

***Ex Parte Norris*, 8 S.C. 408 (1877)—A Window Into Reconstruction Times¹**

C. Mitchell Brown² and Miles E. Coleman
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The decade following the Civil War was a tumultuous time in the former Confederate states, and South Carolina was no exception. The era was characterized by political division, racial tension, civil unrest, and not infrequent episodes of violence. These tensions reached their apex in South Carolina's gubernatorial election of 1876, a closely contested race resulting in two men simultaneously claiming to be governor. This highly unusual situation came before the state Supreme Court in the form of *Ex Parte Norris*.



Gov. Wade Hampton

The incumbent governor, elected in 1874, was Daniel Henry Chamberlain. A native of Massachusetts, Chamberlain had graduated from Yale, attended Harvard Law School, and had served in the Civil War as a Union officer with a regiment of black troops. After the war, Chamberlain relocated to South Carolina, where he practiced law, then served as state Attorney General, and later was a member of the board of trustees of the University of South Carolina. Chamberlain was a Republican and was supportive of Reconstruction and civil rights. Not surprisingly, he enjoyed the support of the federal government, including President Ulysses S. Grant.



Gov. Daniel Henry Chamberlain

The Democratic challenger, Wade Hampton III, was Chamberlain's antithesis. Hampton was a native South Carolinian and former General in the Confederate army. His family was wealthy and well known. Hampton's grandfather and father had served as high-ranking officers in the Revolutionary War and in the War of 1812. His uncle had served in both houses of Congress and as governor of South Carolina. Hampton was an avid outdoorsman, reputed to hunt bears while armed with only a knife. When the Civil War broke out, Hampton resigned his seat in the state General Assembly to organize, finance, and lead a sizeable military unit in the Confederate Army. After the war, he returned home to find much of his wealth and property destroyed by Sherman's marauders.

The election of 1876 thus offered a stark choice framed by the ongoing unrest. While the election was relatively peaceful, this was due in no small part to the presence of federal troops, who had been stationed in the state since 1868 in an attempt to preserve order. Further, the election was marred by allegations of fraud. Most notably, in Laurens and Edgefield counties, it appeared Hampton received more votes than there were registered voters. When the statewide votes were initially tallied, Hampton had received 92,261 to Chamberlain's 91,127.³

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² C. Mitchell Brown is the current President of the South Carolina Supreme Court Historical Society. Miles Coleman and he are attorneys at the law firm of Nelson Mullins Riley and Scarborough, LLP.

³ See the exhibit to the trial court's ruling in *Ex Parte Smith*, republished in *Index to the Misc. Documents of the House of Reps. for the Second Session of the Forty-Fourth Congress*, Vol. 3, Appendix at 206 (1877). If the votes from Laurens and Edgefield counties were excluded from the statewide totals, Chamberlain had 86,216 votes and Hampton had 83,071. *Id.* at 203.

The state Constitution of 1868 mandated that gubernatorial election results be mailed by each county to the Secretary of State, who would deliver them to the Speaker of the House of Representatives, who would then “open and publish them in the presence of both houses.” S.C. Const. Art. III, § 4 (1868). The election results made their way to Henry E. Hayne, the Secretary of State, without incident. However, the remaining constitutional requirements proved more difficult. First, there were two rival bodies, both claiming to be the House of Representatives. Second, the Senate refused to convene with what was determined to be the legitimate House to open and publish the vote tallies when it became apparent that Hampton was likely to be victorious. Both of these complications were resolved by decisions by the state Supreme Court.

The first problem was to determine which of two groups claiming to be the House of Representatives was, in fact, the legitimate body entitled to official recognition. One of the two groups, led by E.W. Mackey, was composed of pro-reconstruction Republicans. The other, led by William H. Wallace, consisted of Democrats. Both groups claimed to be the official, legally elected House of Representatives. The Secretary of State initially delivered the election results to the Mackey House. Wallace brought an action in the state Supreme Court seeking a writ of mandamus requiring the Secretary to deliver the election results to the Wallace House. *See State v. Hayne & Mackey*, 8 S.C. 367 (1876). Each of the three justices issued his own opinion, but all agreed that the Wallace House was the official legislative body. *Id.* at 376-77 (Moses, C.J.) (“Mr. Wallace is the Speaker of a legally-constituted House of Representatives Mr. Mackey stands in the position . . . as a private citizen.”); *see also id.* at 380 (Willard, J.) (“I am fully in accord with the Court that the body which contained the constitutional number was the House over which Wallace presides. The one presided over by Mackey has no legal status whatever. Mackey is a private citizen and is subject to arrest and punishment.”).

The court’s ruling set in motion a string of rapid responses. The court issued its opinion recognizing the legitimacy of the Wallace House on December 6, 1876. The same day, the Mackey house convened with the Senate, opened and counted the votes, threw out the votes of Laurens and Edgefield counties, and purported to find Chamberlain the victor. *Ex Parte Norris*, 8 S.C. at 455-56 (reproducing a brief from a prior case).⁴ The next day, the incumbent governor Chamberlain conducted a ceremony in

⁴ The published opinion in *Ex Parte Norris*, in addition to reproducing the Referee’s report and the parties’ briefs, includes a brief from a prior case involving John Pelton and raising many of the same issues. *See Ex Parte Norris*, 8 S.C. at 447-59.

Biography of Justice Jonathan Jasper Wright

Jonathan Jasper Wright was born in Pennsylvania on February 11, 1840. He attended Lancasterian University in Ithaca, New York. After completing his university studies, Wright spent several years studying the law. When he applied for admission to the Pennsylvania Bar, the Committee refused to examine him, presumably on account of his race.



Wright later traveled to Beaufort, South Carolina, where he served the American Missionary Society as a teacher of freed slaves. After the passage of the federal Civil Rights Act of 1866, Wright travelled to Pennsylvania and became the first black lawyer admitted in Pennsylvania. He remained in Beaufort, acting as the legal advisor for freed slaves before the federal Freedmen’s Bureau. In 1868, he was elected to the Constitutional Convention of South Carolina, where he served as vice president and helped draft the portion of the state constitution dealing with the judiciary. He subsequently served briefly as a state senator before being elected to the state Supreme Court in 1870 shortly before his 30th birthday. He served on the court for seven years, retiring in 1877 to avoid an apparent politically motivated impeachment. He subsequently entered private practice in Charleston, South Carolina, where he died in 1885 after contracting tuberculosis.

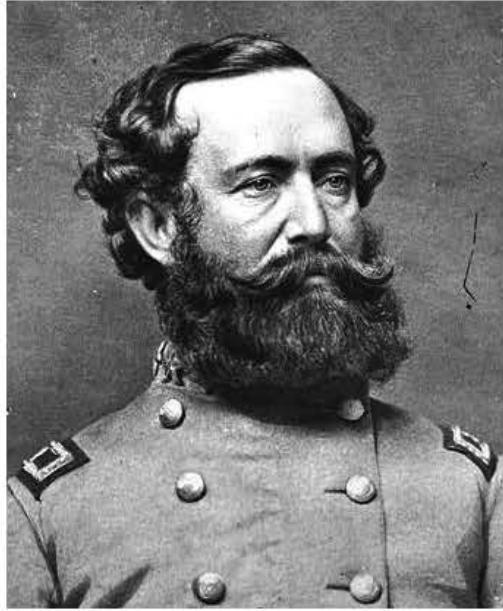
Sources

The University of South Carolina School of Law, “Memory Hold the Door: Jonathan Jasper Wright” (available at www.law.sc.edu/memory/1997/wrightjj.shtml) (last visited April 22, 2013).

Harper’s Weekly, *Judge J. J. Wright, of South Carolina* (March 5, 1870) (available at <http://blackhistory.harperweek.com/7Illustrations/Reconstruction/JJWright.htm>) (last visited April 22, 2013).

which he purported to be re-inaugurated, after which he wrote an inaugural address and had it published. *See Ex Parte Smith*, 8 S.C. 495, 496-97 (1877).

On December 13, 1876, the Wallace House, now in possession of the election results, dispatched a notice and invitation to the Republican controlled Senate to convene together the next day to open and publish the election results. The message was carried to the Senate by the Clerk of the House,



Wade Hampton (c. 1863)

who had some difficulty gaining admission to the State House. *See Ex Parte Norris*, 8 S.C. 408, 409 (1876) (noting the Clerk's testimony that he was denied admission by a constable and "United States soldiers with fixed bayonets"). Despite this difficulty, the message was conveyed to the Clerk of the Senate. *Id.* at 410. The Senate, however, did not publicly announce the invitation or publish it in the legislative journal. As a result, although a few individual Senators attended the opening of the election results by the House, the Senate—as a legislative body—did not attend.

The following day, December 14, 1876, despite the absence of the Senate, the Wallace House opened and published the election results and found that Wade Hampton had prevailed. Hampton took the oath of office that day. Thus began a period of over four months during which two men simultaneously claimed the office of Governor of South Carolina. Ultimately, the resolution of

the issue was precipitated by the issuance of pardons by both Chamberlain and Hampton.

The first pardon was issued by Chamberlain on December 20, 1876, and purported to pardon Peter Smith, who was imprisoned for burglary. *See Ex Parte Smith*, 8 S.C. at 495; *see also* the opinion of the Richland County Trial Court.⁵ When the state Superintendent of the Penitentiary refused to recognize the pardon's validity, Mr. Smith brought a petition for a writ of habeas corpus in state trial court. On January 29, 1877, the trial court—in a ruling reversed by the state Supreme Court nearly a year later—ruled that neither Chamberlain nor Hampton had been legally installed as governor, and thus concluded that Chamberlain, as the incumbent, continued to hold the office. *See Ex Parte Smith*, 8 S.C. at 513-14 (quoting trial court's ruling). Specifically, the court relied on the constitutional provision that the governor held office "'until his successor is chosen and qualified.'" *Id.* at 514 (quoting trial court); *see also* S.C. Const. Art III, § 2 (1868) ("The Governor . . . shall hold his office for two years, and until his successor shall be chosen and qualified.").

On February 9, 1877—less than two weeks after the Richland County trial court upheld Chamberlain's pardon as a legitimate gubernatorial act—Hampton pardoned Tilda Stephens, also known as Tilda Norris. *See Ex Parte Norris*, 8 S.C. at 460 (opinion of Wright, J.). At the time of her pardon, Ms. Norris had served fourteen months of a two-year sentence for manslaughter. *See* Walter Brian Cisco, *Wade Hampton: Confederate Warrior, Conservative Statesman*, 261 (2004). When Ms. Norris presented her pardon to the Superintendent of the Penitentiary, he refused to release her.

⁵ Republished in *Index to the Misc. Documents of the House of Reps. for the Second Session of the Forty-Fourth Congress*, Vol. 3, Appendix at 197 (1877).

Ex Parte Norris, 8 S.C. at 460. She immediately filed a petition for a writ of habeas corpus with the state Supreme Court. *Id.* The court assumed jurisdiction and appointed a Referee, who received evidence and took testimony from the Clerk of the Wallace House, the Clerk of the Senate, several Senators, the incumbent Lieutenant Governor, and a former Speaker of the House. *Id.* at 408-17.

Within a week of receiving the matter, the Referee submitted a report of the testimony he had heard and the evidence he had received. In a written brief, counsel for Ms. Norris—arguing in favor of recognizing Hampton’s authority—contended that the constitutionally prescribed mechanism for the General Assembly to open the election returns and install the governor were mere administrative duties that could not alter the result of the election:

The Legislature can only declare the result of the election; the Court can only recognize it. Neither, separately, nor in concert, can alter the result or impair it. They cannot, together or separately, make a Governor. The people alone can do that. . . . Here there is no question as to who received the majority, and there is no contest before the General Assembly.

Id. at 418-19 (reproducing the petitioner’s brief). Norris’ counsel conceded that “under the Constitution, both houses should have been present, and that one was not,” but argued that the Senate’s partisan refusal to convene with the Wallace House should not be permitted to thwart Hampton’s election. *Id.* at 421 (“Which does most violence to the Constitution—to continue in office a defeated Governor or for the legal Speaker of a legal House to open and publish the returns in the presence of the House and such Senators as will attend?”).

Counsel for the state—supporting Chamberlain’s continuing in office—argued that the election results were suspect, *id.* at 422-23, and that the presence of the Senate and the scrutinizing and counting of the election returns were “essential elements” in ascertaining the election’s result, *id.* at 424.

The power to make the verification and scrutiny of the returns, and to ascertain the result of an election for Governor, is conferred upon the two houses concurrently, to be exercised jointly; the duty imposed is to be performed jointly; and, indeed, under the provisions of the Constitution it cannot be lawfully performed by one body without the presence—the actual presence—and participation of the other.

Id. at 425-26 (reproducing respondent’s brief); *see also id.* at 429 (“The failure of the Senate to attend, from whatever cause or with whatever motive, is absolutely fatal to the claim that Hampton is now Governor.”). The state’s brief further argued that it was “doubtless true” that one branch of the legislature, if it saw fit, could effectively defeat an election. *Id.* at 429; *see also id.* at 431 (“It is no more startling to suppose that one branch of the General Assembly can prevent the declaration of an election or defeat the election itself, than is the proposition on which Hampton’s whole claim now rests, namely, that one branch can elect or declare the election.”).

Counsel for the state also argued that, although Chamberlain’s purported inauguration could not, in itself, confer the office upon him, neither did it effect a resignation or renunciation of his former

Biography of Justice Amiel J. Willard

Amiel J. Willard was born in 1822 in Albany, New York. He studied law under the New York attorney general. After spending a year as assistant counsel of New York City, Willard entered a small private practice in 1849. He was appointed lieutenant colonel in the Union army in 1864, serving with a regiment of black troops. After the conclusion of the war, he was assigned to the Department of Military Justice in Charleston, South Carolina. Willard was elected an associate justice of the state Supreme Court in 1868. From 1877 to 1880, he served as Chief Justice. He developed a reputation for frequently interrupting and questioning counsel, including one likely apocryphal tale in which he is reported to have interrupted counsel to state that the margins of the attorney's brief did not comply with the Court's requirements. The attorney is reported to have silently pulled out a ruler, measured the margins, and replied, "Exactly two inches, your Honor," to which Willard simply responded, "Proceed." After retiring from the bench, Willard lived in Washington, D.C., where he died in 1900.

Source

Ulysses Robert Brooks, *South Carolina Bench and Bar*, Vol. 1, 36-39 (1908).

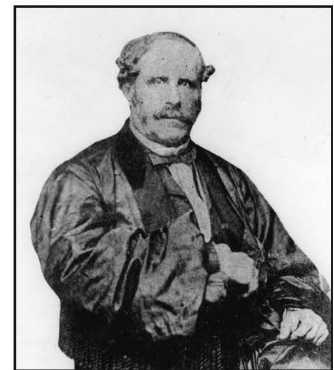
the above," signed by Justice Wright. *Id.*

However, on March 1, 1877—the day before the Court's previously signed order was to be announced—Justice Wright withdrew his prior concurrence in a filed order delivered to his fellow

term as governor. *Id.* at 436 ("The legal effect of his act is nihil. It produced no effect. It conferred no title. It wrought no change. It devolved no office. And, therefore, by irresistible logic, it took away no rights, but left him precisely where he stood the moment before he did the act, to wit, Governor by virtue of the failure of a successor."). Similarly, the state argued that Chamberlain's inauguration did not estop him from continuing to hold his former title. *Id.* at 444-46.

After considering these arguments, the Court ultimately determined that Hampton was the governor, though it reached that conclusion in a circuitous and divided way. Only two of the three Justices—Associate Justices Willard and Wright—actively participated in the case. Chief Justice Franklin Moses, Sr. was quite ill and died before the matter was finally decided. *See id.* at 469 (noting that "the Chief Justice was absent by reason of severe illness").⁶ The Court's decision was expected on Feb. 27, 1877. *See Affairs in South Carolina*, *New York Times*, Feb. 28, 1877. In the courtroom, a "deep but subdued excitement prevail[ed]" among the "densely packed" crowd. *Id.* The justices appeared, only to announce they would be taking a recess to consult together. *Id.* When they reemerged several hours later, they announced that they had been unable to reach a decision, but expected to reach one in a few days. *Id.*

In fact, the two associate justices *did* reach a decision and sign a short order that day, although Justice Wright requested that the order not be filed for four days. *See Ex Parte Norris*, 8 S.C. at 459 (noting that "[t]he above order was signed on the 27th of February"); *id.* at 469. ("A final order was made in this case on the 27th day of February last past, with the concurrence of Associate Justice Wright At the request of Associate Justice Wright, I suspended the filing of the order until Saturday of this week."). The order, which was not filed until March 2, 1877, merely stated, "It is ordered, that the relator be discharged from the custody of the Superintendent of the Penitentiary." *Id.* at 459. The order was signed by Justice Willard as the presiding Justice, and included the statement, "I concur in



Chief Justice Franklin J. Moses, Sr.

⁶ According to at least one historian, Chief Justice Moses had suggested privately that he intended to deliver an opinion in favor of Hampton. *See* Barnett A. Elzas, *The Jews of South Carolina*, 199 (1905).

Justice by the clerk of court. *Id.* at 459.⁷ Contemporaneous newspaper accounts suggest a variety of possible explanations for Justice Wright’s change. Pro-Hampton papers stated that Wright, an African-American jurist, had initially concurred in the order recognizing Hampton as Governor, but feared the political backlash and potential physical danger that might result should he vote in such a way.⁸ See *Judge Wright’s Movements*, Anderson Intelligencer, March 8, 1877 (quoting Charleston’s Journal of Commerce). In contrast, pro-Chamberlain newspapers reported that Justice Wright had only concurred in the initial order “by force, and duress and fear of a horrible death and destruction.” *Id.* (quoting The Union Herald).



Wade Hampton Statue

Justice Wright’s new opinion noted that an election “is not a single act, but a process,” and that the “casting of ballots . . . [is] only one step” in that process. *Ex Parte Norris*, 8 S.C. at 463-64. Accordingly, he determined that an election had not occurred in the absence of the constitutional requirement of the presence of both bodies of the General Assembly when the returns were opened and published. *Id.* at 464-65. Justice Wright viewed this requirement as more than a mere administrative or ceremonial step:

Our General Assembly are not present at the opening of the returns of the election of Governor for the purpose merely of witnessing the mechanical process of opening certain packages and reading their contents. They are present to act as the grand inquest or supervising body, charged with the supreme duty of making a declaration which shall truly express the lawful result of the returns of the election.

Id. at 467; see also *id.* at 465 (noting that the opening and publishing of the returns requires that they be counted, which, in turn, “implies judgment—the separation and examination of the legal and illegal, the good and bad votes”). In Justice Wright’s newly expressed view, the absence of the Senate when the returns were opened and published by the House meant that the election process had never culminated, and that Hampton thus could not be governor. In the absence of a newly elected governor, he believed that Chamberlain’s term continued. *Id.* at 468.

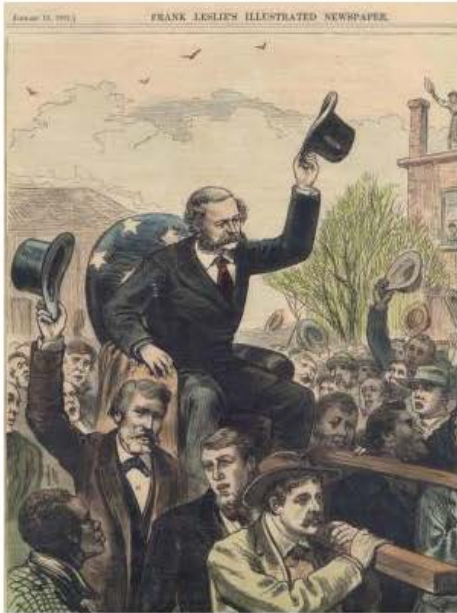
The day after Justice Wright filed his opinion withdrawing his concurrence from the earlier order, Justice Willard appeared at the Court, intending to orally announce his holding. *Id.* at 469. Due to the absence of Justice Wright, however, court was adjourned, thus depriving Justice Willard of a chance to announce his views. *Id.* The short prior order signed by both Justices before Justice Wright’s

⁷ Justice Willard expressed reservations regarding the propriety of Justice Wright’s new opinion revoking his concurrence. *Ex Parte Norris*, 8 S.C. at 469 (Willard, J.) (noting that he had received an order “purporting to be the opinion of Judge Wright, although not endorsed with his signature in the customary manner”).

⁸ Time revealed that Justice Wright correctly grasped that his position was precarious regardless of how he voted. Later in 1877, he resigned from the Court to avoid a politically tinged impeachment proceeding.

revocation, however, was filed that day. *Id.* at 459. The following day, Ms. Norris was released from the penitentiary. See Paul Leland Haworth, *The Hayes-Tilden Disputed Presidential Election of 1876*, 293 (1906); *S. Atl. Quarterly*, Vol. XXI, 348 (1922).

On March 7, 1877, Justice Willard filed a relatively short opinion summarizing his position. *Id.* at 469-70. In essence, he held that Hampton became Governor when he received the highest number of votes, and that the failure of the legislature to perform subsequent administrative tasks could not affect that result. *Id.* He filed a longer, more fully-reasoned opinion on April 24, 1877. *Ex Parte Norris*, 8 S.C. at 470-94. After conducting a thorough discussion of English and American precedent, Justice Willard noted that neither Chamberlain nor Hampton could “show that he has full and peaceable possession of the gubernatorial office,” *id.* at 483, and that neither of them could demonstrate “performance of all acts of public office,” *id.* at 484. Under the relevant provisions of the state Constitution, however, he found that Hampton had a stronger claim to color of title. Specifically, Justice Willard noted the Constitution’s simple statement that “the person or persons who shall receive the highest number of votes shall be declared elected.” *Id.* at 485 (quoting S.C. Const. Art. VIII, § 10 (1868)). In contrast, he found that the presence of both houses of the General Assembly when the returns were opened was an essentially administrative function that became significant only if the election was formally contested, in which case the General Assembly would select the winner. *Id.* at 486-87. In regard to Chamberlain’s purported re-inauguration, Justice Willard held that it was “an act of unlawful usurpation . . . rendered possible by the use of unlawful military force,” and thus could “have no effect to confer color of title” on Chamberlain. *Id.* at 491. Additionally, he held that Chamberlain’s re-inauguration effectively “voluntarily surrendered” any claim to the office he held under his former title. *Id.* at 491-92. Ultimately, Justice Willard held that Hampton’s pardon of Tilda Norris was entitled



Carrying Wade Hampton in Triumph

to respect as an official act of the Governor. *Id.* at 494.

Justice Willard’s opinion, however, could be said to be insufficient to determine who was governor. Because of Justice Wright’s vote change before the filing of the original order, the Court was arguably evenly divided. Yet, an order of two Justices had also been filed and was ultimately not subjected to any legal challenge. This may be explained by the fact that the Justices’ rulings occurred in a larger stream of concurrent events that resolved the situation. On March 2, 1877—the day after Justice Wright filed his revocation and dissent, and the same day that Justice Willard filed the short opinion recognizing the validity of the pardon—the United States Electoral Commission recognized Rutherford B. Hayes as the President of the United States. This recognition of Hayes as President was reportedly the result of political deal making between northern Republicans and southern Democrats. Two days later, Hayes took the oath of office. Within a week, Hayes met with a delegation from South Carolina and informed them of his intent to remove federal troops from South Carolina. See Richard & Belinda



Rutherford Hayes



Ulysses Grant

Gergel, *At Freedom's Door*, 64 (James Underwood and W. Lewis Burke, Jr., eds. 2000). Chamberlain met with Hayes personally on March 27, 1877, and with Hampton two days later. See Rod Andrews, Jr., *Wade Hampton: Confederate Warrior to Southern Redeemer*, 418 (2008). On April 10, 1877, Hayes removed federal troops. Chamberlain and his associates quietly withdrew from their offices and left the state. Accordingly, no practical challenge thereafter remained to Hampton's claim as Governor based on the 1876 election.

In the aftermath, Chamberlain returned to New York, where he practiced law and served as a professor at Cornell University. Hampton was reelected governor in 1878 and subsequently served two terms as a United States Senator. He died in Columbia, South Carolina in 1902 and is buried in the Trinity Cathedral Churchyard. Today, Governor Wade Hampton III is remembered by statues in the United States Capitol and on the South Carolina State House grounds. A portrait of Justice Wright hangs in the South Carolina Supreme Court.

Thus, the state Supreme Court played a critical role in what was one of the most unusual political disputes in South Carolina's storied history. The case of *Ex Parte Norris*, 8 S.C. 408 (1877), while containing legal principles, arguments and conclusions, also serves as a window into history—the history of the difficult and politically-charged times of the 1870s in South Carolina.

SOURCES

Affairs in South Carolina, New York Times, Feb. 28, 1877.

Barnett A. Elzas, *The Jews of South Carolina*, 199 (1905).

Index to the Misc. Documents of the House of Reps. for the Second Session of the Forty-Fourth Congress, Vol. 3, Appendix at 206 (1877).

Judge Wright's Movements, Anderson Intelligencer, March 8, 1877.

Paul Leland Haworth, *The Hayes-Tilden Disputed Presidential Election of 1876*, 293 (1906).

Richard & Belinda Gergel, "'To Vindicate the Cause of the Downtrodden:' Associate Justice Jonathan Jasper Wright and Reconstruction in South Carolina," in *At Freedom's Door: African American Founding Fathers and Lawyers in Reconstruction South Carolina*, 36-71 (James Underwood and W. Lewis Burke, Jr., eds. 2000).

Rod Andrews, Jr., *Wade Hampton: Confederate Warrior to Southern Redeemer*, 418 (2008).

S. Atl. Quarterly, Vol. XXI, 348 (1922).

Walter Brian Cisco, *Wade Hampton: Confederate Warrior, Conservative Statesman*, 261 (2004).

Walter Edgar, *South Carolina: A History*, 402-53 (1998).