MINORITY REPORT IN CASE OF SENATOR SMOOT

The undersigned members of the committee on privileges and elections, having had under consideration senate resolution No. 205, Fifty-seventh Congress, second session, adopted Jan. 27, 1903, being unable to agree with the majority of the committee, submit the following minority report:

They attach hereto and make a part hereof a full statement of the case, showing all charges affecting or intending to affect the right and title of Reed Smoot to a seat in the senate as a senator from the State of Utah, together with an abstract of all the material, relevant, and competent testimony offered with respect thereto, and their conclusions deduced therefrom.

They ask that the same may be printed for purposes of reference as a part of this report, and respectfully refer to the same as a more complete statement of the following findings and propositions, and the testimony and arguments in support of the same, upon which they base their dissent from the conclusions and report of the majority of the committee.

Senator Smoot's Qualifications.

Reed Smoot possesses all the qualifications prescribed by the Constitution to make him eligible to a seat in the senate, and the regularity of his election by the legislature of the State of Utah is not questioned in any manner.

Character Irreproachable.

Aside from his connection with the Mormon Church, so far as his private character is concerned, it is, according to all the witnesses, irreproachable, for all who testify on the subject agree or concede that he has led and is leading an upright life, entirely free from immoral practises of every kind. He is not a polygamist; has never had but one wife, and has been noted from early manhood for his opposition to plural marriages, and probably did as much as any other member of the Mormon Church to bring about the prohibition of further plural marriages.

Has Right to his Beliefs.

So far as mere belief and membership in the Mormon Church are concerned, he is fully within his rights and privileges under the guaranty of religious freedom given by the Constitution of the United States, for there is no statutory provision, and could not be, prohibiting either such belief or such membership.

Moreover, having special reference to the Mormons residing in Utah and their peculiar belief, it was provided in the act of Congress, passed July 16, 1894, that the people of Utah should provide in their constitution "by ordinance irrevocable without the consent of the United States and the people of said states:

"1. That perfect toleration of religious sentiment shall be secured, and that no inhabitant of said state shall ever be molested in person or property on account of his or her mode of religious worship: Provided, that polygamous or plural marriages are forever prohibited."

In consequence there was embodied in the constitution of the State of Utah a compliance with this requirement, and thereupon the territory was duly admitted as a state of the Union.

Accordingly, members of the Mormon Church, open and avowed believers in its doctrines and teachings, have been admitted without question to both houses of Congress as representatives of the state.

Grounds of Contest.

There remain but two grounds on which the right or title of Reed Smoot to his seat in the senate is contested. They are:

1. That he is shown to have taken what is spoken of in the record as the "endowment oath," by which he obligated himself to make his allegiance to the Church paramount of his allegiance to the United States; and

2. That by reason of his official relation to the Church, as one of its apostles, he is responsible for polygamous cohabitation which yet continues among the Mormons, notwithstanding it is prohibited by law.

As to the "endowment oath," it is sufficient in this summary to say that the testimony is collated and analyzed in the annexed statement, and thereby shown to be limited in amount, vague and indefinite in character, and utterly unreliable, because of the disreputable and untrustworthy character of the witnesses.

Unreliable Witnesses.

There were but seven witnesses who made any pretense of testifying about any such obligation. One of these was shown by the testimony of two uncontradicted witnesses to be mentally unsound. Another, to have committed perjury in the testimony given before the committee on another point. The third was shown by the uncontradicted testimony of a number of witnesses to have a bad reputation for truth and veracity, and to be thoroughly unreliable. A fourth admitted that he had been for years intemperate, and was shown by indisputable testimony to have lost his position on that account, and thereupon and for that reason to have withdrawn from the Church and to have assumed such a hostile and revengeful attitude as to entirely discredit him as a reliable witness. The other three witnesses were so indefinite as to their statements that their testimony amounted at most to nothing more than an attempt to state an imperfect and confessedly uncertain recollection.

Contradicted by Senator.

All that it is attempted to show as to the character of this oath is positively contradicted by Reed Smoot and a great number of witnesses, whose standing and character and whose reputation for truth and veracity are unquestioned, except only in so far as their credibility may be affected by the fact that they are or have been members of the Mormon Church.

Upon this state of evidence we are of opinion that no ground has been established on which to predicate a finding or belief that Mr. Smoot ever took any obligation involving hostility to the United States, or requiring him to regard his allegiance to the Mormon Church as paramount to his allegiance and duty to the United States.

His Responsibility.

The only remaining question is whether or not by virtue of his official relation to the Church as one of its apostles he has any responsibility for the continuation of polygamous cohabitation by members of that Church.

The testimony on this point is also carefully collated and analyzed in the annexed statement.

It will be found by an examination of that testimony that he has never at any time, and particularly he has not since the manifesto of 1890, countenanced or encouraged plural marriages; but that on the contrary he has uniformly upheld the policy of the Church, as announced by that proclamation, by actively advocating and exerting his influence to effect a complete discontinuance of such marriages, and that in the few instances established by the testimony where plural marriages and polygamous cohabitation, as a result of them, have occurred since 1890 they have been without any encouragement, countenance, or approval whatever on his part.

As to polygamous cohabitation in consequence of plural marriages entered into before the manifesto of 1890, there is no testimony to show that he has ever done more than silently acquiesce in this offense against law. In view of his important and influential position in the Church, this acquiescence might be regarded as inexcusable if it were not for the peculiar circumstances attending the commission of this offense.

Some History Recalled.

To understand these circumstances it is necessary to recall some historical facts, among which are some that indicate that the United States government is not free from responsibility for these violations of the law. Instead of discountenancing and prohibiting polygamy when it was first proclaimed and practised the Congress remained silent and did nothing in that behalf. While Congress was thus at least manifesting indifference, President Fillmore and the senate of the United States, in September, 1850, gave both recognition and encouragement by the appointment and confirmation of Brigham Young, the then head of the Church, and an open and avowed advocate and representative of polygamy, to be governor of the territory of Utah. When his term of office expired under this appointment he was reappointed by President Pierce and again confirmed by the senate.

First Anti-Polygamy Act.

There was no legislation or action of any kind by Congress on this subject until the act of July 1, 1862, which was in language, as well as legal effect, nothing more than a prohibition of bigamy in the territories and other places over which the United States had jurisdiction.

After this act, for a period of 20 years, plural marriages and polygamous cohabitation continued in the territory of Utah practically unrestrained and without any serious effort on the part of the United States to restrict the same.

Law of 1882.

Finally, in response to an aroused public sentiment, Congress passed the act of March 22, 1882, by which it prohibited both plural marriages and polygamous cohabitation, but legitimized the children of all such marriages born prior to the first day of January, 1883. Under this act prosecutions were inaugurated to enforce its provisions, but it was soon demonstrated that public sentiment was such that only partial and very unsatisfactory success could be secured.

Edmunds-Tucker Act.

Then followed what is known as the Edmunds-Tucker act of March 3, 1887, by which, among other things, the rules of evidence were so changed as to make it less difficult to secure evidence in prosecutions for polygamy and polygamous cohabitation. Again, by the terms of this act, all the children born within 12 months after its passage were legitimized.

The Manifesto.

This statute was upheld by the supreme court of the United States, and efforts to prosecute such offenses were redoubled with such success that on the 26th day of September, 1890, the then president of the Church, Wilford Woodruff, issued what is known as the manifesto of 1890, forbidding further plural marriages. So far as the testimony discloses there have been but few plural marriages since, perhaps not more than the bigamous marriages during the same period among the non-Mormons.

Number of Polygamists.

The evidence shows that there were at this time about 2,400 polygamous families in the territory of Utah. This number was reduced to 500 and some odd families in 1905. A few of these families may have removed out of the State of Utah, but so far as the testimony discloses the great reduction in number has been on account of the deaths of the heads of these families. It will be only a few years at most until all will have passed away. This feature of the situation has had a controlling influence upon public sentiment in the State of Utah with respect to the prosecutions for polygamous cohabitation since the manifesto of 1890.

Whether right or wrong, when plural marriages were stopped and the offense of polygamy was confined to the cohabitation of those who had contracted marriages before 1890, and particularly those who had contracted marriages before the statutes of 1887 and 1882, the disinclination to prosecute for these offenses became so strong, even among the non-Mormons, that such prosecutions were finally practically abandoned.

Children Legitimized.

It was not alone the fact that if no further plural marriages were to be contracted polygamy would necessarily in the course of time die out and pass away, but also the fact that Congress, having by the statutes of 1882 and 1887 specifically legitimized the children of these polygamous marriages, it was inconsistent, if not unwise and impossible, in the opinion of even the non-Mormons to prohibit the father of such children from living with, supporting, educating and caring for them; but if the father was thus to live with, support, educate and care for the children, it seemed harsh and unreasonable to exclude from this relationship the mothers of the children.

Such are some of the reasons assigned for the lack of a public sentiment to uphold successful prosecution for polygamous cohabitation after 1890. It is unnecessary to recite others, for it is enough to say that whatever the real reason or explanation may be, the fact was that after 1890 it became practically impossible to enforce the law against these offenses, except in flagrant cases.

Prohibition of Polygamy.

Such was the situation when the territory applied for admission to the Union and Congress passed the enabling act of July 16, 1904, by which the people of Utah, in order to entitle them to admission into the Union, on terms prescribed by Congress, were required to incorporate in their constitution a proviso that "polygamy or plural marriages are forever prohibited;" not polygamous cohabitation, it will be observed, but only polygamous marriages. The testimony shows that there was a common understanding both in Congress and Utah that there were not only to be no more plural marriages, but that prosecutions for polygamous cohabitation had become so difficult that there was a practical suspension of them, and that time was the only certain solution of the perplexing problem.

This sentiment has not only ever since continued, but with the constant diminution of the number of polygamous families and the rapid approach of the time when all will have passed away, there has come a natural strengthening of the sentiment. The testimony in this respect is set forth at length in the annexed statement, but we make the following quotations in order that it may appear in this summary that there is this common disposition, among non-Mormons as well as Mormons.

Judge McCarty's Testimony.

Judge William McCarty of the supreme court of Utah, a non-Mormon and an uncompromising opponent of polygamy, who has held many important offices of trust, among others that of assistant United States attorney for Utah, and who, as such, was charged with the duty of prosecuting these offenses, testified as follows:

"I prosecuted them (offenses of polygamous cohabitation) before the United States commissioners up until 1893, when the United States attorney refused to allow my accounts for services for that kind of work, and then I quit and confined my investigations before the grand jury in those cases."

In explanation of his action he testified—we quote from the annexed statement:

"That he found the press was against the prosecutions; that the public prosecutor, whose attention he invited to the matter, refused to proceed. From this and other facts which came to his knowledge, Judge McCarty reached the conclusion that the public sentiment was against interfering with men in their polygamous relations, who had married before the manifesto."

E. B. Critchlow's Testimony.

E. B. Critchlow, a non-Mormon attorney at law of Salt Lake City, one of the principal managers of this proceeding against Mr. Smoot, who gave the case his personal attention, attending most of the meetings of committee, testified before the committee, again quoting from annexed statement:

"That after the manifesto of 1890 there was no inclination on the part of the prosecuting officer to 'push these matters as to present cohabitation,' 'thinking it was a matter that would immediately die out;' that it was well known that Apostle John Henry Smith was living in unlawful cohabitation; that non-Mormons generally made no objection to it; that they were disposed 'to let things ago,' and that was the general feeling from the time of the manifesto in 1890 'down to very recent times—pretty nearly up to date, or practically up to date.'"

Mr. Critchlow further testified that the non-Mormons were disposed to overlook the continuous polygamous cohabitation of those who had taken plural wives before the manifesto, because they, the non-Mormons, felt satisfied that there would be no more plural marriages; that the thing would work itself out in the future, and that where the polygamists had their wives in seperate houses and simply kept up the old relations without the offensive flaunting of them before the public, it had been practically passed over.

Hon. O. W. Powers.

Orlando W. Powers, Esq., a leading lawyer of Utah, who was associate justice of the supreme court of the territory, and who showed by his testimony much hostility to the Mormon Church, testified that there was this general feeling after the manifesto not to interfere with those whose marriages were prior thereto. He then added, "There is a question for statesmen to solve. We have not known what was best to do. It has been discussed and people would say that such and such a man ought to be prosecuted.

"Then they would consider whether anything would be gained; whether we would not delay instead of hastening the time that we hope to live to see; whether the institution would not flourish by reason of what they would term persecution. And so, notwithstanding a protest has been sent down here to you, I will say to you, the people have acquiesced in the condition that exists."

He explained that by "the people" he meant the gentiles.

The following quotation from a speech by Senator Dubois, reported in the Congressional Record of Feb. 5, 1903, page 1729 et seq., is to the same general effect:

Dubois Quoted.

"Mr. Dubois. . . . Various causes operated to cause the Mormons to abandon polygamy. There was a feeling among the younger members of the Mormon Church, and a very strong feeling, that polygamy should be done away with. So here was this pressure within the Church against polygamy and the pressure by the government from outside the Church against polygamy. In 1891, I think it was, the president of the Mormon Church issued a manifesto declaring that thereafter there should be no polygamous marriages anywhere in the Mormon Church. The Mormons were then called together in one of their great conferences, where they met by the thousands. This manifesto was issued to them by the first presidency, which is their authority; was submitted to them, and all the Mormon people ratified and agreed to this manifesto, doing away with polygamy thereafter.

"The senator from Maine (Mr. Hale) will recall that I came here as a senator from Idaho shortly after that, and the senator from Connecticut (Mr. Platt) will recall how bitter and almost intemperate I was in my language before his committee and on the floor of the other house in the denunciation of these practises of the Mormon Church. But after that manifesto was issued, in common with all of the Gentiles of that section who had made this fight, we said: 'They have admitted the right of our contention and say now, like children who have been unruly, we will obey our parents and those who have a right to guide us; we will do those things no more.' Therefore we could not maintain our position and continue punishing them unless it was afterwards demonstrated that they would not comply with our promise.

"After a few years in Idaho, where the fight was the hottest and the thickest, we wiped all of those laws from our statute books which aimed directly at the Mormon people, and today the laws on the statute books of Idaho against polygamy and kindred crimes are less stringent than in almost any other state in the Union. I live among those people; and, so far as I know, in Idaho, there has not been a polygamous marriage celebrated since that manifesto was issued, and I have yet to find a man in Idaho or anywhere else who will say that a polygamous marriage has been celebrated anywhere since the issuance of that manifesto.

"Mr. Hale. Then, it must follow from that, as the years go by and as the older people disappear, polygamy as a practise will be pratically removed?

"Mr. Dubois. There is no question about it; and I will say to the senator, owing to the active part which we took in that fierce contest in Idaho, I with others who had made that fight thought we were jutified in making this promise to the Mormon people.

"We had no authority of law, but we took it upon ourselves to assure them that those older men who were living in the polygamous relation, who had growing families which they had reared and were rearing before the manifesto was issued, and at a time when they thought they had a right under the Constitution to enter into polygamous relations—that those older men and women and their children should not be disturbed; that the polygamous man should be allowed to support his numerous wives and their children.

"The polygamous relations, of course, should not continue, but we would not compel a man to turn his families adrift. We promised that the older ones, who had contracted those relations before the manifesto was issued, would not be persecuted by the Gentiles; that time would be given for them to pass away, but that the law would be strenuously enforced against any polygamous marriages which might be contracted in the future."

Much more testimony might be quoted of the same general character. It is sufficient, however, for the purpose of this summary to say that there is practically no testimony in conflict with that which has been quoted.

Conditions Acquiesced In.

In other words, the conditions existing in Utah since Reed Smoot became an official of the Mormon Church in 1900 have been such that non-Mormons and Mormons alike have acquiesced in polygamous cohabitation on the part of those who married before the manifesto of 1890, as an evil that could best be gotten rid of by simply tolerating it until in the natural course of events it shall have passed out of existence.

With this disposition prevailing everywhere in the State of Utah among all classes—the Gentile or non-Mormon population as well as among the Mormons—the undersigned are of the opinion that there is no just ground for expelling Senator Smoot or for finding him disqualified to hold the seat he occupies because of the fact that he, in common with all the people of his state, has not made war upon, but has acquiesced in, a condition for which he had no original responsibility. In doing so he has only conformed to what non-Mormons, hostile to his Church, as well as Mormons, have concluded is, under all the circumstances, not only the wisest course to pursue, but probably the only course that promises effective and satisfactory results.

J. B. FORAKER,
ALBERT J. BEVERIDGE,
WM. P. DILLINGHAM,
A. J. HOPKINS,
P. C. KNOX.

STATEMENT.

The minority respectfully submit the following statement as a part of their foregoing report.

Jan. 27, 1903, the senate adopted the following senate resolution No. 205:

"Resolved, That the committee on privileges and elections of the senate, or any subcommittee thereof, be authorized and directed to investigate the right and title of Reed Smoot to a seat in the senate as senator from the State of Utah, and said committee, or any subcommitee thereof, is authoriezd to sit during the sessions of the senate, to employ a stenographer, to send for persons and papers, and to administer oaths; and that the expense of the inquiry shall be paid from the contingent fund of the senate upon vouchers to be approved by the chairman of the committee."

At the time of the adoption of this resolution there were pending in the Senate two formal protests against the admission of Reed Smoot to the senate, both having been filed before he took his seat. One of these protests is signed by M. W. Paden and 17 others, and the other by John L. Leilich alone—Mr. Leilich being also one of the 17 who signed the principal protest.

Shortly before the adoption of the foregoing resolution at a preliminary hearing on the 16th of January, 1903, of which notice was duly given, counsel appeared before the committee representing Mr. Paden and others who signed the principal protest, and Mr. Smoot also appeared in person and by counsel. At that time statements were made by counsel for the respective parties, stating in a general way what they expected to prove and what their claims were as to the legal aspects of the case. Later the taking of testimony commenced.

Numerous witnesses were produced and examined before the committee, both on behalf of the protestants and on behalf of Mr. Smoot. The taking of this evidence was continued from time to time until the 25th day of January, 1905, when the further taking of testimony was closed and counsel were heard in argument. The committee took the case under consideration with a view to making a report. Afterwards, at the present session the case was reopened for the further taking of testimony, after which the case wase again argued by counsel.

In the protest signed by Mr. Leilich alone it was charged that Reed Smoot is a polygamist, and that, as an apostle of the Church of Jesus Christ of Latter-day Saints—commonly called the Mormon Church—he had taken an oath "of such a nature and character as that he is thereby disqualified from taking the oath of office required of a United States senator." No one appeared, however, to sustain either of these charges. No evidence has been offered in support of either of them, but on the contrary both charges were refuted by a number of witnesses.

The investigation made by the committee has been based chiefly upon the charges made in the protest signed by Mr. Paden and others. At the preliminary hearing already referred to counsel for the protestants presented, in a more formal way than had been done in the protest itself, the charges supposed to be embodied in that protest.

The charges thus presented are as follows:

First. The Mormon priesthood, according to the doctrine of that Church and the belief and practise of its membership, is vested with, and assumes to exercise, supreme authority in all things temperal and spiritual, civil and political. The head of the Church claims to receive divine revelations, and these Reed Smoot, by his covenants and obligations, is bound to accept and obey, whether they affect things spiritual or things temperal.

Second. The first presidency and twelve apostles, of whom Reed Smoot is one, are supreme in the exercise of this authority of the Church and in the transmission of that authority to their successors. Each of them is called prophet, seer, and revelator.

Third. As shown by their teaching and by their own lives, this body of men has not abandoned belief in polygamy and polygamous cohabitation. On the contrary—

(a) As the ruling authorities of the Church they promulgate in the most solemn manner the doctrine of polygamy without reservation.

(b) The president of the Mormon Church and a majority of the twelve apostles now practise polygamy and polygamous cohabitation, and some of them have taken polygamous wives since the manifesto of 1890. These things have been done with the knowledge and countenance of Reed Smoot. Plural-marriage ceremonies have been performed by apostles since the manifesto of 1890, and many bishops and other high officials of the Church have taken plural wives since that time. All of the first presidency and twelve apostles encourage, countenance, conceal, and connive at polygamy and polygamous cohabitation, and honor and reward by high office and distinguished preferment those who most persistently and defiantly violate the law of the land.

Fourth. Though pledged by the compact and bound by the law of their commonwealth, this supreme body, whose voice is law to its people and whose members were individually directly responsible for good faith to the American people, permitted, without protest or objection, their legislators to pass a law nullifying the statute against polygamous cohabitation.

In substance these charges so far as they seem to be a proper subject of inquiry here are:

1. That the Mormon Church exacts and receives from its members, including Reed Smoot, absolute obedience in all political matters.

2. That the Mormon Church is promulgating the doctrine of polygamy, and that the first presidency and all the twelve apostles, including Reed Smoot, "encourage, countenance, conceal, and connive at polygamy and polygamous cohabitation, and reward those who practise it."

No evidence has been submitted to the committee or has come to its knowledge in anywise affecting injuriously the general character of Reed Smoot. On the contrary, it has been admitted by the protestants, through their counsel, and a number of witnesses on both sides have testified, that his moral character is unimpeachable in every respect. In the protest of Mr. Paden and others it is explicitly stated that they do not charge him with any offense cognizable by law.

Some Historical Facts.

To a proper understanding of the voluminous evidence in the case, in so far as it tends to throw any light upon the question whether Reed Smoot is entitled to retain his seat in the senate, it will be useful to set forth, in a preliminary way, certain indisputable historical facts.

The Mormon people, under the lead of Brigham Young, in their pilgrimage from Nauvoo, Ill., settled at the place now known as Salt Lake City in the summer of 1847. The place where they located was, at that time, Mexican territory. The Mormons, however, hoisted the Stars and Stripes on an eminence near the city, ever since called Ensign peak.

On the 20th day of September, 1850, Brigham Young, the then head of the Mormon Church, was nominated for governor of the Territory of Utah by President Fillmore, and his appointment was confirmed by the senate Sept. 28, 1850. During his term of office under that appointment, and in the year 1852, Brigham Young, as the president of the Mormon Church, formally and publicly proclaimed polygamy as a doctrine of that Church.

There is some dispute as to whether polygamy had not been proclaimed in 1844 by Joseph Smith, Jr., Brigham Young's predecessor as president of the Church; but it is not deemed necessary in this statement to consider the merits of that controversy. The admitted fact is that from the time of Brigham Young's announcement in 1852 polygamy was openly practised in Utah by many of the Mormon people, including Brigham Young himself.

When his term of office as governor of the territory expired in 1854 he was appointed for another term of four years by President Pierce, his nomination being again confirmed by the senate; he served out his second full term of four years. During all of this time he continued to be president of the Church and to openly live in polygamous relations with several wives.

Act of 1862.

There seems to have been no attempt by the government of the United States to interfere with the practise of polygamy in Utah until July 1, 1862, on which date an act of Congress entitled "An act to punish and prevent the practise of polygamy in the territories of the United States and other places, and disapproving and annulling certain acts of the legislative assembly of the Territory of Utah," became a law (12 Stat. L., 501).

The first section of that act is as follows:

"That every person having a husband or wife living, who shall marry any other person, whether married or single, in a territory of the United States, or other place over which the United States have exclusive jurisdiction, shall, except in the cases specified in the proviso to this section, be adjudged guilty of bigamy, and, upon conviction thereof, shall be punished by a fine not exceeding $500, and by imprisonment for a term not exceeding five years: Provided, nevertheless, That this section shall not extend to any person by reason of any former marriage whose husband or wife by such marriage shall have been absent for five successive years without being known to such person within that time to be living; nor to any person by reason of any former marriage which shall have been dissolved by the decree of a competent court; nor to any person by reason of any former marriage which shall have been annulled or pronounced void by the sentence or decree of a competent court on the ground of the nullity of the marriage contract."

It will be observed that while this section of the act of 1862 made it a penal offense to take a plural wife or husband it did not punish or in anywise interfere with the continued cohabitation of those who had previously entered into the polygamous relation.

The Edmunds Law.

Such cohabitation was not made an offense until March 22, 1882, when the socalled "Edmunds act" became a law (22 Stat. at Large, 30). This act of 1882 amended the act of July 1, 1862 (which in the meantime had become section 5352 of the Revised Statutes). Section 3 of the amendatory act provided:

Sec. 3. 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.

In the seventh section of the same act it was provided as follows:

"Sec. 7. That the issue 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, in any territory of the United States, and such issue shall have been born before the first day of January, A. D. 1883, are hereby legitimized.

Soon after the Edmunds act became a law, prosecutions were instituted in the territorial courts against persons who were living in polygamy, those prosecutions being nearly all under the third section of the act, which made it an offense for a man to cohabit with more than one woman. From that time until October, 1890, the number of polygamous marriages in Utah decreased, but the practise was not entirely stopped.

The Edmunds-Tucker Act.

By what is called the Edmunds-Tucker act, approved March 3, 1887, (24 Stat L., 635), the rules of evidence were changed so as to make a lawful husband or wife of a person accused of bigamy, polygamy, or unlawful cohabitation a competent witness.

By section 7 of that act the various acts of the legislative assembly of the Territory of Utah incorporating or continuing the corporation known as the Church of Jesus Christ of Latter-day Saints were disapproved and annulled, and that corporation dissolved; and it was further made the duty of the attorney-general of the United States to take proper proceedings in the supreme court of the territory to wind up the affairs of the corporation. Section 11 of this act of 1887 further provided as follows:

"Sec. 11. That the laws enacted by the legislative assembly of the Territory of Utah which provide for or recognize the capacity of illegitimate children to inherit or to be entitled to any distributive share in the estate of the father of any such illegimate child are hereby disapproved and annulled; and no illegitimate child shall hereafter be entitled to inherit from his or her father or to receive any distributive share in the estate of his or her father; Provided, That this section shall not apply to any illegitimate child born within 12 months after the passage of this act, nor to any child made legitimate by the seventh section of the act entitled "An act to amend section 5352 of the Revise Statutes of the United States, in reference to bigamy, and for other purposes," approved March 22, 1882."

Reynolds vs. the United States.

Althought the act of 1862, above referred to, made it a criminal offense to marry a plural wife in the territories of the United States, and althought polygamy was openly and publicly practised, there seems to have been little effort on the part of the government to suppress it in Utah for many years after that time. Finally, however, one George Reynolds was indicted and charged with bigamy under that act, and his case was taken to the supreme court of the United States.

The principal question involved was whether, since polygamy was a duty under the religious doctrines of the Mormon Church, an act of Congress punishing the taking of a plural wife was an unconstitutional interference with religion. That case was decided at the October term, 1878 (Reynolds vs. United States, 97 U. S., 145). The court held that while it was not competent for Congress to make a mere belief a punishable offense, yet it was entirely competent for it to make criminal an act which the person committing it might consider to be a duty under his religious belief.

It is worthy of note that the belief of the Mormons in the unconstitutionality of the act in question was so strong that Reynolds, a member of the Church, voluntarily enabled proof of his offense to be obtained in order that the constitutionality of the act might be tested.

The Manifesto of 1890.

On the 26th of September, 1890, Wilford Woodruff, then president of the Mormon Church, issued what is called "The Manifesto," of which the following it a copy:

Official Declaration.

"To whom it may concern:

"Press dispatches having been sent for political purposes from Salt Lake City, which have been widely published, to the effect that the Utah commission, in their recent report to the secretary of the interior, allege that plural marriages are still being solemnized, and that 40 or more such marriages have been contracted in Utah since last June or during the past year; also that in public discourses the leaders of the Church have taught, encouraged and urged the continuance of the practise of polygamy.

"I, therefore, as president of the Church of Jesus Christ of Latter-day Saints, do hereby, in the most solemn manner, declare that these charges are false. We are not teaching polygamy, or plural marriage, nor permitting any person to enter into its practise, and I deny that either 40 or any other number of plural marriages have, during that period, been solemnized in our temples or in any other place in the territory.

"One case has been reported in which the parties alleged that the marriage was performed in the endowment house, in Salt Lake City, in the spring of 1889, but I have not been able to learn who performed the ceremony; whatever was done in this matter was without my knowledge. In consequence of this alleged occurrence the endowment house was, by my instructions, taken down without delay.

"Inasmuch as laws have been enacted by Congress forbidding plural marriages, which laws have been pronounced constitutional by the court of last resort, I hereby beclare my intention to submit to those laws and to use my influence with the members of the Church over which I preside to have them do likewise.

"There is nothing in my teachings to the Church or in those of my associates during the time specified which can be reasonably construed to inculcate or encourage polygamy, and when any elder of the Church has used language which appeared to convey any such teachings he has been promptly reproved. And I now publicly declare that my advice to the Latter-day Saints is to refrain from contracting any marriages forbidden by the law of the land.

WILFORD WOODRUFF,
President of the Church of Jesus Christ of Latter-day Saints."

At the semi-annual general conference of the members of the Mormon Church, which was held on October 6, 1890, the foregoing declaration was unanimously accepted "as authoritative and binding." Two years later it was again approved by the general conference of the Church. Since it was first approved by the general conference, in October, 1890, it has been and still remains a part of the fundamental law of the Mormon Church, which can be repealed or modified only by the action of a similar conference.

As to the effect of the manifesto on the power of the president of the Mormon Church, or any subordinate official to celebrate a plural marriage we quote a part of the testimony of James E. Talmage. Doctor Talmage prepared and issued, under the auspices of the Church authorities, a work called "Articles of Faith," which authoritatively sets forth the doctrines of the Church having been submitted to, approved by, and published by the Church itself. (Vol. III, pp. 47 and 48.)

Mr. Worthington—Doctor, you have used the expression here "holding the keys" in connection with that revelation involving polygamy, when it was given to Joseph Smith, Jr., that he was the only man who held the keys to that power. He only at that time, or some person delegated by him, could make a plural marriage that would be valid according to the laws of the Church. Am I right in that?

Mr. Talmage—Yes, sir.

Mr. Worthington—From that time on down to the time that President Woodruff issued this manifesto, which the Church approved in conference assembled, the same principle obtained?

Mr. Talmage—Yes, sir.

Mr. Worthington—That a plural marriage could not be valid according to the law of the Church, only when celebrated by the president, or by somebody authorized by him to celebrate it. Is that right?

Mr. Talmage—That is strictly true.

Mr. Worthington—Then when this revelation which is called the manifesto came and it was submitted to the people and accepted by them, that power was taken away from the president, was it not?

Mr. Talmage—Yes, sir.

Mr. Worthington—So that since the 6th day of October, 1890, the president of the Church had no power to solemnize a plural marriage according to the law of the Church, even?

Mr. Talmage—That is true.

Mr. Worthington—And no power to authorize anybody else to celebrate one?

Mr. Talmage—That is true.

Mr. Worthington—So that if any person has undertaken to enter into plural marriage, if any woman has become the plural wife of a husband since the 6the day of October, 1890, she is no more a wife by the law of the Church than she is by the law of the land?

Mr. Talmage—That is true.

Mr. Worthington—And it is not in the power of the president to revive the old system so that he can make a valid plural marriage or authorize one unless he does it through the general conference of the Church?

Mr. Talmage—Certainly. It is now a rule of the Church that that power shall not be exercised. The power is there, but the exercise of it is entirely stopped, and a rule of the Church thus made and sanctioned is equally binding with the law founded upon revelation, and the president therefore has in one sense, half voluntarily, inasmuch as he was the chief individual to bring it before the conference, but by the action of the conference, properly speaking, has surrendered that power as far as its exercise is concerned.

Mr. Worthington—It takes the action of the people to restore it, does it not?

Mr. Talmage—Most assuredly——. (3—48, 49.)

The Enabling Act.

The enabling act, under which Utah in January, 1906, was finally admitted into the Union, was passed by Congress on July 16, 1894, (28 Sta. L., 107). By section 3 of that act it was required that the state convention, which was authorized to be called to organize the state government, should provide:

"By ordinance irrevocable without the consent of the United States and the people of said state—

"First. That perfect toleration of religious sentiment shall be secured, and that no inhabitant of said state shall ever be molested in person or property on account of his or her mode of religious worship: 'Provided, That polygamous or plural marriages are forever prohibited.'"

It is very important to observe that while this act made it a condition to the admission of the state that polygamous or plural marriages should not be allowed, no provision of any kind was made against polygamous cohabitation. That offense was left to be governed by the constitution and laws of the state as the inhabitants of the state might determine.

The testimony shows that the distinction thus made by Congress in the enabling act between polygamous marriages and polygamous cohabitation was intentional. Polygamous marriages, as we have seen, were not forbidden by any act of Congress until 1862, ten years after polygamy had become prevalent in Utah. It was 20 years later still, 1882, before Congress prohibited polygamous cohabitation.

From the time polygamy was first promulgated by Brigham Young, as president of the Mormon Church, until about five years thereafter, he was continued in office by the government as governor of the territory. Both the Edmunds act of 1882 and the Edmunds-Tucker act of 1887 recognized polygamous marriages to the extent of making legitimate all the children born of such marriages prior to the passage of those acts, respectively, who might be born within a period in one case of nine months and nine days and in the other 12 months after the passage of the act.

Polygamous Cohabitation.

Under these laws families had been created, and children born of polygamous marriages had grown to manhood and womanhood. It is not surprising, under such circumstances, that there was a feeling on the part both of the government officials in that territory and of the people of the territory that if further polygamous marriages should cease the continuance of polygamous relations theretofore created might be tolerated, if they were not openly or flauntingly carried on.

To prohibit such relations would be to deny the parents of legitimate children to dwell together with such children. Some 25 or 30 witnesses have been examined on this subject, most of them non-Mormons and several of them witnesses called on behalf of the protestants. There is a practical unanimity among them that at least from the time of the admission of the state into the Union, which occurred on January 4, 1896, there was practically a universal disinclination to prosecute those who had plural families born of relations established before the manifesto of 1890.

As a sample of the evidence on this subject we refer to the testimony of Judge William M. McCarty, one of the associate justices of the supreme court of Utah. He was assistant United States attorney for the territory of Utah from 1889 until 1893, when he was elected county attorney of Sevier county, in that territory. He was re-elected in 1894. In 1895 he was elected one of the district judges of the State of Utah.

He was re-elected to that office in 1900, and in 1902 was elected to his present office. He is a non-Mormon, and has always been an uncompromising opponent of polygamy. He conducted some of the prosecutions for polygamous cohabitation between the date of the manifesto, in 1890, and the admission of the State into the Union in January, 1896. He testified:

"I prosecuted them before the United States commissioners up until 1893, when the United States attorney refused to allow my accounts for services for that kind of work, and then I quit and confined my investigations before the grand jury in those cases."

And Judge McCarty further testified that the superior to whom he referred as stopping the prosecution for polygamous cohabitation was John W. Judd, a gentile.

In 1897 some prosecutions for polygamous cohabitations against men who were married before the manifesto came before Judge McCarty as district judge of the State. The accused in those cases admitted their guilt and were punished by a fine only, upon agreeing to cease cohabitation with their plural wives. Judge McCarty testified that it was after these prosecutions he obtained the first emphatic expression he had observed as to the state of public opinion in Utah at that time regarding such prosecutions.

He said that he found the press was against the prosecutions; that the public prosecutor, whose attention he invited to the matter, refused to proceed. From this and other facts which came to his knowledge Judge McCarty reached the conclusion that the public sentiment of the State was against interfering with men in their polygamous relations who had married before the manifesto. (Vol. 2, 882 to 886; 889, 916.)

E. B. Critchlow, a gentile lawyer, of Salt Lake City, who prepared the principal protests in this case and who, during the early sittings of the committee, assisted Mr. Tayler, counsel for the protestants, in presenting the case, testified as a witness on behalf of the protestants that after the manifesto of 1890 there was no inclination on the part of the prosecuting officer to "push these matters as to present cohabitation," "thinking it was a matter that would immediately die out;" that it was well known that Apostle John Henry Smith was living in unlawful cohabitation; and non-Mormons generally made no objection to it; that they were disposed "to let things ago," and that that was the general feeling from the time of the manifesto in 1890 "down to very recent times—pretty nearly up to date or practically up to date."

Mr. Critchlow further testified that the non-Mormons were disposed to overlook the continuous polygamous cohabitation of those who had taken plural wives before the manifesto, because they—the non-Mormons—felt satisfied that there would be no more plural marriages; that the thing would work itself out in the future, and that where the polygamists had their wives in separate houses and simply kept up the old relations without the offensive flaunting of them before the public it had been practically passed over. (Vol. 1, 624, 625.)

Another witness called on behalf of the protestants was Orlando W. Powers, a leading lawyer of Utah, a non-Mormon, who was associate justice of the supreme court of the territory of Utah in 1885 and 1886, and whose testimony in general shows his strong feeling against the Mormon Church. He testified that, speaking for those who fought the Church party in the days when it was a power, they had felt and still feel that if the Church would stop new plural marriages those who had contracted such marriages before the manifesto would not be interfered with. After stating that the people who lived in the east had no understanding of the situation in this regard in Utah, Judge Powers added:

"That condition exists. There is a question for statesmen to solve. We have not known what was best to do. It has been discussed, and people would say that such and such a man ought to be prosecuted. Then they would consider whether anything would be gained; whether we would not delay instead of hastening the time that we hope to live to see; whether the institution would not flourish by reason of what they would term persecutions. And so, notwithstanding a protest has been sent down here to you, I will say to you the people have acquiesced in the condition that exists."

Then the witness added that by "the people" he meant the gentiles. (Vol. 1, 884-885.)

William J. McConnell, ex-governor of Idaho and ex-senator of the United States from that state, when asked whether there was any public sentiment in Idaho in reference to prosecutions for simply unlawful cohabitation as distinguished from new polygamous marriages, replied:

"It was understood and agreed when we adopted our State Constitution and were admitted to statehood, that these old Mormons who had plural families would be allowed to support their wives and children without molestation. It was agreed by all parties, Democrats and Republicans alike, that they should be allowed to drift along. We could, under the law, have prosecuted these people and perhaps have sent them to jail. We could doubtless have broken up these families, but we felt it better that these men should be allowed to support these old women and these children than to further persecute them." (2, 522).

This witness was sharply cross-examined by Mr. Tayler and by the chairman on this subject, with the result that he made his testimony more emphatic (2, 524, 526).

On his redirect examination he further stated that he agreed to the foregoing testimony of Mr. Critchlow and Powers (2, 531, 532).

F. H. Holzheimer, a leading lawyer of Idaho, who was practising his profession in Utah until November, 1890, testified that the issuing of the manifesto of 1890 brought about a very peculiar state of affairs, and that the