case was the same as if the first indictment had in terms laid the unlawful cohabitation for the whole period preceding the finding of the indictment. The conviction on that indictment was in law, a conviction of a crime which was continuous, extending over the whole period, including the time when the adultery was alleged to have been committed. The petitioner's sentence, and the punishment he underwent on the first indictment, was for that entire, continuous crime. It included the adultery charged. To convict and punish him for that also was a second conviction and punishment for the same offense. Whether an acquittal would have had the same effect to bar the second indictment is a different question, on which we express no opinion. We are satisfied that a conviction was a good bar, and that the court was wrong in overruling it. We think so because the material part of the adultery charged was comprised within the unlawful cohabitation of which the petitioner was already convicted and for which he had suffered punishment.

The conclusion we have reached is in accord with a proposition laid down by the Supreme Judicial Court of Massachusetts in the case of Morey v. Commonwealth, (108 Mass. 433, 435.) The court there says, by Mr. Justice Gray: "A conviction of being a common seller of intoxicating liquors has been held to bar a prosecution for a single sale of such liquors within the same time, upon the ground that the lesser offense, which is fully proved by evidence of the mere fact of unlawfully making a sale, is merged in the greater offense; but an acquittal of the offense of being a common seller does not have the like effect. (Commonwealth v. Jenks, 1 Gray, 490, 492; Com. v. Hudson, 14 Gray, 11; Com. v. Mead, 10 Allen, 396.)" Whilst this proposition accords so nearly with our own views, it is but fair to say that the decision in Morey v. Commonwealth is the principal one relied on by the government to sustain the action of the district court of Utah in this case. Morey was charged under a statute in one indictment with lewdly and lasciviously associating and cohabiting with a certain female to whom he was not married; and in another indictment he was charged with committing adultery with the same person on certain days within the period of the alleged cohabitation. The court held that a conviction on the first indictment was no bar to the second, although proof of the same acts of unlawful intercourse was introduced on both trials. The ground of the decision was that the evidence required to support the two indictments was not the same. The court said: "A conviction or acquittal upon one indictment is no bar to a subsequent conviction and sentence upon another, unless the evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other. The test is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense. A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other." (p. 434.) We think, however, that that case is distinguishable from the present. The crime of loose and lascivious association and cohabitation did not necessarily imply sexual intercourse, like that of living together as man and wife, though strongly presumptive of it. But be that as it may, it seems to us very clear that where, as in this case, a person has been tried and convicted for a crime which has various incidents included in it, he cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offense.

It may be contended that adultery is not an incident of unlawful cohabitation, because marriage of one of the parties must be strictly proved. To this it may be answered, that whilst this is true, the other ingredient (which is an incident of unlawful cohabitation) is an essential and principal ingredient of adultery; and, though marriage need not be strictly proved on a charge of unlawful cohabitation, yet it is well known that the statute of 1882 was aimed against polygamy, or the having of two or more wives; and it is construed by this court as requiring, in order to obtain a conviction under it, that the parties should live together as husband and wives.

It is familiar learning that there are many cases in which a conviction or an acquittal of a greater crime s a bar to a subsequent prosecution for a lesser one. In Mr. Wharton's Treatise on Criminal Law, vol. I, § 560, the rule is stated as follows, to wit: "An acquittal or conviction for a greater offense is a bar to subsequent indictment for a minor offense included in the former, wherever, under the indictment for the greater offense, the defendant could have been convicted of the less;" and he instances several cases in which the rule applies; for example, "An acquittal on an indictment for robbery, burglary, and larceny, may be pleaded to an indictment for larceny of the same goods, because upon the former indictment the defendant might have been convicted of larceny." "If one be indicted for murder, and acquitted, he cannot be again indicted for manslaughter." "If a party charged with the crime of murder, committed in the perpetration of a burglary, be generally acquitted on that indictment, he cannot afterwards be convicted of a burglary with violence, under 7 Wm. IV and 1 Vict. c. 86, s. 2, as the general acquittal on the charge of murder would be an answer to that part of the indictment containing the allegation of violence." "An acquittal for seduction is a bar to an indictment for fornication with the same prosecutrix." "On the same principle, in those States where, on an indictment for adultery, there could be a conviction for fornication, an acquittal of adultery is a bar to a prosecution for fornication." It will be observed that all these instances are supposed cases of acquittal; and in order that an acquittal may be a bar to a subsequent indictment for the lesser crime, it would seem to be essential that a conviction of such crime might have been had under the indictment for the greater. If a conviction might have been had, and was not, there was an implied acquittal. But where a conviction for a less crime cannot be had under an indictment for a greater which includes it, there it is plain that while an acquittal would not or might not be a bar, a conviction of the greater crime would involve the lesser also, and would be a bar; and then the proposition first above quoted from the opinion in Morey v Commonwealth would apply. Thus, in the case of The State v. Cooper, (1 Green, N. J. Law, 361), where the defendant was first indicted and convicted of arson, and was afterwards indicted for the murder of a man burnt and killed in the fire produced by the arson, the Supreme Court of New Jersey held that the conviction of the arson was a bar to the indictment for murder, which was the result of the arson. So, in State v. Nutt, (28 Vt. 598,) where a person was convicted of being a common seller of liquor, it was held that he could not afterwards be prosecuted for a single act of selling within the same period. "If," said the court, "the government see fit to go for the offense of being 'a common seller,' and the respondent is adjudged guilty, it must, in a certain sense, be considered as a merger of all the distinct acts of sale up to the filing of the complaint, and the respondent can be punished but for one offense." Whereas, in Com. v. Hudson; (14, Gray, 11,) after an acquittal as a common seller, it was held that the defendant might be indicted for a single act of selling during the same period. (See 1 Bishop's Crim. Law, 5th Ed. § 1054, &c.)

The books are full of cases that bear more or less upon the subject we are discussing. As our object is simply to decide the case before us, and not write a general treatise, we content ourselves, in addition to what has already been said, with simply announcing our conclusion, which is, that the conviction of the petitioner of the crime of unlawful cohabitation was a bar to his subsequent prosecution for the crime of adultery; that the court was without authority to give judgment and sentence in the latter case, and should have vacated and set aside the same when the petitioner applied for a *habeas corpus*; and that the writ should have been granted and the petitioner discharged. The judgment of the district court is reversed, and the cause remanded with directions to issue a *habeas corpus* as prayed for by the petitioner, and proceed thereon according to law.

True copy.
Test:
JAMES H. MCKENNEY,
Clerk Supreme Court U. S.