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REMARKS OF MR. BENCHER,

OF NORTH CAROLINA,

On the Contested Election, between David Newland & James Graham, in the House of Representatives, March 18, 1836.

Mr. Speaker: Notwithstanding the apparent impatience of the house, to bring this discussion to a close, I cannot permit the question to be taken, without submitting as briefly as I can, the views which I take of a subject so important to a portion of the people of my state. A sense of public duty, compels me to throw myself upon the indulgence of the house. Anxious as I am, that this question should be decided speedily, I am still more anxious that it should be decided correctly, and I can assure the house, that I do not intend to trouble them with any argument or any authority, which I do not consider pertinent and essential to a correct understanding, and decision of the questions now under consideration. Some gentlemen seem to consider this subject as involving the rights of the two gentlemen only who are now contending for a seat upon this floor; but I think it a question of higher magnitude. It is one which involves the constitutional rights of the people of the twelfth congressional district of the State of North Carolina. And what are those rights? Can any gentleman tell me what are the constitutional qualifications of a voter in the State of North Carolina? Has the committee informed the house what provision the constitution and laws of North Carolina have made to secure the purity of her elections?—Have we been put in possession of the information necessary to enable us to decide this quest on upon principle? We have not. The report of the majority has said not one word about it. It is as silent as the grave. The committee have not condescended to give us the principles upon which they have decided this case. I am, therefore, surprised and astonished to see the anxiety with which some gentlemen wish to precipitate this house into a decision of this question. Are we to take the report of the committee upon faith, and eject the sitting member, or are we to go to the law and the testimony, and examine for ourselves? I repeat the question, can any gentleman tell me from reading this report, the principles upon which the committee have decided this case? And if this house cannot solve this insolvable riddle, how will it be possible for those who come after us?

The constitution of North Carolina has fixed the qualifications of a voter for the lower branch of her legislature, and consequently for a member to congress, the qualifications in each being the same. What this constitution is, the majority of the committee in their report have not even hinted at, while the minority have entirely misconceived, and mistated it. Here it is, "that all freemen of the age of twenty-one years, who have been inhabitants of any one county within the state twelve months, immediately preceding the day of any election, and shall have paid public taxes, shall be entitled to vote for members of the House of Commons, for the county in which he resides."

To enable a man to vote for a member of Congress he must have complied strictly with the requirements of the constitution. He must be twenty-one years of age, have paid a public tax, must vote in the county in which he resides, and have been an inhabitant of that county twelve months immediately preceeding the day of election. It is not sufficient that he has been an inhabitant of the state twelve months immediately preceding the day of election; but he must have been an inhabitant of the county where he votes. Suppose a man to have been all his lifetime an inhabitant of the county of Burke, and six months before the election, he moves into the county of Buncombe, can he vote in the county of Buncombe? He has lived in Buncombe only six months, and his residence in Burke, whatever it might have been, was not immediately preceding the day of election, and to make the constitutional period you must add his residence in Buncombe to his residence in Burke, and that would be any thing else than a residence in any one county twelve months immediately preceding the day of election.

This construction, which requires a residence in the county twelve months, immediately preceding the day of election, is not only the letter of the constitution, which cannot be departed from, but it is the spirit and intent of the framers of the constitution. They did not intend that any should vote for the county, but such as had a fixed residence for twelve months, so as to enable the judges to know them and their qualifications, and for the same reason it does not allow a voter, even in the same congressional district, to vote out of his own county, because the judges of that county are supposed to know him and his qualifications best. But while the committee have acted upon this plain letter of the constitution in one instance, and have rejected, and properly rejected from the poll of the sitting member, all votes given out of the county where the voter resided, though they were residents of the district; yet by some strange process of reasoning they have received and counted for the petitioner votes given by persons who had not resided in the county twelve months immediately preceding the day of election. I leave it to others to reconcile such strange inconsistency.

If it were necessary to adduce authorities to support the construction for which I contend, I have one at hand as strong as authority can be. That is the case of Kelly and Harris, which came here from Tennessee, and the question decided upon a single vote. The voter had resided in the county in which he voted only three months immediately before the election. The language of the constitution of Tennessee is, "every freeman being an inhabitant of any one county in the state six months immediately preceding the election, shall be entitled to vote for members of the General Assembly, for the county in which he shall reside." It will be seen that this language is the same with that of our constitution, except that six months only is required instead of twelve; and the House decided that the constitution restricts him to the county wherein he has been an inhabitant six months immediately preceding the day of election, and permits him to vote no where else—and such must be the decision of this house upon the constitution of North Carolina. He must reside twelve months in the county where he votes immediately before the election, and he can vote in no other.

Mr. Speaker, having shown that the committee have entirely misconceived and misstated the constitutional qualifications of a voter, in North Carolina, and that therefore, this report should be recommitted to the committee, that these defects may be supplied and corrected, I come now to the application of the sitting member for further time to complete his testimony. To me this application appears reasonable, and ought to be granted. What is the principle upon which the petitioner expects to obtain a seat upon this floor? It is by rejecting votes given to the sitting member, not because they were not qualified to vote in the twelfth congressional distritrict, but because they did not vote in the particular county in which they resided, supposing they had a right to vote any where in the congressional district. It is known and proven to be a common, though a mistaken opinion, prevailing not only in the twelfth congressional district, but to a greater or less degree throughout the state.—These honest men supposed, that being qualified voters in any county of the districts, substantially, it made no difference where they might cast their votes, provided they voted within the district; because the member thus elected to Congress, would be the member for the whole district, and not for any particular county. It is not wonderful, therefore, that the farmers of the country, should have fallen into this mistake. It is in evidence that the petitioner's brothers fell into a similar error; and the petitioner himself, though for many years a member of the state legislature, and twice a candidate for Congress, fell into the same mistake, for he voted for Congress out of the county in which he resided.

[The chair here suggested to Mr. Rencher, that he was going to much into the merits of this question, which would not be in order, at this stage of the proceedings.]

Mr. Rencher said his object was to show that the petitioner did not rely upon the substantial merits of his claim, but took advantage of a mere form as to the place of voting, and that where a party took advantage of such an objection this House ought to grant every reasonable indulgence to the sitting member and to the people of the 12th congressional district, to bring before the House the true merits of this case which he presumed would be in order.

CHAIR. That will be in order—proceed.

Who, Mr. Speaker, these two men voted for does not appear, and is left altogether to inference. The petitioner asks of us to strike from the poll of the sitting member all such votes as were given to him by persons qualified to vote in the district, but who voted through mistake, like himself, out of the county in which they reside. I regret that I am compelled to disfranchise these honest but mistaken voters, but the petitioner has demanded it and the constitution is imperative. But I would ask the House if under these circumstances, when the petitioner asks for a seat upon grounds strictly technical, and upon principles which he himself had violated in the election, if we ought or can refuse further time to the sitting member, to show that he is sill clearly entitled to the seat notwithstanding such objections?

But there is another point of view in which this subject cannot fail to strike the attention of the House.—Notwithstanding the narrow and illiberal ground taken by the petitioner, the committee and the House have extended to him extraordinary indulgence. Of this, I do not complain. No one shall go farther than I will, to extend indulgence to every one who seeks, in his own person to secure the rights and privileges of the people; but this indulgence loses the noble character of justice, unless it be extended to all alike. Through all the stages of this controversy before the committee of elections the petitioner has had the benefit of able and experienced counsel, a thing that is unprecedented, and though the report of the committee would induce us to believe that the arguments before that committee were made by the petitioner himself, it is not the fact, for it is known that they were made by the district attorney, a most skilful and ingenious lawyer, while the claim of the sitting member has had no other aid than what his daily duties in this house would enable him to bestow upon it. This is not all. A majority of the committee who attended the committee room, heard the arguments and examined the facts, have at all times been in favor of the sitting member.

They could at any time if they had chosen to do so, have granted the request now made to the House, or they could at once have reported in favor of the sitting member. They did not choose do so, but allowed what is expressly forbidden by parliamentary law, all these questions to be decided by members confined to their sick chambers, who could not attend the committee room, who did not hear the arguments or examine the facts. Recently the petitioner asked permission to appear upon this floor in proper person, pending the discussion of these preliminary questions. The request was at once granted and had my support. And now when the sitting member asks only for a few weeks, to take testimony which he had not time to take before leaving home that the whole truth may be heard, can the House refuse the application? If this reasonable application should be refused, the country will have good cause to enquire why the House has made fish of one and flesh of another.

[Here the morning hour having expired the House proceeded to the orders of the day.]

Saturday, March 19.

Mr. Speaker, Before I proceed with the argument which I commenced on yesterday, and in which I was interrupted by the expiration of the hour allotted for such discussions, I beg leave to remark upon the extraordinary annunciation made by my honourable colleague (Mr. Bynum.) Upon my resuming my seat on yesterday, my colleague rose in his place and announced, in the most formal and emphatic manner, that he should on Tuesday next, call the previous question, and cut off this debate. I could not but feel a little surprised and astonished, not only at this very extraordinary annunciation, but especially so at the particular quarter from whence it came. My colleague, it is well known, has addressed the house oftener and consumed more time upon this subject than all his other colleagues together. Of this I do not complain—he has doubtless felt it his duty to do so, but when another gentleman feels it equally his duty to address the house, that he should throw out a threat that the house was to be gagged, and the freedom of debate suppressed, is a matter of profound astonishment and mortification. And this too, upon a subject involving the constitutal rights of the State from which we come, and that which the people there hold as dear to them as life itself—the freedom, independence and purity of the ballot box. But my colleague by way of justification repeated the trite sentiment of another "that he would demand nothing but what was right, and would submit to nothing wrong," which means, I suppose, being interpreted that he would not demand to speak more than half a dozen times himself, and would not submit that another should speak at all!—I hope we shall hear nothing more of this previous question from that quarter at least.

In the remarks, I shall submit today my only object is justice and truth, and in their pursuit I intend to be, as I feel, perfectly respectful to the petitioner—perfectly respectful to the majority of the committee whose report I shall examine with much freedom, and strictly observant of the rules of order so far as I understand them. In the remarks which I submitted on yesterday, my object was to show, and I trust I succeeded, that the report of the committee was so defective that it was impossible for this house, and much less so for any future Congress, to say, upon what principles the committee have decided this case against the sitting member, and that so far as their views had come to light, they had entirely misconceived and mistated the constitutional provisions of the State from which this contested election comes.

My object to day will be to show, that this report is still more defective in matters of fact, and that from beginning to end it is a misstatement and a misrepresentation of the truth, as it appears in evidence. But before I commence this important part of the discusion, I must invite the attention of the house to the argument, which I commenced on yesterday, upon the application of the sitting member for further time to take testimony. In the remarks which I submitted, I was endeavoring to show that the petitioner had placed his claims to a seat upon a mere matter of form, and such as was entirely technical, and that if he obtained a seat at all, it would be by striking from the poll of the sitting member, such votes as were given by good qualified voters, but who, through mistake, voted exactly as himself did, out of their proper county. I declared my intention to strike off these votes, and that, however unwilling I might be thus to disfranchise these honest voters, the constitution was imperative, and under my oath, I had no alternative. Whether it is fair and generous, in the petitioner, to wish thus to obtain a seat, is a consideration for himself and the people of the twelfth congressional district, a majority of whom he claims to represent. But as the petitioner thus takes advantage of a mere matter of form, it is but reasonable that the same strict legal rules should be applied to him. Let us therefore enquire whether the notice given by the petitioner was a reasonable and lawful one. I do not intend to enquire whether this notice, from its vagueness and uncertainty, is absolutely void. That would not at present be in order under the rules of the House, but it is in order to show that these notices are so vague and uncertain, that the sitting member could not know the specific grounds of objection, and could not therefore collect testimony until the petitioner had commenced, which was not until the 29th October, about one month before the meeting of Congress. The election took place early in August, and it is not until the 2nd day of October that the sitting member receives notice that his seat was to be contested. And what was this notice? Why "that illegal votes had been given to him, while legal votes offered for petitioner had been rejected at *different precincts in the district.*" Now I would ask the house if any thing can be more vague? If he had said take notice, I intend to oust you from Congress, would it have been more vague and uncertain than it is? Illegal votes given at the different precincts! How Illegal? by whom given? and at what precincts? and as to the legal votes illegally rejected, who were they? where offered? and by whom proven? All these questions present points which should have been specified in the notice, so as to enable the sitting member to know the grounds of objection and collect evidence.

They are questions, the answers to which the petitioner must have known. He had spent two months in searching out these facts, and yet he studiously conceals them in his notice. This House has determined again and again, that notice shall be given with reasonable certainty, so as to enable the sitting member to know the particular grounds on which his election is contested. In the case of Easton and Scott, this House resolved "that the names of persons objected to for want of sufficient qualifications, ought to be set forth prior to the taking of testimony:" Will any gentleman contend, that the time allowed the sitting member under such a vague notice as this, was sufficient to enable him to hunt up and take testimony, and at the same time attend to the notices of his opponent, in the largest congressional district perhaps in the Union, embracing six large counties, and extending two hundred miles in length and nearly a hundred in breadth? In North Carolina, in a contested election for the Legislature, thirty days previous notice is necessary in a single county. This is considered but reasonable notice for a single county; how then can sixty days be considered reasonable notice for six counties, even if the notice had been such a one as it ought to have been? I beg gentlemen to consider of the difficulty of collecting testimony in a State where the election is by ballot, as in North Carolina. I would address this argument particularly to gentlemen coming from States where they vote *viva voce.*

In Virginia and Kentucky, for instance, the name of the voter is recorded, and opposite his name is found the candidate for whom he voted; while in North Carolina, where they voted by ballot, you must ascertain that by enquiry in the neighborhood of every precinct election. Can any gentleman say, that two months is sufficient time to make those enquiries, and take the testimony at the "*different precincts*" in this immense district, especially under a notice, so vague and undefined? What has been the course pursued by the petitioner? The election took place in August, but he does not pretend to give notice till October, and does not commence taking testimony, so as to enable the sitting member to know upon what grounds he relied, till about a single month before the meeting of Congress. Why the petitioner should thus delay for nearly three months, and then suddenly spring upon his antagonist, I will not say; but thus much I will say, that if he had formed a plan to take advantage of the sitting member, he could not have formed a more artful and perfect one. Will the house thus permit injustice to be done, not merely to the individual member, but to the people of the twelfth congressional district? Ought they not rather to say, let the whole truth be heard fully, impartially, and fairly.

I beg leave now, Mr. Speaker, to examine some authorities which have been brought in review in the course of this debate. The gentleman from New York (Mr. Vanderpoel) has relied with confidence upon the case of Talliaferro and Hungerford, for refusing the present application. I have examined that case, and so far from its being opposed to the present application, it sanctions it. That case came here from Virginia where they vote *viva voce.* The election took place in April: Hungerford obtained the certificate of the Sheriffs—Talliferro immediately gave him notice that he should contest his seat, and in that notice specified particularly the grounds of objection—the votes that were to be disqualified, and even the names of the witnesses by whom such disqualification was to be proven. Hungerford disregarded this notice altogether, and took no testimony whatever.

But notwithstanding the gross and criminal neglect of Hungerford, the committee on elections agreed to grant further time. I beg leave to read from that report to show, that the patriotic men of that day did not view contested elections as the gentleman from Maryland, (Mr. Howard) has done, a mere scuffle between individuals for place. 'The committee are aware,' says the report, "that some inconvenience may arise to the petitioner, if this contest is laid over for any time, but they think the right of suffrage ought not to be hazarded or destroyed on account of any individual inconvenience. If there has not been gross neglect in the sitting member, the committee conceive that it is due to the electors of the district, who polled for him, and to himself, not to hurry his case to a decision without giving them and him an opportunity to make good the election if they can do it. The house overruled this report by a small majority, because as is evident, Hungerford had been guilty of the grossest neglect. There is no such neglect in this case, but on the contrary, there is positive proof, that all that could be done has been done by the sitting member, considering the shortness and vagueness of the notice, and the extent of his district.

But, I have a more recent authority in which this house granted to the parties further time to take testimony, in a case not half so strong as the one now under consideration. It is one of high authority because it had the approbation of the gentleman from New York (Mr. Vanderpoel,) who was a member of the Committee of Elections I allude to the case of Moore and Letcher. In that case the election was *viva voce.* It took place in August—both parties commenced taking testimony immediately, in a congressional district not so large as the twelfth congressional district of North Carolina, they continued to take testimony up to the meeting of Congress, and yet the house granted them further time to complete their testimony. A stronger authority than this cannot be found. Both parties had consumed four months, and yet both wished further time. The house did not think the application unreasonable, the gentleman from New York did not then think it unreasonable, for he voted for it both in the committee, and in the House, though he now thinks the application of the sitting member most unreasonable. It is no answer to this argument to say, that in the case referred to, both parties applied for further time. It only shows what I have been contending for that with all possible industry neither party believed his testimony complete, although they had doubled the time allowed the sitting member, and in a congressional district not near so large.

With these two cases staring us in the face, and many others that might be mentioned, it must be a matter of surprise and regret that the committee in their report now under consideration, should declare in the most broad and unqualified terms that no precedent could be found, in which an application similar to the present, had been granted either by the committee of elections or by the House. If therefore reason and argument is to prevail, if precedent and authroity is entitled to any weight, if equal and evenhanded justice to be administered to all alike, if we wish that the truth should be heard and the 12th congressional district should speak her own voice and not the voice of a party in this house, then we will not, and cannot, refuse to grant further time that the whole truth may be heard.

I must here Mr. Speaker, take occasion to protest against the gratuitous inference, made the other day by the gentleman from Maryland (Mr. Howard) that this application had been made after the battle had been, fought and lost by the sitting member. This application was made in January last, before the evidence was examined and before the sitting member could know how the committee would report. He did not then believe, he does not now believe, that this battle will be lost if justice shall be done; but he feels it his duty, a duty he owes to himself as to the people he represents, to put this question beyond all cavil, so that the most miserable tool of party shall not doubt. I have examined this case upon the evidence before me carefully and impartially, and I must say that if ever there was a case in which injustice has been done, if there ever was a case in which the right of the sitting member to his seat was clear; it is this, and yet I am for giving further time, because it is desired. I wish to hear all that can be said that the whole truth may appear. Are gentlemen afraid of the light? Is the petitioner afraid that the whole truth should be heard? If not, let us give further time, and not hasten this important question to a premature decision.

Mr. Speaker, the most unpleasant task remains to be performed. I am constrained from a sense of public duty to examine further into the errors and misrepresentation of this extraordinary report, whose like I hope we shall never see again. I beg the gentleman from Kentucky, (Mr. Boyd) to believe that it is in no unkind spirit towards him, that I speak thus freely of his labors. I heard the honorable gentleman, a few days ago, disclaim all party feelings, and avow the honesty of purpose by which he had been governed. The gentleman spoke with earnestness, and I felt, at the time, that he spoke conscientiously; but I could not but deeply regret that in the review and self-examination of which he spoke, he had not detected the gross errors by which he has done great injustice to the sitting member, and irreparable injury to the state from which I come. Let me, therefore, invite the honorable member to the review which I propose to make of this public document.

At the Franklin precinct in Macon county, five or six votes were found in the commons' box for Newland, and taken from that box, and placed to his poll for congress, although it made five votes more than the number of freemen who had voted at that election. The committee allow these five votes, and as a reason for allowing them, the report says: "Robert Hall one of the judges, states that it is customary to correct such mistakes. There is no positive proof to show how many ballots were thus exchanged, nor who they were all for. Killian says, there were five or six for Newland, and perhaps some for Graham—he does not recollect. It is left quite uncertain, whether there was not some for the sitting member!" Sir, in this short sentence, there are not less than three mi-statements of facts. For the truth of this, I beg to read the testimony of Robert Hall and James W. Killian. Here it is: Robert Hall's testimony: "The judges upon consultation, agreed to exchange the votes and the exchange was made, but I do not recollect the number. I know that it has been the custom, for men who lived in, the district to vote in whatever county in the district, where they may be at the election." James W. Killian's testimony: "I was present at the close of the business of counting out tickets. There were several tickets *five or six* for congress in the commons' box, and the same number for the candidates for the senate and commons in the congress box. These were exchanged. *All the tickets* taken from the commons' box, for candidates for congress were given for Newland. *If there were any for Graham, I do not recollect it. There may have been some but I do not know of any.*"

The committee say, that Robert Hall swears it was customary to make such exchange—but Robert Hall swears no such thing. He swears that it was customary for men living in the district, to vote any where in the district, but notwithstanding this custom, the committee have rejected such votes, and as I have heretofore shown, properly rejected them. The committee say that there was no positive proof to show how many ballots were thus exchanged; but Killian swears that there were five or six. The committee say, that it was left quite uncertain whether there was not some for the sitting member, perhaps say they, there was some for Graham. But what says Killian? Let him speak for himself. "All the tickets," says he, "were for Newland—if there were any for Graham I do not recollect—