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.)

To the act of July 2, 1862, which prescribed the oath of office known as the iron-clad oath, it was objected in the Senate that it virtually prescribed, in violation of the Constitution, a new qualification for Senators and Representatives in Congress. But the reasons urged in support of this enactment embraced no claim or pretense that Congress had any constitutional power to fix or alter the qualifications of Senators or Representatives otherwise than as a punishment for crime after trial, conviction, and sentence according to law. The debate on this bill in the House of Representatives covers less than a column and a half of the *Congressional Globe*. It contains no allusion to this constitutional question. The bill having been reported by Mr. Wilson, chairman of the Committee on the Judiciary, Mr. Phelps, of Missouri, said: "I hope the gentleman from Iowa will permit this substitute to be printed. The point that strikes me in it is this: that it affords no opportunity for repentance. Men may have gone into the rebel service and may have since returned to their allegiance, and yet it is proposed to render them forever ineligible to hold any office under the government of the United States."

It appears that this important bill was not even printed before it passed the House.

Mr. Wilson replied as follows—

"The substitute reported is not so severe as the original section embraced in the amendment offered by the gentleman from Tennessee. The substitute applies only to persons who have *voluntarily* engaged in this rebellion. That exception was not made in the section of the amendment offered by the gentleman from Tennessee. Now, sir, the sole object of this bill is to keep out of office under the government of the United States men who have taken up arms against the United States, and who have endeavored to destroy the government under which we live. I do not believe in repentance coming to men of this kind, who have used the official positions they have held heretofore for the purpose of overturning the government. I believe we ought to legislate in some degree against this rebellion. We have not been able to pass any thorough confiscation or emancipation act, or anything of the kind. This bill is very plain in its provisions; and for the purpose of determining whether the House is disposed to enact any measure which shall deal with those rebels as they should be dealt with, I demand the previous question on the third reading of the bill."

The bill was immediately passed.

Mr. Trumbull, chairman of the Judiciary Committee of the Senate, took charge of the measure in that body. Senators Saulsbury, Davis, and Carlisle raised the question whether the bill did not involve an unconstitutional attempt to prescribe additional qualifications for Senators and Representatives in Congress. The point was presented on the 13th of June, 1862, by Mr. Davis, in this form: He said that there were certain qualifications necessary to make a man eligible to a seat in the Senate or House of Representatives; that these qualifications could not be enlarged by an act of Congress; could not be diminished by an act of Congress; that whenever any citizen came up to the constitutional rule and measure, he was entitled to a seat if he was elected according to the forms of the Constitution; and that Congress, by prescribing another oath for him to take, different from that which the Constitution prescribes, or by adding to the qualifications of a member of either House, could not place a single obstacle in the way of his taking his seat. Mr. Davis referred to repeated decisions of the two branches of the legislature of Kentucky, to the effect that the qualifications of members of the legislature, which were fixed by the State constitution, could not be changed by a statutory provision imposing an oath against dueling upon members as a condition for admission to the legislature. Mr. Trumbull, in reply, said that a law of the State of New York, providing that persons convicted of a certain offense should hold no office in that State, had been adjudged coustitutional by the courts. He had in mind the case of Barker *vs.* The People (3 Cowen, 686), to which I will presently ask the attention of the committee. Mr. Saulsbury stated that the constitution of Alabama prescribed the qualifications of attorneys at law in that State, and that an act of the legislature, providing that duelists should not practise as attorneys in the courts of that State, was adjudged unconstitutional and void. This was the substance of the whole argument on this point in the Senate.

Mr. Trumbull's real vindication of the measure was presented in the following words:

"Now, sir, having replied to these suggestions, which I think are untenable, I will state what I think the object of the bill is. It is to prevent persons who have been engaged in the rebellion from hereafter holding office under the government, by requiring that they shall take an oath specifically stating that they have not been engaged in armed hostility against this government voluntarily. I think we had better pass such a bill as that. I know my friend from Kentucky, and I should hope my friend from Delaware does not wish any persons to exercise official duties under this government who have voluntarily waged war against it. I never wish to see a person admitted as a Senator or a Representative who has voluntarily taken up arms to fight against this government; and if I can prevent it, no such man ever shall have a seat in this body, or in the other, or hold any office of honor, profit, or trust under this government."

It will be observed, that these considerations are substantially the same with those which had been urged in support of the measure by Mr. Wilson in the House of Representatives.

Ten days later, on the 23d day of June, 1862, the consideration of the bill was resumed in the Senate, and it was, after a short debate, so amended as not to apply to the Vice-President, or to Senators or Representatives in Congress, or to any other officers for whom an oath of office is prescribed in the Constitution of the United States. And the bill thus amended was passed by the Senate on the same day. But the Conference Committee on this bill struck out the amendment, and their report was finally adopted without debate in the Senate. The grounds upon which this law was vindicated, although not stated with much care or precision, are nevertheless clearly enough disclosed by the debates. It was enacted as a war measure. The iron-clad oath was adopted as the countersign which should, in time of war, exclude domestic enemies from the civil administration of the Government, in the same manner and for the same reason that the military countersign was employed to exclude those enimies from the military lines of the army. It was enacted as a measure of defence against an armed enemy in time of war, and was as necessary and as justifiable as any other war measure not specifically marked out in the text of the Constitution.

The case cited by Mr. Trumbull was that of Barker *v.* The People, 3 Cowan, 686. An examination of this case will show that, while it was not an authority even in favor of the constitutionality of the oath of office act, it was very far indeed from being an authority in favor of the contestant in the case now before this committee. Barker was indicted and tried in the city of New York, in 1822, for sending a challenge to fight a duel, under the statute of November 5, 1816, which provided that any person who should engage in dueling should be beemed guilty of a public offense, and being convicted thereof, should be incapable of holding or being elected to any post of profit, trust, or emolument, civil or military, under that State. The jury found Barker guilty, and the judgment of the court was that, "for the offense aforesaid, as charged in the first, second, third, and fourth counts of the said indictment wherof he is convicted, he be incapable of holding or being elected to any post of profit, trust, or emolument, civil or military, under the State of New York."

The State constitution, in force at the time of the passage of the act of November 5, 1816, was that which was adopted on the 20th of April, 1777. The only provisions which it contained touching the subject of qualifications for office were these: that chancellors and judges of the supreme court should, during their terms of office, hold no other office except that of member of Congress; that the first judges of the county courts should in like manner hold no other office, except that of State senator or member of Congress; that sheriffs and coroners should not hold their offices for more than four years in succession; that sheriffs should, during their official terms, hold no other office; that ministers of the Gospel and priests should be ineligible to office; that the town clerks, supervisors, assessors, constables, and collectors, and all other officers then eligible by the people, should always continue to be so eligible, in the manner directed by the existing or future acts of legislature; that no member of the State should be disfranchised or deprived of any of the rights or privileges secured to the subjects of the State by that constitution, unless by the law of the land or the judgment of his peers.

The chancellor pronounced the udgment of the court of errors.

He cited the 1st section of the act of the 5th of November, 1816, to suppress dueling, which prescribed that "the persons convicted shall be incapable of holding or being elected to any post of profit, trust, or emolument, civil or military, under this State;" and he said that the objection then made was that this punishment was inconsistent with the constitution.

Eligibility to office, he said, was not declared as a right or principle by any express terms of the Constitution; but it resulted as a just deduction from the express powers and provisions of the system. The basis of the principle was the absolute liberty of the electors and the appointing authorities to choose and to appoint any person who was not made ineligible by the Constitution. Ineligibility to office, therefore, belonged not exclusively or specially to electors enjoying the right of suffrage. It belonged equally to all persons whomsoever not excluded by the Constitution. He therefore conceived it to be entirely clear that the legislature could not establish arbitrary exclusions from office, or any general regulation requiring qualifications, which the Constitution had not required. If, for example, it should be enacted by law that all physicians, or all persons of a particular religious sect, should be ineligible to public trusts, or that all persons not possessing a certain amount of property should be excluded, or that a member of the assembly must be a freeholder, any such regulation would be an infringement of the Constitution; and it would be so because, should it prevail, it would be, in effect, an alteration of the Constitution itself. But the question before the court was not at all of this character. The legislature had made no such general regulation. They had prescribed that incapacity to hold public trust should be the punishment of a particular crime; and the question was, whether they had power to prescribe such incapacity or not. The power of the legislature in the punishment of crimes he held not to be a special grant or a limited authority to do any particular thing or to act in any particular manner. It was a part of "the legislative power of this State," mentioned in the first section of the Constitution. It was the sovereign power of the State to maintain social order by laws for the due punishment of crimes. It was a power *to take life and liberty, and all the rights of both*, when the sacrifice was necessary to the peace, order, and safety of the community. This general authority was vested in the legislature; and as it was one of the most ample of their powers, its due exercise was among the highest of their duties. When an offender was imprisoned, he was deprived of most of the rights of a citizen; and when he suffered death, all his rights were extinguished. The legislature had power to prescribe imprisonment or death as the punishment of any offence. The rights of a citizen were thus subject to the power of the State in the punishment of crimes; and the restrictions of the Constitution upon this, as upon all the general powers of the government, were that no citizen should be deprived of his rights, unless by the law of the land or the judgment of his peers; and that no person should be deprived of life, liberty, or property without due process of law.

(TO BE CONTINUED)

By Telegraph.

CONGRESSIONAL.

SENATE.

WASHINGTON, 11.—Conkling presented a petition from the Workingmen's Convention, for a *sine die* adjournment of Congress.

A number of House bills and resolutions were reported from the committees and placed on the calendar.

Morrill, of Vt., introduced a resolution directing the committee on public buildings to ascertain if the material of the present unfinished Washington monument would be sufficient for the erection of an arch, to be called the Washington arch, and if the Washington Monument Society would consent to such arrangement; adopted.

Ramsey presented a petition from the Northern Pacific Railroad Company, asking a modification of its charter, accompanied by a bill for that purpose; referred to the committee on railroads.

The Senate went to the calendar and passed a number of bills.

At the expiration of the morning hour the Geneva award bill was resumed, the question being on the motion of Thurman to strike out the clause excluding insurance companies from filing claims for losses.

Thurman spoke in advocacy of the motion, not that he thought their claim should be allowed, but they should be permitted to file them.

Bayard took the same view. After further discussion it was agreed to take a vote on the bill at three o'clock to-morrow, and the Senate adjourned.

HOUSE.

WASHINGTON, 11. — Garfield, at half past two, moved to adjourn.

The Speaker intimated that he would not have recognized Garfield if he had thought he intended to move an adjournment, as he had told Garfield that he had promised to recognize Orr, who wanted a bill passed.

Garfield repudiated the imputation of bad faith, and withdrew the motion, when Potter, of New York, criticized the Speaker's language to Garfield, and a sharp colloquy took place between the Speaker and Potter, the former intimating that Potter had rushed into a matter not concerning him, and the latter defending his right to criticize the Speaker when he told members they had no right to move an adjournment. Orr then got his bill passed.

Dunn offered a resolution, authorising the President to appoint a provisional governor for Arkansas, to hold office until the present disputes there are legally settled; referred to the judiciary committee.

The house went into committee of the whole on the Military Academy bill, which appropriates $335,000, and considered it, and laid it aside, to be reported to the House.

The committee took up the deficiency appropriation bill, which appropriates three millions, three hundred and forty-one thousand, the largest item, for the interior department, being $1,465,000.

Beck spoke in condemnation of the manner in which the appropriation bills were being rushed through.

After spending a short time on the deficiency bill the committee rose, and reported the Military Academy bill to the House, and it was passed.

Page presented a memorial from the San Francisco chamber of commerce, against the cancellation of the contract with the Pacific Mail S. S. Co., for a semi-monthly China mail.

The river and harbor appropriation bill was taken up under a suspension of the rules, and passed 167 to 58; the bill appropriates six millions.

AMERICAN

DETROIT, 11.—The latest news from the forest fires is more encouraging, late rains having helped extinguish the flames in many localities; heavy fires are still raging near St. Clair, on the line of the Detroit and Bay City R. R., and near Saginaw. The timber and lumber are destroyed in some localities more extensively than in 1871; no loss of life is yet reported.

WASHINGTON, 11.—The Attorney General, to-night, telegraphed Brooks that the President considered Baxter's proposition concerning his retiring from the State House and depositing the arms, entirely reasonable, and that his interests demanded his acceptance.

The bill to aid the construction of the Northern Pacific Raliroad, authorizes the company to issue five per cent. gold bearing bonds, to the extent of fifty thousand dollars per mile for all the road built or to be built; and that the Secretary of the Treasury shall, on the completion of each additional twenty miles of road and telegraph, endorse the bonds, guaranteeing the holders thereof the semi-annual payment of the interest in gold, with a statement that the company has deposited with the Secretary a bond of the like amount bearing 7 3-10 per cent. interest, secured by a first mortgage on the entire road. Whenever the company shall have paid the U. S. the interest on the bonds so guaranteed the Secretary shall, upon the completion of each continuous twenty miles of the road, hand over to the company forty thousand dollars of the bonds per mile, reserving ten thousand per mile as government security for the payment of the guaranteed interest; the company shall also deliver, simultaneously, its seven and three-tenths first-mortgage bonds in proportion to fifty thousand dollars to each forty thousand dollars, in five per cent bonds turned over by the Secretary. As a further security the company shall transfer to the government all the land grants acquired and to be acquired. This land shall be sold to actual settlers only, at two dollars and a half per acre. The company shall pay into the treasury twice each year the net earnings for the preceding six months. If the funds thus provided fail to meet the interest guaranteed on the bonds the Secretary of the Treasury may sell enough of the ten thousand per mile retained by him to pay the interest. Any surplus in the treasury arising from the land sales and earnings shall be paid over to the company till the end of the year 1888, when it shall be paid into the sinking fund to extinguish the five per cents. The Northern Pacific seven-thirties, issued prior to this act, may be exchanged, dollar for dollar, for fives, with interest guaranteed from and after July 1st, 1878, if the exchange is made before that date; if after, the holders get the interest from the January or July following. Seven-thirties will be held by the government as security for payment of the fives. To guarantee the payment of the principal of the fives the government will hold the company's deposited seven-thirties; also a sinking fund of one per cent. on all bonds issued under this act shall be established. In January, 1889, the bonds shall be cancelled as bought, but the company shall pay the interest on them. The bill provides that the entire road shall be finished by July 4th, 1884. The seven-thirties remain the first lien on the road. The act restores to the government fifty million acres of public lands. The act further provides that the government may fix the fares, tolls and transportation charges of the whole road.

LITTLE ROCK, 11.—In the morning's skirmish several Brooksites were reported killed. Baxter, this evening, in response to the President's telegram in regard to the adjournment of the legislature, consented that he would disband his force in proportion as Brooks did, but the latter must leave the State House, deposit the State arms, and retire as far west of the State house as he himself was east of it. Thirty-five members of the legislature endorsed this reply. Baxter, to-day, receiving six hundred reinforcements, revoked the proclamation of martial law as concerned the legislature, notifying all persons not to interfere with them while in session. The U. S. troops stand in readiness to prevent a collision to-night.

President Grant has nominated Thomas B Bedford, Associate Justice of Colorado Territory.