

WEST VIRGINIA CONTESTED ELECTIONS.

1872 ?

Mr. G. W. HAZELTON submitted the following

VIEWS OF A MINORITY.

The undersigned members of the Committee on Elections, while concurring in the conclusion of certain members of the committee as to the invalidity of the so-called October election, find ourselves unable to concur in the opinion that the so-called August election was also invalid, and beg leave to submit to the House such views as seem to us to have a bearing on the subject.

There are two cases, we may premise, which were discussed together, and treated by the distinguished counsel who appeared before the committee as standing upon the same grounds, and we assume that the views and considerations which control the action of the House in one case will also be applied to the other.

The case seems to us to turn largely, if not entirely, on the construction of a statute which we quote—the statute of West Virginia, passed in 1869, for the purpose of providing the necessary legislation touching the holding of elections in that State.

The first two sections of that statute are as follows :

1st SECTION. The general elections for State, district, county, and township officers, and members of the legislature, shall be held on the fourth Thursday of October."

2d SECTION. At the said election in every year there shall be elected delegates to the legislature, and one senator for every senatorial district. And in the year 1870, and every second year thereafter, a governor, secretary of the State, treasurer, auditor, and attorney-general of the State; a prosecuting attorney, surveyor of lands, recorder, and the number of assessors prescribed by law, and a Representative in the Congress of the United States, for the term beginning on the fourth day of March next after the election, for every Congressional district.

The first section is but a substantial re-enactment of a section of the original constitution of the State, but this fact is not material to the discussion.

A constitutional convention, duly called, and sitting at the capital of the State, in the winter of 1872, prepared a new constitution, and submitted the same, with a schedule, to the people of the State on the fourth Thursday of August, for adoption or rejection, and also provided for an election of the officers contemplated by the new constitution on the same day.

The provision of the schedule is as follows :

On the same day, and under the superintendence of the officers who shall conduct the election for determining the ratification or rejection of the constitution and schedule, elections shall be held at the several places of voting in each county, for senators and members of the house of delegates, and all officers, executive, judicial, county, or district, required by this constitution to be elected by the people.

Under this authority the constitution was adopted; a governor, members of the legislature, judges of the courts, and all the officers down to constables were elected, qualified, and entered upon their several offices.

At this election, Davis in the first district, Hagan in the second, and Hereford in the third, were elected to the Forty-third Congress.

Another election was held on the fourth Thursday of October, the day designated in the old constitution for the general election, at which Wilson was elected in the first district, Martin in the second, and Hereford elected, or re-elected in the third.

The question is, which of these, if either, was the valid and legal election? Was it the election held in October?

By turning back to the sections of the code of 1869, before quoted, it will be seen that the general elections for State, district, county, and township officers, and members of the legislature, was to be held on the fourth Thursday of October.

The second section says:

At the said election * * * in the year 1870, and every second year thereafter, a governor, secretary of state, &c., "and a Representative in the Congress of the United States" shall be elected.

At the said election; at what said election? Clearly that election mentioned in the first section, to wit, the general election for State, district, county, and township officers.

The word which is employed to introduce the said second section, as well as the general meaning and obvious intent of the section, render this very manifest.

At the said election for State and local officers, Representatives shall be elected. "At," in its ordinary and usual application, as applied to time, means contemporary with, in conjunction with.

Now, how can it be claimed that Representatives in Congress can be elected at the general election for State and local officers on the fourth Thursday of October, when there is no general election for State and local officers on that day? Observe the language: The section does not read "on said fourth Thursday of October" Representatives in the Congress of the United States shall be elected, but *at the general election for certain officers* therein named, on the fourth Thursday of October, Representatives shall be elected. The whole significance of the section is destroyed by the construction sought to be put upon it, for the purpose of sustaining the October election.

Take an illustration:

Suppose the first section of an act of the legislature of West Virginia to provide as follows:

SEC. 1. The annual meeting of the legislature for the State of West Virginia shall be on the fourth Thursday of October.

SEC. 2. At the said meeting, the governor shall deliver his annual message, &c.

Suppose, now, a subsequent legislature strikes out "the fourth Thursday of October" in the first section, and inserts in lieu thereof "the fourth Thursday of November."

The governor, under the logic of the "October election," would deliver his annual message "at the said meeting, a month before the meeting should take place."

Again, we fail to understand what authority there was for holding an election for Representatives in Congress only, on the fourth Thursday of October. The law of the State, the code of 1869, regulating the manner of holding the elections, prescribing the officers who should conduct the same, directing as to the making returns, &c., had reference to the State election, the election of the officers of the State government as distinguished from the Federal Government. The election of Representatives in Congress was hinged on to the State election. It was a mere incident of the State election. They were to be elected at the general election for State and local officers.

Where is the authority for setting in motion the machinery provided for the *State* government, to elect Representatives in Congress alone? Who is to give the requisite notice; who to act as inspectors; who to furnish places for conducting the election; who to make the returns and declare the result? The code of West Virginia does not require one of the officers named in the election act to take a step or lift a finger at any election of Representatives in Congress apart and distinct from the State election. Their duty relates exclusively to the State election, and the election of Representatives in *connection with* such election.

This being so, the State had clearly failed to prescribe any "manner" of electing Representatives in October as required by the constitution of the United States, and so no election of such Representatives could take place at that time.

These considerations seem to us conclusive as to the utter invalidity of the October election, without adverting to the obvious intent of the legislature in keeping together the election of Representatives in Congress and officers of the State government, as manifest in the language of the second section of the code. We therefore dismiss the October election as clearly invalid.

And this brings us to the other question.

We ask the reader to turn back again to the sections of the code of 1869, and the provision of the schedule above transcribed.

The convention of 1872 having the clear and undisputed power to change the time of holding the State election for that year as for 1874 and subsequent years, did, as we have seen, change the election for all the officers required by the new constitution to be elected by the people for 1872, from the fourth Thursday of October to the fourth Thursday of August, subject, of course, to ratification by the people.

In legal effect, the convention struck out of said section one of the code the words "the fourth Thursday of October" and inserted "the fourth Thursday of August."

The first section being thus by competent authority changed as stated, the second section, it will be seen, follows and applies without the change of a word or a letter to the first section so amended.

Thus it will be observed that there is nothing in the language of the second section which refers it necessarily to the election for State and other officers to be held on the fourth Thursday of October.

This is but another method of saying that the legislature of 1869, when it framed the election law and provided all the machinery for conducting an election, and enacted that Representatives in Congress should be elected *at said elections*, intended to point out and designate the *occasion* for electing such Representatives; intended that the one election should be held in conjunction with the other; in other words, that when it provided the means or agencies for holding the State election, and authorized Representatives to be elected *at the time* of said election, and under and by virtue of the machinery *for* said election, it did not intend that Representatives in Congress should *not* be elected at said election and *without* any legal "manner" whatever provided therefor.

Connecting the election of Representatives with an occasion was, moreover, entirely in harmony with the practice of the old State of Virginia, which for some forty years, it seems, was authorized to elect Representatives in Congress under a statute which fixed the election at the holding or opening of certain terms of court, which latter were constantly changing with successive acts of the legislature.

It being, we think, clearly the purpose of the legislature that Repre-

sentatives in Congress should be elected at the general election, it follows that when the occasion was changed, transplanted, the election of Representatives in Congress went with it.

But, in reply, we are told just here that the election in August was not the general election. It is true it was not expressly called in the schedule a general election. But it is equally true that it was provided to take the place in every particular of the election mentioned in the code as "the general election," and it is also true that it could not have been more general if it had been so declared by the said schedule. It matters little what it was called. What was it in fact?

It is true it was not held at the same time as had previously been designated for the general election, but uniformity of time is not of the essence of a general election. It may be one year in October and the next in November, and yet be the general election. In the State of Iowa, for instance, the general election every fourth year is held in a different month from that in which it occurs in the intermediate years.

The legislature in a State where there is no constitutional inhibition, may change the time of the election every year or every other year, but it is no less the general election.

It is true it was not "to count" in case the constitution should fail to be ratified. It is equally true that an acknowledged general election does not count in case of a tie. If a mere uncertainty as to results varies the case in one instance it does in the other.

It is *not* true that it was an election simply to ratify or reject the constitution. It was equally an election—made so by the same section of the schedule—to officer the State. Every officer required to be elected by the people, from governor down to constable, was to be elected on that day. The people were required to do exactly that thing in August, 1872, which in October, two years before, was known to everybody to be the general election, and which all concede will be the general election when it occurs in October, 1874; and yet for some reason it is insisted that it was, nevertheless, not a general election then. It is unnecessary to enlarge upon what is a general election. Definitions are easy. The case under consideration seems to us to comprehend all the elements of what we every day speak of and recognize as a general election. It was the only general election held in 1872. It was intended to and did provide the entire official staff of the State government, from highest to lowest, as will appear from the ticket used by the voters on that occasion, a copy of which is transcribed; and if not a general election within the fair and ordinary meaning of the term; we confess our inability to discover wherein.

Ticket.

For governor:
 For auditor:
 For treasurer:
 For attorney-general:
 For judge of court of appeals:
 For superintendent of free-schools:
 For Congress, second district:
 For judge of second judicial circuit:
 For State senator, tenth district:
 For house of delegates:
 For sheriff:
 For clerk of circuit court:

For clerk of county court:
 For president of county court:
 For prosecuting attorney:
 For surveyor of lands:
 For assessor, eastern district:
 For assessor, western district:
 For magistrates:
 For constables:
 For inspector of election:
 For purchase of poor-house farm:
 Against purchase of poor-house farm:
 For road surveyor, — district.

This brings us to the question whether, conceding that the August election was the general election for State and local officers in 1872,

and that the second section of said code carries the election of Representatives to it, the time was sufficiently "prescribed" within the Federal Constitution which declares that "the times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof."

We maintain the affirmative of this proposition. Even if we concede that the word "prescribe" shall have here its narrowest and most technical signification, there seems to us to have been a sufficient prescription of the time.

The schedule submitted with the new constitution provides that, in case of adoption, the same shall be deemed and taken to have been in force from and during the whole of said fourth Thursday of August. The law knows no fraction of a day. Being ratified, it became and was in fact as well as legal intendment, the law of the State prior to the opening of the polls on that day. The time was therefore prescribed, when the ballot-boxes were opened on that day. That is to say, the law-making that day the day of the general election for State and local officers was in force before a vote was polled.

But it is said that this was not a prescription of the time, because, if the constitution had not been ratified, the election would have amounted to nothing. Saying nothing just here about the impolicy and injustice of applying so technical a rule for the purpose of disfranchising a State, we submit that it is too late to raise that question. In a series of cases running back through many years, the House has given another and different construction to the word.

The constitution of California was, without any enabling act, framed on the 13th of October, 1849. It was ratified on the 13th of November, 1849. The eighth section of the schedule contained these words:

At the general election aforesaid, namely, the 13th day of November next, there shall be elected a governor, lieutenant-governor, members of the legislature, and also two members of Congress.

On the 9th of September, 1850, the State was admitted and the Representatives took their seats.

The State of Arkansas framed a new constitution in 1868, which was submitted for ratification or rejection on the 13th day of March, 1868, and on successive days; and at the same time the people were authorized to elect "members of the House of Representatives and State officers."

In 1867 the State of Louisiana framed a new constitution, which was submitted to the people on the 17th and 18th days of April, 1868. The schedule provided for the election of State officers and "congressional Representatives" on the same days.

Precisely the same thing occurred in the States of Minnesota, Mississippi, South Carolina, Nebraska, Nevada, Alabama, and Texas.

In each and all of these cases there was no pre-written designation, no fixing beforehand of the time of electing Representatives than as stated above. In each instance the time for electing such Representatives had the same element of uncertainty as in the case at bar, and yet Representatives were elected in every one of these States on just such a prescription of the time, and admitted to their seats after due and careful deliberation.

It is no answer to aver that these were new States. It makes no difference whatever, so far as the construction of the term "prescribe" is concerned, whether the power making the prescription be the constitutional convention or the legislature. If the only permissible construction of that word requires that the time shall be determined antecedent to the day of the election, and determined beyond any contingency, as

claimed, it is utterly immaterial whether it is to be done by one authority or another.

Nor can it be claimed that, as no legislature of a State could exist prior to the birth of the State itself, therefore the time could not be prescribed. The constitutional convention had authority to prescribe a time, after its ratification, for the election of Representatives. The case of Michigan is in point. The State constitution was adopted on the 24th day of June, 1835. Section 6 of the schedule contained these words:

The first election of governor, lieutenant-governor, members of the State legislature, and a Representative in the Congress of the United States, shall be held on the first Monday of October next and on the succeeding day.

The Representative was so elected on the first Monday and succeeding day in October, 1835, and was subsequently admitted to his seat in the House.

See also the case of Iowa. The constitution of Iowa was adopted May 18, and ratified August 3, 1846. The sixth section of the schedule provides as follows:

The first general election under this constitution shall be held at such time as the governor of the Territory, by proclamation, may appoint, within three months after its adoption, for the election of a governor, two Representatives in the Congress of the United States, (unless Congress shall provide for the election of one Representative,) members of the general assembly, and one auditor, treasurer, and secretary of state.

Representatives were chosen under the governor's proclamation on the 26th of October, 1846, and subsequently admitted to seats in the House.

We are very firmly impressed with the conviction that the precedents cited are conclusive upon this question. The word "prescribe," as used in the Constitution of the United States in connection with the election of Representatives, may well be said to have a settled meaning and construction.

We may add, in conclusion, that we are all the more willing to follow this construction in the present case, because it saves us from the alternative of disfranchising a State, while it seems to do no injustice to any one.

As a precedent, it is entirely without consequence one way or the other, because Congress has already fixed a uniform time for electing Representatives in Congress, and thus taken the whole subject out of State control, after the year 1876.

In view of the foregoing considerations, and of the further facts that nearly double the number of votes were polled in August as in October; that the Representative from the third district has already taken his seat and entered on his duties; that in the first district, at the August election, a joint discussion was held, a large vote was polled—larger than that for several of the candidates on the State ticket—and that no public interest is likely to be subserved by imposing upon the State the expense, agitation, and delay of another election, we are in favor of sustaining the August election.

G. W. HAZELTON.
J. W. ROBINSON.



