AN APOLOGY FOR JUSTICE.

REPORT OF THE TUCKER COMMITTEE.

In the House of Representatives, June 10th, 1886, Mr. Tucker, from the Committee on the Judiciary, submitted the following

REPORT:

[To accompany bill S. 10.]

The Committee on the Judiciary, to whom was referred Senate bill No. 10, have had the same under consideration, and respectfully report back a bill with sundry amendments thereto—and additional sections—as a substitute for said bill.

Your committee will briefly state the changes proposed and the reasons therefor:

The first section of the Senate bill provided that in all prosecutions for polygamy and unlawful cohabitation under any statute of the United States, the lawful husband or wife of the person accused should be a competent witness and should be compelled to testify, but should not be permitted to testify as to confidential communications.

Your committee recommend that the competency of such witness be legalized, but compulsion to testify be stricken out, and permission be negatived as to any statement deemed confidential at common law.

The second section of the Senate bill provided for the attachment of witnesses without previous subpœna; and while such summary process might be needed, your committee thought it ought to be guarded *in favorem libertatis* by requiring that it should only issue upon the affidavit, in writing, of two credible witnesses.

The third section of Senate bill your committee recommend to be stricken out. It proposed to change the limitation for prosecutions for polygamy and the like from two to five years.

Your committee doubted the propriety of such extension, and thought moreover it was needless, in view of the eleventh section proposed by the committee, which is additional to the Senate bill and will be hereafter noticed.

The fourth section of the Senate bill, with a slight change, is adopted by the committee. Its need arises from the fact that no marriage laws exist in Utah, except as the churches or parties may establish them. This section makes every marriage a matter of record, and a public record open to inspection as all others are. This is the third section of the committee's bill.

The fifth section of Senate bill is stricken out by the committee, because it authorized a summary and unusual proceeding, and one seemingly contrary to the spirit, if not the letter, of the fourth amendment to the Constitution as to searches and seizures of private papers. Besides, it was unnecessary, and all proper remedies are afforded by the established practice of the courts.

The sixth section of Senate bill (and fourth of the committee's bill) authorizes proof of marriage by any legal evidence now admissable.

The seventh, eighth, and ninth sections of Senate bill correspond to the fifth, sixth, and seventh of the committee's bill, respectively; are identical. The first denies suffrage to women, the next secures the undivulged ballot, and the last limits the jurisdiction of the probate courts of the Territory to probate business, thus leaving all civil business to the courts of the United States.

The eighth, ninth, and tenth sections of the committee's bill correspond to the twentieth, nineteenth, and eleventh of the Senate bill. The afirst named punishes incest, the committee making fifteen years instead of five years, as proposed by Senate bill, the maximum penalty.

In the ninth of committee's bill adultery is defined so as to make both parties where either is married guilty of the crime. The committee make a change in the penalty.

The tenth of committee's bill changes the Territorial law by authorizing prosecutions for adultery upon complaint of others than the husband and wife. This is plainly right, and accords with Senate bill, section 11.

The committee strike out section twenty-one. The punishment of the offense of fornication may be left to the Territory, as not involved in the institution of polygamy, with which Congress is dealing.

Section eleventh of committee's bill is a new one, and enacts into law what this committee have already recommended as a constitutional amendment.

The purpose of this may be briefly stated.

In the first place, this section makes the status of polygamy criminal, and not merely the original act which created the status. When a man is married to a second living woman, he in the sense of the usual laws against bigamy has completed his crime. This act means to make the continuance of the status, thus created, an offense, and its continuance after any prosecution commenced, a new offense.

In the second place, this will do away with the trouble as to the statute of limitations, for now most cases of polygamy in the Territory are barred, because committed many years, some over thirty years, ago.

And again, this section will remove the questions of construction on the act of March 22, 1882, which have been discussed in Cannon v. U. S., 116 U. S. Reports.

The twelfth section of committee's bill corresponds to the tenth of the Senate bill. It relates to illegitimate children. This committee requires that the disinherision of illegitimate children shall not apply to any child born within twelve months after its passage (ten months being the period of gestation allowed in the rules as to perpetuities). This the committee thought would prevent any retroactive operation of this section against unborn innocents.

Section thirteen of committee's bill is a new one. It is intended to exclude any inference that this act should supersede the act of March 22, 1882, which, except as this will be repugnant to it, is left with its legitimate force.

But a more important purpose was in view. The sixth section of the act of March 22, 1882, gives to the President the power to grant amnesty in cases arising under that act, and the committee wished to extend it to all offenses under this act.

By reference to the former report of this committee on the constitutional amendment proposed, it will be seen that there are some cases of polygamy in Utah arising from marriages before the passage of the act of Congress of 1862 making it criminal. These parties are growing old. Parties married in conflict with said act stand in a different attitude. The first did not marry against any legal enactment. The last married in defiance of a law of Congress.

But it is not to be overlooked that offensive as the polygamous institution is to the public sentiment and moral sense of Christendom, a status has been created and has existed for years, under which relations of interdependence have been established, and feelings of affection (however immoral in the eyes of others it may be) have grown up, and children without personal blame have been born.

It is a question for the exercise of a wise clemency by the President in many of such cases, where he may absolve from the penalty for these offenses those who in good faith renounce the relation between them as one of marriage, cease to hold themselves out as man and wife, but who, in obedience to these laws, may still do the acts which humanity, benevolence, and the former marital relation make proper, but without any intercourse, residence, or manifestation between them contrary to the injunction and mandate of the constitutional authority of the Union; and this is the more clear in regard to the children of polygamy, who hold under parental obligation to help and foster them, those whom, whether under or against human law, nature and Divine Providence have made their real parents, and the authors of their being.

The fourteenth section of the committee's bill amending the twelfth section of the Senate bill will be very properly considered with the fifteenth section of both bills, and with the thirteenth, fourteenth, and sixteenth sections of the Senate bill, as amended by the sixteenth section of committee's bill.

The two corporations referred to in these sections are closely connected in their objects, and are nearly related to the general policy of the Mormon people.

A partial recapitulation of the views presented in the previous report on the constitutional amendments will be necessary.

The Mormon system is directly antagonistic to all ideas of European and American civilization. A family springing from the marital relation of one man to many wives seems to make a home of unity, harmony and hearty co-operation impossible. Its elements are heterogenous, alien, and must in most cases be hostile, if the Biblical origin of our race be admitted, one man and one woman—the dual unity—constituted the Divine appointment for the family. Affection concentrated, not divided; care and protection by the man for the woman, and mutual assistance and sympathy, which are found in a wedded pair rearing a common offspring in a home from which none stray but to return with deeper devotion than ever—in which no jealonsy from rival claims intrudes—and the twain become one and indivisible in life, labor and interest. These are the essential qualities of a marriage in Christendom, and of that family life which is the basis of civilization in Europe and America.

These two types of domestic life are absolutely irreconcilable and inconsistent. They cannot unite; they must part. They cannot coalesce; they must exist in separate nationalities.

But it will have been seen from the views stated in the former report that when polygamy assumed the garb of religion, and clothed its deformity with the insignia of ecclesiastical and even Divine authority; when it legalized what the American States regard as crime, under the higher law of God, and sought through the rapid propagation of the species under the economy of celestial or plural marriages to people the earth and occupy it with the Latter-day Saints; when clothed in brief authority, with the assumed Statehood of Deseret, it incorporated its church, whose head was president of the State; when to all this it added another corporation, subject to the church, whose purpose was to limit emigration to propagation, to make more certain the occupation of the public domain; when it organized its militia force into a Nauvoo Legion, whose name recalled the lost capital of its kingdom; when it granted lands and rights in them to its leaders and adherents as a mode of preoccupying a large Territory of the United States, and finally put its legion in battle array to oppose the army of General Albert Sidney Johnson in 1857-'58, and to drive it back from the Territory with threats of war, and with openly proclaimed defiance, no impartial observer of these historic events from 1849 to 1858 can doubt the dangerous purpose of the leaders of the Mormon people to set up their authority in hostility to the general colonization of the Territory by the people of the Union, and a fixed ambition to make Utah the permanent seat of Mormon supremacy and power.

The events in order of time strikingly show that this statement is not fiction.

On the 18th of March, 1849, a convention of the people met, nearly a year after the proclamation of the treaty of Guadalupe Hidalgo, by which the whole Territory became the property and dominion of the United States, and adopted a constitution. Its territory was immense, stated by a late writer as follows:

> The proposed State was to be 700 miles from east to west and from north to south, comprising about 490,000 square miles, or 313,600,000 acres—an area nearly as large as that of all the States situated south of the Potomac and Ohio Rivers and east of the Mississipi River. It embraced the present Territories of Utah and Arizona, the State of Nevada, and a considerable portion of California, Idaho, Wyoming and Colorado.

On the 21st of July, 1849, the legislature of Deseret convened and declared that the constitution had been adopted, that Brigham Young, the head of the church, had been elected governor, and Heber C. Kimball, an apostle of the church, had been elected lieutenant-governor.

On September 9, 1850, the organic act for Utah became a law.

Brigham Young was commissioned governor of the Territory September 28, 1850.

Notwithstanding this, the State of Deseret passed the law incorporating the "Church of Jesus Christ of Latter-day Saints" on the 8th of February, 1851. That law was void *ab initio*, because passed by a body without any legal existence or authority to do so, a fact to be noted as important in the subsequent discussion.

The head of this corporate church was a "trustee in trust." He was Brigham Young, the governor of Deseret, and afterward of the Territory of Utah, by commission of the President.

Let it be observed that this ecclesiastic corporation was the only one created. It was the church of Deseret. Its head was the chief executive of Deseret.

On the 5th of February, 1852, the legislative assembly of Utah organized its militia into the Nauvoo Legion (Acts of Utah, 1855, p. 207). The governor, by the constitution of Deseret, was commander-in-chief of all the militia, but this Utah law put it under the command of a lieutenant-general, commissioned by the governor and elected by the votes of the commissioned officers of the legion, and these commissioned officers were elected by a majority of the votes of their commands. Thus the whole military power was commanded by those whose election came from the votes of the militia.

On the 12th of January, 1856 (Acts 1855-'56, p. 38), the "Perpetual Emigrating Fund Company" was legalized, which had been incorporated by the State of Deseret September 14, 1850, after the organic act of Utah became a law. That original charter was void, because passed by a body which had no existence or authority. That charter placed the company under charge of the Church of Jesus Christ of Latter-day Saints. Its powers were well nigh unlimited, and among the rest it had the power to emit bills of credit, a power denied by the Constitution to the States.

Without authority this people thus created the State of Deseret, established a church, and a church corporation, with the scarcely concealed design of bringing Mormons from abroad to fill a Territory of the United States with the disciples of their creed. The trustee in trust of the church, the controlling chief of emigration, the commander-in-chief of the militia, and the governor of the State were one and the same person—Brigham Young.

If we now regard this ambitious scheme for a moment, we will realize the nature and extent of its power.

The Mormon religion is based on a supposed revelation of which its priesthood is the inspired interpreter and expounder—making their influence almost absolute, and their declarations almost the voice of God. The sincere among its adherents are victims of a delusion, which the insincere will be prone to maintain and promote from sinister motives and for selfish and ambitious purposes. The awful sanctions of the church give force and authority to the civil mandate. The union of the ecclesiastical power with that of the government, and of the civil and military authority in the same hands, made Brigham Young at once, the hierarch of the church, the civil ruler of the State, and the commander of its armies. Church and state, civil and military power, were united in him as the Supreme autocrat of Deseret and Utah.

As has been shown in detail in the former report, the legislative power of the State of Deseret and Territory of Utah lavished upon the chiefs of the church timber, water, and herd privileges, and large landed estates. It gave large portions of these to the church and its servant, the Emigration Fund Company. It organized municipal corporations with extraordinary territorial limits—and by its whole course of procedure displayed partiality to its church and its members, in private, corporate, and associated interest.

It is not a matter of wonder that the ambitious leader of his people should have evinced jealousy of the incoming of a newly appointed governor by President Buchanan in July, 1857. It is said he declared he would not permit him to take the office. The new governor, therefore started for Utah under military escort, increased, on account of the defiant attitude of Brigham Young, to an army, which was placed under command of General Albert Sidney Johnston.

The motives for this action by President Buchanan are explained in his annual message in December, 1857. He says:

> As Chief Magistrate I was bound to restore the supremacy of the Constitution and laws within its limits. In order to effect this purpose, I appointed a new governor and other Federal officers for Utah, and sent with them a military force for their protection, and to aid as a *posse comitatus*, in case of need, in the execution of the laws.

President Buchanan further said in his message to Congress of December 8, 1857:

> Whilst Governor Young has been both governor and superintendent of Indian affairs * * he has been at the same time head of the church called the "Latter-Day Saints," and professes to govern its members and dispose of their property by direct inspiration and authority from the Almighty. His power has been therefore absolute over the church and state.

And again.

> All the officers of the United States, judicial and executive, with the exception of two Indian agents, have found it necessary for their personal safety to withdraw from the Territory, and there no longer remains any government in Utah but the despotism of Brigham young.

And Secretary Floyd, in his report from the War Department, said:

> From the first hour they fixed themselves in that remote and almost inaccessible region of our territory, from which they are now sending defiance to the sovereign power, their whole plan has been to prepare for a successful secession from the authority of the United States, and a permanent establishment of their own.

Governor Young issued a proclamation in the midst of these events, ordering the troops of the Territory to be ready to move at a moment's notice, and forbidding all armed forces from coming into the Territory on any pretense whatever; and General Wells, lieutenant-general commanding the Nauvoo Legion, sent to the officer in command of the United States forces a copy of the proclamation of Governor Young, and directing him "to retire forthwith from the Territory by the same route he entered."

Prudence prevented the conflict of arms, and peace was restored.

Your committee, as already stated in a former report, has no disposition to recommend any measure to the House which will invade the sanctity of any religious faith, however wrong in their opinion it may be; but the distinction between overt acts, resulting from belief, which the law makes criminal and the rights of opinion, and to worship God according to the dictates of conscience, was so fully stated in the report as not to need repetition here.

In view of the history given of this people and of their actions years ago, and of the persistence to which they adhered to the polygamous relations despite the laws made to suppress crime, and of the necessity of making every constitutional effort to put the Territory of Utah into a position for admission into the Union as a State, free from the presence of this criminal relation, your committee have considered the provisions of the Senate bill with great care in the sections under consideration.

It has been warmly argued by counsel for the Mormons before the committee that the corporation of the church cannot be annulled; that it is a private corporation; that Congress cannot, any more than a State, impair the obligation of such a corporate contract; and that the act of July, 1862 (12 Stats. at Large, 501), which annulled that law granting the charter, is inoperative and unconstitutional; at least, so far as the corporate power exercised prior to the annulling act has resulted in property or other rights to the corporation.

Your committee do not feel it necessary to go fully into all the questions which are germane to that before it for decision.

As preliminary to the discussion, the committee do not hesitate to express their dissent from the twelfth section of the Senate bill, the effect of which would be that the conduct of the corporate "Church of Jesus Christ of Latter-Day Saints" would be controlled by trustees of the church in conjunction with trustees appointed by the President. This union of trustees of the church and those of the Government can ot be distinguished from a union of church and state and "a law respecting the establishment of religion," nor can it be other than a limitation on the free exercise of religion when a majority who control in matters of faith and discipline are appointed by the President. This section would really resemble, if it be not in fact, an establishment of the Mormon Church by law, to be controlled by the Government.

Your committee recommend an annulment and dissolution of the incorporation. This is clearly public policy, if it can constitutionally be done.

First. Its policy is shown from the enormous power of the corporation to increase its means and influence in the infant State. All the reasons which have induced the mortmain acts of the mother country and all the evils which must follow unlimited power of the church to take and hold lands and other property, which evils are beginning to show themselves in our own country, should lead the legislative authority to look with jealousy on this tendency and to check it in its beginnings. Ecclesiastics clothed with property, which is so potential an influence in every state, would invade the province of the state as disastrously to religion and corruptly for the state as when the state invades the province of the church. And these reasons increase in force when, as in this case, the church has shown such an inherent tendency to control the state and master its fate.

But can Congress take away this charter? Several reasons make it clear that it can be done without any strained construction of authority:

(1) Both the charter of the church and of the Emigration Fund Company were null *ab initio* for lack of power, as has been pointed out.

(2) The acts confirming these null charters were probably ineffectual, because of the doctrine that what is void *ab initio* cannot be confirmed, but only what is voidable.

(3) It is a matter of grave doubt whether the organic act authorized the original grant of such charters as these were.

(4) The organic act expressly provides that all laws passed by the Territorial Legislature "shall be submitted to the Congress of the United States, and if disapproved shall be null and of no effect." This power, whenever exercised, makes the original law null—not only hereafter, but "of no effect." If disapproval only nullifies its effect for the future, no force will be given to the last words.

But this power to annul is independent of the reservation of it in this act. (See National Bank v. County of Yankton, 101 U. S. Reports, 129.)

(5) The emigration fund act trenches upon the power of Congress as to foreign emigration, and assumes to regulate a matter neither delegated to it nor within its authority.

But both laws are unconstitutional; for, without going into the question *in extenso*, it is obvious it gives a preference to this form of religion over every other. None other is incorporated, and, much less, with such power to acquire property. So far from it, the legislature of Utah never passed any act for other religious sects until 1878, when a very inadequate law was passed allowing religious corporations no more real estate than is necessary for their purposes. (Acts 1878, p. 46.)

A law which discriminates thus in favor of one form of religion over another is in a proper sense "a law respecting the establishment of religion." It gives preference and advantage to one over another, which is of the essence of a church establishment. All must be equally free; none must have any advantage in privilege or right.

(6) But your committee can have no doubt that Congress, which possesses all original power over the Territories, and whose power is exercised only derivatively by the Territoral legislature, has the right to avoid the act of its subordinate ageucy, and assert its own policy without being bound in any degree by the act of the Territory.

With these views of the power of Congress your committee recommend to cut up by the roots this church establishment, with the Emigration Fund Company as its attachment, and to authorize judicial proceedings, under direction of the Attorney-General, for dealing with the property rights according to law and equity.

In fact, the Emigration Fund Company is dependent for its being upon the church. Its officers are appointed by the church corporation; and if the latter is dissolved its parasite cannot survive.

No one can read the terms of the act incorporating the "Church of Jesus Christ of Latter-day Saints" and fail to see that it is "a law respecting the establishment of religion." Its unlimited power to acquire property, its self-assertion of authority "in the Lord" over marriage and in the discipline of its members, and the specific reference to its peculiar creed, in the absence of like grant of privilege to other religious creeds, show the purpose of its authors, as well as the results of its existence, to be an establishment of the Mormon Church on a foundation of privilege denied or not granted to any other, and which, if unrepealed and unrepealable, would give it all the authority and influence in the infant State of an ecclesiastical establishment.

It has been argued before the committee that this is a private and not a public corporation, and hence would be irrepealable by a State law, under the Dartmouth College case (4 Wheaton R.), and is equally so by Congress.

No decision is known to your committee in which this limit has been applied to the authority of Congress. On the contrary, though in the legal-tender cases Congress was at first held to have no such power over contracts between private parties, yet finally the Supreme Court decided that it had. In the absence of any decision to the contrary, it would seem to be a corollary from this last decision that if Congress could impair the obligation of a contract between A and B, it would not be forbidden to do so in regard to a contract between the Government and an individual, however contrary to the public policy it might be.

But your committe are not willing to concede that these corporations are private corporations only.

(1) There are no stockholders and no persons definitely entitled to the property. The members of the church are interested in it, but only as long as they are members. When they cease