REMARKS

By Senators Thurman, Bayard, Carpenter, and Stewart, on the Utah Bill, in the Senate. Feb. 26, 1873.

Mr. Thurman. I move to amend section eighteen, page 25, by inserting after the word "process," in line eleven, these words:

And a writ of error from the Supreme Court of the United States to the supreme court of the Territory shall lie in criminal cases where the accused shall have been sentenced to capital punishment, or to imprisonment for six months or upward, or to pay a fine of $1,000 or upward, such writ to be applied for by the person or persons convicted.

Mr. Frelinghuysen. I should have no objection to that amendment so far as it relates to capital offences; but I think it is carrying it too far when you apply it to all criminal proceedings. It would embarrass very much the criminal proceedings. These judges are appointed by the President and confirmed by the Senate, and we certainly can trust them in the ordinary prosecution of criminal jurisprudence of that Territory. So far as it relates to capital offences, I would not object to the amendment.

Mr. Thurman. I am glad to hear the Senator say that he agrees to it in the case of capital punishment, but that is not going far enough. The questions likely to arise upon which there ought to be the decision of the Supreme Court of the United States will very seldom be cases in which the punishment is capital. I have sought to restrict this amendment to cases in which the punishment is of great severity, where it is either capital or imprisonment of six months or more, or a fine of a thousand dollars or more. If there ought to be a greater safeguard than that, or some greater restriction than that, let it be made; but do not restrict it enterely to cases wherein the punishment is capital. If you think it ought to be where the punishment is imprisonment for a year or more, so amend it; if it ought to be where the fine is $2,000 or more, so amend it, but do not limit it entirely to capital offences.

My sole object is that there may be, in regard to questions that every one can see deserve the most impartial and enlightened consideration, a decision by a tribunal wholly removed from all local influences, passions, interests, or prejudices; a decision by a tribunal whose action will command universal respect and acquiescence in that Territory. We cannot conceal it from ourselves, we know it to be so, that in that Territory there have been judges who have been rather remarkable for a spirit of persecution than for a spirit of enlightened and impartial administration of the law. There may be such in the future. There is a conflict there. Nine-tenths of that community belong to the Mormon Church. Barely one-tenth of them are what are there called Gentiles. It is of the utmost consequence that the administration of the law shall be such as to command not simply the obedience but the respect of the people of that great Territory; and I do think that nothing would tend more to secure for the laws a faithful observance, and to procure for them a sincere respect, than to allow cases to come up to the Supreme Court of the United States under reasonable restrictions, and thus obtain the decision of that high tribunal of the last resort.

One word more, and I am done. Mr. President, there is nothing in this world so dangerous as unrestrained power, and judges are but men. An unrestrained power in a judge may be abused just as much as unrestrained power in a legislator, or in any other individual. The judge in Utah acts under no higher sanction than members of Congress, or members of a Legislature. Every officer in the United States takes an oath, and an oath just as stringent, just as binding on his conscience as the oath taken by the judge in Utah. But we know that unrestrained power is always dangerous. Now, if you will give to the supreme judicial tribunal of the Union a power to revise the decisions of these inferior courts, it will operate as a salutary restraint upon them and make them cautious how they decide causes between man and man, or between the public and those who are brought before them charged with offenses against the law. I think every consideration teaches us that we ought, under proper limitation, to allow an appeal in the last resort to that highest judicial tribunal in the land which is wholly free from any bias, from any local feeling, prejudice, or interest, and the high character of whose members is a sanction and an assurance that its decision will be precisely according to law.

Mr. Frelinghuysen. I move to amend the amendment by striking out all after the words "capital punishment."

The Senator from Ohio says that unrestrained power is dangerous. That is true, sir; but in this Territory the judges are nominated by the President, and confirmed by the Senate. They are our own appointees. * * * * *

Mr. Bayard. I was about to ask the honorable Senator from New Jersey whether this law being applied to a Territory was not necessarily a temporary act and made for a period filled with difficulty, peculiarly so, and therefore requiring in some degree, I will not term it special legislation, but legislation adapted for the peculiar and unhappy condition of affairs in which that portion of the country is found. I do not know what is the value of this amendment if it be restrained to merely capital cases, because I am not aware of any capital cases that could occur under the provisions of this act; but I think there was much force in the suggestions of the Senator from Ohio and I wish they would have effect upon the Senator from New Jersey and others interested in the passage of this bill.

Considering the peculiar condition of affairs of this people, that the law necessarily is but for a time, because this region now a Territory will probably become by the influx of people a State, and when it is a State these offences against domestic affairs will necessarily pass under the control of State law, and the United States will be absolved from all care of such offences, if such there should then be, I ask whether it would not tend to a more careful and wiser and more conservative and merciful administration of the powers given under this act, if the judges who impose these heavy penalties knew that there was a court capable of revising errors which they might commit? The mere pride of profession, the simple question of the doubt of being overruled, is a restraint. Our theory is to have restraints, checks and balances upon power, whether judicial or otherwise, and they form one great part of the philosophy of our system; and why, I ask, may not that well be applied to this act? I do not think there can be any capital cases under this act, and I am sure the Senator from New Jersey would desire to see the judgments of this court exercised under a sense of responsibility and restrained power, which certainly would be more effective if they knew that their judgments were capable of revision and of being passed upon in the event of error.

Nay, more than that, there is as I have said a very peculiar condition of affairs, of sentiment in that country, in which what may seem to us law may not be to them justice and equity. Your punishments, after all, if they are to be effective, are not to be administered in the spirit of vengeance, but for the purposes of inhibition and example. Human punishments can have no sanction except they are simply for example; they have no sanction if they are for purposes of vengeance alone. Therefore, surely it is better in the anomalous condition of affairs for which you are proposing wisely, or perhaps not wisely, at this time positively to legislate, that you should at least impose some limitation upon the high penal powers given by your law to a judiciary, not the choice of the people of the Territory, in whose selection they have no voice. Remember, it is not like the judiciary of a State in whose selection the people have a choice; but it is the selection of judges to sit in judgment over the highest rights of person and property, and those who are to be affectd by them have no power in the selection of those who are to judge them. It is not like the case of New Jersey or Delaware. We need no writ of error there, because there is a question of choice. But I submit, in all these matters which you are now confiding to a Federal tribunal, matters of life and death, protecting the person and property of the citizen, the general police regulation is confided to the State, and State tribunals alone can entertain these questions, and State tribunals are selected by the people of the State who have a voice in the choice of those who shall judge them.

But now you are dealing with a Territory; you are making laws to be executed by a class of magistrates in whose choice the people have no voice whatever; and is it not wise and just in the peculiar condition of strangely variant sentiment in which you find this population that you shall impress upon your judges the fact that when they do administer law there shall be a tribunal to sit in error upon the defects which they may create? I submit that this is not a parallel to the case of a State. It is not parallel to the case of a people who are to be judged by judges of their own choice. Checks and balances upon judgments are wise, for the judgment of men is frail; it should be carefully exercised; and there never was a condition of affairs in this country or perhaps in any other when slow judgment and careful consideration were more necessary for the peculiar class of offenses which this bill is intended to punish. They are not evil in themselves. They are simply evil because your statute prohibits them. You create the offense; you created the judge; you give the people to be affected no power to choose their judge; and therefore I say it behooves you that you should give every chance for a revision of an inaccurate or an unjust sentence.

Mr. Thurman. A few words in reply to the Senator from New Jersey. The Senator says that elsewhere there is no appeal by way of writ of error to the Supreme Court. That is true, sir; and I think it is a disgrace to our laws that it is so. Upon any property question arising under the Constitution and laws of the United States, where the amount of property involved is of the value of $2,000 or more, the cause may be taken to the Supreme Court of the United States for decision; but upon the sentence of one single man a district judge of the United States, whom the Senator from New Jersey would not employ if he were at the bar to collect a $500 note, (and there are such in this republic,) a man may be sentenced to death, and there is no opportunity to review that decision.

Mr. Sherman. The inquiry I make of my colleague, if he will allow me, is whether in the Territories there is not a writ of error always from the judge who presides at the trial to the supreme court of the Territory?

Mr. Thurman. Oh, yes, to the supreme court of the Territory; but how is that supreme court constituted?

Mr. Sherman. Then it must require three judges to concur in the sentence.

Mr. Thurman. How is that supreme court constituted? The district courts are held by the members of the supreme court. A single judge of the supreme court holds a district court.

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But again, the Senator from New Jersey says that these judges are nominated by the President and confirmed by the Senate. Ay, sir, they are; but does not the Senator know full well, for he belongs to the Judiciary Committee, the trouble we have had to obtain men fit to hold judicial station not simply in the Territories but in the States? Does he not know what difficulty we have had at this very session to determine who should be a judge in Utah Territory? I can speak no more plainly because I cannot speak of our proceedings in executive session; but will he tell me that the fact that the judge is nominated by the President and confirmed by the Senate is any sufficient guarantee that there will be no error in his decision? No, sir, that will not do.

Again, he says there is danger of overloading the Supreme Court of the United States. Sir, if we are to protect that court from having excess of business, we had better begin at some other end of its Calendar; we had better curtail its jurisdiction somewhat in civil causes, in order that it may have time to decide the criminal cases that ought properly to be brought before it. I have in my mind now some laws that have been enacted by Congress, the proceedings under which deserve to be considered by the Supreme Court of the United States, and ought to have been reviewed by that court; but of which you give to that court, the court of last resort to decide upon the highest constitutional questions in the land, no jurisdiction whatsoever.

But, sir, I do not propose to go into a general review of the law on this subject on this bill and correct the defects that I consider to exist in it. For the reasons stated by my friend from Delaware, peculiar to this case, I ask that in this case there may be this appeal to the Supreme Court. Although I should very much like to see, when there was time to take it up and prepare a proper code on the subject, the Judiciary Committee report to the Senate a proper bill allowing a writ of error from the Supreme Court of the United States in certain criminal cases, not simply to the supreme court of Utah, but to every Federal tribunal that has criminal jurisdiction throughout the whole length and breadth of the Republic, I propose nothing of that kind now. I propose simply to deal with the matter that is now before us; and for the peculiar reasons mentioned by my friend from Delaware. I hope the Senate may be disposed to allow this appeal to exist.

Mr. Carpenter. Mr. President. I entirely concur with the Senator from Ohio and the Senator from Delaware upon the particular subject that they have discussed. * * *

It is, as the Senator from Ohio has well said, a shame that a man can be tried for his life in a district court of the United States before a single judge and have no writ of error to any other tribunal. A district judge may be the best man in the world; he is not expected to be the greatest man in the world. You shut the door upon superior professional attainments when you fix the salary at $3,000 or $3,500, and then, when we come here and ask you to increase the salary you say, "Oh, that will not do; these district judges do not amount to anything." They will never make very great men while good lawyers can make $10,000, $15,000, and 20,000 a year at their profession, and you pay only $3,500 for the services of a district judge; and yet in every State of this Union men may be tried for violation of Federal law and sentenced to death by the determination of one such judge.

If you punish offenses, you must give the Federal machinery for trial, and you disregard your duty when you do not give all the safeguards which the Constitution contemplates in criminal trials.

Now let me come to this case before us for a moment. Here we have a most painful condition of things to deal with. I have assented in the Judiciary Committee to most of the provisions of this bill; I do now concur heartily in the most of them; and yet it is impossible not to see that this bill may work injustice; it is impossible to shut our eyes to facts which all the world know. I am no apologist for polygamy; I am no advocate for Mormonism; and yet that condition of things has been tolerated, and has grown up under the eye of this Government, and in a measure under its approbation, at all events with its consent and acquiescence; and Brigham Young, at a time when he had fourteen wives I think, was nominated by the President of the United States and confirmed by the Senate to be Governor of the Territory of Utah. The Senator from Indiana showed to-day conclusively that under the statutes of the Territory which were in force, because not disapproved of by Congress, polygamy was a legal institution in that Territory for some ten or twelve years. It is all very easy to say that polygamy is wrong; that the condition of things there must be corrected because it is a reproach to our civilization; at the same time, it is not quite so easy to determine just what ought to be done.

The Mormons have committed many crimes it is said, and I believe they have. They have taxed the patience of the people of the United States it is said, and I believe they have. It may be that the day of vengeance has come; and yet, Mr. President, when I am called upon to contemplate a day of vengeance on any people, I am always inclined to hesitate and consider well the grounds upon which retribution is to be decreed.

The excitement which war brings arouses those feelings in human nature which respond to the drum and fife, and we may proceed without relenting to exterminate our enemies; but when it comes to a case like this, where you are to deal with men, women, and children, and your laws must reach the youngest child in that community, the fact that the Mormons have committed great crimes, the fact that they are outraging our civilization, the fact that the day of reckoning has come, only lays upon us a deeper obligation to see to it that if we draw the sword and wield it, we do so with forbearance and charity.

Mr. Bayard. My friend forgets that the law knows no vengeance; its purpose is justice.

Mr. Carpenter. I am not certain that I am forgetful on that point. I have seen some acts of vengeance committed under the forms of law, and I do not expect to see a community so perfect nor an administration of justice so entirely above criticism as to bring it within the theory to which the Senator from Delaware has so happily alluded.

Here are men with a plurality of wives, and children, to correspond. If we interfere rudely and tear up these relations and scatter that people abroad, what is to be the result? What is to become of those wives and what is to become of those children? It does not require any very close thought to see what must be their fate.

I am not criticising the bill at all in these remarks. I think it has been prepared substantially with this view; while it does not indorse the condition of things there, it does not propose to interfere with it, and the provisions which are deemed essential to procure conviction for polygamy in that Territory are confined, as I think they should be, entirely to the future. The past this bill does not protect, nor does it on its face condemn it.

And yet, Mr. President, we do know the fact that the judges of that Territory today are under the impression that they are commissioned, I do not say by the Government of the United States, but by that higher Power which rules the universe, to extirpate Mormonism and polygamy in that Territory. The chief justice of that court entered upon this crusade and was brought up standing by the decision of the Supreme Court, which wiped out everything that he had done. Application is now made to us for the purpose of strengthening them in that purpose; and while the judiciary committee have drawn a bill as carefully guarded as it is possible to be, a bill which on its face is entirely fair, which, if it could be administered by high-minded, impartial judges, would be unexceptional in every particular, yet we cannot shut our eyes to the fact that this law empowers that court as it is constituted and with the theories and opinions which its judges entertain, to go on administering the law upon the condition of things there existing, and that injustice may be done.

Well, sir, I am not objecting; I am not going to vote against this bill. At the same time I do go forward in the matter with great reluctance, because I fear that from the best of motives and with the greatest caution and prudence that it is possible to exercise, we may do more harm than good: we may do more injustice than justice; we may punish more innocent people than guilty persons.

I would throw around the proceedings under this law every possible safeguard. I would give these people this right of appeal. I do not speak particularly of the precise limits fixed by the amendment. Perhaps imprisonment for six months is too small; a fine of $1,000 may be too small. Perhaps appeal should only be allowed in cases of imprisonment for two or three years and a fine of $2,000. Sir, I would not exclude every man p osecuted for crime from the right of being heard in the supreme tribunal of the land. If these men are tried there they are to be tried for violating the act of Congress, and the judicial power, with the supreme tribunal at its head, should be authorized to reach, to hear, and to determine all those causes.

Let me say again, I am not criticising anybody. I believe I know that the members of the judiciary committee feel the embarrassment as much as I do, and are as anxious as I am to do nothing which can by any possibility be perverted to an end of injustice, and I believe they would cheerfully accept any amendment which they thought would throw additional safeguards around this bill, and it seems to me that giving this right of appeal is one of those safeguards.

Mr. Stewart. Mr. President, the precise difficulty that has embarrassed the administration of justice in the Territories for the last twenty years is suggested by this amendment, and upon this point I have made observation for a long time. It is not the Territory of Utah alone, but all the Territories, that need an appeal wherein their causes can be heard from the Supreme Court that is provided under your organic acts. * * * *

Sir, a $3,000 judge in a Territory cannot be a very great man. Three thousand dollars will not support a judge and his family in any one of the Territories, I care not how economical he may live; at any rate in one of the mining interior Territories. Three thousand dollars will not procure legal talent of sufficient capacity to hear and determine the causes that ordinarily come before those courts.

Now, this amendment proposes to allow appeals and writs of error to the Supreme Court of the United States. That would be the most desirable thing imaginable in both civil and criminal cases, if it were possible. I should be glad to vote for this amendment if the thing were possible; but from Utah alone I think appeals will come up and writs of error to occupy the entire time of the Supreme Court of the United States. It is simply out of the question.

Then again, that court is behind now nearly four years, and an appeal in a criminal case which has to abide four years for determination is always a denial of right. The thing is practically impossible. It is unjust to the alleged criminal, unjust to other litigants, and unjust to the government. Some other means must be adopted. I deny that the Constitution of the United States provides or guarantees to every man in the Territories the right of appeal to the Supreme Court of the United States. It is true the Constitution says there shall be one Supreme Court, &c., but it has been repeatedly decided by the Supreme Court of the United States that the Territories do not come under those provisions of the Constitution providing for a Supreme Court. They are governed by Congress under its power to deal with the Territories, and the courts are territorial courts.

This country can afford, however, and it must afford if it is going to deal with a subject as grave as this, to give the people of this Territory a reasonable right of appeal, such a right of appeal as can be used, such a right of appeal as can be sufficiently speedy, so as not to be a denial of justice, and there is no other way to do that except to create a court of appeal. I assisted on a former occasion, in preparing a proposition to that effect, which has been before the House of Representatives, which I ask to have read, and which I shall propose as a substitute for this. I do not like hasty legislation, but I do believe that the right of appeal to have a case determined by a court of higher jurisdiction than those now organized in the Territories is but just. * * *

This proposition is to appoint three circuit judges for the nine Territories. I have not reduced the number of district judges because that would be a matter of too much labor, but it can be reduced so as to save more, and the supreme courts of the Territories might be dispensed with altogether and an appeal taken directly to the circuit court. That would give you three judges who would be on a par with the circuit judges of the United States; and that would be as high a court of jurisdiction as exists in the States for the determination of like questions; and then questions which might go up to the circuit courts might also go to the Supreme Court of the United States.

Now, I tell you that in the Territories judges with $3,000 a year are not the class of men with whom these important interests can be trusted. I have nothing to say about the judges of Utah. * * * They are zealous in their work; but the system is wrong. They are too poorly paid, and all judges in the Territories are