DESERET NEWS:
WEEKLY.

TRUTH AND LIBERTY.

PRINTED AND PUBLISHED BY THE
DESERET NEWS COMPANY.

CHARLES W. PENROSE, EDITOR.

WEDNESDAY - MAY 6, 1885

THE NEW DEPARTURE OF THE PROSECUTION.

WERE it not for the serious character of the questions involved in the performances in progress in the Third District Court, some of their features would be intensely comical. They are at least entirely devoid of dignity or consistency. The District Attorney and his assistant, Mr. C. S. Varian, have turned a back-hand legal summersault and are urging Judge Zane to show his agility by performing the same feat judicially.

Reduced to a few words, the prosecution, in the case of Mr. Angus M. Cannon, take the ground that if a man dwells in the same habitation with two or more women whom he acknowledges to be his wives, he is guilty of unlawful cohabitation, as defined by the Edmunds act, even if no sexual commerce has occurred. This is an entire change of base from that formerly maintained by Messrs. Dickson and Varian, who, in proceedings in former cases went to extraordinary, and even grossly indecent lengths for the purpose of obtaining the very class of evidence they now assert is entirely immaterial. In one instance the District Attorney asked a plural wife whether she had ever practically lived in that relationship with her husband. Not being satisfied with a direct answer to that question he asked the same witness whether she had ever had sexual intercourse with her husband. A witness in another case was asked whether or not she knew that Maggie Naismith, an alleged plural wife, was a "pregnant woman." But the instances of this kind are too numerous to mention, in connection with prosecutions under the present crusade against the "Mormons." Indeed, heretofore the procuring of that kind of evidence now asserted by the prosecution to be non-essential, was formerly the leading object in cases in which the charge is similar to that involved in the cause now on trial before the Court

Mr. Kirkpatrick, in his able argument on the point, in behalf of the defense, in the citation of authoritles sustaining the position he assumed very appropriately referred to an opinion formerly expressed by His Honor on the bench. At first Judge Zane intimated that it was possible the attorney addressing the Court was somewhat mistaken regarding his words, said to have been delivered in his charge to the jury in the Rudger Clawson case. It is to be hoped that the Judge's intimation of this probable error on the part of the attorney was not an outgrowth of a devout wish. But the matter was settled near the close of the gentleman's remarks by the quoting of the exact words of the charge, so far as related to the point under discussion. Here they are:

"The court charges you that cohabitation, in a legal sense, as applied in this case, means the living together of a man and woman as husband and wife, or *under such circumstances as induces a reasonable belief of the practice of sexual intercourse.*"

But the Court has furnished more evidence than this in the same direction. There are other barriers upon which Judge Zane would be liable to break his back were he to attempt the judicial acrobatic feat the District Attorney would like him to perform. Mr. Dickson has shown the court a striking official example in that line, but it would be rash indeed to conclude in advance that the Judge will "follow the lead." It will now be appropriate to quote the remarks of Judge Zane, in the case of Orson P. Arnold, which were as follows:

"Mr. Arnold, the laws of the United States provide 'that if any male person in a Territory or other place over which the United States have exclusive jurisdiction, hereafter cohabits with more than one woman, he shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by a fine of not more than three hundred dollars, or by imprisonment for not more than six months, or by both said punishments, in the discretion of the court." This law affords the court a discretion of imposing a penalty of a fine of not more than three hundred dollars or imprisoning you for a period of six months, or by both fine and imprisonment. The maximum punishment, in view of the punishment imposed for polygamy, which is imprisonment not exceeding five years and fine not to exceed five hundred dollars, seems to be rather light. Polygamy is treating more than one woman as a man's wives according to the forms of marriage, and *unlawful cohabitation is treating more than one woman as a man's wives without going through these forms.* There does not appear to be so much difference in the substance of the offenses, except that *polygamy adds to the crime, the tendency to bring marriage into contempt* and to treat it as an idle ceremony, by placing an unlawful marriage or an unlawful ceremony of marriage on the same footing as a lawful one."

If the language of the charge to the jury in the Clawson case left any loophole for doubt as to His Honor's definition of unlawful cohabitation—with special reference to its scope—the foregoing would be sufficient to close up any gap of that kind. Polygamy is the entering into the relationship, by ceremony, of plural marriage. "Polygamy," says the court, "adds to the crime" of unlawful cohabitation. The conclusion is therefore inevitable that, according to that definition, unlawful cohabitation can be committed without the ingredient of a ceremony of marriage or any admission of or claim to the existence of that relationship.

Several leading attorneys who heard the judge's remarks in the Arnold case, as quoted above, expressed an unqualified opinion at the time that the unlawful cohabitation clause of the Edmunds act would be defined by him, if the question was brought squarely before him, as of general and not special application. They maintained that he had clearly indicated what his ruling would be in that event. We are not now bringing up this fact for the first time, this journal having treated upon Judge Zane's remarks relating to it, in an article which appeared on the 20th inst., under the head of "General and Not Special in Application." The Court now has the opportunity of ruling consistently with its own expressed views and the law of Congress.

It will be seen by the account of this morning's court proceedings that Mr. Dickson re-asserted the new ground assumed by the prosecution, and made some of the most extraordinary statements ever uttered in a court of law and presumed justice. He cast aside with undisguised abandon all claim that the anti-"Mormon" crusade is in the interest of genuine sexual morality. The drift of his expressions would naturally lead those who examine his views to the conclusion that, from his standnoint, it necessarily takes an exactly opposite direction.

We are now enabled to state that Judge Zane performed the somersault desired by the prosecution.

THE ANTI-"MORMON" PLOT THICKENS.

THE most rabid anti-"Mormon" would scarcely have the temerity to call the proceedings in the Third District Court, concluded yesterday, in the case of President Angus M. Cannon, a trial. They were solely a prosecution. Not a particle of evidence was admitted for the defense. Every attempt to present defensive facts was met by an objection, sustained by the Court, from the counsel for the government.

The parody on public justice enacted yesterday has necessarily brought the court into such popular contempt that expressions are being made to the effect that "Mormons" who are accused under the law may just as well make up their minds to relinquish any attempt at a legal defense against the villainies that are being perpetrated. Conviction is a foregone conclusion in every case, it is urged, and why go to the trouble of making any legal resistance? While forced to admit the farcical character of the judicial proceedings under consideration, we decidedly differ from any idea tending to the adoption of a supine policy. The encroachments of tyranny should and must be resisted to the utmost extremity. The reasons for this position are numerous and strong.

If there were no other motive for intelligent resistance, the necessity to force the crusaders to show their utter inconsistency should inspire it. Conviction in every case being the objective point sought by the prosecution and Court, the latter, by the way, forming a prominent part of the former, they have already shown with what unscrupulous facility they can change bases and rulings to suit different cases. They operate with such a total absence of principle that, in order to convict, they will to-morrow go directly in the face of precedents established by themselves to-day. A short time since sexual commerce was by them made an indispensable element in making out a case of unlawful cohabitation. Chameleon-like, their color of yesterday was utterly varied from that exhibited to-day. Sexual intercourse is immaterial in such cases now. It is only necessary to show that a man has acknowledged more than one woman as his wives. What the next fluctuation or variation may be remains to be seen.

If no trouble is taken for defense, these outrageous inconsistencies, which will yet bring those who resort to them into irretrievable shame and disgrace, will not be exhibited. It is by interposing defensive tactics that they are brought out and developed, and the villainous legal and judicial contortionists are manifested in their unprincipled nakedness by their own inexcusable perversions.

There may be cases where the evidence is such that no new developments would ensue in consequence of legal resistance, or an attempt at it. In such instances this idea of folding the arms supinely and accepting inactively the foregone conclusion of conviction may be consistent. But there are doubtless others in which the only class of evidence possessed by the prosecution is of a character repudiated by the infamous rulings of yesterday. In them a legal defense should be made, without doubt. In an instance of that nature it would be necessary, under the policy of the crusade of "conviction in any event," for the prosecution to maintain, with its usual unblushing effrontery, that proof of sexual intercourse is all that is needful to establish a case of cohabitation, and for the court, with its usual yielding to the "counsel for the government," to so decide judicially. And thus would the anti-"Mormon" judicial machinery flop over to its former position, and when a case of another character arises make another exhibition of vacillation, always leaping toward the point of conviction. There are numerous developments in cases which would force the anti-"Mormon" legal crusaders into a course of perpetual oscillation, rendering necessary a species of compulsory change of base that would be a spectacle to behold in this enlightened age.

The decisions of yesterday constituted a judicial monstrosity of peculiar contour and proportions. The defendant was convicted without trial, the result being reached by a purely prosecutive or, more aptly still, persecutive process. The maximum penalty of the law under which the conviction was obtained is imprisonment for six months and a fine of $300. According to the rulings of yesterday it would simply be imprisonment for life, with a short vacation between each half year, providing the convicted individual should, after emerging from prison have the temerity to visit his wives and partake of a meal with them. The cruelty of such procedure is further exhibited by the fact that, although yesterday's rulings defined such to be the intent of the law, no method as to how a person could evade the punishment by living within the law was prescribed. The terrors of the law were exhibited with probably a hundred fold more intensity than it was ever intended to possess, but no pretention was made to give a definition of what constituted living within the statute.

According to the interpretation given the decision of the Supreme Court of the United States by the Utah Commission, in the election cases against themselves taken up on appeal, the definition of what constitutes cohabitation given by the District Court yesterday is erroneous. The Commission formerly stretched the law in order to exclude "Mormon" cohabiters only from voting. To effect this they inserted in the notorious test oath the words "I have not lived or cohabited with more than one woman *in the marriage relation.*" The italicised words were inserted for the protection of the libertine, adulterer and whoremonger. This bulwark of the corruptionist was, however, in their opinion, evidently demolished by the decree of the Court of Last Resort, and in the recent circular to the registration officers, the phrase "in the marriage relation" was eliminated, thus indicating that the Edmunds Act, as defined by the decision, was intended to exclude from the privilege of the franchise non-"Mormon" as well as "Mormon" cohabiters with "more than one woman." At least, that seems to be the understanding of the Commission, since they received the new light on the subject, else why was the peculiar phrase inserted in the first place and eliminated now?

The situation is getting no better very fast, and presents, on the part of the crusaders, a mass of contradictions and incongruities, mingled with malignity, that is pitiful to behold.

LOCAL NEWS.

FROM WEDNESDAY'S DAILY, APR. 29

Sentence and Dismissal.—At the opening of Court this morning there was another large attendance. John R. Gillespie, convicted of grand larceny, was sentenced to one year's imprisonment in the penitentiary. The other case against Gillespie, for assault with a deadly weapon, was dismissed, on motion of the prosecution, owing to the evidence being insufficient to secure a conviction; as was also the case against Meyers, indicted for a similar offense, because two principal witnesses had left the Territory.

James C. Hamilton Arrested.—Bishop James C. Hamilton, of Mill Creek Ward, was arrested this morning at his home by Deputy Marshals Vandercook and Sprague, on a complaint sworn out by E. A. Ireland, and dated April 28, 1885.

The complaint alleges that the accused lawfully married and took to wife one Belle Hill prior to August 1, 1884, and that on the date mentioned he unlawfully married one Mary Belle White, and has since, at divers times and continuously lived and cohabited with more than one woman, viz: one Belle Hamilton and one Mary Bell White, contrary to the statutes of the United States in such case made and provided.

The accused appeared before Commissioner McKay to-day, waived examination and was placed under $2,500 bonds, John A. Hill and Thomas H. Nott becoming his sureties.

John A. Hill, George M. White, Isabella H. Hamilton, Margaret A. White and Mary B. White were subpœnaed as witnesses and placed under $200 bonds each.

The Immigrants.—The company of immigrants who arrived in this city yesterday afternoon are now scattered out in various parts of the Territory, many of them having taken this morning's train for the south. Though it was not known in this city until yesterday forenoon when they would arrive, many friends were on hand to greet the new comers, and extend to them the hospitality they needed after their somewhat tiresome journey. All things considered, the journey was a prosperous one, only one accident having occurred to mar its pleasure. An old gentleman by the name of D. Parnham had a fall while on shipboard, resulting in the fracture of his collar bone. He is, however, getting along quite favorably and will probably soon be well.

The most courteous treatment was extended to the company by the ship's officers and railway officials while they were *en route*, for which Brother Lund, who came in charge, desires us to express his gratitude.

Home Again.—We received a pleasant call this morning from Elder Louis P. Lund, who had charge of the company of immigrants that arrived yesterday, and were glad to welcome him home again.

He left here on the 10th of April, 1883, for a mission to England, and on his arrival in Liverpool was assigned to the London Conference. For the first four months he labored in the Bedfordshire and Hertfordshire district, as a traveling Elder, and subsequently in the same capacity for ten months in the North London Branch, during which time he was quite successful in proselyting, and baptized thirty-two persons. He was then called upon to succeed Elder Nye in the presidency of the London Conference, which office he continued to fill until released to return home. He greatly enjoyed his missionary labors, and values the experience he has gained abroad; and, though he did not so express himself, we doubt not that he is glad to be home again.

TRIAL OF ANGUS M. CANNON.

WHAT CONSTITUTES COHABITATION.

In continuing his argument yesterday afternoon, Judge Sutherland maintained that cohabitation was an entirety, and all the conditions should be testified to before the jury. The prosecution had raised the question of the definition of cohabitation prematurely, he thought, but the defense were ready for the discussion. His friend on the other side had argued that the Edmunds act was not in behalf of general decency, but only against a certain class who practiced polygamy. If this claim was correct, the indictment had failed to charge the polygamous relations of the defendant. The word "cohabit" should be given its best known and understood meaning. He had searched in vain in Webster's dictionary for the definition of "cohabit" given by his friend on the prosecution. It was not in the book; it must be a misprint. (Mr. Varian admitted that the definition given was not in Webster's). That authority said cohabit meant to dwell with; to inhabit or reside in the same place or country. This was one definition, and under this it would be absurd to say that a man was guilty of unlawful cohabitation because he lived in the same country as a woman not his lawful wife. Now-a-days, in some houses, two persons could reside for years, and not become acquainted with each other. Another definition of cohabit was to live together as husband and wife.

The law of Congress was not against sexual vice. It was a plurality of women that constituted the offense. A man could dwell innocently in the same house with two women, and not be liable for unlawful cohabitation. The law said "male," and made no reference to age, yet a male of certain age could occupy the same bed with two women without crime. It was when an adult male dwelt with two women, and intercourse followed, that made him liable to the law, which did not punish for opportunities; but for the intimacy usual to husbands and wives. The Edmunds act was an anti-polygamy law intended to correct the practices of a community. It was intended to prevent polygamous marriages, and the continuance of polygamous relations. The Court, in deciding this question, should consider the past history of Utah, and take notice of the political and social condition of the people. Plural marriage was believed to be a divine institution by a large proportion of the population of this Territory. There was among this people a zeal akin to ambition to rear large families. The Edmunds act had been passed, in answer to the voice of a class in this Territory, re-echoed by the nation at large, for the suppression of this practice, and intended that no more children should be born in polygamy. It was to maintain monogamous marriage and to curtail the discursive exercise of the procreative faculty. The people whom was the act intended to reach cohabited for the purpose of begetting children, and "By their fruits shall ye know them." It was this that was sought to be prohibited. Cohabitation referred to, and was, the intimacy existing between husband and wife. Parties married for that intimacy and the rearing of children, not for what the prosecution termed "matrimonial cohabitation," and it required sexual intercourse to complete legal cohabitation. Without this the definition was too loose, and extended from dwelling in the same country to living in the intimacy of husband and wife. This last condition had been described as marital cohabitation, and the prosecution would not claim a distinction between this and matrimonial cohabitation, or living in the same house.

In view of the purpose of the law, the meaning claimed by the defense was undoubtedly that of Congress in passing the enactment, as evinced in the Supreme Court decision. The prosecution had contended that a man must divorce himself from his wives, to "flee from the wrath to come"—he could not live in the same house, or eat at the same table with them. But the law only subjected to punishment those who cohabit, not those who visit, support and associate with their plural wives. The statute should have a reasonable construction. Men are not to be compelled to throw aside their families, but should obey the law and cease sexual intercourse—cohabitation. If the fathers of polygamous children were not to be shut out from their families, the defense would show that the accused had lived within the law. If the prosecution maintained their claim, the law would be in contravention of the Constitution, being *ex post facto* and a bill of attainder.

Judge Kirkpatrick, for the defense, said the construction put upon the word "cohabitation" by the defendant, if it was reasonable and the common definition, and as such was complied with by him, should be considered. Congress knew that multitudes of children had been born in this order, and had legitimatized those children, and it could not be the purpose of the act to deprive these innocent, legitimate children of their natural protector, and of his social communion and support. The prosecution objected to as inadmissible any testimony to show there was no sexual intercourse. The question was, What was the meaning of cohabitation, now and when the act passed? and not at some former day. The etymology of a word was no guide. The meaning of words was often inverted by years of custom. The word in the living language of to-day included sexual intercourse.

But there was another authority beside those quoted for the interpretation of the word—a more weighty one, that of His Honor himself. This Court had construed this very word, in the Clawson case, in its charge to the jury, in the presence of the people the law was passed to govern, to mean "the living together of a man with a woman as husband and wife, or under such circumstances as induces a reasonable belief of the practice of sexual intercourse." This, then, was the proper meaning. If the defendant had adopted and acted upon *this* construction of the word, he could not be adjudged guilty and punished infamously therefor. The guilty mind was essential to criminal conduct. The intent was the essence of the crime. The man who acted in good faith was guiltless of wrong. The law was not so selfish as to refuse protection to such a man. The evidence therefore could not be excluded. Without it the court or jury could not render a just verdict in the case.

Court adjourned till 10 a.m. to-day.

At the opening of court this morning, there was another large attendance. After disposing of some regular business, the defense continued their argument on the admissability of the evidence asked for.

Arthur Brown said this question seemed to be the turning point of the case, as the prosecution, in their opening, admitted they could not prove sexual intercourse. Mr. Varian had argued that in cohabitation sexual intercourse was not necessary. Under this reasoning a man and woman could live in the most notorious, scandalous relations, and not be liable. But the defense claimed that to cohabit, in this statute, was not merely a living together in the house, but a something that had a moral sense, *i. e.*, cohabitation with copulation. The idea of living together as man and wife without the object of that union being consummated was an absurdity. The prosecution held that the law was to punish the act of holding before society more than one woman as a wife. This, then, would make a man liable, even though the parties lived separately, if he still admitted them as his wives. It would permit a man to live with half a dozen mistresses, and still be innocent of a crime against the law. Surely Congress did not mean this, and that only Mormons should be punished. It had been said that sexual sins were too insignificant for Congress to meddle with, and yet that body had treated unlawful cohabitation as an insignificant offense by the small punishment. If Congress intended anything but cohabitation, why didn't they say so? If the Mormons were to be punished for living in the same house as, or for neglect to get a divorce from or put away their wives, why didn't Congress declare that in the law? The English language was no pauper for words to express the direct meaning. Congress had not power to adjudicate upon relationships existing, for such a law would be *ex post facto*. They could not compel a man to turn his wife and family into the street, and had not tried to do so, but had forbid-