## ARGUMENT OF MR. KIRKPATRICK.

DELIVERED BEFORE THE SUPREME COURT OF UTAH TERRITORY IN THE CASES OF A. M. CANNON AND A. M. MUSSER.

Mr. Kirkpatrick, in closing the argument in behalf of the defendants, spoke as follows:

May it please the Court.

In weigning a question of this kind—a question of statutory construction—a good deal depends on our point of view. It was Mr. Seward, I believe, who, in the ante-bellum times, first blew the trumpet of the civil war by proclaiming an irrepressible conflict between slavery and free labor—two opposing and irreconcilable forces, and he declared that the continent must speedily become all free or all slave. In the great conflict which ensued, involving, as it did the existence of the government, many things were said and done, judicially and legislatively, under the plea and pressure of national necessity, which, when the paroxysm of passion was over were seen to be violations of the chartered rights of men, and had to be reversed, repealed or revoked.

My friend, Mr. Dickson, in like manner, raises the cry of danger to our institutions—it is the key note to the fine argument he delivered; and he desires this statute to be considered and construed by the court under the sense and pressure of national exigency and peril. In imitation, I suppose, of the memorable declaration of Mr. Seward, he proclaims an irrepressible conflict between monogamy and polygamy—two opposing and irreconcilable forces—and he declares in effect that the country must soon become all monogamous or all polygamous. He tells us that monogamy is menaced and imperiled by this formidable system of polygamy, which if not at once suppressed will become dominant on this continent. And we are summoned by the trumpet blast of my friend to rally for the suppression of this new rebellion against the marriage institution of the land.

It strikes me that this is a pretty large concession for a monogamist to make. I for one am not prepared to concede so much, nor do I think that your honors in the positions you occupy, looking out upon the facts around you with the cool eye of reason, can be much impressed by this clamorous appeal of the prosecution. You will doubtless say to yourselves, can it be possible that monogamy is imperiled by polygamy? Monogamy, the marriage system of the fifty millions of people who inhabit this continent—not only theirs, but that of their ancestors for countless generations—a system born and bred in their very blood and bones, which they could no more give up than they could cease to breathe; not only their system, but that of the four hundred millions who people Europe, the most cultured and progressive of the earth—the marriage system of civilization—the corner stone on which all its grand and enduring institutions are founded—in danger of subversion by polygamy—a system advocated and practiced here by a comparatively small sect of religious devotees—a system apparently so cumbersome, expensive, impracticable, so burdened with impediments of every kind—so totally unsuited to the genius, the traditions, the character, the circumstances, the situation of the people who inhabit this continent, and even of those who compose the membership of this religious denomination, that although it has been preached and proclaimed for forty years by their prophets, seers and leaders as the revealed will of God, only two per cent. of its male membership could be induced or persuaded to go into it! Why, it must occur to your honors that by nothing short of the direct interposition of divine providence could such a system be made—I will not say dominant on this continent, but permanently established on even the most limited area of this republic. You might as well plant the orange or the fig tree on the frosty summits of the Wasatch!

And to do them justice, these people who call themselves Latter-day Saints rely upon that very thing for supremacy. They see the difficulties of their position as well as we do—the obstructions arising mountain high before them. But they look at this subject from a different standpoint—they view it with the eye of faith, for whatever may be thought of them, none can deny that they are an earnest, devout and deeply religious people, and they say this is the will of God and He will make it good. Well, if that is so, I suppose we would be willing, and in point of fact would have to submit; but we all know, or we think we know, how small are the chances for such a miraculous intervention.

If we are to credit the social philosophers, the best and most intelligent observers of our time, the danger to monogamy lies in just the opposite direction. It is not polygamy, not the *extension* of the marriage tie, but its prevailing disregard and threatened dissolution that is the rock ahead. It is materialism, they tell us, scepticism, the eclipse of faith, the rising flood of sensuality and luxury threatening to extinguish all our high ideals of self-sacrifice and fidelity and duty—from such elements is compounded the storm cloud which darkens the sky of the future. We, who, with our pernicious theories, have degraded marriage from the sacrament it once was to the low plain of a mere civil contract, possessing no more solemnity or binding obligation than a promissory note for a hundred dollars—shall we be heard to say that monogamy is imperiled by polygamy? Monogamy can never be endangered by polygamy; but if our civilization is to endure, marriage must be, and it will be, purified, redeemed and restored to its original sanctity.

Therefore I assert that the idea of an irrepressible conflict between monogamy and polygamy is purely a creation of the fertile imagination of my friend Dickson—one of the most remarkable instances on record of the creation of a mountain out of a molehill. You can give it no credence whatever.

And now, if your honor please, having gotten our point of view, and taken the true bearings of the question before us, with minds freed from all illusions—freed from the idea that the law is to be bent, interpolated, twisted or distorted from its true intention, and its plain letter to answer the purpose of some assumed necessity, or public policy, or to avert imminent peril to our institutions, let us take up this statute by its four corners and read and construe it according to the obvious sense and meaning of its language—as we would any other statute bearupon an ordinary question of right between man and man.

The third section of this act—known as the Edmunds law, provides: "That if any male person, in a Territory or other place over which the United States have exclusive jurisdiction, hereafter cohabits with more than one woman he shall be deemed guilty of a misdemeanor," and punished as therein provided.

I wish to point out as briefly as I can, and without wearying the Court by unnecessary repetitions of arguments and authorities already used by the gentlemen who have preceded me, why I consider the construction of this section contended for by the prosecution and endorsed by the Court below, to be illogical, inconsistent with itself and a plain violation—I say it respectfully—of the intent and meaning of the statute.

The law is of general application, but now I take the case of a man who has been living in polygamous relations for years before the passage of this statute, so long that no law can touch him in that regard—relations known to the community, and who has families of children by his polygamous wives. It is the case of defendants. Now the law presumes innocence, and that every man obeys the law, and therefore that all persons who were cohabiting when the Edmunds Act took effect, contrary to the provision of that act, then ceased to do so; neither can evidence or inference of guilt be drawn from such previous polygamous relations. This was expressly ruled by Mr. Justice Boreman, in the southern district in the late case of Fotheringham.

Congress at the passage of this law was of course aware of the existence of polygamous marriages here, and of the great calamity and mischief of illegitimacy resulting from them—a class growing up in the community without a legal status; and one of the principal objects of the statute was to alleviate that evil as regards the past, and suppress it as regards the future. Hence the two provisions, one looking to the past, the other to the future. First, by the seventh section, all issue of polygamous marriages known as "Mormon" marriages born before the 1st day of January, 1883, are legitimated; and, secondly, that the recurrence of this evil might be prevented in the future, that there might be no more such offspring, the third section makes cohabitation thereafter a crime, and prescribes the penalty—obviously intending by cohabitation, sexual interconrse, for only by sexual intercourse could such offspring be produced.

Now, what relation it any could the polygamous husband and father have to the polygamous family after the passage of this law?

It will not be denied that he may hold social intercourse and communion with his children and and with the mothers of his children. It is his duty to support them. It is his duty to provide for their comfort, education, and moral and intellectual training. He may visit the family daily, hourly. Surely he may break bread with them. It is his duty to assume his full share of the burden of caring for the family and rearing the children. He must visit them in sickness, and remain to care for the sick, and to confer the consolation of his presence and counsel in affliction and suffering and sorrow. All this and more he may do, nay it is his imperative duty to do it. There is no law, human or divine, that would absolve him from the performance of these duties. For remember these are his children—his legitimate children—and this is the mother of his children; and this father and this mother must discharge their duties together, and rejoice or weep together, drawn by that deep and reciprocal sympathy and affection for their offspring which nature herself has planted in the human heart. All this has been in substance ruled by such of your honors as have had occasion to consider this subject.

And now I ask your honors carefully to note that the duties I have indicated are of quite indefinite extent. In point of time their discharge cannot be definitely limited. The presence of the father in the family for these purposes cannot be limited to just so many minutes or just so many hours, or just so many days. So long as the necessity, or the propriety or the fitness exists the presence may continue, and manifestly, as in cases of sickness or affliction, it may embrace the night as well as the day. In the nature of things you cannot predicate a definite rule in this regard upon a ground so shifting and indefinite; you cannot limit in time the performance of this vast mass of duties, the duty of the father in the family—so varied, so delicate, and extending into such infinite detail.

And you cannot therefore say *as matter of law*, that remaining at the house where the mother and the children live, the place where these duties are to be performed, whether for recurrent periods or more continuously, affords more than a *prima facie* presumption of cohabitation, if it affords so much, for having the right to be there for many lawful purposes—in the discharge of many lawful and imperative duties—he has at least the right to rebut your inference of guilt by showing, if he can, that in point of fact he was there for such lawful and commendable purposes. His remaining at the house, being matter of evidence, is on common principles of law open to explanation. Surely this cannot be controverted. And yet this right was denied to us.

But the remaining or dwelling at the house, we are told, is not permissible, because he then holds out the woman as his wife.

Now if the term "holding out" is not to have some new and arbitrary meaning imposed upon it, it must consist not of negative and equivocal, but of positive affirmative, unequivocal acts—such as introducing her as his wife. or asserting publicly that she is his wife. But there is not a particle of evidence in this record that the defendant during the time mentioned in the indictment or since the passage of the Edmunds act ever introduced or proclaimed either of these women as his wife. He is not required to go into the courts and obtain a decree of divorce. This was also ruled in the Fotheringham case by His Honor Judge Boreman, and with manifest correctness; for in the first place it cannot be necessary, if it were possible, to dissolve a void marriage by a decree of divorce; and in the second place the statute does not require it, and you cannot punish a man for failing to do that which no law commands him to do. Nor is he required to place on the public records a declaration abjuring the woman whom he had once acknowledged to be his wife; nor is he required to go about in the community or upon the highways proclaiming that "this woman whom I once acknowledged as my wife is no longer such, I reject her, I acknowledge her no longer." He is not required to put upon the mother of his children—his legitimate children, this degrading insult. He is not required to change her name, nor the names of his children—nor could he do so without their consent.

See then his predicament; not required to divorce her, nor to disown her by any public declaration, and you will not absolve him from his duties, as the father and supporter of that family; he must educate and train, minister in sickness and affliction, and for all these purposes he may visit and remain at the home where the mother and the children reside as often and as long as the discharge of these duties may require. And if he may do all this, how vain and futile it is to say to him, We punish you because you hold this woman out as your wife. There is no evidence, mark you, that he has introduced or proclaimed her as his wife, or performed any further act of recognition than those allowable and commendable acts which it is agreed on all hands he may perform—except only that he has remained and slept at the house, either for recurrent periods of time or more continuously. But is that a holding out? This matter of sleeping is not a public act. It is personal, exclusive and private. It does not introduce anybody, it proclaims nothing, it holds nobody out. For this purpose it is far less affirmative and positive than many of those other acts and duties which are allowable and commendable. And, besides, it is easily seen that the circumstances or exigencies of the family may render it necessary or proper that for periods of time he should remain and sleep at the house. In the long gradation of duties which he may lawfully perform, is there any reason why the line should be drawn at this point rather than at some other point? Why not draw it at the duty of supporting the mother, the duty of visiting and caring for her children, the duty of consulting and advising with her, the duty of aiding and comforting her in sickness and affliction; all of which are marital duties which he performed while he acknowledged her as his wife, and as acts of "holding out" are more conspicuous than this which you interdict.

The truth is, that having once allowed the performance of all those marital and parental duties, you cannot consistently interpose short of the point of sexual intercourse. There and there only can the line be drawn. And thus by a logical necessity, from which there is no escape, we are brought back to sexual intercourse as the essential ingredient in the meaning of the word cohabitation as used in this act of Congress. Much less can you say that the remaining or sleeping at the house is *conclusive* evidence of guilt; for the conclusion, if any can be drawn from therefrom, has merely a *prima facie* force—presumptive and inferential, and in the nature of things it must, in every case, be open to rebuttal. And here lies the whole question on this appeal. We were denied the right to rebut by countervailing proof the inference of cohabitation or sexual intercourse.

It has been suggested that this unreasonable and illogical conclusion, for so I must regard it, is necessary—that it would be impossible to enforce the act under any other construction—that if sexual intercourse is made essential, being a secret act, it would be impossible to prove it.

[Here Mr. Dickson disclaimed having made any such suggestion.]

Mr. Kirkpatrick, continuing, said he was glad to hear the disclaimer, for he considered it as amounting to an admission that the suggestion was unwarranted; nevertheless, he said, I have heard it, and unworthy as it is when considered as a reason for wresting the law from its true intention, yet, I ask does such necessity exist, or is it a mere figment of the imagination? Does not sexual intercourse result naturally in the birth of children, and is not the birth of a child an event which cannot be concealed? If no child is born the defendant is still entitled to the presumption of innocence, and the prosecution must produce further evidence. In prosecutions for adultery it is not considered a hardship that sexual intercourse must be proved; nor can guilt be inferred from the mere opportunity of committing it. But in this case we did not ask that the prosecution should prove sexual intercourse by positive proof. On the contrary we conceded a *prima facie* case against us from the facts shown.

We merely demanded the right to rebut the presumption by showing that in point of fact there had been no sexual intercourse.

The construction contended for by the prosecution makes sexual intercourse immaterial, and at the same time by the almost continuous presence in the family in the performance or allowable duties, affords unbounded opportunity for its occurrence. If sexual intercourse must be excluded from the definition of cohabitation, then the great evil and calamity of illegitimacy, the birth of illegitimate children—a class growing up in our midst without a legal status, that huge and ugly fact over which Congress threw the mantle of legitimacy, may go on unchecked, and the third section expends itself in the prohibition of mere outward forms and immaterial acts.

Absorbed in their theory of an irrepressible conflict, which has no existence save in their own imaginations, they insist that sexual intercourse, adultery, fornication, the birth of illegitimate children are immaterial matters, and, provided he do not "hold out the woman as his wife," he may, whether polygamist or not, indulge in the worst excesses and sink to the lowest depths of licentiousness without violating this act of Congress. If such be the law let it be so declared, but not, I beseech your honors, upon any doubtful construction, nor unless that intention be plainly expressed in the law itself.

In order to reach that construction we must interpolate into the third section the words "in the marriage relation" so as to make it read, "If any male person cohabits with more than one woman in the marriage relation," when the section, as it stands, contains no hint of any such limitation. You must hold that it applies to polygamists exclusively in the face and eyes of the express words of the law: "If any male person," not any male polygamist or bigamist, or male Mormon—but, "If any male *person*," the word "person" being a word of utter generality—"in any Territory or other place over which the United States have exclusive jurisdiction hereafter cohabits with more than one woman," not in Utah only, but wherever the legislative jurisdiction of Congress extends, in any Territory, in the District of Columbia, the dockyards and arsenals, the army and navy, the military camps and reservations—in places where no Mormon has ever dwelt—"if *any* male *person*" in any such locality hereafter cohabits with more than one woman such is the wide scope of this enactment.

Look at the eighth section: "That 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 place over which the United States has exclusive jurisdiction, shall be allowed to vote," etc. It is not the polygamist or bigamist merely who is here disfranchised—if so the ensuing words "or any person cohabiting with more than one woman" would be superfluous; but it does not stop there, it embraces also "any other person cohabiting"—and includes also any woman cohabiting with any of those persons, that is to say with any polygamist, bigamist, or any other person who cohabits with more than one woman—all such are disfranchised. Is it possible to misunderstand or evade the invincible clearness of this language? There is no room for construction, it is your sole duty to declare the law as it is written. I care not what may have been said in the debates of Congress as to the policy or intention of the law. Such utterances, whatever their source, can have no weight to control the plain import of the written words of the statute. The language being clear, the duty of the Court is plain. You have only to follow the broad highway of the statute itself and execute it according to its terms.

I fear, may it please the Court, we have not sufficiently comprehended the consequences of the construction contended for by the prosecution. I ask your Honors, in the name of these defendants, to lift this question up, place your decision on high ground, where it shall command the respect and reverence of all good men. Give this law that general application which its terms plainly require. Make it applicable to Mormons and non-Mormons alike—to the married and the unmarried—to all who dwell within the legislative jurisdiction of Congress, so that instead of becoming the dead letter which that construction would make it—expending itself upon outward forms and immaterial acts, it may become a great and potent factor in the regeneration of society fast sinking in sensuality and luxury—a bulwark against the only foe which monagamy has to dread—that deadly and insidious foe which sapped the mighty power of ancient Rome, and subdued those invincible legions which had carried her eagles to the furthest ends of the habitable globe. How easy to conform in outward show to your rule of "holding out"—leaving that frightful ulcer to gnaw untouched within, and missing this wide field of beneficence, the statute is frittered away, and the great purpose of its enactment defeated.

## CORRESPONDENCE.

### A "MORRMON" IN PENNSYLVANIA.

#### Anti-"Mormonism" in a Masonic Lodge.

PITTSBURG, Pa., June 17, 1885.

*Editor Deseret News*:

After the day's labor is o'er and while sitting to read the NEWS, my mind is often drawn out upon

SOME SERIOUS TOPICS,

seeing that clouds hang over affairs in Utah, which have caused me much thought and meditation. I cannot find in history where a crusade of just this same character has ever taken place in any part of the globe. We read of direful persecutions having taken place in different parts of the earth, but who ever read of Christian homes being broken up, happy homes where the sound of prayer and praise ascended on high, where the head of the family was a true Christian, one of Heaven's noblemen, who was training up his children in the paths of virtue and holiness and in those heaven born principles which have been revealed in the gospel from Heaven? In these last days such peaceful, happy homes are torn assunder, the patriarch thereof confined within a gloomy cell, and the sledge hammer of three hundred dollars brought to bear upon his case seems hard to bear; but prison cell will not harm a true Saint; he knows in whose cause he has to suffer, and come life or come death, he knows in whom he has put his trust. But there is one thing he will feel very keenly—that his family are suffering; it will hurt his feelings to know they have no bread and butter, and the $300 required of him to pay would help them along awhile; and while they are lacking the comforts of life the product of his labor, which justly belongs to his family, goes in another channel. Such a condition brought upon his family constitutes a severe punishment. And thus they are made to suffer who are innocent, and have done no wrong. Those noble sons of God in prison will be all right; it will place a bright star in their crown. They will learn by confinement in prison what they did not realize before. Their father will not forsake them there. The light of heaven will fill their souls, and those who visit them will see it on their faces.

God bless you, my brethren; 'tis my religion you are in jail for! May God bless and comfort your families while you are taken from them.

When I look at the pressure put upon good men I often wonder if Mr. Zane and Mr. Dickson would do themselves what they are requiring of others. I don't for a moment think they would. I think they would show more of a Christian spirit. I do sincerely think that sooner than do it they would themselves prefer going to the same place they are sending others to. The time may come when the scales may fall from their eyes, and they see things in a very different light to what they do now. For example, Saul, who was a persecutor of the Christian Church could not see, as some persecuting the Christian Church in Utah cannot see. Saul labored hard to bring trouble upon the Saints for their religious views. We do not read of him requesting men to cast a loving companion adrift, yet he hailed men and women to prison as they do in Utah, thinking he was doing God service, like they do in Utah. But there was one after him that he was not aware of, and stopped him in his mad crusade. The sequel explains itself.

So Almighty God, in His wise providence may show the present officials in Utah that it is His cause they are battling against and enable them to see their true position. They would know then (as I would to God they knew today that they were

AT WAR WITH HEAVEN)

They then, Saul-like, might labor to build up what to-day they are trying to overthrow. Saul contracted a heavy debt. So have they. Though Saul, afterwards Paul, was a shining light and labored hard for his Lord and Master, yet he had the compunctions of conscience, speaking of the thorn in the flesh, and also fearing that after preaching to others he himself should become a cast away.