SENATOR BROWN'S SPEECH ON THE CULLOM BILL.

A MASTERLY DEFENSE OF CONSTITUTIONAL PRINCIPLES.

POPULAR AND TERRITORIAL RIGHTS VINDICATED.

MR. BROWN. Mr. President, it is not my purpose at present to follow the example of the Senator from Illinois, and discuss the social question connected with the affairs of Utah or its church polity. At a future period in the debate, when the bill introduced by the honorable Senator from Vermont is taken up for consideration, I may give some attention to that question, and I may contrast practices of the social evil in Utah and other sections of the Union. And while I have certainly no justification for these evil practices in any part of the Union, I shall be disposed, as far as we have the power, to apply the same remedies for the extirpation of the same evil in different sections. And I shall not draw distinctions between crimes against the family and the State, identical in their character, because they are practiced under different names. My purpose at present is to place upon the record, in connection with the remarks of the Senator from Illinois, an argument in which I shall attempt to show the unconstitutionality of the recent legislation already had in connection with Utah affairs, and the indefensible character of the legislation proposed.

As the Senator from Illinois has not been interrupted during the delivery of his remarks, and as I desire to discuss a constitutional question of importance, I respectfully request of Senators that the thread of my argument may not be broken by questions propounded during its delivery. After I have concluded the remarks I desire to make, I will then very cheerfully respond to any questions in connection with the argument which any Senator may desire to propound.

On a former occasion, when the bill known as the Edmunds bill, in reference to affairs in Utah, was before the Senate, I took occasion to express my abhorrence of the practice of polygamy, and to deprecate and denounce it. We now have pending before the Senate a bill to amend the provisions of that act and enlarge the scope of authority given by it. I desire to see the bill amended so as to meet any reasonable expectation that the country may have on the subject if it can be done without a palpable violation of the Constitution of the United States, which every senator in this chamber has taken a solemn oath to support.

When the original bill was pending before the Senate, I had not carefully investigated the whole question, and did not enter at length into the constitutional argument. But further reflection has satisfied my mind beyond a reasonable doubt that the eighth section of the act is a palpable violation of the Constitution of the United States, and is therefore null and void; and that the Utah commission, which s acting under that unconstitutional statute and prescribing test-oaths to voters, however amiable and accomplished they may be as gentlemen, are acting without authority of law; and that every act performed by them under said eighth section is without law, and every infringement of personal liberty or private rights is an unjustifiable and indefensible usurpation of power.

The eighth section of the act, which is the essence of it, is in these words:

> No polygamist, bigamist, or any person cohabiting with more than one woman, and no woman cohabiting with any of the persons described as aforesaid in this section, in any territory or other place over which the United States have exclusive jurisdiction, shall be entitled to vote at any election in any such Territory, or other place, or be eligible to election or appointment to, or be entitled to hold, any office, or place of public trust, honor, or emolument in, under, or for any such Territory, or place, or under the United States.

Now, I shall undertake to show that this section as administered violates at least a half a dozen provisions of the Constitution of the United States. If I succeed in showing that it violates a single provision of course every lawyer must admit that it is a nullity.

I shall undertake to show, Mr. President, that it is a palpable violation of the following provisions of the Constitution, which I shall quote and then make my comments:

First. "Nor shall any person be deprived of life, liberty, or property, without due process of law."

Second. "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury."

Third. "In all criminal prosecutions the accused shall enjoy the right of a speedy and public trial by an impartial jury of the State or district wherein the crime shall have been committed."

Fourth. He shall be confronted with the witnesses against him."

Fifth. "He shall have compulsory process for obtaining withesses in his favor."

Sixth. "He shall have the assistance of counsel for his defense."

Seventh. "No person shall be compelled in any criminal case to be a witness against himself."

Eighth. "No bill of attainder shall be passed."

Ninth. "No *ex post facto* law shall be passed."

Now, Mr. President, I propose to examine these different provisions and to show that this act as administered by the commission violates every one of them.

First, the Constitution declares that no person shall be deprived of life, liberty, or property without due process of law.

It is solemnly declared in the great charter of English liberty that—

> No freeman shall be taken, imprisoned, or disseized of his freehold or liberties, or free customs, or be outlawed or exiled, or otherwise destroyed or condemned, but by lawful judgment of his peers, or by the law of the land.

Judge Blackstone says of this provision in the great charter that it protected every individual of the nation in the free enjoyment of his life, his liberty, and his *property*, unless declared to be forfeited by the judgement of his peers or the law of the land. (Com., vol. 4, page 424.) Again, in volume 1, page 139, he says:

> And by a variety of ancient statutes it is enacted that no man's lands or goods shall be seized into the king's hands against the great charter and the law of the land; and that no man shall be disinherited, or put out of franchises or freehold, unless he be duly brought to answer, and be forejudged by course of law; and if anything be done to the contrary it shall be redressed and holden for none.

Vattel, in his standard work upon the law of nations, page 33, while treating of the principal objects of good government, says:

> The society is established with a view of procuring to those who are its members the necessaries, conveniences, and even pleasures of life, and in general everything necessary to their happiness—of exabling each individual peaceably to enjoy his own *property*, and to obtain justice with safety and certainty.

Now, Mr. President, I beg you to bear in mind that the Constitution not only guarantees protection to life and to liberty, but it also guarantees like protection to the *property* of every citizen of the United States. The eighth section of the Edmunds act as administered denies to every Mormon who is a citizen of the Territory of the United States the right to hold office or place of public trust, honor, or emolument, unless he takes a certain oath prescribed by the commissioners. The Constitution of the United States guarantees to every such citizen protection of his *property*, which shall not be taken from him without due process of law. It becomes necessary, then, to inquire whether an officer has a property in his office. If so, he is protected in the enjoyment of it by the Constitution, and it can not be taken from him without due process of law. "An officer is one who is legally invested with an office" (1 Bacon's Abridgment, 279). Now, you will please bear in mind that the eighth section of the Edmunds act as administered denies to any one refusing to take the test oath prescribed by the commission the right to hold office. What is an office? Judge Blackstone, in his Commentaries, says:

> Offices, which are a right to exercise a public or private employment, and to take the fees and emoluments thereto belonging, are also incorporeal hereditaments, whether public, as those of magistrates, or private as of bailiffs, receivers and the like. For a man may have an estate in them either to himself and his heirs, or for life, or for a term of years, or for during pleasure only.—*Blackstone's Com., 36.*

By these quotations it appears that a man may have an estate in an office. What is the meaning of the word "estate."

> In its most extensive sense it is applied to signify everything of which riches or fortune may consist, and includes personal and real *property.—Bouvier's Law Dict., 516.*

Having established by authorities which will not, I presume, be quesed that an officer has a property in his office. and having shown that the Constitution of the United States expressly declares that he shall not be deprived of that property without due process of law, it becomes necessary to inquire whether the eighth section of the law known as the Edmunds act, which, as executed by the commission, deprives a Mormon of his property in his office and of his right to hold any place of public trust, honor or emolument if he refuses to take a certain test-oath prescribed, takes his proper to by due process of law or without law.

The case of Huber vs. Reily, reported in third volume of P. F. Smith's Pennsylvania reports, in which the able opinion of the court was delivered by Judge Strong, was very similar to that under consideration.

By the act of Congress passed 30th March, 1865, all persons drafted for military service who did not report on notice were declared to be deserters. And in addition to other lawful penalties for the crime of desertion all persons who committed it were declared to have forfeited their rights of citizenship and their rights to become citizens, and were declared incapable of holding any office of trust or profit under the United States. The plaintiff Huber was returned by the provost-marshal as a deserter.

It is admitted that he was a citizen of the State of Pennsylvania and entitled to vote at the precinct where he tendered is vote, if the disqualification did not render him ineligible. He tendered the vote, and it was rejected by the managers of the election on the ground that he was a deserter, as shown by the registry of the provost-marshal of the district. He brought suit against the manager of the election for refusing to permit him to vote. Upon this statement of facts a judgment was entered in favor of the plaintiff in the court below, and error was assigned, and the court above affirmed the judgment on the ground that the plaintiff had not been convicted of desertion by any court martial, or any court of competent jurisdiction having the authority to render a final judgment in the case, and that the penalty could not attach, nor could he be disfranchised without due process of law. As already stated, the case is very much like the one now under consideration.

In each case the managers of the elections declared the voter ineligible on account of the commission of a crime of which he had not been *convicted*, the only difference being that in the Utah case the voter was required to swear that he had not committed the crime, and on his failure to make the oath was disfranchised, while in the case decided by Judge Strong the fact of desertion appeared on the records in the provost-marshal's office, and upon that the managers of the election held that he was guilty and rejected the vote. In neither case was there any trial by a competent tribunal, nor any judgment of conviction rendered by any court of competent jurisdiction.

I shall read a few sentences from the able opinion delivered by Judge Strong in this case. On page 117 he says:

> But I can call to mind no instance in which it has been held that the ascertainment of guilt of a public offense and the imposition of legal penalties can be in any other mode than by trial according to the law of the land or due process of law. That is the law of the particular case administered by the judicial tribunal authorized to adjudicate upon it.
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> And I can not persuade myself that a judge of elections or a board of election officers, constituted under State laws is such a tribunal. I can not think they have power to try criminal offenders, still less to adjudge the guilt or innocence of an alleged violator of the laws of the United States. A trial before such officers is not due process of law for the punishment of offences according to the meaning of that phrase in the Constitution. There are, it is true, many things which they may determine, such as age and residence of a person offering to vote, whether he has paid taxes, and whether, if born an alien, he has a certificate of naturalization. These things pertain to the ascertainment of a political right.
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> But whether he has been guilty of a criminal offense, and as a consequence forfeited his right, is an inquiry of a different character. Neither our Constitution nor our law has conferred upon the judges of elections any such judicial functions. They are not sworn to try issues in criminal cases. They have no power to compel the attendance of witnesses, and their judgment, if rendered, would be binding upon no other tribunal.
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> Surely that is no trial by due process of law, the judgment in which is not final, decides nothing, but leaves the accused exposed to another trial in a different tribunal, and to the imposition by that other tribunal of the full punishment prescribed by law.

Again, on page 121, the learned judge says:

> It may be added that this construction is not only required by the universally admitted rules of statutory interpretation, but it is in harmony with the personal rights secured by the Constitution, and which Congress must be presumed to have kept in view. It gives to the accused a trial before sworn judges, a right to challenge, an opportunity of defense, the privilege of hearing the witnesses against him, and of calling witnesses in his behalf. It preserves to him the common-law presumption of innocence until he has been adjudged guilty according to the forms of law. It gives finality to a single trial. If tried by a court-martial and acquitted his innocence can never again be called in question, and he can be made to suffer no part of the penalties prescribed for guilt. On the other hand, if the record of conviction by a lawful court be not a prerequisite to suffering the penalty of the law, the act of Congress may work intolerable hardships. The accused may then be obliged to prove his innocence whenever the registry of the provost-marshal is adduced against him. No decision of the board of election officers will protect him against the necessity of renewing his defense at every subsequent election, and each time with increased difficulty arising from the possible death or absence of witnesses. In many cases this may prove a gross wrong.
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> To hold that the act of Congress imposes upon such the necessity of proving their innocence without conviction of guilt would be an unreasonable construction of the act, and would be attributing to the National Legislature an intention not warranted by the language and connection of the enactment. It follows that the judgment of the court below upon the case stated was right. The plaintiff, not having been convicted of desertion and failure to return to the service, or to report to a provost-marshal, and not having been sentenced to the penalties and forfeitures of the law, was entitled to vote.

Chief Justice Woodward concurred in the judgment of the court and added:

> But I do not concur in treating the act of Congress as a valid enactment, for I believe it to be an *ex post facto* law in respect to all soldiers except such as commit the crime of desertion after the date of the law. This is not a case of desertion subsequent to the enactment, but prior to it, and the penalties of the offense were such as were fixed by law when the offense was committed, and it is not competent for the Legislature to increase them except for future cases.

And I will add in this connection, Mr. President, that it is not competent for Congress to punish citizens of a Territory, or to add new penalties for polygamy committed before the passage of the Edmunds act, or to disfranchise any citizen of a Territory for crimes committed prior to the passage of the act of disfranchisement.

In Dorsey's case, 7 Porter's Alabama Reports, Judge Ormond refers to the constitution provision that the crime or offense must be ascertained by due course of law, and says the term "due course of law" has a settled and ascertained meaning, and was intended to protect people against privations of their lives, liberty, or property in any other mode than through the intervention of the judicial tribunals of the country. But this law seeks to ascertain a fact exalted into a crime and punished in a particular manner—not by the judgment of a competent court, but by the admission of the offender, and construing his silence as evidence of guilt.

In the case of Green *vs.* Biggs, 1 Curtis' Circuit Court Reports, 325, Judge Curtis, of the Supreme Court of the United States, presiding in the circuit court, defines what is meant by the law of the land. He says:

> Certainly this does not mean any act which the Assembly may choose to pass. If it did the legislative will could inflict a forfeiture of life, liberty or property, without a trial. The exposition of the words as they stand in Magna Charta, as well as in the American Constitution, has been that they require "due process of law," and in this is necessarily implied and included the right to answer to and contest the charge, and the consequent right to be discharged from it, unless it is proved.

Lord Coke, in giving an interpretation of these words in Magna Charta, 2 Inst., 50, 51, says they mean "due process of law," in which is included presentment or indictment, and being brought in to answer thereto. And the jurists of our country have not relaxed this interpretation. "It follows," says he, speaking of the case before him, "that a law which would preclude the accused from answering to and contesting the charge * * * and which should condemn him to fine and forfeiture unheard if he failed to comply with the requisition, would deprive him of his liberty or property, not by the law of the land, but by an arbitrary and unconstitutional exertion of legislative power.

I might add other weighty authorities as to the meaning of "due process of law," but I deem it unnecessary. Those already produced show conclusively that the test-oath prescribed by the commissioners under the Edmunds act is not "due process of law" and that it deprives the citizen of Utah of his property in his office without due process of law and without law. It simply prescribes a test-oath which he is required to take, and if he refuses to do so his guilt is conclusively presumed, and his property is taken from him without giving him an opportunity to contest the truth of the charge, and without requiring proof of it.

The Supreme Court of the United States in the case of the test oath prescribed for lawyers, and in the case of the Missouri test-oath has conclusively settled this question, that the application of a test oath or the requirement that the party take the oath before he can exercise certain constitutional rights or before he can have the benefit of his office, is unconstitutional and of no effect. If the requirement that a lawyer take a test oath that he has not committed a certain crime before he can practise law is not due process of law, and the law requiring it is void, and that in a test-oath, as in the Missouri case, requiring a minister of the Gospel to swear that he has not committed a particular crime before he can discharge the sacred functions of his position, is *not* due process of law, and the lawn aquiring it is null and void, as the Supreme Court has decided it is, then I should like to hear some lawyer draw a distinction between them and the test-oath applied to the citizen of a Territory, requiring him to swear that he has not committed a particular crime before he can discharge the duties of his office.

If the law which denies to a lawyer, who has a property in his profession, the right to practice till he takes a test-oath, and if the law which deprives a minister of the Gospel of the right to discharge the duties of his office until he takes a test-oath are unconstitutional, how can a law which requires a citizen of a Territory to swear that he has uot committed a particular crime before he can discharge the duties of his office be constitutional and valid? There can be no legal distinction drawn between the cases; if one is a nullity, they are all three nullities. In two of the cases the Supreme Court of the United States has expressly ruled that they are nullities. So much for the first objection to the constitutionality of this act.

I will now proceed to consider in more concise form some of the other objections. For convenience, and as theyare intimately connected, I will consider together the second, third, fourth, fifth and sixth.

As a statute of the Congress of the United States makes bigamy a crime in the Territories and punishes it by imprisonment in the penitentiary, I suppose it will not be questioned by those who have a most laudable zeal for its suppression, that it is an *infamous* crime.

The second constitutional objection above made is that no one shall be held to answer for a capital or otherwise infamous crime without indictment or presentment of a grand jury The polygamist in Utah is made to answer before a commission appointed under the Edmunds act, which tenders to him a test-oath requiring him to swear that he is not a bigamist or polygamist, and, as construed by the commission, that he has not at any time been guilty of the offense; and if he refuses to take the oath, guilt is conclusively presumed, and the punishment, that he shall neither vote nor hold office, is inflicted upon him. In other words, he is convicted or conclusively presumed to be guilty by a commission acting as court, jury and executioner, and deprived of his right to vote and of his property in his office without due process of law and without indictment or presentment of a grand jury.

I hold therefore that the second objection is well taken and the provision of the Constitution therein referred to is palpably violated.

The third objection is that the act violates that provision of the Constitution which requires a speedy and a public trial by an impartial jury. The Constitution provides in such case, first, that the accused shall be indicted by a grand jury and then that he shall be speedily and publicly tried by jury. For this constitutional requirement, which guarantees to him a speedy and public trial by jury, the commission under the Edmunds act tenders to him a test-oath and requires him to swear that he has not committed a crime; and if he refuses to do it guilt is conclusively presumed, and the sentence is passed by the officer controling the elections, or by the commission, which denies to him his right to vote or to hold his office. This proceeding therefore violates that portion of the Constitution referred to in my third objection.

My fourth objection is that the Constitution requires in each criminal case that the accused shall be confronted with the witnesses against him. The omnipotent commission, acting under the Edmunds act, requires that he shall take the test-oath that he did not commit the crime, and if he refuses to do it he shall be confronted with no witnesses, but by the executioner, who executes the sentence of the law by driving him from the polls, confiscating his property in his office, if he has one, or refusing to permit him to vote or hold an office. The act is therefore a palpable violation of this provision of the Constitution.

My fifth objection is that the act violates that provision of the Constitution which guarantees to him compulsory process for obtaining witnesses in his favor. The bill permits him to introduce no witnesses in his favor. The trial is had without witnesses in his favor, and it matters not whether he committed the crime or whether he is the most innocent man in the Territory. It matters not that he might be able to prove by a hundred witnesses that he never committed the offense. The statute allows him no compulsory process to bring one of them before the court or the commission that has assumed jurisdiction in his case. But his simple refusal to take the test-oath prescribed is held to be his conviction, and no witness is permitted in his favor, and no appeal is provided to any other tribunal. Then the Edmunds act violates this provision of the Constitution also.

My sixth objection is that it violates that provision of the Constitution which guarantees to the citizen who is accused of a crime the assistance of counsel for his defense. As it provides for no indictment by a grand jury, and no speedy and public trial by a traverse jury, as it permits him to be confronted by no witness against him, and denies him compulsory process to bring in the witnesses in his favor, it follows as a necessary consequence that in the case of the trial, if we may call such a mockery of justice a trial, it denies to him the assistance of counsel for his defense, and is therefore violative of the fundamental law of the land.

The charge of bigamy is a criminal charge, and is punishable by law. The commissioners under the Edmuuds act undertake to ascertain the guilt or innocence of the accused by means of a test-oath, and if the party answers that he has been guilty of the offense, or refuses to answer, punishment is inflicted upon him for the offense. In the Missouri test-oath case before the Supreme Court it was claimed by counsel for the State that the oath was a qualification for holding office and practising certain professions, etc. But the court says it has been made an instrument for the infliction of punishment, which could not rightfully be done. (4 Wallace, 319.) Again, on pages 320 and 321, the court says: "The deprivation of any right may be punishment; disqualification from the pursuit of a legal profession, or from positions of trust, is punishment." The court says the oath was punishment.

Having shown that the crime at which the Edmunds act is aimed is an infamous one, and that the eighth section of that act denies to any Mormon who has been guilty of it the right to vote or hold office, and takes his property without due process of law and without providing for any legal trial, I now call attention to the additional fact that it violates the seventh provision of the Constitution, referred to in my objections, which says: "No person shall be compelled in any criminal case to be a witness against himself." This is a criminal case, or rather it is a proceeding to punish citizens of the United States for the crime of bigamy by depriving them of their vote, or the right to vote or hold office. How does the commission propose to do this? It does it by compelling the party to be a witness against himself, to testify whether he has or has not been guilty of the crime. And if he refuses to testify, it draws from the refusal the conclusion of his guilt. What right has the Congress of the United States or any commission acting under it to impose any such test-oath? What right has it to pass any law compelling the party to testify whether he has been guilty or not guilty of the offense?

Nemo tenebater prodere scipsum is the well-established rule of the common law, and is thus explained by a very able and accurate American authority; that when the answer will have a tendency to expose the witness to penal liability, or to any kind of punishment or to a criminal charge, or to a forfeiture of his estate, the witness is not bound to answer. And if the fact to which he is interrogated forms but one link in the chain of testimony which is to convict him, he is protect-