ed. And if the witness declines to answer, no inference of the truth of the fact is permitted to be drawn from that circumstance. (1 Greenleaf's Evidence, secs. 451—453.)

I hold, therefore, that the eighth section of the Edmunds act as administered is a palpable violation of the constitutional provision that no one shall be compelled to be a witness against himself in a criminal case. The able and accurate authority above quoted seems to put this question beyond doubt. No one shall be held to answer if the answer will have a tendency to expose him to penal liability, or to any kind of punishment (and the Supreme Court has held that the oath itself is punishment), or to a criminal charge, or to a forfeiture of his estate; and no inference of the truth of the charge is permitted to be drawn from his refusal to answer. The Edmunds act as executed requires him to answer an oath when the answer, if in the affirmative, will expose him to penal liability, will expose him, in the language of the Supreme Court of the United States, to punishment and to the forfeiture of his estate in his office, if he holds one. The act is, therefore, plainly and palpably in conflict with the provision of the Constitution last referred to.

In 4 Dever., N. C. Reports, it is held that "a public office is the subject of property, as everything corporeal or incorporeal from which a man can earn a livelihood and make gain. The office is created for a public purpose, but it is conferred on a particular man and accepted by him as a source of individual emolument, and to the extent of that emolument it is private property as much as the land he tills or the horse he rides, or a debt that is owing to him."

And in 2 Ala. Rep., N. S., page 31, the chief-justice says:

> An office is as much a species of property as anything else capable of being held or owned; and to deprive one of it or unjustly withhold it is an injury which the law can redress in a manner as ample as it can any other wrong.

Again he says, page 34:

> We need not cite authorities to prove that by the common law no one can be deprived of the right to exercise or hold a civil office but by the judgment of his peers, as we have already shown that an office is a species of property.

An office is an estate which may be for life, or for a term of years, or during pleasure. That estate is property, and the Constitution of the United States says no one shall be deprived of property without due process of law.

It matters not whether it is attempted to be done by means of a test-oath, compelling a party to criminate himself, or in whatever imaginable form, other than by due process of law, it is null and void, whatever may be the means resorted to for its accomplishment. What power then has Congress to deprive any man of his property in his office, simply because he refuses to swear whether he has or has not violated the criminal law of the land, when he has neither been charged with, indicted, or convicted of, any such violation? I deny that it has any such right. This attempt is in violation of the fundamental law as expounded by the highest authorities, and is absurd within itself; and I know of no rule governing courts which could justify them in the enforcement of any such enactment. The statute is a nullity and must, in my opinion, be so held whenever and wherever it is brought in question before any intelligent court.

In support of the position that a statute prescribing a test-oath which deprives a citizen of his right to hold office is a penal one, I refer the Senate to the case of Leigh, 1 Mumford's Va. Reports, and the case of Dorsey, 7 Porter's Ala. Reports. Each of these States had passed stringent acts against dueling, and had prescribed an oath to be taken in Virginia by all officers of the State government, and in Alabama by all State officers and practising attorneys, that each had not before engaged in a duel and would never engage in one while he remained in office. In each case the applicant moved to be admitted to the bar of the Supreme Court without taking the oath, and in each case the court sustained the motion. The decisions are lengthy, but as they are very able I shall not apologize for reading portions of them to the Senate. And upon the point to which I last referred I invite the attention of the Senate especially to the following language of the judges:

In Leigh's case, page 482, Judge Roane, who was greatly distinguished for his ability, says:

> However laudable the object of the act to suppress dueling may be it is still a highly penal law and must be construed strictly. It is unusually penal if not tyrannical in compelling a person to stipulate upon oath, by the third section, not only in relation to his past conduct and present resolution, but also for the future state of his mind. Thus premising that this act is highly and unusually penal, I will, under the influence of the rules for construing penal statutes, proceed to apply it to the case before us.

Judge Fleming in the same case says:

> The act under consideration being a compulsory law (however salutary it may be), imposing on the officers of the Government an oath unknown to the former law of the State, or of the United States, though there be no pecuniary penalty inflicted on those who refused to take the oath therein prescribed, I cannot but consider it as a penal statute, and as such must give it a strict interpretation.

Again he says:

> Admitting that attorneys are comprehended in the act, it has or ought to have a prospective and not retrospective operation, and can not affect officers of any description appointed to office prior to the passage of the act.

In Dorsey's case (7 Porter, 366) Judge Goldthwaite says:

> have omitted any argument to show that disqualification from office or from the pursuit of a lawful avocation is a punishment. That it is so is too evident to require any illustration; indeed it may be questioned whether any ingenuity could devise any penalty which would operate more forcibly on society.

Again he says:

> A citizen is informed that by the laws of the State he is entitled to aspire to any office or pursue any other avocation which any other citizen can. Yet when he is about to enter in the office or avocation he is required to swear to his innocence of a particular crime; it then becomes evident that if he can not truly take the oath required he is excluded. Can it be doubted that for all the purposes of the disqualification the guilt of the individual is ascertained? In what does it differ from the general enactment that a candidate for office shall be required to prove and establish his innocence of a specified crime? Admitting a person to be guilty, he is neither accused, tried, nor convicted by any tribunal known to the laws; yet he is punished with unerring certainty and the utmost celerity; his conscience is made his sole accuser and judge; his punishment commences with the commission of the crime, and terminates only when he ceases to exist; he is excluded from the sympathy of his peers, no legal doubt can intervene to produce his acquittal; an error of his judgment involves his soul in the awful guilt of perjury or punishes him without guilt. I have no hesitation in declaring that this act provides a mode of ascertaining and punishing guilt which is not only unwarranted by the Constitution, but is also in direct contravention of several of the most important provisions of the declaration of rights by which the liberties and privileges of the citizens are guarded. * * * When once it is admitted or proved that a citizen has a right to aspire to office, or to pursue any lawful avocation, it seems to me impossible that he can be legally deprived of that right by a punishment for an offense committed without a trial by jury; and I can perceive no sound distinction between a law which deprives one of his right without a trial and that which ascertains and punishes his guilt by an illegal mode of trial.

He then refers to the governor's right to grant pardons, and says:

> We can not presume that the General Assembly intended by this act to interfere with the constitutional prerogative of mercy vested in the executive, yet this act, if constitutional, imposes a penalty which can not be remitted and inflicts a punishment beyond the reach of executive clemency.

In the same case Judge Ormond says, p. 379:

> This is a highly penal law; it excludes, unless its terms are complied with, all persons from practising as attorneys and counselors at law in the courts of this State. It must, therefore, receive a strict construction, in accordance with well-established principles, and the authority to pass it be clearly and fairly discoverable from the Constitution.

And, on page 38:

> It is so offensive to the first principles of justice to require a man to give evidence against himself in a penal case, that independent of the constitutional interdict, no one in this enlightened age will be found to advocate the principle.

But it may be said this is not a case of this kind, as no corporal or pecuniary punishment is the consequence of a refusal to take the oath against dueling. But are not the results the same whether punishment follows from the admission or is imposed as a consequence of silence? Can ingenuity make a distinction between a punishment inflicted in this mode, as a consequence of a refusal to take the oath, by closing one of the avenues to wealth and fame, and a positive pecuniary mulct? If there is a difference, I think it entirely in favor of the latter, so far as the amount or weight of the penalty could affect the decision of the case. On page 381:

> With great deference to the opinions of others who may differ from me, I think that the requisition by the Legislature, in substance and effect, requires the applicant for a license to give evidence against himself, and that, if not within the letter, is at least within the words of the prohibition—the very foundation of which is, that every one is presumed to be innocent until the contrary appears.

Judge Pitman, in the same case, refers to the fact that the statute under consideration rendered any one engaged in selling spirituous liquors an incompetent juror, and authorized the question to be propounded to him, and says:

> This law authorizes the court to inquire of the juror, who may be challenged on this account. It is true the law says, "He may decline to answer;" but what then? Is the fact to be proved by other evidence? No; this silence is considered as sufficient proof, and he is excluded accordingly. He is therefore compelled to answer if he does not wish to be excluded as unworthy to sit as a juror, or does not wish to be considered as concerned in a traffic which may be considered as infamous. The maxim of the common law recognized by the Constitution is that every man is presumed to be innocent until he is proved to be guilty. The whole spirit of this law appears to me to be at variance with the rights of property as well as person. The Legislature has no right by an act to confiscate the property of the citizen.

Now, Mr. President, I beg the Senate to bear in mind that the two cases just referred to were precisely similar to the case now under consideration. The statutes of Alabama and of Virginia were aimed against dueling, just as the Edmunds act is aimed against bigamy. The means resorted to for the suppression of the vice and the punishment of the offender were the same in each case, a test-oath, which attorneys at law in the one case and officers of the State in the other, were required to take, swearing that they had not and would not engage in a duel, etc. In the case before the Senate a like test-oath is applied to a citizen of Utah, requiring him to swear that he is not a bigamist or a polygamist; and the commission appointed under the act requires his oath to cover all his past life. If he has ever at any time been guilty, though it may have been before the passage of the act by Congress making bigamy a crime in Utah, or if the case occurred since the passage of the law, though it may have long since been barred by the statute of limitations, still he is required to swear that he never committed the act, or he is driven from the polls and denied the right to hold office.

As already stated, the Supreme Court of the United States held the lawyer's test-oath to be unconstitutional; they also held the Missouri test-oath, which applied to ministers of the Gospel and other officers, unconstitutional. The supreme court of Virginia held the dueling test-oath unconstitutional, and the supreme court of Alabama held a like test-oath unconstitutional: and I apprehend there is no United States court, nor is there any respectable court of any State in the Union, that would hold the Edmunds act as construed by the commission constitutional. If the test-oath in four similar cases was unconstitutional and was so adjudged by courts of the highest authority, how can the Edmunds act, similar in all its objects and aims, be held constitutional by any good lawyer, by any competent court, by Congress, or by the country?

But I must notice the two remaining constitutional objections. The Constitution of the United States denies to Congress the power to pass any bill of attainder. The Supreme Court of the United States has held that the acts of Congress prescribing the test-oaths above mentioned were bills of pains and penalties in the nature of a bill of attainder, and as such inhibited by the Constitution. What is a bill of attainder? A bill of attainder, as I understand it, is a judicial sentence by Parliament or by Congress; in other words, it is a legislative usurpation of judicial power, as when Parliament passed a bill to attaint A B of high treason and directed his execution and the confiscation of his estate. This act is in the nature of a bill of attainder. It does not attaint the Mormon who refuses to take the test-oath of high treason, but it does assume judicial functions and confiscate his property in his office without judicial trial or the judgment of any court. It usurps the power that properly belongs to the courts alone of determining the question of the guilt or innocence of the accused.

I may be told that the British Parliament centuries ago enacted test-oaths, and that no man was allowed to hold office until he had taken the sacraments of the Church of England and the oaths of abjuration, etc. This is true; and it is also true that the enlightenment of the age and the triumph of reason have long since swept these oaths from the statute-book, and the Jew and the dissenter sit to-day by the side of the churchman in the Parliament of the realm.

But it does not follow from this historical fact that Congress now has or ever did possess any such powers. The Parliament of Great Britain has establish a particular church. Has the Congress of the United States any such power? Parliament has established an aristocracy and provided for the grant by the King of titles of nobility. Can Congress do the same? Certainly not. Why not? Because there is a written constitution in this country which expressly forbids it. There was none in England. Such is the omnipotence of the Parliament of Great Britain that, with the consent of the King, it may change what they call the constitution at pleasure. The Congress of the United States with the President has no such power. The Parliament of Great Britain has power to confiscate the property of the subject beyond the period of his life, and either with or without the use of test oaths, if it should so will to deprive a subject of his *property* without due process of law. The written Constitution of the United States, which it has no power to change, denies to Congress the power to do either. From the difference in the powers possessed by Parliament and by Congress, the Senate will readily perceive the reason why the British test-oaths can as precedents be of no avail to the advocates of similar oaths in this country.

There is, therefore, no escape, Mr. President, from the position that the eighth section of the act in question is a bill of pains and penalties, in the nature of a bill of attainder, the passage of which is expressly forbidden by the Constitution of the United States. My ninth objection is that it is an *ex post facto* law.

What is an *ex post facto* law? It is thus defined by Mr. Justice Chase, delivering the opinion of the Supreme Court of the United States in the case of Calder and Wife vs. Bull and Wife, 3 Dallas, 386:

> 1. Every law that makes an action, done before the passing of the laws and which was innocent when done, criminal, and punishes such action.
>
> 2. Every law that aggravates a crime or makes it greater than it was when committed.
>
> 3. Every law that changes the punishment and inflicts a greater punishment than the law annexed to the crime when committed.
>
> 4. Every law that alters the legal rules of evidence and receives less or different testimony than the law required at the time of the commission of the offense in order to convict the offenders.

See also 1 Kent's Com., 408; Sergeant on Const. Law, 356; Smith's Com. on Const. Construction, 372.

In Fletcher vs. Peck, 6 Cranch Reports, 138, Chief Justice Marshall, delivering the opinion of the Supreme Court of the United States, says:

> An *ex post facto* law is one which renders an act punishable in a manner in which it was not punishable when it was committed. Such a law may inflict penalties on the person, or may inflict pecuniary penalties which swell the public Treasury. The Legislature is prohibited from passing a law by which a man's estate, or any part of it, shall be seized for a crime which was not declared by some previous law to render him liable to that punishment.

In the case of Ross (2 Pick., 169) it was held that if a statute add a new punishment, or increase the old one, for an offense committed before its passage, such an act would be *ex post facto*. The party ought to know, says the court, at the time of committing the offense, the whole extent of the punishment.

Will it be questioned by any one that the disfranchisement practised in Utah under the Edmunds act is legal punishment of a high character? The punishment inflicted on the Mormon who refuses to take the test oath in Utah is precisely the same which the Constitution inflicts on the President of the United States, or any other high official, who is impeached by the House of Representatives and convicted by the Senate. He is removed from office and disqualified to hold and enjoy any office of honor, trust or profit, and he is still liable and subject to indictment, trial, judgment and punishment for the crime of bigamy, according to law; just as the President, if impeached and convicted, would be liable in the courts to trial and punishment for his crime after he had suffered the penalties which follow the conviction on impeachment. And this high penalty of removal from office, and disqualification, is inflicted under an act of Congress passed long after the crime was committed.

Can any lawyer defend an act so palpably *ex post facto* and void, inflicting the highest punishment known to the Constitution of the country for a crime committed before its passage, a punishment as high as that which follows the conviction of the highest officer of the government when impeached for high crimes and misdemeanors?

I beg to refer to the fact that the Utah Commission has in practice denied the citizen of Utah who does not now practice polygamy, the right to hold office if he practised it at any time during his past life. The Commission in their first report, page 6, say:

> Did Congress intend that those only should be excluded who at the very time of their registration or election were then living in polygamy or in unlawful cohabitation with more than one woman? If so, such a construction would render this section a perfect nullity. The means of evasion are patent to the dullest apprehension. [We therefore conclude that neither the letter nor the spirit of the statute requires such a narrow construction, and in our published rules and regulations we gave the exclusion a wider scope and application.

In the case of Jennings, he admitted that he practised polygamy prior to the passage of the statute, 1st July, 1862, making it penal, but that one of his wives died about 1871, and he had never since had more than one wife; and upon this state of facts he claimed the right to vote. The question was submitted to the commission, and they decided that having once practised polygamy, though it was before the passage of the act making it penal, and if afterwards the crime had long since been barred by the statute of limitations, still he was ineligible, and they refused to permit him to vote or hold office.

Now, apply to Jennings' case the rule laid down by Mr. Justice Chase, and the act is clearly unconstitutional, because it inflicts a greater punishment than the law annexed to the crime when perpetrated. In addition to the old penalty, it denies his right to vote, forfeits his estate in his office, and denies to him the right to hold office, which could not be done, because no previous law, in the language of Chief Justice Marshall, rendered him liable to that punishment.

And in the language of the supreme court of the State of Massachusetts, cited in the above-stated case, if it does not increase the old it adds a new punishment for an offense committed before its passage. How could a Mormon, at the time of committing the offense years ago, know, in the language of the last-named court, the whole extent of the punishment? How could he know that the wisdom of Congress would at some future day pass the Edmunds bill?

This law therefore punishes the citizen of Utah for what is now held to be an offense by legislative enactment, and not by the judgment of a court, denying him the right to a trial by jury, and in that respect it is also unconstitutional. The Constitution says, article 3, section 2, paragraph 3:

> The trial of all crimes except in case of impeachment shall be by jury.

I beg the pardon of the Senate for taking up so much time reading authorities. But as they are in points and are the opinions of able judges, and as the question is an important one, I have relied upon your indulgence. These authorities establish the points I have taken against the law to my mind beyond all question.

First. That the citizen of Utah who is an office-holder has a property in his office.

Second. That this act of Congress violates the social compact, Magna Charta, and the Constitution of the United States by depriving him of that property without due process of law in this, that he is in effect convicted and his property forfeited without presentment or indictment of a grand jury; that he is denied a trial by jury; that he is dined the right to be confronted with the witnesses against him; that he is denied compulsory process for obtaining witnesses in his favor; that he is denied the assistance of counsel for his defense; and that he is compelled to be a witness against himself in a criminal case or that his silence is construed as conclusive evidence of guilt.

Third. That the act is in the nature of a bill of attainder, and is an usurpation by the legislative department of the Government of the functions assigned by the Constitution to the judicial department, being a sentence of forfeiture pronounced by Congress, which, being a judicial and not a legislative act, can only be done by the judiciary after trial and conviction.

Fourth. That the law is not and was not intended to be a law drescribing qualification for office, but a penal law forfeiting his property for the commission of an act which at the time of its commission had no such penalty annexed by law, and that the act or offense is punished by this law in a manner different from that prescribed by law at the time of its commission; and that the law is for this reason *ex post facto* and void.

The defendant is put upon trial not before a judicial tribunal, but before a commission appointed by Congress; he is made the witness against himself, and if he refuses to swear that he is not guilty he is judged to be guilty and punished by disfranchisement.

But I may be told that while the authorities I have referred to might well apply to a similar act passed by Congress applicable to the States, as in the case of the lawyers' test-oath, or passed by a State as in the case of the Missouri test-oath, that they do not apply to a test-oath passed by Congress as applicable to a Territory. And it may be claimed that the power of Congress over a Territory or the inhabitants of a Territory is absolute and uncontrollable, and that Congress may pass any law it thinks proper to pass applicable to Territories without constitutional restraint.

I deny the correctness of this position, and respectfully submit that the Congress of the United States has no greater power to violate the Constitution of the United States in the Territories, nor to pass laws that are unconstitutional as applied to the citizens of a Territory, than it has to pass like laws applicable to the citizens of States. Under what delegated power does Congress derive its right of absolute legislation in the Territories? I presume it must be found in the follow grant, if found at all:

> The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory and other property of the United States, and nothing in this Constitution shall be so construed as to prejudice any claims of the United States or of any particular State.

The language "territory and other property," putting territory on the same footing with other property, does not seem to contemplate the government of communities or districts of country. But it seems to refer to rules and regulations respecting the territory as property as distinguished from population or an organized community. Territory and *other* property does not seem to mean a territorial Government, but it puts territory as property, because it says that and other proyerty. It would seem that this was the intention of the framers of the Constitution, who, treating it as property, were careful to protect the claims of the General Government and of the States to it as property.

But however imperfect the language of the Constitution may be, to confer such power, it must be admitted that Congress has practised upon the rule that it had the power to legislate for the Territories from the earlier periods of the Government; and the Supreme Court has sanctioned that practice. But this claim does not prove, nor has the Supreme Court held, that the power of Congress in the Territories is omnipotent, or that Congress may violate the spirit and letter of the Constitution by its legislation as applicable to the Territories. There are many things that Congress has no more power to do in the Territories than it has in a State. To illustrate: Congress has no power to pass any law applicable to any Territory for the establishment of religion, or the prevention of the free exercise of religion therein; nor can it grant any title of nobility in a Territory; nor can it destroy or abrogate the right of trial by jury; nor can it suspend the privileges of the writ of *habeas corpus* unless in case of rebellion or invasion; nor can it pass any law requiring excessive bail, or impose cruel or unusual punishments; nor can it by law justify unreasonable searches and seizures without the proper warrants; nor can it deny to any person the right to be confronted with the witnesses against him when on trial in any criminal case; nor can it deny to the defendant compulsory process to compel the attendance of his own witness; nor can it deprive any one of life, liberty, or property without due process of law; nor can it pass any law abridging the right of citizens of the United States to vote on account of race, color, or previous condition of servitude; nor can it establish involuntary servitude, except as a punishment for crime; nor can it pass any bill of attainder or *ex post facto* law; nor can it compel any person to be a witness against himself in any criminal case; nor can it destroy the principles of local self-government in a Territory as practised for the last fifty years; nor can it refuse to govern the Territory according to the genius and spirit of our republican form of government; nor can it exercise any authority not delegated by the Constitution.

[*Continued on page 12.*]