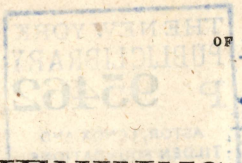


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SPEECH



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HON. T. JENKINS, OF NEW YORK,

ON THE



CONTESTED-ELECTION CASE FROM NEW JERSEY.

DELIVERED

IN THE HOUSE OF REPRESENTATIVES, WEDNESDAY, MARCH 4, 1846

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1878

NEW JERSEY CONTESTED ELECTION.

[The majority of the Committee on Elections, consisting of Messrs. DOBBIN, CHAPMAN, HARPER, McGAUGHEY, and CULVER, reported in favor of the election of the sitting member, Mr. RUNK; and the minority, consisting of Messrs. HAMLIN, CHASE, ELLSWORTH, and CHIPMAN, made an adverse report, having come to the conclusion that the contestant, Mr. FARLEE, was entitled to the seat.]

Mr. JENKINS said :

Mr. SPEAKER: On the 5th and 6th days of November, 1844, an election was held in the State of New Jersey for the choice of electors of President and Vice President of the United States, and for members of Congress in the several districts of that State. The third congressional district of New Jersey is composed of the counties of Hunterdon, Somerset, Mercer, and Middlesex. Isaac G. Farlee and John Runk were the opposing candidates for Congress—Farlee for the Democratic and Runk for the Whig party. According to the returns, Runk had a majority over Farlee of sixteen votes.

Thirty students, four of whom were then at college, and the residue at the Theological Seminary at Princeton, appeared at the polls in that district and deposited their ballots for electors and a member of Congress. One of these collegians testified that he voted for the contestant, and it is alleged that the remaining twenty-nine voted for the sitting member.

The majority of the committee have put the question, For whom did these students vote? but have left us without an answer. Let us first examine this point; for if it be not sufficiently proved that at least eighteen of the twenty-nine students voted for the sitting member, any further investigation of the case will be of no importance.

Nineteen of these students were examined, under oath, as witnesses in September last, upon this subject. The remaining eleven had nearly all graduated, and all had then left that section of the country, and could not be produced for examination. The four who were first called testified that they voted for the sitting member, and the one

who voted for the contestant admitted the fact of his voting for Farlee. The remaining fourteen, who were examined as witnesses, utterly refused to disclose for whom they deposited their ballots. For the purpose of proving for whom seventeen of the students voted, composed of a part of those who had refused to testify on the subject, and a part of the absentees, evidence was taken disclosing their declarations made before, and about the time of the election, wherein they admitted that they belonged to the Whig party; and some of them, after the election, alleged that they voted for the sitting member. This class embraces the three collegians alleged to have voted for the sitting member, and fourteen of the students of the theological school. The remaining eight belonged also to the theological institution. The proof, from reputation, received, that these eight students also belonged to the Whig party at the time of the election—that the Democratic students in the theological school, prior to the election, were advised not to offer their votes—that it was generally spoken of in the theological school that none of the Democratic students intended to vote, and afterwards that none but Whig students in that institution had voted—made up a strong current of evidence tending to establish, and, in my judgment, fully establishing the fact, that the twenty-nine students cast their votes against the contestant, and in favor of the sitting member.

I am of the opinion that this species of evidence is admissible. Where, as in New Jersey, the law allows of voting by ballot, thus intending to enable the elector to withhold the knowledge of his choice from all, that law cannot so run counter to its own spirit as to compel him, on some other occasion, to unfold the secret. Hence the necessity of resorting to a grade of evidence less direct, but which may be, and often is, no less certain than the oath of the voter. This position is supported by the decision in the election case from New Jersey, in this House, which was determined in 1840. In that case, the majority of the Committee on Elections, consisting of Messrs. Campbell, Rives, Medill, Crabb, and Brown laid down the following

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rule as their guide: "Although in numerous instances the voter, being examined as a witness, voluntarily disclosed the character of his vote, yet in many cases he did not appear, or, appearing, chose to avail himself of his legal right to refuse an answer on that point. In such cases, proof of general reputation as to the political character of the voter, and as to the party to which he belonged at the time of the election, has been sufficiently demonstrative of the complexion of his vote." In the same case, the minority of the committee, consisting of Messrs. Fillmore, Smith, and Botts, adopted a rule of similar import. It is this: "If an unlawful vote be cast, how are we to ascertain who had the benefit of such a vote? It seems to the undersigned to be indispensable to resort to secondary evidence (when no better can be obtained) to this point: such as the declarations of the voter, either at the election or soon after, and also proof of his political character, which, when well defined, will be a sufficient guide to the truth."

Resort to this kind of evidence is often had to prove the character of a witness. Marriage or the pedigree and relationship of a family; and if, for such purposes, this grade of evidence is competent, surely it must suffice to prove political affinity.

The honorable gentleman from North Carolina, [Mr. DOBBIN,] without urging this point of the case with much emphasis, inquired whether it was not common for electors to vote for their opponents in politics? Although an elector, from motives of personal friendship, or some other special cause, sometimes may cast his ballot for a candidate belonging to the opposite party, yet in 1844, at an election carried on with more ardor and acrimony than was ever before known in this country; when the last die in the political fortune of the distinguished Kentuckian was to be cast, it is not to be presumed, in absence of all proof, that one of his followers would break from party drill and vote for a candidate to Congress opposed to all of his leading measures. I think it cannot be seriously denied but that sufficient is shown, by legal evidence, to establish the fact, that the twenty-nine students voted for the sitting member.

I now proceed to the discussion of a question of more interest. Under the constitution and laws of New Jersey, were these students entitled to vote in the third congressional district of that State?

The new constitution of that State, framed in June, 1844, went into effect in September, immediately prior to the election. The second article is as follows: "Every white male citizen of the United States, of the age of twenty-one years, who shall have been a resident of this State one year, and of the county in which he claims his vote five months next before the election, shall be entitled to vote for all officers that now are, or hereafter may be, elected by the people: *Provided*, that no person in the military, naval, or maritime service of the United States, shall be considered a resident of this State by being stationed in any garrison, barrack, or military or naval place or station within this State; and no pauper, idiot, insane person, or person convicted of a crime, which now excludes him from being a witness, unless

'pardoned or restored by law to the right of suffrage, shall enjoy the right of an elector."

Although the whole question will be found to turn upon the interpretation given to a very common word, yet the inquiry is one of some importance to that State, and especially to the third congressional district. In that district there are two colleges and one theological seminary, together having some six hundred students, and probably a majority of whom are above the age of twenty-one years. If these students have a right to vote, they hold the balance of political power in that district.

These institutions hold out favorable inducements to the parent and the pupil, and youth from all parts of the Union resort there for the attainment of an education. They leave their homes, as other students generally do, to pass through a course of study, trusting to the future to point out a place of final settlement. None of them enter these institutions with the intent and purpose of making a permanent residence there. The object they go for is limited as to time and specific in its character, and from the beginning they expect to leave, and they do disperse when that object is accomplished. Are such students *residents* at these places of temporary abode within the meaning of the constitution of New Jersey? Do they lose their residence in the other States or counties from whence they come, and gain a legal residence in the congressional district embracing the schools in question? The word "residence" does not of itself designate whether a permanent or temporary abode is thereby intended. The circumstance that this word is capable of being qualified, by joining it to others, so as to designate a longer or shorter period of time; a fixed inhabitancy or a temporary sojournment, demonstrates the necessity of looking beyond the mere letter for a key to its interpretation.

If we examine the books for aid upon this question, it will be found that various discussions and decisions upon the words domicil, inhabitant, settlement, and citizen, as well as resident, are capable of affording us some light to guide us in this investigation. Questions much like this have arisen in discussions upon the law of nations. That law has recognised certain special rights in a class of men whose condition falls short of a citizen, and rises above a sojourner. In order to avail himself of such rights, the claimant must have a domicil in the country under which he seeks protection. If his intention of moving to such country "was to make a permanent settlement, or for an indefinite time, the right of domicil is acquired even by a residence of a few days." In this language, Judge Washington has sufficiently defined the legal meaning of the word residence. The same proof which was required to prove the right of domicil is also necessary in a case of residence.

The word citizen is often used in a sense synonymous with that of resident. By the Constitution of the United States, jurisdiction is conferred on the Federal courts in cases where the parties are *citizens* of different States. The courts have uniformly held that citizenship, when spoken of in the Constitution with reference to the jurisdiction of the courts of the United States, means nothing more

than residence. "If a citizen of one State shall think proper to change his domicile, and to remove himself and family (if he have one) into another State, with a *bona fide* intention of abandoning his former place of residence, and to become an inhabitant or resident of the State to which he removes, this makes him a resident of the latter State."

The supreme court of the State of New York has decided, that an inhabitant and a resident mean the same thing, and that a "resident within the State" is not one who had a residence of a temporary nature, but one of a permanent and fixed character." Chancellor Walworth held that inhabitancy, residence, and domicile, "mean a fixed and permanent abode or dwelling-place, for the time being, as contradistinguished from a mere temporary existence."

In the construction of the poor laws, the same rules have been applied to the interpretation of the word settlement. Every man has a lawful residence somewhere, and that is equivalent to the place of his lawful settlement. If he be an infant, his residence follows that of his parents. If his parents gain a new residence, that of the infant changes with theirs. If no other residence can be found, the place of his birth is his settlement. Every person has a lawful residence, and it is always found between the present and the cradle. The first, of necessity, is retained until a new one is acquired.

In order to change the place of one's residence, in the legal acceptation of the term, there must be an absolute intention of forever quitting the former place of abode and the actual moving to the new home, with the undisguised intention of remaining there an indefinite time. If the length of time be limited, one of the essential ingredients to a residence is gone, and nothing above the condition of a sojourner is acquired.

The three collegians, and those of the theological students who were called upon to testify, gave their places of residence. The catalogue of the theological seminary, under the head "residence," designates the domicile of all the students in that institution. Of the twenty-nine who voted, one resided in the State of Kentucky, one in the island of Ceylon, one in Alabama, two in Mississippi, one in Ohio, six in Pennsylvania, one in Michigan, one in Maine, one in Maryland, one in Tennessee, nine in New York, and five only in New Jersey; and not one of them in the district in which they voted; unless it shall be decided by this House, that the mere departure from home, and entering an institution for the temporary purpose of going to school for a certain period of time, shall constitute a lawful residence.

These young men could feel no strong and abiding interest in the civil institutions of New Jersey. Their attachments naturally centred about their homes and their kindred. There would they go in sickness and misfortune; and the day of pastime and joy would send their bounding footsteps there. But to name a college home, is a burlesque upon the word. It were more appropriate to call it a prison.

It must be against the policy of New Jersey to permit mere students coming from abroad and

from other States, with no knowledge of her laws, no acquaintance with her candidates for office, and no feeling of responsibility for her prosperity, to take part in the choice of her rulers. Whoever should be entitled to the exercise of this important privilege, should first have become incorporated into her society. His interests should interlock with the interests of her people; his patriotism and his love of country should have a home there. If her liberty were in danger, he should have no place for retreat, but, cemented by ties stronger than life, should be prepared to sacrifice all for her safety.

In this respect, the well-being of the students and the institutions of learning coincide with that of the State. Parents do not send their sons there to be converted into politicians. The exertions which they make use of to educate their children would be illy requited if, instead of acquiring a thorough knowledge of their studies, to fit them for honor and usefulness, these young men should surrender themselves to the hot spirit of party strife, sure of being politicians, but scholars, never. Let it be known that these institutions, which occupy so high a rank in this country, have entered the political arena, that the students there are allowed to be pressed into the service of ambitious aspirants to office, and I pronounce their usefulness and prosperity at an end. No discreet parent would ever trust his offspring to their charge.

By the present constitution of New Jersey, whoever of her citizens shall have had the misfortune to lose his property, and has become so much worn out by age, or prostrated by disease, as to compel him to lean upon public bounty for support, is excluded from any participation in the choice of his rulers; and this, too, though he may have been the greatest public benefactor in the State. Yes, though he may have projected railroads, built up towns, improved the mechanic arts and the agriculture of the State, and poured the treasures of commerce into her bosom; yet this constitution allows poverty to sink him to the grade of a criminal, and for this cause denies him the right of suffrage. If the people of that State have been thus strict in guarding the right of suffrage, can it be maintained that they intended to extend that important privilege to a mere sojourner? No. The policy of the State and the well-settled judicial interpretation given to the word *resident*, unite in forbidding such a temporary resident the right of suffrage.

Whoever may not be convinced by this view of the case, should not close his investigations here. The first constitution of New Jersey, adopted in 1776, allowed all *inhabitants* of the colony of full age, who were worth fifty pounds, and had resided in the county in which they claimed to vote for twelve months immediately preceding the election, to vote for all officers elective by the people. This constitution continued in force until September, 1844, when the present constitution went into operation. Before the adoption of the new constitution, several statutes had been passed by the State Legislature, rendering the property qualifications prescribed in the old constitution merely nominal. What right the Legislature had to abrogate the explicit language of the constitution in this respect, it is not my purpose to inquire.

But for some years the patriotic *women* of New Jersey, taking advantage of the liberal phrase "all inhabitants," made use of by the framers of that instrument, claimed and exercised the right of voting for all officers, from Governor downwards. The State Legislature, however, in 1820, perhaps deserving of more applause for prudence than praise for gallantry, passed a solemn act, forbidding the women from voting. By this act the Legislature of that State took it upon themselves to give a legislative definition of the word "inhabitants," thereby holding that the phrase "all inhabitants" meant all male inhabitants.

Prior to the formation of the present constitution, and in the month of March, 1844, the Legislature of that State passed an act declaring that when any person should thereafter leave his home, or place where he resided, to attend any college or theological seminary, such absence should not constitute a change of the place of residence of such person, so as to entitle him to vote at any election in which such college or theological seminary, was situate. This act was in affirmance of the common law, and substantially gave the same definition to the words "inhabitant" and "resident" which the courts of law had long since established. Indeed, the supreme court of New Jersey had before then, in a well-considered opinion, delivered by Judge Dayton, (the chief justice and associates concurring,) decided, in accordance with the adjudications of the courts in other States and of the United States, "that a domicile may be defined to be a residence in a particular place, accompanied with positive and presumptive proof of continuing it an unlimited time." This, too, was a case of election, arising under the constitution of New Jersey; and the learned Judge remarked, in giving the opinion, "that students of our colleges and hundreds of others, scattered on land and sea, engaged for the time being in the prosecution of some transient object, are considered in law as residing at their original homes." At the time of the congressional election in question, this statute of New Jersey had not been repealed. If then it were in force, it requires no argument to show, that the twenty-nine students were manifestly excluded thereby from voting. What answer, Mr. Speaker, do you think is given to this position? Verily, the honorable gentleman from North Carolina claims that the adoption of the constitution of New Jersey, subsequent to the passage of the act of the Legislature, operated as a repeal of the act. As well might he claim that the new constitution repealed all of the prior legislative enactments of that State; for the constitution of the State adopts the common law, and I think it is manifestly shown that the statute is in affirmance of that law, and hence that it is not repugnant to the constitution. Is the doctrine sound, that when the constitution uses a word capable of two different definitions, the Legislature cannot prescribe which interpretation shall be adopted? If the act be in existence when the constitution is framed, the proper conclusion is, that the convention forming the constitution used the word with reference to the statute, and in accordance with the definition therein prescribed. Whether, therefore, the statute be passed before or

after the formation of the constitution, it is equally operative. Hence the Legislature of New York, under a provision in the constitution of that State, quite similar in this respect to the constitution of New Jersey, has enacted that no person shall gain or lose a residence by leaving home to attend any seminary of learning.

But the argument of the honorable gentleman from North Carolina is based mainly upon the proceedings in the convention which formed the constitution. What were they? "Mr. Zabriskie (a Democratic member) moved to amend, so as to 'exclude students, who had taken up a transient residence, from voting.'" Mr. Hornblower (a leading Whig member) opposed this motion, in a speech of some length, and said "He had no doubt 'that there were then many men who came there 'for (in one sense) a temporary, and not a permanent residence, that is to say, until Providence 'should call them elsewhere, or as long as they should 'support themselves.'" "There are (he said) many 'students who expect never to return to their native 'State, nor to remain here but for a course of 'study,'" and insisted that such students ought to have the right to vote. Mr. Vroom (of the Democratic party) said, "he thought it better to leave it to legislation." Mr. Zabriskie thereupon withdrew the amendment. This is the substance of the proceedings before the convention, so far as they have any bearing on the question under discussion. When Mr. Vroom, a distinguished lawyer, expressed an opinion that it should be left to legislation, not a member of that convention even intimated that such legislative action would be repugnant to the constitution. The proposition was obviously withdrawn, upon the ground that the subject was within legislative control. The proceedings of the convention, therefore, make against the position taken by the honorable gentleman from North Carolina, rather than in favor of it. The constitution was framed with the decisions of the courts, and the statute before the convention, both prohibiting such sojourners as these students were, from being deemed residents, and the convention adopted that word in accordance with both the statutory and common law definition of it.

The honorable gentleman from North Carolina, perhaps, feeling some doubt that his positions of law might not be sound, makes up an issue of fact, which we will proceed to try. It is this: that it appears by the evidence that these twenty-nine students did not expect ever to return to their homes. If this were so, that circumstance forms no answer to the objection against their voting; for to constitute them residents, it must also appear that they intended to make these places, at which they were at school, their permanent abode.

The rule by which a man's intentions is to be adjudged is, his acts. Acts constitute the only lawful evidence of his intentions. In an able opinion on this subject, Judge Washington says: "A material ingredient in changing the place of residence is the intent; but the intention is to be collected from the acts, and not from the declarations of the party." So a party to an alleged fraud, called upon to prove his good faith in a sale of prop-

erty, is never permitted to speak of his intentions. He must disclose the facts, and the jury will judge of his intent.

In this case, not one of the students disclosed a fact tending to show that they did not intend to return to their homes. They swore to conclusions of their own minds, but gave no facts in support of such conclusions. The eighteen students who were examined upon oath did show quite conclusively that they had read the speech made by Chief Justice Hornblower, for he had predicted in the State convention, that *many students did not expect to return to their native State*, and the whole eighteen testified in substance, under the solemn sanction of an oath, that *they did not expect to return*. He said that many students expected to *stay till the providence of God called them elsewhere*; and they swore that *they expected to stay, until the providence of God directed otherwise*. Some testified that they intended to remain there "*permanently as long as they staid*;" and none would admit they designed to return home. All this was in direct contradiction to the printed catalogue designating their places of residence—a catalogue which must have been made out from intelligence derived from them, and was under their daily observation. But they may have felt themselves justified, because they had only sworn up to the point designated in the speech of Chief Justice Hornblower. Verily the great Whig horn of New Jersey was blown, and these twenty-nine students personate the smaller notes, which came from the echo.

Although this testimony was wholly incompetent, yet, if competent, it is unworthy of credit. Is it probable that these twenty-nine students expatriated themselves when they left the parental mansion for school? If so, it was the most remarkable occurrence which ever happened, before or since that time. No; this cannot be true. They left with the manifest expectation of returning home when their studies were finished. These

students, who had been so wrought up by political excitement as to be induced to decline stating for whom they voted, for the purpose of aiding the sitting member, ought not to have trusted themselves to testify in regard to their intentions when they left home.

But it is said that these were students in theology. Not so. Their testimony shows them proficient in casuistry. The simple but sublime truths of that religion which they profess could never have driven them back to the schoolmen for models, or taught them, with an adroit play upon words, to conceal the purpose of the heart. A fearless, frank, and manly disclosure of the whole truth alone can come from the real student in theology.

The rejection of the sitting member will send back an appropriate admonition to the State from whence this case proceeded. The theological institution itself has already felt the blight of party politics. The catalogue, made *since* these young men voted, omits to state the "residence" of the students as the former one had done, but holds out the words "where from" as a substitute. For what purpose has this change been made? Was the institution fearful that any one would be misled by giving the true residence of the student—the place where his parents live—his nursery—his home? Or has the insidious thought of holding the balance of political power in that district made its way from the student upwards, now disclosing itself in preparatory action? These are questions which time must answer.

In my judgment, a due regard for the well-being of the State, the prosperity of these institutions of learning, and a faithful examination of the law and the facts belonging to this case, irresistibly lead to the conclusion that the contestant is entitled to the disputed seat.