CONSTITUTIONAL RIGHTS MAINTAINED — "MORMON" MORALITY DEFENDED.

ARGUMENT BEFORE THE SUPREME COURT OF THE UNITED STATES, IN THE SNOW CASES.

By Franklin S. Richards.

MAY IT PLEASE THE COURT:

In the discharge of a solemn duty, I stood in this august presence, at an early day of the present term, and asked for a construction of section three of the "Edmunds Act." In the name of a whole people who were harassed by the most extraordinary and conflicting judicial interpretations, made by the lower courts, I appealed to your Honors for a removal of the doubts, and a dissipation of the mysteries, by which this strangely ambiguous statute had been enveloped. The decision of this Court in that cause, the Cannon case, was most conclusive so far as the fate of that particular defendant was concerned, but it did not provide against future complications and oppressive constructions.

Once more I appear at this exalted forum upon a similar mission. I fear that I can add no new reasons to those given on the former occasion, why this supreme tribunal should grant to the devoted people of Utah, a fixed definition of this incomprehensible law. I can only pray this court in its merciful justice, to remove the stumbling blocks, the snares and pitfalls, from the pathway of my people, and to shed light along the way which many must travel in order to conform their conduct to the requirements of this law. If your Honors will do this—if you will but show what the law is, that it may be understood and obeyed—whatever may be the individual fate of Lorenzo Snow, the plaintiff in error, he will not feel that his jeopardy and privation have been in vain.

Mr. Snow, on separate trials, was convicted in the District Court of the First Judicial District of Utah Territory on three indictments for unlawful cohabitation, and the judgments, each for the highest punishment allowed by law, were affirmed by the Supreme Court of the Territory and he is now imprisoned in execution of the same. The indictments are found under section 3 of chapter 47 of an act of Congress approved March 22d, 1882, which reads as follows:

"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."

One indictment charged cohabitation with seven women as wives in 1882; another charged cohabitation with the same women in 1884, and the third charged cohabitation with the same women during the eleven first months of 1885. The trials occurred in the inverse order of the time covered by the indictments, commencing with the indictment for 1885; and the numbers in this Court do not correspond with the order of trial.

The questions in the first case tried involve the construction and effect of the section of the act of Congress above quoted and what constitutes an offence under it, also the evidence admissible to prove it, and the manner in which the questions involved were submitted to the jury. The questions arise out of objections to the sufficiency of the evidence under said statute, objections and exceptions to the admission and exclusion of evidence, and to instructions given to the jury and requests for instructions refused.

The other cases involve the same questions, arising in the same way, and each of them also involves two additional questions of general importance, to-wit:

1st. Where the alleged cohabitation has been continuous and at the same place and with the same women, can the cohabitation be divided into separate offences marked only by an arbitrary division of the time?

This question arises on the ruling of the court sustaining a demurrer to pleas of the first conviction, and of the first and second convictions, in bar to indictments in the second and third cases respectively.

2d. Is the offence of unlawful cohabitation with more than one woman committed by cohabiting with a woman not a lawful wife, and at the same time having a lawful wife living with whom there is no cohabitation; and if there is a presumption of cohabitation with the lawful wife, is it indisputable and incapable of being rebutted?

This question arises on an instruction to the jury in the second and third cases, which I will read when I reach that point in my argument.

Our first assignment of error is: Insufficiency of the evidence to support the conviction.

The whole record shows an utter absence of evidence of cohabitation with any woman except the wife Minnie, and discloses the fact that the defendant lived exclusively with her and made his home at her house during the entire time charged in the indictment.

The marriages with the several wives had taken place at different periods, the first, Adeline's, occurring more than forty years ago, and the last, Minnie's, fifteen years ago. Each of the wives lived in her own home, conveyed to her by deed from the defendant, dated in 1874.

Adeline and Phœbe occupied one house, (which was conveyed to them in parts), and had so lived for ten years. Their house was from a third of a mile to half a mile distant from that in which Mr. Snow lived with Minnie. Mary dwelt in a separate house and had so lived for ten years or more. Her house was about half a mile from Minnie's. Sarah, Harriet, Eleanor and Minnie had resided in the adobe house called the "Old Homestead," each in her own part, and the defendant had also lived there until some time in 1881 or 1882, when he and Minnie moved into the brick house on the same block, where he lived exclusively until his indictment. Since Minnie's removal from the old homestead, Sarah, Harriet and Eleanor, with their families have occupied it, each living in the part conveyed to her. The old homestead fronts east on Main Street, which runs north and south, is about twenty feet from the street, and from the gate in front of the house a path leads northerly and westerly, passing partly around the east and north sides of the house to the northwest corner of it, and continuing thence northerly through a gate in the fence between the old homestead premises and the brick house premises, owned and occupied by Minnie. The brick house is on an east and west street, fronts north, and is 60 to 70 yards from the old homestead, but on the same block.

Your Honors can see from the diagram [indicating] where these parties lived, and I will now endeavor to tell you what the evidence discloses as to how they lived.

There is no evidence that the defendant ever saw either Adeline or Phœbe during the time charged in the indictments. He lived with Minnie in the brick house. The evidence to show cohabitation with Sarah, Harriet, Mary and Eleanor, or one of them, is in substance this:

He called on Mary and her family "as any other gentleman friend," four or five times during the eleven months of 1885, and remained from half a minute to half an hour. These calls were in the daytime, and he had not eaten or slept in the house nor been there at night. This leaves the occupants of the old homestead, Sarah, Harriet and Eleanor.

He called two or three times on Sarah and her family, and remained half an hour—possibly an hour—during the day. Did not eat or sleep in the house and was not there in the evening or at night. He was generally occupied during these calls in business conversations with Alvirus (a son), who was assistant manager in the co-operative store of which the defendant was superintendent; but Mr. Snow also made inquiries about the welfare of the family.

He had called on Harriet and her family two or three times to inquire concerning the children and to learn of their wellbeing; and on business with Frank, a son, who was engaged in mercantile pursuits. He stayed a few minutes each time, and sat down from half a minute to perhaps half an hour.

He called on Eleanor and her family two or three times in 1885, remaining from ten to fifteen minutes each time, but did not eat or sleep there.

This is the whole evidence to show cohabitation in 1885, and there was less evidence of it in 1883 and 1884.

There was no room kept for him in any house except Minnie's. There he ate, slept and stayed when at home. His mail and business papers came there; his personal clothing was kept and cared for there; and no indication existed of a home or habitation at any other place. Not only was it the fact that he lived exclusively at the brick house with Minnie, but it was also the understanding and repute in the neighborhood that he had so lived.

I confidently submit that such a state of facts cannot constitute a criminal cohabitation with more than one woman. There was in fact and in law no cohabitation with any woman but Minnie, and therefore the evidence is insufficient to sustain the conviction. I have, in discussing this point, dwelt more particularly upon the evidence in the case first tried, because it is the strongest of the three cases against the defendant.

Mr. Justice Harlan: There is evidence that he claimed the women as his wives, is there not?

Mr. Richards: Yes, sir; he admitted that they were his wives and that he had claimed them as such. I shall consider the effect of that admission in my next point, but, certainly, it alone could not constitute cohabitation.

Mr. Justice Harlan: What do you say cohabitation consists of; what does cohabitation mean?

Mr. Richards: I say precisely what your honors said in the Cannon case, that cohabitation means living together as husband and wife. And to violate this statute a man must so live with more than one woman.

As my illustrious colleague will have occasion to refer to the evidence, during his argument, I will pass on to the second assignment of error.

We contend that the court erred in admitting on the trial for cohabitation in 1885 evidence tending to show cohabitation with the same women in 1883 and 1884, and prior thereto, when indictments for 1883 and 1884 were pending before the court.

The evidence so admitted extends through the entire case, and includes a comparison of the manner of living in the year 1885 with the manner of living prior thereto.

In objecting to the evidence the attention of the court was called to the indictments for 1883 and 1884, and the court held that it would take judicial notice of them and not require them to be offered in support of the objection.

The evidence was not only admitted, but the judge charged the jury as follows:

"If there is evidence that the defendant had married the women, had been living with them as his wives before the offence, it may be considered by the jury as adding weight to any circumstances proven, pointing to unlawful cohabitation during the time the offence is charged."

The statute, under which Mr. Snow was indicted, has been construed to mean a cohabitation with more than one woman as wives, or under the claim or color of a marriage relation. There were two things for the prosecutor to prove: The claim or color of a marriage relation, and the cohabitation—the latter being the body of the offence, the former only relating to the status of the person committing it. It is not disputed that, as to such status of the person, evidence would be proper covering any number of years, though separate indictments were pending, and that such evidence would violate no rule of law. The plaintiff in error, at the opening of the trial, admitted the status and the "holding out" of the women as wives in the broadest terms, as this quotation from the record shows: "The defendant by his counsel admitted before the court and jury that he had been married to all the women named in the indictment, the last marriage being in 1871, and that he never was divorced from either; and ever since the respective marriages has claimed each of said women as his wife, but did not admit that he had cohabited with more than one of them during any part of the time charged in the indictment."

This reduced the issue to proof of the cohabitation during the time charged, and gave the prosecutor no excuse for offering evidence of prior cohabitation to show the status of the parties, or the "holding out" as wives.

The general rule that, to aid in convicting a person of one offense the commission of another though a like offense, cannot be shown to defendant's prejudice, is well settled. Mr. Bishop in his work on Criminal Procedure, Sections 1120 and 1123, says: "On a trial for a particular crime, the State cannot aid the proofs against the defendant by showing him to have committed another crime." * * "Not even on cross examination can his case be prejudiced with the jury by testimony to any irrelevant guilt." And this is the settled rule of law as shown by the authorities cited in our brief.

The exceptions to the rule do not relate to the proof of the fact or act constituting the offense, but only to the questions of knowledge, purpose, malice or intent, where such things characterize the act and are necessary to make it criminal or to enhance its criminality. The cases cited by opposing counsel go to this extent but no further, and, in his argument on another branch of the case, he has conceded the very point for which we are here contending. After quoting liberally from the authorities he says: "From this practice it is clearly to be deduced that there might be any number of indictments against a party for either of the offenses named, but that no one indictment could be supported by evidence which has been introduced under any of the others."

If counsel has stated the law correctly upon this point, and he certainly has, then it necessarily follows that there was error in admitting this evidence to prove the only fact in issue, and in giving instructions to the jury that they might consider it. The usual test as to whether one action or prosecution is a bar to another is whether the same evidence would prove or tend to prove each case. Here there were separate indictments for 1883 and 1884, for the same acts which were proved to procure a conviction for 1885.

Mr. Justice Miller: Suppose there was but one indictment, that for 1885?

Mr. Richards: Then I say the prosecution might have introduced evidence of what occurred in 1883 and 1884, because there was but one offence charged. But I most emphatically insist that a person cannot legally be convicted of three separate offences upon the same evidence introduced in three separate trials. Both law and justice forbid such a thing; and yet it was done in these cases. On the trial for 1885 the Court admitted evidence of what occurred in 1883 and 1884; on the trial for 1884 the evidence as to 1883 and 1884 was used the second time to procure a conviction; and on the trial for 1883 the same evidence as to what occurred in that year was used the third time.

Mr. Justice Field: It may be that the same testimony covers the three years.

Mr. Richards: It is utterly incomprehensible to me, under the authorities as I read them and the principles of law as I understand them, that the same testimony can be used three times to convict a person of three distinct offenses. But I pass on to the next point in my brief.

The Court erred in excluding evidence that no sexual intercourse had taken place with any of the women except one.

This Court has decided that proof of sexual intercourse need not be made by the prosecutor and is not essential to the offence. It has been held, however, that the prosecutor may prove it, if he can, and proof of the birth of children in Utah is taken as evidence of cohabitation.

In the Cannon case (116 U.S., p. 71,) it was held not to be error to exclude proof of non-sexual interconrse. We understand that ruling is not based on the idea that the proof is immaterial in all cases, but that the admitted facts in the Cannon case constituted cohabitation irrespective of the fact of sexual intercourse, and that the admission of the evidence could not have helped the defendant's case, and its exclusion could not injure it.

In this case there were no such conclusive facts. The plaintiff in error had not lived in the same house with more than one woman. He claimed, and the evidence showed, that he had merely visited, and had not lived with more than one, and it was a question of fact for the jury whether those visits were made in good faith and for the purposes claimed by the plaintiff in error, or whether he was in fact living or cohabiting with the women. It was therefore proper for the plaintiff in error to show to the jury the character of those calls or visits, what occurred and what did not occur, and especially that no such decisive act took place as would convert those visits into cohabitation. The nature of the visits and the purposes for which they were made were involved, and from the admission that the women were his wives the jury may have drawn unfavorable inferences as to what occurred. A reference to the testimony will show that there was no evidence from which the Court, as a matter of fact and law, could say there had been cohabitation, but that the jury must pass upon the question, hence the Court erred in applying the decision in the Cannon case.

The argument of opposing counsel illustrates the hardship to the defendant of this ruling. He insists that the testimony of Mr. Snow's wives should show that "he had become to them as other men." How could this have been done in a more effective manner than by their testimony upon this very point? It is true that Mary said, "he called as any other gentleman friend," but, when pressed by the defense to a more specific statement, she was stopped by the Court at this most important point and forbidden to answer.

The court erred in refusing instructions asked by the defendant as follows:

Second Request. "The term cohabit means 'live with' or 'dwell with,' and in the act under which the defendant is indicted means to 'live with as wives.'"

Third Request. "To constitute cohabitation there must be such a frequency or regularity and manner of association of a man and woman as to amount to a living together and distinguish the association from mere visits, and so long as there is not a living together occasional visits do not amount to cohabitation."

The court refused these requests severally, and gave no equivalent instruction or any instruction which would clearly call the attention of the jury to what constituted cohabitation, or that the parties must in any manner live together to constitute a cohabitation.

The court charged as follows and the plaintiff in error excepted:

"It is not necessary that the evidence should show that the defendant and these women or either of them occupied the same bed, slept in the same room, or dwelt under the same roof; neither is it necessary that the evidence should show that within the time mentioned in the indictment the defendant had sexual intercourse with either of them.

"The question is, were they living in the habit and repute of marriage?

"The offence of cohabitation is complete when a man, to all outward appearances, is living and associating with two or more women as wives.

"If the conduct of the defendant has been such as to lead to the belief that the parties were living as husband and wife live, then the defendant is guilty."

Mr. Justice Field: If a man has several wives, and he does not live in the same house, does that prove that they do not cohabit together? Unless he keeps a harem he must keep them in separate buildings.

Mr. Richards: While it may not prove that they do not cohabit, it certainly does not prove that they do cohabit. It is, your Honor, for the purpose of finding out what constitutes cohabitation that I am here with these cases.

In four sentences the court gave one negative definition, that is, told the jury what was not necessary to the offence, and three separate affirmative definitions, and the state of the evidence is important in comparing what was asked with what was given. Occasional and quite rare calls or visits on the women who lived in separate houses was all that was shown, and some of those visits were to sons of the women on business. The plaintiff in error claimed before the jury that those calls were mere visits, and in that view asked that the jury might be instructed as to the meaning of the word "cohabit," and what would constitute cohabitation. The evidence showed that he had not eaten or slept, or passed an evening or a day in the house of any of these women, and there was at least a fair question of fact to go to the jury.

The negative definition of the judge did not meet the case, and, though some of it was correct, the statement that they need not dwell in the same house was at least misleading, and not an answer to the requests. It may be conceded that cohabitation is possible without dwelling in the same house, but there was no evidence in this case calling for the instruction, and the jury could only have understood that living in separate houses and holding out the women as wives was sufficient.

The first affirmative definition is: Were they living in the "habit and repute of marriage?" The repute of marriage, and marriage in fact, were not disputed. The habit of marriage was a vague general expression from which the jury could get no information as to what was cohabitation, and was only a repetition of the substance of the word cohabitation without aiding in its interpretation. The second affirmative definition did not submit to the jury whether there was a living together, or cohabitation, which was the issuable fact, but submitted the probative fact whether there was the outward appearance of cohabitation, and did not specify to whom such appearances must be known. The differences between the requests and this definition are pointed, and the instruction had a tendency to mislead the jury as to what was the issuable fact to be found.

In the case of Livingston v. Maryland (7 Cranch) Mr. Justice Story in delivering the opinion of this court said: "The prayer of the plaintiffs in the fifth exception was for a direction that under all the circumstances of the case there was no such concealment as would avoid the plaintiffs' right to recover. And if, in point of law, the plaintiffs were entitled to such direction, the court erred in their refusal, although the direction afterwards given by the court might, by inference and argument, in the opinion of this court, be pressed to the same extent. For the party has a right to a direct and positive instruction; and the jury are not to be left to believe in distinctions where none exist, or to reconcile propositions by mere argument and inference. It would be a dangerous practice, and tend to mislead instead of enlightening a jury."

The Supreme Court of Connecticut in the case of Morris v. Platt, (32 Conn.,) says; "The court did not conform to the request. The charge as given informed the jury what 'the great principle' of the law of self-defense is, and correctly; but that was not all to which the defendant was entitled. It is not for juries to apply 'great principles' to the particular state of facts claimed and found, and thus make the law of the case. When the facts are admitted, or proved and found, it is for the court to say what the law as applicable to them is, and whether or not they furnish a defense to the action, or a justification for the injury, if that be the issue. And so where evidence is offered by either party to prove a certain state of facts, and the claim is made that they are proved, and the court is requested to charge the jury what the law is as applicable to them, and what verdict to render if they find them proved, the court must comply. This is not only the common law rule, but it is carefully and explicitly declared in this state by statute."

The third affirmative definition given in this case seems clearly erroneous:

"If the conduct of the defendant has been such as to lead to the belief that the parties were living as husband and wife live, then the defendant is guilty."

The issue was whether the plaintiff in error had in fact cohabited with more than one woman, and this fact was to be found beyond a reasonable doubt. The defendant asked the court to say to the jury that the parties must have lived together. The court refused to so instruct, but said that if the jury found that some one might have been led to that belief it was enough. Who is to be led to that belief? If it be interpreted to mean that the jury must be led to the belief, it is still erroneous and would mean "if you find you are led to this belief by the evidence the defendant is guilty."

Fourth request. "The defendant, though living with one wife, could lawfully visit another and her children at reasonable times and for lawful purposes, and the purposes of inquiring concerning the health and welfare of such other wife and his children by her, of providing for their support, and the education, employment, and business of the children would be lawful. He is not required to break off friendly relations with any of his wives and may attend friendly or social or religious meetings at their houses."

This request met every aspect of the evidence in the case and the defendant's claim of the purposes of his visits. If he can visit a plural wife at all, we submit that it should have been given.

And this brings us to the important query: Can a man visit his plural wife at all without violating the provisions of this section? She is the mother of his children and, in addition to his moral obligation to support her and them, to provide for their education, and moral training, there is the legal duty to do all this imposed upon him by the same act which prohibits cohabitation. The children are as a rule at the mother's home, and need the combined wisdom and solicitude of both parents to rear and fit them for the vocations and pursuits of life. Can it be possible that Congress intended to prevent the parents from ever conferring together upon such important issues or to compel them, after sustaining these close relations to each other, to sacrifice the vital interests of their offspring and become as utter strangers? Does the law forbid them such association and intercourse as would have been proper if they had never been more than ordinary friends, and as is now necessary to the welfare of the children? Does the law, in making it the duty of the father to care for his offspring, also require that he should tear them from the mother's bosom and send them be-