Contested Election Case

OF

John J. Carney vs. Dick T. Morgan

FROM THE SECOND CONGRESSIONAL DISTRICT OF OKLAHOMA

BRIEF OF CONTESTANT.

The naked defense that because the Fourteenth Amendment has had the partisan acquiescence of the departments of government, and the forced acquiescence of the Southern States, it has the sanction of adoption, will not avail, for partisan acquiescence and forced acquiescence are neither moral nor legal acquiescence.

GIDDINGS & GIDDINGS,
Attorneys for Contestant.

THE HARLOW-RATLIFF PRINTING CO., OKLAHOMA CITY.

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QUESTION.

We desire to present three questions for the consideration of the committee:

1st. Large numbers of negroes having voted for the contestee, without which he could not have received the certificate of election, that the Fourteenth Amendment never having been legally adopted, the contestant was legally elected.

There were 48,000 votes cast in the election that were counted for the parties hereto. Out of such a vast number of votes, it is plainly evident that very little fraud and chicanery would be necessary to affect the result. At the time of this election, and for some time previous thereto, there had been in effect in Oklahoma what was commonly known as the "Grandfather Clause" This law provided, in substance and effect, that no person should be registered as an elector, or be allowed to vote in Oklahoma, unless he were able to read and write any section of the Constitution of the state. And likewise provided that no person who was, on January 1, 1866, or at any prior time, entitled to vote under any form of government, and who at that time resided in some foreign nation and no lineal descendant of such person should be denied the right to register and vote because of such inability. Such law further made it the duty of the precinct election inspectors to see that the law was carried out as written. The Supreme Court of the State of Oklahoma, in the case of *Atwater* v. *Hassett*, 27 Okla 292, 111 Pac. 802, had held this law to be valid and constitutional. It had been passed by overwhelming vote of the people. At the time of this election the Federal machinery was in the hands of the

2nd. Regardless of the non-adoption of the said Fourteenth Amendment, sufficient fraud and intimidation being used on behalf of contestee in the several precincts affected, and being so interwoven with the vote as to render impossible an attempt to separate the good from the bad vote, that contestant is elected when these negro precincts are rejected, or

3rd. Irrespective of the election of the contestant, so much gross fraud and intimidation were used by and on behalf of the contestee, and are so generally admitted in the pleadings and the evidence, that there was not a free election in said Congressional District, and that, therefore, the seat of the contestee should be declared vacant.

There are several other legal questions, incidental thereto, which we desire to discuss in conjunction therewith.

HISTORY OF THE CASE.

The evidence and admissions in the contestee's answer indicate that many negroes live in the Second Congressional District. The contestee only claims to have been elected by 663 votes over the contestant.

viction was sure if they dare enforce the law. The average election official, knowing full well how convictions may be had in Federal courts whose judges may comment upon the weight of the evidence, and with the entire machinery of the court in the hands of republicans who were incensed at the law, notwithstanding it was adopted by a vote of the people, would not enforce it, as the record discloses. Men with families and untarnished reputations, serving their communities and state for inconsequential compensation on election day, could not be expected to enforce it, particularly when the hideous example of their brother election officials having been convicted forcibly was called to their attention. The writer of the letter had been the campaign manager, as the record discloses, for the contestee in the previous election, and had been rewarded by appointment as United States District Attorney. He returned the favor for the contestee in full and rounded measure. He wrote a letter that found its way by some serpentine process into the hands of every election official in every negro precinct in the district. He called attention to the fact that two white men of Democratic persuasion had been convicted for failure to permit negroes to vote in violation of the "Grandfather Clause." That

members of the contestee's political faith. They used every means in their power to threaten and intimidate election officials in the enforcement of this law, Over 900 negroes, as the record shows, rushed pell mell to the polls in Oklahoma County alone, showing the human nature of that race in the desire to vote, regardless of law. The United States Attorney's office of the Western District of Oklahoma had scattered all over the district a letter from the United States Attorney for the Western District of Oklahoma, calling attention to the conviction of Beall and Guinn, election officials, in the Federal Court at Enid, Oklahoma, in 1911, for enforcing as precinct election officials this law, and also calling attention to the fact that a Federal Court had held adversely to the validity of the law, and that the precinct election officers were bound by the decisions of the Federal Court declaring the law unconstitutional when applied to negroes desiring to vote for Members of Congress, and that the defense of good faith would not prevent them from prosecution. Sent out to every election official in this state, in conjunction with this letter, was a circular headed, "Talk it Over with Your Wife, Mr. Election Official and Remember that You will Go to the Penitentiary," calling attention to the fact that that con-

they allowed many negroes to vote who otherwise were disqualified, and that on account thereof it was impossible to determine the vote and result in their precinct, and requesting that the vote be not canvassed and the result declared. A sample of one of these amended returns is found at page 9 of the record. Other amended returns will be found at pages 100 to 105 of the record. The contestee only claiming his election by 663 votes, and there being over 900 illegal negro votes according to the test of the law and the authorities to which we call your attention, it certainly takes considerable temerity upon his part to claim his lawful election. There is no denial that fraud and intimidation were used. The denial of the contestee is as to his personal participation therein. The circumstances disclose an active participation therein by those who owed their political and official elevation to him. If it can be said that to threaten election officials with terms in the federal prison, pull them away from their wives and loved ones, for observing their oaths as the election officials of the state, be not fraud and intimidation, then no election contest ever developed fraud and intimidation. We introduced in evidence, which the typewritten record will show, but which we did not incorporate

was a splendid achievement, and one that will redound to the glory and credit of the now bursted carpet-bag administration of Oklahoma! This was the last dying gasp of the carpet-baggers who dominated the fair Territory of Oklahoma. It was their final stand. As the negroes went to the polls, they went viciously and sullenly, with the idea that there was an attempt to deprive them of their right to vote, and yet with full knowledge that men of the Caucasian race had been made to suffer the penalty of the law for doing that which the law of the state required them to do. It was small wonder that these election officials permitted these negro republicans to vote. The evidence discloses that they were all republicans. Common knowledge teaches us that they were all republicans. They voted, many of them, who could not read or write. Some samples of the writing are found within the testimony. The letters of the District Attorney, the threatening circular that the election official who enforced the law would go to the penitentiary, and the amendment to the State Constitution, are found at pages 8 and 9 of the printed record. There will also be found in the record amended return after amended return of these precinct election officers that intimidation was used against them to such an extent that

legal acquiescence. The fact of its non-adoption does not require proof in this case. Its non-adoption is historical. History is not a matter to be proved in a lawsuit. It is not necessary to prove that Columbus discovered America, or that Washington crossed the Delaware. If the Southern states were out of the Union their acquiescence in the adoption of the Fourteenth Amendment was unnecessary. If they were always in the Union, their acquiescence in the adoption of the Fourteenth Amendment was necessary. The theory upon which they were kept in the Union was that this was an indestructible Union, composed of indestructible states. Certainly the Southern states could not be both in and out of the Union at the same time. If in the Union, their citizens were entitled to participate in any amendment to the constitution of the United States, an instrument which their forebears more than largely had been instrumental in creating.

Everyone knows that the Fourteenth and Fifteenth Amendments to the United States Constitution primarily were drawn to enfranchise the negroes. It was a revolution in the system of the electorate of the Union. Every state, therefore, was entitled fully to

in the printed record on account of its vast volume and, therefore, expense, the number of negroes who registered and voted in Oklahoma County alone, the number being over 900, if we remember the record aright. The best way we could trace out who voted was through the testimony of election officials who knew their politics, through the registration lists, which show they were all listed as republicans, and through the records of precinct election officials, which show that they voted. All of this the record discloses.

FOURTEENTH AMENDMENT.

That the Fourteenth Amendment was never legally adopted is not open to serious question. The serious matter involved in the urging of its non-adoption is to get serious consideration thereof. The Supreme Court of the United States has never directly passed upon this question. The assumption has been that it was adopted. The attack upon its adoption has been avoided. It will not do to say that because the several departments of the government have acquiesced in its adoption that, therefore, it has been adopted. Forced acquiescence is neither moral nor

Acceptance Case, 1 Ct. Cl. 270; *Com.* v *Owensboro, etc. R. Co.* 95 Ky. 60; *Ewing* v. *Ainger*, 97 Mich. 381; *Van Loon* v. *Lyons*, 61 N. Y. 22, reversing 4 Daly (N. Y.) 149; *Matter of Manhattan Sav. Inst.*, 82 N. Y. 142; *Albright* v. *Bedford County*, 106 Pa. St. 582; *Simpson* v. *Willard*, 14 S. Car., 195; *Travelers' Ins. Co.* v. *Fricke*, 94 Wis. 258; *State* v. *Fricke*, 102 Wis. 107. See also *Clow* v. *Harper*, 3 Ex. D. 198. *Dollar Sav. Bank* v. *U. S.*, 19 Wall. (U. S.) 227; *Goldsborough* v. *U. S.*, Taney (U. S.) 80; *Employers' Liability Assur. Co.* v. *Insurance Com'rs*, 64 Mich. 614.

It has likewise been held in a number of cases that an erroneous interpretation of a pre-existing statute is not binding.

See *Read* v. *Storey*, 6 H. & N. 423; *Coverdale* v. *Charlton*, 4 Q. B. D. 116; *Rolls* v. *St. George*, 4 Ch. D. 785; *Reg.* v. *Keyn*, 2 Ex. D. 163; *Van Norman* v. *Jackson Circuit Judge*, 45 Mich. 204; *Salters* v. *Tobias*, 3 Paige (N. Y.) 338.

The same rule, of course, applies to the administrative department of the government. The same principle prevails in the construction of the constitution as prevails in the construction of statutes. See the title "Constitutional Law," 6 A. & E. New Ed.,

meet and pass upon the issue, and freely to do so, as well.

It will not do to hedge upon this proposition by saying that its adoption has been acquiesced in by the several departments of the government. If it were never adopted, acquiescence could not breathe validity into it. In this respect the construction of constitutional provisions is upon the same plane as the construction of statutory enactments. The contemporary construction of a law is persuasive but not binding nor controlling upon the courts nor upon legislative committees sitting with judicial functions. Many cases may be found in the books where courts have refused to follow a contemporaneous construction of a law by the several departments of the government. For instance, where there have been departmental constructions of acts of Congress, they have not been binding upon the courts.

See *Robertson* v. *Downing,* 127 U. S. 607. That the continued acquiescence in an act not a law by the departments of a government is not controlling, numerously has been held by the Supreme Court of the United States and the several courts of the country.

See *U. S.* v. *Dickson,* 15 Pet. (U. S.) 161; *Floyd*

"The Congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this constitution." There has never been a trial of the alternative proposition of a convention of the states. Hundreds of amendments have been offered; many submitted by the two houses of Congress. Only sixteen amendments have been ratified. Ten of these amendments came in the first session of Congress; six thereafter. This history shows the obvious disinclination of the sovereign states of the Union to alter the federal constitution as it was originally constructed. That the validity of an amendment to the constitution must depend, as to the procedure in the creation of the amendment, upon whether the law making power has followed the constitutional method in reference thereto, is so elementary that the mere statement should be sufficient exposition of the proposition. Certainly a written constitution is a limitation upon the powers of those whose duty it is to act as servants of the people under it. Mr. Cooley has this to say in his Constitutional Limitations:

> "A written constitution is in every instance a limitation upon the powers of government in the hands of agents, for there never was a written republican constitution which delegated to functionaries all the latent powers which lie

pp. 931, 932, *People* v. *Le Fevre,* 21 Colo. 218; *Frost* v. *Pfeffer,* 26 Colo. 338; *Kenny* v. *Hudspeth,* 59 N. J. L. 533.

We have disposed of this proposition first for the obvious reason that the position taken by all who have sought to maintain the Fourteenth Amendment is based upon this ground—because of favorable contemporaneous construction upon the part of those whose duty it was to execute it, and having been acquiesced in by the several departments of the government, it would be presumed that it had been adopted. Certainly that cannot be a law which has never been made a law by the law making department of the national government.

Article 5 of the Constitution of the United States requires a two-thirds vote of both Houses of Congress, and a three-fourths vote of the states in ratification of Congressional action. The official journal of the Senate and the House of Representatives of the United States of the Thirty-ninth and Fortieth Congresses show that there was neither a two-thirds vote of the two Houses, nor a three-fourths vote of the states in ratification of this so-called Congressional action. The provision in Article 5 is as follows:

The naked statement that because the
counsel ~~denies~~ has ~~the nerve~~ to want
this office and counsels' attorneys want
him to have it, ~~he should be given it~~ will
not avail, for the ~~ick~~ for office and
assertions of counsel are neither legal
~~convincing~~
~~moral~~ or legal evidence.

Whether an amendment has been validly submitted or validly adopted depends upon the fact of compliance or non-compliance with the constitutional directions as to how such amendments shall be submitted and adopted, and whether such compliance has, in fact, been had must, in the nature of the case, be a judicial question.

Our (Mississippi's) constitutional provisions create no special tribunal to determine whether amendments have been validly submitted or validly adopted. It is not said that 'if it appears' to the legislature, upon which erroneous assumption is builded the argument counter to our view. Plainly and manifestly the language 'if it appear' means simply if it should be made manifest or evident; if it should be the fact that, etc.; but whether it is a fact is a judicial question determinable by the courts.

* * * * * * * *

It is the mandate of the constitution itself, the paramount and supreme law of the land, that such amendment cannot become part of the constitution unless two facts exist: First, unless such amendment or amendments should be adopted by the majority prescribed. These two conditions are facts which must exist in truth and reality, and not simply be declared to exist by the legislature, whether they do exist or not. The legislature is not given the power as a special tribunal to count the votes, canvass the returns, declare the result, and make the amendment part of the constitution by proclamation. All that it does, all that it can do, in the first instance, to propose the amendment or amendments to the people for their vote in the way the constitution directs. It is for the people, and the people alone,

yet, where the existing constitution prescribes a method for its own amendment, an amendment thereto, to be valid, must be adopted in strict conformity to that method; and it is the duty of the courts, in a proper case, where an amendment does not relate to their own powers or functions, to inquire whether, in the adoption of the amendment, the provisions of the existing constitution have been observed; and if not, to declare the amendment invalid and of no effect." In a lucid opinion by Chief Justice Whitfield, in

State of Mississippi v. *Powell*, 77 Miss. 543, we find the court dealing directly with the proposition we here advance:

> "Three questions are presented for solution:
>
> First. Is the question whether the proposition submitted to the voters for adoption as part of the constitution be one amendment or more than one amendment a judicial question?
>
> * * * * * * * *
>
> As to the first proposition, we are clear that both questions are judicial questions. This placed beyond cavil as the settled doctrine of this State by *Green* v. *Weller* (32 Miss.), and *Sproule* v. *Frederick* (69 Miss. 898). The same response is given by an overwhelming weight of authority from other States. In the sixth volume of American and English Encyclopedia of Law, at page 908, second edition, it is said: 'The courts have full power to declare that an amendment to the constitution has not been properly adopted, even though it has been so declared by the political department of the State.'

> whether an act of Congress is within the limits of its delegated power or not is a judicial question to be decided by the courts, the Constitution having, in express terms, declared that the judicial power shall extend to all cases arising under the Constitution."

Patently, then, if the question as to the legality of the adoption of the amendment was a judicial question, the Congress of the United States could not declare the Fourteenth Amendment adopted, particularly when, in fact, according to the forms prescribed by the instrument itself, it had not been adopted.

Article 4, Section 4, of the Federal Constitution, provides: "The United States shall guarantee to each state in this Union a republican form of government." The term "a republican form of government" must mean a free form of government. It was because of the almost perfect equilibrium between the sections that Washington in the beginning urged his countrymen to form themselves into a union of sovereign states. Sovereignty certainly does not mean inferiority. Immediately after the war between the states, ten southern states unlawfully were organized into five military departments. At the time of the so-called adoption of the Fourteenth Amendment, there were thirty-seven states in the Union. Three-fourths

existing constitution pre-
to say by the majority prescribed in the constitution whether they adopt or reject the proposed amendment or amendments. Amendments which are adopted owe their vitality to the action of the people primarily * * * and that is absolutely all that that legislature has to do with the matter. * * * The legislature in what it has to do acts ministerially as the agent of the people."

See likewise in particular, the following language of Chief Justice Taney in the case of *Gordon* v. *United States,* 117 U. S., 705:

"The Constitution of the United States delegates no judicial power to Congress. Its powers are confined to legislative duties, and restricted within certain prescribed limits. By the second section of Article VI the laws of Congress are made the supreme law of the land only when they are made in pursuance of the legislative power specified in the Constitution; and by the tenth amendment the powers not delegated to the United States nor prohibited by it to the States are reserved to the States respectively or to the people. The reservation to the States respectively can only mean the reservation of the rights of sovereignty which they respectively possessed before the adoption of the Constitution of the United States and which they had not parted from by that instrument. And any legislation by Congress beyond the limits of the power delegated would be trespassing upon the rights of the States or the people and would not be supreme law of the land, but null and void; and it would be the duty of the courts to declare it so. For

sequent to the War. While a long time has passed since then, a Democratic Congress should right the wrong.

Section 5 of the Reconstruction Act of March 2, 1867, provided as follows:

> "That when the people of any one of said rebel states shall have formed a constitution of government in conformity with the Constitution of the United States in all respects, framed by a convention of delegates elected by the male citizens of said State 21 years old and upward, of whatever race, color, or previous condition, who have been resident in said State for one year previous to the day of such election, except such as may be disfranchised for participation in the rebellion, or for felony at common law, and when such constitution shall provide that the elective franchise shall be enjoyed by all such persons as have the qualifications herein stated for electors of delegates, and when such constitution shall be ratified by a majority of the persons voting on the question of ratification who are qualified as electors for delegates, and when such constitution shall have been submitted to Congress for examination and approval, and Congress shall have approved the same, and *when said State, by a vote of its legislature elected under said constitution, shall have adopted the amendment to the Constitution of the United States, proposed by the Thirty-ninth Congress, and known as Article XIV, and when said article shall have become a part of the Constitution of the United States, said State shall be declared entitled to representa-*

of thirty-seven states certainly must be twenty-eight states. Twenty-eight states never ratified the Fourteenth Amendment. Three states voted emphatically no. California did not vote. Ohio and New Jersey first ratified, and then rejected, as they had the right to do, the amendment before its so-called adoption. Six states under the Reconstruction Act and under military establishments, were forced to do that which, under ordinary circumstances, they would not have done. We here have twelve states out of thirty-seven states not adopting this amendment as the Constitution declared an amendment should be adopted. If twelve states out of the thirty-seven did not ratify the amendment, it had but twenty-five votes for its ratification. Twenty-five states are not two-thirds of thirty-seven states, but lack the requisite number to the extent of three states. This is a simple problem of mathematics. Statistics everywhere confirm this position; real history is in accord with it. No student of history with truth upon his lips, or on the point of his pen, can deny it.

Every man informed upon the history of Reconstruction times knows the rough-shod manner in which the Southern people were run over immediately sub-

> No one, we believe, has ever doubted the proposition that, according to the institutions of this country, the sovereignty in every State resides in the people of the State, and that they may alter and change their form of government at their own pleasure."

These are the facts of history. What will you do with them? It will not do to say that because of so long a period of time an act becomes constitutional and binding which has neither shadow nor substance of constitutionality or validity. The Supreme Court of the United States has gone so far as to declare acts of Congress passed in 1820 invalid when passed upon by the said Supreme Court in 1856. The right of Congress to declare that carried which had not carried did not exist. It does not exist now. It was a judicial question then. It is a judicial question now. This committee sits with judicial powers. It tries this contest as a judicial tribunal. It passes upon questions of law and disputed issues of fact, as does the judiciary everywhere in the Union. No committee on elections so far has passed upon this proposition. Will this committee right the wrong done the Southern people in periods of prejudice and passion? Calmness and fair play now dominate the councils of the

tation in Congress, and Senators and Representatives shall be admitted therefrom on their taking the oaths prescribed by law."

Assuredly this was a novel provision! Here we have the Congress providing that when the so-called rebel states had adopted the amendment to the Constitution of the United States known as Article XIV, they should be entitled to representation in Congress, and their senators and representatives should be admitted upon taking the oath prescribed by law! Admitted to what? Admitted to the legislative department of a government they had never been excluded from? These ten Southern states, to escape destruction, were forced to comply with reconstruction demands; were compelled to do so to avoid the wrath of military establishments over them; were forced to ratify an amendment that had never been adopted. And yet they tell us that such acquiescence was a legal acquiescence!

In *Luther* v. *Borden,* 7 How. 1, the Chief Justice of the United States, in reference to military governments, said:

> "Unquestionably a military government, established as the permanent government of the State, would not be a republican government, and it would be the duty of Congress to overthrow it.

Dear Sir: I have your letter asking whether at the coming general election the precinct election officers can enforce the law commonly termed the grandfather law and escape punishment therefor in the Federal courts on a showing of good faith in enforcing said law. I presume your question has arisen on account of the apparent conflict between the decision of of the Supreme Court of the State of Oklahoma and the United States District Courts for the Eastern and Western Districts of Oklahoma on the constitutionality of the law, the State supreme court having held the law constitutional, while the two United States courts in the State have held it unconstitutional and void.

It must be borne in mind that this involves purely State matters as well as Federal matters, and in considering the same these two phases of the law must be kept in mind. As to the purely State questions involved in the law, I do not express any opinion, the same not being within the jurisdiction of this office and his opinion is directed solely to the Federal question involved; that is, the application of the grandfather law to negroes who, on account of race, color, and previous condition of servitude, are not permitted to vote without submitting to certain tests of reading and writing. Nor shall I argue the question of the constitutionality of the law, for the reason that after very extensive argument by some of the best legal talent of the State it has already been in positive terms declared unconstitutional by the two United States district courts in this State, which decisions are now the law of this State as far as the Federal questions therein in-

nation. We feel assured they will dominate the decision of this committee.

What has been said about the Fourteenth Amendment applies with equal emphasis and effect to the Fifteenth Amendment. The Fourteenth Amendment merely attempts to make the negroes citizens. The Fifteenth Amendment attempts as citizens to give them the right to vote. We challenge both with history and the records of the Congress of the United States.

LAW AND EVIDENCE.

We first call your attention to the fact of the letter of the United States District Attorney, and the warning circular attached thereto. Later we will call your attention to the law regarding such intimidation. The letter is found at page 87 of the record, marked "Exhibit B," and the warning circular is found at page 87 of the record and marked "Exhibit A."

Department of Justice,
Office of the United States Attorney,
Western District of Oklahoma,
Guthrie, October 31, 1912.

Mr. Fred A. Wagoner,
Deputy County Attorney,
Chandler, Okla.

of good faith will not protect them from prosecution for enforcing the law in direct conflict with the Federal decisions.

Respectfully,

HOMER N. BOARDMAN,
United States Attorney.

TALK IT OVER WITH YOUR WIFE, MR. ELECTION OFFICIAL, AND REMEMBER THAT YOU WILL GO TO THE PENITENTIARY

If you violate the Federal election laws, and not Gov. Cruce nor his brother, Attorney A. C. Cruce. You will remember that the latter defended Beall and Guinn who last year were convicted in the United States court at Enid and sentenced to the penitentiary for violating the Federal election law, and the State paid the attorneys in these cases about $14,000 for defending these two men. This averages about $7,000 per case. It is not likely that the people of this State, already overburdened with taxes, will be willing to continue to pay out $7,000 every time an election official violates the Federal statutes. The people are not sufficiently able to enrich the governor's brother, Attorney A. C. Cruce. Besides, what's the use? Where conviction is sure, there is nothing gained by paying out big sums of money for attorney fees. That is to say, there is nothing gained by anyone but the attorney.

There is no dispute, in the pleadings or evidence, but what this letter and this circular were scattered broadcast throughout the Second Congressional Dis-

volved are concerned, having never been reversed or modified.

Knowing this, that the Federal courts, having jurisdiction over the entire State, have declared the law to be unconstitutional and of no force and effect, the question arises whether the precinct election officers can enforce it against negroes on account of their race and color, and then, when prosecuted in a federal court for doing so, defend the prosecution on a plea of good faith in enforcing the law? The question of good faith must be determined with reference to the decision of the courts on the subject and having jurisdiction thereof, so there can be no good faith in acting in direct conflict with the known decisions of the courts, although in the absence of any such decisions such defense might be made. In the case against Beall and Guinn who were convicted in the Federal court at Enid, in 1911, for violating section 19 of the Federal Criminal Code in enforcing the grandfather law at the general election in November, 1910, the defense of good faith was attempted, although without success, as the verdict of the jury disclosed. However, in that case at the time the acts were committed which caused a prosecution; that is, in November, 1910, no Federal court had passed upon the law.

Furthermore, all precinct election officers have quasi-judicial capacity, and being officers of inferior and restricted jurisdiction, are all bound by the decisions of the Federal courts declaring the law unconstitutional when applying the same to negroes desiring to vote for Members of Congress and electors for President, and the defense

Q. All of these others outside of these four they took some sort of test, did they, under your direction?

A. Yes.

Q. And then you allowed them to vote?

A. Yes; I allowed them.

Q. You gave them ballots and allowed them to vote?

A. Yes; they went to the clerk and got ballots.

* * * * * * * * *

Q. And you didn't consider that Morgan was threatening you with any prosecution if--

Mr. Giddings: Wait a minute.

Q. If you enforced the grandfather clause?

A. No; Morgan didn't come into my mind at the time I received the communication.

Q. Or at any time during the day?

A. During the election—that I remember in connection with this letter.

Mr. Morgan: I think that is all.

Mr. Giddings: Answer the question as you want to.

A. But the fact that there was a United States attorney's name to this and that two men had been prosecuted in Oklahoma and convicted for attempting to enforce this law was the reason why I let men vote there who I did not consider had given me the proper qualification.

trict of Oklahoma. What effect they had upon the precinct election officials is best attested by the record, beginning at page 31 thereof, where the first witness, W. I. Davis, stated that they made him afraid to enforce the grandfather clause:

"A. They made me afraid to enforce the grandfather clause.

* * * * * * * * *

Q. You didn't require him to take the tests?

A. No.

Q. Now, outside of Watson, Anderson, Brice, whom you allowed to vote without taking the tests, all other negroes who voted on the 5th day of November, 1912, qualified by passing a test under your direction by writing some part of the Constitution?

A. By attempting to write a part of the Constitution.

Q. And they did write it to your satisfaction, so that you—

A. No.

Q. So that you allowed them to vote?

A. No, sir.

Mr. Giddings: Wait a minute; we object to that.

Q. But you did allow them to vote after they had taken some sort of tests?

A. We allowed them to vote.

Q. In what way did you handle it different?

A. We let 14 or 15 negro voters cast their ballots on their own responsibility that we would have denied, they claiming and not being able to read and write.

* * * * * * * * *

By Mr. Morgan:

Q. Now, Mr. Vorel, you claim that there were how many negroes voted who were not qualified to vote?

A. Fourteen or fifteen.

Q. Did you apply the tests to these 14 or 15 negroes?

A. I asked every one of them questions could they read or write, and they answered me in the negative.

* * * * * * * * *

By Mr. Dortch:

Q. This Tom Franklin that was spoken of, do you know whether or not he could stand the test under what is known as the grandfather clause?

A. On his own say so he could not.

Q. He voted that day, did he?

A. Yes, sir.

Q. Do you know of what political faith he is?

A. Why do you call them rock-ribbed or stalwart

* * * * * * * * *

Q. Were they in a sullen and angry mood or like the ordinary voter?

A. They showed a disposition to be considerably wrought up over the fact that they thought that the grandfather clause, as it is termed, was being pushed on them illegally and that they was being discriminated against. Some of them was sullen and wrought up considerable."

* * * * * * * * *

Testimony of T. J. Clark, page 37:

A. No; I didn't have anything to do in the enforcement, but I was afraid that we would have trouble. We didn't only get them notices, but we got other. I got other notices that there would be trouble here.

* * * * * * * * *

Testimony of Louis Vorel, page 42:

Q. I mean in the performance of your official duties?

Mr. Morgan: Same objection to the last question.

A. Well, I didn't like to take the responsibility on the face of that and we handled the election in a different way from what we would have if it hadn't come up.

A. Republicans.

Q. Did any of these 14 or 15 negroes, when they presented themselves, make any statements in regard to political subjects that day?

A. Why, they made statements in so far as—they made statements that they would vote, they had a right and insisted on voting.

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Testimony of B. B. Moore, page 47:

Q. Do you know what effect, if any, the receipt of that Exhibit A had upon the election officials of your township as to the enforcement of the law commonly known as the grandfather clause?

A. We let people vote that we would not otherwise have done if it hadn't been for that warning.

* * * * * * * * *

Q. If it hadn't been for the circular letter you have described, would the tests have been required in your township?

A. I think I would.

Testimony of J. W. Sorrells, page 63:

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Q. What effect, if any, did it have on you in the enforcement of what is commonly termed the grandfather clause?

A. It caused me to hesitate to enforce the law.

—he is a Republican.

Q. This Martin Benjamin, who was spoken of; do you know whether or not he could stand the test under the grandfather clause?

A. Not on his own say so; he could not, he told me at different times he could not read or write.

Q. Did he vote the State and Federal ballots in November, 1912?

A. Yes, sir.

Q. Do you know his political faith?

A. Yes, sir.

Mr. Morgan: We object to that question for reasons same is incompetent, irrelevant, and immaterial; the party concerning whom the witness is called upon to testify not having appeared and refused to tell of his political faith.

A. Why, he voted the Republican ticket.

* * * * * * * * *

Q. Do you know the political faith of any of the rest of these 14 or 15 negroes whom you have testified to who could not stand the tests, yet voted the State and Federal ticket in November, 1912?

A. Yes, sir.

Q. What was the faith of those that you know?

A. Republicans.

Q. What ballot did they call for on that day?

A. Possibly 120 or 130 negroes.

* * * * * * * * *

Q. What effect, if any, did the receiving and reading of that circular have upon you in the enforcement of the so-called grandfather clause?

A. Why, it caused us to let parties vote that we would have not let vote if we hadn't received that circular.

* * * * * * * * *

Testimony of E. A. Ringgold, who introduced in evidence all the registration lists and stubs of the election, showing the innumerable number of negroes who voted in Oklahoma City and who were registered therein. (Page 70 of the record):

Testimony of W. W. Barker, page 75 of the record, in a precinct where over 60 negroes voted:

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Q. Do you know what effect that had in the enforcement of —strike that—do you know what effect those circulars had in the enforcement of what was commonly called the grandfather clause; that is to say, what effect it had on the election officers of that precinct?

A. Yes, sir.

Q. What?

A. We permitted them all to vote.

Q. Who do you mean by all?

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Testimony of J. E. Lucas, pages 64-65, who testified that in his precinct 200 negroes voted:

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Q. What effect, if any, did it have upon you in the enforcement of what is commonly called the grandfather clause at the last general election?

A. It had a tendency of me being a little more lenient with the negro votes than if I hadn't received it.

Q. Do you know whether or not it had an effect upon the other officials in the same manner?

A. I think it did; we talked about it.

Q. If it hadn't been for this influence do you know whether or not the results would have been different in that precinct?

Mr. Morgan: Objected to.

Q. Or would it have any effect upon the result in that precinct?

A. I think it would.

* * * * * * * * *

Testimony of B. B. Moore, page 66:

* * * * * * * * *

Q. State, if you know, how many negroes voted in that township at the November, 1912, election?

the record, who testifies that these circulars caused them not to feel like going up against the Federal laws, and that they had read about the prosecutions in Kingfisher, and who testified, as did all the other election officials, that the result would have been different in his precinct had it not been for these threats and this intimidation, in a precinct where over 70 negroes voted:

* * * * * * * * *

Q. What effect, if any, did the receipt of those circulars have upon you in the enforcement of the election laws of the State, and particularly of that portion thereof commonly known as the grandfather clause?

A. Oh, it had a tendency to weaken us down, of course; we didn't feel like going up against the Federal laws. As a matter of fact, we had read about the prosecutions out about Kingfisher, and we were still laying again that; we understood that was something similar—the same thing.

Q. If it hadn't been for the receipt of these communications would you have enforced the election laws of Oklahoma at that election in that township?

A. Yes, sir.

Q. How many negroes voted in that township at the last general election to the best of your knowledge?

A. As nearly as I recollect, about 70.

Q. What were their political faith?

A. All the colored voters; everybody who asked for a ticket got it.

Q. Why were you afraid to enforce the grandfather clause down there?

A. Well, most all of them were familiar with the condition out here, of the conviction of two or three fellows on the election board at Enid. I think they all had the same fear of the same thing.

Q. Do you know what the political faith of those negroes was?

A. They would just vote one way.

Q. And what way?

A. Republican.

Q. Do you know any negro out there who voted the Democratic ticket?

A. (Laughs.) No.

* * * * * * * * *

Testimony of F. H. Morris, page 78 of the record:

* * * * * * * * *

Q. What effect, if any did these circulars have upon you in the enforcement of the election laws of the State of Oklahoma?

A. Well, I simply didn't want to try to enforce the grandfather clause in the state it was in with those threats over me.

* * * * * * * * *

Testimony of C. E. Burnsworth, pages 80-81 of

election boards were composed of ministerial officers, and that they did not have even quasi-judicial powers as the letter of the United States District Attorney stated they possessed. All lawyers know that election officials merely act in a ministerial capacity in the count and canvass of the returns. The duty of the injured party, in such an instance, is to appeal to the courts for redress, or, in a congressional election, to the Committee on Elections.

We come now to the admissions in the pleadings, taken in conjunction with all the facts we have shown you by this record. We call your attention to the admissions of the contestee in his answer. It is also elementary that admissions in pleadings obviate the necessity of proof on the issues thus admitted. In contestee's answer, at page 14 of the record, he admits that there were 268 illiterate negroes in Oklahoma county; at page 15, that there were 82 illiterate negroes in Blaine county; on page 16, that there were 34 illiterate negroes in Canadian county; at page 16, that there were 89 illiterate negroes in Caddo county, and at page 17 that there were 13 illiterate negroes in Custer county, aggregating 386 illiterate negroes whom he admits were then residents of the second congressional district of the state of Oklahoma. He

A. Republican.

Q. If that provision of the election laws of this State, to-wit, what is commonly termed the grandfather clause, had been complied with out there, enforced, would it have changed the result in that precinct?

A. Yes.

* * * * * * * * * *

Q. Why didn't you?

A. From the simple fact I was threatened with the Federal law if I did.

* * * * * * * * * *

All of these witnesses, and others who testified, swore that if it had not been for these threatening circulars the result would have been different in their precincts and they would have enforced the law. It is unnecessary to burden this brief further with other testimony in regard to this matter. We call your attention to the affidavits, beginning at page 100 of the record, and running all through the testimony of the contestant. We set out Exhibit "K" as a sample of the other amended returns.

We call your attention to the elementary proposition of law, that neither the county election board nor the state election board had judicial powers, that each had to take the returns as sent to them by the precinct election officials; that both the county and state

stitutionality of election laws, in an opinion by Judge Robert L. Williams, we find, at page 812:

> "To say, because plaintiff or his ancestors, who were not entitled to vote under any organized form of government on or prior to January 1, 1866, or who were not then non-resident aliens, having since come to the United States and become citizens by naturalization, that said amendment discriminated against them on account of race or color, is as unfounded as to say that a property qualification discriminates on account of previous condition of servitude for the reason that if, a man had not been held in bondage, he would have been able to acquire property, as a slave could not acquire property any more than he could vote."

The court then proceeds to construe the grandfather clause as valid and constitutional. Notwithstanding the highest appellate tribunal in the state has so passed upon the law, a partisan District Attorney of the United States, with all the Federal machinery at his command, suspends the sword of Damocles over the head of the election official of the state and tells the election official that sword will fall if he does not violate his oath as an election official and refuse to enforce the law.

Was it intimidation to tell these election officials that if they did enforce the law even the defense of good faith would not avail them? See the position

denies that the grandfather law was not enforced, but does not allege that these illiterate negroes did not vote. No wonder they sent such a circular broadcast throughout the second congressional district of Oklahoma; no wonder they threatened the precinct election officials with terms in Federal prisons for the enforcement of this law. Yet at the same time that he admits there were so many illiterate negroes he asks us, in his answer, to give the names and addresses of them. If, specifically and numerically, he knows of so many negroes who were illiterate—all of whom voted the Republican ticket, as the record and common knowledge verify—what does he want their names and addresses for? He attacks, indirectly, the grandfather law of the state. When he does so, he attacks the supreme court of the state. In the opening statement as to the history of this case, we called the Committee's attention to the fact that the validity of the grandfather clause had been passed upon by the supreme court of the state of Oklahoma. We now call your attention to that case. In *Atwater* v. *Hassett et al.*, 111 Pacific Reporter 802, the supreme court of Oklahoma, in one of the ablest opinions it, or any other court, has ever rendered with regard to the con-

"VIOLENCE AND INTIMIDATION.—1, Effect in General.—It is an old adage of the common law, that elections should be free; and anything which prevents the free exercise of the right of suffrage by the qualified electors will be a sufficient ground for setting aside an election in any country or state where the rules of the common law prevail. When persons are prevented by force from casting their ballots it cannot be said that there has been an election, although there may have been the form of one; and the people should not be bound by such a proceeding."

The Supreme Court of Arkansas, in *Patton* v. *Coates,* 41 Ark. 111, held: "that intimidation sufficient to render it uncertain what the result of an election would have been, will avoid it, though it may not have been such as would have influenced men of ordinary firmness."

It makes but little difference, under these decisions, who was guilty of the intimidation, although it is connected, by every conceivable circumstance, with the contestee.

In 10th A. & E. (N. E.), page 778, the rule is laid down:

"5. By Whom Intimidated.—It is not necessary that the persons who are guilty of violence or intimidation should be connected with the candidate; but, if there is such violence that the

this placed the election official in. He was upon a tempestuous sea; the Scylla of Federal prosecution upon the one side and the Charybdis of State prosecution upon the other. If he failed to enforce the grandfather clause he violated the State law; if he enforced the grandfather clause a partisan United States District Attorney would contend that he violated the Federal law, and in that position the Federal carpet-bag Republican machinery of this State placed the white election officials of Oklahoma. Was this intimidation? The courts say that such intimidation invalidates an election. Will it avail the contestee to say that he had nothing to do with it? Did he have anything to do with it? The District Attorney who had been his campaign manager, under this record, in the previous election, and who owed his political elevation to the contestee, wrote the letter. It is idle to say that somebody forged his name. It is idle to say that such a letter emanated from Democratic headquarters or from Democrats, because these negroes did not vote the Democratic ticket; because the Democrats of Oklahoma had been the parents of the grandfather clause.

In the 10th A. & E. (N. E.), page 776, the law is laid down as follows:

troduced upon his side to show that it had no material effect upon the result:

> "*Where intimidation shown, burden on other party to show* result not affected.—'Where intimidation is practiced over men sufficient in number to affect the result the burden of proof is devolved upon him in whose interest the intimidation is done to show that the intimidation did not affect the result. If this proof be not made the intimidation is so interwoven with the vote that it is impossible to separate with reasonable certainty the good from the bad vote, and the whole precinct must be rejected.' "

Hurd v. *Romeis* (minority report), 49th Congress.

In the case of *Smalls* v. *Tillman*, 47th Cong., the question of violence arose, and the Committee held as follows:

> "Where violence was prevalent throughout a county, the canvass and count of the vote involved in inextricable confusion and fraud, and the record illegally suppressed, the returns from the county were thrown out."

These cases will be found in the Digest of Contested Election Cases, page 739, a digest compiled by Honorable Chester H. Rowell. In *Whyite* v. *Harris*, 35th Cong., the Committee held that the whole election may be vitiated by such fraud. In *Richardson* v. *Rainey*, 46th Congress, the Committee found that

voters cannot safely deposit their votes, the election should be set aside, regardless of the relation of the persons by whom it was committed."

They hold that under such circumstances the election should be set aside, and innumerable cases are cited in the notes. They hold that it is not necessary that the persons who were guilty of intimidation should be connected with the candidate, but if there be such violence that the voters cannot safely deposit their votes, the election should be set aside. *A fortiori,* if there be such an intimidation that the election officials may not properly conduct the election, the intimidation is even stronger. Is this a free eleection? Is this such an election as the common law, or the laws of the United States or of any State in the Union, intend or intended should exist?

There are many cases cited in the Digest of the Contested Election Cases in the House of Representatives of the United States, similar in point of law to this one. In the minority report of *Hurd* v. *Romeis,* they held that the burden shifts to the shoulders of the contestee, and when this intimidation is shown he must show that it did not affect the result. Even granting that this be a harsh rule, it certainly must be admitted that some degree of proof should be in-

precinct should be rejected. Some of the cases we have already cited to the Committee take that view. It seems to be the view of the great majority of the courts of the country. In the case of *Knox* v. *Blair*, 1 Bart. El. Cl. Cas. 526, it was said:

> "When the result in any precinct has been shown to be 'so tainted with fraud that the true cannot be deducible therefrom,' it should never be permitted to form a part of the canvass. The precedents, as well as the evident requirements of the truth, not only sanction, but call for, the rejection of the entire poll, when stamped with the characteristics here shown."

In the case of *Morey* v. *Spencer*, 4 Cong. El. Cas. 447, the Committee held that fraund vitiates everything into which it enters, and that it is just as impossible to determine how far the fraud affects the election, as to separate the pure from the poisonous drops, if poison be dropped into water.

Thus, in 10th A. & E. (N. E.), page 774, the rule is laid down:

> "FRAUD.—1. Effect in General.—While the reception of illegal votes, where no fraud is charged upon the election officers, will not affect the election, unless the number of votes received was great enough to change the result, fraud destroys the value of returns as evidence. The fraud does not invalidate the legal votes cast, but

where the intimidation prevailed in more than half of the district the whole election is void. In *Wallace* v. *Simpson*, 41st Congress, the Committee held that where the result was obtained by intimidation the contestant should be seated. These three cases will be found on page 740 of the Digest, *supra*. In *Giddings* v. *Clark*, 42d Congress, page 743, where a large part of the vote was prevented from being cast, the whole vote was rejected. Here the Committee held that this was not a free and fair election. It based, it is true, its decision upon the ground of military interference. But wherein is the difference between military interference where voters are concerned and Federal official interference where election officials are concerned? All these cases lay down the rule, as originally cited to the Committee, that where intimidation is shown, of such magnitude and viciousness as were exhibited in this case, it taints the entire election. Further authorities certainly are not necessary to illuminate this proposition.

We come to the next proposition, that where the good vote is so interwoven with the bad vote that it is impossible to determine what the result would have been without that condition, the entire vote of the

the certificate of election to the contestant herein. Further elaboration of this point in the case would be to insult the intelligence of this Committee. This Committee well knows that the State Election Board of Oklahoma could not pass upon a contest between the contestant herein and one of his rivals at the democratic primary, but that that was a judicial question. The State Election Board must take the returns as it finds the returns, and award the certificate accordingly.

SUMMARY.

We have covered this case somewhat extensively, because of the momentous issues involved. An expectant people, long burdened with Federal officialism, carpet-bagism and negroism, await this Committee's verdict. If it should be adverse to this contestant, it will but lend encouragement to similar nefarious practices upon the part of partisan Federal officials in the future. Beyond the peradventure of a doubt, this contestant has shown that intimidation of the grossest kind was used, that the election officials were afraid to enforce this law because they were not willing to

by destroying the presumption of the correctness of the returns, it makes it necessary that any person who claims any benefit from the votes shall prove them; and where no proof is offered, and the frauds are of such a character that the correct vote cannot be determined, the return of the precinct will be rejected."

We have already shown the Committee, from the amended returns and from the testimony of the election officials, that the proper result, without these votes, could not be determined in the several precincts over which these witnesses presided as election officials at this election. There is no evidence to the contrary. It stands uncontradicted.

The extremity of the contestee is readily seen, where he seeks by cross-petition beginning at page 20 of the record, to have declared the nominee, as against the contestant, the Honorable J. S. Ross, who was a candidate against the contestant at the democratic primary election. This certainly is the extreme in contested election cases. The State Election Board awarded the certificate of nomination to the Honorable John J. Carney, contestant herein, and it does not lie in the mouth of the contestee to raise that question at this day. The presumption is that the State Election Board acted *bona fide* in so awarding

We ask this Committee, in justice to free elections, in deference to an untrammeled ballot, to declare one of two things: First, that by the rejection of this illegal vote the contestant stand elected, or that, by reason of the intimidation used, and wantonly used at that, the seat in congress from the second congressional district is vacant. We are not fighting so much for a seat in congress as we are for the principles of local self-government; of white supremacy in our State. We will be satisfied with either one of these findings, to the end that the contestee may be unseated, in the interests of civilized and free elections, and that he may no longer hold a seat in congress over the earnest protest and votes of the great majority of our intelligent and conscientious citizenship.

Respectfully submitted,

JOHN J. CARNEY,
Contestant.

By GIDDINGS & GIDDINGS,
His Attorneys.

take the chances of going to a Federal prison merely to be permitted to serve as precinct election officials. We have shown that over 900 illegal negro votes were cast; we have shown that the whole result is so tainted as to make it utterly impossible to determine what the result would have been in these negro precincts without this condition. We have shown that without this illegal negro vote this contestant would have received the certificate of election. We have shown the admission in the pleadings of the number of illiterate negroes in the congressional district from which this contest comes. We have shown that election officials in the past, for the enforcement of this law, were branded as felons, by the same agencies that put in circulation these threats and this intimidation in this particular election. We have shown that these negroes went to the polls sullen and determined, that they voted because they were backed by the strong arm of Federal officialism in the State of Oklahoma. We have shown by history, by mathematics, by reason, by every possible historical deduction, that not one of them was ever enfranchised by this government. We have shown that the grandfather clause of Oklahoma has been declared constitutional by the highest State court of Oklahoma.