BIGAMY.

THE TUCKER-EDMUNDS BILL.

In the House of Representatives, August 5, 1886, Mr. Bennett, from the Committee on Judiciary, submitted the following views of the minority, which were referred to the House calendar and ordered to be printed. [To accompany bill S. 10.]:

The undersigned regret that they cannot agree with the majority in their report on Senate bill No. 10, nor give their assent to some of the provisions of the bill which has been reported as a substitute for that measure. There is a misapprehension of the historical facts as we understand them. This is not surprising in view of the intense feeling almost invariably displayed in the discussion of the so-called Mormon problem. For nearly half a century local and general agitation of the Mormon question has excited a degree of warmth which is not creditable to the good sense of our people or to our statesmanship. Religious problems are always vexatious, and in dealing with them legislators are liable to be influenced by their preconceived notions, and always in danger of being led astray by clamor.

It is not necessary to discuss the nature of the faith of these people. That is not the province of legislators. Happily for our fathers and for us all matters of religion were by our organic law left to the domain of the individual conscience.

It is admitted that outside the belief in polygamy and its practice the Mormons have all the virtues and few of the vices of other communities. The work they have accomplished in redeeming a desert and making it to bloom as the rose speaks for itself. We regret that the majority should have instanced the occurences of 1857-'58, because we believe that they did not reflect entire credit upon our rulers at that period. The precaution of having an investigation made by reliable and unbiased men who would have avoided an expensive and unnecessary expedition, which resulted simply in demonstrating the falsity of the charges which had been made against the Mormons.

The organization of the State of Deseret is represented as a purpose on the part of the Mormons to establish an independent government. The fact, neglected to be stated, that application was at once made for admission into the Union is a sufficient refutation. Here were more than twenty thousand people who had been ignored by the General Government. The necessity for some sort of government was imperative. It was neither criminal nor evidence of ambitious intentions to form a provisional government. It was not so regarded then by the Federal authorities, or Brigham Young would not have been made governor of the new Territory.

It was not unnatural that a people who had been driven out of Missouri and out of Illinois, and who had made an unparalleled journey of more than 2,000 miles to find new homes, should seek to strengthen themselves against those who might follow and seek to renew the old strife. They had sought and found a new abiding place in a new land. Water and timber were precious. Was it an evidence of disloyalty to the Government that these people endeavored to conserve for themselves and their posterity two such essentials? It may have been grasping and ungenerous; unfortunately, human nature has never yet been entirely reformed by any religious creed or teaching.

It is puerile to insist that this little community could have at any time seriously menaced our Republic. It is positively childish to insist that there is now or ever can be any danger to our civilization or our institutions from the exertions of the Mormon people. We refuse to dignify with so much importance a sect that, all told, in all the world, numbers less than two hundred and fifty thousand souls; whose beliefs are so directly antagonistic to the intellectual tendency of the age, and whose practice of polygamy is so repugnant to the notions of Europeans and Americans.

The practice of polygamy is an evil which we desire to see eradicated. We yield to none in our condemnation of this offense, which has been made a crime by our laws. These laws deprive polygamists of the right to vote, to serve as jurors, and to hold office. It matters not that they entered into the polygamous relations long before they were made criminal, the penalty of disfranchisement and disqualification is imposed. The offense of unlawful cohabitation created by the act of Congress approved March 22, 1882, as construed by the court of last resort, can be constructively committed, and persons who were only guilty of constructive cohabitation are now in the penitentiary. Moreover, the offense has been held to be continuous, and the courts allow segregated indictments for such periods of time as the district attorney sees fit to subdivide the past.

So far as the guilty are concerned there seems to be no undue clemency shown. They may be fined to the extent of all their worldly possessions and imprisoned for the balance of their natural lives. There has not been a single failure since an effort to enforce these laws was made to indict and convict an accused person. There can therefore be no necessity for additional legislation increasing the power of the courts or of creating new rules of evidence.

It does not appear that there has been any increase of polygamous marriages. On the contrary, the evidence of the Utah Commission shows that so far as they could learn no such marriages had occurred in the Territory during the year 1885. The statistics which they give disclose, moreover, the fact that polygamy has never been in universal practice among the Mormons. It is undoubtedly true that a large majority of the Mormons hold that their so-called revelation on the subject of polygamy was not mandatory but permissive. Whatever the power and influence of the Mormon Church may have been it has never succeeded with impressing its adherents with the belief that polygamy was essential to salvation. It is not reasonable to suppose that this majority will naturally grow, and that if extraneous causes do not interfere the minority will soon disappear? There is no difficulty in enforcing the law. The overcrowded penitentiary in Salt Lake City attests this fact. The penalties are sufficiently severe. Deprived of the right to hold office, to vote, to serve on juries, with the certainty of swift and vigorous punishment following even constructive offenses, what motive can there be for monogamous or for unmarried Mormons to offend against the laws already provided?

There can be but one danger, that intemperate zeal on the part of those who enforce the law may excite a religious intemperance which will convert Mormons into religious zealots and superinduce a desire for martyrdom. The legislation proposed by the original Senate bill, and by the substitute therefor reported by the majority, is, in our judgment, calculated to effect something of this kind. It is unprecedented in the United States, and for severity can only be compared with the non-conformist laws of Great Britain or the Blue Laws of Connecticut.

The specific objections which we desire to submit to the bill begin with section 2, reported by the majority of the committee. This section, as we believe, invades the personal rights, attacks and overthrows the personal security of the citizen. This provision of the bill empowers the officers named therein to arrest a citizen upon *ex parte* affidavits and imprison indefinitely unless released on bail. It contains no provision for a hearing on the grounds of his arrest. It does not specify any terms, nor generally the facts which shall be deemed sufficient, if proved, to authorize the imprisonment of the citizen, nor does it require that any facts shall be stated in the affidavits upon which the imprisonment is made. The party imprisoned is not permitted to controvert the *ex parte* affidavits, and, by disproving them, regain his liberty; nor can he show that the affidavits are maliciously made against him and thereby secure his release. The only requirement of the law is that two citizens shall swear that, in their opinion, there is good reason to believe that the person imprisoned will unlawfully fail to obey a subpœna. This rule of procedure is arbitrary, anomalous, and unheard of. It is oppressive, without a precedent, and capable of great abuse, and is not justified by the Constitution. A general warrant for arrest is insufficient. (Sanford vs. Nichols, 13 Mass., 289.)

The facts justifying must be first stated and ascertained, and after the arrest and before imprisonment an opportunity must be given the person dealt with to be heard. Otherwise, the person so imprisoned is deprived of his liberty without due process of law. This section may be used to corrupt a witness by restoring him to liberty after imprisonment on condition that he will swear as the party causing his arrest desires. It imprisons for contempt when no contempt has been committed, and denies a hearing on the alleged grounds of his imprisonment, and makes his release only possible by giving bond, and for that reason, among others, is vicious. (Bradley vs. Fisher.)

Section 6 is useless, inasmuch as there are no such laws as are therein denounced.

Section 7 annuls certain laws conferring jurisdiction upon the probate courts of Utah. This provision judged by the doctrines of the report of a majority of the committee, is full of destruction. On page 7 of the majority report it is said:

> The organic act expressly provides that all laws passed by the Territorial legislature "shall be submitted to the Congress of the United States, and if disapproved shall be null and of no effect." This power whenever exercised makes the original law null—not only hereafter, but "of no effect." If disapproval only nullifies its effect for the future no force will be given to the last words.

The doctrine just quoted is asserted by the majority of the committee to justify the repeal of the charter of the Mormon Church. If the effect of the annulment of the laws heretofore giving jurisdiction to the probate court is as it is in this majority report declared to be, then the laws repealed are not only not to have any effect hereafter, but to have been in the past of no effect. This position, if a correct one, overthrows everything that was done by the probate court while acting under the laws which this bill proposes to annul. All disposition of property, all adjudications, all acts of said court coming within the scope of the laws annulled are by this bill and under the doctrine of the majority report also annulled and "of no effect." We shall have something to say of this doctrine further on.

Section 11 declares that "polygamy or any polygamous associations or cohabitation between the sexes is hereby declared a felony." What is "any polygamous associations" is not defined, but is left open to construction to the courts of Utah. That it does not include unlawful sexual intercourse between parties is evident.

The Supreme Court, in United States *v.* Cannon, 116 U. S., 17, has held that cohabitation may exist though there be no sexual intercourse, though the parties do not occupy the same bed or sleep in the same room. Justices Miller and Field dissented from this definition of cohabitation, and held that such a construction of the law is strained and unjustifiable.

Polygamous associations in this bill is not synonymous with unlawful cohabitation, but is an incident of polygamy more remote from polygamy than unlawful cohabitation as defined by the Supreme Court, as above quoted. Cohabitation may exist without illicit intercourse. Polygamous associations is of a lighter shade of wrong than unlawful cohabitation, and contemplates the punishment of a person for countenancing, approving or tolerating, in those with whom he associates, polygamy. This raises the question whether it is competent for Congress to punish a person for his associations only. It is believed that no case can be found where punishment is held to be constitutional where imposed upon a person not participating in any degree in an act made criminal by law. In the case of the city of St. Louis against William Fitz, 53 Mo., 582, it was decided that an ordinance which punished an individual who knowingly associated with persons having the reputation of being thieves and prostitutes was unconstitutional. One of the judges, in passing upon the case, said:

> I hold the ordinance absolutely invalid on the broad ground that its direct effect is to invade and necessarily destroy one at least of those certain inalienable rights of the citizen bestowed by the Creator and granted by the organic law, personal liberty.

In the case of Murphy v. Glover, 41 Mo., 266, the court says:

> It must be admitted that their opinions and feelings, when not put forth in any known acts of resistance to the law, belong to themselves, and cannot with reason and justice ever lawfully be punished as if they were offenses against the law.

In State v. Keys, 5 Mo., 33, it was held that it was not competent to punish a person who was present at a murder and approved of the same, he taking no part in the murder and doing no act which promoted it. Of the same import is Betx v. Purcy, 67 Mo., 89.

This bill, however, for the first time in the history of the Government, proposes to punish "polygamous associations." That this language does not denounce polygamy is clear, because polygamy is punished, as the law now is, with the extremest severity. That it is not limited to the punishing of unlawful cohabitation is clear, because, as the law now is, both real and constructive cohabitation are punished by imprisonment in the penitentiary. "Polygamous associations," then, means something different from polygamy or from unlawful cohabitation, and is a new offense designed to punish acts which are not included in polygamy or unlawful cohabitation. We submit that the law already inflicts punishment upon polygamists to the limit of constitutional toleration, and that a further punishment of a person for "associations" is without warrant of law or constitutional justification.

Section 14 annuls the law incorporating the Church of Jesus Christ of Latter-day Saints, so far as the same has any legal validity, and also annuls the corporation of the association called the "Perpetual Emigrating Fund Company," and dissolves said corporation. This provision, which undertakes to annul a corporation of a private character without a judicial hearing in court, is justified in the report of the majority of the committee on the ground that there never has been any such corporations; that they were void from the beginning; that the State of Deseret had no authority to incorporate them, and that the legislature of Utah had no power subsequently to confirm them.

Section 16 requires the Attorney-General to cause proceedings to be taken to dissolve said corporations mentioned in the preceding section. The status of these corporations, as fixed in the majority report, is that their charters are void *ab initio*. Yet one section of the bill dissolves them. How any force can be given to the bill to dissolve a corporation that never existed the undersigned cannot see. The sixteenth section is not content with the fact that the corporations had never had any existence, and, with the further fact that this law in terms dissolves them, requires the Attorney General to dissolve them over again. It seems to the undersigned that this legislation can only operate to throw into litigation a vast amount of property in which the Government of the United States has no interest, and claims none by this bill, and subject the beneficiaries in said trust and the equitable owners thereof to the cost and loss and vexation of such litigation without, profit to any one other than those participating in such litigation for the prosecution. It is questionable whether the United States can maintain a suit in a controversy in which it has no pecuniary interest whatever. It has been repeatedly held in the State of Massachusetts that the sovereign cannot intervene by its attorney-general in a litigation in which it has no pecuniary interest, and this is specially so where the attorney-general on three distinct occasions instituted proceedings with regard to church property.

In Attorney-General *v.* The Merrimac Manufacturing Company, 14 Gray, 602, it is stated:

> Public worship may mean the worship of God conducted and observed under public authority, or it may mean worship in an open or public place, without privacy or concealment; or it may mean the performance of religious exercises under a provision for, or equal right in, the whole public to participate in its benefits; or it may be used in contradistinction to worship in the family or in the closet. In this country what is called public worship is commonly conducted by voluntary societies, constituted according to their own notions of ecclesiastical authority and ritual propriety, opening their places of worship, and admitting to their religious service such persons and upon such terms and subject to such regulations as they may choose to designate and establish. A church absolutely belonging to the public, and in which all persons without restriction have equal rights, such as the public enjoy in highways or public landings, is certainly a very rare institution, if such a thing can be found. Religious charities of various denominations, incorporated by special acts of the legislature or under general laws, or, as is often the case, consisting simply of a company of persons associated together without any corporate capacity, and holding their property through the intervention of trustees, erect buildings and places of worship, consecrate them with religious ceremony, and make provisions in them for the due observance of sacraments and ordinances. * * * It has certainly been held in this Commonwealth, and we do not know that it was ever suggested that the power of disposing of the property or of changing the use to which it should be applied did not remain as absolute and unquestioned as in the case of any other real property.

The above case grew out of an attempt on the part of the State of Massachusetts, through her attorney-general, to interfere in the matter of church business, and resulted in declaring that the State had nothing to do with the matter, and had no standing in court to interfere with the trust in any manner.

In the case of Attorney-General *v.* Proprietors of Meeting House on Federal Street, Boston, reported in 3 Gray, pp. 48 and 49, a similar question was raised and decided:

> The court is unable to perceive in this transaction any characteristics of a charitable foundation to be vindicated by the public through the attorney-general on the ground that those who ought to reap the benefit of it are incapable of vindicating their own rights. * * The court says at page 49 it is quite definite and certain who are the persons beneficially interested in such use, and they only could claim its execution in a court of justice or elsewhere.

A charity which may be controlled by the Government must be a public charity, as is said in 2 Parry on Trusts, sec. 710:

> Consequently a trust to establish a school which is not free, but the benefits of which are confined to particular individuals who are named in the will, is not a charitable trust and will not be regulated by the courts.

Sec. 732, 2 Parry on Trusts, declares:

> Where a gift is not a public charity, but to a school that is not free and open to the general public, the attorney-general cannot maintain an information or bill. So if there is a gift or dedication of land for a church or meeting house to be owned by the church, parish, society, or by pew-holders who had vested rights and can sue, the attorney-general cannot sue in his official capacity, unless the gift is so public and indefinite that no individuals or corporation had the right to come into court for redress. Suits to regulate such trusts must be brought by the parties interested. The church edifices of this country stand in a peculiar position. They are not free, open churches, as those words are used in describing a public charity. They are owned by societies, parishes, churches, trustees or pew-holders, and can be controlled by those bodies as corporations or quasi corporations, and directed to such use as they see fit. For these reasons the funds given or contributed to build these edifices and keep them in repair are not funds given for public charitable uses in the legal sense.

We submit that Congress has reached the limit of its authority when by law it repeals the act of incorporation. Property belonging to a corporation, the legal title of which was in the corporation, is the property of certain beneficiaries for whose exclusive benefit the corporation held it, and the United States cannot intrude itself into a controversy in which it is not interested, nor can it be authorized to take charge of a legal controversy between private parties. To the extent that it may litigate the interests of individuals, to that extent it deprives individuals of the right to litigate for themselves, and to that extent is a usurpation of power.

Section 18 deprives persons creating a religious trust for private purposes of the power to appoint trustees and manage such private trusts, and submits the appointment of such trustees to a court. This section should certainly be modified so as to permit the beneficiaries to name to the court the trustees they desire to have appointed.

The scope and purpose of other sections of the bill overthrow the right of self-government in the Territory of Utah, and make a special government for that Territory. This special action of Congress in suspending the right of local self-government can only be justified, if justified at all, because there are some twenty-five hundred male persons in the Territory, out of a population of a hundred and eighty thousand, who in times past have committed polygamy. A different government is to be given to the Territory of Utah from that which prevails in all other Territories of the Union because of this fact. We submit that the right of local self-government is of great sanctity to the people, and its suspension or overthrow is not justified because a few people in a given Territory violate the law.

Section 25 deprives all persons of the right to register and the right to vote who do not swear that they are not polygamists or associates of polygamists, or do not unlawfully cohabit. No such law is in existence anywhere else within the territory of the United States. If this provision be constitutional, is it wise? Is it sound policy to require a person to swear, before he can exercise the right of franchise, which has heretofore been assumed one of the most valuable privileges of a citizen, that he is not an associate of a polygamist? This oath will operate as the undersigned believe, to exclude persons who have committed no criminal act against the laws of the United States. It leaves open for construction what is meant by an associate of a polygamist, and furnishes apparent authority to a corrupt returning board to exclude every person who belongs to the Mormon Church from the right to vote. If this is the design and object of this bill it should be candidly and openly stated and not left in obscurity.

If it is not the purpose and object of the bill to exclude all those who belong to the Mormon Church from the right to vote then it has no place in the bill, and those only should be excluded who are legally responsible for acts forbidden by law to be done. If this bill operates to exclude persons from the right to vote because they sympathize with parties who have violated the law, or because they mentally approve of polygamy, then the law is extending its punishment and force into the dominion of feeling as distinguished from the dominion of conduct, and is condemned by every principle of our jurisprudence. No one can be lawfully punished or excluded from any political privilege in this country for his religious or other associations.

The law of 1882, as it now stands, punishes every phase and aspect of bigamy, polygamy, and unlawful cohabitation with penalties which outstrip in severity those imposed upon any similar violators of the law in any part of the Union. The law as it is now construed does not permit the father of an illegitimate child or the husband of an unlawful marriage to support the child or wife, but makes such support sufficient evidence of unlawful cohabitation on the part of the husband. Such persons are now excluded from the right to vote, sit upon a jury, or hold office. The corporations which are dealt with in this bill are declared by the bill itself to be unlawful, and by the report of a majority of the committee to have no legal existence whatever. The United States has no interest in any property of any kind belonging to any of these corporations. Why oppressive proceedings should be begun that will result in waste and destruction of private property in which the Government has no interest the undersigned cannot see. Why criminal punishment shall be extended to conduct never before in the history of the Government made criminal is inexplicable. There is no evidence before the committee that the administration of the law as it now is is impeded in any way whatever. It is established before the committee that the law is being executed and enforced against the persons denounced by law, and, in the opinion of the undersigned, the law as it now stands is sufficient, if criminal punishment can accomplish it, to remedy the evils of polygamy complained of in Utah.

R. T. BENNETT,
PATRICK A. COLLINS.

CORRESPONDENCE.

THE FROZEN NORTH.

Time Profitably Spent—Painful Accident, Etc.

LAKETOWN, Rich County,
Nov. 27, 1886.

Editor Deseret News:

The seeming disadvantage of our rigorous winters is very greatly offset by the fact that, while the frost and the snow is with us, much intellectual and spiritual labor is performed. Our summers are so short that Sabbaths are about the only days we can, in any satisfactory degree, seek the Bread of Life. The six days are used, long and hard, in struggling for the bread which perisheth; but, during our winters, we have a great deal of time which we may, if so disposed, use in the culture of our minds in useful knowledge.

This winter has opened well in the way of profitable instruction. President Wm. Budge and some other leading Elders have just completed a missionary tour through the various wards of the Stake. They visited and held meeting with us on Monday night last. Our meeting house was densely crowded at the appointed hour. The discourses delivered were grand in their old-time gospel simplicity, and there was a power manifest that must have penetrated the inmost recess of every heart. Never in the history of our ward have we enjoyed better or more richly and divinely-inspired teachings. The party completed its labors by holding forth in Woodruff and Randolph on Tuesday and Wednesday. Judging from our experience, it is safe to say that the labors of these men of God will be greatly appreciated throughout our snow-bound valleys.

Our first ball for the season, held Friday night, was well attended, and a good social time was the result.