A PLEA FOR RELIGIOUS LIBERTY AND THE RIGHTS OF CONSCIENCE.

ARGUMENT IN THE SUPREME COURT OF THE UNITED STATES, APRIL 28, 1886.

By George Ticknor Curtis.

[Lorenzo Snow, commonly called "Apostle Snow," a rank in the hierarchy of the Mormon Church, was convicted and sentenced on three indictments in the District Court of Utah Territory, for violating the 3d section of the act of Congress passed March 22, 1882, known as the "Edmunds act." The judgments were affirmed by the Supreme Court of Utah, and the cases afterwards brought to the Supreme Court of the United States, by writs of error, and there argued together. The law under which Mr. Snow was indicted prohibits cohabitation "with more than one woman." The evidence in the case showed that he lived exclusively with one of his wives, and had no association with either of the others which would have been in any degree improper in any other gentlemen, but he had acknowledged them all to be his wives. The facts in evidence, and the questions arising on the bills of exceptions, so far as they were discussed by Mr. Curtis, sufficiently appear from the following stenographic report of his argument.]

ARGUMENT.

Once, may it please your Honors, and once only, in the course of my professional career, I have been counsel in a case in which the life of a human being was at stake. This was in the days of my youth—46 years ago—when the energies were full, when ambition was high, when applause was sweet, and the desire for success was keen. And now, when I have passed my three score and ten, have arrived at an age when we look backward and not forward, when fame no longer allures and little is left but duty to be discharged because it is duty, I find myself here engaged in a cause which is directly to affect the peace, the welfare, the safety, the religious constitutional rights of thousands of my fellow creatures, and may possibly draw into its consequences the lives of some of them. Bear with me this great responsibility, at least so far as to understand and appreciate the grounds of my apprehension. Bear with me while I separate those considerations and elements which are fit to be entertained by this Court, from those which belong exclusively to the statesman and the legislator. No one can be more sensible than I am, that when a statute is to be construed by a court, it is the meaning and intent of the lawgivers that is to be ascertained. I do not need to be told that it is your province not to make laws, but to interpret and apply them. Nevertheless, it does happen under our system of government, that even when there is nothing to be determined but the construction of a law, constitutional provisions must be taken into consideration; and when that is not the case, it also happens that the time of the enactment of the law, the circumstances which led to it, the public facts and public equities which surround it, each and all are of fit and proper consideration in determining the meaning and application of the language of the legislature to successive cases as they arise.

I am firmly convinced, after a very thorough study of these cases, that both of these inquiries arise on these records. I am to submit to you a constitutional question which involves the religious liberties of these people called Mormons; and it arises in this way: This man was convicted three several times on evidence which was precisely this and no more, that on a certain day he casually introduced an acquaintance of his to two women, who were present in the marshal's office when he was under arrest, as his "wives," and that is all there is of his language which is in evidence in these cases. The whole of his other conduct, if you grasp all its incidents in one bundle, resulted from moral and religious duties, as he estimated and believed his religious duties to be, and this I shall demonstrate to you, I think, is the precise question here. Without a doubt, it presents a constitutional question, and a very grave one.

The first proposition to which I have to ask your attention is stated on the 22d page of my brief.

The construction given by the court below to the 3d section of the act of March 22d, 1882, and on which the plaintiff in error was thrice convicted, makes it violate the first amendment of the Constitution, because it makes the statute punish the profession of a religious belief belief, when, under that construction, it is applied to the evidence in the three cases now before the Court.

In approaching the subject of religious liberty, there is of course a great deal of antecedent history to be taken into account. I do not propose to go over the whole of it, because most of us here are legal and historical scholars. You, Mr. Chief Justice, in a recent case, Reynolds vs. United States, (98 U. S.,) had occasion to develop the subject somewhat. It is necessary for me, on this occasion, to supplement what you then said by a little further development of the subject; and, moreover, it is necessary for me to show what was the religious persecution on which history had set the seal of its condemnation before our Constitution was made. In all the modern ages of the world in which religious persecution has been carried on by governments, or in the name of public authority, the whole essence of the atrocious wrong has been this—power has said to the weak: "Renounce your religious opinions, recant your religious beliefs, or die, or go to prison." This was what was said by Philip II and the Inquisition to the whole anti-Catholic party in his dominions. This is what was said by Bloody Mary, of England, when she burnt her Protestant subjects at the stake. This was what was said in the persecution in Northern Italy in the seventeenth century, to the subjects of the Duke of Savoy, when the great Protector of the Commonwealth of England signified that if that persecution did not cease the English guns should be heard in the Vatican. This, too, was what was said (with inexpressible grief and shame I advert to it) by my Puritan ancestors of Massachusetts when they hanged Quakers. This is what I am to show will be said by this Edmunds act to the Mormons of Utah, if it is to be construed and applied here as it was construed and applied by the territorial judges. If I fail in showing this, I shall fail in this branch of my argument. If I succeed in showing this, these judgments will be reversed.

I pass to the more immediate threshhold of the constitutional question. But before I cross it I must advert again to the two religious persecutions which stand nearest in time to the establishment of our Constitution. I have alluded to the persecution in northern Italy which Cromwell checked. It was while that persecution was goin on that Milton penned that grand sonnet which rang like a trumpet through Christendom:

Avenge, oh, Lord! thy slaughtered saints, whose bones
Lie scattered on the Alpine mountains cold.

It was Milton, too, who, as Latin Secretary to the Protector's government, wrote the dispatches which threw the shield of England over nearly all the Protestants of the Continent; a protection which they did not lose until Charles II basely sold himself to the French king for gold. That protection was not again afforded to them until William of Orange lifted the crown of England out of the degradation into which it had fallen when it was worn by his uncles.

What the poet said about the poor peasant of the Alps is what some future Milton may have to say if we do not find some better way out of this sad problem in Utah than any that we have yet tried. For, if the barriers of the Constitution are to be disregarded, we may soon hear that the blood of these people is demanded. We may take warning from the spirit of violence that prevails everywhere. Everywhere those who are disliked for any cause are made the victims of popular rage. At this moment a bill is passing through Congress to indemnify certain Chinese for outrages committed upon them by mobs. The Mormons will suffer anything rather than have their religious convictions forced out of them by persecution; and this is what is now tried by the machinery of the criminal law as it is administered in that Territory. They will obey the law when they can learn what it requires of them; and whatever is done to them, they will not be driven into rebellion, much as some of their enemies might like to have them, for they hold the doctrine of non-resistance by physical force as a part of their religious creed. They will use no violence, but they may be made the victims of violence.

The persecution which Milton denounced, and which Cromwell stayed, occurred just three years before the persecution of the Quakers in Massachusetts. The most accurate account of the Quaker persecution is to be found in Palfrey's History of New England. It transpired one hundred and twenty-seven years before the Constitution of the United States was adopted.

The distinction between the case of Cannon vs. The United States (116 U. S., 55) and the three cases of Snow vs. The United States is broad and clear.

Treating the three present cases as one, for the purposes of the argument, because, with reference to the constitutional question, all the evidence that needs to be considered was the same in all of them, I shall contend that the evidence on which Snow was convicted under an erroneous construction of the statute makes the conviction and sentence violate the free exercise of religion guaranteed by the 1st Amendment of the Constitution.

In Cannon's case unlawful cohabitation was held to consist in a man's living in the same house with two women, eating at their respective tables one-third of the time or thereabouts, and holding them out to the world, by his language or conduct, or both, as his wives, without occupying the same bed with either of them, or sleeping in the same room, or having sexual intercourse with either of them. No constitutional question arose in that case because there was no language proved to have been used by Cannon, in speaking of either of the two women as his wife, which required to be put to the jury to find whether he used the term "wife" as indicating a spiritual and religious relation, or used it to signify a claim of right to continue a carnal relation with both of them notwithstanding the prohibition of the statute. But, in Snow's case, the only evidence of his language consisted in proof that he spoke of two women as his "wives," under circumstances which called for a distinct instruction to the jury to find in what sense and with what intent he used that language. If he spoke of the women as his "wives," meaning that by the religious law of his church he was bound to them in a spiritual and religious tie that did not necessarily signify the enjoyment of a carnal relation, but was a mere expression of his religious belief, he could not be convicted of unlawful cohabitation by his language, or by the use of his language as part of the evidence of guilt, without violating his rights of conscience. On the other hand, if he spoke of the women as his "wives," in a sense of a claim of right to maintain a carnal relation with them or to dwell with both of them, notwithstanding the prohibition of the statute, the evidence of his language might go to the jury, along with the other facts proved, without violating his religious freedom; and if the whole evidence, taken together, had a reasonable tendency to show unlawful cohabitation, under a proper definition of that offence, he could have been convicted without a violation of his religious freedom. The imperative necessity, therefore, for a careful instruction to the jury to find in what sense and with what intent he used the word "wife," or "wives," which instruction was not given, and was refused, is perfectly apparent.

The Chief Justice: Was there a request of that kind?

Mr. Curtis: I am going to show presently what the request was, and I say that it covers the whole ground.

The sole proof of Mr. Snow's language consists in the fact that when under arrest, and in the marshal's office, he introduced Harriet and Sarah as his "wives" to Mr. Peery, an acquaintance of his and a brother Mormon, just previous to the examination before the U. S. commissioner. His words were: "Mr. Peery, or Brother Peery, this is my wife Harriet; Mr. Peery, or Brother Peery, this is my wife Sarah." (Testimony of Franklin N. Snow, record in case No. 1278, p. 16.)

The extreme importance of having it ascertained by the jury in what sense, and with what intent, he spoke of these two women as his "wives" is apparent from the testimony of the women who were made compulsory witnesses for the prosecution.

Thus, Mary Snow, speaking of Mr. Snow's occasional visits to her, said, in answer to a question put by the prosecution: "In these visits, and in all our intercourse, we recognized each other as husband and wife just as much to-day as ever." What did she mean? She was married in 1857. In a previous part of her evidence she testified that "there is a great deal of difference between our relations the past year and eleven years ago." Yet she considers herself as his wife to-day just as much as ever, although she lives entirely by herself, in her own house, and he has merely called on her as a friend. She could have meant only that spiritual and religious tie which, according to her and his belief, is created by one of their marriages according to the law of their church, and may be wholly distinct from any carnal relation or any cohabitation, although they hold that it sanctifies the carnal relation.

Eleanor Snow. Married 35 years ago in Nauvoo; resides in her own house; lived in company with Harriet and Sarah. Mr. Snow lives across the block, and has lived there about four years; in 1885 Mr. Snow called on her for a few minutes two or three times; she says, "I guess I recognized him as my husband and he me as a wife during 1885." She could not have meant a recognition of any other than the spiritual and religious tie.

Sarah Snow. Married nearly forty years; has lived for nearly thirty years at the old homestead on Main Street; from that time she was married until about ten years ago she lived with him, but has since had a place by herself; "he has not introduced me as his wife for the last ten years, as I can remember, but there has been no less the relation of husband and wife;" she must have meant the spiritual and religious relation.

Minnie Snow. She is the wife with whom he has lived exclusively for four years in the full sense of cohabitation. She says: "I know all the other ladies who have testified, they are his wives;" she, too, could only have meant "wives," according to their religious belief. She testifies again: "He has not, to my knowledge, publicly claimed these other women as his wives; he has never spoken to me of them as his wives, to my knowledge; certainly they are his wives, and it was so understood in the family during the past year."

This testimony is in the record of case 1278. In the case No. 1279, the following is found on page 14:

Eleanor Snow. "According to my religion I was a married woman in 1884, and my husband was Lorenzo Snow, and I never was divorced from him. * * * According to my religion I recognized Mr. Snow as my husband in 1884." By no possibility could she have meant anything but the relation of husband and wife according to their religion. (See also the question put to her by the court and her answer, page 15.)

Mary Snow. "According to my religious belief I am married, and was married to defendant in 1857, and have had no divorce," *i. e.*, no divorce according to the law and custom of their church.

It is of the utmost importance, therefore, for this Court to know what the religious belief of these people is, and what authorizes the Court to use the ordinary means of judicial knowledge.

The 7th section of the act of March 22, 1882, speaks of bigamous or polygamous marriages, known as Mormon marriages, in cases in which such marriages have been solemnized according to the ceremonies of the Mormon sect.

This opens all the ordinary sources of judicial knowledge respecting the marriages of the sect referred to, and allows me to read from the book that is accepted by them as the authorized statement of the law of their church.

Moreover, there is testimony in one of these records which distinctly explains what a Mormon marriage is. It is the testimony of Harriet Snow, who was married to the defendant forty years ago, and it is to be found in the record in case No. 1279, pp. 12, 13, which was the second case tried.

And here I will say that for simple pathos, for dignity, for clearness of ideas and of expression, I have never seen any piece of human testimony that is to be compared with the evidence of this Mormon matron, put on the witness stand by a public prosecutor to convict her husband of a crime. She has been examined by the District Attorney, and is now under cross-examination for the defense. I will read:

"I was married to Lorenzo Snow in Nauvoo in 1846, and have never been divorced. He was not my husband in 1884, according to the general term of husband: He did not live with me as a wife. He arranged for my support, and I drew it as common. In 1884 I looked upon him as my companion; the husband of my youth. In 1884 the marriage relation did not continue, as it was in my young days. I was an old lady in 1884."

Now she is apparently addressing herself to the judge and jury, because the counsel for the defense was of her own faith:

"I call myself a married lady. I was sealed to the defendant for time and eternity. When a lady gets so that she cannot bear children, then she is released from some of her duties as a wife. I mean that he is my companion, but not husband. In 1884 I lived in my own house."

She puts into eleven words the whole of their doctrine on the subject of the marriage relation.

"I was sealed to the defendant for time and for eternity." There is the whole doctrine. "When a lady gets so that she cannot bear children, then she is released from some of her duties as a wife. I mean that he is my companion but not husband."

The Mormon faith on the subject of plural marriage is to be found in the Book of Doctrine and Covenants, a copy of which I have, caused to be placed in the Congressional Library, and that copy is precisely like the one I hold in my hand. The subject is found at section 132, clauses 1 to 7, 48, 61 to 63. I will read the title page—"The Doctrine and Covenants of the Church of Jesus Christ of Latter-day Saints, containing the Revelations given to Joseph Smith, Jr., the Prophet, for the Building up of the Kingdom of God in the Last Days. Second Electrotype edition, published at Liverpool in 1882."

The whole Christian world scorns the idea of a subsequent and supplemental revelation. But the question is not what we believe. It is not what we can receive. It is what these people believe, have believed, and hold with perfect tenacity and sincerity of conviction, and have lived by and died by. The doctrine, the philosophy, and the right of religious liberty in this country, are imbedded in our fundamental law, and we have not yet reached a state of things in which an expression of belief or any conduct which is not in and of itself injurious to society, or so declared by the legislative authority; we have not yet reached a condition of things in which belief when so held, and so professed, and carried out in innocent conduct, is to be touched by the hand of criminal law. And here, may it please your honors, I beg to be explicitly and carefully understood. I have asked for this variation in the order of addressing the Court, not only in order that your honors may know exactly what I do not and what I do contend for, but in order that the counsel for the Government may have no reason for misapprehending me. Of course I do not stand here to contend that a man's religious belief operates to prevent the legislative power from prohibiting conduct which that power deems injurious to the welfare of society. The Mormons once made that contention, at least up to a certain point; but I am not asked to make that contention now, and I could not make it if I were. Beyond a doubt, the legislative power, where it has full legislative authority over any community, may punish overt acts, may define such and such conduct to be *malum prohibitum*, and the man who continues that conduct must be punished if he is convicted; but with all that and notwithstanding all that, when there is clear evidence before this Court that the statute has been so construed and so applied to a state of facts, by an inferior court, that conviction and punishment have been reached, and could only be reached, by trenching on the rights of conscience, then the person cannot be touched.

The section to which I refer in this book, is entitled, "Revelation on the Eternity of the Marriage Covenant, including Plurality of Wives. Given through Joseph Smith, in Nauvoo, Hancock County, Illinois, July 12th, 1843."

[Here follow quotations from the revelation.]

Mr. Justice Field: Is that the book known as the Mormon Bible?

Mr. Curtis: No, it is not.

Mr. Richards: What we call the Book of Mormon is sometimes called the Mormon Bible.

Mr. Curtis: This book which I have in my hand is the recognized embodiment of the law of their church.

Justice Field: Does that contain what is supposed to have been found on steel plates?

Mr. Richards: No, your Honor, but the Book of Mormon does.

Chief-Justice: This is a supposed subsequent revelation, is it not?

Mr. Richards: This book contains the revelations received by Joseph Smith. The Book of Mormon was translated by him from the plates referred to, which were gold, and is a history of the ancient inhabitants of this continent.

Mr. Curtis: Here we are with all our civilization around us, and all our sentiments and feelings on the subject of the marriage relation, almost incapacitated from understanding how there can be purity, womanly virtue, dignity of life, refinement and cultivation, domestic harmony, among educated people, maintaining this relation, in which several women stand as the wives of one husband. But, whether we have to act upon this subject as legislators, or as judges, or as philanthropists, or as patriots, or as citizens, we can do no good, we can accomplish nothing but pain and misery for others, and mortification and bafiled hopes and disappointed efforts for ourselves, unless we can rise to that condition of mind which enables us to stand in the inner circle of their feelings and convictions, and so far to treat them as our equals—equals before the law, equals before the God who made us all. Without doing so, we can never expect the Mormon women to meet us half way, or to meet us at all.

There is a gross error that is standing in the way of all efforts of the Christian world, by whomsoever attempted, to reach this, which is accounted so great an evil. We cannot, unless we meet the Mormon women of Utah half way, and recognize who and what they are, we cannot accomplish anything useful. It is unphilosophical, it is absurd, it is dangerous to deal with the subject in any other way. The idea of treating these women, many of them women of New England birth, people, at least, of intelligence, educated in the public and private schools of our older States, as if they were a set of degraded beings, wearing a yoke under which they bend, and from which it is our duty to emancipate them by any and every means—including trained constructions of the criminal law—if we do not lay aside this idea we can never do anything successfully with this terrible problem.

The whole evidence, taken together, consisted of the word "wives," as used by Mr. Snow, and the proof of his visits to the houses inhabited by some of them, besides Minnie, with whom he dwelt exclusively in a house which she and her children alone inhabited.

In the case first tried, (Record 1278,) the conviction rested on this evidence, as applied to the case of *Sarah*, who was held by the appellate court to be the *lawful* wife. Cohabitation with *her* was held by the Chief-Justice of the court below, in his opinion, to be established by a presumption of *matrimonial* cohabitation, and by *inferences* from the facts. As cohabitation in every sense with Minnie was admitted by the defendant, the general verdict of "guilty as charged in the indictment" fixes the unlawful cohabitation in this case as cohabitation with Sarah and Minnie. In this all the judges below concurred.

This covered the period from January 1, 1885, to December 1, 1885—eleven months. There was evidence in this very case which should have admonished the trial judge of the nature of the relation of husband and wife claimed by these persons.

It have referred in the brief, but will not now read it, to the evidence of four witnesses, which is very important if your honors will please to look at it. It is the evidence of Harriet, Mary, Eleanor, and Sarah, in Record 1278, pp. 8, 10, 11, and 12.

All this evidence gave to the trial judge the most pointed notice that here he was dealing with the term "wife" or "wives," in a sense that might, when spoken by Mr. Snow, comprehend nothing but a religious doctrine and a religious belief.

It was his plain duty, *sua sponte*, to put it to the jury to find in what sense Mr. Snow introduced Mr. Peery to Harriet and Sarah as his "wives."

He was asked to charge so, that the jury would not be misled.

The 5th prayer is the one I now present to your honors' attention; and in it, I say, is included a request, a necessary request, an indispensable part of the charge, without which justice could not be done.

Fifth Request. "Having more than one wife and claiming and introducing more than one woman as wives do not constitute the offense charged. You must find, to justify a conviction, that he has lived with more than one within the time stated in the indictment."

Instead of giving this instruction, he throws into the scale the term "wife," used by Mr. Snow, along with the other evidence about visiting, etc., and tells the jury that from all this farrago they may infer unlawful cohabitation with twoor more women!

The next case tried was that in Record 1279, the indictment covering the whole of the year 1884.

Here the conviction rested on cohabitation with Adeline and Minnie.

Here Adeline is taken as the lawful wife, and Minnie as the unlawful wife, in 1884, whereas Sarah was held to have been the lawful wife in the first trial, which related to eleven months of 1885.

I will now briefly apply the constitutional principles, for which I contend, to the facts of Mr. Snow's conduct.

I surrender to the judgment of this Court all that part of his conduct which may by any fair interpretation of the statute be considered as cohabitation with Sarah and Minnie, or with Adeline and Minnie.

But there is another aspect of his