EVENING NEWS.

Published Daily, Sundays Excepted, AT FOUR O'CLOCK.

PRINTED AND PUBLISHED BY THE DESERET NEWS COMPANY.

CHARLES W. PENROSE, EDITOR.

Thursday - June 11, 1885

JUDGE SUTHERLAND'S ARGUMENT.

We surrender our editorial space to-day, and also necessarily leave out some interesting news items, to find space for the able argument of Judge Sutherland in the case of A. M. Cannon on appeal before the Supreme Court of the Territory. It will be found well worthy of perusal. In the language of one of the legal gentlemen who listened to its delivery, "It does not leave the Court from which the appeal is taken a leg to stand upon." The decision of the Supreme Court in this case is awaited with interest.

THE CANNON AND MUSSER CASES.

THE ARGUMENTS BEFORE THE SUPREME COURT.

The appeal on the motions for new trials in the cases of President A. M. Cannon and Elder A. M. Musser, came up for hearing before the Territorial Supreme Court this morning, Chief Justice Zane presiding, Associate Justices Powers and Boreman present. The defendants were also in court.

District Attorney Dickson objected to the hearing of the Musser case, because one or two points had been raised therein that were not involved in the Cannon case, and he was unprepared to proceed with the argument until next week.

Mr. Brown said that the particular point referred to was Mr. Varian's argument, and due notice had been given to the District Attorney. The defense had done everything in reason to have all prepared in time, and objected to the continuance as a great injustice.

The District Attorney insisted on having five days' notice; he was also very anxious to have Mr. Varian present at the time of hearing.

Mr. Brown then said he must insist on having the case set for Saturday, but Mr. Dickson stated that he could not be present on that day, and assented to a suggestion of Judge Kirkpatrick, that until Thursday, the 17th inst., be allowed the prosecution to file a brief in reply, if they so desired.

Judge Sutherland asked that there be no restriction as to the time of argument, and that he be allowed the whole of the morning session.

Mr. Dickson said that in that case he would desire to use this afternoon, as his family were going east in the morning, and he desired to accompany them to Ogden. This arrangement was accordingly made, and Judge Sutherland delivered his argument as follows:

I.

The indictment is bad for the reason that it does not state a case including all the elements of the offense defined in the third section of the Edmunds act.

We invoke the rule, which is settled beyond all controversy, that an indictment must allege all the facts necessary to fill every particular of the statutory or common law definition of the offense sought to be charged.

1 Am. Cr. L., Secs. 235, 238.
1 Bish. on Cr. Pr., Secs. 326, 336, 517, 521.
Bish. on St. Cr., Sec. 612, and note.
1 Arch. Cr. Pl. and Pr., 86 note.
State vs. McKenzie, 42 Me., 392.
Koster vs. People, 8 Mich., 431.
Enders vs. People, 20 Id., 233.
Palmer vs. People, 43 Id., 417.
Wood vs. People, 53 N. Y., 511.
People vs. Allen, 5 Denio, 79.
Brown vs. Commonwealth, 8 Mass., 65.

The rule is elementary, and it would be a waste of time to collect the cases which affirm it.

The section of the statute on which the indictment is founded provides, "That if any *male person* in a Territory, * * * hereafter cohabits with more than one woman, he shall be deemed guilty of a misdemeanor." The indictment states that the "Grand Jurors * * * find and present that *Angus M. Cannon* * on the first day of June, A. D. 1882, and on divers other days, and continuously between the said first day of June, A. D. 1882, and the first day of February, A. D. 1885, at the county of Salt Lake and Territory of Utah, did unlawfully cohabit with more than one woman, to wit: one Amanda Cannon, and Clara C. Mason, sometimes known as Clara C. Cannon, against the form of the statute of the said United States in such case made and provided. * * *"

Under the head first stated, we rely on two defects of the indictment.

1. It fails to allege or show that the defendant is a "*male person*."

The rule of pleading just adverted to requires that the indictment should allege that the defendant is "a male person," for in no other way could the statutory offense be fully stated.

Where the offense consists of an act done by a person of a particular description, the indictment must allege that the defendant is a person of that description.

People vs. Allen, 5 Denio, 79.
Ex parte Hedley, 31 Cal., 108.
Commonwealth vs. Libby, 11 Met., 64.
King vs. John, 3 M. and S., 548.

2. The indictment does not allege that the defendant put forth any pretense of marital relation to the women therein mentioned.

The third section denounces all cohabitation of a male person with more than one woman. To confine it to a cohabitation with them, under a claim of marriage, the court must interpolate words which the lawmaker has not inserted. This court has held that it is not competent so to interpret and change a statute.

Logan City vs. Buck, 3 Utah, 301, 306.
Leoni vs. Taylor, 20 Mich., 155.
Tynan vs. Walker, 35 Cal., 639, 645.

But the prosecution advocates this restrictive construction, and the charge of the court to the jury apparently adopted the same view, for otherwise holding out these women as wives would have been immaterial.

While we controvert the construction contended for by the prosecution, and insist that the section applies to all males who cohabit with a plurality of women, we contend that the indictment is not framed on that reading of the statute, which the court below seemed to adopt. It is fatally defective if that construction is the correct one. It does not state a case within section three if it refers only to matrimonial cohabitation.

It must contain allegations of fact filling every particular, in the description of the offense as defined by construction of the statute.

Bates vs. State, 31 Ind., 72.
Schmidt vs. State, 78 Id., 41.
Commonwealth vs. Slack, 19 Pick., 304.
Commonwealth vs. Bean, 11 Cush., 414.
Commonwealth vs. Stout, 7 B. Mon., 249.
The Mary Ann, 8 Wheat., 389.

This indictment should have alleged that the defendant cohabited with the women *as wives*.

II.

The court below erred in the rejection of evidence offered by the defendant as well as in instructions to the jury.

The indictment is founded on the 3rd section of the Edmunds Act. Under it cohabitation by a *male person* with more than one woman is an offense.

The words of the statute are very general and require construction. This is evident from the first reading. According to the letter of the statute, it being in the *present tense*, it is *ex post facto*; it thus purports to apply only to a cohabiting at the time the act passed, and was not even, for that reason, in its nature a legislative act. On elementary principles, to be such, it must not interfere with *past* or the *present*, but look wholly to the future.

Merrill vs. Sherborn 1 N. H. 204.

Secondly, it applies to all males without regard to age. Unless the word cohabit is properly interpreted a boy below the age of puberty, but old enough to be capable of criminal intents, might be held within the statute if he lived with his mother and sister.

Thirdly, if the act can have a future operation then the word "cohabit" is made to mean *shall cohabit*; then association in successive periods in lawful matrimony with two women would be within the letter of the statute. Fourthly, if the court applies the latitudinary popular definition to cohabit, nearly every male in the country has been guilty every day since the act was passed.

It is a rule of construction that where the words of a statute are general it is the duty of the court to so interpret and apply them that the statute shall not lead to unjust or absurd consequences. U. S. vs. Kirby 1 Wall 486-7 Alvord vs. Lent 23 Mich 271-2. There can be no doubt that the law was intended to be solely *prospective*. It is equally clear that it applies only to males old enough to come within moral and legal regulations in respect to intercourse with the other sex. It is no less manifest that Congress had no intention to restrict the privilege of a man who has lost his wife to marry and cohabit again.

The word cohabit also needs construction—a restrictive construction. Webster and other lexicographers substantially agree in two definitions: "1 to dwell with, to inhabit or reside in company, or in the same place or country. 2 To dwell or live together as husband and wife." If the Court were to adopt the first as evincing the intention of Congress it would lead to the most absurd consequences. That definition must be wholly rejected as having no application to the word as used in this statute. It implies no intimacy—no relation requiring legal regulation—certainly no restriction on account of difference of sex.

The other definition implies intimacy—sexual intimacy—and a degree of it illustrated by the dwelling together of husband and wife. This statute is intended to prevent the living together of an adult male person with more than one woman in the same intimacy as is usual between husband and wife. The statute means an habitual living intimacy requiring marriage to justify it. In other words, it forbids a man and two women to so live together as to amount to cohabitation because both women can not be his lawful wives.

This statute not only aims to vindicate the institution of monogamic marriage by prescribing a penalty for polygamy, but it enforces a correspondent practise; it will not allow a man to live like a husband with more than one woman. Not only shall a man not marry more than one, but he shall not take to himself practically more than one woman to live with him without marriage.

No intimacy of the sexes is offensive to the public, nor criminal under this statute, unless it includes in fact or by necessary presumption ultra-matrimonial copulation.

All cohabitation which the law deals with is a sexual cohabitation. The law regulates and draws inference from it because it imports a living together in the habitual practice of sexual intercourse. It has been the subject of judicial consideration for several purposes. They deserve a moments notice—First, as evidence of marriage or its consummation—To be evidence of marriage, the cohabitation establishes the marriage habit, and needs mutual recognition of a marital relation to give the repute of marriage.

Yardley Est., 75 Pa. St.
Badger vs. Badger, 88 N. Y., 551-2.
Tyler vs. Sweet, 22 Am. Dec., 159.
Stevenson Heirs vs. McReary, 51 Id., 113.
Haynes vs. McDermott, 91 N. Y., 459.
Brinkley vs. Brinkley, 50 Id., 198.
Whart. Ev., § 1297.

That copulation is part of marital cohabitation is shown by the common law requiring it for consummation of marriage.

4 W. Coast Rep., 88.

Statutes make marriage complete by a ceremony, but at common law it was a contract per verbe in presenti *cum copula*. The contract itself produced what was sometimes called marriage *de facto*, to distinguish it from a complete and perfect marriage. As a contract *de presenti*, it was executory. Until copulation no earnest was paid; there was no part performance, and one essential was lacking, so that if one of the parties had sexual intercourse with a third person, it was not adultery.

6 Bac. Abr., 454.

In proceedings in the Ecclesiastical courts in England, either to annul a marriage or for the enforcement of conjugal rights, the right of husband and wife to have sexual intercourse is fully acknowledged.

Dr. Lushington in D—— vs. A——g, 1 Robt. R. 298, says: "I apprehend that we are all agreed that, in order to constitute the marriage bond between young persons, there must be power, present and to come, of sexual intercourse. Without that power, neither of the two principal ends of matrimony can be attained, namely, a lawful indulgence of the passions to prevent licentiousness, and the procreation of children."

He annulled the marriage in that case, because the female, on account of an incurable malformation of the vagina, was incapable of complete coition.

Impotence was recognized as ground for annulling the marriage though solemnized in church. If the parties live together three years, and there is no sexual intercourse by reason of the impotence of the male, the court would declare the marriage null and void.

Sparrow vs. Harrison, 3 Curt, 16, 7 Eng. E. R. 359.
Pollard vs. Wybourn, 3 Id, 398.

A right to copulate is recognized, though there is no legal process for compelling specific performance.

In Orme vs. Orme (2 Addams, 382, 2 Eng. E. R. 354,) the wife who lived with her husband but was not admitted to his bed sued for relief from this exclusion. Sir Christopher Robinson said: "I think the objection taken to this libel is well founded—it sets up a case either altogether *without* the jurisdiction of the Court, or one, at least, very far transgressing those bounds of interference to which it has restricted itself in modern practice."

"Matrimonial intercourse may be broken off on considerations (of health for instance, and there may be others) with which it is quite incompetent to this Court to interfere."

Cohabitation between husband and wife is a condonation of matrimonial wrongs.

Johnson vs. Johnson, 4 Paige.

Forgiveness by a wife for matrimonial wrong cannot be inferred from the parties living together, nor even from their occupying the same bed, if copulation is in fact disproved.

II.

Cohabitation is so inclusive of sexual relations that it suffices to prove adultery when the other necessary conditions exist, or continuous lewdness in the absence of marriage.

In all modes of the cohabitation under discussion sexual intercourse is in whole or in part the motive; in matrimony lawful, out of it, unlawful.

It is a form and habit of association under which such intercourse is habitual, according to the pleasure of the parties.

It is true that cohabitation may continue after this motive has lost its force or wholly ceased, especially between husband and wife. It does not commence, however, where that motive is absent; it does not continue between parties who have joined themselves without marriage, or by a mere lascivious tie, after the sexual desire between them has died out. It always has its inception in whole or in part for this purpose, and its continuance is always proof of the practice. In short, cohabitation is evidence of habitual sexual intimacy.

If there is no copulation for any period during cohabitation, it is exceptional, and therefore does not militate against the rule; consequently cohabitation is only tolerated where such intimacy is lawful. It is never proper to formulate a general rule on what is merely exceptional. Cohabitation should be accepted for what it generally or universally implies.

Any habitual association of persons of opposite sex which does not approach in habit to such familiarity as to be proof of sexual intercourse is not cohabitation. They may excite suspicion by their mutual conduct, and it may be shown that by stealth they have made opportunities for lascivious intercourse, and still there be no cohabitation.

Cohabitation, which requires marriage to commend and justify it, is peculiar. It is plainly distinguishable where the parties and the particulars of their mode of living as far as they ever come under general observation are seen and understood. It is *sui generis*, and not likely to be confounded with any other living together.

No explanation of the relation is so expressive and complete as the one we have insisted upon, *a dwelling together by male and female adult persons in the intimacy of husband and wife.*

The defendant, therefore, should not have been convicted if he did not live in such intimacy with both of the women mentioned in the indictment. This is the legal rule or instruction which the court should have given the jury, and it was matter of fact for them to determine whether the defendant was an adult male person, and so lived or dwelt with those women as that rule requires to constitute cohabitation.

To enable the jury to decide the question in issue, it was the primary duty of the prosecution and the absolute right of the defendant, to have disclosed to the jury in the evidence all the facts tending to show and illustrate his daily and nightly habit of living and conduct with and towards the women with whom he is charged with cohabiting.

A verdict of guilty affirms, precisely, that the defendant is an adult male person, and that, during the period mentioned in the indictment he cohabited with those women. The verdict affirms the law and the fact; the law as the Court has defined it, and the fact as they find it from the evidence which the Court permits them to hear. If the Court has erred in defining the law, the jury have been led wrong to affirm the law involved in the affirmative of the issue. If the Court has erred in the rejection of evidence, the jury have affirmed the fact involved in th issue, without having that full information which it was the duty of the prosecution to offer, the duty of the Court to submit to the jury, and the defendant's right to have them consider.

The error of the Court on the trial consisted in the rejection of evidence necessary to such full information to the jury and in the instructions given them for the law of the case. The latter must be here considered with reference to what the learned judge said and what he refused, on request, to say.

1. It was neither alleged in the indictment, nor made the subject of inquiry on the trial, nor submitted to the jury to find, that the defendant was a male person.

The Court expressly refused to instruct the jury, that the ingredients of the offense included, among other things, that the person charged be a male person.

Trans. p. 21, 9th request.

2. The court refused to allow by proof full information to the jury.

Matter was offered pertinent in itself to the issue, and on cross-examination of Clara C. Cannon. It was very material, for it tended, to show what were the defendant's practical relations to the women named, and during the period of time mentioned in the indictment.

It tended to show, first: an intention not to violate this statute. Second, that the defendant did not live with those women in the intimacy of husband and wife; that he did not occupy nor visit their private rooms, nor have sexual intercourse with them.

Admit, if you please, that these facts are not absolutely decisive; they are pertinent to the inquiry whether there was cohabitation under a rule that cohabitation is the dwelling together in the intimacy usual between husband and wife, conceded to include in fact or by necessary presumption, the opportunity and fact of sexual intercourse. It cannot plausibly be questioned that it was proper to show that in the sleeping apartments of each of the women were children, and some of them of adult age, who habitually lodged there with the women named, precluding any opportunity of private intercourse between them and the defendant. That he did not visit their apartments, nor occupy or frequent any other with them for such intercourse; that in fact he had no such intercourse.

In short we insist that on those facts it would appear there was neither the form nor the substance of cohabitation. The facts rejected would show his innocence, or at least, and that is enough for our purpose—tended to show it.

The matter offered to be proved showed an actual separation from these women, except in particulars of living and conduct, which are wholly innocent, and would be in line with correct deportment of host or guest in a house with ladies.

If an intimacy like that between husband and wife is inquired for, and is the gist of the inquiry, would not such facts naturally influence the judgment, would they not have some weight and be entitled to some weight? Those facts would enlighten the understanding as to the very elements of cohabitation. The first inquiry that would occur to the impartial investigator would be how they daily and nightly conducted towards each other. Did they sleep together? Did they privately occupy any room habitually? Did they have sexual intimacy? If told in answer to such questions that he never sought or had access to the private rooms of the females; that he neither had opportunity, nor sought to make any, for sexual intercourse; that he had no such intercourse, and that in all his actual and apparent conduct towards them nothing was done which would not be consistent with the strictest propriety and the utmost personal indifference, would not such information help him to decide whether he was living like a husband with them?

This information was all withheld—and withheld on the express ground that it was *irrelevant, immaterial and incompetent.*

If the jury had been instructed that they could not convict unless they found from the evidence that the defendant cohabited with these women as a husband cohabits with his wife, the absence of such details would incline a fair jury to acquit. Therefore I call attention to the instructions.

3. The Court erred in not giving the proper instructions.

The Court did not define the word cohabit at all. The jury were not informed that the legal substance of the charge was that the defendant had lived with these women in the intimacy usual between husband and wife, and that it devolved on the jury to find on the evidence, whether that charge was true. Moreover, the court refused to instruct the jury that the indictment was founded on the third section of the Edmunds Act. Trans. p 20, 1 Request. The court refused to charge that that section was applicable to Utah, or provided that if any male person here since March 22d, 1882, has cohabited with more than one woman he shall be deemed guilty of a misdemeanor.—3d, Request 2.

The court refused to instruct the jury according to the 4th, 5th, 6th, 7th, 8th and 9th requests, all of which contain a correct exposition of "cohabit" and the statute.

These instructions were refused, and no other equivalent instructions were given. This is error. Brief p 12.

The learned judge states correctly the charge contained in the indictment, but the jury's attention was at once diverted from that charge without any explanation of it by a positive direction to convict on three things being found to be true on the evidence. Trans. p 19.

There is no reference to the statute, no explanation of the elements of the offense, no analysis of the testimony to point out to the jury what portion of the evidence was addressed to each part of the charge. 1 Bish. in Cr. Pr. §976.

The Court not only omitted and refused to instruct that to cohabit was to live with the women on the terms that a husband lives with his wife, but expressly informed them that the principal parts of what is conceded to be in this law, cohabitation, were unnecessary. The jury were directed to convict if they found from the evidence that "he lived in the same house and ate at their respective tables one-third of his time or thereabouts, and that he held them out to the world by his language or his conduct, or by both, as his wives."

Let me discuss the constituents of the offense as thus stated:

First, The Court refers to the defendant as a male by using the masculine pronoun. The requisite age and sex were assumed. Neither is apparent to this court except as disclosed by the record.

The evidence incidentally shows both the age and sex, but the subject was not submitted to the jury. The learned Judge decided the age and sex himself.

Second, As to his living in the same house: If there is any difference between one house and another as to the applicability of that branch of the charge, it was ignored in what was said to the jury. The Court must have regarded any such differences as immaterial in the deliberation of the jury—The dimensions of the house are not stated—but the relative positions of rooms were explained by the testimony. The Court determined the importance of that discription. The learned judge must have regarded the evidence as addressed to the bench and not to the jury box—This was a double house. Each of these women were mothers. One had four children, the other nine—They had separate suits of apartments and maintained independent and distinct, households—There were doors for interior communication between these sets of apartments. If the Court meant to say, should the jury find that the defendant lived in this house where these mothers also lived, then all matters of actual difference between that house and any other were disposed of in the judges mind; and the effect of living in the same house was the affect of living in such a house as he, judging of the facts, found this house to be. To that extent he trenched on the functions of the jury—but the language was general. How would it be if the same roof covered a row of a dozen or more houses divided by solid interior walls. The defendant occupying one at one end of the row, and the women two at the other end, would they be living in the same house? Yes, unless the law makes a difference on account of the disparity of distance across a "hall" and through a few intervening sets of connected houses.

But mark the loose cohabitation indicated by living in the same house. But we are willing to suppose the parties lived in the same family. That was a co-residence after the first definition of cohabitation. It is no more than living in company. If no other fact is insisted upon to bring the parties into nearer relation, it is not necessary to cohabitation under that definition that they should get so near each other as to live in the same house—it would be enough that they live in the same city, or in the same country.

Living in the same house is not a criminating fact. Those who cohabit in the sense of this statute, may be expected to live in the same house, but all who live in the same house do—not—cohabit. Other facts make all the difference between those who, living in the same house, cohabit, and those who do not cohabit though residing in the same domicile. Living in the same house has no significance whatever to show cohabitation; the proof must go further; it must appear that the defendant not only lived in the same house, but lived with the women in the intimacy of husband and wife. He might live in the same house, under supposable circumstances, and not even be acquainted with others who also lived there. Acquaintance and residence under the same roof are at most but living in the same family.

Third—He eats at their respective tables one third of the time or thereabouts.

There is nothing immoral or scandalous in that. There is no complaint that he did not behave well at the table. It is certain that it is not a sexual interview. Husbands and wives eat together, so do others. Eating together does not even prove good fellowship. It is a neutral fact in respect to cohabitation.

Eliminating from his intercourse with the women named the intimacy of husband and wife, confining himself to the course of conduct specified in the defendant's offer of proof, he had a right to occupy the south-east room on the second floor, and take the whole of his meals alternately with these women and their families, if he chose to do so. Could not another man do those acts without being chargeable with unlawful cohabitation? Could not another man do these acts and not even be suspected of any intimacy, sexual or otherwise, with the women? The instances are too numerous in all decent society to leave any question for discussion.

The defendant had a right to be there. He had duties to perform. The evidence shows that these were the defendant's families. They were dependent on him for home and support. He married Amanda Cannon prior to 1862. She had borne him nine children and they lived with her in a part of this house. He married Clara C. Cannon over ten years ago. She had borne him three children, only one of whom was living during the time mentioned in the indictment. She had an older daughter by a former husband, and two orphan children not her own, and these four children constituted her family residing in this house.

These wives had been married according to the prevalent practice among the "Mormons." These families and the defendant were "Mormons."

These children were legitimated by the Edmunds law, and legitimated of course as the children of their parents. The defendant was under a moral if not a legal obligation to support the children and the mothers. He had a right to hold any intercourse with them short of cohabitation with the mothers.

There is no "dead line" to be crossed in social approach to plural wives. If the defendant did not cohabit with them he is not guilty of any offense.

I have said he had a right to be there. He had a right to carry the necessaries of life to those whom he was bound or or permitted to support. He had a right to be with his children and to cooperate with the mothers in their home nurture and training. He had a right to confer with the mothers as frequently as he pleased. He had a right to maintain pleasant social relations with these mothers. They may rejoice together over whatever is good in their offspring, and they may pray and weep together over such as go astray. These acts are no ingredients of cohabitation.

Congress is presumed to have known the peculiar situation in this Territory, and the Court also must take judicial notice of the same situation; that polygamy has flourished here for forty years by the sufferance of the government. The fruits of this social and domestic system offer a solemn subject, not only for the statesman, but the magistrate.

The children, many thousands in number, have had their reproach taken away—they are made legitimate—but their mothers have no *status* in the law except that they are mothers of legitimate children. They have accepted their conjugal state according to their faith, and that must content them before the law as it does in their church.

This law puts no restraint on the performance of friendly offices to them by the fathers of their children, nor on the free discharge of parental duties; it puts no embargo on the cultivation of pleasant and familiar relations between children and both parents. It shows no intention to separate the parents in their ministrations to their children, nor in enjoyment of the society of these children during the years of their growth.

For obvious reasons there is a supreme necessity that the parents be at liberty to co-act in their support and training.

With the zeal to enforce this law there must be some practical and humane consideration of the future welfare of those affected by it. The act is remedial as well as penal. If there is stern determination in one aspect there is tender commiseration in another. If one hand carries a scourge, in the other there is a healing balm.

This law is not intended to extinguish parental and filial affection. Nor can it be overlooked that there is a bond between the parents which no law can wholly sever. While it must cease to be a marital bond, it is a tie which will survive cohabitation; it will be an important factor in the performance of ensuing obligations, public and private.

The duties that parties to plural marriages owe to their children, and to each other, and the existence of common interests and hopes in their offspring will justify and furnish a warrant for, such familiar intercourse as is properly incident to the performance of such duties and social intercourse generally.

Beyond the sphere of their useful activities there is another to them as well as to others, of enjoyment. After their work is done and in the intervals of their common work they may pause in each others company. The government will not dictate what they shall say to each other, nor assume to regulate their emotions.

It restrains them from beating each other, and it will not suffer them to cohabit.

To make the presence of the defendant in the habitation of his legitimate children and their mother, and his joining them in their meals at regular times, without other intimacy, not evidence only as tending to show a sexual cohabitation, but the offense itself, to be declared by the court, as a matter of law, is to err in the exposition of the statute. It is a conclusion which makes mere probative facts the basis of an irrebuttable presumption of guilt.

The Court would thus abridge the right of innocent intercourse, and hamper the performance of duties which it ought to be inferred that the government is willing that all parents, even in such an anamolous position, should fulfil.

See 13, 17 and 18 Requests, Trans. p.p. 23 and 24.

The Court refused in the language of the 13th Request or otherwise to say to the jury that:

"This law does not command polygamous fathers to abandon their children, nor to break off all communication with their mothers. Such fathers are at liberty and under the strongest moral obligation to support both. He may hold any friendly and familiar relations, other than sexual, naturally incident to the proper discharge of such duties."

The continuance of the polygamous status with these wives was evidently considered by the jury under the charge as showing that the defendant is one of the wicked, according to this act, and, therefore, that his laudable conduct in fulfilling his duties to his families had a baneful flavor, on the hard principle that even—"The *ploughing* of the wicked is an abomination."

Fourth—Holding out these women as wives.

It is not very clear what idea was intended to be conveyed to the jury by the few words spoken on this subject.

This feature of the charge was not elaborated. The single remark made was vague. On the testimony the jury could make much or little of it. It was still more vague to the defence in view of refusals to charge. The "*holding out*" was required to be found, however, from the evidence, in addition to the other two facts which were mentioned as necessary to conviction. This required holding out was a suppletory fact needed to interpret and give criminal significance to the others.

The instruction was that it could occur by language or by conduct.

There was no conduct after the passage of this law, but that of living in the same house and eating at the same table.

Did the Court intend to leave it to the jury to say whether these facts amounted to a holding out? I can not belive it. Cohabitation in the full sexual sense is not of itself a holding out of the woman cohabited with as a wife. This is manifest from the authorities which have been read. So, of course, there could not be such a holding out in the more equivocal facts of living in the same house in non-sexual relations and eating at the same table. It may be said that these women were the defendant's wives. That is true; but they became such a long time before this Edmunds Act was passed. That marriage fixed a *status* of the parties which continued until after the passage of that act. Did the Court below intend that the jury should infer that the continuance of that relation, because the defendant had taken no effectual step to divorce himself, was a continuing holding out of these women as his wives? If this was the intention or effect of the instruction it was clearly erroneous, for it would make the act *ex post facto* as to this case. No act done before the passage of the act can be made by that act the basis of a criminal charge.

Nor can subsequent legislation make a prior act conduce to a conviction, for it would then alter the situation of the defendant to his disadvantage:

Kring vs. Missouri, 107 U. S., 221, 228-9.
U. S. vs. Hall, 2 Wash., 366.

It is probable that the Court intended the jury to understand that if a polygamist lives in the same house with two of his wives, and takes turn in eating at their tables as stated in the instructions, that shall be deemed cohabitation, without regard to whether their relations were sexual or not. Not that such facts should go to the jury as evidence of a sexual cohabitation, but the presumption that it is so is so violent that the Court will declare the conclusion as a matter of law. That makes the previous marriage, for which there was no punishment in the case of this defendant, conduce to his conviction for an offense subsequently created and which was not an offense at all when the marriage was contracted.

The Court did not express this view, but it was left to the jury to infer it. Had the Court intended to advance that doctrine to the jury, or that they should act upon it, why were they not told to inquire whether upon the evidence the defendant at some time had married these women as plural wives? Why were they not informed that if so, in the absence of proof that the relation had been dissolved, the law would presume its continuance, and if the defendant lived in the same house and ate at the same table, he was guilty?

I have treated the charge to the jury as equivalent to this—as directing them to convict the defendant if these women were his plural wives and the first two facts stated in the instructions were found.

If the prior marriage were treated only as an evidentiary fact and tending to make it more probable that the defendant standing in such existing relations would maintain sexual relations and did maintain such relations as would amount to cohabitation, the case might be different. The offense then would consist of acts since the passage of the law, and they would be open to trial, not on appearances, but actual facts. But when the prior marriage under the name of holding out the women as wives or otherwise is made an ingredient of the offense, so that joined to two other innocent acts, the crime is complete, the Edmunds act is made to operate manifestly as an *ex post facto* law.

There were no acts, as I have before said, tending to show a holding out of these women as wives since the statute was passed.

There was no holding out by language. The proof discloses none. There is evidence by Clara C. Cannon and Geo. M. Cannon that at some time the defendant said Amanda was his wife. But no witness testified that the defendant ever spoke of Clara C. Cannon as such. She testified that she had been his wife, that he married her ten years ago.

There has been no holding out as to her since this law passed—none during the period of time mentioned in the indictment.

If the defendant had openly and repeatedly announced that these women were his plural wives, he would only have stated what the Supreme Court of the United States have decided is his actual *status* from the mere fact of his marrying them, and not having taken any effectual step to dissolve the relation. The continuance of that status is declared by that Court to be no offense.

There was no proof whatever of any holding out either by language or by conduct, and the Court was requested so to charge the jury.

See 19 and 20 Requests, Tr. p. 25.

The Court was asked to instruct the jury to acquit if they should find that the defendant had not held out Clara C. Cannon as a wife since the enactment of the Edmunds bill. Even this was refused.

20 Request.

This indicates that the Court intended that this ingredient of the offense might be committed before the offense was created, or else that the defendant was not to be acquitted though the jury negatived the facts on the finding of which the instructions made conviction to depend. There was no such word as fail on the slate of the prosecution.

The Supreme Court of the United States has ruled on the effect of continuing the polygamous status.

Murphy vs. Ramsey, 14 U. S., 14.

The Court say: "He can only cease to be such when he has finally and fully dissolved in some effective manner, which we are not called on to point out, the very relation of husband to several wives which constitute the forbidden status he has previously assumed. Cohabitation is only one of many incidents of the marriage relation. * * * The statute makes an express distinction between bigamists and polygamists on the one hand, and those who cohabit with more than one woman on the other; whereas, if cohabitation with several wives was essential to the description of those who are bigamists or polygamists, these words in the statute would be superfluous and unnecessary." * * "Continuing to live in that state afterwards is not an offense, but cohabitation with more than one woman is. But as one may be living in a bigamous or polygamous state without cohabitation with more than one woman, he is in that sense a bigamist or a polygamist, and yet guilty of no criminal offense."

These extracts show that cohabitation with more than one woman and the existence of the relation of "husband to several wives," is very clearly distinguished in the law. The status once assumed continues, and its continuance is no offense. A holding out of such wives—which is a mere acknowledgment of the relation—and identifying the parties, is as innocent as the fact itself. If continuing in a polygamous state is no offense, it can be none for the parties to mention that status and who are concerned in it. Such an admission or announcement does not add to or change that status, or convert it into cohabitation.

Hence, we say the Court commited a double error: charged the jury so as to mislead them to find a holding out when there was no evidence of it, and in making it a corliminating fact when the Supreme Court of the United States have declared that it is not.

In U. S. vs. Breitting, 20 How, 254, the Court say: "It is clearly error in a court to charge a jury upon a supposed or conjectural state of facts, of which no evidence has been offered. The instruction presupposes that there is some evidence before the jury which they may think sufficient to establish the facts hypothetically assumed in the opinion of the court; and if there is no evidence which they have a right to consider, then the charge does not aid them in coming to correct conclusions, but its tendency is to embarrass and mislead them. It may induce them to indulge in conjectures instead of weighing the testimony."

This is quoted and affirmed in Ins. Co., vs. Baring, 20 Wall, 161-2. In that case the court add with reference to an instruction depending on facts of which no evidence had been given: "It will as a general rule be regarded as error in the court, for the reason that its tendency may be, and often is, to mislead the jury by withdrawing their attention from the legitimate points of inquiry involved in the issue:" citing Goodman vs. Simons, 20 How, 359.

Fifth—The Court below refused the request to charge the jury that

"The law presumes innocence, and therefore that all persons who were cohabiting when the Edmunds law took effect, contrary to the provisions of that act, then ceased to do so." 15 Request, Trans. p. 23.

The correctness of this proposition cannot be controverted. The refusal is error. The general statement of the presumption of innocence contained in the last paragraph of the instructions does not cure the error. The defendant was entitled to the benefit of the presumption in the particular predicament stated. The refusal of this specific instruction had the effect to deprive him of that benefit. Other parts of the instruction had the effect substantially to reverse the proposition, and the general concession that the law presumes innocence was a legal platitude—"sounding brass or a tinkling cymbal," conveying no idea whatever. This must be apparent from what has been said on the point of holding out these women as wives. Instead of presuming a cessation of what the law forbade, the continuance of the polygamous status was held in effect to raise a presumption that the defendant continues to recognize and treat the women practically as wives. This also appears by the refusal of the 20th Request. Though the marriage took place years before the passage of this act, it was held to have the effect of a holding out of the women as wives afterwards so as to be one of the three facts on which a conviction was directed. No other holding out after the law passed was necessary.

This could only be true in the absence of the presumption stated in the 15th request.

The last half of the 13th request is based on the same sound doctrine embodied in the 15th request. The refusal of it shows the intention to deprive the defendant of all benefit from the legal presumption of innocence. The Court thus refused to say that, "All his social familiarity with the mothers of such families, established prior to the passage of said act, not shown to include all the particulars of cohabitation as the Court has defined it, should be considered by the jury with the legal presumption of innocence, and the failure to establish such cohabitation entitles the defendant to acquittal."

In the charge given, the Court directed the jury to convict on finding certain facts. The jury were not, however, directed to acquit if those facts were not found. In effect, the Court refused so to charge. The refusal of the foregoing request has that significance; so has the refusal of the twentieth request.

The general effect of the instructions given, and the refusals, was that the law generally presumes innocence until guilt is proved, but one who was a polygamist at the passage of this law will not be presumed to discontinue cohabitation then and thereby made unlawful.

16th Request, Trans., p. 21.

His conduct afterwards will be looked upon with suspicion. If he gets near enough to his polygamous wives for practical cohabitation, that is enough, the law will presume it. To appear to cohabit is not simply evidence for the jury to weigh; it is in law cohabitation, whether it is true in fact or not.

Is this reversal of presumption correct? Can it be justified on the suspicion that if appearances are submitted to a jury they may be explained away and acquital follow?

District Attorney Dickson made his argument this afternoon, taking as a base that the "habit and repute" of marriage was sufficient, and no proof of actual living together was necessary.

BY TELEGRAPH.

PER WESTERN UNION TELEGRAPH LINE.

AMERICAN.

LATEST BY LIGHTNING

Soldiers Killed by Apaches.

SAN FRANCISCO, 11.—Tombstone, Arizona, special: This morning John Slaughter and J. J. Patten who arrived to-day from Swisshelms, report that Apaches killed four soldiers belonging to Capt. Lowden's command, on Tuesday last, in Guadaloupe Canon. A Mexican named Ochoa was killed last night by another band of Apaches, six miles south of Bisbel, in the Whetstone mountains.

Republican Convention.

SPRINGFIELD, Ohio, 11.—The republican state convention was called to order at 10 o'clock. Delegations of 88 counties of State all full, and over four thousand persons packed in the wigwam. Committees were appointed and the convention took recess until after dinner.

FOREIGN.

LATEST TRANS-ATLANTIC DISPATCHES.

The Cholera Spreading.

MADRID, 11.—The cholera in Spain is spreading, and an increase in the number of cases is now daily reported, causing great alarm among the people. In Valencia there [illegible] cases reported since the last previous returns of yesterday.

The *Castile* announces 13 cases in the province of Murcia, and there are 60 cases resembling cholera. This number includes 28 cases in the city of Murcia.

A Conference With the Queen.

LONDON, 11.—6.30 p. m.—Nearly every hour brings fresh rumors concerning the ministerial question. The latest of these rumors is that the Marquis of Hartington, Secretary of State for War, will be asked by the Queen to reconstruct the Liberal ministry, Gladstone to retire. Nothing reliable, however, has transpired to-day up to this hour.

LATER.—The Queen has made an appointment to confer with Gladstone on the present crisis in British political affairs. The conference will take place next Thursday at Balmoral castle. The Queen has arranged to return to Windsor Castle on the 20th instant.

The Murder of the Ameer of Afghanistan.

ST. PETERSBURG, 11.—The *Novosti* confirms its statement that the Ameer of Afghanistan is dead. It says rumors are being received continually both from Caucasus and the Afghan frontier of the assassination of the Ameer. The *Novosti* adds that the people of Afghanistan are in a state of great excitement. Rumors of the death of the Ameer having reached them, they were followed by another rumor that Ayoub Khan, former Ameer, now in Persia, will take the place of the murdered Ameer through the machinations of Russia.

—The Union Pacific have attached a new railway signal to their telegraph building at Cheyenne, and are substituting the same for all stationary signals along the line of their road. The signals are worked inside the building, and show the white and red color. It is so constructed that should it by carelessness or accident get reset, it will always show red, the danger signal, which calls the engineer to halt for instructions.

—The Ogden brass band has decided to join with the firemen in their excursion which will leave Ogden for Logan on the 22nd of this month. It is also expected that the shooting clubs of Ogden and Salt Lake will attend. There will be two dances on consecutive nights in the Cache Valley capital. Numerous games will be provided and lots of fun is expected. The committee will meet in Ogden next Monday to perfect their arrangements.