

disagreement in the returns—" and evidently the word "disagreement" here means an irregularity or discrepancy which affects the right of a candidate—"then said members of the county court shall canvass the votes as herein directed." It seems clear that the word "herein" does not simply refer to this section, but also to the one preceding it. The word "votes" being used in the same sentence instead of the word "returns" also has an important bearing in the construction of this section of the act.

Doubtless it was the intention of the Legislature to confer upon the board, as thus constituted in each county, the authority to canvass, in proper cases, the ballots cast in such county, for any Territorial officer or for any officer whose election is affected by more than one county. While, however, the law thus confers the power to canvass the votes in proper cases upon such board, regardless of the rank of the office, it restricts the powers of the clerk of the county court in making out and transmitting certificates of election to county and precinct officers. The power to make out and transmit certificates of election to territorial officers, and to such officers whose election depends on more than one county, is conferred upon another officer, as will be seen in subsequent sections in the statute. It is incumbent upon such clerk and members of said court, after such canvass has been made, to declare the result thereof, and under section 20, I. d., the ballots must immediately, after such inspection, be returned in to the ballot box, which must then again be locked and securely sealed, and "so preserved for ten days after the result of the election has been declared;" then, immediately after the expiration of the ten days, said clerk shall, in the presence of at least one member of the county court, and of such candidates as may be present, "open each of the ballot boxes and destroy all the ballots contained therein." When this is done the clerk of the county court and the members thereof, have no further duty to perform as an election board, and the duties of such members cease altogether so far as such election is concerned; but the clerk of said court is required under section 21, I. d., "as soon as possible after the result of the election has been so determined," to make out a general abstract thereof, in triplicate, certify to its correctness, and then forward a certified copy of the names of the persons voted for, and the number of votes each has received for Territorial offices" to the secretary of the Territory; and to make other disposition of the abstract as provided by law. The copy here provided for constitutes the returns mentioned in Section 22, I. d., which is the only remaining provision of the Territorial act necessary to be considered in the decision of this case; and it reads as follows: "As soon as all the returns are received by the secretary of the Territory, he shall, in the presence of the governor, unseal and canvass the same, and make an abstract thereof, and the secretary shall, within ten days thereafter, make out and transmit a certificate of election to each member of the legislature and territorial officers elected." The secre-

tary's duties under this section are simple. He has but to unseal and canvass the returns in the presence of the Governor, and make an abstract thereof, and make out and transmit the certificates of election within ten days after the returns are received by him. He has nothing whatever to do with irregularities or discrepancies or with canvassing the votes, and he can only issue certificates to Territorial officers, and members of the legislature. He must see, however, that the returns are genuine, and made out as required by law.

Thus, from an examination of the act of 1878 as it was before the act of Congress took effect, it will be seen that there is a provision made for four distinct classes of officers, and that each class is endowed with certain special powers, and required to perform certain specific duties. These classes are:

First, the registration officers, whose duty it is to register the voters. The statute constituted the assessors of the respective counties such officers, with power to appoint deputies.

Second, the judges of election, whose duty it is to open the polls, receive the ballots, close the polls, canvass the ballots, declare the result, certify and transmit the returns with the ballot box, to the clerk of the county court. They are appointed by the county court.

Third, the clerk and members of the county court, acting as a canvassing board, whose duty it is to canvass the returns, declare the results thereof, and, in proper cases, canvass the ballots and declare the result, and then such clerk must then issue certificates of election to county and precinct officers, and forward a certified copy of the names of the persons voted for, and the number of votes each has received for Territorial offices to the secretary of the Territory, and, at the time specified in the statute, destroy the ballots.

Fourth, the Governor and secretary of the Territory; and it is the duty of the secretary of the Territory to canvass the returns for Territorial officers, so transmitted to him by the clerk of the county court, in the presence of the Governor, and issue certificates to all Territorial officers, including members of the Legislature.

Having thus indicated my conclusions as to the powers and duties of election officers, and as to what constitutes the returns under the act of 1878, one of the most important questions yet to be entertained in this case is, how and in what respect its provisions are modified or changed by the act of Congress approved March 22, 1882, known as the "Edmunds law."

Section 9 of this act, so far as material here, provides as follows: "That all the registration and election offices of every description in the Territory of Utah are hereby declared vacant, and each and every duty relating to the registration of voters, the conduct of elections, the receiving or rejection of votes, and the canvassing and returning of the same, and the issuing of certificates, or other evidence of election in said Territory, shall, until other provision be made by the Legislative Assembly of said Territory, as is hereinafter by this section provided, be performed under the existing laws of the United States and of said Territory, by proper persons who

shall be appointed to execute such offices and perform such duties by a board of five persons, to be appointed by the President," etc. Under this section, all the election offices, created by the Territorial act of 1878, were declared vacant, and the President of the United States was authorized to appoint a board of five persons. This board is known as the Utah Commission, and the defendants in this case constitute said board, which is given power to fill all the offices thus declared vacant, by the appointment of "proper persons."

The duties, powers and requirements of such "proper persons," are the same as those which were incumbent upon the persons who filled said offices, under the Territorial act, before the enactment of the "Edmunds law." No part of the methods of procedure prescribed by the act of 1878 is repealed or limited, or modified by the section under consideration, except that the officers, required to carry out the provisions of the Territorial act, must be appointed as provided in this section of the law of Congress.

With this exception, the Territorial act remains in full force and effect, and is the rule of action to guide the defendants. It is manifestly the duty of the defendants to appoint all the officers required for the conduct of elections, in the manner prescribed in the Territorial act, and they cannot themselves perform any powers or duties, under said act, which have not been devolved upon them by express provision of the act of Congress. The donee of a power to appoint is not necessarily, or by reason of being such donee, clothed with power to perform.

It is insisted, however, by counsel for defendants, that the powers and duties to be performed under section 18 and 19 of the act of 1878, in so far as election for members of the Legislative Assembly are concerned, are devolved upon the defendants by section 9 of the act of Congress, of which another material clause affecting the question reads as follows: "The canvass and return of all the votes at elections in said Territory for members of the Legislative Assembly thereof shall also be returned to said board, which shall canvass all such returns and issue certificates of election to those persons who, being eligible for such election, shall appear to have been lawfully elected, which certificates shall be the only evidence of the right of such persons to sit in such assembly."

Notwithstanding the able arguments of counsel in support of their position, I am unable to agree that this or any clause of said section confers such power upon said board. Such a construction would not only render useless and ineffectual sections 21 and 22 of the act of 1878, without any words of repeal or limitation in the provision which is claimed to produce such a result, but also would do violence to the spirit and intent of the Territorial act and to the economical method of procedure provided thereby in cases of irregularities and discrepancies in the returns which would affect the rights of persons to such offices. If Congress had intended such a result, if it had intended to confer upon the board such great power, it is but reasonable to presume that it would not have left such intention to mere implication. Nor is there any