The Deseret Weekly.

PUBLISHED BY

THE DESERET NEWS COMPANY,

SALT LAKE CITY, UTAH.

SUBSCRIPTION RATES

Per Year, of Fifty-two Numbers, - - - $2.50.
Per Volume, of Twenty-six Numbers, - - 1.50.
IN ADVANCE.

CHARLES W. PENROSE, - - - EDITOR.

Saturday, - - - March 8, 1890.

A MOST ASTONISHING "OPINION."

WE publish today the full text of the opinion of the Supreme Court of the United States in relation to the Idaho Test Oath case. We were surprised when the purport of the decision reached us by press dispatch. We are much more surprised after reading the opinion of the Court. Our astonishment is twofold: First, that the Court did not seize upon points that might have been taken, which would have been at least plausible; and, second, that they have entirely avoided and utterly ignored the question on which the whole case turns.

That question was not whether a person who breaks the law in relation to polygamy and polygamous practices, or who aids and abets, counsels or advises its violation, may be disfranchised. No such hypothesis was presented to the court. And yet this is made the basis of the whole argument indulged in by the court.

Their citations from the decisions in the Reynolds and Murphy cases have little or no bearing upon the issue in this case. They relate to the *practice* of polygamy. But incidentally they touch on the question of belief and the freedom of opinion, and, so far as they are relevant to the present question, they are dead against the conclusion which the Court has reached. They declare that it is only overt acts against peace and good order that can be touched by legislation, and that liberty of faith and worship are secured to all religionists by the Constitution and the institutions of this republic.

The appellant in this case was not a bigamist or polygamist, and he did not aid or abet, counsel or advise anyone to commit an offense against the laws. He was simply a member of a Church some other members of which, it is claimed, were polygamists and did aid and abet the practice of polygamy. The question was, whether he could be punished or deprived of any political rights or privileges because of the overt acts of other people, when it could not be shown, and was not even claimed or pretended, that he had committed any such overt act himself. This question the Court has not even alluded to.

The decision, then, is not a decision of the matter in litigation, except that the Court says the test oath law is not in violation of the Constitution, and yet in giving their reasons for arriving at this conclusion, they are silent upon the facts and arguments which demonstrated its unconstitutionality.

And this is not all. The Court misstates the claim of counsel for the appellant and goes so far as to put language into their mouths which is the exact opposite of their words. For instance the Court says:

"It is assumed by counsel of the petitioner that because no mode of worship can be established or religious tenets enforced in this country, therefore any form of worship may be followed and any tenets, however destructive of society, may be held and advocated, if asserted to be a part of the religious doctrines of those advocating and practicing them. But nothing is further from the truth. Whilst legislation for the establishment of a religion is forbidden, and its free exercise permitted, it does not follow that everything which may be so called can be tolerated. Crime is not the less odious because sanctioned by what any particular sect may designate as religion."

That counsel for the defendant did *not* "assume" this, may be readily seen from the following extract from their brief, p. 38:

"From the foregoing it conclusively appears that a man may entertain any religious opinion, belief, faith, or sentiment he chooses, and there is no civil power or authority that can in any way, directly or indirectly, restrain or interfere with that opinion, nor deprive him of any of the rights or privileges of citizenship because thereof.

"It is equally clear that he may, in the free exercise of his religion,' worship 'according to the dictates of his conscience,' and perform such 'acts,' and engage in such 'practices' as he may deem 'most acceptable to his Creator,' *provided he commits no criminal offense.* It is only when he has done an act that the law has declared to be criminal that he can be punished or deprived of any right common to his fellow-citizens, and then he is not punished, or thus deprived, because of his opinion but because of the commission of the act which has been forbidden by law.

It is not a crime, and in this country cannot be made a crime, to belong to any particular church, and this, as we shall hereafter see, even though it teach bigamy and polygamy. No legislative authority has ever attempted to make such a law. The full extent to which a statute might go would be to punish the act of bigamy or polygamy when committed.

The appellant, in "the free exercise of religion," was entitled to his membership in the Mormon Church. He had committed no act forbidden by law. *Therefore the provisions of the Idaho statute disfranchising and debarring him from office are unconstitutional and void.*

We state, without the slightest hesitation, that this position of the learned counsel is impregnable. It cannot be overturned by law or logic. The only thing the Court could do against it was to misunderstand or misrepresent it, and that they have done one or the other is palpable. They say counsel for the defendant have assumed that any form of worship may be followed, however destructive of society, if asserted to be part of religious doctrine; while counsel actually say that a man may worship according to the dictates of conscience, *provided he commits no criminal act*, and that he may be punished and deprived of rights common to his fellow citizens for an act which has been forbidden by law!

The case of the appellant is thus stated by his counsel in their brief, p. 11:

"It is not denied, and consequently is admitted, that he had the qualifications of citizenship, age and residence; he was not under the disability of any conviction for treason, felony, or bribery; he was not registered or entitled to vote at any other place; he was not a bigamist or polygamist; he did not, and would not, publicly or privately, or in any manner whatever, teach, advise, counsel, or encourage any person to commit bigamy or polygamy, nor any other crime, and *he regarded the Constitution and laws, as interpreted by the courts, as the supreme law of the land, any teachings of the Church to the contrary notwithstanding.*"

It is clear from this that the appellant had committed no overt act against the law, nor aided nor advised others to do so, and, further, that he had sworn he would not. And yet the whole argument of the Court to excuse their decision is directed against the *practice* of polygamy, the *carrying into effect* of doctrines and tenets which are opposed to the criminal laws of the country, as though the appellant had been found guilty of this offense.

In commenting upon the test oath, the Court says:

"With the exception of persons under guardianship or of unsound mind it simply excludes from the privilege of voting, or of holding any office of honor, trust or profit, those who have been convicted of certain offenses, and those who advocate a practical resistance to the laws of the Territory and justify and approve the commission of crimes forbidden by it."

This is perfectly astounding. The objection to the test oath is not founded upon anything thus expressed by the court, but upon the exclusion from the privilege of voting and holding office of citizens who have neither been convicted of those offenses nor have commit-