EDITORIALS.

SPEECH OF SENATOR PENDLETON ON THE EDMUNDS BILL.

Mr. President, I heard the President of the Senate say to a Senator who offered an amendment that it was not in order in the present stage of the bill, because there was already pending an amendment to an amendment. Observing the admonition of the Chair, I shall at the proper time move to amend the fifth line of the fourth section, at present the fifth section of the bill, by striking out the words "or has been," before "living;" and also in the seventh line striking out the words "or has been," before "guilty;" so as to read:

That he is living in the practice of bigamy, polygamy, or unlawful cohabitation with more than one woman, or that he is guilty of an offense punishable by either of the foregoing sections, &c.

I shall also move to amend by inserting after the word "woman" the words "or any woman with whom he is not married."

In the first line of the seventh, now the eight section, I shall move to strike out the words "polygamist, bigamist, and insert the words "persons now practicing polygamy or bigamy;" and after the word "woman," in the second line, I shall move to insert "or any woman with whom he is not married."

Mr. President, I have listened to this debate to-day, and I have read with great care the debate which took place yesterday, when I was not present in the Senate. I read with interest the remarks made by the honorable Senator from Arkansas [Mr. Garland] and the honorable Senator from Delaware, [Mr. Bayard.] I was pleased to see the statement made by one, or I think both those Senators, that while they had finally come to the conclusion that they would support this bill they did it with many misgivings as to several of its provisions, and with a great doubt as to whether it would finally secure the purpose which they intended to accomplish. I do not find it necessary in what I have to say upon the bill or the vote that I may finally give to controvert any of the legal positions which either of them has taken.

I have had great difficulty, not only upon this occasion but heretofore, in defining to myself exactly the provision of the Constitution upon which the power of the Government of the United States over the Territories rests. I heard a Senator whose memory was so fitly decorated here the other day, after a most elaborate argument, come to the conclusion that the idea that the power of Congress over the Territories rested in the second clause of the third section of the fourth article, the one quoted by the Senator from Arkansas yesterday — the clause that Congress shall have power to dispose of and make all needful rules and regulations respecting the territory and other property belonging to the United States —was entirely without foundation, and that the whole power of the Government in the matter was to be derived from that clause of the Constitution which provides for the admission of new States. It is not a new question; it is not a question easy of solution. I do not undertake to say that even in my own mind I have come to a satisfactory conclusion upon it; but I think it is absolutely certain that by whatever clause the power is given to the Congress of the United States to control and govern the Territories of the United States, Congress is always, in all circumstances, under all conditions, limited by the prohibitions in the Constitution. I do not believe that it is in the power of the Congress of the United States, to violate any of the guards which the Constitution of the United States has provided for personal liberty. Congress has no power except that which is granted. Lest powers may be assumed under general and indefinite grants, the Constitution has provided certain guarantees of personal freedom and has prohibited the exercise of certain powers. Congress cannot under any pretense, at any time, for any purpose, violate these guarantees of personal rights or exercise the power thus prohibited.

Mr. Garland. May I interrupt the the Senator one moment?

Mr. Pendleton. Certainly.

Mr. Garland. Under article 3, section 1, of the Constitution:

The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior

In section 1864 of the Revised Statutes we have the following provision:

The Supreme Court of every Territory shall consist of a chief-justice and two associate justices, any two of whom shall constitute a quorum, and they shall hold their offices for four years, and until their successors are appointed and qualified.

The tenure by the Constitution of all inferior judges is "during good behavior." Here is a section of the law which provides that in the Territories they shall hold for four years, which the Supreme Court has held, after elaborate argument, to be within the power of the Congress of the United States under their power over the Territories.

Mr. Pendleton. I understand that perfectly. These Territorial courts, to be found in every law organizing the Territories of the United States or exercising control over them after they are organized, do not belong to the judicial system of the United States. They are organized under the general power of Congress to provide governments for the Territories. I admit that Congress has the power to establish governments over those Territories, to organize Legislatures, to organze courts, to enable them through their own action to perform all the functions of civil government. I deny that there is any power in the Congress of the United States under the Constitution or anywhere else to establish a despotism over the Territories. I deny that they can in any of the Territories violate any of those provisions of the Constitution which protect the life and liberty of the citizens of the United States. I deny that they can establish a government in the Territories of the United States anywhere which shall try and execute a man without giving him the benefit of a trial by jury under an indictment according to the forms of law which the Constitution has prescribed.

Mr. Butler. I wish to ask my friend a question in connection with that part of his argument. Does he believe that Congress, under the Constitution, may or may not impose a qualification for voters in the Territories?

Mr. Pendleton. I believe Congress may; and I shall direct some remarks I have to make directly to that very subject.

Mr. Jones, of Florida. I wish in that connection to ask the Senator from Ohio if he considers the act which I cited yesterday, for the government of the Territory of Florida, unconstitutional, which vested the entire powers of government in one or more persons, to be designated by the President and confirmed by the Senate, includiug the judicial and legislative powers of the Territory?

Mr. Pendleton. I have not had the opportunity of examining closely that statute; I do not know exactly what it provided; but I am prepared to say that if it vested in two or two hundred people the right to control and govern the Territory of Florida in any way inconsistent with the provisions of the Constitution of the United States, guaranteeing the rights of life and personal liberty and property to the citizens, it was unconstitutional.

Mr. Hoar. May I ask the honorable senator from Ohio a question?

Mr. Pendleton. With pleasure.

Mr. Hoar. I desire to ask him if he believes that Congress might constitutionally take away from the inhabitants of any Territory of the United States all power of self-government whatever, and might make all the laws, civil and criminal, and appoint officers to execute them, giving the inhabitants of the Territory no voice whatever? Is not that exactly what we have done in a territory acquired? Is it not what we do in this District? If that be true, how can the Senator complain if Congress may constitutionally exercise all the powers of government for a Territory and not allow any voting at all, when instead of doing that it allows the citizens to vote on certain conditions?

Mr. Pendleton. Mr. President, I have not yet complained of anything; I have not yet reached the point where I am disposed to complain at all of this bill, or of any of the provisions of it. I was defining what I considered to be the extreme limits of the powers of Congress over the territories. I am not prepared to say that I could fix the exact limit where I think Congress ought to allow to the people of a Territory the right of governing themselves. It has been done in some cases where those people reached perhaps six or eight or ten thousand; it has been denied in other cases until they reached thirty or forty thousand. This I say: that the Congress of the United States is bound to give to the people of a Territory the right of self-government within certain ranges, as soon as it becomes safe and proper that they should exercise that right, in order to give them the training necessary to be admitted as new States; and until that time, as long as it assumes to control and govern them, it is bound by the grants and the prohibitions of the Constitution.

Mr. Hoar. But are not all the Territories to-day, subject to the veto power of the governors, in whose selection the people have no part, and to the veto power of Congress?

Mr. Pendleton. I do not know that all of them are. Some of them are; perhaps all of them, but that suggestion, I submit, would not in any degree affect the argument that I am making as to the power of Congress at all times, and the duty of Congress at some time, to remit to these people the rights of self-government. I do not find myself bound in any way at all to antagonize the position the gentlemen have taken in relation to the powers of Congress over the Territories. I might differ with them. I do differ with them essentially, but it is not necessary for my argument that I should enter into any discussion with them upon that subject.

Now, what is the bill before us? It is a crimes act. The title defines it to be a bill to amend a clause of the crimes act. This whole title of the Revised Statutes of the United States, of which section 5352 is a part, is the crimes act of the United States. This bill provides an amendment to a clause of the crimes act, and the only amendment that I see in the first section of this bill is simply the introduction of the words "and any man who hereafter simultaneously or on the same day marries more than woman."

I do not know whether it is found in the practice of this Territory that it is necessary to be so particular as to the time when the act of the second marriage takes place. It may have been. It may be that they have held that the day was but an instant of time, and if the marriages took place on the same day it was not a subsequent or a prior marriage, and therefore it was necessary to introduce this provision of the bill. I do not know how that is, and I therefore take no exception to it. At all events this is an addition to the crimes defined in section 5352 of the Revised Statutes, which is part of the crimes act of the United States.

Then section 2 of this bill as originally reported, but now section 3, is another addition to the crimes act, for it provides—

That if any male person, in a Territory or other place over which the United States have exclusive jurisdiction, hereafter cohabits with more than one woman he shall be deemed guilty of a misdemeanor.

I do not know the exact state of the law on this subject, but I suppose that the crime defined is cohabiting with any other woman than his wife, and that this section of the bill is intended to meet the case where with or without marriage he shall be guilty of this cohabitation. When we come to the fourth section of the bill what do we find? In defining the qualications of jurors who shall sit in cases of this kind, we find that it shall be a cause of challenge that a man "is now, or ever has been living in the practice of bigamy or polygamy, or unlawful cohabitation with more than one woman, or that he is or ever has been guilty of an offense punished by either of the foregoing sections" of this bill. "Is or ever has been."

Mr. President, your experience on judicial tribunals and in construing and observing laws is very great. did you ever know a jury law which went back to the whole course of a man's life and disqualified him from sitting upon a jury unless he would swear that he is not now, and never has been guilty of any of the acts defined as crimes in the laws? He may have been a bigamist; he may have been a polygamist; he may have abandoned all those beliefs: he may have abandoned all those practices; he may have, either by death or divorce or otherwise, been entirely freed from the obligation which the marital relations imposed upon him, and yet, according to this bill he is forever deprived of the right of sitting upon a jury in these cases. Where is the justice of that? Where is the propriety of it? You take away the *locus pœnitentiæ*; you deprive him of the right to abandon that which you define as a crime, and say that if he has abandoned what you have now for the first time defined to be a crime, or at least now do define to be a crime, he shall not sit upon a jury. Do you do that in relation to any other man? A man goes into the penitentiary after conviction of crime, and in some States he is disqualified from sitting on a jury, but if he comes out upon a pardon he is competent to sit upon the jury; but he would not be competent under the provisions of a statute like this. The pardon, while it may wash away his sins so that he shall become as white as snow, cannot override a provision of the statute that prescribes that he shall not thereafter sit on a jury.

Now, sir, I do not think this extremely important; I am perfectly ready to say that, but I do think it shows this animus and spirit with which the bill is pressed upon the Senate to-day, and in that I mean no reflection upon honorable Senators who sit upon the Judiciary Committee. I think it is the outgrowth of a spirit which is abroad in the land which means to stigmatize these people as criminals, as outlaws, as beyond the borders not only of civilization, out of the protection of the Constitution of the United States.

I am not to be misunderstood. I will coincide with any gentleman who endeavors to go the farthest, within proper limits, to crush out this crime of polygamy. I believe that the home is the fountain of the purest civilization; that it presents the safeguards by which society is to be secured; that the sweet charities of conjugal and parental and filial love are those which guide and guard our civilization. I will do what I can properly to relieve all our people from influences so deleterious as I believe these polygamous marriages to be. But, sir, I believe still more that the great guards of personal right, which the Constitution has provided, the great provisions giving to every man the enjoyment of life, liberty, and the pursuit of happiness; that he shall not be punished, except after indictment and trial by jury and conviction, after being confronted with witnesses; I believe these are more important to be preserved through all the ages and under all conditions than that we shall crush out in a day any evil practices prevailing in a neighborhood and community, however evil those practices may be.

But I find here, Mr. President, in the eighteenth line of this section that among the causes of challenge shall be, that a man believes that another man is entitled "to have more than one living and undivorced wife," or "to live in the practice of cohabiting with more than one woman;" that is to say, if being married to a woman according to our monogamous institutions, a man deserts her, abandons her and lives with a prostitute in daily cohabitation, he shall be a proper juryman to sit in cases of this kind; but if he believes and faithfully lives up to the doctrine of purity in his relations with the wives with whom he has been married, he shall be utterly incompetent. You pay a premium upon vice which parades itself as vice throughout all the country, and you put a prohibition upon that which pretends to be virtue.

Mr. Hoar. I think, if the Senator will pardon me—

Mr. Pendleton. Certainly.

Mr. Hoar. He will see that this criticism on the bill is hardly a just one.

Mr. Pendleton. I shall be very glad to correct it if it is not true.

Mr. Hoar. The Senator says that the bill leaves men who are in the open practice of immorality in the method he has described to sit upon a jury. The bill does not prevent the ordinary method of filling up a jury list which prevails everywhere, which secures the selection from the body of the community of men of high character and standing. It does not prevent the Territorial law making the method or the Territorial marshal exercising his discretion.

Mr. Pendleton. I understand very well, Mr. President, that this bill does not permit the doing of other things than that which it prescribes shall be done; but here you press this bill and you undertake to define the causes of challenge against jurors who are to sit in these particular cases; you prescribe just this, that the professedly immoral and licentious may sit on the jury, but the professedly virtuous may not

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Mr. Hoar. This is my precise criticism on the Senator's statement, which he so courteously permitted me to make. This bill does not undertake to define the causes of challenge, leaving the ordinary causes of challenge to be settled in the ordinary manner. It simply adds this one. The bill does not say that a man indicted for murder shall not sit on the jury that tries him; that is left to the ordinary action of the law. So in the case the Senator refers to.

Mr. Pendleton. This does not pretend to be a general law defining the qualification of jurors who are to be called at all times and upon all cases, but it undertakes to define the qualifications of those who shall sit in these particular cases, and it includes the man who lives in open and corrupt and acknowledged vice as one of those whose competency to a seat upon a jury is maintained, and it excludes the man who does not. I propose an amendment that shall exclude both. I have no fault to find with the provision of the bill upon that subject, but I want an additional provision in it which shall also exclude the man who, having one wife, is living in open and notorious adultery with another woman.

Mr. Edmunds. May I ask my friend from Ohio a question?

Mr. Pendleton. Certainly.

Mr. Edmunds. Assuming that the theory of a jury is impartiality, that impartiality must be in respect of the precise offense that is attributed to the accused. I assume everybody will agree to that. Therefore I ask my friend from Ohio whether it is quite in point to say that a man should sit on a jury in an indictment for forgery who had been guilty of having two wives or living in a state of open adultery? The question is whether that vice would affect the impartiality of his mind as it regarded the question of forgery. Now, the question is, if a man is accused of bigamy, whether one who lives in open adultery has a particular prejudice on the side of two wives. I think there is where the point of the thing really comes as between the two cases. I do not mean to say that my friend from Ohio would be able to answer the question from any special point of information.

Mr. Pendleton. Whether or not the law should go to the extent of saying that a man guilty of forgery or not guilty of it or suspected of it should sit upon this jury, I agree might be outside of this bill; but in this bill you provide that a man who is indicted for the crime of bigamy or polygamy may not be tried by one who is living in polygamous relations, but may be tried by one who having one wife is living in adulterous relations. I submit that they are at least so sufficiently connected as that they ought to be provided for in this bill or else the rule alluded to by my friend from Georgia, *expressio unius est exclusio alterius*, will apply.

Mr. Edmunds. But if my friend from Ohio will allow me, I think he will agree that the whole course of political jurisprudence as to jurors is to exclude those from the jury-box who have a bias upon the particular point that is to be tried, and not others. That is the theory of the bill exactly; the theory of the decisions of the Supreme Court of the United States, and the decisions of every State court, indeed, for the matter, upon analogous questions.

Mr. Butler. Those questions, the Senator will pardon me, are always propounded to a juryman.

Mr. Edmunds. Certainly. It is the law now really, We only put it in to a statute and allow the court to try the question instead of having it done by triers.

Mr. Pendleton. The Senator from Georgia suggests to me that I should ask the Senator from Vermont this question: Why, if you exclude a man who is prejudiced in favor of crime you should not exclude a man notoriously prejudiced against it?

Mr. Edmunds. That is a very proper question, and one that all human institutions outside of the State and the church, (and I will say there too, because I will not make a joke at the expense of my friend) have always recognized. Every juror in every political community is supposed to believe in the law, in the government that he is living under, and therefore the idea is that you are not to carry on a government by putting it in the hands of its enemies; and so it is that in every case of a juror, you exclude him for bias and so on and so on; and therefore in the sense in which some people talk about it every jury that is challenged at all is packed; that is to say it must be a jury that believes