CONSTITUTIONAL RIGHTS.

Speech of Hon. Chas. E. Littlefield on the Roberts Case, in the House of Representatives, Jan. 23, 1900.

(Continued.)

McCarry also takes the ground that statutory and constitutional provisions making ineligible to office any person who has been guilty of crime presuppose a conviction before the ineligibility attaches. (Ibid., page 345.)

Paine, in his work on elections, takes the same view (pages 104-108).

Upon this great proposition as to whether or not it is legitimate upon the part of the House, by its own unaided action, to thus change and make uncertain that which should be certain a fundamental law, I wish to invoke the authority—though not precisely in point, still significant—of the immortal Webster, the defender and expounder of the Constitution.

His language is significant and bears upon the general proposition as to the propriety of any majority of this House undertaking to amend and supplement the Constitution. He says, in discussing a similar question, fundamental in our system:

"Suffrage is the delegation of the power of an individual to some agent.

"This being so, then follow two other great principles of the American system:

"1. The first is that the right of suffrage shall be guarded, protected, and secured against force and against fraud; and

"2. The second is that its exercise shall be prescribed by previous law; its qualifications shall be prescribed by previous law; the time and place of its exercise shall be prescribed by previous law; the manner of its exercise, under whose supervision (always sworn officers of the law), is to be prescribed. In the exercise of political power through representatives we know nothing, we never have known anything, but such an exercise as should take place through the prescribed forms of law; when we depart from that we shall wander as widely from the American track as the pole is from the track of the sun.

"I have said that it is one principle of the American system that the people limit their governments, national and State. They do so; but it is another equally important, that the people often limit themselves. They set bounds to their own power. They have chosen to secure the institutions which they establish against the sudden impulses of mere majorities. All our institutions teem with instances of this. It was their great conservative principle in constituting forms of government that they should secure what they had established against hasty changes by simple majorities." (Daniel Webster's Works, volume 6, page 224.)

"We are not to take the will of the people from public meetings, nor from tumultuous assemblies by which the timid are terrified, the prudent are alarmed and by which society is disturbed. These are not American modes of signifying the will of the people, and they never were. If anything in the country, not ascertained by a regular vote, by regular returns, and by regular representation, has been established, it is an exception and not the rule; it is an anomaly which, I believe, can scarcely be found." (Ibid., page 225.)

While the great Webster was not discussing this provision of the Constitution, I submit that in prophetic language he gave to this House a fundamental principle, which on its oath and in conscience it must not disregard in determining the rights of the gentleman from Utah, independent of conditions, unconstrained by desires or wishes, unaffected by majorities, undisturbed by "sudden impulses" of the people, and undeterred by influences outside of this House.

Upon this great question, whether this House, under the lead of the majority of this committee, can of its own motive declare a disqualification that has not heretofore existed and impose it on the gentleman from Utah, or whether it can be done by an act of Congress, we stand, and I trust we may be pardoned if I say we take pride in standing with Burke, the lawyer, orator, and patriot of the eighteenth century; with Wilson, Dickinson, Morris, Madison, and Hamilton, framers and interpreters of the Constitution, who have hitherto received, and will continue to receive, the universal homage and admiration of mankind for their great services in establishing constitutional liberty; the State courts of Michigan, Maryland, Kentucky, and Virginia; and Webster, Story, Cooley, Tucker, Foster, Paschal, McCrary, and Paine, elementary writers, that for learning, authority, and reputation are at least unexcelled, against the State courts of Ohio and Colorado, construing a constitutional provision as applied to statutory offices; Burgess, Throop, and Pomeroy, and an "it is conceivable" of Mr. Justice Miller.

We give the House the authorities. Let it say where the weight of authority lies. Let the House say, when it comes to vote before "the country and history," whether it will stand by the authorities to which I have called your attention or with the courts of Ohio and Colorado and the three elementary writers. Before I leave this branch of the subject allow me to repeat what Mr. Foster says, showing the dangers that inhere in the majority proposition:

"The principle that each House has the right to impose a qualification upon its membership which is not prescribed in the Constitution, if established, might be of great danger to the Republic. It was on this excuse that the French Directory procured an annulment of elections to the Council of Five Hundred, and thus maintained themselves in power against the will of the people, who gladly accepted the despotism of Napoleon as a relief."

LEGISLATIVE PRECEDENTS.

The minority of your committee say that while they concede that weight is to be given to the precedents established in this House and in the Senate, they also say that unless it shall appear to the House, on adequate information and intelligent discussion, that these precedents are founded on reason, they cannot rightfully govern the action of the House in this case. Because someone else did wrong on insufficient information, on inadequate debate, is no excuse for this House at this time, under these circumstances, in pursuing a like wrong course.

I have just a word to say about the Larned case in Massachusetts. There is no statement in the report of the majority as to what the provisions of the constitution of Massachusetts were. It was prior to the adoption of the Constitution of the United States and in the absence of the statement the case counts for nothing upon either side.

NILES CASE.

I understood the gentleman from Ohio (Mr. Tayler) to say that a question was raised as to the exclusion of Niles, and that a resolution was adopted in the Senate for the purpose of ascertaining whether or not he was sane or insane, as an element of eligibility. I beg leave to disagree with my friend, the gentleman from Ohio. I hold in my hand the resolution, being that of the majority of the committee which reported it, and what does it say?

"To inquire into the election, return, and qualification of the said John M. Niles—"

And what else?

"And into his capacity at this time to take the oath."

"Capacity" meant his mental capacity. It is not worth while for me to stand here and argue in the presence of lawyers that an insane man can do no valid act. If insane he could take no valid oath. And after they were instructed to inquire as to his "qualifications," they were instructed to inquire also "into his capacity, simply whether or not mentally he was capable of taking the oath. "Capacity," as thus used, had nothing whatever to do with eligibility or qualifications.

THOMAS CASE.

The Thomas case, next alluded to, I will discuss with the Kentucky cases for a like nature, that occurred in the House.

STARK CASE.

If you have the report of the majority, you will find it on page 24. I will call the attention of the House to a few things that the majority of this committee omitted when they stated this case to the House.

I wish you to remember as I begin the analysis, the square, distinct, explicit statement of the gentleman from Ohio that "no precedent in the American Congress exists against exclusion"—that is, that there is no case where they have decided they did not have the power to exclude. That is his explicit statement in his speech this afternoon in the House. (Since revised, the gentleman probably meaning "House" instead of "American Congress.")

What was the Benjamin Stark case? Benjamin Stark was a senator from the State of Oregon, who was charged with disloyalty. In the majority report they have quoted a lengthy suggestion from Mr. Trumbull, who was a member of the committe on the judiciary. Mr. Trumbull discusses this "general-welfare" proposition in relation to qualifications. What does Mr. Trumbul start out with? Bear in mind that the distinguished gentleman from Ohio (Mr. Tayler) has just stated to this House that there was "no precedent against exclusion in the American Congress." Let me read in the Stark case from Mr. Trumbull. He says:

"A preliminary question was raised in the Senate when this case was referred to the committee, whether it was competent for the Senate, for any cause, to refuse to allow a person to be sworn as a member of the Senate whose credentials were in proper form and who possessed all the qualifications as to age, citizenship, and inhabitancy prescribed by the Constitution; and whether the only remedy which the Senate had to protect itself against the presence of an infamous person, a convicted felon, or an avowed and open traitor, was not by expulsion by a two-thirds vote after he should have been sworn into office."

This is the precise question presented now. The precise question persented in the Stark case is presented here at this moment.

Again:

"Many lawyers holding that when he possessed the necessary credentials and the qualifications prescribed in the Constitution, that notwithstanding the charge of disloyalty he had the right to be sworn in and the remedy was of exclusion."

Mr. Trumbull held the other way, but every other man on the judiciary committee held against him. Bear in mind the statement of the gentleman from Ohio (Mr. Tayler) that there is "no precedent against exclusion." What did the Senate do "in the American Congress?" I think the gentleman from Ohio ought to have leave to amend his remarks. What did the Senate do, in this very case? Let me read the resolution that they finally adopted under circumstances where, it is suggested by the gentleman from Ohio, this House of Representatives might make itself "supremely ridiculous" before the American people. This awful spectacle was first presented by the Senate, or rather the precedent was furnished by them. Here is the resolution:

"Resolved, That Benjamin Stark, of Oregon, appointed a senator of that State—"

Now, they did not put this in their report, mind you—

"appointed a senator from that State by the governor thereof, is entitled to take the constitutional oath of office without prejudice to any subsequent proceedings in the case."

The majority of the committee supported it. The charges of disloyalty were made. Ex parte affidavits were submitted as in this case. Mr. Trumbull, a minority of one, raised the same question raised here today by the majority of this committee. I do not know whether he charged the Senate with being "ridiculous," as has been suggested by the gentleman from Ohio (Mr. Tayler), but every other man on the judiciary committee supported that resolution, and that resolution was adopted by the Senate of the United States—yeas 26, nays 19.

Now, I sumbit, in all candor and fairness, when we are standing here upon either side of these legal propositions to disclose the truth, what becomes of the assertion of the gentleman from Ohio that there is no "precedent in the American Congress against exclusion?" What becomes of it, in view of this case and this vote on the part of the Senate? I am not through with this case yet. Let me read the names of the men who voted in the affirmative. They were:

Anthony, Browning, Carlisle, Collamer, Cowan, Davis, Fessenden, Foster, Harris, Henderson, Howe, Johnson, Kennedy, Latham, McDougall, Nesmith, Pearce, Powell, Rice, Saulsbury, Sherman, Simmons, Ten Eyck, Thomson, Willey and Wilson of Missouri.

There is the vote of the Senate, under circumstances exactly parallel to the circumstances existing before this House, except that Stark was charged with actual disloyalty, not the newly invented, theoretical, metaphysical, empirical, chemerical, fanciful "disloyalty" of the majority.

There is a further suggestion that is made upon the Stark case by the majority. They say here, on page 25:

"There is absolutely no doubt whatever that if the case of disloyalty had been stronger, Stark would have been excluded."

I do not say that this is not so, though I think the assertion is rather vigorous. I am going to state the facts to the House and let the House say whether it is so. The committee say:

"There is absolutely no doubt whatever that if the case of disloyalty had been stronger, Stark would have been excluded."

Let me read to you from the report of a committe of investigation returned to the Senate on April 22, he having been admitted February 27 and his case referred to the committee. The committee say:

"That the senator from Oregon is disloyal to the government of the United States."

There is the precedent cited by the distinguished gentleman from Ohio (Mr. Tayler) for the purpose of frightening this House from acting in accordance with the fundamental law of the land, as to which he says that there is no precedent in the American Congress against the power of exclusion, when the Senate took precisely the course suggested here.

Mr. Tayler of Ohio. If the Senate thought he was disloyal, why did it not exclude him?

Mr. Littlefield. The case dragged along for a long while. I have it right here. Do not fear that I am not informed about the case. I have not commented on what the Senate did. I am giving you the record in the case. The principle involved is the question. John Sherman, of Ohio, was on the committee that found he was disloyal, and that ought to settle it. (Laughter.) Now, it is true that when it came to a vote, for some reason or other the Senate of the United States did not vote to expel him.

Mr. Grosvenor. Might not the same thing occur in this case?

Mr. Littlefield. Well, I am ready to meet you on that proposition, that you can frighten this House into voting for exclusion, in violation of the law, when the other course is the only one which can legitimately be pursued. I stand here upon the proposition that, so far as I am concerned, the gentleman from Utah, Mr. Roberts, shall have what I believe under all circumstances to be his constitutional right. I do not care how he is situated (applause) nor what is the result. The fact that you may not get votes enough to expel does not tend to demonstrate the existence of the legal right to exclude.

The vote in favor of expulsion did not pass in that case, and Mr. Sherman, who signed the report of the committee, holding that he was disloyal, did not even vote, either in the affirmative or in the negative. That indicates, perhaps, that some things might have occurred in connection with Mr. Stark, of Oregon, that the record does not disclose. I do not know anything about it. I give you the case exactly as it stands. I submit this in all fairness and candor. I do not complain of the inadequate report of the majority.

These records are open to us all, and it may appear to the House before I get through with this discussion, that I have taken occasion to examine some of them, in order that this House might intelligently apprehend, upon all the facts, precisely what these propositions stand upon. There is no good reason why the House should not have all the facts.

KENTUCKY AND THOMAS CASE.

First, we should take into consideration the conditions that surrounded the House of Representatives and the Senate of the United States in those days of 1866, 1867 and 1868. I do not wish to stand here and closely criticise the action of either one of those bodies, for we should bear in mind that under the feeling that existed throughout the land, they believed that these men who were seeking admission to Congress, had been engaged in open rebellion and were still traitors to the United States. We must consider the fact that these case were determined under such circumstances. The reports of the committees and the debates show the intense feeling that existed. In the Thomas case they were passing upon the question as to the test oath in 1862. This is what Mr. Dawes said in his second report in the Kentucky cases in the House, as appears by the majority report:

After calling attention to the gravity of the situation he said that "in relation to these questions there are no precedents by which it may be guided in arriving at correct conclusions." In 1867, then, it seems from Mr. Dawes, that there were no precedents from this action now sought to be taken in this House. It may be that Mr. Dawes had not looked up these precedents, although his ability and industry were recognized as great.

I hope that no one will think for a moment that I have failed to recognize the great industry, zeal, intelligence, ability, and capacity which the gentleman from Ohio has brought to the investigation of these questions. We all know that he has rendered most valuable service. But still Mr. Dawes did not examine the precedents, if there were any earlier that could properly be relied on, the Thomas case occurring March 18, 1867, and the Kentucky case July 3, 1867. Shallaberger, in his letter, states the question upon which these cases turned. "First, may a law such as that prescribing the test oath be constitutionally passed and enforced either as to any officer or to a member of Congress?" And Mr. Dawes makes this suggestion:

"Now, sir, to those of us who believe that the fourteenth article is already a part of the Constitution, there is an expressed inhibition upon this man contained in that article. I do not care to take the time of the House in discussing the question whether it is or not a part of the Constitutoin. I plant myself upon the Constitution without amendment."

It is apparent that some members based their action upon the test oath act of 1862, and some upon section 3, of the fourteenth amendment.

This great fact is to be borne in mind. It was in the trying times, when the Republic was reorganizing itself after a terrible and devastating war, that these precedents occurred. What else came out of that excitement under the heat and prejudice that was engendered there? The fourteenth amendment was placed in the Constitution to bar and exclude men from a seat in Congress who had been traitors, because they knew without the amendment they had no right to exclude even a traitor. Its purpose was self-preservation. I submit at this time, in these days of peace, when there is no probability under the circumstances that exist today, in either North or South—brethren everywhere—of the existence of a traitor within our borders, it is hardly worth while to invoke such cases as precedents for the exercise of this unlimited power. No exigency exists, anything like that which existed under those circumstances. (Applause.)

I desire to call attention of the House further to what seems to me a very significant fact, as bearing on the proposition as to whether or not these cases are now entitled, in cold blood, in the exercise of plain, simple reason, to weight as precedents. The test-oath act was passed in 1862. In 1865 a statute was passed making it applicable to attorneys at law. Under that section the case of Ex parte Garland (4 Wall., 333) was determined. The Supreme Court of the United States, by at majority opinion announced in 1866, held, in relation to this test oath that was proposed to be imposed upon members of Congress, upon attorneys at law, and upon any officers of the United States, as follows:

"The exaction of the oath is the mode provided for ascertaining the parties upon whom the act is intended to operate, and instead of lessening, increases its dangerous character. All enactments of this kind partake of the nature of bills of pains and penalties, and are subject to the constitutional inhibition against the passage of bills of attainder, under which general designation they are included (page 377."

A little thing like that is of no consequence, I apprehend. The Thomas and Kentucky cases were substantially based on the test-oath act of 1862. Ordinarily, after such a decision by the United States Supreme Court they would lose all force as precedents; not so now, however.

These cases have never been cited hitherto, as precedents. Before I call your attention to the remarks of General Logan in the Whittemore case, I call the attention of the House to the fact that in 1867 John A. Logan was a member of the House of Representatives, and himself submitted one of the resolutions against swearing in certain members from Kentucky, making them stand back until their loyalty was determined.

He made on the floor of the House afterwards, at least half a dozen speeches on the same question. In 1870, when this man Whittemore, who had been guilty of selling cadetships, resigned from the House, went back to the State of South Carolina and was returned immediately, a gross insult to the American Congress, Logan, making his speech on the floor of the House insisting upon excluding Whittemore, said—what?

"In reference to precedents, it is said by men whispering around that there is no precedent for the course that I desire the House shall take in this case.

"But if we were to copy precedents, and ask ourselves is there any precedent to be found anywhere for this conduct of ours, I say there is; and the only precedent you can find is against Mr. Whittemore. If you will take the case of Wilkes in the English parliament—he was four times, I believe, expelled from that parliament."

One resolution of exclusion in the Kentucky cases was adopted in 1868.

Just think of it! Logan taking part in this debate early in 1870, says:

"If we were to ask ourselves, is there any precedent to be found anywhere for this conduct of ours—"

He put it fairly well—

"this conduct of ours, I say there is but one precedent you can find."

Mark that!

"The only precedent you can find is against Mr. Whittemore, if you take the act of Wilkes, in the British parliament, who was twice four times expelled."

Logan said in his speech, fresh from the cases of 1867 and 1868, that the Wilkes case was "the only precedent."

I submit in all soberness and seriousnes to this House that it is a far cry in 1900, thirty years afterwards, to cite as a precedent for the action of this House, a precedent that John A. Logan himself did not deem worthy of citation for the action of the House in 1870. It must be that Logan realized, as I think everyone realized, that the House under those trying and exciting circumstances had gone beyond the proper constitutional limitations of its power, and that a constitutional amendment was necessary in order to protect the House under similar conditions. If the Thomas and Kentucky cases, by reason of their extraordinary and exceptional character, were not worthy to be cited by Logan, has anything transpired to improve them by age? It is inconceivable that they were not fresh in the minds of all. If they were not authority then, they certainly can not be now.

WHITTEMORE CASE.

The case of Whittemore, in the Forty-first Congress, is another legislative precedent for the right to exclude. I have examined that case with care, and I feel bound to say that I do not think it entitled to any weight as a precedent. The argument upon which it was based shows the action of the House to have been unwarranted and ill advised in excluding Whittemore. The only speeches made in support of the proposition were by Mr. Logan. He does not in any way refer to the one great legal question involved, as to whether Congress, to say nothing of the House, acting alone, had the power to add to the qualifications specified in the Constitution, and that question was not raised during the debate, although at that time (1870) several State courts—one at least—had discussed it, People vs Baker having been decided in 1824.

The House had apparently never heard that there was such a question. The only provision of the Constitution that could possibly justify the action of the House, that constituting the House the judge of the "election returns and qualifications of its own members," was not referred to directly or indirectly, and if the debate is the criterion, the House acted without any reference to it whatever. The clause stating the qualification was incidentally referred to once. Indeed, they apparently acted upon an entirely different provision, that does not relate to exclusion or determining eligibility or qualifications, and Mr. Logan distinctly based his case upon it when he says:

"I base my opinion, first, upon the Constitution of the United States, which authorize Congress to prescribe rules and regulations for the government of their members, and provides that by a two-thirds vote either House may expel any one of its members without prescribing the offenses for which either house may expel."

He then proceeded to make this gratuitous and unwarranted assumption:

"This being the theory with which I start out, I then assume that where the House of Representatives has power to expel for an offense against its rules, or a violation of any law of the land, it has the same power to exclude a person from its body."

Without giving any attention to the legal distinctions involved, or even referring to the constitutional right of passing upon qualifications, or adverting to the fact that exclusion is the act of a majority and expulsion of two-thirds, he begs the whole question and assumes their identity. He quotes a statute which makes a disqualification to hold office absolutely dependent upon a conviction, and then assumes it disqualified Whittemore, although there had been no conviction. He admits there was no congressional precedent for the action which he proposed. He cites the Wilkes case in the English parliament as a precedent, when, as he states it, that case was directly in point against him. Wilkes, he says, was elected four successive times to the same parliament, three times without opposition and the fourth time against an opposing candidate. Three times he was expelled. The fourth time his opponent was seated. Neither time, according to his statement, was Wilkes excluded.

Just how that case can be an authority for excluding as against expelling Whittemore we cannot see. These considerations (and many more could be suggested), in view of the fact that the House, under Mr. Logan's lead, absolutely refused to allow any committee to examine, for the information of the House, the legal questions involved or to have the cases referred to any committee—though such a course was desired by such as Poland of Vermont, Farnsworth of Illinois, and Schenck and Garfield of Ohio—and would not allow Schenck and Garfield to be heard on the law for even ten minutes each, deprive this case, in my opinion, of all weight as a precedent.

(To be Continued.)

THEY ORGANIZE CONGRESS.

Students Form House of Representatives at University.

Within the walls of the University a new institution has been set on foot by the college men, which will, perhaps, be as potent in teaching them how to practically cope with the world, and instill into them as sound a learning of government as any other feature of their college work. Yesterday was completed the movement of organizing a house of representatives after the exact fashion of the lower house of the national Congress, to sit identically as that body, and delibate upon questions of great moment, as are before its great prototype.

Yesterday afternoon at 4:30 a large body of students met in room 15, and immediately after quieting down, Ernest Bramwell, the floor leader of the Republican side, told the distinguished body what it had been called togethr for and that partisanship should be relegated to the rear, and true patriotism control their every act. In a nicely worded eulogy he nominated for speaker Seth F. Rigby, '99, a Republican. N. T. Porter, the floor leader on the Democratic side, arose and stated that the majority, which was Democratic, would waive its political right and support Mr. Rigby as speaker. When this graceful act was done, a vote was taken and Mr. Rigby was unanimously elected and escorted to the chair. He thanked the members very heartily for the honor they had bestowed upon him. The house then proceeded to elect a reading clerk, recording clerk, and a sergeant-at-arms. The following were elected in the order named: Frank Barnes, C. M. Morris and C. F. Gatehouse.

Thomas Glenn then secured the floor and offered a set of resolutions extending sympathy to the Boers in their controversy with England. These resolutions will come up at the next session. N. T. Porter then announced to the house that at the next session he would introduce a bill to amend the Constitution of the United States in respect to the election of United States senators.

The boys have divided according to their personal political views, and the Democrats are in a majority, but there are a sufficient number of the independent party to hold the balance of power. Chester Ames is the leader of that party.

This movement has been inaugurated by the students as a sort of preparation for future intercollegiate contests, as well as personal benefit.