116 U. S., and in Snow's case, 120 U. S., that sexual intercourse was not an indispensable element of unlawful cohabitation; but it did not say, nor has any court said that when sexual intercourse takes place between the parties, during the continuance of an unlawful cohabitation, such intercourse does not form part of the cohabitation. On the contrary, while proof that it did not occur during the cohabitation is no defense to the charge, yet proof that it did occur is one of the highest evidences of the unlawful cohabitation and is admitted as such against the accused. This is the invariable rule in the Utah courts.

This court has said that "the offense of cohabiting with more than one woman * * * may be committed by the man by living in the same house with two women whom he had theretofore acknowledged as his wives, and eating at their respective tables, and holding them out to the world by his language or conduct, or both, as his wives, though he may not occupy the same bed or sleep in the same room with them, or either of them, or have sexual intercourse with either of them. The offense of cohabitation, in the sense of this statute, is committed if there is a living or dwelling together as husband and wife. This is inherently, a continuous offense, having duration; and not an offense consisting of an isolated act."

While this court has said that the foregoing state of facts constitutes unlawful cohabitation, it has not said that such cohabitation might not exist on some other state of facts, nor has it said that any of the acts enumerated are indispensibly necessary to constitute the offense of unlawful cohabitation. Residence in the same household is not a necessary element; nor is the introduction of the plural wife by the defendant, nor eating at the same table, nor the multitude of other evidences of the relation, necessary elements, but they are all acts going to prove the unlawful relationship and conduct, and forming a part of it. No one nor any number, nor any particular kind of acts are necessary elements in the sense of being of the essence of the crime; it is only necessary to show a sufficient number of a certain character of acts to make out the offense. It is one of the peculiarities of a continuing offense of this character that no matter how few, nor how many, nor how long continued the distinguishing acts of the offense, they form but a single indivisible offense. To live in the same house with the plural wife outwardly occupying the relation of husband and wife, is sufficient to constitute the offense. If the parties occupy the same bed, this but adds another fact to the proof. It does not make another crime.

In the language of this court, the offense of unlawful cohabitation is committed if there is "a living or dwelling together as husband and wife." Every act or fact that goes to make up such living or dwelling together, whether it be living in the same house, or eating at the same table, or holding the women out as wives, or occupying the same beds with them, or any other act that goes to make up the cohabitation, constitutes a part of the transaction. If a state of facts exists which constitutes this offense, the gravity of the offense is not increased by any other additional fact included in it. If the parties have lived and dwelt together as husband and wife without sexual intercourse, an offense has been committed; if they have had sexual intercourse during such living or dwelling together, it was by virtue of this relationship or claim of marriage, and it becomes a part of the transaction of cohabitation. It does not change the character of the offense, because it was as much unlawful cohabitation without as with the element of sexual intercourse, but if that fact exists, it becomes a part of, and so involved in the cohabitation that the government is barred from prosecuting for the cohabitation and afterwards maintaining a separate prosecution for that element. And this view is in harmony with the authorities.

The keeping of a disorderly house during the entire period of time prior to the finding of the indictment, as in the case of unlawful cohabitation, is a single, continuous offense, incapable of division into separate crimes—made up it may be of many acts extending over many days, but connected by the thread of continued and unbroken action into a single and undivided whole. A conviction as a common seller of liquor is a conclusive bar to all complaints for sales prior to commencing the action on which the conviction was had.

The same principle applies to this case. The defendant has been convicted—not for a single act, nor for a series of acts—his offense consists not of a single act nor of a series of acts—but of a general and systematic course of conduct, a mode of life, a habit, if you please; and he having been convicted of such mode of life or habit, has been convicted of every act which goes to make up or form a part of that mode of life or habit, and he cannot again be punished for one of those acts, without an arbitrary disregard of the rule that no man shall be twice punished for the same offense.

Inasmuch as it was incompetent for the grand jury to divide up the continuous transaction and present more than one indictment for unlawful cohabitation, it was also incompetent and illegal for them to present one indictment for unlawful cohabitation, covering a portion of the transaction, and then select an isolated act comprising another part of the transaction, and indict for it under the name of adultery. It is another attempt to do what this court said in the Snow case could not be done, punish a person more than once, for a continuous and indivisible offense.

Counsel insists that these charges must be separate and distinct offenses, because "there is no period of time that is common in the two indictments," and, because, under the Massachusetts rule, no evidence is admissable tending to show that a continuous offense was committed "at any other time than upon the day named." This is not the rule in Utah. The evidence is not confined to the time laid in the indictment, but if it were the contention would not be sound. In considering this case the court must take the whole record, and construe the indictments with reference to the plea of former conviction, interposed on the second trial. When this is done, it appears, as has already been shown, that the act of sexual intercourse, which constitutes the alleged adultery, was committed during the continuance of the cohabitation and formed a part of it. This being so, and but one continuous offense having been committed prior to the finding of the indictment, it was not within the power of the prosecution, by arbitrarily fixing the dates in each indictment, upon which the acts complained of were committed, to thereby multiply the offenses.

This is very clearly illustrated by the case of State v. Egglisht (41 Iowa, 574) where several indictments were found by the same grand jury against the appellant for uttering and publishing forged checks, and others for forgery. After conviction upon one of these indictments the appellant was put on trial for another. He pleaded the former conviction, which was overruled by the trial court. The Supreme Court sustained the plea, and said:

"Whether certain criminal acts constitute one crime or more, must depend upon the nature and circumstances of the acts themselves. When the defendant uttered, at the Davenport National Bank, four forged checks, the character of his act became fixed. He either committed one crime or he committed four. It is not competent for the State, at its election, by the form of the indictment, to give to the defendant's act the quality of one crime or of four, at pleasure. The act partakes wholly of the one character or wholly of the other. * * *

"It is urged by the appellee that if the State had failed to prove the forgery of the check described in the first indictment tried there would have been an acquittal, and that it is a dangerous rule to allow such acquittal to be pleaded in bar to a subsequent prosecution for uttering another check, since it would thereby be placed in the power of the defendant to secure a trial upon the indictment under which he knows no conviction could be had, and then plead the judgment of acquittal as a bar to the other indictments. But the State can and should prevent the happening of any such contingency, by charging the uttering of all the checks offered at the same time, in one indictment and as but one offense. When this is done, the proof that any one of the checks was known to be forgery will support the indictment."

So we say in this case that the prosecution should have charged a continuous cohabitation from October 15th, 1885, to September 27th, 1888, but having carved out an of-