an essential element of the offense which was proved on both trials. And so we say that this case is distinguishable from the Morey case and the latter is no authority for what has been done here.

This court has settled the question of jurisdiction in such a case as this, by its decisions in the Snow case, 120 U. S. and in the Lange case, 18 Wall. Every objection urged here was brought forward in those cases and fully answered by the court. In the Snow case, which is identical in principle with this, at page 281, the court says:

"It is contended for the United States that, as the court which tried the indictments had jurisdiction over the offenses charged in them, it had jurisdiction to determine the questions raised by the demurrers to the oral pleas in bar in the cases secondly and thirdly tried; that it tried those questions; that those questions are the same which are raised in the present proceeding; that they cannot be reviewed on *habeas corpus*, by any court; and that they could only be re-examined here on a writ of error, if one were authorized. For these propositions the case of Ex parte Bigelow, 113 U. S. 328, is cited. But * * * we are of opinion that the decision in that case does not apply to the present one. * * * Other considerations bring it within the principles of such cases as Ex parte Milligan, 4 Wall. 131; Ex parte Lange 18 Wall. 163; Ex parte Wilson 114 U. S. 417."

Much of the argument of counsel on this point was based upon the assumption of a case where the issue on a plea of former conviction had been submitted to a jury and passed upon by them. I submit that the rule in such a case could not apply here, because in that case the evidence would have gone to the jury and, the record failing to disclose it here, the verdict that the offenses were not the same would be conclusive upon this court, but that is not our case. Here the record (plea of former conviction) discloses all the facts which go to determine whether the transaction constituted one offense or more. The question decided by the trial judge was a question of law and not one of fact, because the facts were all admitted by the demurrer, and the court only had to determine whether the facts stated were sufficient in law to show that there was but one offense. Here the record discloses the fact that, there being but one offense, the trial court had exhausted its jurisdiction before the second judgment was rendered, while the record in such a case as counsel supposes, would not show that fact. Herein lies the distinction, which your honors have drawn between the province of the writ of error and the writ of *habeas corpus*. The record in this case establishes the jurisdiction of this court beyond question.

The Pitzner case, 44 Tex. App., 578, cited by opposing counsel, is not in point because in that case there had been no conviction on the second trial and no punishment imposed. The case was still pending in the trial court and, of course, the proper remedy, as the Supreme Court said, was by special plea of *autrefois acquit* to be interposed in the trial court, and not *habeas corpus* from the court of appeals.

The whole policy of the law is against the multiplication of offenses and the infliction of cumulative punishment. In the language of the Supreme Court of North Carolina, "this notion of rendering crimes, like matter infinitely divisible, is repugnant to the spirit and policy of the law, and ought not to be countenanced." This court has forcibly condemned that mode of procedure in Snow's case (120 U. S., page 282). where an attempt was made to divide a continuous cohabitation and prosecute different parts of it as separate and distinct offenses. This court said:

"The division of the two years and eleven months is wholly arbitrary. On the same principle there might have been an indictment covering each of the thirty-five months, with imprisonment for seventeen years and a half and fines amounting to $10,500, or even an indictment covering every week, with imprisonment for seventy-five years and fines amounting to $44,400, and so on, *ad infinitum*, for smaller periods of time. It is to prevent such an application of penal laws, that the rule has obtained that a continuing offense of the character of the one in this case can be committed but once for the purposes of indictment or prosecution, prior to the time the prosecution is instituted."

Sometimes the result of a rule is the best test as to whether or not it is a sound rule. Applying the same illustrations to this case that your honors applied to the Snow case, and, if the rule is not as we claim, a vast number of prosecutions might be instituted and maintained upon proof of facts and presumptions arising therefrom. for intercourse occurring during one continuous cohabitation of three years, the penalties for which would aggregate hundreds of years of imprisonment.

This must be so, because if a separate indictment can be sustained for one act of sexual intercourse occurring during such a continuous cohabition, a hundred, prosecutions could be sustained, if there were that many acts of intercourse occurring during the cohabitation. Certainly the court of last resort, in a free country, will hesitate to so construe a highly penal statute, as to render possible such appalling consequences.

But there are some matters which are so much a part of the history of affairs in Utah, that I hope I may without impropriety allude to them here. The present condition of affairs there warrants the assumption that, unless some system of multiplying offenses prevails, such as is here attempted, prosecutions for this class of offenses will soon cease and the vexed question be settled.

The jury law in force in Utah, practically excludes all Mormons from serving as grand or trial jurors in this class of cases, and, as a rule, jurors are selected by the United States Marshal on open venire. How far, under such circumstances, this statute will be made an instrument of oppression if you sanction what has been done in this case, I will not pretend to say. Nor will I say that it was to delay or prevent this settlement that the mode of procedure was adopted which we are opposing in this case, but I do say that such must necessarily be its effect. Everything that tends to magnify the importance of these offenses and the extent of these practices, and every means that are employed in their suppression, which bear upon their face any semblance of disregard for the personal rights of the accused, only tend to delay, instead of hasten, the consummation so devoutly to be wished.

The experience of ages has demonstrated that fair, impartial and humane methods are always more effectual, in producing obedience to the law, than arbitrary, oppressive and cruel means. While the one course induces respect for the law and consequent obedience to it, the other engenders an opposite feeling and is apt to result in every possible evasion of the law.

My excuse for having ventured these observations upon a most delicate point lies in the fact that this case is but one of many like cases that are now pending in the courts of Utah. If your honors hold that what has been done here has the warrant of legal authority, the strong temptation and stimulating effect of liberal fees, and other considerations will, I fear, induce the bringing of a vast multitude of such prosecutions, and, while individual defendants are being crushed by the weight of legal penalties, the whole people will be made to suffer because of the exaggerations thus given to the actual offense committed in their midst.

In taking leave of this case, I can conceive of no more sublime sentiment or fitting words to utter than those pronounced in one of the grandest decisions that ever emanated from the judicial bench. In the Lange case this court said: "If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offense. * * * There is no more sacred duty of a court, than, in a case properly before it, to maintain unimpaired those securities for the personal rights of the individual, which have received for ages the sanction of the jurist and the statesman; and in such cases no narrow or illiberal construction should be given to the words of the fundamental law in which they are embodied." And when your honors apply this rule to the case at bar, I feel sure that you will be able to add, as in the case from which I quote, that "without straining either the Constitution of the United States, or the well settled principles of the common law," you have "come to the conclusion that the sentence of the court, under which the petitioner is held a prisoner, was pronounced without authority, and he should, therefore, be discharged."