macy of husband and wife. He might live in the same house, under supposable circumstances, and not even be acquainted with others who also lived there. Acquaintance and residence under the same roof are at most but living in the same family.

Third—He eats at their respective tables one third of the time or thereabouts.

There is nothing immoral or scandalous in that. There is no complaint that he did not behave well at the table. It is certain that it is not a sexual interview. Husbands and wives eat together, so do others. Eating together does not even prove good fellowship. It is a neutral fact in respect to cohabitation.

Eliminating from his intercourse with the women named the intimacy of husband and wife, confining himself to the course of conduct specified in the defendant's offer of proof, he had a right to occupy the south-east room on the second floor, and take the whole of his meals alternately with these women and their families, if he chose to do so. Could not another man do those acts without being chargeable with unlawful cohabitation? Could not another man do these acts and not even be suspected of any intimacy, sexual or otherwise, with the women? The instances are too numerous in all decent society to leave any question for discussion.

The defendant had a right to be there. He had duties to perform. The evidence shows that these were the defendant's families. They were dependent on him for home and support. He married Amanda Cannon prior to 1862. She had borne him nine children and they lived with her in a part of this house. He married Clara C. Cannon over ten years ago. She had borne him three children, only one of whom was living during the time mentioned in the indictment. She had an older daughter by a former husband, and two orphan children not her own, and these four children constituted her family residing in this house.

These wives had been married according to the prevalent practice among the "Mormons." These families and the defendant were "Mormons."

These children were legitimated by the Edmunds law, and legitimated of course as the children of their parents. The defendant was under a moral if not a legal obligation to support the children and the mothers. He had a right to hold any intercourse with them short of cohabitation with the mothers.

There is no "dead line" to be crossed in social approach to plural wives. If the defendant did not cohabit with them he is not guilty of any offense.

I have said he had a right to be there. He had a right to carry the necessaries of life to those whom he was bound or or permitted to support. He had a right to be with his children and to cooperate with the mothers in their home nurture and training. He had a right to confer with the mothers as frequently as he pleased. He had a right to maintain pleasant social relations with these mothers. They may rejoice together over whatever is good in their offspring, and they may pray and weep together over such as go astray. These acts are no ingredients of cohabitation.

Congress is presumed to have known the peculiar situation in this Territory, and the Court also must take judicial notice of the same situation; that polygamy has flourished here for forty years by the sufferance of the government. The fruits of this social and domestic system offer a solemn subject, not only for the statesman, but the magistrate.

The children, many thousands in number, have had their reproach taken away—they are made legitimate—but their mothers have no *status* in the law except that they are mothers of legitimate children. They have accepted their conjugal state according to their faith, and that must content them before the law as it does in their church.

This law puts no restraint on the performance of friendly offices to them by the fathers of their children, nor on the free discharge of parental duties; its puts no embargo on the cultivation of pleasant and familiar relations between children and both parents. It shows no intention to separate the parents in their ministrations to their children, nor in enjoyment of the society of these children during the years of their growth.

For obvious reasons there is a supreme necessity that the parents be at liberty to co-act in their support and training.

With the zeal to enforce this law there must be some practical and humane consideration of the future welfare of those affected by it. The act is remedial as well as penal. If there is stern determination in one aspect there is tender commiseration in another. If one hand carries a scourge, in the other there is a healing balm.

This law is not intended to extinguish parental and filial affection. Nor can it be overlooked that there is a bond between the parents which no law can wholly sever. While it must cease to be a marital bond, it is a tie which will survive cohabitation; it will be an important factor in the performance of ensuing obligations, public and private.

The duties that parties to plural marriages owe to their children, and to each other, and the existence of common interests and hopes in their offspring will justify and furnish a warrant for, such familiar intercourse as is properly incident to the performance of such duties and social intercourse generally.

Beyond the sphere of their useful activities there is another to them as well as to others, of enjoyment. After their work is done and in the intervals of their common work they may pause in each others company. The government will not dictate what they shall say to each other, nor assume to regulate their emotions.

It restrains them from beating each other, and it will not suffer them to cohabit.

To make the presence of the defendant in the habitation of his legitimate children and their mother, and his joining them in their meals at regular times, without other intimacy, not evidence only as tending to show a sexual cohabitation, but the offense itself, to be declared by the court, as a matter of law, is to err in the exposition of the statute. It is a conclusion which makes mere probative facts the basis of an irrebuttable presumption of guilt.

The Court would thus abridge the right of innocent intercourse, and hamper the performance of duties which it ought to be inferred that the government is willing that all parents, even in such an anamolous position, should fulfil.

See 13, 17 and 18 Requests, Trans. p.p. 23 and 24.

The Court refused in the language of the 13th Request or otherwise to say to the jury that:

"This law does not command polygamous fathers to abandon their children, nor to break off all communication with their mothers. Such fathers are at liberty and under the strongest moral obligation to support both. He may hold any friendly and familiar relations, other than sexual, naturally incident to the proper discharge of such duties."

The continuance of the polygamous status with these wives was evidently considered by the jury under the charge as showing that the defendant is one of the wicked, according to this act, and, therefore, that his laudable conduct in fulfilling his duties to his families had a baneful flavor, on the hard principle that even—"The *ploughing* of the wicked is an abomination."

Fourth—Holding out these women as wives.

It is not very clear what idea was intended to be conveyed to the jury by the few words spoken on this subject. This feature of the charge was not elaborated. The single remark made was vague. On the testimony the jury could make much or little of it. It was still more vague to the defence in view of refusals to charge. The "*holding out*" was required to be found, however, from the evidence, in addition to the other two facts which were mentioned as necessary to conviction. This required holding out was a suppletory fact needed to interpret and give criminal significance to the others The instruction was that it could occur by language or by conduct.

There was no conduct after the passage of this law, but that of living in the same house and eating at the same table.

Did the Court intend to leave it to the jury to say whether these facts amounted to a holding out? I can not belive it. Cohabitation in the full sexual sense is not of itself a holding out of the woman cohabited with as a wife. This is manifest from the authorities which have been read. So, of course, there could not be such a holding out in the more equivocal facts of living in the same house in non-sexual relations and eating at the same table. It may be said that these women were the defendant's wives. That is true; but they became such a long time before this Edmunds Act was passed. That marriage fixed a *status* of the parties which continued until after the passage of that act. Did the Court below intend that the jury should infer that the continuance of that relation, because the defendant had taken no effectual step to divorce himself, was a continuing holding out of these women as his wives? If this was the intention or effect of the instruction it was clearly erroneous, for it would make the act *ex post facto* as to this case. No act done before the passage of the act can be made by that act the basis of a criminal charge.

Nor can subsequent legislation make a prior act conduce to a conviction, for it would then alter the situation of the defendant to his disadvantage:

Kring vs. Missouri, 107 U. S., 221, 228-9.

U. S. vs. Hall, 2 Wash., 366.

It is probable that the Court intended the jury to understand that if a polygamist lives in the same house with two of his wives, and takes turn in eating at their tables as stated in the instructions, that shall be deemed cohabitation, without regard to whether their relations were sexual or not. Not that such facts should go to the jury as evidence of a sexual cohabitation, but the presumption that it is so is so violent that the Court will declare the conclusion as a matter of law. That makes the previous marriage, for which there was no punishment in the case of this defendant, conduce to his conviction for an offense subsequently created and which was not an offense at all when the marriage was contracted.

The Court did not express this view, but it was left to the jury to infer it. Had the Court intended to advance that doctrine to the jury, or that they should act upon it, why were they not told to inquire whether upon the evidence the defendant at some time had married these women as plural wives? Why were they not informed that if so, in the absence of proof that the relation had been dissolved, the law would presume its continuance, and if the defendaut lived in the same house and ate at the same table, he was guilty?

I have treated the charge to the jury as equivalent to this—as directing them to convict the defendant if these women were his plural wives and the first two facts stated in the instructions were found.

If the prior marriage were treated only as an evidentiary fact and tending to make it more probable that the defendant standing in such existing relations would maintain sexual relations and did maintain such relations as would amount to cohabitation, the case might be different. The offense then would consist of acts since the passase of the law, and they would be open to trial, not on appearances, but actual facts. But when the prior marriage under the name of holding out the women as wives or otherwise is made an ingredient of the offense, so that joined to two other innocent acts, the crime is complete, the Edmunds act is made to operate manifestly as an *ex post facto* law.

There were no acts, as I have before said, tending to show a holding out of these women as wives since the statute was passed.

There was no holding out by language. The proof discloses none. There is evidence by Clara C. Cannon and Geo. M. Cannon that at some time the defendant said Amanda was his wife. But no witness testified that the defendant ever spoke of Clara C. Cannon as such. She testified that she had been his wife, that he married her ten years ago.

There has been no holding out as to her since this law passed—none during the period of time mentioned in the indictment.

If the defendant had openly and repeatedly announced that these women were his plural wives, he would only have stated what the Supreme Court of the United States have decided is his actual *status* from the mere fact of his marrying them, and not having taken any effectual step to dissolve the relation. The continuance of that status is declared by that Court to be no offense.

There was no proof whatever of any holding out either by language or by conduct, and the Court was requested so to charge the jury.

See 19 and 20 Requests, Tr. p. 25.

The Court was asked to instruct the jury to acquit if they should find that the defendant had not held out Clara C. Cannon as a wife since the enactment of the Edmunds bill. Even this was refused.

20 Request.

This indicates that the Court intended that this ingredient of the offense might be committed before the offense was created, or else that the defendant was not to be acquitted though the jury negatived the facts on the finding of which the instructions made conviction to depend. There was no such word as fail on the slate of the prosecution.

The Supreme Court of the United States has ruled on the effect of continuing the polygamous status.

Murphy vs. Ramsey, 14 U. S., 14.

The Court say: "He can only cease to be such when he has finally and fully dissolved in some effective manner, which we are not called on to point out, the very relation of husband to several wives which constitute the forbidden status he has previously assumed. Cohabitation is only one of many incidents of the marriage relation. * * * The statute makes an express distinction between bigamists and polygamists on the one hand, and those who cohabit with more than one woman on the other; whereas, if cohabitation with several wives was essential to the description of those who are bigamists or polygamists, these words in the statute would be superfluous and unnecessary." * * * "Continuing to live in that state afterwards is not an offense, but cohabitation with more than one woman is. But as one may be living in a bigamous or polygamons state without cohabitation with more than one woman, he is in that sense a bigamist or a polygamist, and yet guilty of no criminal offense."

These extracts show that cohabitation with more than one woman and the existence of the relation of "husband to several wives," is very clearly distinguished in the law. The status once assumed continues, and its continuance is no offense. A holding out of such wives—which is a mere acknowledgment of the relation—and identifying the parties, is as innocent as the fact itself. If continuing in a polygamous state is no offense, it can be none for the parties to mention that status and who are concerned in it. Such an admission or announcement does not add to or change that status, or convert it into cohabitation.

Hence, we say the Court commited a double error: charged the jury so as to mislead them to find a holding out when there was no evidence of it, and in making it a coriminating fact when the Supreme Court of the United States have declared that it is not.

In U.S. vs. Breitting, 20 How, 254, the Court say: "It is clearly error in a court to charge a jury upon a supposed or conjectural state of facts, of which no evidence has been offered. The instruction presupposes that there is some evidence before the jury which they may think sufficient to establish the facts hypothetically assumed in the opinion of the court; and if there is no evidence which they have a right to consider, then the charge does not aid them in coming to correct conclusions, but its tendency is to embarrass and mislead them. It may induce them to indulge in conjectures instead of weighing the testimony."

This is quoted and affirmed in Ins. Co., vs. Baring, 20 Wall, 161-2. In that case the court add with reference to an instruction depending on facts of which no evidence had been given: "It will as a general rule be regarded as error in the court, for the reason that its tendency may be, and often is, to mislead the jury by withdrawing their attention from the legitimate points of inquiry involved in the issue;" citing Goodman vs. Simons, 20 How, 359.

Fifth—The Court below refused the request to charge the jury that

"The law presumes innocence, and therefore that all persons who were cohabiting when the Edmunds law took effect, contrary to the provisions of that act, then ceased to do so." 15 Request, Trans. p. 23.

The correctness of this proposition cannot be controverted. The refusal is error. The general statement of the presumption of innocence contained in the last paragraph of the instructions does not cure the error. The defendant was entitled to the benefit of the presumption in the particular predicament stated. The refusal of this specific instruction had the effect to deprive him of that benefit. Other parts of the instruction had the effect substantially to reverse the proposition, and the general concession that the law presumes innocence was a legal platitude—"sounding brass or a tinkling cymbal," conveying no idea whatever. This must be apparent from what has been said on the point of holding out these women as wives. Instead of presuming a cessation of what the law forbade, the continuance of the polygamous status was held in effect to raise a presumption that the defendant continues to recognize and treat the women practically as wives. This also appears by the refusal of the 20th Request. Though the marriage took place years before the passage of this act, it was held to have the effect of a holding out of the women as wives afterwards so as to be one of the three facts on which a conviction was directed. No other holding out after the law passed was necessary.

This could only be true in the absence of the presumption stated in the 15th request.

The last half of the 13th request is based on the same sound doctrine embodied in the 15th request. The refusal of it shows the intention to deprive the defendant of all benefit from the legal presumption of innocence. The Court thus refused to say that, "All his social familiarity with the mothers of such families, established prior to the passage of said act, not shown to include all the particulars of cohabitation as the Court has defined it, should be considered by the jury with the legal presumption of innocence, and the failure to establish such cohabitation entitles the defendant to acquittal."

In the charge given, the Court directed the jury to convict on finding certain facts. The jury were not, however, directed to acquit if those facts were not found. In effect, the Court refused so to charge. The refusal of the foregoing request has that significance; so has the refusal of the twentieth request.

The general effect of the instructions given, and the refusals, was that the law generally presumes innocence until guilt is proved, but one who was a polygamist at the passage of this law will not be presumed to discontinue cohabitation then and thereby made unlawful.

16th Request, Trans., p. 24.

His conduct afterwards will be looked upon with suspicion. If he gets near enough to his polygamous wives for practical cohabitation, that is enough, the law will presume it. To appear to cohabit is not simply evidence for the jury to weigh; it is in law cohabitation, whether it is true in fact or not.

Is this reversal of presumption correct? Can it be justified on the suspicion that if appearances are submitted to a jury they may be explained away and acquital follow?

District Attorney Dickson made his argument this afternoon, taking as a base that the "habit and repute" of marriage was sufficient, and no proof of actual living together was necessary.