DESERET NEWS:

WEEKLY.

TRUTH AND LIBERTY.

PRINTED AND PUBLISHED BY THE

DESERET NEWS COMPANY.

CHARLES W. PENROSE, EDITOR.

WEDNESDAY - - JULY 8, 1885

THOSE PONDEROUS OPINIONS.

As a matter of record we have published in full the opinions of the Judges of the Supreme Court of the Territory in the Cannon and Musser cases. They can not as a whole, be placed in the category of racy reading, even for legal effusions, which at best do not come under the head of lively literature. The documents furnished by Associate Justice Powers have the merit of clearness. This result is attained by close reasoning and good construction. The quality of perspicuity is on the other hand, conspicuous for its absence in the opinions of the other two judges, the redundancy of words in that of the Chief Justice being specially bewildering. His Honor's habit of resorting to a too plentiful infusion of parenthetical interjection gives a labyrinthian aspect to his productions, creating a meandering sensation in the reader that superinduces mental weariness in the effort to grasp his meaning.

Some of the main points involved had been previously decided in the lower court by the majority of the Supreme Court. This being the case, when the proceeding came up on appeal for review, the task before their honors was an easy one. It was merely to go over ground they had traversed on a lower judicial plane, and attach their endorsement to it in a presumedly more exalted station. Of course there was one out of the three Judges who was not already committed upon the points at issue, but being in the minority his position could not affect the result one way or the other. Consideration of this fact will show that the beneficial prospects of the defendants in those cases to have their condition bettered by having another decision from functionaries who had already decided, were not enormous. And thus is the beauty and effectiveness of the Territorial system of jurisprudence aptly illustrated.

However, the review is not without its redeeming features. The one Judge who did not sit in the capacity of a judicial officer practically endorsing his own doings, gave a ringing dissenting opinion in the Musser case, and a semi-dissenting one in the Cannon case. It is to be regretted, however, that Judge Powers' view of the Edmunds law is of the same contracted character as that held by the other two Judges. He maintains, as they do, that the third section, providing penalties for persons convicted of cohabiting with more than one woman, was intended by Congress to apply to "Mormons" only, and was not aimed at persons guilty of sexual immorality. It is difficult to see how such a construction can be placed upon the law when the statute itself is silent upon the subject, giving no intimation that a strained meaning should be given to the word cohabitation in order to enforce it.

But while the dissenting opinion of Judge Powers shows that the present Utah Judges are a unit regarding the application of the law as qualified by what they claim to be the intent of Congress, he is wide apart from his judicial associates in his views regarding the procedure of the courts in the class of cases arising under the Edmunds Act.

Settling upon the character and aim of the law, he sets out upon the theory that defendants in cases of this class are actually entitled to fair trial. This is a decided innovation upon the tactics of the present anti-"Mormon" crusade, in which the whole judicial structure has been transformed into a prosecutive machine. The phrase adopted some time since as a qualification for jurymen tells the whole tale—"in sympathy withthe prosecution." It is indeed refreshing to observe that the first Democratic Judge appointed by the present administration has the independence to take the ground that a "Mormon" placed on trial in the courts of Utah has some rights that are entitled to respect.

We do not propose to review the positions taken on the several issues involved in the opinions of the Judges, but one or two special points are deserving of particular mention. Referring to that of Judge Powers in the Musser case, he held that the Court should have given the instruction desired by the defense, to the effect that it should be presumed that at the date of the Edmunds law going into force those living in polygamous relations ceased the occupancy of that status.

The evidence in the Musser case had extended back for years prior to the passage of the act, hence defendant's conduct previous to his course being rendered criminal by law was applied to his damage. Chief Justice Zane, in a way that shows his intense bias, holds that his conduct previous to the passage of the law should be considered as pointing to what his conduct was likely to be subsequent to its enactment. Common sense, with which good law should harmonize, would suggest that no actions of a defendant performed before such conduct is rendered *malum prohibitum* should be used to his disadvantage on his trial. Otherwise there is an innovation upon the general principle at law that a person is innocent until proved guilty. To use his innocent conduct in order to fix or at least lead to his guilt is surely incompatible with this legal proposition.

Without a direct allusion by words, Judge Powers delivers a forcible thrust at the absurd crusade theory of separation of plural wives from their husbands, by what has been denominated, in crusade parlance, "judicia adjudication." Of course he holds to the self-evident truth that there can be no legal divorcement. He maintains that in order for a man who has been living and cohabiting with more than one woman as wives to conform to the Edmunds act, his deportment toward his plural wives must be of the nature of that of a man toward a woman from whom he has obtained a decree of divorcement. Consequently, according to his position, in order to make out a case, the prosecution would have to show that his conduct has been other than of that nature.

Nothing can be clearer than the reasoning of Judge Powers upon the point of plain injustice having been done to the defendant Musser in allowing the impression to remain with the jury, created by remarks of the prosecution, to the effect that he had been instrumental in putting witnesses out of the way. There had been no evidence that witnesses had been put out of the reach of the prosecution, to say nothing of the fact that none had been adduced to connect the defendant with such a proceeding. Allowing the jury to inferentially obtain the impression that an attempt had been made to influence one of its members in behalf of the defendant, the court failing to instruct the jury not to be affected unfavorably to him by that incident, was in keeping with the same line of injustice.

In the case of Mr. Cannon, Judge Powers may have been legally justified in agreeing with the result of the trial while dissenting from a portion of the method by which it was attained. It is claimed that the defect in the body of the proceeding was not sufficient to change the outcome. We do not pretend to state that such a position is inadmissable in law, but we do hold that it is totally so in logic and mathematics, and between law and the exact sciences there should be but little, if any, discrepancy. It is apparent from his honor's ruling that he is of opinion that a plain right of the defendant in the course of the trial was denied him. Consequently the trial cannot from his standpoint be estimated a fair one. Every person accused of crime is entitled to a fair trial; therefore not having had one of that charter, that right should now be accorded him.

INTERMINABLE COMPLICATIONS.

THE enforcement of the Edmunds act illustrates a truism that is constantly verified in human affairs. One false step, unless it be retraced, involves the taking of several others to make an appearance of justification. Those advances successively make it needful to enter still further into the devious ways of deceit, until the schemer is enveloped in a maze of crookedness.

The first false step was the passage of the act, the next its endorsement by the Supreme Court, these two involving the burlesque on jurisprudence that has been enacted in the Rocky Mountain region of late.

One of the chief questions connected with the application of the act has been a definition of conduct on the part of a man having more wives than one that would be in harmony with it. The "judicial adjudication" idea of the Third District Court is conspicuous for absurdity. Practically applied, it appears to consist of an accused person making an agreement with the Judge that he will renounce his wives, live within the law, and advise others to do the same. The course of the Court, illustrated in several instances, justifies the conclusion that it esteemed this *modus operandi* as harmonious with the law, while in point of fact it was merely making a promise to take that line of action. It was a sort of side-show divorcement, designated, in the language of the District Attorney, as a "judicial adjudication."

But the subject gets no less muddled as time and circumstances progress. Judge Powers, in his opinion delivered in the Musser case, makes an effort to clear away the mist from this particular point, but it is still enveloped in the fog of uncertainty. The following extract from his opinion may be taken as his definition of conduct harmonious with the subtle statute that leads to such astonishing and complicated results as these which are constantly exhibited in the court of Utah:

"The defendant claims that there is no law that requires him to divorce himself from the women. That is true, but the effect of the Edmunds act is to require him to treat these women substantially as he would be required to treat them if he had been divorced from them by a court of competent jurisdiction. In my opinion a man who has heretofore contracted a polygamous marriage, and has had children by two or more women, is required, as I have stated, to treat those women precisely as he would be required to treat them if he had been divorced from them. A man divorced from a woman is under legal obligations to support her children; he may be required by the decree of the court to support his wife and to pay to her stated sums at stated intervals, but, with the exception of the business relation which exists between him and his former wife, it is not expected that he will have any further intimacy with her. He may visit his children, he may make directions with regard to their welfare, he may meet his former wife on terms of social equality, but it is not expected, after the decree of divorce, that he will associate with his former wife, that he will live under the same roof, and, to outward appearances, live with her as a husband lives with his wife. The Edmunds law says that there must be an end, and it puts an end to the relationship previously existing between the parties, whatever it was. It says that the relationship must cease."

This is a tolerably clear statement of how a man may treat his plural wives and children and remain in harmony with the Edmunds law. But the question is, could he not go considerably further than the boundary thus defined and still not be in conflict with it? We are not now assuming the position that he could, but we do contend that he could step over the Powers' delimitation line so far as the adopted theory in regard to the intent and applicability of the act is concerned as constructed by the three Utah Judges, who are a unit on that point. They all hold that it was exclusively aimed at the "Mormon" marriage relation, and was not intended to deal with sexual sins.

Suppose then that a man and his wife are legally divorced. Carry the supposable case still further. If, subsequent to the granting of the decree of divorcement, the couple should, without being again married—in addition to adopting the course Judge Powers outlines as the one they would be "expected" to follow — live together in the same house, occupy the same bed, produce and rear children, what would be their status. Undoubtedly they would be guilty of "sexual sin," which the District Attorney truly and aptly asserted, the "'Mormons' condemn."

If such a case occurred here, the male principal to the transaction would, according to the rulings of the Judges, not be in the slightest danger from the operations of the Edmunds act, which is not directed against sexual sins. Then all of this conduct is what a man may engage in (no matter what is expected of him) who has been legally divorced from his wife. How would it operate if a man were to deport himself similarly toward his plural wife? Could he be made liable to the penalties of the Edmunds law, providing he did not claim that the woman was his wife? Or is the conduct of a man toward a woman who stands in the relationship of a plural wife to him to be regulated by what is "expected" from a man toward a woman from whom he is divorced, and not what he may do with impunity, so far as the Edmunds act is concerned?

It appears that the entire programme of what a man who has been divorced *may* do could be carried out in the case of the polygamist so long as he was not guilty of holding out his plural wife to the world as his wife. In point of fact it would not even change the status of his justification if his plural wife should call him husband, and in every way treat him as such, so that he did not convey the idea publicly that she was his wife. Certainly the conduct of the man divorced would convey the idea that the woman was still his wife, and his conduct would continue with impunity even if in the meantime he had married another, yet he would be exempt from the penalties of the Edmunds act.

The construction judicially placed upon the Edmunds law is that it is not aimed at genuine crime and moral rottenness. It is held to be in the nature of a blow at a community. Consequently it is a boil on the seat of jurisprudence, which squirms every time it attempts to sit down upon its proposed victim.

LOYALTY OF THE LATTER-DAY SAINTS.

THE "Mormon" people are the most loyal community within the pale of the Republic of the United States of America. They rejoice when the principles of human liberty, upon which the nation was founded, are vindicated and maintained.

On the other hand when those sacred safeguards are trampled in the dust, they are stricken with sorrow inexpressible.

They have no reason for engaging in expressions of joy under existing circumstances, being denied the commonest rights of man, and seeing that toward them there is a repetition of the wrongs which caused the fathers of our common country to throw off the yoke of the parent government. More than this, the unwarrantable inflictions heaped upon the Latter-day Saints are, in some of their aspects, much more severe and tyrannical than those under which the fathers of the nation groaned.

Because of this lamentable disregard of the fundamental principles of this grand Republic, the grief of a portion of the people was expressed by the national insignia of mourning—the nation's flag at half-mast—being placed upon some of the public buildings of this city.

This drooping appearance of the national ensign occasioned some surprise and considerable feeling, and it was thought by not a few, that news had been received of the death of General Grant, But the reason in the minds of those who thus manifested the prevailing sentiment on Independence Day was a more potent one than even that, notwithstanding that the General is a great national character. The American standard was placed at half-mast because the fundamental principles upon which this great government was built, were being assassinated by some of those who should be the most interested in their preservation and perpetuation. It was a symptom of loyalty to constitutional principles because of sorrow at their being dragged in the mire of tyranny.

But let us proceed to the proof of the position. A perusal of the following parallel between the wrongs under which the British colonies groaned, as enumerated in the Declaration of Independence, and a few of those which have been heaped upon poor Utah will serve to partially explain the situation. It is a striking repetition of history:

Extracts from the fundamental reasons for the Declaration of Independence.	*Statements of fact connected with the treatment the people of Utah have received at the hand of the government.*
He has refused his assent to laws the most wholesome and necessary for the public good.	Governors have refused their assent to laws the most wholesome and necessary for the public.
He has forbidden his governors to pass laws of immediate and pressing importance, unless suspended in their operation till his assent should be obtained, and when so suspended, he has utterly neglected to attend to them.	Governors appointed without the sanction of the people, have been granted the absolute veto, thus giving them the power to thwart the popular will, and the right has also been retained to abrogate even those laws that might pass through that process of absolutism.
He has refused to pass other laws for the accommodation of large districts of people, unless those people would relinquish the right of representation in the legislature — a right inestimable to them, and formidable to tyrants only.	A large body of people have been summarily, without due processof law, deprived of any participation whatever in political affairs, by having the elective franchise—a right inestimable to them and formidable to tyrants only — taken from them.
He has called together legislative bodies at places unusual, uncomfortable, and distant from the depository of their public records, for the sole purpose of fatiguing them into compliance with his measures.	Federal officers have appointed precincts in places remote from the residences of comparatively large bodies of electors in some of the precincts, and in close proximity to smaller bodies of voters, because the latter were in sympathy with them.
He has dissolved representative houses repoatedly for opposing with manly firmness his invasions of the rights of the people.	One of the governors has published falsehoods to influence Congress to deprive the people of representation, because his usurpapations were opposed with manly firmness.
He has refused, for a long time after such dissolutions, to cause others to be elected; whereby the legislative powers, incapable of annihilation, have returned to the people at large, for their exercise, the State remaining in the meantime, exposed to all the dangers of invasion from without and convulsions within.	One of the governors, who has been retained in office contrary to the will of the people, refused his sanction to an election bill enacted in pursuance of an act of Congress, and brazenly and falsely published broadcast the fabrication that the law was not appropriate, his purpose being to bring the people under the rule of a horde of political hacks.
He has endeavored to prevent the population of these States; for that purpose obstructing the laws for the naturalization of foreigners, refusing to pass others to encourage their migration hither and raising the conditions of new appropriations of land.	Endeavors have been made to prevent the population of this Territory; some of the judges having obstructed the laws for the naturalization of foreigners, by excluding them from the benefits thereof because of their religious belief. In various ways the migration of foreigners hither has been discouraged.
He had made judges dependent upon his will alone for the tenure of their offices and the amount and payment of their salaries.	Judges have been made dependent upon the will of one man alone for the tenure of their offices, the people having no voice in their appointment or removal.
He has erected a multitude of new offices, and sent hither swarms of officers to harass our people and eat out their substance.	A multitude of new offices have been erected and swarms of officers have been sent here to harass our people and rob them of their liberties.
He has kept among us, in times of peace, standing armies, without the consent of our legislatures.	An invading army has been sent against us without the remotest cause, the people being strictly loyal.
He has combined with others to subject us to a jurisdiction foreign to our constitution and unacknowledged by our laws; giving his assent to their acts of pretended legislation.	Combinations have been formed to subject us to a jurisdiction foreign to our constitution and unacknowledged by our laws; thus giving assent to pretended acts of legislation.
For protecting them, by a mock trial, from punishment for any murders which they should commit on the inhabitants of these States.	For protecting criminals, by mock investigations, and declining to investigate offenses committed by non-"Mormons," and pursuing with rigor the "Mormon" people.
For depriving us, in many cases, of the benefits of trial by jury.	For trying us by juries "in sympathy with the prosecution," and denying the benefits of bail.
For suspending our legislatures and declaring themselves invested with *power to legislate for us in* all cases whatsoever	For claiming the authority to suspend our legislature, and that it is invested with power to legislate for us in all cases whatsoever.
Nor have we been wanting in attention to our British brethren. We have warned them from time to time, of attempts made by their legislature to extend an unwarrantable jurisdiction over us. We have reminded them of the circumstances of our emigration and settlement here. We have appealed to their native justice and magnanimity, and we have conjured them by the ties of our common kindred, to disavow their usurpations.	Nor have we been wanting in attention to those who have injured us. We have warned them from time to time, of attempts made by their legislature to extend an unwarrantable jurisdiction over us. We have reminded them of the circumstances of our emigration and settlement here. We have appealed to their native justice and magnanimity, and we have conjured them by the ties of our common kindred to disavow their usurpations.
We, therefore, the representatives of the United States of America, in General Congress assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the name and by the authority of the good people of these colonies, solemnly publish and declare that these united colonies are, and of right ought to be, free.	The People of Utah, appealing to the Supreme Judge of the world—in whom they trust—for the rectitude of their intentions, do solemnly declare that, notwithstanding the wrongs that have been heaped upon them, they are determined to stand by the flag of their country and the principles of freedom, hoping that some time they will be vindicated and their oppressors see the error of their ways.

The parallel might have been extended to a greater length, but the foregoing will serve to show a striking similarity between the two situations. In the above the outrageous attempt of the present Governor to thwart the will of the people by giving a certificate of election to a meagre minority candidate for the delegateship to Congress has not been introduced. Neither has his other conspiracy against popular sovereignty and in favor of tyrannical rule, in endeavoring to fill nearly every elective office by his autocratic appointment. His refusal to sign the appropriation bill passed by the last Legislature unless the $50,000 item for the new University building should be stricken out, was also a flagrant usurpation of despotic power, he assuming to dictate in what manner the people should or should not spend their