gross ignorance or contempt of law in a nomination, and in the other two, from probable or evident design, manifested with less or more clearness, in devising peculiar contrivances to coerce the popular will, into fictitious expressions; it would be quite hopeless for any except those who are set apart, and duly fitted and empowered for an elaborate investigation of each case, to seek to catch the thread of each ravelled sleeve of cunning, and expose its texture in its original design.

Time may not suffice even for the ablest minds to take up the story of these wrongs, given in myriads of versions, and draw therefrom a record of events having the semblance of a high probability. Per-

chance some other method of investigation may present itself, which will render the task simpler as to details, and briefer in cost of time. For it not seldom occurs, that however ingenious or intricate the contrivances of wrong, the perpetrators are seen to have overlooked the compassing of some salient point for trenching, which in the process of right would have been embraced in its investment, and thus themselves disclose the embrasure, through which their nefarious schemes may be espied and counteracted.

And here it may be well further to premise that it would be unwise in the last degree to imagine that in such issues as those to be considered, the actors resort to all the lower kinds of fraudulent device. Any such imagination would in designs of complicated figure lead the enquirer wide of the mark. The end sought being political power, and its subservient patronage, the crudest methods would show the invention of the instant—extemporized—finesse of filching, and reveal the handiwork of the inexpert catspaw or the bungling adventurer. The subtler methods most likely to be relied on by trained political schemers, would lie in the preparatory work of storing power, of cumulating it during a series of clandestine movements, of biding their time until the long expected moment dawned on the maturity of their plot; and then precipitating their hoarded resources and opening their unmasked batteries upon a surprised and overwhelmed population.

Sometimes, then, there is pleaded as an inadvertence or a peccadillo, and as such remittible, what when sternly viewed, reveals an offence against a clear prescription of duty, it may be bald disobedience to organic law. Anon it occurs, that those who are clothed with definite measures of power grasp at those more ample, and allotted in

the ordinances of society to others ; and thus the lower affects to supplant the higher power, and strains its every nerve for victory in so unseemly a strife. But far more dangerous than these extemporized emeutes of ambitious partizanship, are those organized conspiracies, in which the traitors are clothed with the highest honors and trusts, who, not in low haunts, or out of the revels of dark purlieus, but in the Capitol of the Commonwealth's power, under the shade of its mighty fame, and with its sovereign seal, proclaim as the common will and for the common good those legislative acts, whose true and only end is to mine the citadel of the constitution, and in the common ruin, bury the hopes and rights of those who intrusted them with representative power.

In all such cases it is not obligatory to view with microscopic care, the several acts which appear as parts in the concerted movements, or to ascertain their appropriate place in the series. It is enough to allow their apologists so to arrange them as to them seems best, under their elected shape and dress. As in the commonest experience with litigants and criminals, the plunderer or culprit being allowed full liberty to parade his most ingenious statement, is met by the demurrer of his adversary and so most easily abashed and silenced.

But to the law applicable to the status of the electoral votes in dispute, and to such testimony of a general character as is not widely conflicting or brought into serious question. And taking up, in the first instance, the one which presents hardly any impediment of fact, it is to be observed that it is nearly a century and a half since the general doctrine of *votes thrown away* was first promulgated in Westminster Hall. Two of the earliest cases seem to have been decided on general principles of law, as

where in the one of the votes of the majority of electors were silent; and in the other were said to have been "absolutely thrown away," because given for two persons jointly, on single vacancy. In all the cases reported, up to those decided by Lord Ellenborough, as hereinafter adverted to, the questions came up under the special charters of boroughs, first on general grounds of repugnance, and afterwards, as they were affected by the disabling clause of the statute, 13 Car, II. As to the last, the decisions were rendered for a long period in full sustainment of its prohibitions, and then their effect was varied when taken in conjunction with the subsequent enabling statute of 47th Geo. III. In the 13th year of Queen Anne, in the case of Regina *vs.* Boscawen, where ten voted for one Roberts, and ten for the defendant, who was a non-inhabitant, the judgment was rendered on the opinion (as stated by Mr. J. Wilmot, in Rex *vs.* Foxcroft, 2 Burr. p. 1,021) "that the votes given for a non-inhabitant, where inhabitancy was necessary, were holden to be thrown away." This necessity arose from the terms of the special charter under which the election was had, as appears by the explanation given by Lord Mansfield in Rex *vs.* Monday Cowp. p. 539, 'residence' being in this, as it was not in other boroughs, 'a precedent qualification.' In this and like cases, it was said that the votes cast for such a candidate were 'as if he were not *in esse*.'

The nature and law of ineligibility, as affected by the Statutes above cited, are very clearly given in The King *agt.* Hawkins, 10 East., 211, by Lord Ellenborough, who passes in review the previous decisions above adverted to. On the 18th of December, 1806, Hawkins, being candidate, for alderman of the borough of Saltash, against Spicer, had, as his opponent

also, received two votes, when notice of the fact, creating the disqualification of the former under the statute of Charles II., was given, to wit: that he had not partaken of the sacrament within a year next before the day of such election; and thereafter twenty persons voted for Hawkins and sixteen for Spicer. Hawkins acknowledged the fact, when it was first charged, to be true, and allowed his canvass to proceed, probably knowing that thereafter he might, as he actually did, avail himself of the remedial clause in the Act of George III. He became communicant, and within the time prescribed by the Act, to wit., on October 4th, 1809; and thereupon founded his right to retain the office. But Spicer treating the votes of his opponent as a nullity, had been sworn in by two of the aldermen, after the Mayor had sworn in Hawkins, but before the latter had sought to relieve himself of his disability by taking the communion. Inasmuch, however, as by the statute, the disability, even if purged, 'could not restore or entitle' Hawkins to the office, '*already legally filled up and enjoyed by another person*,' and on the ground "that the presumption that every one has conformed to the law, shall stand, till something shall appear to shake that presumption" Spicer having conformed to the Act of Charles, was adjudged to have so filled up and enjoyed, and rightfully to hold the office.

The same doctrines were, after very elaborate argument, adhered to by the same noble Chief Justice, in the two cases of The King against Parry and Phillips; and the defendants, though incapacitated under the same statute of Charles, were held to have been rehabilitated under that of George, having relieved themselves of their disqualification, and been sworn in, *before* their several offices had been filled up and enjoyed by other persons. As an off-set or relief against supplanting

the choice of the majority by the superior dexterity of the minority candidate in so taking possession of the coveted office, it is expedient here to state, that in some cases where electors were ignorant of the fact, that the candidate of their choice was obnoxious to such sacramental incompetency, they were not held as bound, until fully apprized, to know a fact, which until so known, was one merely of *private personal cognizance*; and the minority candidate was not inducted, but a new election was ordered. Hence, the origin of the conclusion which has crept into some learned opinions, and as if it were one of universal application, that if there was not sufficient ground for the imputation of knowledge '*quod* ***quisque*** *scire tenetur*' of the disability, such new election, not only in ordinary, and the lower grades of municipal corporations, but in the filling of offices designated by organic law, should be ordered.

Even though it stands on the highest authority (17 Wall. 322) that a municipal corporation 'is a portion of the sovereign power of a State, and the inference is ready that what is true of a part is true of the whole; still the distinction first suggested by Lord Mansfield (cas. sup. cit., Cowp., 530) can not be overlooked. It is wisely based upon considerations *ab inconvenienti*. He says "There are different kinds of elections; elections of Members of Parliament, verderors, corporators, &c. and different questions may arise out of each. Therefore, they must not be confounded together. * * * * * Upon the election of a Member of Parliament or a verderor, where the electors *must* proceed to an election because they cannot stop for that day, or defer it to another time, there must be a candidate or candidates; and, in that case, there is no way of defeating the election of one candidate proposed but by voting for another; but in the business of corporations it is a different thing."

Seventy years after this opinion was given, its review with that of the others we have cited was elaborately made by Lord Denman in Gosling *vs.* Veley, 7 Adolph, & Ellis 406, a case in which the parishoners of Braintree were convened in a vestry meeting for the purpose of making a vote to repair the parish church; the majority by vote refused to make, and the church wardens and others being a minority, subsequently voted a rate. He says: 'Where the majority of electors vote for a disqualified person, in ignorance of the fact of disqualification, the election may be void or voidable, or in the latter case may be capable of being made good, according to the nature of the disqualification; the objection may require ulterior proceedings to be taken before some competent tribunal, in order to be made available, or it may be such as to place the elected candidate on the same footing as if he never had existed, and the votes for him were a nullity * * * * If it be disclosed afterwards, the party elected may be ousted and the election declared void; but the candidate in the minority will not be deemed *ipso facto* elected.' Referring to the duty of an elector, he limits it to that which is cast upon him * * * 'by the franchise he enjoys' * * * to wit., 'to assist in making an election. If he dissents from the choice of A who is qualified, he must say so, by voting for some other also qualified * * * If he 'will not oppose the election of A in the only legal way, he throws away his vote by directing it, where it has no legal force, and in so doing he voluntarily leaves unopposed, *i. e.* assents to the voices of the other electors." * * * * "If the disqualification be of a sort, whereof notice is to be presumed, none need expressly be given. * * * * Should he vote only for a woman to fill the office of mayor or burgess in Parliament, his vote would be thrown away." And as in the case of Taylor *vs.*

the mayor of Bath, 3 Luders, 324, stated correctly in the King *vs.* Parry, &c., to which his Lordship next adverts, in which counsel "took the distinction between not voting at all and voting for a disqualified candidate," he notes approvingly the answer of the Court in overruling the distinction; 'to vote for a person not qualified, they said, was the same thing as not to vote at all, which, it was admitted, would have been a constructive assent."

It may be proper to state that this case was discussed on appeal to the Exchequer Chamber (see 14 Queen's B., p. 387.), Barons Parke and Wilde, writing the dissenting opinions, which were sustained in the House of Lords (see 4 H. of L's Cases, p. 772) by the elaborate one given by Lord Truro; the final decision on that branch of the case, being that what was true of corporate meetings for elections, was not true of such meetings convened to make a church rate, or to do other business; thus approving Lord Mansfield's view in a double sense.

This history of the decisions cited, would be wholly useless if it failed to show clearly, that the common law rule that *ineligibility worked defeasance of the vote* given for a candidate suffering under it, was, for a long period of time, uniformly sustained in the Court of King's Bench; that not until the enactment of the statute, (which has for years ceased to have any important place in British, and never had any in American legislation), making a matter, presumptively wholly within the personal knowledge of the candidate, and not within that of the electoral body, a ground of defeasance; did the doctrine of notice to the electoral body have any existence. But for this, then, the rule would have been always operative, to the full extent of its penalty, on the occurrence of a breach of any of its mandates.

The doctrines, as laid down by the British Ju-

diciary, have been fully confirmed by the Courts of this country, from the first case decided in the last year of the last century, in the General Court of Maryland (4 Harr. and McH. 279) to the last except one published, in 1 Oreg. 123, in which, singularly enough, with reference to the present question, the statutory phrase in the General Laws of that State (§ 41, p. 708), "the expressed will of a majority of the *legal voters* as indicated by their votes," is reduced to the equivalent formula adopted by the Court in the question put for solution, "which candidate received the highest number of *legal votes* cast."

In the former case Hutcheson (majority candidate for Sheriff) *vs.* Tilden and others, summoned as Judges of Election, the plaintiff claimed that on the third day of election he had acquired property sufficient to make him eligible for the office of Sheriff. But as the language of the State Constitution declaring the terms of the qualification, required it, 'at the time he was (is) voted for.' Chase, C. J., held, that the plaintiff was only entitled to such votes, as were given *after* he had acquired the necessary qualification, and that 'all votes given for a candidate not having it at the time they were so given, were 'to be thrown away and rejected, as having no force or operation in law.'

Later decisions have adopted the rule, as to what sort of notice, voters at public elections are entitled, after the mode of suggestion last cited from the opinion of Denman, C. J. The Superior Court of Indiana, specifies in Gulick *vs.* New, 14 Ind., p. 102, cases (as giving characteristics to a class) in which knowledge of incompetency to hold office might not be inferred; as infancy, non-residency, non-naturalization, not of male sex, not in existence: and adjudged that one who held, by virtue of his being mayor of a city, a judicial office under a State law, with jurisdiction extending

over the county, and as such disqualified by the constitution, from being elected to the office of sheriff of the county, was not only disqualified; but that notice of it was chargeable upon the voters. In 1860, under the then new constitution of this State, which declared eight, as the number of years in any period of twelve, as the limit of eligibility to certain offices; where one having only three years right, was elected for four years, and at the close of the third year was again a successful candidate; it was held that the disability 'was one of which the voters were bound to take notice;' and that they were chargeable with knowledge of the constitutional provision, that incumbents of certain offices specified therein were not eligible to certain other offices. (See Carson *vs.* M. C. Phetridge, 15 Ind., 327, from which it appears that all the cases in the different State Courts prior to 1860 were fully examined.)

The even tenor of the American decisions was well preserved until recently, when in two cases* in Pennsylvania and New York, *it seems* to have been interrupted, and this only from over-nice deductions, perchance to be with great respect to the very learned authors of the opinions given, treated as not essential to the decisions rendered.

In the first case, that of Cluley, who, under a prohibition in the Constitution "that no person shall be twice chosen or appointed sheriff to any term of six years," had been elected by a majority of over six thousand votes in 1866, and duly returned and commissioned as sheriff of Alleghany County, having held such office for the three months of the unexpired term, and for the benefit of the family of his deceased predecessor; it was held (against a stately opinion of Thompson, C. J. who insisted

* Commonwealth *vs.* Cluley, 56 Penn., St., 270; People *ex. rel.* Furman *vs.* Clute, 50 N. Y., 451.

that the number and not the duration of the commissions received was the thing forbidden), that the writ of *quo warranto* was not to be issued as of right to the relator ; and that there were no allegations before the Court, that sufficient notice had been given to the electors of the disability, and *no averment* that if the votes given for Cluley were thrown away, *the relator received a majority of votes at the said election.* On this ground of notice, the views of Lord Denman in the Queen *vs.* Hiorns, 7 Adolph & E., 960 and 3 Nev. & Perry 148, were quoted approvingly.

In the second or Clute's case, the defendant was claimed to have been ineligible, to the office of superintendent of the poor of the County of Schenectady, at the general election in 1871 ; because although being a majority candidate, he had been elected supervisor of a ward of the city of the same name, accepted and discharged the duties of that office, until the 12th day of December then next. On that day he resigned, and by taking the oath, and tendering the bond of office, made claim thereto. Under the general act of 1829, a supervisor of any town was not to be appointed to hold the office of superintendent of the poor in any county ; and this act, by an omission of the revisers was not inserted in the first edition of the Rev. Stat., and did not appear in any compilation thereof, until the 4th edition. In 1853 this law, referred to as in such 4th edition, was amended, so as by express terms to prevent such election, as well as appointment and by an amendment to the charter of the city in 1862, its supervisors of wards were made subject to the provisions of law applicable to like officers in towns. The amending law of 1853, was held by the Court of the highest resort and ability to have sufficiently expressed the intention of the Legislature, and not to have been an unconstitutional infringement on the rights of electors; for the reason that the

office of superintendent of the poor was originally filled by appointment, and was not set up as elective by the Constitution of 1846, but by act of the Legislature the year following. On the remaining question of Clute's tenure, it was held that the doctrine of Westminster Hall was appropriate in saying "to the elector, who, ignorant of the law which disqualifies, has voted for a candidate ineligible, your ignorance will not excuse you, and save your vote; the law must stand, and your vote in conflict with it must be lost to you."

But the very learned judge Folger, who wrote the opinion of the Court, adds that the doctrine could not be carried further, and charge "upon the elector such a presumption of knowledge of fact and law as finds him full of the intent to vote in the face of knowledge, and to so persist in casting his vote for one, for whom he knows that it cannot be counted, as to manifest a purpose to waste it." This proposition as one of intent to be raised as of law from the peculiar mode of conducting elections and their preliminaries in this country may be adverted to further on. Unquestionably, on the facts in this case of Clute's as before the court, there was not sufficient ground of evidence of such knowledge of fact, on the part of the electors of the county, outside of the ward, of which Clute was supervisor, as there was on the part of those within it, to wit, of his holding such office. Nor was any suggestion made in the pleadings or on the trial below, which, as in some of the English cases, brought the knowledge of the facts constituting the groundwork of the legal disability (see Queen *vs.* Mayor, 3 Law R. Q. B. 629) home to the whole body of electors, or to any part thereof, so as to work any other result than that their votes were cast away. But that no such accompanying disregard of the facts of the ineligibility of their candidate, was brought to the

knowledge of the majority, as that they, resolved to abstain from exercising their franchise, and so elect the minority candidate, there can be not the slightest doubt ; nor ground of exception to the concordant validity of the judgment of the Court, on the record before it.

That there is an essential difference between the electoral customs of Great Britain and of this country, in the manner of conducting elections, is indisputable ; and it is equally clear that the customs vary in two marked particulars, the first having reference to the manner of voting, and the second, though prior in point of time, to that of nomination. As to the first, in Great Britain the vote is *viva voce* ; and in case of any sufficient cause, as of disqualification, ascertained after the vote is given, the original can be cancelled and a fresh vote cast. In this country the vote is by ballot, and when once deposited is beyond the control of the elector for any cause, because when once in the ballot-box it becomes the common property of the whole electoral body. The power over his vote until the close of the polls, gives considerable latitude to the British elector in the exercise of his duty towards himself and his vote, for ascertaining any possible disqualification of his candidate, and correcting his blunder before it is too late. But to a citizen of any State in the Union, the known absence of any such power, devolves upon him the highest sort of vigilance, as to the eligibility of those for whom he casts his ballot, unless he is content to suffer the legal penalty of any remissness and to throw his vote away. What would be a curable blunder in the one case, is an unpardonable breach of his electoral duty in the other. So that, following other legal analogies, judgment for any such breach ought to be administered in a more summary manner, and on stricter requirements as to the exercise of vigilance, and

the possession of due knowledge, than in a conceded case of remissible negligence.

This prepares the way for the suggestion of the residuary difference of electoral custom, as to the nomination of candidates. In Great Britain candidacy is mostly announced by him who seeks the office, or by some of his friends who are for this purpose in law his agents. In this country, as the most general, if not universal rule, the electoral body in its different parties, makes its own nominations ; not, it is true in a mass meeting of the whole for that purpose, but through its several nominating conventions, which to such end are virtually constituted, the several agents of the respective parties into which the whole is divided. And such is the almost absolutely necessary obligation of party ties, in order by concert of action to effect the aim of such party, that the principal is bound to render due support to the nomination made by his constituted agent, who in that act, not only by common consent binds his principal, but as his representative is charged with all the vigilance which his principal would otherwise be directly responsible for, in respect to the eligibility of his candidate. And hence, while in a given case it might be impossible to bring home to the members of the electoral body—who, in some cases, might be counted by hundreds of thousands—the requisite knowledge, it is comparatively easy to do so with reference to the small numbers of those duly constituted party agents, who make up political nominating conventions.

Applying these principles, in conjunction with those judgments which have stood one hundred and fifty years nearly, as the basis and bulwark of the Anglo Saxon law of elections, to the case of Oregon in the electoral count ; it is of the strongest possible presumption, that the convention acting as the authorized agent of the party who voted the

electoral ticket with the name of Watts on it, knew him, and of him well enough, to know him as holding an office under the General Government at the time of his nomination. Hence it follows that those voters of that party who in their ballots accredited the nomination made by their duly constituted agents, acted in such persistent defiance of the mandate in the General Constitution which declares that "no * * * * person holding an office of trust or profit under the United States shall be appointed an elector," as to fall under the condemnation of those who are chargeable with the knowledge of ineligibility, and of so acting as if they had absented themselves from the polls, and thus elected, the minority candidate, Cronin.

If this argument needs supplementing of its resources, by collateral proof drawn from other sources, it is readily found as a sequence from the recent amendments of the Constitution, which declares a citizen of each State to be also a citizen of the United States or in more exact form of the proposition, one who is of the latter class to be of the former in the State in which he resides.

Now, if a citizen of a county is bound to the knowledge of the fact that such or such a person is sheriff of that county and not re-eligible for a term immediately succeeding the one held by him; if a citizen of a State is bound to the knowledge that 'no member of the Legislature shall receive any civil appointment within the State or the Senate of the United States from the Governor * * or Legislature, or from any city government during the term for which he shall have been elected;' each of which laws of disqualification are in the constitution of the State of New York; then by parity of reasoning, a citizen of the United States as such, is bound to take notice of like disqualifications of persons holding offices of trust or profit, as are expressed in their Constitution.

Therefore, if the electors of Oregon, through their authorized representatives, met in the convention which nominated him, are to be presumed to have had knowledge of the fact that Watts held an office of trust or profit under the general Government; and in their proposed nomination and alleged election of him, as a Presidential Elector, were acting as citizens of the United States as such in the fulfilment of the power vested in them as such under its Constitution, to appoint as they, as citizens, and with other citizens of the State, might see fit by legislative enactment to direct; and were, as citizens either of the United States as such, or of the State as such, bound to take knowledge of certain inhibitions imposed on such power of appointment; then they had such combined knowledge of the fact and law constituting Watt's ineligibility, that their votes for him were nullities, and as if those giving such votes had not expressed any choice. Hence, those given for his opponent being a plurality, were the only legal votes cast, and the certificate given by the Governor of the State to Cronin, as the law of the State directed, cannot be impeached.*

If there exists a mawkish sentimentality that the votes of a State are to be held in law according to a professed intent on the part of those claiming to be a majority of its voters, it can only be entertained by minds who fail to perceive that there is but one secure way for ascertaining that intent; and that by methods duly instituted and perfected for the ascertainment of what are true votes, and their ascendency over such as are given in disregard of law. In this age, claiming for the people of this country, exalted measures of wisdom and intelligence, there should be a proportionate patriotism, which will, for the common good, exact such evidence of wise and intelligent conduct on the part of the nominating

* These views may apply to other cases of ineligibility.

conventions, who represent millions of freemen, as would be manifest in a fair knowledge of their organic laws, and the disabilities they proclaim, and intend to be practically enforced. Any relaxation of such a requirement is a premium for those who, with the criminal classes of society, rejoice in the contempt of duty, and in the plea of ignorance.

From so lengthened a discussion, as that which the neglect in some quarters to subordinate *conditional subsequent qualifications* to *categorical precedent limitations*, has rendered imperative, the transition to the second part of this thesis, is grateful as its statement is freed from the ambiguities of seemingly conflicting cases. The distinction as to range of power and limits of duty between those who count votes and those who enquire into their legality when thereunto required is simple and clear. The former are those clothed with ministerial and the latter with judicial functions. The former* can never assume the province of the latter, who may revise and so control their doings. The rules of law which mark these distinctions have never been questioned, and are so familiar† that their statement should be terse. The acts of a Board charged by law with canvassing the votes of a district or State, in the tabulation of the votes, are of a lower grade of evidence than the votes themselves, and the lists as certified by such board may be corrected by the votes. The office of a higher canvassing board, is limited to the ascertainment of that which is regular on the face of the returns, made by an inferior board to them. They have no right to go behind them, on the ground even of fraud. This alone is the province

*2 Ld. Raym 938, 1 Bro. Par. Cas. 45, 11 Johns, 114.

† A few of the prominent decisions in different States are added : 13 Ala., 805 ; 8 N. Y , 67 ; 28 Cal., 123; 13B. Mon, (Ky.) 515 ; 16 Ohio, St., 104; 16 Mich., 283 ; 29 Ill., 413 ; 4 Phil., 362 ; 10 Minn. 107 ; 27 N. Y., 43 ; 1 Oreg., 149 ; 3 Hill, 42 ; 12 Barb. 217 ; 33 N. Y. 603.

of a judicial tribunal, which has this high prerogative, that when a given return is before it by proper process, its power over the return is conclusive against any act of the board, except that which the tribunal directs. The Board is bound to amend its ministerial work as required to do, and any attempt to evade an order of the Court is futile. If then it shall appear that the return of the State Canvassing Board of Florida was amended by them, after the same had been passed in review by the State Court, and thus became subject to judicial jurisdiction, there can be but little difficulty in reaching the conclusion, that that act was not only in contempt of judicial power but '*ultra vires.*'

Any irregularities which are not charged to affect, and do not change the result, and also it may be inferred, (though express decisions do not go so far) any acts of fraud, which prove to be impotent of mischief, are not grounds of exception, either before the judicial tribunals or the highest ministerial boards. These latter officers, "having *once* canvassed the votes returned, have exhausted their power over the subject and *cannot afterwards revise their decision* by making a different determination;" nor having "once reached a determination *can they be convened by mandamus from the Supreme Court*, for the correction of any errors therein." Moreover, they have "no right to discriminate against the returns sent up to them, even on the ground of fraud if the same are regular on their face," unless by some special privilege conferred on them by statute they have that extraordinary power.

The peculiarity just hinted at, anomalous as it is, to Anglo-Saxon notions, exists, however, in the State of Louisiana. "Out of the parish of Orleans, there is no law providing for a judicial scru-

t ny into the votes for any other than parish officers," 13 La. Ann'l, 89. Affirming the continued state of the law to the present time, Judge Taliaferro says in Collins *vs.* Knoblock, in the 25th vol. of the same series: "If the statute of 1870 is liable to just criticism, it is no fault of the judicial tribunals. It is not for them to declare it *infamous, even if it be so.*"

In the case of this State the returning Board, to suit its own political penchant, or as is said to subserve the will of its masters, in this device, has manipulated the electoral vote of that State, and made it to count on the other side, by rejecting the votes of certain parishes. This it claims to have done under warrant of a State law,* which authorizes the Board so to annul such votes, whenever it is satisfied that acts of gross intimidation of the description set forth in the statute, have been developed in any parish or parishes so as "materially to interfere with the purity and freedom of the election" during its progress. It seems passing strange, if not worse, however mildly or glibly such revisory control is phrased, that an arrant usurpation of the highest right of American Sovereigns, should be couched under color of title to such official franchise and vested by a statute in a ministerial board. To the electors of at least every other Commonwealth in the Union, such plenary power, when dormant, appears as the highest conceivable species of intimidation, and when exercised an unparalleled effusion of organic crime. Such wholesale disfranchisement of communities authorized to perpetuate in its wildest extravagance, the evil it professes to redress, was never achieved, by any autocrat of the old world, unless he defiantly threw

* Title Elections. § 55, Digest of the Statutes of La., in 2 vols., by John Ray. Published by authority. New Orleans, 1870.

his sword in the scale ; nay, no imperialism of any age ever ventured to put forth such a pious fraud.

Concede the facts, as in the premises of the Statute presumed, of acts of outrage, violence, tumult, or whatsoever *additamentum* of intimidation, may be in the last degree possible and consistent with the equally patent facts, which the returns from these parishes evidence, that multitudes, undriven by force of arms or other engines of violence, untouched with fear of any semblance of outrage, or of any apparitions of tumult, remained at their posts, and without molestation from which they suffered bodily harm, cast their ballots. Concede further, for the sake of the argument, and to give the words of the statute their grossest possible significance, that there were hostile bands set in array, not only to threaten, but to molest with dire penalties, affecting life, liberty, and property, voters who would not comply with their exactions open or covert, as to the vote to be cast! Concede this aye more! than the advocates of the high social standing, and moral purity of the members of this board allege was the measure of outrage and tumult which justified its course! Now then, these prowling Parthians, if they assumed at any time, that they materially interfered with the purity and freedom of the election, a bodily shape, were part of the communities, in the cases given, terrorized, or they were foreign to it. If they came to the scene of outrage as marauders from without, it would seem that every prompting of manhood, as well as the special provisions of the statute for such emergency enacted, would place in instant deployment, the constabulary, and if necessary, the posse of the precinct to repel the ruthless invasion. If they were partizans of the vicinage wrought up by the violence of frenzy, to coerce reluctant suffrages to the support of the ticket they had resolved to carry,

were there no summary means of redress in the issuing of warrants, or in those agencies known to the laws of other States, adequate at the time to arrest the progress of the outrage, or at some future day to bring its perpetrators to condign punishment? But, if in either case, no such or other adequate measures of redress were at hand, and the honest electors were overborne, their will supplanted, or at the worst, their ballots destroyed, and the polls closed; then the stricken district would have had consolation in this, that they had succumbed to an overwhelming disaster, improvised by their enemies, unforeseen by them, and not been obliged to take up the lament, as now they must, that they were ordained in the absence of all peril of which they were conscious, (save that at the last, 'four rogues in buckram let drive' at them), to a like calamity and a worse disgrace.

Can such things be? enquire wondering freemen from the coast of Maine, that flouts the boisterous Atlantic, to the gate of California, that woos the gentler Pacific. It may be that the only State, of the thrice thirteen, which ignored the beneficence of the common law remedies for electoral rights, withheld by fraud or force, is at the mercy of an incomplete or emasculate system. But if so, is there nothing of organic law under our boasted Union, is there nought of our common liberty, or of the light that heralds its orbital course, repercussed from the bright galaxy of the constellated States, that can lighten the gloom of this lone eclipsed State? If there be none, then the champions of Louisiana's servitude have the day! Then the fear of conjectural danger is wiser than the readiness to meet it face to face; and statutes should be planned and executed by those "who fear the report of a caliver worse than a struck fowl or a hurt wild duck."

If this be so, then the proposition of law to be stated in the abstract is this, that it is within the

constitutional prescription of personal liberty in the exercise of the elective franchise by citizens of a State, that if a given number of them, belonging to or outside of any district, commit, at or near a poll, acts of violence, within the purview of any statute touching intimidation of voters by acts therein specified, that not only the terrorists, but those who, under theory of the statute are terrorized, become, and of right ought to be disfranchised! And if this be so, then freemen may deem it better policy that laws should be silent, and arms reign, and that if unsafe in the right, they be forewarned in time to be secure in might; and so maintain in their choice of untrammeled liberty, the liberty of choice, irrepressible by domestic conspiracy or foreign aggression.

It is horrible to think, as sometimes it happens in the convulsions of nature, and the swift aberrations of its forceful elements, that the innocent should suffer with the guilty. But that this sentence should, save in the direst of social extremities, pass into execution—that it should be enacted in the semblance of a law! Why, this is the mockery of that instinctive love for right, which is before all law, and of which this, if not a spurious birth, is its creation.

To the Constitution, as the Aegis of our liberties, one turns with promptitude, unless he be wise in the learning of its expounders. And the temptation is great when this is looked into in its latest lucubrations, to wish in right earnest, that the views of Mr. J. Field* were available for a State, all but wrecked by its own legislation. But notwithstanding that the general design of that instrument as sketched in its preamble, is, among other things, to establish justice and "secure the blessings of

* Slaughter House Cases, 16 Wall., p. 96. See also opinion of majority of Court, pp. 74–8.

liberty," notwithstanding the clause guaranteeing the comity of the privileges and immunities of citizens, as between States, and the recent amendment which declares that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;" the majority of the Supreme Bench have decided that even the latter clause was not especially "intended as a protection to the citizen of a State against the legislative power of his own State;" that the privileges and immunities referred to in the amendment were simply those which by previous decisions of that tribunal, had been designated by the epithet "fundamental," and placed under the limited powers granted to the general government; and were by the Fourteenth article of amendment to be understood "as the privileges and immunities of a citizen of the United States *as such*, as distinguished from those of a citizen of a State *as such*," that it was not contemplated under the "power granted to enforce that article, to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States," nor to constitute the Supreme Bench a "perpetual censor upon all legislation of the States, with authority to nullify such as it did not approve;" and that such civil rights "rest then for their security and protection where they have heretofore rested."

What then, for all time, in the privilege and immunity of suffrage—the most potent of all civil rights in the preservation of the republic—is to rest as a right underived from the general Constitution, and as an original right in the citizens of each State, must find its surest record in the Bill of Rights written on the organic law of each State. And if ever thence obliterated by anarchy, or by misrule deprived of its true efficacy, it is in such case summarily to be restored to its place and

just power by the will of the United States, who have guaranteed to each State the essence of a republican form of government.

If there be any chance, then, of avoiding this ultimate and summary interposition by the strong arm of the nation, recourse to the *Constitution* of Louisiana, as opening the present door of her escape, is to be had. That instrument, in the second article of its first title, declares its citizens to be embraced under the designation of those "born or naturalized in the United States and residents of the State for one year," and guarantees, under the general clause "they shall enjoy," to *each one* what is accorded to any other citizens, and among other rights the same * * * political * * * * * rights and privileges."

It is in the spirit of the ninth article of amendment proposed, as above hinted, by the patriots of New York to the constitution of the United States that the fourteenth article of this title adds: "The *rights enumerated* in this title shall not be construed to *limit or abridge* other rights of the people not herein expressed." The ninety eighth article, of the sixth title, declares that every male person of the foregoing description "of the age of 21 years, &c., shall be deemed *an elector*, except those disfranchised by the Constitution, and persons under *interdiction*. The persons as in the first class are in the succeeding section specified as those *convicted* of treason, perjury, forgery, bribery, *or other crime punishable in the penitentiary*, while those incapacitated under the 3d section of the 14th Article of Amendment of the Constitution of the U. S., are intended for those of the second. Article 102 especially declares, and it is an unusual declaration, except, perhaps, as a more specific limitation of the last clause in the 8th Article of the Amendment, as above referred to, that "*all penalties shall be proportioned to the nature of the*

offence;" and Article 103 adds, that "the privilege of free suffrage shall be supported by laws regulating elections, and prohibiting, under ***adequate penalties***, all undue influence from power, bribery, tumult, or other improper practice."

Reference may be briefly made to those sections of the statutes which were passed in seeming compliance, at least with these constitutional provisions. § 10 requires the commissioners of election to preserve order and decorum, and gives them power to commit any offender to prison *provided he first be permitted to vote before his actual incarceration.* This, it may be remarked in passing, is a singular and very highly commendable support of the guaranteed right of the offender as an elector, and prior to any *adjudication* of his guilt. By the same section they are also *required* to issue their warrants for the arrest of disorderly persons. By section 29 the commissioners are required to make, in duplicate, a clear and full statement of all the facts relating to, and of the effect produced by any riot, tumult, acts of violence, intimidation, armed disturbance, &c., in preventing a fair, free, peaceable and full election; and of the *number of qualified electors deterred thereby from voting*, which statements are to be corroborated under oath by three respectable citizens, qualified electors of the parish. These statements are to be forwarded to the supervisor of registration and by him to the governor.

§ 35 requires that the elections for electors for president and vice-president of the United States, shall be held and conducted, and the returns thereof made in the manner prescribed by law for the general elections; and by section 55, the returning officers are requested first to complete their statement from all polls where there has been a fair, free and peaceable election; next, to proceed to *investigate* the statements of riot, tumult, &c. at other polls, and, if satisfied that they

did not materially interfere with the purity and freedom of the election, to canvass and compile the vote ; but if not *so satisfied, to examine further testimony, and if therafter* they shall be *convinced* of the truth of such statements, *then not to canvass or compile the statement of such vote, but to exclude it from their returns.* Without stopping to animadvert on the *very orderly methods* of what is popularly if vulgarly yclept "gerrymandering," the vote, which the Legislature saw fit to prescribe as the requisite compliance with the Constitutional mandate in this regard; this summary of statute law will be completed in the statement that § 59 declares the offence of interfering with an elective officer of whatever grade, by violence or threats thereof, abusive language or other species of intimidation, * * to be a misdemeanor and prescribes its penalty by fine, from one to three hundred dollars and imprisonment from one to three months, while § 60 * declares riots, tumults, acts of violence, intimidation or armed disturbance, at or near any poll, to be felony, and their penalties to be fines from one to five hundred dollars, and imprisonment from six months to two years. Would it be believed that, almost in the same breath, *false registry and voting* declared together with these atrocious acts of riot and armed disturbance, which are, besides the personal vengeance visited by law, to cancel the entire vote of a precinct, to be felonious, have as penalties meted out fines, the same as for riots, &c., but as to *imprisonment*, the shortest term is increased by 100 and the longest by 50 per cent.

The arraignment of the section of the statute which commands under the circumstances it recites, the cancellation of the entire vote of one or more of the parishes of the State, as being '*ultra*

* All the sections of the Statute on Elections, as referred to in the text, are as numbered in the digest noted on page 22.

vires,' is easily and to be briefly sustained. And first, the Constitution, in guaranteeing equality of political rights and the electoral franchise to every citizen, except those disfranchised for crime, &c., and that *after conviction* ; does not, and could not, authorize the passage of any law which effects the same result *before* conviction. Secondly, a returning board is not such a tribunal as is empowered to try an offender, much less to mete out to him a prescribed punishment, the more especially as its methods have no parallel except in the odious precedents of the Star Chamber. Thirdly, no person can be convicted of a felonious offence without indictment, and in the commune in which his offence is charged to have been committed, a due trial by a jury of his peers. Fourthly, the statute cannot be deemed to be a furtherance of the constitutional requirement of Art. 103, which requires the privilege of free suffrage to be *supported* by laws regulating elections, and prohibiting, under *adequate* penalties, all undue influence, &c. First, because the law, instead of seeking to give the required support, essays indirectly, and by circuitous processes, to *destroy* that free suffrage which it is commanded to support by proper laws, and the prescription of adequate penalties—and secondly, because the previous section having declared that all penalties shall be proportioned to the nature of the *offence*, cannot so be, if measured out to *others than the offenders*.

The power reposed under the Constitution of 1868 in the legislature to pass laws for the protection of the right of suffrage is not a novel one in the history of the State of Louisiana. The constitutional provision is the same *totidem verbis*, with that in the former preceding organic charters adopted in 1862, 1852, 1845 and 1812. And until within a few years, the extinction of communal rights of suffrage was never dreamed of, as an adequate pen-

alty for the wrongs sought to be guarded against. "The unconstitutionality of the police provisions of an election law' has been declared by its Supreme Court '*not to render the vote illegal* and thus disfranchise the electors.' '*The legislature cannot*' the same opinion* declares,' *by encompassing with unconstitutional provisions an election law, make the votes of the electors null and void.*"

The true nature of the effect designed to be prevented by any proper police law passed to secure elections against the evils to be remedied under the Constitutional mandate, is clearly expressed in subsequent decisions† by the same tribunal. The petitioners for a *quo warranto* against the defendants, holding the offices of mayor and councilmen of the town of Carrollton, represented that their election was carried on by intimidation, tumult and the interference of degraded banditti, and sought to go behind the certificates of the election. The writ granted by the District Court was dismissed for the reason that it was *not alleged*, "*that a sufficient number of voters were prevented from voting to have varied the result of the election.*"

The scope of any constitutional law, and its final intent, are thus given in full interpretation of Lousiana's organic law, by its own tribunals. It seems unnecessary to say that such exposition finds its counterpart in the decisions of other States, and that the condemnation by the local tribunal, of ***a like law*** with that under which this Returning Board acted, and of such acts as it was guilty of, will meet the approval of all jurists. And unless such decisions can be shown to be hostile to the Constitution of the United States, they must stand, and without appeal, as the valid judgment of the highest competent tribunal; the Supreme Court at

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* Andrews v. Saucier, 13 La. Ann. 301.

† State v. Mason and others 14, do do 505.

Washington having declared,* that "it has *no authority to revise a State Statute, upon any ground of justice, policy or consistency with the State Constitution.*" It thus becomes unnecessary to enter upon any discussion of this law or the action under it, as within the exercise of such proper police power, as has been accorded by the Supreme Court of the United States, when claimed by acts of legislation, held by the Courts of the State who passed them to be in conformity with its own Constitution.

We have reached the outlook of the thesis last proposed, that a law which inflicts punishment on the many, for the guilt of the few, is not one of vicarious substitution, but of accumulated outrage of punitive exaction, against the first principles of social order and political right, and wholly inconsistent with the spirit of our institutions.

If the considerations presented may, in any particular, contribute towards the adjustment of the problem soon to be decided, and offer views which have not been made familiar in the public discussions of the body adorned by your presence, the design of the writer will have been accomplished.

With sentiments of high consideration, I remain your obedient servant,

A. B. CONGER.

No. 120 *Broadway, N. Y.,*
January, 30th, 1877.

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* 17 How. 456. See also, 12 Wheat. 153. 8 Wall. 575. 9 Wall. 35. 17 Wall. 648. 18 Wall. 71.