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THESIS
For the Degree of Bachelor of Laws.

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CONGRESSIONAL LEGISLATION
ON THE
MORMON QUESTION.

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Joseph Tanner Richards.
Cornell University.
1892.
The object of this paper will be to give a brief summary of the legislation of Congress affecting the Mormon people, with the principal cases arising under these laws and the important constitutional questions involved.

Perhaps no epoch in the history of our jurisprudence more forcibly illustrates the might and majesty of the law—certainly no similar, and possibly no more remarkable conditions have ever been the subject of its operation. It is safe to say that the history of no country furnishes such an example of complete revolution in the social conditions of any sect. The practice which this legislation was designed to prevent was only participated in by a comparatively small portion of the Mormon people, and they acted under a claim of religious right, but the operation of the law has been so farreaching as to affect the entire people.

Can anything be more anomalous than to see men who have been convicted of crime, confined in state's prison, with hair shorn and arrayed in convict's garb, emerging from their prison cells at the expiration of their terms of sentence and taken by the hand by the most prominent and influential members of the community, who sustain them...
in positions of responsibility and trust, where they receive the confidence of all classes of people. Hundreds of such cases have occurred in Utah, but the operation of the law has been most effective and complete.

On account of the peculiar social conditions existing in Utah, in the year 1882 Congress passed "An act to punish and prevent the practice of polygamy in the Territories and other places and disapproving and annulling certain acts of the legislative assembly of the Territory of Utah", which in addition to making polygamy a crime and prescribing a penalty therefor, limited the capacity of religious and charitable corporations and associations to hold real property to the amount of Fifty Thousand Dollars.

This act remained a dead letter on the statute book until the year 1878, when George Reynolds was convicted of polygamy in the Third District Court of Utah. The judgment was affirmed by the Supreme Court of the Territory and the case was taken to the Supreme Court of the United States; the prisoner claiming that the legislation under which he was convicted was in violation of the first amendment to the constitution of the United States, which provides that Congress shall make no law respecting an
establishment or free exercise of religion. No better dis-
cussion of the subject can be made than is contained in
the following quotations from the opinion of Chief Jus-
tice Waite in the decision of the Reynolds case:

"It is impossible to believe that the constitutional
guaranty of religious freedom was intended to prohibit
legislation in respect to the most important feature of
social life. Marriage, while from its very nature a sacred
obligation, is, nevertheless, in most civilized nations, a
civil contract, and usually regulated by law. Upon it so-
ciety may be said to be built, and out of its fruits
spring social relations and social obligations and duties,
with which government is necessarily required to deal.

"In our opinion the statute immediately under consid-
eration is within the legislative power of Congress. It
is constitutional and valid as prescribing a rule of ac-
tion for all those residing in the Territories, and in
places over which the United States have exclusive con-
trol. This being so, the only question which remains is,
whether those who make polygamy a part of their religion
are excepted from the operation of the statute. If they
are, then those who do not make polygamy a part of their
religious belief may be found guilty and punished, while
those who do must be acquitted and go free. This would be introducing a new element into criminal law. Laws are made for the government of nations, and while they cannot interfere with mere religious belief and opinions, they may with practices. x x x

"A criminal intent is generally an element of crime, but every man is presumed to intend the necessary and legitimate consequences of what he knowingly does. Here the accused knew he had been once married, and that his first wife was living. He also knew that his second marriage was forbidden by law. When, therefore, he married a second time, he is presumed to have intended to break the law. And the breaking of the law is the crime. Every act necessary to constitute the crime was knowingly done, and the crime was, therefore, knowingly committed."

Before the Reynolds' trial, an important act had been passed by Congress which greatly restricted the few powers of local self-government enjoyed by the people of Utah. Its full effect can only be appreciated by remembering the limited degree of sovereignty possessed by the people under a Territorial form of government. The Governor, the Secretary of the Territory, all the judges, the United States Attorney and Marshal, and many other officers are appointed by the President of the United States,
and are in no way responsible to the people. This "Act in relation to the courts and judicial officers in the Territory of Utah", was approved June 23rd, 1874. It abolished the offices of Territorial Marshal and Attorney General, and conferred the powers and duties of these officers upon the United States Marshal and United States Attorney; regulated the jurisdiction of District, Probate and Justice's Courts and made such provision in regard to the drawing of grand and petit juries as, with an amendment made by Congress 1887, left the majority of the population of the Territory without representation on juries; took from the people the power to elect officers to which they were entitled to represent them in the highest courts of the Territory.

This act was followed in the year 1882 by the so-called "Edmunds Law" entitled "An act to amend section fifty three hundred and fifty two of the Revised Statutes of the United States, in reference to bigamy, and for other purposes". This act, very comprehensive in its scope, defined and prescribed penalties for the crimes of polygamy and unlawful cohabitation; required additional qualifications for jurors serving in such cases; legitimated the offspring of polygamous marriages; disqualified polyg-
mists to vote, hold office, or serve on juries, and provided for a commission of five persons to be appointed by the President of the United States, who should have power to appoint all the registration and election officers in the Territory. Section nine of the "Edmunds Act" reads as follows:

"Section 9. That all the registration and election offices of every description in the Territory of Utah are hereby declared vacant, and each and every duty relating to the registration of voters, the conduct of elections, the receiving or rejection of votes, and the canvassing and return of the same, and the issuing of certificates or other evidence of election in said Territory, shall, until other provision be made by the Legislative Assembly of said Territory as is hereinafter by this section provided, be performed under the existing laws of the United States and of said Territory by proper persons, who shall be appointed to execute such offices and perform such duties by a board of five persons, to be appointed by the President, by and with the advice and consent of the Senate. x x x The canvass and return of all the votes cast at elections in said Territory for members of the Legislative Assembly thereof shall also be returned
to said board, which shall canvass all such returns and issue certificates of election to those persons who, being eligible for such election, shall appear to have been lawfully elected, which certificates shall be the only evidence of the right of such persons to sit in such assembly: PROVIDED, That said board of five persons shall not exclude any person otherwise eligible to vote from the polls on account of any opinion such person may entertain on the subject of bigamy or polygamy, nor shall they refuse to count any such vote on account of the opinion of the person casting it on the subject of bigamy or polygamy.

It seems very evident from this section that the commission thereby created had but one duty to perform prior to election, and that was to appoint the registration and election officers to fill the vacancies created by the act. After performing this duty, the commission was functus officio until called upon to canvass and return the votes for members of the Legislature. Instead of performing this plain and simple duty, the commission proceeded to constitute itself a coordinate department of the Territorial government, by making rules and regulations for the registration of voters and the conducting
of elections, hearing appeals, and acting as if vested with legislative and judicial powers. By prescribing an oath to be taken by persons applying for registration an ex post facto operation was given to the law. Not only then polygamists but all persons who had ever occupied that status, although they might have discontinued the practice and abandoned the polygamous relation, were excluded from voting and holding office. Applicants for registration were accorded the privilege of appealing from the decision of the registration officer to the commission, from which the oath and rules debarring them from exercising the elective franchise, had emanated.

It seems strange that the commission could so mistake its powers and duties. They were clearly defined in the law as extending only to the appointment of registration and election officers, the canvass and return of votes cast for members of the Legislative Assembly, and the issuance of certificates of election to such persons as they might find entitled to the same. If the language of the law was not sufficiently clear as to the intention of Congress, and especially of the distinguished author of the act, the debates in the Senate at the time of the passage of the bill showed that the idea of the commissioners having any such powers as they assumed to exer-
The exercise was never contemplated by Congress. As reported in the Congressional Record, 1882, Volume 13, Part 2, page 1156, Senator Edmunds said:

"As to the qualification of electors, the board of five persons are not by this bill vested with any power at all; they are left exactly where they are left by the other laws of the United States and the laws of the Territory of Utah."

And the laws of the Territory of Utah and of the United States made ample provision for the registration of voters and the regulation and conducting of elections in the Territory.

Under this section of one of the most important acts in the history of the Territory, a number of test cases arose, upon statements of fact which are very similar. The cases were carried to the Supreme Court of the United States, submitted upon the same briefs and decided by the court in one opinion.

Murphy v. Ramsey, 114 U.S. 15-47.

The plaintiff Murphy was deprived of the privilege of voting, under the legislation of the commission, he having once been a polygamist but not occupying that status
at the time he applied to register. He sued the commissioners, county registration officers, and the deputy registrar in the precinct in which he resided and by the laws of the Territory was entitled to vote. Judgment was rendered for the defendants in the District Court and was affirmed by the Supreme Court of the Territory. Mr. Justice Matthews, in delivering the opinion of the Supreme Court of the United States, said:

"An examination of the ninth section of the act of March 22nd, 1882, providing for the appointment and prescribing the duties and powers of that board, shows that they have no functions whatever in respect to the registration of voters, except the appointment of officers in place of those previously authorized, whose offices are by that section of the law declared to be vacant; and the persons appointed to succeed them are not subject to the direction and control of the board, but are required, until other provision be made by the Legislative Assembly of the Territory, to perform all duties relating to the registration of voters 'under the existing laws of the United States and of said Territory'. The board are not authorized to prescribe rules for governing them in the performance of these duties, much less to prescribe any
qualifications for voters as a condition of registration. The proviso in the section does indeed declare 'that said board of five persons shall not exclude any person, otherwise eligible to vote, from the polls on account of any opinion such person may entertain on the subject of bigamy or polygamy', but in the absence of any general and express power over the subject of declaring the qualifications of voters, it is not a just inference from the words of this proviso that it was intended to admit by implication the existence of any authority in the board to exclude from registration or the right to vote, any person whatever, or in any manner to define and declare what the qualifications of a voter shall be. x x x

"It follows that the rules promulgated by the board, prescribing the form of oath to be exacted of persons offering to register as voters and which constitute the directions under which it is alleged the registration officers acted, were without force and no effect can be given them."

It was contended by the appellants that Section Eight of the Edmunds Act violated that provision of the Constitution of the United States which prohibits Congress from passing any bill of attainder or ex post facto
law.

That Congress has no more power to pass a bill of attainder or ex post facto law for the Territory of Utah than for the State of New York, there can be no question. Section eighteen hundred and ninety one of the Revised Statutes of the United States provides that "The Constitution and all laws of the United States which are not locally inapplicable, shall have the same force and effect within all the organized Territories, and in every Territory hereafter organized, as elsewhere within the United States".

See also Dred v. Sandford 19 Howard, 449-50.

It is settled by the Supreme Court of the United States, that the deprivation of the right to vote or hold office may be punishment, the circumstances attending and causes of the deprivation determining that fact. A statute inflicting such punishment without legal trial and conviction, is a bill of pains and penalties or, a bill of attainder, prohibited by the Constitution of the United States. An ex post facto law is one which imposes a punishment for an act which was not punishable at the time it was committed, or imposes an additional punishment to that then prescribed, or changes the rules of evidence by
which less or different testimony is sufficient to convict than was then required.

Cummings v. Missouri, 4 Wal. 277.

Ex parte Garland 4 Wal. 233.

Huber v. Riley 3 P.T. Smith 112.

The foregoing principles seemed to decide the point as contended for by the appellant Murphy that section Eight of the Edmunds law was punatory, and, as construed by the commission constituted a bill of attainder. Whatever the power of Congress might be to prescribe the qualification of voters, it could not, without trial and conviction, under cover of such legislation, inflict punishment upon a citizen for an offence previously committed. So soon as the fact appeared that the object of the law was punatory, the constitutional inhabitation applied.

"In the construction of a statute, every part of it must be viewed in connection with the whole, so as to make all its parts harmonious, if practicable, and give a sensible and intelligent effect to each".

Dwarris on Statutes, 144.

Lord Mansfield says: "That all laws which relate to the same subject, notwithstanding some of them may be expired or not noticed, must be taken to be one act and con-
Chancellor Kent says: "It is to be inferred that a code of statutes relating to one subject was governed by one spirit and policy, and was intended to be consistent and harmonious in its several parts."

1 Kent's Commentaries, 463.

The question was, did the purity of the elective franchise or the punishment of bigamists and polygamists inspire the enactment of Section Eight of the Edmunds Law? If intended for the purpose first named, would it not have been made an amendment to that section of the organic act which relates exclusively to the qualifications of voters in Utah, instead of being made a part of an act which created the crime of polygamy and prescribed a penalty therefor? If the purpose of Section Eight was to preserve the purity of the elective franchise, by preventing it from being exercised by persons practicing polygamy, the proviso of Section Nine would have no place in the law.

The Supreme Court of the United States upheld the statute and in its decision, said:

"In our opinion, every man is a bigamist or polygamist in the sense of this section of the act, who, having previously married, has one wife still living, and having
another at the time when he presents himself to claim registration as a voter, still maintains that relation to a plurality of wives, although, from the date of the passage of the act of March 22nd, 1882, until the day he offers to register and vote, he may not in fact have cohabited with more than one woman. Without regard to the question whether at the time he entered into such a relation, it was a prohibited and punishable offence, or whether by reason of lapse of time since its commission a prosecution for it may not be barred, if he still maintains the relation, he is a bigamist or polygamist, because that is the status which the fixed habit and practice of his living has established. He has a plurality of wives--more than one woman whom he recognizes as a wife, of whose children he is the acknowledged father, and whom, with their children, he maintains as a family of which he is the head. And this status as to several wives may well continue to exist as a practical relation, although for a period he may not in fact cohabit with more than one; for that is quite consistent with the constant recognition of the same relation to many, accompanied with the possible intention to renew cohabitation with one or more of the others when it may be convenient."
Section Three of the Edmunds Act provides "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 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 1885, Angus M. Cannon was indicted and convicted in the Third District Court of Utah Territory for unlawful cohabitation under this section. The important in the case was the meaning of the word "cohabit" as used in that section. On the trial, the defendant offered to prove that while he still continued to reside under the same roof with the women named in the indictment as his wives, eating at their respective tables alternately, and acknowledging said women as wives, upon the passage of the Edmunds Act he had changed his mode of living by non-access to the beds of said women, and had declared his intention not to violate the law. This evidence was excluded, and the defendant excepted.

The Court charged the jury: "If you believe from the evidence, beyond a reasonable doubt, that the defendant
lived in the same house with Amanda Cannon and Clara C. Cannon, the women named in the indictment, and ate at their respective tables one third of the time or thereabouts, that he held them out to the world by his language or conduct or by both as his wives, you should find him guilty." This instruction was excepted to by the defendant.

The court refused to charge the jury as follows:
"Sexual intercourse is a necessary element of the crime of cohabitation, and if the jury find the defendant has not had sexual intercourse with both Clara C. and Amanda Cannon since the passage of the Edmunds Act and within the dates named in the indictment, then they should acquit the defendant." Defendant excepted to the refusal of the court to give this instruction.

Mr. Cannon was convicted, and the case was carried to the Supreme Court of the United States, where the decision of the trial court was sustained in a short opinion, in which the court decided that sexual intercourse was not a necessary ingredient of the crime prohibited by this section. It seemed to base its decision upon the theory that sufficient acts of the defendant had been shown to evidence a "holding out to the world" of these
women as wives, which constituted the offence.


Justices Miller and Field dissented in the following concise statement of the law: "I think that the act of Congress, when prohibiting cohabitation with more than one woman, meant unlawful, habitual sexual intercourse.

"It is in my opinion a strained construction of a highly penal statute to hold that a man can be guilty, under that statute, without the accompaniment of sexual connection.

"I know of no instance in which the word "cohabitation" has been used to describe a criminal offence where it did not imply sexual intercourse."

This view in regard to the interpretation of this statute would certainly be favored from a reading of the law, particularly those clauses in regard to the legitimating of children and the power of the President to grant amnesty in cases of marriages contracted before the passage of the law. It would seem that it was not the intention of Congress to compel the desertion and abandonment of these women and their children, but rather to impose a duty upon the man to provide for them, but to refrain from contracting future marriages, and from cohabit-
ing with plural wives. Had a less strict construction been placed on this act, the results accomplished might not have been the same. But I cannot help thinking that the fundamental principle of law was correctly stated by the minority of the Court.

A discussion of the necessity for such a law or the benefits to be derived from its passage, would be entirely out of place in a treatise of this character, but whether or not it would have failed in the ultimate object aimed at by Congress, certainly should not, in justice or law, be considered by the court in its construction. It would seem that the construction given to this statute -- one of a highly penal character and demanding the strictest construction -- was rather in the nature of an amendment to the law, than an attempt to bring it within the intention of Congress as evidenced by the act, and it has the appearance of an effort to adapt the law to the exigencies of the occasion.

Webster and other lexicographers substantially agree in two definitions of the word "cohabit". (1). "To dwell with. To inhabit or reside in company or in the same place or country. (2). To dwell or live together as husband and wife." If the court had adopted the first mean-
ing as evincing the intention of Congress, it would have led to the most absurd consequences. That definition must be rejected as having no application to the word as used in this statute. It implies no intimacy -- no relation requiring legal regulation -- certainly no restriction on account of the difference in sex. The other definition implies intimacy -- sexual intimacy -- and a degree of it illustrated by the dwelling together of husband and wife. This statute must have been to prevent the living together of an adult male person with more than one woman in the same intimacy as is usual between husband and wife.

All cohabitation which the law deals with is sexual cohabitation. The law regulates and draws inferences from it, because it imports a living together in the habitual practice of sexual intercourse. No intimacy of the sexes is offensive to the public nor could be criminal under the statute, unless it includes in fact or by necessary presumption sexual intercourse.

The word "cohabit" has never been used in any criminal law to mean anything less than actual sexual intercourse, and if the idea of habit and frequency implied in the word (as distinguished from isolated acts), was not required, the word "cohabitation" in such statutes could be chang-
ed to "sexual intercourse" and the term "lewd or lascivious cohabitation", can be paraphrased to read "lascivious and habitual or frequent sexual intercourse", without any change of signification. When in a civil case a question arises as to the consumation of a marriage, the term "cohabitation" has been deemed as an equivalent of sexual relations, and could have no other meaning. So if the question is whether a marital offence has been condoned, the cohabitation after knowledge of the offence means sexual intercourse only.


It is not necessary that the wife shall withdraw from the house. She may be unable to do so, and it is enough that she cease cohabiting with the husband by withdrawing from his bed.

The popular use of the word, especially when applied to the relation of the sexes, conforms to this meaning, and whether we look to judicial proceedings, lexicographers or common speech, the same significance is found. Had Congress intended to use the word in a new signification, would not a definition have been given to carry out the intent?

It seems misleading to assume that this statute re-
fers only to cohabitation under the marriage relation, and
that the word "cohabit" relates only to those associating
under the form of a marriage contract, -- a necessary in-
ference from the decision of the court. Such an assump-
tion treats the void marriage relation as a constituent
of the offence and a part of its definition, instead of
treating it only as a matter of evidence tending to raise
presumptions of fact going to establish the offence.

Cohabitation does not only mean the living together
of husband and wife, but the living together of a man and
woman as husband and wife. It refers to the manner of
living and not the contract, and therefore includes hus-
band and wife and all men and women who assume their
habits of living. Unless this is the meaning of the term,
statutes against lewd and lascivious cohabitation could
not be enforced, unless the prosecutor could show a void
marital contract or relation, and such statutes would fail
to reach the cases intended to be included. In such cases
it is the habit and frequency of the visits and sexual
relations which makes the cohabitation.

By the decisions of the courts, the term "any male
person" in this section was limited to the term "any male
person who in a polygamous relation, etc." Such a con-
struction would not only incorporate new words and incorporate a new meaning, but would give an ex post facto application to the law, by making a past act an essential part of an offence to which a new punishment was annexed, and would revive past offences, though prosecutions were barred by the statute of limitation.

The maximum punishment prescribed for the offence of unlawful cohabitation was six months imprisonment in the Penitentiary and $300 fine. Thinking this penalty too slight, the prosecuting officers undertook to increase it in a rather singular way. Lorenzo Snow was indicted separately in the First District Court of the Territory of Utah on three indictments for unlawful cohabitation, covering together a continuous period of time, each covering a different part, but the three parts being continuous; the indictments being found at the same time, by the same grand jury, on the same oath and on one examination of the same witnesses, covering the whole continuous time. The cases were tried in the inverse order from that in which the several crimes charged were committed. On the trial of each of the two latter charges, the defendant entered a special plea of Autrifois Convict, which was overruled. One judgment was entered in the three cases. It first
imposed a term of imprisonment and fine; it then imposed two other successive terms of imprisonment and fines, each to begin at the expiration of the last preceding sentence. The judgment set forth the time embraced by each indictment, and specified each of the three punishments as being imposed in respect of a specified one of the indictments.

The defendant, Lorenzo Snow, was given a maximum punishment in each of the three counts. After serving his term of imprisonment and paying the fine imposed on the first count, he applied to the District Court for a writ of habeas corpus, claiming that he had been convicted three times for the same offense; that three punishments had been imposed therefore; that he had satisfied the full penalty of the law and was being punished the second time for one and the same offense. The writ was refused and an appeal taken to the Supreme Court of the United States, which held that there was but one entire offense for the continuous time, and ordered the discharge of the prisoner.

Mr. Justice Blatchford, after explaining the theory of unlawful cohabitation as laid down in the Cannon case, said:

"There was but a single offense committed prior to the time the indictments were found. This appears on the
face of the judgment. It refers to the indictments as
found 'for the crime of unlawful cohabitation committed'
'during the time' stated, divided into three periods ac-
cording to each indictment. For so much of the offense as
covered each of these periods the defendant is, according
to the judgment, to be imprisoned for six months and to
pay a fine of $300. The division of the two years and
eleven months is wholly arbitrary. On the same principle,
there might have been an indictment covering each of the
thirty five months, with imprisonment for seventeen years
and a half and fines amounting to $10,500. or even an in-
dictment covering every week, with imprisonment for seven-
ty four years and fines amounting to $44,400. and so on
ad infinitum for smaller periods of time. It is to pre-
vent such an application of penal laws, that the rule has
obtained that a continuing offense of the character of
the one in this case can be committed but once, for the
purpose of indictment or prosecution, prior to the time
the prosecution is instituted."

In Re Snow, 120 U.S. 274.

A thorough and able discussion of this subject by
Lord Mansfield is given in the case of Crepps v. Durden,
Cowper 640, quoted from at length in the opinion of the
The third section of an act of Congress of March 3rd, 1887, entitled "An act to amend an act entitled 'An act to amend section fifty three hundred and fifty two of the Revised Statutes of the United States, in reference to bigamy and for other purposes," provides:

"That whoever commits adultery shall be punished by imprisonment in the Penitentiary, not exceeding three years; and when the act is committed between a married woman and a man who is unmarried, both parties to such act shall be deemed guilty of adultery; and when such act is committed between a married man and a woman who is unmarried, the man shall be deemed guilty of adultery."

Acting upon the theory that sexual intercourse was not an essential element of unlawful cohabitation, and perhaps stimulated by a desire for glory, easily obtained by prosecuting an unpopular sect, the representatives of the government devised a new scheme for adding to the burdens already carried by those offending against this legislation. Although forbidden to segregate the offense of unlawful cohabitation, they proceeded to indict for the latter offense, and then indicted for adultery occurring between the same parties during the period covered by the
cohabitation. This was somewhat consistent with the decision of the court in the Cannon case, from which it seemed that 'holding out' the wives constituted the offense of cohabitation, instead of sexual intercourse.

On the 27th, day of September, 1888, two indictments were found, by the same grand jury, against Hans Nielson in the First District Court of Utah Territory, one for unlawful cohabitation under section three of the Edmunds Act, and the other for adultery under the section last quoted. The first indictment charged that on the 15th, day of October, 1888, and continuously from that time to the 13th, of May, 1888, the said Nielson committed the offense of unlawful cohabitation with two women named therein. The second indictment charged the said Nielson with having committed the crime of adultery with one of the same women named in the other indictment, on the 14th, of May, 1888.

The defendant entered a plea of guilty to the charge of unlawful cohabitation, and when arraigned on the charge of adultery, entered a plea of former conviction. This plea was over-ruled. He pleaded not guilty, and was convicted of the crime of adultery. Sentence was pronounced in each case, and after Nielson had served his term in the
Penitentiary and satisfied the judgment against him for unlawful cohabitation, he applied for a writ of habeas corpus, claiming that he had been twice convicted for the same offense; that he had paid the full penalty of the law and was now being punished twice for one and the same offense. The writ was denied, and an appeal taken to the Supreme Court of the United States, where it was held that the offense of unlawful cohabitation was a continuing one up to the time that the indictment was found, and subject only to one prosecution.

Mr. Justice Bradley, delivering the opinion of the Court, said:

"True, in the case of Snow, we held that it was not necessary to prove sexual intercourse in order to make out a case of unlawful cohabitation; that living together as man and wife was sufficient; but this was only because proof of sexual intercourse would have been merely cumulative evidence of the fact. Living together as man and wife is what we decided was meant by unlawful cohabitation under the statute. Of course that includes sexual intercourse. And this was the integral part of the adultery charged in the second indictment, and was covered by and was included in the first indictment and conviction."
In the case of Morey v. Commonwealth, 108 Mass., Mr. Justice Grey lays down the following proposition, which accords with the decision in this case: "A conviction of being a common seller of intoxicating liquors has been held to bar a prosecution for a single sale of such liquors within the same time, upon the ground that the lesser offense, which is fully proved by evidence of the mere fact of unlawfully making a sale, is merged in the greater offense; but an acquittal of the offense of being a common seller does not have the like effect."

In that case the court held that a conviction for lewdly and lasciviously associating and cohabiting with a certain female to whom he was not married, would not bar prosecution on an indictment for several acts of adultery committed during the same period of time embraced in the former, on the ground that different evidence was required to support a conviction in each case. "The test is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense."

Ex parte Hans Nielson, 131 U.S., 176.

In this case it was held that where a court is without authority to pass a particular sentence, such sentence
is void and the defendant imprisoned under it may be discharged on habeas corpus. A judgment in a criminal case denying to a prisoner a constitutional right, or inflicting an unconstitutional penalty, is void and may be discharged on habeas corpus.

When the Territory of Utah was organized, the Church of Jesus Christ of Latter-day Saints was a de facto corporation, existing under an ordinance of the provisional government of the State of Deseret. In 1885, the Legislative Assembly of the Territory of Utah validated the ordinance incorporating the Church.

By the act of Congress of July 1st, 1862, before referred to, Congress disapproved so much of the act incorporating said Church as tended to "establish, maintain, protect or countenance the practice of polygamy", and prohibited religious and charitable corporations and associations from acquiring or holding more than $50,000 worth of real estate.

The act of Congress of March 3rd, 1887, entitled "An act to amend an act entitled 'An act to amend section 52, 53 of the Revised Statutes of the United States, in reference to bigamy and for other purposes, approved March 22nd, 1882", provided:
"That the acts of the Legislative Assembly of the Territory of Utah incorporating, continuing or providing for the corporation known as the Church of Jesus Christ of Latter-day Saints, and the ordinance of the so-called General Assembly of the State of Deseret incorporating the Church of Jesus Christ of Latter-day Saints, so far as the same may now have legal force and validity are hereby disapproved and annulled, and the said corporation, in so far as it may now have or pretend to have any legal existence is hereby dissolved."

The same act made it the duty of the Attorney General of the United States to commence proceedings in the Supreme Court of Utah "to wind up the affairs of said corporation conformably to law", and also, to institute proceedings to forfeit and escheat to the United States property held in violation of the act of Congress of July lst, 1862, above referred to.

In June 1887, a suit was instituted on behalf of the United States against the late corporation of the Church Jesus Christ of Latter-day Saints and its trustees, praying for the appointment of a receiver to take charge of the assets, property and effects of the corporation, and to hold the same subject to such disposition as the court
might make of them; for a decree declaring the charter of the corporation of the Church of Jesus Christ of Latter-day Saints dissolved and annulled, and for all necessary orders and decrees to wind up the affairs of the corporation conformably to law and equity.

The defendants in this suit claimed that the act of Congress was unconstitutional, in so far as it attempted to annul the charter or dissolve the Church corporation, because the said charter was an executed contract which could not be impaired, and the act was in the nature of a legislative decree of dissolution.

Members of the Church intervened and claimed that if the corporation had been legally dissolved, the Church, as an unincorporated body, was entitled to the property of the corporation.

The Supreme Court of the Territory of Utah held that the act of Congress was constitutional and decreed that the corporation was dissolved. It also adjudged the personal property of the corporation, which was of the value of nearly half a million Dollars, forfeited and escheated to the United States, because "the doctrine of polygamy or plurality of wives was one of the doctrines, teachings and practices of the corporation."
The real estate had all been seized by the receiver, but the temple and tabernacle used by said sect for the worship of God were set apart to the Church for that purpose, the remainder of the realty being escheated to the United States including a piece of land acquired in 1847 when Salt Lake City was first laid out.

This case was taken to the Supreme Court of the United States, where the decision of the lower court was affirmed so far as it upheld the act of Congress and decreed the dissolution of the Church corporation, but was modified in reference to the disposition of the personal property, Chief Justice Fuller and Justices Field and Lamar dissenting.

The late corporation of the Church of Jesus Christ of Latter-day Saints et

also United States
130 U.S. 27-50.
140 U.S. 665.

On the question as to what disposition should be made of the property, the court says: "When a business corporation instituted for the purpose of gain or private interest, is dissolved, the modern doctrine is that its property, after payment of its debts, equitably belongs to its stockholders. But this doctrine has never been extended to public or charitable corporations. As to these
the ancient and established rule prevails, namely: that when a corporation is dissolved, its personal property, like that of a man dying without heirs, ceases to be the subject of private ownership, and becomes subject to the disposal of the sovereign authority, whilst its real estate reverts or escheats to the grantor or donor, unless some other course of devolution has been directed by positive law, though still subject, as we shall hereafter see, to the charitable use."

The pleadings and findings of fact show that all of said property was donated for religious and charitable uses. Following a rabid denunciation of the Mormon Church, its aims and objects, particularly as to the practice of polygamy, which the eminent jurist characterizes as its principal object, he proceeds to show that the property so held should not be used for the furtherance of an unlawful practice or design. After citing cases from the Pandects of Justinian down to the present time, and laying down the well established Cy pres doctrine as applicable to the case at bar, the court, through Mr. Justice Bradley, says:

"These authorities are cited (and many more might be adduced) for the purpose of showing that where property
has been devoted to a public or charitable use, which cannot be carried out on account of some illegality in, or failure of, the object, it does not, according to the general laws of charities, revert to the donor or his heirs, or other representatives, but is applied under the direction of the courts, or of the supreme power in the State, to other charitable objects, lawful in their character, but corresponding as nearly as may be to the original intention of the donor."

The most important question involved in the case was that regarding the constitutionality of the act of Congress annulling the charter of the Church. It was upon this point that the distinguished Chief Justice and two of the associate justices dissented. The court says:

"The power of Congress over the Territories of the United States is general and plenary, arising from and incidental to the right to acquire the territory itself, and from the power given by the constitution to make all needful rules and regulations respecting the territory or other property belonging to the United States. It would be absurd to hold that the United States has power to acquire territory and no power to govern it when acquired. The power to acquire territory, other than the territory
Northwest of the Ohio River, (which belonged to the United States at the adoption of the Constitution), is derived from the treaty making power and the power to declare and carry on war. The incidents of these powers are those of national sovereignty, and belong to all governments. The power to make acquisitions of territory by Congress, by treaty and by cession, is an incident, of national sovereignty. x x x The propositions are so elementary, and so follow necessarily from the condition of things arising upon the acquisition of new territory, that they need no argument to support them. They are self-evident."

Murphy v. Ramsey, 114 U.S. 15, 44.

Holding that there was no question that the acts of July 1st, 1862, and March 3rd, 1887, were both valid exercise of Congressional power, Chief Justice Fuller, in the dissenting opinion of the minority of the court, says:

"Congress possesses such authority over the Territories as the Constitution expressly or by clear implication delegates. Doubtless territory may be acquired by the direct action of Congress, as in the annexation of
Texas; by treaty, as in the case of Louisiana; or, as in the case of California, by conquest and afterwards by treaty; but the power of Congress to legislate over the Territories is granted in so many words by the Constitution.

Article 4, Section 3, Clause 2.

"And it is further therein provided that 'Congress shall have power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof.'

"In my opinion Congress is restrained, not merely by the limitations expressed in the Constitution, but also by the absence of any grant of power, express or implied, in that instrument. And no such power as that involved in the act of Congress under consideration is conferred by the Constitution, nor is any clause pointed out as its legitimate source. I regard it of vital consequence that absolute power should never be conceded as belonging, under our system of government, to any one of its departments. The legislative power of Congress is delegated and not inherent, and is therefore limited. I agree that the power to make needful rules and regulations for the Ter-
ritories necessarily comprehends the power to suppress crime; and it is immaterial, even though that crime assumes the form of a religious belief or creed. Congress has the power to extripate polygamy in any of the Territories, by the enactment of a criminal code directed to that end; but it is not authorized under the cover of that power to seize and confiscate the property of persons, individuals or corporations, without office found, because they may have been guilty of criminal practices."

"The doctrine of Cy pres is one of construction and not of administration. By it a fund devoted to a particular charity is applied to a cognate purpose, and if the purpose for which this property was accumulated was such as has been depicted, it cannot be brought within the rule of application to a purpose as nearly as possible resembling that denounced. Nor is there here any counterpart in congressional power to the exercise of the royal prerogative in the disposition of a charity. If this property was accumulated for purposes declared illegal, that does not justify its arbitrary disposition by judicial legislation. In my judgment, its diversion under this act of Congress is in controversion of specific limitations in the Constitution; unauthorized, expressly or by implica-
tion, by any of its provisions; and in disregard of the fundamental principle that the legislative power of the United States as exercised by the agents of the people of this republic, is delegated and not inherent."

The privilege of the writ of habeas corpus, the right of trial by jury, the prohibition against the passage of bills of attainder or ex post facto laws, or laws respecting the establishment of religion or prohibiting the free exercise thereof, or abridging the freedom of speech, or the press, or depriving any person of life, liberty or property, without due process of law, or denying to any person the equal protection of the law, are secured and recognized by the express provisions of the Constitution. And it is equally well established by the decision of the Supreme Court of the United States that Congress can pass no law impairing the obligation of contracts, or legislate back to the government property that has been given away by acts of Congress, or divest title of property from one citizen and give it to another, because such acts are repugnant to the spirit of our institutions.

The Territory of Utah, by virtue of the Organic Act of 1850, became a political organization -- a body politic. In one sense it might be likened to a municipality, and as
such had power to act through a Legislative Assembly and a Governor. They, for the time being, were the representatives of the political organization, and as such they had power to act for the interests of all the inhabitants of the Territory. They could pass laws for the opening and improvement of highways, for the organization of militia, for the support and government of common schools, for the building of jails and penitentiaries, and it could scarcely be claimed that, if the Legislative Assembly and government should, by ordinance or law, make a contract with an individual for the performance of any public service, the Congress of the United States could, by a simple declaration disapproving such an act, after the contracting party had performed services under it, annul and set aside such a contract. And the Supreme Court has said that the relation of the Territorial government is much the same as that which counties bear to the respective States, and that Congress may legislate for them as a State does for its municipal organizations. And yet it could not be claimed that when a municipal organization had been created by a State Legislature, vesting it with certain powers under which that municipal organization had made contracts with individuals or corporations, therefore, because
the State Government might entirely abolish such a municipal organization, it could also impair the obligations of contract made by such municipal organization while it was in being.

In the sinking fund cases, 99 U.S. 718, the Supreme Court says: "The United States cannot, any more than a State, interfere with private rights, except for legitimate governmental purposes. They are not included within the constitutional prohibition which prevents States from passing laws impairing the obligation of contracts, but, equally with the States, they are prohibited from depriving persons or corporations of property without due process of law. The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that the term implies, as it would be if the repudiator had been a State, or a municipality, or a citizen."

Similar quotations from numerous cases might be made would space permit.

Murphy v. Ramsey, 114 U.S. 44.

Dartmouth College Cases, 4 Wheat. 637.

Miller v. State, 15 Wal. 488.
Railroad v. Church, 98 U.S. 108.

Pennsylvania College Cases, 3 Wal. 212.


Holyoke v. Lyman, 15 Wal. 500.

In these and many other cases, to which reference might be made, the courts held that, in order to give the Legislature power to repeal, alter or amend a charter of incorporation, there must be either an express reservation in the charter itself, or some provision of the general law or of the Constitution, on the subject of corporations, which reserved this power to the Legislature and, so far as I have been able to discover, there is no case which maintains a contrary doctrine. The general power vested in all Legislative bodies to repeal, alter or amend laws of a general nature does not give them power to alter and amend a charter of incorporation. The State, when it makes a contract, occupies the same relation to the other contracting party that an individual citizen of the State occupies in making a contract with another citizen. If it reserves the power to alter, a contract may be altered, otherwise not.

It was contended that the charter of the Church corporation had received the implied sanction of Congress
by the act of its incorporation being allowed to remain on the Statute Books of the Territory without disapproval, from 1855 to 1887, there being in force during all of said a law which required the Secretary of the Territory to transmit to the President of the Senate and the speaker of the House of Representatives, for the use of Congress, two copies of the laws and journals of each session of the Territorial Legislature, within thirty days after the end of each session, and one copy to the President of the United States. After a reasonable time had elapsed, Congress could not impair the contract nor dissolve the corporation, either by disapproving the act of incorporation, or by repealing the charter. In the case of Clinton v. Englebrecht, 13 Wal. 446, the court, speaking of the jury law applicable to the Territory of Utah, says:

"In the first place we observe that the law has received the implied sanction of Congress. It was adopted in 1859. It has been on the Statute Book for more than twelve years. It must have been transmitted to Congress soon after it was enacted, for it was the duty of the Secretary of the Territory to transmit to that body copies of all laws on or before the first of the next December in each year. The simple disapproval by Congress at any
time could have annulled it. It is no unreasonable in-
ference therefore that it was approved by that body."

Conceding that Congress had the power to disapprove
the charter of the Church and dissolve the corporation,
then, under previous decisions of the Supreme Court of the
United States, the property would seem to belong to the
members of the corporation. In the case of Greenwood v.
Freight Company, 105 U.S. 19, the court, through Mr. Jus-
tice Miller, says:

"Personal and real property acquired by the corpora-
tion during its lawful existence, rights of contract or
chooses in action so acquired, and which do not in their
nature depend upon the general powers conferred by the
charter, are not destroyed by such repeal; and the court
may, if the Legislature does not provide some special rem-
edy, enforce such rights by the means within their power.
The rights of the shareholders of such a corporation to
their interest in its property, are not annihilated by such
a repeal, and there must remain in the courts a power
to protect those rights."

The language of the court above quoted, clearly recog-
nizes the right of the members of a dissolved corporation
to its property, and, although it was used with reference
to a business corporation, it is difficult to see why the same principle should not apply to religious and charitable organizations. Indeed, it seems repugnant to the whole theory of our government and to the genius of republican institutions to permit the government to confiscate and escheat the property of such a dissolved corporation.

This was clearly expressed by the Supreme Court in the case of Terrett v. Taylor 9 Cranch, 50. In many respects this Utah case is very similar to that. The Legislature of Virginia, by statute passed in 1798, attempted to disincorporate the Episcopal Churches in that State, by repealing all statutes passed for their benefit previous to that time, upon the ground that they were inconsistent with the principles of the State constitution and of religious freedom, claiming that all the property acquired by the Episcopal Churches in all the parishes of the State of right belonged to the State, and directing the overseers of the poor in each parish to sell the property and appropriate the proceeds to the use of the poor of the parish. In delivering the opinion of the Court, Mr. Justice Story exhaustively reviews the law relating to such cases, and says:
The property was in fact, and in law, generally purchased by the parishioners or acquired by the beneficence of the pious donors, and the title thereto was indefeasibly vested in the churches. x x x A private corporation created by the Legislature may lose its franchises by a misuse or nonuse of them, and they may be resumed by the government by a judicial judgment upon quo warranto to ascertain and enforce the forfeiture. This is the common law of the land, and is a tacit condition annexed to the creation of every such corporation. x x x But that the Legislature can repeal statutes creating private corporations or confirming to them property already acquired under the faith of previous laws, and by such repeal can vest the property of such corporations exclusively in the State, or dispose of the same to such purposes as they may please without the consent or default of the corporators, we are not prepared to admit, and we think ourselves standing upon the principles of natural justice, upon the fundamental laws of every free government, upon the spirit and letter of the Constitution of the United States, and upon the decisions of most respectable judicial tribunals, in resisting such a doctrine.

It would seem that objection urged against giving
the property to the members of the churches, that it would be used to maintain an illegal practice, was not valid, because the property had been contributed for various religious and charitable uses, and, if one of the uses was illegal, the court could and should prohibit its use for that purpose and confine the use to purposes that were strictly legal. This doctrine is fully and ably discussed by the Supreme Court of Massachusetts in the case of Jackson v. Phillips, 14 Allen, 591, Mr. Justice Grey, in delivering the opinion of the court, says:

"The intention of the donor is the guide -- in the phrase of Lord Coke, 'The lodestone of the court', and therefore, whenever a charitable gift can be administered according to its express direction, this court, like the court of Chancery in England, is not at liberty to modify it upon consideration of policy or convenience. But there are cases where the charitable trust could not be executed as directed in the will, in which the testator's scheme has been varied by the court in such a way and to such an extent as could not be done in the case of a private trust."

The Mormon Church case was sent back to the Supreme Court of Utah, with instructions to have the personality
that belonged to the church corporation at the time of its dissolution applied to such charitable uses, lawful in their character, as may most nearly correspond to those purposes to which it was originally destined. A master was appointed to devise such a scheme. The authorities of the church asked to have the income arising from the fund devoted to the support of the poor of the church, and to the erection and maintenance of houses of worship for its members. The government opposed this scheme on the ground that these were some of the identical uses for which the property had been contributed, and the order of the court required that a similar purpose, but not the same purpose, must be selected. Upon this theory the master adopted the scheme proposed by the government, and recommended that the property be given to the public schools of the Territory. He found as a fact, however, from testimony taken, "that since the rendition of the decree in this case, the practice of polygamy has been abandoned by the church."

Exceptions were filed to this report, and it is now pending in the Supreme Court of Utah.

As the property was taken away from the church because of the practice of polygamy, and that institution had been abandoned, there would seem to be no good reason
why it should not be restored to the lawful uses for which it was contributed, instead of being devoted to a purpose foreign to the intention of the donors, in which the public -- those who never contributed anything to the fund and are not even members of the church -- will be the beneficiaries.

In conclusion, I quote from the congressional report of the Committee on Territories of the House of Representatives, made April 1st, 1892, after exhaustive hearings, as showing present conditions in Utah.

The Committee, after quoting voluminously from the testimony taken by it, says: "In the face of such evidence as this, the witnesses, including all classes of Gentiles and Mormons, both official and unofficial, there can no longer be a question as to the status of polygamy in the Territory. That institution has been abolished forever, and the laws relating to it are as strictly obeyed in Utah as in any other Territory or in any State of the Union. x x x .

"Your committee is thoroughly satisfied of Utah's entire qualification for admission into the Union, with all the powers of full Statehood. x x x . The satisfaction which your committee has expressed is, we think,
fully justified by the facts and statistics which are exhibited in this report, and certainly by the hearings which took place in the committee room, which hearings have been printed in full. Utah is shown to be enormously rich in natural resources, many of which have been greatly developed, but the most of which lie dormant, awaiting the touch of enterprise which needs only the assurance of a government of the people, by the people, to lay hold of the wealth which nature has provided. The people of the Territory, on the farms, in the mines, and in the cities and towns, have, in spite of much repression, made a strong, wealthy, and refined community, which, in all the essentials of American citizenship, is fairly comparable to any other community of equal population within our border."

This I deem a just tribute to the flourishing Territory and her loyal citizens.