EDITORIALS.

AN ABLE PAPER.

We surrender a considerable portion of our space to-day to an article on the subject of polygamy in Utah, which was prepared for publication several months ago, but was laid aside through press of other matter and did not receive the attention which it merited. We take pleasure in now presenting it for the consideration of the public, as it is carefully written and considers the subject in a different manner to the common style.

The article is from the pen of an English barrister, now a member of the New York bar, who is a Master of Arts of the University of Cambridge and the author of a work on "Marriage and Legitimacy," which is well known in the Old World and the New.

The writer shows unmistakably that the *practice* of polygamy is not and never was a *crime* at common law—a position taken long ago by the DESERET NEWS—and that there is no national common law in this country, nor any ecclesiastical law; also that the offspring of plural marriage are not necessarily illegitimate. And he further proves beyond dispute that until the law of Congress was passed in 1862, polygamy could not in any sense be considered a crime in the Territory of Utah, and was not even illegal in this Territory. There are several other points put forth and well established, all bearing on this important subject.

This *lucid legal argument* may not have any bearing at present in a judicial consideration of cases arising under the law of '62, but it is of importance as a logical disquisition, sustaining the "Mormon" position apart from its religious ground, and coming from a non-"Mormon" source, is the more valuable a weapon of defence, in the polemical warfare waged against a practice which has been common among the great majority of mankind from the remotest periods of human history. We commend it to our readers for their careful consideration:

POLYGAMY IN UTAH.

The decision of the United States Supreme Court declaring the Act of Congress, under which George Reynolds was convicted of bigamy, to be constitutional, suggests grave questions of a social character irrespective of the religious element imported into the case by the Latter-day Saints, relying upon the clause of the Constitution which enacts that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." (Amendments. 1st Article.)

It appears that the Statute under which Reynolds was indicted was passed in the year 1862, and enacted that "every person having a husband or wife living, who married another whether married or single, in a Territory or other place over which the United States have exclusive jurisdiction, is guilty of bigamy, and shall be punished by a fine of not more than $500, and by imprisonment for a term of not more than five years." (R. S. Sec. 5,352.)

George Reynolds was indicted for bigamy in the Third District Court of the Territory of Utah, and was convicted. The conviction was affirmed by the Supreme Court of that Territory and that decision was further affirmed by the Supreme Court of the United States, the defense throughout relying principally upon the clause in the Constitution quoted, the defendant himself being a member of the Church of "Latter-day Saints of Jesus Christ," a form of religion in which polygamy is not *only* permitted but enjoined under, as claimed, an alleged special revelation from Heaven.

Bigamy was never known as a *crime* to the common law of England. And according to the Canonists was not what is now understood by that offense; but it consisted in marrying two virgins successively, one after the death of the other, or once marrying a widow. 3 *Inst.* 88. Such were esteemed incapable of orders, etc; and by a canon of the council of Lyons (A.D. 1274, Pope Gregory X) were *omni privilegio clericali nudati et coercioni fori secularis dicti.* His canon was adopted and explained in England by 4 Edw. I, st. 3, c. 5, and bigamy thereupon became no counter plea to the claim of benefit of clergy. (M. 40 Edw. 3, 42; M. 11 Hen. 4, 11, 48; 13 Hen. 4, 6; Staundf, P. C. 134.) The cognizance of the plea of bigamy was declared by 18 Edw. 3, c. 2, to belong to the Court Christian like that of bastardy. But by 1 Edw. 6, c. 12, § 16, bigamy was declared to be no longer an impediment to the claim of clergy. See *Dal.* 21; *Dyer* 201.

Thus, it appears, that bigamy, in this restricted meaning at all events, was declared by 1 Edward 6th to be no longer an impediment to claim of benefit of clergy, which benefit was not limited to those in holy orders, but extended to all *clerks* or *learned* persons. Bigamy or polygamy, in the sense in which we now understand the term, had never been the subject of legislation, either ecclesiastical or civil until 1 Jac: I, c, 11 (A.D. 1604) when for the first time in the history of the world, and in the 17th century of the Christian era. it was made a *criminal* offence. Bigamy or polygamy, in the eye of the *criminal* law, is the act of formally entering into the marriage relation with a third person by one sustaining at the same time the relation with a second person. 2 Bish. Crim. Law, §891, &c. This sexual relationship had certainly never been cognizable as an offence by the temporal courts until constituted a *crime* by the statute of James. It was unknown as a crime to the *common law* of England, and the Canon law, even if it assumed any spiritual interference with such a relationship, of which there is no evidence, had never any force in England *proprio vigore.* The King's ecclesiastical law alone took effect in England, and no decree of any ecclesiastical council unless adopted by express statute or by the tacit consent of the nation—certainly no decree of a foreign provincial council, such as Lyons, or even Rome itself, had any force in the realm of England, unless so specially adopted. It might be otherwise with an œcumenical council, in which the King of England was represented. Mr. Burge says, in his work on "Colonial and Foreign Laws," that, according to the Canon law, "A marriage, although null and void, will have the effect of entitling the wife, if she be in *good faith*, to enforce the rights of property which would have been competent to her if the marriage had been valid, and of rendering the children legitimate." "Such," he adds, "was not recognized by the civil law, but sprung from the Canon law; it was unknown in England, Ireland and Holland, but was admitted into France, Spain and Germany," and has struggled, it would seem not altogether ineffectually, for a recognition in Scotland. (Page 152.) It is therefore with the Canon or ecclesiastical law of England that we alone have to deal and which, as part of the common law of England, was imported into the American colonies. The canon law, which, when "not repugnant, contrarient, or derogatory to the laws or statutes of the realm, nor to the prerogatives of the regal crown of the same," (35 Hen. 8, c. 16,) forms part of the law of the land, may be stated to be, as described in the preamble of 25 Hen. 8, c. 21, a code of "laws which the people have taken at their own free liberty, by their own consent, to be used among them, and not as the laws of any foreign prince, potentate or prelate;" and thus as Mr. Rogers says, "Much of the Canon law has been virtually adopted into our system, and has during many centuries been accommodated by our own lawyers to the local habits and customs of the country." Rogers' Eccles. Law, Gibson's Introduction to Cod. 27; 2 Atk. 673, and various other decisions.

Lord Hale in speaking on the same subject says: "All the strength that either the papal or imperial laws have obtained in that kingdom is only because they have been received and admitted, either by the consent of Parliament, and so are part of the statute laws; or else by immemorial usage and custom in some particular cases and courts, and not otherwise, and therefore, so far as such laws are received and allowed of here, so far they obtain and no further, and the authority and force they have here is not founded on or derived from themselves, for so they bind no more with us than our own laws bind in Rome or Italy. But their authority is founded merely on their being admitted and received by us, which alone gives them their authoritative essence and qualities their obligation." Hist. Com. Law, 27, and vide 2 Inst. 652, 658. And Lord Hardwicke (A. D. 1737) in *Middleton vs. Croft, Strange*, 1060, says, that such of the canons as have been used and accustomed, and thereby, as it were, incorporated into the common law, appear to have received a statutable recognition by the preamble of the 25th Hen. 8, c. 21, which according to his opinion, "is the foundation of the ecclesiastical power, and the principle upon which the canons are binding upon the laity, and upon which the common law courts notice them as the ecclesiastical law of the kingdom." *Com. Dig. Can. C; Godol. Ab.* 585; *Carth.* 485, *etc.* Also in Bell's case of a putative marriage, the Lord Justice Clerk, said: "I know no authority which the canon law or any other law has in this country, except in so far as it has actually been adopted." (Report by R. Bell, Esq., Edingburgh, A. D. 1811.)

As stated by Mr. Burge, in the quotation from his work on "Foreign and Colonial Laws" before referred to, there are certain marriages which although they are null in the eye of the law, are yet, on account of their having been contracted in good faith and in ignorance of the impediment which rendered them unlawful so far favored that the issue are legitimate, though they will not have the effect of legitimating children previously born. Pothier's *Traite du Mariage. par. 5, c. 2, sec. 2, tom. 5, p. 230. Arret du Parl de Bordeaux*, 14 *Feb.* 1617; *Merl, Rep. Univers, tit Lejit, sec, 2, § 2; Voet, lib. 25, tit 7. De Concub. n*, 8. A former able member of the Scotch Bench, Lord Ivory, speaking on this subject, says: "The issue may sometimes be legitimate, where the marriage has been void, nay, where in the result the marriage has been actually annulled." And reference was, in illustration, made to the case of issue by a putative marriage, where one or both of the parties were, at the time in *bona fide.* This case, it is true, did not reach a final judgment. (Bell's case before referred to.) But the solemnity with which the question was entertained, and the favorable allusions to the principle contained in some of our constitutional writers, give great countenance to the reception of such a consideration as an element in questions like the present. But whether or not in Scotland, there can be no doubt that the issues of such putative marriages are received as legitimate in various other countries.

Lord Coke, in speaking of these marriages *de facto*, voidable by reason of precontract, expressed himself thus: "So it is, if a marriage *de facto* be voidable by divorce in respect to consanguinity, affinity, *precontract*, or such like, whereby the marriage might have been dissolved and the parties freed *a vinculo matrimonii*; yet if the husband die before any divorce, for that it cannot now be avoided, this wife *de facto* shall be endowed, for this *legitimum matrimonium quoad dotem*; and so in a writ of dower, the bishop ought to certify that they were *legitimo matrimonio copulati* according to the words of the writ; and herewith agreeth 10 Edw. III. 35. But if they were divorced, *a vinculo matrimonii* in the life of the husband she loseth her dower." (Inst. 33 a.) Braeton. In the Queen v. Willis (10 Cl. & Fin. 841) Lord Lyndhurst (Lord Chancellor) said: "When therefore a contract *per verba de praesenti* between two parties was followed by a marriage solemnized in the face of the Church between one of the parties and *another person*, the latter marriage was not by *reason of the precontract absolutely void, but merely voidable;* and as a consequence of this, that if such marriage were not annulled by sentence of the Ecclesiastical Court in the lifetime of the parties, it could not be afterwards affected; the widow would have her dower, and the children be legitimate."

No criminality is even so much as suggested under such a state of circumstances. The subsequent bigamy statutes alone interfered with the recognition of such double marriages. We believe that in every State throughout the United States bigamy is forbidden by special statutes of the respective States, thereby favoring the view that at common law it is no offence. And ecclesiastically, at all events, no special canon is to be found on the subject. In some of the States the rights of a wife and the legitimacy of children are recognized under certain circumstances. In Missouri, for instance, though the marriage in the lifetime of a former husband or wife is void, a statute makes the children legitimate. *Lincuum. v. Lincuum.* 3 *Misso.* 441. Also in Texas. *Hatwell v. Jackson. 7 Tex.* 576. And in California. *Graham v. Bennett.* 2 *Cal.*, 503. In Louisiana, where a woman is married to a man having a former wife, with whom a marriage is still subsisting, if she were deceived by him, being ignorant of any impediment, she is entitled, while the deception lasts, to all the rights of a wife, and the children born during this period are legitimate. *Clendenning v. Clendenning.* 15 *Mart La.* 438. *Hobbell v. Jukstein.* 7 *La. An.* 252—*Summerton v. Livingston.* 15 *La. An.* 519.

It is said that in the Territory of Utah the *local legislature* has abolished the right of dower, so that no one wife shall have preference above another, thus depriving the first wife of her common law rights; but this is little more than has been done in England, though the motive and object have been different. Thus in England, by statute 3 & 4 Wm. IV. c. 105, a widow married subsequent to 1st January, 1834, shall not be entitled to dower out of any land which shall have been absolutely disposed of by her husband in his lifetime or by his will; that all partial dispositions, debts, encumbrances, contracts and engagements to which his land shall be subjected, shall be good against her dower; that her dower may be barred by a single declaration in any deed executed by the husband, or by his will; and finally, unless a contrary intention is declared by the will, a devise by the husband of any estate or interest in land out of which she would be entitled to dower, to or for the benefit of the widow, shall bar her dower. Upon the assumption, which was at that time generally accepted, that a Mormon or polygamous marriage was not absolutely prohibited in the Utah Territory, Sir I. P. Wilde, (Judge of the English Divorce Court) said, in *Hyde vs. Hyde and Woodmansee*, L. J. R (N. S.) Vol. 35, P. m., A. & E., p. 57, "The Court does not profess to decide upon the right of succession or legitimacy which it might be proper to accord to the issue of polygamous *minors*, nor upon the *right or obligations in relation to third persons, which people living under the sanction of such union* have *created for themselves.* All that is intended here to be here decided is, that as between each other they are not entitled to the remedies, the adjudication, or relief of the matrimonial law of *England*"

In the case of appeal from a judgment of the Supreme Court of Bombay (*Ardraseer Cursetzel v. Perozeboyne*, Moore's P. C. C., Vol. 10, p. 275), where, according to Parsee law, under certain circumstances, "the husband is permitted to take another wife, the first being alive," Dr. Lushington, in pronouncing judgment, said—"In suits commenced on the civil side the peculiar difficulties which belong to the exercise of ecclesiastical jurisdiction would not arise, proceedings might be conducted on the civil side with *such adaptation* to the circumstances of the case as *justice might require*, though on the ecclesiastical side such modification would be wholly irreconcilable with ecclesiastical law. This appeal was decided in 1856, prior to the existence of the present English Divorce Court, but the principles involved seem to be the same as those considered in *Hyde vs. Hyde and Woodmansee*, and the decisions appear to be in accord.

Upon the whole it appears that bigamy or polygamy is not a *crime* known to the common law of England, or to the ecclesiastical law of England except as affecting the soul's health, and as such perhaps cognizable by the ecclesiastical judges in that country; but, as we shall presently see, such ecclesiastical jurisdiction has no existence in this country. That until Congress passed an act in 1862, rendering such a proceeding penal, it was not illegal within the Territory of Utah, there being no acknowledged spiritual jurisdiction within the jurisdiction of the United States, the offense in this country resting only on the acts of the several State legislatures—that the Act of Congress can scarcely have a retrospective effect or partake of the odious character of an *ex post facto* law—that even prospectively this act has remained virtually a dead letter for some 15 years, or has been ineffective until brought to bear in the trial of George Reynolds—that the women, for the most part, have submitted to polygamous unions in ignorance of their illegality, and that if the law is strictly enforced many thousands of women will be stigmatized as concubines, and many thousands more children be branded as illegitimate.

We contend that bigamy is a *crime* created by statute alone, that the statute of James did not extend to the colonies, otherwise there *would have been no necessity* for the enactment of special statutes on the subject in the different States of the Union, that in the absence of any ecclesiastical canon which might have been incorporated into the common law, even though no temporal penalty attached; the offence cannot be said to have been forbidden at common law, and that therefore, prior to the year 1862 bigamous or polygamous unions, however repugnant to the general feeling of Christendom, were not absolutely illegal in a Territory where no prohibitory statute existed on the subject. Subsequent to that date there is unquestionably no room for controversy, although considering the practical immunity resulting from the non-enforcement of the law and the general belief, especially among the female portion of the community, that the law was inoperative, a general amnesty might well be extended to innocent sufferers. The law has now been vindicated and for the present must remain unquestioned, but at least in all cases antecedent to the enactment of Congress it cannot be affirmed that any law was violated.

This is evident from the fact that polygamy was not indictable in any State until made an indictable offense by the several State legislatures. Mr. Bishop, in his work on Criminal Law, says: "Polygamy was not indictable until made so by the Statute Jac. 1, c. 2, when committed 'within his Majesty's dominions of England and Wales,' so that in this country the offense rests only on the acts of the several State legislatures." Vol. 1, § 379. "*It is an established doctrine of our courts,*" *says the same authority*, "that we have no national common law." Wheaton vs. Peters, 8 *Pet.* 591-658. *Sonnan vs, Clarke*, 2 *McLean* 568. *Dawson vs. Shaver*, 1 *Blackf.*, 204, 205. "There is no clause in the United States Constitution, nor any act of Congress adopting the common law as a national system." Bishop's Crim. Law, Vol. 1, § 18. "We can have no national common law unless one has been introduced either by the Constitution itself or by acts of Congress made in pursuance of the same constitutional authority." 1 Bishop. C. L., vol. 1, § 16. "It is," says the same authority, "the established doctrine of our courts that we have no national common law; but," in the language of Marshall C. J., "when a common law right is asserted, we must look to the State in which the controversy originated. *Wheaton vs. Peters*, 8 Pet. 591, 658, etc., (*Supra.*) And further: "The United States courts cannot punish crimes against government until they have been defined and specified by an act of Congress. U. S. vs. Hudson, 7 Cranch, 32. U. S. vs. Coolidge, 1 *Wheat* 415, reversing decision of Story J. in 1 *Gaths* 488. *U. S. vs. Lancaster* 2 *McLean* 431, 433 and numerous other cases. In the colonial jurisprudence of some of the older States a few of the English statutes, passed subsequently to the settlement, were adopted, and that made of force by general consent. *Com. v. Chapman* 13 *Met.* 68 *Pemble v. Clifford* 2 *McCord.* 31—*State v. Rollins* 8 *N.H.* 550. *Sibley v. Williams* 3 *Gill. & J.* 52. But unless so adopted, no such act of Parliament bound the colonies, except by express words. *Comm. v. Miller* 2 *Ashman.* 61, 53 *Bull v. Loveland* 10 *Pick.* 9, 13 *Pemble v. Clifford* (*Supra*) *Common v. Lodge*, 2 *Grat*, 579, 580. Bishop's C. L. Vol 1. § 379. The statute against bigamy (1 Jac. 1. c. 2. A. D. 1604) was passed little more than two years previous to the earliest English settlement (1607), and as we have already seen was limited to England and Wales. Consequently it could have had no reference to the colonies. "To know what the common law was before the making of any statute, is the very lock and key to set open