THE CANNON AND MUSSER CASES.

THE ARGUMENTS BEFORE THE SUPREME COURT.

The appeal on the motions for new trials in the cases of President A. M. Cannon and Elder A. M. Musser, came up for hearing before the Territorial Supreme Court this morning, Chief Justice Zane presiding, Associate Justices Powers and Boreman present. The defendants were also in court.

District Attorney Dickson objected to the hearing of the Musser case, because one or two points had been raised therein that were not involved in the Cannon case, and he was unprepared to proceed with the argument until next week.

Mr. Brown said that the particular point referred to was Mr. Varian's argument, and due notice had been given to the District Attorney. The defense had done everything in reason to have all prepared in time, and objected to the continuance as a great injustice.

The District Attorney insisted on having five days' notice; he was also very anxious to have Mr. Varian present at the time of hearing.

Mr. Brown then said he must insist on having the case set for Saturday, but Mr. Dickson stated that he could not be present on that day, and assented to a suggestion of Judge Kirkpatrick, that until Thursday, the 17th inst., be allowed the prosecution to file a brief in reply, if they so desired.

Judge Sutherland asked that there be no restriction as to the time of argument, and that he be allowed the whole of the morning session.

Mr. Dickson said that in that case he would desire to use this afternoon, as his family were going east in the morning, and he desired to accompany them to Ogden. This arrangement was accordingly made, and Judge Sutherland delivered his argument as follows:

I.

The indictment is bad for the reason that it does not state a case including all the elements of the offense defined in the third section of the Edmunds act.

We invoke the rule, which is settled beyond all controversy, that an indictment must allege all the facts necessary to fill every particular of the statutory or common law definition of the offense sought to be charged.

1 Am. Cr. L., Secs. 285, 288.
1 Bish. on Cr. Pr., Secs. 326, 508, 517, 521.
Bish. on St. Cr., Sec. 612, and note.
1 Arch. Cr. Pl. and Pr., 86 note.
State vs. McKenzie, 42 Me., 292.
Koster vs. People, 8 Mich., 431.
Enders vs. People, 20 id, 233.
Palmer vs. People, 43 id, 417.
Wood vs. People, 53 N. Y., 511.
People vs. Allen, 5 Denio, 79.
Brown vs. Commonwealth, 8 Mass., 65.

The rule is elementary, and it would be a waste of time to collect the cases which affirm it.

The section of the statute on which the indictment is founded provides, "That if any *male person* in a Territory, * * * hereafter cohabits with more than one woman, he shall be deemed guilty of a misdemeanor." The indictment states that the "Grand Jurors * * * find and present that *Angus M. Cannon* * * * on the first day of June, A. D. 1882, and on divers other days, and continuously between the said first day of June, A. D. 1882, and the first day of February, A. D. 1885, at the county of Salt Lake and Territory of Utah, did unlawfully cohabit with more than one woman, to wit: one Amanda Cannon, and Clara C. Mason, sometimes known as Clara C. Cannon, against the form of the statute of the said United States in such case made and provided. * * *"

Under the head first stated, we rely on two defects of the indictment.

1. It fails to allege or show that the defendant is a "*male person.*"

The rule of pleading just adverted to requires that the indictment should allege that the defendant is "a male person," for in no other way could the statutory offense be fully stated.

Where the offense consists of an act done by a person of a particular description, the indictment must allege that the defendant is a person of that description.

People vs. Allen, 5 Denio, 79.
Ex parte Hedley, 31 Cal., 108.
Commonwealth vs. Libby, 11 Met., 64.
King vs. John, 3 M. and S., 548.

2. The indictment does not allege that the defendant put forth any pretense of marital relation to the women therein mentioned.

The third section denounces all cohabitation of a male person with more than one woman. To confine it to a cohabitation with them, under a claim of marriage, the court must interpolate words which the lawmaker has not inserted. This court has held that it is not competent so to interpret and change a statute.

Logan City vs. Buck, 3 Utah, 301, 306.
Leoni vs. Taylor, 20 Mich., 155.
Tynan vs. Walker, 35 Cal., 639, 643.

But the prosecution advocates this restrictive construction, and the charge of the court to the jury apparently adopted the same view, for otherwise holding out these women as wives would have been immaterial.

While we controvert the construction contended for by the prosecution, and insist that the section applies to all males who cohabit with a plurality of women, we contend that the indictment is not framed on that reading of the statute, which the court below seemed to adopt. It is fatally defective if that construction is the correct one. It does not state a case within section three if it refers only to matrimonial cohabitation.

It must contain allegations of fact filling every particular, in the description of the offense as defined by construction of the statute.

Bates vs. State, 31 Ind., 72.
Schmidt vs. State, 78 id., 41.
Commonwealth vs. Slack, 19 Pick., 304.
Commonwealth vs. Bean, 11 Cush., 414.
Commonwealth vs. Stout, 7 B. Mon., 249.
The Mary Ann, 8 Wheat., 389.

This indictment should have alleged that the defendant cohabited with the women *as wives*.

II.

The court below erred in the rejection of evidence offered by the defendant as well as in instructions to the jury.

The indictment is founded on the 3rd section of the Edmunds Act. Under it cohabitation by a *male person* with more than one woman is an offense.

The words of the statute are very general and require construction. This is evident from the first reading. According to the letter of the statute, it being in the *present tense*, it is *ex post facto;* it thus purports to apply only to a cohabiting at the time the act passed, and was not even, for that reason, in its nature a legislative act. On elementary principles, to be such, it must not interfere with *past* or the *present*, but look wholly to the future.

Merrill vs. Sherborn 1 N. H. 204.

Secondly, it applies to all males without regard to age. Unless the word cohabit is properly interpreted a boy below the age of puberty, but old enough to be capable of criminal intents, might be held within the statute if he lived with his mother and sister.

Thirdly, if the act can have a future operation then the word "cohabit" is made to mean *shall cohabit*; then association in successive periods in lawful matrimony with two women would be within the letter of the statute. Fourthly, if the court applies the latitudinary popular definition to cohabit, nearly every male in the country has been guilty every day since the act was passed.

It is a rule of construction that where the words of a statute are general it is the duty of the court to so interpret and apply them that the statute shall not lead to unjust or absurd consequences. U. S. vs. Kirby 1 Wall 486-7 Alvord vs. Lent 23 Mich 271-2. There can be no doubt that the law was intended to be solely *prospective*. It is equally clear that it applies only to males old enough to come within moral and legal regulations in respect to intercourse with the other sex. It is no less manifest that Congress had no intention to restrict the privilege of a man who has lost his wife to marry and cohabit again.

The word cohabit also needs construction—a restrictive construction. Webster and other lexicographers substantially agree in two definitions: "1 to dwell with, to inhabit or reside in company, or in the same place or country. 2 To dwell or live together as husband and wife." If the Court were to adopt the first as evincing the intention of Congress it would lead to the most absurd consequences. That definition must be wholly rejected as having no application to the word as used in this statute. It implies no intimacy—no relation requiring legal regulation—certainly no restriction on account of difference of sex.

The other definition implies intimacy—sexual intimacy—and a degree of it illustrated by the dwelling together of husband and wife. This statute is intended to prevent the living together of an adult male person with more than one woman in the same intimacy as is usual between husband and wife. The statute means an habitual living intimacy requiring marriage to justify it. In other words, it forbids a man and two women to live together as to amount to cohabitation because both women can not be his lawful wives.

This statute not only aims to vindicate the institution of monogamic marriage by prescribing a penalty for polygamy, but it enforces a correspondent practice; it will not allow a man to live like a husband with more than one woman. Not only shall a man not marry more than one, but he shall not take to himself practically more than one woman to live with him without marriage.

No intimacy of the sexes is offensive to the public, nor criminal under this statute, unless it includes in fact or by necessary presumption ultra-matrimonial copulation.

All cohabitation which the law deals with is a sexual cohabitation. The law regulates and draws inference from it because it imports a living together in the habitual practice of sexual intercourse. It has been the subject of judicial consideration for several purposes. They deserve a moments notice—First, as evidence of marriage or its consummation—To be evidence of marriage, the cohabitation establishes the marriage habit, and needs mutual recognition of a marital relation to give the repute of marriage.

Yardley Est., 75 Pa. St.
Badger vs. Badger, 88 N. Y., 551-2.
Tyler vs. Sweet, 22 Am. Dec., 159.
Stevenson Heirs vs. McReary, 51 id., 113.
Haynes vs. McDermott, 91 N. Y., 459.
Brinkley vs. Brinkley, 50 id., 198.
Whart. Ev., § 1297.

That copulation is part of marital cohabitation is shown by the common law requiring it for cosummation of marriage.

4 W. Coast Rep., 50.

Statutes make marriage complete by a ceremony, but at common law it was a contract per verbe in presenti *cum copula*. The contract itself produced what was sometimes called marriage *de facto*, to distinguish it from a complete and perfect marriage. As a contract *de presenti*, it was executory. Until copulation no earnest was paid; there was no part performance, and one essential was lacking, so that if one of the parties had sexual intercourse with a third person, it was not adultery.

6 Bac. Abr., 454.

In proceedings in the Ecclesiastical courts in England, either to annul a marriage or for the enforcement of conjugal rights, the right of husband and wife to have sexual intercourse is fully acknowledged.

Dr. Lushington in D——e vs. A——g, 1 Robt. R. 298, says: "I apprehend that we are all agreed that, in order to constitute the marriage bond between young persons, there must be power, present and to come, of sexual intercourse. Without that power, neither of the two principal ends of matrimony can be attained, namely, a lawful indulgence of the passions to prevent licentiousness, and the procreation of children."

He annulled the marriage in that case, because the female, on account of an incurable malformation of the vagina, was incapable of complete coition.

Impotence was recognized as ground for annulling the marriage though solemnized in church. If the parties live together three years, and there is no sexual intercourse by reason of the impotence of the male, the court would declare the marriage null and void.

Sparrow vs. Harrison, 3 Curt, 16, 7 Eng. E. R. 359.
Pollard vs. Wybourn, 3 id, 308.

A right to copulate is recognized, though there is no legal process for compelling specific performance.

In Orme vs. Orme (2 Addams, 382, 2 Eng. E. R. 354,) the wife who lived with her husband but was not admitted to his bed sued for relief from this exclusion. Sir Christopher Robinson said: "I think the objection taken to this libel is well founded—it sets up a case either altogether *without* the jurisdiction of the Court, or one, at least, very far transgressing those bounds of interference to which it has restricted itself in modern practice."

"Matrimonial intercourse may be broken off on considerations (of health for instance, and there may be others) with which it is quite incompetent to this Court to interfere."

Cohabitation between husband and wife is a condonation of matrimonial wrongs.

Johnson vs. Johnson, 4 Paige.

Forgiveness by a wife for matrimonial wrong cannot be inferred from the parties living together, nor even from their occupying the same bed, if copulation is in fact disproved.

II.

Cohabitation is so inclusive of sexual relations that it suffices to prove adultery when the other necessary conditions exist, or continuous lewdness in the absence of marriage.

In all modes of the cohabitation under discussion sexual intercotrse is in whole or in part the motive; in matrimony lawful, out of it, unlawful.

It is a form and habit of association under which such intercourse is habitual, according to the pleasure of the parties.

It is true that cohabitation may continue after this motive has lost its force or wholly ceased, especially between husband and wife. It does not commence, however, where that motive is absent; it does not continue between parties who have joined themselves without marriage, or by a mere lascivious tie, after the sexual desire between them has died out. It always has its inception in whole or in part for this purpose, and its continuance is always proof of the practice. In short, cohabitation is evidence of habitual sexual intimacy.

If there is no copulation for any period during cohabitation, it is exceptional, and therefore does not militate against the rule; consequently cohabitation is only tolerated where such intimacy is lawful. It is never proper to formulate a general rule on what is merely exceptional. Cohabitation should be accepted for what it generally or universally implies.

Any habitual association of persons of opposite sex which does not approach in habit to such familiarity as to be proof of sexual intercourse is not cohabitation. They may excite suspicion by their mutual conduct, and it may be shown that by stealth they have made opportunities for lascivious intercourse, and still there be no cohabitation.

Cohabitation, which requires marriage to commend and justify it, is peculiar. It is plainly distinguishable where the parties and the particulars of their mode of living as far as they ever come under general observation are seen and understood. It is *sui generis*, and not likely to be confounded with any other living together.

No explanation of the relation is so expressive and complete as the one we have insisted upon, *a dwelling together by male and female adult persons in the intimacy of husband and wife.*

The defendant, therefore, should not have been convicted if he did not live in such intimacy with both of the women mentioned in the indictment. This is the legal rule or instruction which the court should have given the jury, and it was matter of fact for them to determine whether the defendant was an adult male person, and so lived or dwelt with those women as that rule requires to constitute cohabitation.

To enable the jury to decide the question in issue, it was the primary duty of the prosecution and the absolute right of the defendant, to have disclosed to the jury in the evidence all the facts tending to show and illustrate his, daily and nightly habit of living and conduct with and towards the women with whom he is charged with cohabiting.

A verdict of guilty affirms, precisely, that the defendant is an adult male person, and that during the period mentioned in the indictment he cohabited with those women. The verdict affirms the law and the fact; the law as the Court has defined it, and the fact as they find it from the evidence which the Court permits them to hear. If the Court has erred in defining the law, the jury have been led wrong to affirm the law involved in the affirmative of the issue. If the Court has erred in the rejection of evidence, the jury have affirmed the fact involved in the issue, without having that full information which it was the duty of the prosecution to offer, the duty of the Court to submit to the jury, and the defendant's right to have them consider.

The error of the Court on the trial consisted in the rejection of evidence necessary to such full information to the jury and in the instructions given them for the law of the case. The latter must be here considered with reference to what the learned judge said and what he refused, on request, to say.

1. It was neither alleged in the indictment, nor made the subject of inquiry on the trial, nor submitted to the jury to find, that the defendant was a male person.

The Court expressly refused to instruct the jury, that the ingredients of the offense included, among other things, that the person charged be a male person.

Trans. p. 21, 9th request.

2. The court refused to allow by proof full information to the jury.

Matter was offered pertinent in itself to the issue, and on cross-examination of Clara C. Cannon. It was very material, for it tended to show what were the defendant's practical relations to the women named, and during the period of time mentioned in the indictment.

It tended to show, first: an intention not to violate this statute. Second, that the defendant did not live with those women in the intimacy of husband and wife; that he did not occupy nor visit their private rooms, nor have sexual intercourse with them.

Admit, if you please, that these facts are not absolutely decisive; they are pertinent to the inquiry whether there was cohabitation under a rule that cohabitation is the dwelling together in the intimacy usual between husband and wife, conceded to include in fact or by necessary presumption, the opportunity and fact of sexual intercourse. It cannot plausibly be questioned that it was proper to show that in the sleeping apartments of each of the women were children, and some of them of adult age, who habitually lodged there with the women named, precluding any opportunity of private intercourse between them and the defendant. That he did not visit their apartments, nor occupy or frequent any other with them for such intercourse; that in fact he had no such intercourse.

In short we insist that on those facts it would appear there was neither the form nor the substance of cohabitation. The facts rejected would show his innocence, or at least, and that is enough for our purpose—tended to show it.

The matter offered to be proved showed an actual separation from these women, except in particulars of living and conduct, which are wholly innocent, and would be in line with correct deportment of host or guest in a house with ladies.

If an intimacy like that between husband and wife is inquired for, and is the gist of the inquiry, would not such facts naturally influence the judgment, would they not have some weight and be entitled to some weight? Those facts would enlighten the understanding as to the very elements of cohabitation. The first inquiry that would occur to the impartial investigator would be how they daily and nightly conducted towards each other. Did they sleep together? Did they privately occupy any room habitually? Did they have sexual intimacy? If told in answer to such questions that he never sought or had access to the private rooms of the females; that he neither had opportunity, nor sought to make any, for sexual interconrse; that he had no such intercourse, and that in all his actual and apparent conduct towards them nothing was done which would not be consistent with the strictest propriety and the utmost personal indifference, would not such information help him to decide whether he was living like a husband with them?

This information was all withheld—and withheld on the express ground that it was *irrelevant, immaterial and incompetent.*

If the jury had been instructed that they could not convict unless they found from the evidence that the defendant cohabited with these women as a husband cohabits with his wife, the absence of such details would incline a fair jury to acquit. Therefore I call attention to the instructions.

3. The Court erred in not giving the proper instructions.

The Court did not define the word cohabit at all. The jury were not informed that the legal substance of the charge was that the defendant had lived with these women in the intimacy usual between husband and wife, and that it devolved on the jury to find on the evidence, whether that charge was true. Moreover, the court refused to instruct the jury that the indictment was founded on the third section of the Edmunds act. Trans. p 20, 1 Request. The court refused to charge that that section was applicable to Utah, or provided that if any male person here since March 22d, 1882, has cohabited with more than one woman he shall be deemed guilty of a misdemeanor.—3d, Request 2.

The court refused to instruct the jury according to the 4th, 5th, 6th, 7th, 8th and 9th requests, all of which contain a correct exposition of "cohabit" and the statute.

These instructions were refused, and no other equivalent instructions were given. This is error. Brief p 12.

The learned judge states correctly the charge contained in the indictment, but the jury's attention was ot once diverted from that charge without any explanation of it by a positive direction to convict on three things being found to be true on the evidence. Trans. p 19.

There is no reference to the statute, no explanation of the elements of the offense, no analysis of the testimony to point out to the jury what portion of the evidence was addressed to each part of the charge. 1 Bish. in Cr. Pr. §3976.

The Court not only omitted and refused to instruct that to cohabit was to live with the women on the terms that a husband lives with his wife, but expressly informed them that the principal parts of what is conceded to be in this law, cohabitation, were unnecessary. The jury were directed to convict if they found from the evidence that "he lived in the same house and ate at their respective tables one-third of his time or thereabouts, and that he held them out to the world by his language or his conduct, or by both, as his wives."

Let me discuss the constituents of the offense as thus stated:

First, The Court refers to the defendant as a male by using the masculine pronoun. The requisite age and sex were assumed. Neither is apparent to this court except as disclosed by the record.

The evidence incidentally shows both the age and sex, but the subject was not submitted to the jury. The learned Judge decided the age and sex himself.

Second, As to his living in the same house: If there is any difference between one house and another as to the applicability of that branch of the charge, it was ignored in what was said to the jury. The Court must have regarded any such differences as immaterial in the deliberation of the jury—The dimensions of the house are not stated—but the relative positions of rooms were explained by the testimony. The Court determined the importance of that discription. The learned judge must have regarded the evidence as addressed to the bench and not to the jury box—This was a double house. Each of these women were mothers. One had four children, the other nine—They had separate suits of apartments and maintained independent and distinct households—There were doors for interior communication between these sets of apartments. If the Court meant to say, should the jury find that the defendant lived in this house where these mothers also lived, then all matters of actual difference between that house and any other were disposed of in the judges mind; and the effect of living in the same house was the affect of living in such a house as he, judging of the facts, found this house to be. To that extent be trenched on the functions of the jury—but the language was general. How would it be if the same roof covered a row of a dozen or more houses divided by solid interior walls. The defendant occupying one at one end of the row, and the women two at the other end, would they be living in the same house? Yes, unless the law makes a difference on account of the disparity of distance across a "hall" and through a few intervening sets of connected houses.

But mark the loose cohabitation indicated by living in the same house. But we are willing to suppose the parties lived in the same family. That was a co-residence after the first definition of cohabitation. It is no more than living in company. If no other fact is insisted upon to bring the parties into nearer relation, it is not necessary to cohabitation under that definition that they should get so near each other as to live in the same house—it would be enough that they live in the same city, or in the same country.

Living in the same house is not a criminating fact. Those who cohabit in the sense of this statute, may be expected to live in the same house, but all who live in the same house do not cohabit. Other facts make all the difference between those who, living in the same house, cohabit, and those who do not cohabit though residing in the same domicile. Living in the same house has no significance whatever to show cohabitation; the proof must go further; it must appear that the defendant not only lived in the same house, but lived with the women in the inti-