CONTESTED ELECTION,

TERRITORY OF UTAH.

Geo. R. Maxwell vs. Geo. Q. Cannon.

Argument of Halbert E. Paine, Counsel for Sitting Member.

(Before the Committee on Elections of the House of Representatives of the United States, Washington, D. C., 1874.)

(CONTINUED.)

Now, this decision is not—as the adoption of the iron-clad oath was not—an authority for the position that the House may, in the exercise of its power to judge of the election, returns, and qualifications of its members by a mere majority vote, exclude a member elect charged with but not convicted of crime. On the contrary, its doctrine is that the House cannot so exclude a member except after *conviction had*, and *judgment of disqualification* actually rendered according to law.

If it be assumed, for the sake of argument, that, under the Constitution of the United States, Congress has the right to punish polygamy in the Territories, by declaring that persons duly convicted thereof shall be ineligible to office, yet Congress has done no such thing. By the act of July 1, 1862, it is provided that persons guilty of bigamy in the Territories shall, upon conviction thereof, be punished by a fine not exceeding five hundred dollars and by imprisonment for a term not exceeding five years. But there is no statute of the United States which makes ineligibility to office a part of the punishment for bigamy or polygamy committed in the Territories or elsewhere.

The precedents of the House are in accordance with this construction of the Constitution. There has been no precedent since the organization of the Government which would justify, any more than would the Constitution itself justify, this committee or the House acting as the judges of the election returns and qualifications of Mr. Cannon, in a decision to deprive him of his seat on the ground that he has violated the law prohibiting polygamy in the Territories of the United States.

The case of B. F. Whittemore, in the 41st Congress, is relied upon as an authority for the refusal to admit a Representative elect on other grounds than mere constitutional disqualifications. But a critical examination of that case will show that the House only decided that a Representative who had by resignation escaped expulsion for an infamous crime from *that House* should not be re-admitted to the *same House*. Mr. Whittemore, having avoided expulsion for the sale of a cadetship, by resignation tendered just before the final vote on the case, was re-elected to the same House. His credentials were referred to the Committee on Military Affairs, who had investigated his alleged offenses, and had reported the resolution of expulsion. Mr. Logan presented the report of the committee, recommending that Mr. Whittemore should not be admitted to his seat. He alone spoke in favor of the report. His language was this:

"It is said we have exhausted our jurisdiction. That is not true. We have jurisdiction both of the person when he seeks to enter Congress and of the offense. Having claimed that jurisdiction heretofore, and having decided that what this man did was an offense—that it was a crime, we have a right now to declare that he has been guilty of a crime, that that crime is an infamous crime, and that he shall not enter these halls during this Congress. We have a right to say that because this is the Congress in which he committed the offense, the Congress from which he retired because of his crime, this is the Congress which has jurisdiction of his person and of the offense; it is the Congress that has the right to determine whether or not he shall be admitted here as a representative of any portion of the people of the United States.

"There are the cases of Brooks and Keitt, of South Carolina. What were these cases? Mr. Brooks was censured. He was not expelled. A vote was taken to expel him, and there were 121 votes to ninety odd, and not being two-thirds, he was not expelled. The House then censured him, and he resigned, was re-elected and took his seat. Mr. Keitt's case was the same. His conduct was censured by the House, and he also resigned, was re-elected and took his seat. But mark you, neither one of these men was charged with a penitentiary offense, or any infamous crime. There is a wide difference. They were charged with an improper act, with improper conduct in violation of the rules of the House, but not with crime.

"Then you may take the case of Matteson, of New York. What was that? He was convicted in the House of bribery and corruption, or at least he would have been, but he resigned. That case will perhaps be cited as a precedent, but it is not one. He resigned before the House expelled him, just as Whittemore did, and he was censured. What did he do? He was censured by the 34th Congress, and he returned to the 35th Congress. He did not return to the same Congress that censured him, nor was he elected to the succeeding Congress after the censure. He had been elected to the 35th Congress before he was censured in the 34th Congress, and hence he took his seat in the 35th Congress. Why? Because the 34th Congress had expired. The body of which he was a member when he was censured had expired, and had no further jurisdiction over the case, and the 35th Congress had no jurisdiction over him. Mr. Harris, of Illinois, in the 35th Congress, introduced a resolution of expulsion against Matteson, but it was decided that that Congress had no jurisdiction, and hence he was permitted to retain his seat in the 35th Congress. That is a very different case from this. This man comes here to this Congress, of which we have said he is unfit to be a member. He returns to us now; and I tell you, gentlemen, you cannot find a solitary precedent in the whole history of legislation that authorizes this Congress to receive him or reject him.

Mr. Logan took the ground that an expulsion for an infamous crime was valid for an entire Congress, and that, although a subsequent House could not refuse to admit a Representative elect on account of an expulsion by the House of Representatives of the 41st Congress, yet *that* House itself, during its existence, could constitutionally refuse to readmit a man whom, for an infamous crime, it had or, but for his resignation, would have, expelled. The case of Mr. Whittemore, after his expulsion and re-election, was driven by a strong will through an uneasy House. To many honest minds the knowledge or even apprehension that they are suspected, is as galling as punishment itself to the guilty. The representative who questioned the regularity of the proceeding in this second case was stigmatized as "the friend of Mr. Whittemore." A vote in the negative was to signify that the voter himself had sold cadetships.

The case of John Wilkes, in the House of Commons of England was cited — evidently misunderstood—in the brief discussion in the case of Mr. Whittemore. That case, and the still earlier case of Sir Robert Walpole, in view of the magnitude of the question involved, the energy with which they stirred the popular heart of England, and the illustrious qualities of the statesmen who took part in them, will doubtless continue to be the great leading cases on the question now under consideration amongst all English-speaking races maintaining parliamentary governments for centuries to come. I beg that you will consider the several stages of this case of John Wilkes from its commencement in 1769 to its termination in 1782. The constitutional principle of the case was, after 13 years of struggle, settled on the day it terminated. The principle is, that a member of the House of Commons cannot, on re-election, be rejected on the ground of previous expulsion, even from the same Parliament. And it is to be remembered that the powers of the House of Commons under the unwritten British constitution are even broader than the powers of the American House of Representatives. Mr. Wilkes was first expelled from the House of Commons of England on the 19th day of January, 1764, by the adoption of the following resolution:

"*Resolved*, That it appears to this House that the said John Wilkes, Esq., is guilty of writing and publishing the paper intituled 'The North Briton, No. 45,' which this House has voted to be a false, scandalous, and seditious libel, containing expressions of the most unexampled insolence and contumely towards his majesty, the grossest aspersions upon both Houses of Parliament, and the most audacious defiance of the authority of the whole legislature; and most manifestly tending to alienate the affections of the people from his majesty, to withdraw them from their obedience to the laws of the nation, and to incite them to traitorous insurrections against his majesty's government.

"*Resolved*, That the said John Wilkes, Esq., be for his said offence expelled this House."

Mr. Wilkes was elected March 28, 1768, a member of the 13th Parliament of England, which met at Westminster, on the 10th day of May, 1768. The session was a short one. At the second session, which commenced on the 8th day of November, 1768, a motion was made for the expulsion of Mr. Wilkes. The motion was made by Lord Barrington on the 3d day of February, 1769, and carried on the same day. It was predicated in part on the grounds of his former expulsion, but mainly on new facts. It was in these words:

"That John Wilkes, Esq., a member of this House, who hath, at the bar of this House, confessed himself to be the author and publisher of what this House has resolved to be an insolent, scandalous, and seditious libel, and who has been convicted in the Court of King's Bench of having printed and published a seditious libel, and three obscene and impious libels, and by the judgment of the said court has been sentenced to undergo twenty-two months' imprisonment, and is now in execution under the said judgment, be expelled from this House."

Among those who debated this motion was George Grenville. I proceed to quote at some length from his speech (16 Hansard, 559) for two reasons. In the first place, it embraces an exhaustive and masterly statement of the real character of the power to admit, reject, and expel members secured to the House of Commons by the unwritten constitution of England; and then it also contains an able and complete statement and discussion of the earlier case of Robt. Walpole, expelled for an infamous crime in January, 1712, and admitted a few months afterwards, without objection to a new Parliament.

"But it has been urged," said Mr. Grenville, "whatever may be the case in point of power in regard to the several articles contained in this question, whether taken together as an accumulated and complicated charge, or considered separately and distinctly, yet this House must necessarily be the judges whether any member of their own is or is not a fit person to sit amongst them; and it has been argued that if the last Parliament thought him unfit, the present has certainly an equal right to adjudge that he is so. It has been asked what merit he has had since that time to recommend him, and to induce the present Parliament to think him a properer man to sit amongst them than he was to sit among their predecessors? This would, indeed, be a conclusive argument, if we really had that discretionary power of excluding all those whom we think proper upon which it is founded. But we have no such general authority vested in us, nor is there a single precedent where we have pretended to exercise it. Whenever this House has expelled any member, it has invariably assigned some particular offense as the reason for such expulsion. By the fundamental principles of this constitution, the right of judging upon the general propriety or unfitness of their representatives is entrusted with the electors, and, when chosen, this House can only exclude or expel them for some disability, or for some specific offense alleged and proved. If it were otherwise, we should, in fact, elect ourselves, instead of being chosen by our respective constituents.

"If I had been one of the electors for the county of Middlesex I should have shown by my vote the opinion which I entertained with regard to the conduct and character of Mr. Wilkes, and to the propriety of choosing him a knight of the shire for that county. I had not only a right, but it would have been my duty to have manifested that opinion. But when he is chosen and returned hither, my duty is widely different. We are now acting in our judicial capacity, and are therefore to found the judgment which we are to give, not upon our wishes and inclinations, not upon our private belief or arbitrary opinions, but upon specific facts alleged and proved according to the established rules and course of our proceedings. When we are to act as judges, we are not to assume the characters of legislators any more than the Court of King's Bench, who were bound to reverse Mr. Wilkes's outlawry if they found any irregularity in it, though possibly they were convinced in their private opinions that it would have been more beneficial to the State to have confirmed it. If we depart from this principle, and allow ourselves a latitude in questions of this nature; if we are to admit those whom we think most proper and expel those whom we think most improper, to what lengths will not this doctrine carry us? There never was a Parliament chosen into which there were not some persons elected whom the greater part of the House thought unworthy of that honor—I speak of former Parliaments—and it becomes us to be careful that posterity should not speak still worse of us. Let me suppose for a moment that this were true to a certain degree even in the present Parliament, and that it were carried still further, from party prejudice or from motives less defensible. This would, indeed, be the sure means of purging the House effectually from all ill humors within these walls, and of dispersing them at the same time throughout every corner of the kingdom. But if this summary mode of reasoning was really meant to be adopted, there was certainly no occasion for our sitting four or five days and nights together to decide a question which might as well have been determined in so many minutes. I cannot, therefore, bring myself to think that any gentleman will avow the proposition to this extent.

"But perhaps some may wish to shelter themselves under the other part of the argument, and may contend that a man who has been expelled by a former House of Commons cannot, at least in the judgment of those who concurred in that sentence, be deemed a proper person to sit in the present Parliament, unless he has some pardon to plead or some merit to cancel his former offenses. They will find upon examination that this doctrine is almost as untenable as the other. Votes of censure, and even commitments, by either House of Parliament, acting in that capacity only, determine, as is well known, with the session. There are, indeed, some instances where, in matters of contempt and refusal to submit to the orders of the House, the proceeding has been taken up again in a following *session*. But to transfer an expulsion from one *Parliament*, and by this means to establish a perpetual incapacity in the party so expelled, which must be the consequence of it—as this objection will hold equally strong in any future Parliament as in the present—this, I say, would be contrary to all precedent and example, and inconsistent with the spirit of the Constitution. I could cite many precedents to prove the first part of my assertion, but one alone will be sufficient for my purpose, because that is so signal and so memorable in all as to render any confirmation or enforcement of it quite unnecessary. In quoting this precedent I beg leave to say, that I do not intend to throw any imputation on any person whatever. I neither mean to acquit or condemn those who were parties to it, but merely to state the fact as it appears from your journals, and then to submit the result of it to the judgment of those who hear me.

"The case I allude to was that of Mr. Walpole, who was afterwards first minister to King George I and King George II, for the term of twenty years and upwards. On the 17th of January, 1711—'12, he was voted by the House of Commons guilty of a high breach of trust and notorious corruption, in receiving the sum of five hundred guineas, and taking a note for five hundred pounds more, on account of two contracts made by him when secretary of war, pursuant to a power granted by the Lord Treasurer, and for this offense he was committed prisoner to the Tower, and expelled the House. He was immediately re-elected, but declared incapable of being chosen during that Parliament. However, the dissolution of it, a year and half afterwards, he was again chosen into the new Parliament, admitted to take his seat with the least question or objection account of his former expulsi and continued a member of House of Commons, in every sequent Parliament, till the y 1742, when he was created Ear Orford. It cannot be denied the offense was in its nature in mous, and such a one as rende the person guilty of it unfit to trusted with the power to give to manage the public money. same party that expelled hi whose enmity was aggravated his great talents and knowledge business, continued equally adve to him, and equally prevalent the new Parliament; but howe desirous they were to get rid him, and however violent u many other occasions, yet in very zenith of their power they not dare to set up this pretence to urge the expulsion of a form Parliament, although not years before, as a sufficient grou for re-expelling or declaring him capable of sitting in a new Par ment. If this could have been tempted, every circumstance curred to make them wish it. crime itself was breach of trust notorious corruption in a public cer relative to public money- offense in the eye of Parliam certainly not less infamous or criminal than writing and publi ing a seditious libel. Few, if a were more obnoxious or more midable to them than the gen man who had been the object their justice or resentment. heat of party rage had been ple ed in excuse, if not in justificati of many extravagancies on b sides, but they thought this me ure beyond the mark of a comm violence, and therefore dared no attempt it. I have said before it was not my intention to appr or to blame the censure they pas upon that extraordinary man.

"It was the subject of great cussion and altercation at the ti I do not wish to revive past he The present are more than su cient, and all wise and good m should endeavor, by justice moderation, to allay them. Le suppose that he was guilty or in cent of the charge to the utm extent, and then let us consi how the case will apply to that of the question which is now be us. The crime, as it related t fraud concerning the public re nue, was certainly under the im diate cognizance of this House, was, perhaps, punishable in no er manner. They punished it as verely as they could, both by prisonment and expulsion, the mer of which ended in a months, and the consequence the latter in a year and a half. he was guilty of a high breach trust and notorious corruption, was certainly very unfit to be vested with the most sacred tr in this kingdom, that of a mem of the Legislature. Had the qu tion been asked upon that occas likewise, what merit he had a his first expulsion to recomme him to the subsequent Parliame the answer must have been, tha had persisted in justifying what had done; that he had appea not only to his electors but to world at large, in more than printed pamphlet, accusing House of Commons, which condemned him, of violence injustice. With all these aggra tions, and with every other indu ment, what could have prote him—what could have preven his re-expulsion but the notori and the certainty that such a m sure was not consistent with known law and usage of Par ment, even when exerted again guilty and obnoxious man? is the state of the argument u that supposition. But if we the other part of the alternati and suppose that he was innoc of the charge, the proposition wo be much stronger. We must, th consider him in the light of a expelled by party rage, or on w motives, not for his crimes, but his merit; not that he was un but that he was too well quali for the trust reposed in him. W would have been the consequenc this doctrine of transferring the di bility incurred by a former senten to a subsequent Parliament h been then established? The pub and this House would have be deprived for ever of those servi which, from his knowledge a