This dissertation has been microfilmed exactly as received

LINFORD, Orma, 1935—
THE MORMONS AND THE LAW:
THE POLYGAMY CASES.

The University of Wisconsin, Ph.D., 1964
Political Science, general

University Microfilms, Inc., Ann Arbor, Michigan
THE MORMONS AND THE LAW: THE POLYGAMY CASES

BY

ORMA LIMFORD

A thesis submitted in partial fulfillment of the requirements for the degree of

DOCTOR OF PHILOSOPHY

(Political Science)

at the

UNIVERSITY OF WISCONSIN

1964
THE MORMONS AND THE LAW: THE POLYGAMY CASES

A thesis submitted to the Graduate School of the University of Wisconsin in partial fulfillment of the requirements for the degree of Doctor of Philosophy.

by
Orma Linford

Degree to be awarded
January 19--
June 19--
August 1944
To Professors: Fellman
Epstein
Hurst

This thesis having been approved in respect
to form and mechanical execution is referred to
you for judgment upon its substantial merit.

[Signature]
Dean

Approved as satisfying in substance the
doctoral thesis requirement of the University of
Wisconsin.

[Signature]
Major Professor

[Signature]
Leon D. Epstein

Date of Examination, August 4, 1964
PREFACE

Since Mormon standard works and other publications are not well-known, a brief explanation of the ones used in this paper seems advisable.

The Latter-day Saints acknowledge the Bible as the first and foremost of their standard works. The Book of Mormon, sometimes incorrectly called "the Mormon Bible," is second in importance; it purports to be a divinely-inspired history of ancient peoples, containing sacred commandments, prophecies, and revelations, translated from golden plates by Joseph Smith, Jr. A cornerstone of Latter-day Saint faith is a belief in modern divine revelation; revelations received by leaders of the Church are recorded in the Doctrine and Covenants, the third of the basic works. The Pearl of Great Price contains a selection of the writings and inspirations of Joseph Smith, as well as a purported translation of ancient papyrus which came into the possession of the Church.

The first six volumes of the Documentary History of the Church contain a diary-history of the Church by its founder, Joseph Smith. The seventh and last volume contains excerpts from Brigham Young's Manuscript History (under lock and key at the Church Historian's Office) and various other accounts of events between Joseph's death and
the migration to Salt Lake valley. The Comprehensive History of the Church is a six-volume work written by Brigham H. Roberts, which is the official Church history. It should be noted here that the author was forced to accept the authority of these sources on points of Mormon history, since the manuscript collection at the Church Historian's Office is governed by strict security measures. However, these sources were cited as authority only when the matter was non-controversial or could be corroborated.

There were five pre-Utah Church publications. The Messenger and Advocate and the Elders' Journal were published in Kirtland, Ohio. In Independence, Missouri, the Evening and Morning Star was the first English-language newspaper west of the Mississippi. In Illinois, the Mormons published the Times and Seasons, a newspaper devoted primarily to Church doctrine and history, and the Nauvoo Neighbor (originally called The Wasp), which contained current events, matters of general interest and advertisements. The Millenial Star was the first foreign publication of the Church; it was published in Manchester, England, and the first number was issued in 1840. The Deseret News was, and still is, the Church organ in Utah.

A concentrated attempt has been made here to avoid lapsing into debate on the merits of polygamy. Such a discussion is destined to be unsatisfactory. First, it is not crucial to the purpose of this study. Second, there is a lack of demonstrable evidence on either side. Third, the
subject is so charged with emotion that objectivity is virtually impossible. The simple fact of the matter is that polygamy was incompatible with American society. As long as it remained the exclusive province of an isolated community, removed from regular intercourse with the rest of the country, indignation merely rumbled. But when transportation, communication, and political developments brought this peculiar institution closer to the national awareness, the indignation turned to outrage and eventually was expressed in the form of governmental action against those who practiced it.
ACKNOWLEDGEMENTS

I wish to acknowledge the University of Utah and the Utah Historical Society, and especially the staff members of the Utah Room, the University of Utah Law School library, and the Society, who gave so liberally of their time and expertise.

I owe an immeasurable debt to two very good friends, Bonnie Reese and Dolores Marx, who dispensed moral support, editorial comment, and secretarial talent when they were needed most.

My parents are special objects of my appreciation. Without their help, both material and inspirational, this thesis would not have been possible.

Professor David Fellman has been my advisor and friend for some time now, and I wish to express my obligation to him for his patience, advice, sincere concern, and occasional gentle prodding throughout the writing of this thesis, as well as throughout our association.

And finally, I am sure that Mrs. Norma Lynch is the most competent, generous, and understanding typist extant.
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Preface</td>
<td>ii</td>
</tr>
<tr>
<td>Acknowledgements</td>
<td>v</td>
</tr>
<tr>
<td><strong>Part I. The Mormons, The Nation, and Congress</strong></td>
<td></td>
</tr>
<tr>
<td>Chapter I. Introduction</td>
<td>1</td>
</tr>
<tr>
<td>Origins</td>
<td></td>
</tr>
<tr>
<td>Missouri: A &quot;New Jerusalem&quot;</td>
<td></td>
</tr>
<tr>
<td>Illinois: &quot;Nauvoo, The Beautiful&quot;</td>
<td></td>
</tr>
<tr>
<td>Conclusions</td>
<td></td>
</tr>
<tr>
<td>II. A Bible Commonwealth in the Great Basin</td>
<td>89</td>
</tr>
<tr>
<td>The Flight of Modern Israel</td>
<td></td>
</tr>
<tr>
<td>Democratic Theocracy</td>
<td></td>
</tr>
<tr>
<td>The State of Deseret</td>
<td></td>
</tr>
<tr>
<td>The Advent of &quot;Carpetbagger Government&quot;</td>
<td></td>
</tr>
<tr>
<td>Conclusions</td>
<td></td>
</tr>
<tr>
<td>III. Judiciary in Triplicate</td>
<td>153</td>
</tr>
<tr>
<td>The Courts</td>
<td></td>
</tr>
<tr>
<td>Mormon Attitudes Toward the Law and Lawyers</td>
<td></td>
</tr>
<tr>
<td>Mormon Attitudes About Going to Court</td>
<td></td>
</tr>
<tr>
<td>IV. The Nation Moves Against the Other</td>
<td>185</td>
</tr>
<tr>
<td>&quot;Twin Relic&quot;</td>
<td></td>
</tr>
<tr>
<td>&quot;Celestial Marriage&quot;</td>
<td></td>
</tr>
<tr>
<td>The Opening Shots</td>
<td></td>
</tr>
<tr>
<td>The Act of 1862</td>
<td></td>
</tr>
<tr>
<td>Presidential Attitudes</td>
<td></td>
</tr>
<tr>
<td>The Edmunds Act</td>
<td></td>
</tr>
<tr>
<td>The Edmunds-Tucker Act</td>
<td></td>
</tr>
<tr>
<td>Conclusions</td>
<td></td>
</tr>
</tbody>
</table>
PART II. THE ANTI-POLYGAMY LAWS IN COURT

V. CRIMINAL PROSECUTIONS: POLYGAMY .......................... 260
   The Reynolds Case
   The Miles Case
   United States v. Simpson
   United States v. Bassett
   United States v. Cutler
   United States v. Harris
   Polygamy in Arizona
   Conclusions

VI. CRIMINAL PROSECUTIONS: UNLAWFUL COHABITATION .................. 316
   The Crusade Begins
   "Cohabitation" Defined
   "Segregation"
   Competency of Wives to Testify
   Conclusions

VII. CIVIL DISABILITIES .................................................. 389
   Disenfranchisement
   Disqualification from Office
   Jurors
   Inheritance
   Naturalization
   Conclusions

VIII. THE CHURCH ESCHERAT CASES .................................... 440
   Proceedings Begin
   Before the United States Supreme Court
   The Utah Courts Carry On
   Property Restored
   Conclusions

IX. CONCLUSIONS ............................................................. 497
   The Manifesto and Statehood
   Freedom of Religion Prior to 1897
   An Evaluation

APPENDIX ................................................................. 527

TABLE OF CASES .......................................................... 542

BIBLIOGRAPHY ............................................................. 547
PART I

THE MORMONS, THE NATION, AND CONGRESS
CHAPTER I

INTRODUCTION

Origins

In the first half of the nineteenth century, western New York was repeatedly rocked by successive waves of religious enthusiasm. The Presbyterians, Methodists, Baptists, and most of the lesser denominations were strongly revivalistic. The local population scarcely recovered from one revival before the circuit-riding preachers descended again, stirring emotions to new peaks of intensity. The people of the area were especially responsive to this evangelical approach; in fact, it would appear that one of their most notable characteristics was credulity. Whitney Cross has called it the "uncritical generation." Revivalism bred ultraism, and most of the eccentric and radical religions of the time made an appearance; indeed, several originated, in that region. As a result of the repeated sweeps of religious fire, that part of New York west of the Catskills and Adirondacks became known as the "Burned-over District" or the "Burnt District."¹
These revivals were not without precedent. Colonial America had experienced the Great Awakening, a movement of religious emotionalism that began in the middle colonies about 1720 and subsequently spread through New England and the southern colonies, lingering on until the revolutionary period. This reviverist strategy had been adopted by substantial elements in all Protestant churches when it became evident early in the eighteenth century that Christianity had lost vitality after a few generations in America, and was in need of a new approach in order to recapture its former appeal. Jonathan Edwards participated enthusiastically in the revival of the 1740's, seeing it as a method of defending Calvinist dogma against the English Enlightenment and the ideas of Rousseau. Rational religion had, by the second quarter of the eighteenth century, made a noticeable impression on the more liberal minds among New England clergymen. These tactics did not fail to arouse the militant opposition of important and vocal critics, and the bitter discord that followed broke the hold of the old Congregational church. The Great Awakening had far-reaching effects on religion and society. It brought new converts to the churches and managed to get Christianity moving again. The common man took on new importance; since the central idea was personal religious experience, the layman gained a certain freedom from professional clergy and dogma. It served to strengthen elements of dissent against established churches, thus contributing to the separation of church and state. It produced a new breed of men: the
itinerant free-lance preacher who ignored established doctrine and existing organization to capitalize on emotionalism. Protestantism would bear the stamp of the evangelicalism spawned by the Great Awakening until near the turn of the twentieth century.\textsuperscript{2}

The religious awareness of the country sank to a new low during the revolutionary period. Only ten percent of the population belonged to a church.\textsuperscript{3} By the end of the eighteenth century, the advocates of revealed religion were alarmed again by the increased influence wielded by the advocates of rational religion and again called upon revivalism as part of their containment policy. What ensued has been called the Second Great Awakening, and its first rumblings were heard in New England in the early 1790's.\textsuperscript{4}

The winter of 1799 produced the Great Revival, and while less sensational than it was in Kentucky, its impact in the north should not be underestimated. By 1800, peripatetic preachers were attracting great numbers to their camp meetings west of the Appalachians. Enthusiasm reached another peak in 1807-1808, only to subside during the war years. Following the War of 1812, there were more religious upheavals. Things calmed down after 1820, but by 1826, fervor in the Burned-over District was again whipped high by Charles G. Finney, the most famous evangelist of the era. The turn of the decade in 1830 has been called the time of the greatest of all modern revivals; Finney led
the famous Rochester revival of 1830-1831 with such phe-
omenal success that he became quite respectable even in
the east. The grand climax was reached sometime between
1825 and 1837.5

The revivals of the late eighteenth and early
nineteenth centuries coincided with the westward migration
of Yankees from the western parts of Connecticut, Massa-
chusetts, and Vermont. The enthusiasts of the Great
Awakening had, for some reason, moved into western Vermont,
and the religious temperature in this area remained high
when the general revival spirit lagged between the 1740's
and the 1790's. People in this region then moved on to
western New York, whole families and neighborhoods at a
time.6 "A considerable proportion of the New-Englanders
who left the section were 'come-outers' in religion as in
politics," according to Frederick Jackson Turner, and "many
of the Vermonters and the pioneers who went west were rad-
icals."7 It has been suggested that this migration resulted
in the selection of people who, first, were accustomed to
religious emotionalism, and second, were more prone to ac-
cept novelties in the way of religion than were their more
conservative, stay-at-home neighbors.8

The year 1825 marked a turning-point in the history
of western New York and an event that added fuel to the
fire of the Second Great Awakening: the opening of the
Erie Canal. New wealth and population accompanied, indeed,
had preceded, the completion of this important waterway.
The whole area was rapidly becoming an advanced economy based upon agriculture and trade in the first few decades of the nineteenth century. Rochester became a city of some size and significance. Palmyra became an important local market. The countryside was permeated with a feeling of expectancy.\textsuperscript{9}

The frontier folk took readily to the emotional, unrestrained religion of the Second Great Awakening. They preferred the excitement of the camp meeting to the more sophisticated institutions and practices of the eastern churches. The revivals were often bizarre and frenzied.\textsuperscript{10} These very excesses seemed to neutralize the usual reaction against queer religious beliefs and goings-on, and the people of the Burned-over District took to mesmerism, Swedenborgianism, and spiritualism.\textsuperscript{11} Perfectionism found sympathy there, the chief example being John Humphrey Noyes' Oneida Community, which practiced total religious communism.\textsuperscript{12} The practice of spiritual wifery was not unfamiliar.\textsuperscript{13} Some found what they were looking for in Shaker colonies or communities established by Jemima Wilkinson (or Wilkerson), both of which sects practiced celibacy and communism.\textsuperscript{14} Adventist and millenarian groups, like the Millerites, sprang up. After suffering somewhat of a set-back when Christ did not appear in 1844 as predicted by William Miller, nor on various subsequent occasions indicated by revised calculations, this movement finally crystallized into various adventist groups, among
them, the Seventh-Day Adventist Church. Temperance and abolition movements were in evidence, and benevolent societies added to the general religious and moral awareness in the Burned-over District, engaging in Bible distribution, establishment of Sunday schools, encouragement of the observation of the sabbath, and various other humanitarian and social causes. Anti-masonry made a brief, but impressive, appearance.

In view of all this, it does not seem entirely improbable that in Palmyra, New York, in the spring of 1820, a fifteen-year-old boy, much exercised by the claims and counterclaims of the evangelists, reportedly was visited by two heavenly personages. According to young Joseph Smith, Jr., they identified themselves as God the Father and His Son Jesus Christ, and they had come in answer to his prayer for guidance in the matter of deciding which church to join. He reported that they told him to join none of the churches because none of them was true, but that "the fulness of the gospel" would be revealed to him in the future. Three years later, on the evening of September 21, 1823, he supposedly had another vision. This time an angel named Moroni appeared with a message from God. As the youth later recorded, the angel told him that buried in a hill not far from the Smith home was an abridged account of the origin and history of the ancient inhabitants of the American continent. It was said to be written upon golden plates and to contain the fulness of the gospel as
the Savior had delivered it to these early Americans. Joseph Smith allegedly had been chosen by God to translate the record, and he was to be provided with an apparatus consisting of two stones held in sliver bows and fastened to a breastplate, which, when he looked through them, would make the hieroglyphics on the plates understandable to him—the "Urim and Thummim" or "interpreters." He said that Moroni told him that he would not be given these things until he had learned to keep the commandments of God for a period of four years. Joseph made annual visits to the place where the plates were supposed to be deposited for instructions from the angel, and he claimed to have removed them from the earth in September of 1827, along with the "Urim and Thummim." 

With the aid of a series of scribes, Joseph completed the translation in the summer of 1829, and the Book of Mormon issued from the press early in the spring of 1830. Eleven of the small coterie of people who had become interested in Joseph Smith's story and his project were allowed to view the plates and signed statements attesting to the authenticity of the book. Armed with this new holy scripture, Joseph began to organize the church it described. He claimed to have received direct heavenly guidance in organizational matters, and John the Baptist, Peter, James, and John reputedly appeared to restore the ancient priesthoods, the power by which man might act in the authority of God in administering the gospel on earth.
On April 6, 1830, six people, the number required by New York law, met in Fayette and formally launched the Church of Jesus Christ of Latter-day Saints. Its public ministry began on April 11.

The critics of Mormonism have overlooked very few character-impugning reports and rumors in an effort to discredit Joseph Smith. He has been called lazy, shiftless, immoral, vicious, illiterate, a liar, a necromancer, a lunatic, and an imposter. Even the more sympathetic writers concede that he was a restless, highly imaginative youth, given to searching for buried treasure with a "peep-stone," barely educated, and addicted to telling tall tales. In fact the first official recognition of the Mormon prophet seems to be a South Bainbridge, New York, court record of 1826 which reveals that he was convicted of being "a disorderly person and an imposter," accusations arising out of his treasure-hunting activities.

There also have been numerous attempts to expose the Book of Mormon. One writer applied psychological tests posthumously to the Book of Mormon and its author, and came to the conclusion that it could have been written only in the northeastern part of the United States between the years 1826 and 1834, and furthermore, all evidence indicated that probably it could have been written only by one Joseph Smith, Jr. The formulators of the so-called "Spaulding theory" allege that the true source of the Book of Mormon was the manuscript of an historical novel
about early American Indians written by a Solomon Spaulding, who intended to have it printed in order to pay his debts. According to this theory, one of the early Church leaders had the opportunity to read it while it was in the hands of the printers, and after injecting much religious matter into the story, he persuaded Joseph Smith to participate in the deception. 31

Determining the truth in these matters is not only impossible; it is not even the business of this study. Whether Joseph Smith was a madman or whether the Book of Mormon is indeed a jazzed-up version of the Spaulding manuscript, is of no concern here. What is important is that Joseph Smith did produce a Book of Mormon, and that he was able to convince others of its authenticity and the authority of his own mission. One may think the Book of Mormon absurd, perhaps even laughable, and view the official account of the origin of the Church as incredible, but at least this must be recognized: the Church of Jesus Christ of Latter-day Saints represents the most successful native religion, and its success is impressive. It is the only church responsible for the founding of a state in the Union. And more important here, this is the sect that prompted the Supreme Court of the United States to construe for the first time the provisions of the First Amendment regarding religion. It is high time that the non-Mormon scholar removed his tongue from his cheek and dignified Mormonism to the extent of admitting that it is a legitimate object of scholarly inquiry.
It has been said that Mormonism runs against the mainstream of religion in America, that Joseph Smith was some sort of mutation, and that his followers were nothing but a lunatic fringe. This simply is not so. Although it rapidly developed its own peculiar characteristics, Mormonism bore indelible marks of the time and the place.

The important forces and ideas at work in the country at the time were reflected in Mormon doctrine. Nationalism was evident in the declaration that America was "choice above all other lands," and that God had chosen it for the building of a New Zion and the restoration of His gospel. While Mormonism was a contradiction of many of the assumptions implicit in Jacksonian democracy, the emerging democratic ideals found expression, for example, in the adoption of a universal priesthood of all who proved themselves worthy. Professor Merle Curti has included Mormons among several of the more radical religions that he classified as "essentially democratic developments in the religious expression of the period." The belief in the speedy second coming of Christ was in accordance with a strain of millennial thought that was by no means the exclusive province of deluded minds. The great concern with proselyting among the Indians was a form of participation in the westward expansion. The Church itself was to move west as a body shortly after its founding. The subject-matter of the Book of Mormon and the circumstances surrounding its discovery are obvious manifestations of the Romantic movement.
The Romantic movement had a substantial impact on early nineteenth century American life. Vernon Parrington has said that older America died during the years between the Peace of Paris and the end of the War of 1812, and "the America that succeeded... was a shifting, reckless world... . . . It was our first great period of exploitation, and from it emerged, as naturally as the cock from the mother egg, the spirit of romance... . . . always romance. The days of realism were past, and it was quietly laid away with the wig and small clothes of an outgrown generation."  

Romanticism was a complex and multi-faceted development, and it did not fail to make an impression on religion. The most prevalent form at this time was the "popular" or "folk" romanticism which stressed man's intuitive powers and extrasensory perception.  

Ralph Gabriel pointed out that "the twentieth century student is often astonished at the extent to which supernaturalism permeated American thought of the nineteenth century."  

The New England environment from which the inhabitants of the Burned-over District had come was saturated with tales of the supernatural and "the whole folklore of the money-digger, the spells and incantations, the witch-basil stick and mineral rod," which they brought with them when they migrated to western New York.  

Joseph Smith's vision was nothing extraordinary; reports of such experiences were quite common. Digging for buried treasure held fascination for the most respectable men. Considering the beliefs of the time, the most likely
location for the golden plates would have been an underground hiding-place. The fact that the plates purported to be a history of an ancient American civilization was additionally appealing, in view of the Indian mounds scattered in the vicinity and the resultant interest in Indian lore.\textsuperscript{41} Moreover, there had been a long-standing and well-attended suggestion that the American Indians might be descendants of the lost tribes of Israel.\textsuperscript{42} It was not the temper of the time to be discriminating in such matters. One writer has observed:

\textbf{... Indeed it is scarcely conceivable how one could live in New England in those years and not have shared in such beliefs. To be credulous in such things was to be normal people. To have been incredulous in such matters in that age and locality would have stamped them abnormal. ...} \textsuperscript{43}

Frederick Jackson Turner described the Yankee who crossed the Appalachians to settle the frontier as a sort of schizophrenic: he was a dissenter and a reformer, but at the same time, he carried with him "a body of ideas regarding conduct and a way of looking at the world that were deeply influenced by [his] old Puritan training."\textsuperscript{44} He revolted against the older edition of Calvinism, but he was looking for something to take its place, something that would provide the answers to bothersome questions and give him a fairly precise idea of how to go about living his life. These people, lacking the centralizing influence of the old Congregational church, went searching in all directions and came up with many different solutions. The
absence of organization and formulas left a vast resource of emotions which proved to be a fertile field for revivalism. They founded "isms" of their own. And they flocked around self-styled prophets, a very predictable development. All this revealed strong underlying forces of religious thinking.  

. . . The forgotten fact about Mormonism is that New England settlers in York State had a tradition which held that a church is something more than a social group, that theology has concerns other than the nature of man. The descendants of farmers from isolated valleys in Vermont and Connecticut instinctively thought of one church, the church, with a definite logical creed and reassuring covenants. . . . they thought of a church of saints, directly descended from the "ancient order, as established by our Lord and Savior Jesus Christ, and his Apostles. The church of New England tradition was a church at one with society, without any division of temporal and spiritual power."  

Mormonism established the sought-after "church of saints," and it restored the comforting authoritarian control and the dominant interest of the church in the affairs of both the spirit and the body.  

The literal interpretation of the scriptures was welcome after the confusion spouted by the competing circuit-riding preachers.  

Especially attractive was the idea of having among them a living prophet, an incarnation of their faith. The Mormons claimed exclusive possession of priestly powers, received directly from the hands of the original apostles. The basic lay organization of the Church was in accordance with that of the ancient
Modern revelation supplemented the scripture, providing for timely divine guidance. The doctrines of original sin and predestination were disregarded in favor of a theory of personal responsibility for salvation. All men could look forward to being resurrected as Jesus was. Alexander Campbell, writing in 1832, perceived that the Book of Mormon contained indications of "every error and almost every truth discussed in N. York for the last ten years," and it settled most of the controversial issues of contemporary evangelical theology.

Revivalism of the early nineteenth century encouraged things that, at first, seem to be contradictory, but upon closer examination, are seen to be merely different sides of the same coin. The climate of revivalism fostered innovation; religion hinged upon personal religious experience, conversion, which allowed inventiveness and individuality. The criterion of personal religious experience, however, was a common denominator which supplied unity among Christians. Mormonism was a logical product of revivalism. The spirit of innovation made it possible, certainly, but it was also an attempt to crystallize unity by offering the ancient church of Christ which was designed to appeal to all Christians.

Mormonism took root in the same soil that nurtured a Charles Finney, a Jemima Wilkinson, a John Humphrey Noyes, and a William Miller. Mormonism is full of paradoxes, but the least puzzling of these is its origin. As
Whitney Cross observed, "Clearly it was no case of deliberate imposture, no consciously calculated set of devices to attain power over others." True, Joseph Smith may have gathered ideas from hearsay knowledge of such sects as the Shakers and the Owenites, but hypotheses like the Spaulding theory of the origin of the Book of Mormon are "too transparently simple to explain the broad appeal of the new church. Such myths not only distort Joseph's character but also breed serious misconceptions of how any religious novelty is likely to arise. All the spiritual experiments of western New York were alike genuine growths, rooted in a heritage of moral intensity and blossoming in the heat of evangelistic fervor." 57

Missouri: A "New Jerusalem"

It was not long before Joseph Smith and the others became the objects of persecution by their fellow-citizens. They were threatened by angry mobs which gathered at baptisms and confirmations. 58 Joseph was arrested again on the old charge of being a disorderly person, supposedly having thrown the countryside into an uproar with his Book of Mormon and preaching. 59 He was acquitted twice in separate, successive trials held in two different counties. 60

Kirtland and Jackson County

The publication of the Book of Mormon stimulated interest in the Indians, and missionaries promptly were sent out among these "Lamanites." They preached to the
white populace along the way, and substantial numbers were converted in the vicinity of Kirtland, Ohio. When the situation in New York became hazardous, Joseph promulgated a revelation instructing the Saints to move their headquarters to Ohio.

Another group established a mission in Jackson county, Missouri, in the area of what is now Kansas City. In July of 1831, the Prophet arrived there and announced that it was the place that God had chosen for the gathering of the Saints and the building of a "New Jerusalem." Independence was designated as the central place of Zion, and on the third of August, the temple site was dedicated. For several years there were two centers of Church activity.

Among the converts in Ohio were the remaining members of a Campbellite community based upon communistic principles. It had lost most of its vitality, and the Prophet ordered an end to the practice. However, it soon became necessary to provide a method of organizing the settlement of the New York Saints who had begun to arrive in Ohio, and he announced, by way of revelation, a similar plan of his own. This new scheme of economic relations has been called, variously, the "United Order," the "Order of Enoch," and the "Law of Consecration and Stewardship." The underlying assumption was that the earth and everything on it belongs to the Lord. Members of the Church were asked to "consecrate," or deed, all real and personal property to the presiding bishop of the Church. The bishop then would
grant a "stewardship" to each head of family—a farm, a shop or store, a building lot, a profession or calling, and so on. The value of the stewardship often exceeded the value of the consecration; indeed, many converts came without money or property. Further, each head of family was asked to consecrate annually to a common storehouse the products or money remaining after the needs of his family were satisfied. This surplus was to be used for poor relief and for Church projects of various kinds.

There was no formal supervision or control by the Church over the stewardship. Professor Leonard J. Arrington has identified four elements in the plan: economic equality, socialization of surplus income, freedom of enterprise, and group economic self-sufficiency. He explains:

This redistribution of wealth was designed to place all family heads on an equal economic footing, considering their respective family obligations, circumstances, needs, and "just wants." The law of consecration and stewardship was thus a great leveller, designed to bring about a condition of relative temporal equality among the early converts to the church. . . . It was not "dead level" equality that the system aimed at, however, but a condition in which men were given responsibilities proportionate to their needs, circumstances, and capacities. . . .

The United Order was practiced in Jackson county until the mob forced the closing of the storehouse, and in Ohio until April 10, 1834. Joseph, never excessively enthusiastic about the experiment or involved in it, then proceeded to amend the original scheme and directed his missionaries to correct the notion that the Church
practiced communism. It was revived only once during his lifetime, in 1838, in drastically modified form, and it lasted only until the Mormons were driven out of Missouri. There were later attempts when the Saints reached the Great Basin. 72

By July of 1833, there were more than twelve hundred Mormons in Jackson county, comprising over one-third of the population. 73 As they continued to increase and prosper, the original settlers became fearful of their growing numbers and their claims to "an inheritance in Zion." The first evidence of hostility came as early as the spring of 1832, when bands of Gentiles* began raids upon the Mormons, stoning and shooting into their houses and burning their haystacks. 74 In July of 1833, nearly five hundred people met in Independence and issued a declaration setting forth their complaints against the Mormons and the necessity of driving them from the county "peaceably if we can, forcibly if we must." 75

When the Mormon leaders asked for time to consider the ultimatum, they were given fifteen minutes, and when this offer was refused, a mob proceeded to destroy the office of the Mormon newspaper, the Evening and Morning Star. 76 After more mob violence occurred Mormon leaders signed an agreement to leave Jackson county within a certain time in return for being allowed to put their

*Non-Mormons
affairs in order without further disturbance. Meanwhile, the Saints appealed to Missouri Governor Daniel Dunklin for assistance. He advised them to seek relief in the courts. Their persecutors grew impatient with what they considered to be insufficient progress toward leaving, and the attack began again. The Mormons set up a defense, and an armed battle ensued. On November 5, 1833, the Missouri militia was called out and placed under the command of Colonel Thomas Pitcher, an active member of the mob. He promised the Saints that if they would surrender their weapons, he would disarm their enemies. When they agreed to do so and fulfilled their part of the bargain, Pitcher failed to keep his promise, leaving them almost entirely defenseless and facilitating their expulsion. During the winter of 1833, from twelve to fifteen hundred people were driven out onto the prairie. Mobs burned their homes behind them and took their personal property and livestock.

Clay and Caldwell Counties

The Saints found refuge in adjacent Clay county, whose residents were, at first, sympathetic and hospitable. Almost immediately, they began efforts to gain redress for the losses inflicted upon them in Jackson county. Appeals to the Jackson county courts had failed, since many of the law enforcement and judicial officers were parties to the effort to expel them. Prosecutions were initiated by the state against members of the mob in the circuit court in Independence, but nothing came of them. Governor Daniel
Dunklin later told the Missouri legislature that "conviction for any violence committed against a Mormon cannot be had in Jackson county." Petitions to the legislature came to naught. "Zion's Camp," an army of about one hundred and fifty to two hundred men, was sent from Kirtland in May of 1834 to help reclaim the Missouri lands, but they were intercepted, convinced of the futility of their mission, and persuaded to disband.

The era of good feelings in Clay county lasted only about three years, and by the spring of 1836, Mormons were again suffering harassment. Lilburn Boggs was elected governor, and from the beginning, it was evident that the policy of his administration was not favorable to the Mormons. While lieutenant governor, he had been at his home in Independence at the time of the razing of the Star office, and had full knowledge of the happenings, but he refused to interfere in any manner. He also is said to have been the author of a bitterly anti-Mormon letter published in an Independence newspaper a few years before. Governor Dunklin, at least, had been convinced of the justice of the Saints' cause, even if he was unable to provide effective assistance.

On June 29, 1836, Clay county residents held a meeting reminiscent of the one held in Independence three years before, and asked the Mormons to leave. The latter, remembering the asylum given them by the old settlers when they were driven out of Jackson county and having promised
to remain only so long as they were welcome, agreed to go. A second meeting of the Clay citizens approved the Mormon statement of intentions and promised to help them find a new location. They petitioned the Missouri legislature to organize a new county, a request that was granted on December 29, 1836, with the creation of Caldwell county—a sort of reservation for Mormons. The departure from Clay county was peaceful, and settlements were established in the area set apart in upper Missouri, where Gentiles were persuaded to sell out to the incoming Mormons. Gentiles were not forbidden to enter, but the arrangement was widely understood:

... The Mormons were to have undisputed possession of the new county; they were to hold the county offices, send a representative to the Legislature, and in return for these privileges they were not to settle in any other county save by express consent and permission, previously obtained, of two-thirds of the non-Mormon residents of the township in said county wherein they desired to make location.

The Gentiles were satisfied because they considered the country fit only for Indians (and Mormons, apparently); the Mormons were pleased with the prospect of being left alone.

In October of 1838, the Kirtland camp arrived, after a series of disasters in Ohio. The Church had been shaken by apostacy, and apostates had continued to agitate, causing serious discord among the membership. The Saints had engaged in reckless land speculation and had incurred heavy debts, and their shaky economic structure had toppled
with the failure of their wild-cat "bank" in the financial panic of 1837.98 Joseph Smith and First Counselor Sidney Rigdon were charged with violating the Ohio banking laws and were found guilty in the county court, but they fled the state while an appeal was pending; consequently, the case was never decided finally.99

A wilderness in 1836, Caldwell county contained five thousand people by 1838; ninety percent of them were Mormons, and there were no Gentiles within more than fifteen miles of the county seat, Far West.100 Substantial Mormon settlements had been founded in neighboring Daviess county also, and a few were scattered in Ray and Carroll counties.101

The Fourth of July, 1838, in Far West was occasioned by the issuance of a "Declaration of Independence" from mobs and persecutions:

... [F]rom this day and this hour, we will suffer it no more. We take God and all the holy angels to witness, this day, that we warn all men, in the name of Jesus Christ, to come on us no more for ever; for, from this hour, we will bear it no more: our rights shall no more be trampled on with impunity: the man, or the set of men, who attempts it, does it at the expense of their lives. And that mob that comes on us to disturb us, it shall be between us and them a war of extermination; for we will follow them till the last drop of their blood is spilled, or else they will have to exterminate us. ... We this day, then, proclaim ourselves free, with a purpose and a determination that never can be broken,-- "no, never! no, never!! no, never!!!"102

It was an incendiary statement, a very provocative thing to issue under the circumstances, and it undoubtedly
irritated the Missourians. In August, there was a clash between Mormons and Whigs at the polls in Daviess county (the Mormons were then largely Democrats), and the guerilla warfare continued in Caldwell and Daviess counties for several weeks. Trouble flared in other counties.

The state militia was called into service on August 30, and it soon became evident that the troops had no intention of coming to the aid of the Mormons, but instead were in sympathy with the mob. The whole area collapsed into a state of civil war. General David R. Atchison, in command of the troops, wrote Governor Boggs October 22, complaining of being part of what seemed to him to be official assistance in the persecution of the Mormons:

"The great difficulty in settling this matter, seems to be in not being able to identify the offenders. I am convinced that nothing short of driving the Mormons from Daviess county will satisfy the parties opposed to them; and this I have not the power to do, as I conceive, legally . . . . If the Mormons are to be driven from their homes, let it be done without any color of law, and in open defiance thereof; let it be done by volunteers acting upon their own responsibilities."

"The Mormons Must Be . . . Exterminated"

Boggs now realized the serious nature of conditions, and on October 27 he issued his infamous "extermination order," which declared that "the Mormons must be treated as enemies, and must be exterminated or driven from the State if necessary for the public peace—their outrages are beyond all description." General Atchison withdrew and returned home. Whether he left because he was
opposed to the whole course of action or because Governor Boggs dismissed him is still a matter of uncertainty. 110

October 30 brought the sad spectacle known as "Haun's Mill Massacre." A mounted force of about one hundred and twenty-five militiamen stormed upon a settlement of thirty Mormon families located at Haun's Mill, ten or twelve miles east of Far West. The Mormons, their pleas for mercy ignored, retreated with guns to an old blacksmith shop where they attempted to set up a defense. The attackers riddled the shed with bullets, and, its inadequate wooden walls giving little protection, seventeen inside were killed and twelve wounded. After this butchery, the settlement was looted, leaving women and children destitute. 111

The militia, under General Samuel D. Lucas, finally overtook the Saints at Far West, where most of the families had gathered for safety. A truce was arranged, and a meeting took place between Mormon leaders and the officers of the militia. The commanding officer of the Mormon troops, Colonel G.W. Hinkle, at this time perpetrated a piece of treachery for which he was later excommunicated from the Church. Hinkle secretly agreed to give up the Church leaders for trial, to surrender arms, to make an appropriation of the property of those who had participated in the fighting to pay for damages, and to move the membership from the state. In return, the Saints were to have the protection of the militia. He then returned to the Mormon camp and told Joseph Smith and other Church officials
that they were wanted by the militia officers for a conference. They went willingly, and once in the enemy's camp, they were taken prisoners. The Mormons then were quickly disarmed, more prisoners were taken, and they were directed to leave Missouri immediately.\textsuperscript{112} General Lucas ordered Joseph Smith and the other prisoners to be shot in the public square in Far West.\textsuperscript{113} General Alexander W. Doniphan, to whom this directive was given, flatly refused to comply, and apparently this insubordination so stunned Lucas that no more attempts were made on the lives of the prisoners.\textsuperscript{114} General John B. Clark, to whom command was given after General Atchison retired, was in favor of trying them by court martial, but Governor Boggs informed him that they must be turned over to the civil authorities.\textsuperscript{115}

Eventually, a court of inquiry at Richmond found probable cause to believe that Joseph and five others were guilty of treason, that five were guilty of murder, and that twenty-three were guilty of arson, burglary, robbery, and larceny.\textsuperscript{116} They were later indicted as indicated.\textsuperscript{117} The Prophet was allowed to escape during a transfer which was made necessary when he obtained a change of venue. There were others who escaped also.\textsuperscript{118} Some stood trial and were acquitted. There were never any convictions.\textsuperscript{119}

Clearly, General Lucas had no authority to make an agreement of this kind. The Mormons were not a foreign enemy with treaty-making power, and even if this had been the case, the Constitution forbade a state to take such
action. To force the Mormons to bear the financial burden of the war was unreasonable and likewise unauthorized. To attempt to punish them for offenses they had not been tried for was illegal and contrary to all sense of justice. It could even be argued that the confiscation of arms was unlawful, on the grounds that since the Mormon troops were a part of the regular militia, it should be presumed that they were engaged in putting down civil disobedience until insubordination could be shown.120

To use state authority to force a group of people to leave the state was definitely contrary to the Missouri constitution, but the federal constitutional question is not so clear. Since the Fourteenth Amendment was not ratified until 1868, the Saints could not appeal to the privileges and immunities clause, the due process clause, or the equal protection clause, all of which would have offered possible bases for complaint. There is not much doubt that even the commerce clause, today, would control such action by a state.121

However, it should be noted that, at that time, the Article IV provision that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states" had not been given definitive interpretation. In view of a United States circuit court opinion by Justice Bushrod Washington in 1823,122 the Saints logically could have looked to this clause for protection:
. . . The inquiry is, what are the privileges and immunities of citizens in the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; which have, at all times, been enjoyed by the citizens of the several states which compose this Union. . . .

Among these rights, Justice Washington enumerated the following:

. . . Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; . . . to take, hold and dispose of property, either real or personal. . . . 123

The settled constitutional doctrine on this provision today is that it merely forbids any state to discriminate against citizens of other states in favor of its own. 124 However, the theory that the clause is a guaranty to the citizens of each state of all the privileges and immunities of citizenship that are enjoyed in any state by its citizens was not specifically rejected until 1894. 125 This argument also would have impeached the validity of earlier action confining the Mormons to Caldwell county, had it not been for the fact that it was the result of a gentlemen's agreement and not policy executed under color of law. 126

Alexander Linn has described the aftermath of the capitulation at Far West:
The decisive action of the state authorities had given the local Missourians to understand that the law of the land was on their side, and when the militia withdrew they took advantage of their opportunity. Mormon property was not respected, and what was left to those people in the way of horses, cattle, hogs, and even household belongings was taken by the hands of men who rode at pleasure, and who claimed that they were only regaining what the Mormons had stolen from them. . . .

And Hubert Howe Bancroft has commented:

Thus in the name of law and justice the Mormon soldiery, whose chief crime it would seem was that, in common with the rest of the militia, they had assisted the state in putting down a mob, were forced at the point of the bayonet to sign an obligation, binding not only themselves but the civilians within their settlement to defray the entire expense of the war. This proceeding was sufficiently peculiar; but, as a climax to their conduct, some of the officers and men laid hands on the Mormons' property wherever they could find it, taking no thought of payment.

Lynch law drove the Mormons from county to county until they crossed the Missouri-Illinois border. Defeated, dispossessed, and bereaved, after a forced march in the dead of winter, lacking sufficient clothing, shelter, and transportation, the unwanted Saints grouped at Quincy, Illinois, in the spring of 1839. It was during this time that Brigham Young, who had joined the Church in New York in April of 1832, demonstrated the executive ability that later would enable him to lead his people across the plains and direct the building of an empire in the western desert. Since the other Church officials were jailed or had apostacized, leadership devolved upon him as president of the Twelve Apostles.
The Mormons sent a memorial to the Missouri legislature asking that the exterminating order be rescinded, that the deed to property which was signed at gun-point be returned, and that payment be made for the arms taken by the militia and for the land in Jackson county from which they were driven. The legislature made only the faintest gesture in the direction of seeing that justice was done: an investigating committee was appointed, but it took no action. The Gentiles of Caldwell and Daviess counties turned the two thousand dollars appropriated for their relief over to the Mormons. The same legislature subsequently voted two hundred thousand dollars to defray the expenses of the "Mormon War."\footnote{131}

Thus ended one of the most unfortunate chapters in the nation's history. Missouri was an expensive experience for the Saints. Fifty of their membership were killed, about the same number were injured, and more died as the result of the conditions of the exodus.\footnote{132} They were never fully compensated for the loss of land, houses, and possessions. The Church later, in a memorial to Congress, estimated their Missouri losses at two million dollars.\footnote{133} In the mid-nineteenth century, in the most libertarian country in the world, twelve to fifteen hundred persons--an entire people--were banished from a state in the Union because of their religious beliefs and practices. There were other factors, certainly. The Mormons claimed to be a "chosen people," and this pretension of superiority
naturally annoyed the old settlers. Friendliness with the Indians generated a fear that the Mormons were cultivating the red men as allies against the Gentiles. As the Saints increased in number, they became politically important and drew the fire of those who were jealous or fearful of the growing strength of the Mormon vote. The older settlers were slave-holders or sympathizers, while the Mormons were not. The Saints came to Missouri to claim their "inheritance in Zion," without making it sufficiently clear how they were going to obtain title to it; while they definitely intended to obtain land by purchase, the old settlers naturally became wary.\textsuperscript{134}

It cannot be said that the Mormons were without blame. They retaliated in kind against the shooting, wrecking, burning, and looting on numerous occasions.\textsuperscript{135} Because of the many different factors involved and the intensity of feelings, there is no un-prejudiced account of the events of this period. The Missourians have been censured generally for their part, and the unjustness and inhumanity of their actions is fully documented. Linn noted that "the voice of the press, from the Mississippi to the Atlantic, was, without a discovered exception, on the side of the refugees."\textsuperscript{136}

Missouri historians usually attempt to whitewash the conduct of the mobs by pointing out that the Mormons received the same treatment wherever they settled, as if this were proof that the Saints deserved such reprisals.\textsuperscript{137}
Latter-day Saint historians, on the other hand, claim that Missouri was punished during the Civil War, when the notorious "Order No. 11" was issued by General Thomas Ewing, in an attempt to discourage the bands of robbers and plunderers which roamed western Missouri.\(^{138}\) Jackson county and surrounding area was evacuated; all hay and grain was confiscated; and the countryside was laid to waste. In effect, the district was handed over to the Jayhawkers who, undiscouraged, proceeded to strip it bare.\(^{139}\) To Mormons, this is an example of the retributive justice of heaven. The citizens of Jackson county were given the same cruel treatment that they had given the Saints.

**Illinois: "Nauvoo, The Beautiful"**

The citizens of Quincy and surrounding Hancock county welcomed the refugees and generously contributed clothes, provisions, and money for their relief. The Democratic Association of Quincy was especially active in helping them, and, in addition to giving material aid, lent moral support by adopting a statement denouncing lawless mobs, proclaiming the inviolability of the right of conscience, and declaring that the inhabitants of the Missouri frontier and the governor had deprived the Mormons of their natural rights and had abrogated the laws of justice and humanity.\(^{140}\)

The Mormon leaders apparently were impressed by the place and the people, and the Saints began to purchase land in and around the town of Commerce. Joseph soon changed the name to "Nauvoo," which he proclaimed meant
"a beautiful location" in Hebrew, and it became the hub of Mormon activities. 141

Efforts to obtain redress for the Missouri losses were resumed. In December of 1839, Joseph headed a mission to Washington, where he met with President Martin Van Buren and the Illinois congressional delegation. Van Buren obviously was looking toward the next year's presidential election when he told them: "Gentlemen, your cause is just, but I can do nothing for you. If I take up for you, I shall lose the vote of Missouri." 142 They were more successful with the Illinois legislators, who agreed to present a memorial and petition to Congress. On February 12, 1840, the petition was referred to the Senate Judiciary Committee, 143 which reported on the matter March 4, 1840. 144 The Committee concluded that "the case presented for their investigation is not such a one as will justify or authorize any interposition of this Government." Since the wrongs were not committed by officers of the United States, and the acts complained of took place in Missouri at the hands of Missourians when the petitioners were citizens of that state, redress lay in the hands of the Missouri or federal courts, or:

... [T]he petitioners may, if they see proper, apply to the justice and magnanimity of the State of Missouri—an appeal which the committee feel justified in believing will never be made in vain by the injured or oppressed. It can never be presumed that a State either wants the power, or lacks the disposition, to redress the wrongs of its own citizens
committed within her own territory, whether they proceed from the lawless acts of her officers, or other persons.\textsuperscript{145}

All three branches of Missouri government had failed to grant the justice sought by the Mormons. The question arises: why were the wrongs never called to the attention of the federal courts in Missouri? The Eleventh Amendment of the federal constitution probably would have barred a suit against Missouri without her consent,\textsuperscript{146} but the cause of the exiled Saints clearly would have fallen within the diversity of citizenship jurisdiction of the federal courts. There are two main reasons given to explain why they did not bring action against the members of the mob: first, the expense was prohibitive, given their impoverished condition; second, they were afraid of the same kind of collusion between government officials and their enemies that had been experienced before, and receiving fair treatment from any Missouri jury was unimaginable to them.\textsuperscript{147}

Seeing all avenues to reparation blocked, Sidney Rigdon, first counsellor in the Church presidency, formulated a grand scheme for prompting the national government to force Missouri to deal justly with the Mormons. His plan was to persuade every governor and state legislature to impeach Missouri on the grounds that she abdicated republican government in her treatment of the Saints. Since the Constitution, in Article IV, Section 4, provides that "the United States shall guarantee to every state in this Union a republican form of government," he seemed to
think that when faced with these petitions, the President and Congress would be compelled to take some kind of action. Very little headway was made with this wild plan.148

A State Within A State

One of the reasons that the Mormons were given such a whole-hearted welcome to Illinois was the state's bankrupt circumstances. It was thought that the substantial Mormon numbers could only improve the economic climate. Political considerations were also a significant factor. The Whigs and the Democrats were evenly balanced. The Mormons would be able to meet the six months residence requirement for voting in the 1840 elections. It was evident that the Saints could be an important force in politics, which accounts in part for the charitable activities of the Democratic Association of Quincy, and also explains the extraordinary treatment Nauvoo received at the hands of the state legislature.149 Thomas Ford, who served as governor of Illinois during the Mormon occupation of Nauvoo, has observed:

At the legislature of 1840-'41, it became a matter of great interest, with both parties, to conciliate these people. They were already numerous, and were fast increasing by emigration from all parts. It was evident that they were to possess much power in elections. They had already signified their intention of joining neither party, further than they could be supported by that party, but to vote for such persons as had done or were willing to do them most service. And the leaders of both parties believed that the Mormons would soon hold the balance of power, and exerted themselves on both sides, by professions, and kindness and devotion to their interest, to win their support.150
Nauvoo was made an incorporated city by a special act of the legislature on December 16, 1840.\textsuperscript{151} It is said that Stephen A. Douglas, then secretary of state in Illinois, played a large part in securing this remarkable charter, which passed both houses unanimously.\textsuperscript{152} The act conferred powers so extensive and of such a nature as to create what approached being a city-state. There were really three charters contained in the act: one incorporating the City of Nauvoo, a second creating the Nauvoo Legion, and a third establishing the University of Nauvoo. The purpose of the three charters appeared to be "to establish at Nauvoo a government of the Mormons, by the Mormons and for the Mormons, independent of control either by the state or the United States."\textsuperscript{153}

The boundaries of the city could be extended almost at will: "Whenever any tract of land adjoining the City of Nauvoo shall have been laid out into town lots and duly recorded according to law, the same shall form a part of the City of Nauvoo."\textsuperscript{154} The city council, composed of a mayor, four aldermen, and nine councillors elected by the qualified voters, could be enlarged whenever it was deemed desirable.\textsuperscript{155}

The council had the power to pass all ordinances "necessary for the peace, benefit, good order, regulation, convenience and cleanliness of said city; for the protection of property therein from destruction by fire or otherwise, and for the health and happiness thereof,"

provided that they were not repugnant to the constitutions of the United States and Illinois.\textsuperscript{156} Nothing was said about conforming to the laws of the two governments, contrary to the admonitions placed in other charters. The oath of office to which the members of the city council were required to subscribe bound them to support only the constitutions, national and state.\textsuperscript{157} The mayor and aldermen were given all the powers of justices of the peace in both civil and criminal cases arising under state law.\textsuperscript{158} The mayor was given exclusive jurisdiction of all cases arising under city ordinances;\textsuperscript{159} appeals were to be taken to the municipal court, composed of the mayor as chief justice and the aldermen as associate justices, and from there to the circuit court for Hancock county.\textsuperscript{160}

The city council was given the power to establish a "University of the City of Nauvoo," under the exclusive management of a board of trustees. The trustees were given full authority to pass and execute all laws and ordinances deemed necessary for the "welfare and prosperity" of the university and its students—again, subject only to the limitation that they should not violate the constitutions of the United States or Illinois. The board of trustees would be appointed by the city council.\textsuperscript{161}

The charter also made provision for a "body of independent military men, to be called the 'Nauvoo Legion.'" The law-making authority of this body, the court martial, was composed of the commissioned officers, and it had the
power to pass and execute laws and ordinances "necessary for the benefit, government, and regulation of said legion"—provided, once more, only that the court martial act within the limits prescribed by state and federal constitutions. The members of the Legion were to perform the same amount of military duty as was required of the regular state militia and were to be at the disposal of the mayor for the enforcement of state and local law and the governor for public defense and the enforcement of state and federal law.162

Ex-Governor Ford expressed extreme criticism of the charter:

Thus it was proposed to re-establish for the Mormons a government within a government, a legislature with power to pass ordinances at war with the laws of the State; courts to execute them with but little dependence upon the constitutional judiciary; and a military force at their own command, to be governed by its own by-laws and ordinances, and subject to no State authority but that of the Governor. It must be acknowledged that these charters were unheard-of, and anti-republican in many particulars; and capable of infinite abuse by a people disposed to abuse them. The powers conferred were expressed in language at once ambiguous and undefined; as if on purpose to allow of misconstruction. The great law of the separation of powers of government was wholly disregarded. . . . One would have thought that these charters stood a poor chance of passing the legislature of a republican people jealous of their liberties. Nevertheless they did pass unanimously through both houses. . . . 163

It would appear that Joseph Smith had the city in the palm of his hand. He was president of the Church, mayor, ex-officio judge of the mayor's court, chief justice of
the municipal court, and commanding officer of the Nauvoo Legion, to name only the most conspicuous of his positions. He had been adequately impressed with the importance of having full control of the decision-making and coercive machinery of government, for Missouri had taught him that religious control was not enough. He saw to it that certain ordinances giving him special privileges were enacted. For instance, he was given exclusive control over the liquor traffic within the city limits. This kind of action was one of the factors that later led to the secession of an important segment of the Church.

One of the first acts of the Nauvoo city council was the passage of an ordinance of religious toleration. Section 1 provided that:

... the Catholics, Presbyterians, Methodists, Baptists, Latter-Day-Saints, Quakers, Episcopalians, Universalists, Unitarians, Mohammedans, and all other religious sects, and denominations, whatever, shall have free toleration, and equal privileges, in this city, and should any person be guilty of ridiculing, abusing, or otherwise depreciating, another, in consequence of his religion, or of disturbing, or interrupting, any religious meeting, within the limits of this city, he shall on conviction thereof before the Mayor, or Municipal Court, be considered a disturber of the public peace, and fined in any sum not exceeding five hundred dollars, or imprisoned not exceeding six months, or both, at the discretion of the said Mayor, or Court.

The similarity between this ordinance and the so-called "group libel" laws is marked. It is also interesting to note that the same pronouncement that guaranteed freedom of religion to all sects made it possible for the
Mormon courts to impose a fine and prison sentence for ridiculing the religion of the Latter-day Saints.

"Demand and Discharge"

Meanwhile, Missouri repeatedly tried to extradite Joseph Smith so that he could stand trial on the outstanding charge of treason. In September of 1840, an attempt was made to take him and several others into custody in consequence of a warrant issued by Governor Thomas Carlin at the request of Governor Boggs of Missouri. When the law enforcement officers arrived in Nauvoo, however, they found that the accused had gone into hiding. Another effort was made in June of 1841, and Joseph was captured by a sheriff's posse. He petitioned for a writ of habeas corpus and was released by Judge Stephen A. Douglas, who had been elected to the Illinois supreme court and was holding circuit court in Monmouth. The central difficulty concerned the validity of the warrant, since agents had failed to serve it the preceding year and had returned it to Governor Carlin. Douglas ruled that the warrant, having been returned to the governor, was dead, and the prisoner could not be arrested under it.

On May 6, 1842, an attempt was made to assassinate ex-Governor Boggs of Missouri. Boggs filed affidavits charging Orrin P. Rockwell, a Mormon and one of the lesser-known but one of the most-accomplished "fast guns" in the west at that time, with the deed, and Joseph Smith with being an accessory. He persuaded Missouri Governor
Thomas Reynolds to ask Governor Carlin to extradite the two men. Carlin responded to the request, and on August 8, 1842, sheriff's officers arrested them. The arresting officers left them in the hands of the Nauvoo marshal while they made a brief trip out of town for further instructions, and when they returned, the prisoners were gone. Joseph remained in seclusion for most of the remainder of 1842.170

The writ issued against the Prophet was unjustified for two reasons: first, if he had sent Rockwell to Missouri to murder Boggs (as was widely believed), he violated a law of Illinois, not Missouri; second, Bogg's affidavit stated that Joseph was a resident of Illinois; therefore, to allege that he had fled from the justice of Missouri as Governor Reynolds did, was an unwarranted assumption of fact. In view of this, Joseph's advisors asked Thomas Ford, Carlin's successor, to issue a duplicate of the old warrant—which was in the possession of an official who could not be reached—so that its validity could be tested in a federal court. The Prophet surrendered, and the case was brought, on a writ of habeas corpus, before Judge Nathaniel Pope in the United States circuit court at Springfield.171 The decision is an important one in the law of interstate extradition.172

The question of the power of the court to decide a supposedly "executive" matter between sister states was disposed of with little difficulty. Extradition is a subject arising under the Constitution and laws of the
United States, over which the federal courts are given power in Article III. The warrant for the arrest of Joseph Smith was issued in consequence of an act of Congress designed to carry into effect the provisions of Article IV, Section 2 of the Constitution. Since the governor acted in accordance with United States law, the warrant was issued under federal authority. On the merits, Judge Pope declared that the Prophet was illegally arrested. It was not shown that he committed a crime, that he committed it in Missouri, nor that he fled the state. Boggs' affidavit merely stated a belief, unsupported by evidence. The court pointed out that since it was not asserted that the crime was committed in Missouri, to advocate the utilization of the provisions of the law to "remove to the state having jurisdiction of the crime" would be to maintain that Missouri has jurisdiction of crimes committed in other states. This is not so. The affidavit identified the accused as "a citizen or resident of the state of Illinois." It is up to Illinois—not Missouri—to make it unlawful for him to aid, abet, or advise another to commit a crime in a sister state. The governor of Missouri could not conclude that "Joseph Smith is a fugitive from justice" and "has fled to the state of Illinois" on the basis of the affidavit. The court expressed the opinion that since the attempted assassination took place on May 6, and the affidavit was not made until July 20, there should
have been sufficient time for Boggs to gather facts to support his suspicions.

Attesting to the critical nature of extradition problems, Judge Pope said:

... No case can arise demanding a more searching scrutiny into the evidence, than in cases arising under this part of the constitution of the United States. It is proposed to deprive a freeman of his liberty—to deliver him into the custody of strangers, to be transported to a foreign state, to be arraigned before a foreign tribunal, governed by laws unknown to him—separated from his friends, his family, and his witnesses, unknown and unknowing. Had he an immaculate character, it would not avail him with strangers. Such a spectacle is appalling enough to challenge the strictest analysis. The framers of the constitution were not insensible of the importance of courts possessing the confidence of the parties. They therefore provided that citizens of different states might resort to the federal courts in civil causes. How much more important that the criminal have confidence in his judge and jury.175

More extradition papers were issued in June, 1843, when the Missouri governor asked for the rendition of the Prophet on the old charges of treason, etc. He was arrested near Dixon by a Missouri agent and the constable of Hancock county. After suing out a writ of habeas corpus, he commenced a suit for false imprisonment against his arresting officers in a Lee county court. While the officers were held in custody by the Lee county sheriff, he procured another writ of habeas corpus to replace the first one, since the judge to whom it had been directed was out of town. The second writ was returnable before the "nearest tribunal in the Fifth Judicial Circuit, authorized to hear
and determine writs of habeas corpus," which was Nauvoo. Meanwhile, the agents also had procured writs of habeas corpus, directed at Judge Young in Quincy. Presently, a strange cavalcade, composed of Joseph and his friends, the arresting officers, assorted lawyers, the sheriff of Lee county, guards, and wagon-drivers, started vaguely in the general direction of Nauvoo and Quincy. The sheriff of Lee county had two writs of habeas corpus, each addressed to a different tribunal. The party ended up in Nauvoo, however, due in no small part to a detachment of the Nauvoo Legion which rode out to meet them as they neared the city.\footnote{176}

In the opinion of Thomas Gregg, an historian of Hancock county, they should have gone to Quincy, and he accuses Joseph of sneaky tactics. Thus he has written: \"The conclusion is irresistible, that when the second writ was obtained, the purpose was to carry them before that non-descript tribunal [in Nauvoo].\"\footnote{177}

Once in Nauvoo, the municipal court directed the officers to bring Joseph Smith before it—still another writ. They refused, on the grounds that the court had no jurisdiction. It proceeded to deliberate without their cooperation, decided the merits of the case, and dismissed the prisoner.\footnote{178} Governor Ford refused to order out the militia to retake him, having concluded that since the accused had been delivered into the hands of the Missouri agent, the writ had been executed in full. Illinois had done her part, and it was then a matter to be settled
between the Mormon Prophet and Missouri. This was the last move "in the interesting game of 'Demand and Discharge' which the chief executives of the two great states had been for two or three years playing."

These machinations are indicative of the sophistication the Prophet had acquired through his repeated brushes with the law and his awareness of the crucial nature of judicial proceedings. He and other church members had made good use of the habeas corpus jurisdiction of the Nauvoo municipal court, when it was in fact non-existent in many cases. The Nauvoo charter provided: "The municipal court shall have the power to grant writs of habeas corpus in all cases arising under the ordinances of the city council." This would seem to preclude explicitly the consideration of extradition cases. However, in view of the vast powers given in the charter, there was some justification for supposing that very little lay outside the scope of the city's authority, and the court "had been repeatedly assured by some of the best lawyers in the State who had been candidates for office before that people, that it had full and competent power to issue writs of habeus corpus in all cases whatever."

Prophet-Statesman

Joseph Smith wrote letters to five prospective presidential candidates in the election of 1844—John C. Calhoun, Lewis Cass, Henry Clay, Richard M. Johnson, and Martin Van Buren—asking each man what his policy toward
the Saints would be. Only Calhoun's and Clay's replies are recorded. Calhoun wrote that since the federal government possessed only enumerated and limited powers, the Missouri troubles did not come within its jurisdiction. Clay expressed sympathy, but he said that if he were elected President, he would have to be free from guarantees and promises. Joseph wrote harsh rejoinders chastizing both.

Since this correspondence revealed that none of the candidates was acceptable, on May 17, 1844, Joseph Smith's name was placed in nomination for President, with First Counsellor Sidney Rigdon as his running mate. This followed the publication of the Prophet's "Views on the Powers and Policy of the Government of the United States." He advocated the reorganization of Congress, with a reduction in membership. He suggested the establishment of a national bank with branches in each state and territory, the directors of which would be popularly elected each year. Revenues from the national bank would go to the national government; the revenue from the branches would go to the states and territories in which they were located. Taxes would be reduced to the extent of the net profits of these institutions. He called for more equality and freedom among the people and more economy in government. He urged the Southern states to abolish slavery by 1850 or sooner, and proposed that the slave-owners be given reasonable remuneration. He suggested that the expense
of this plan could be met by the surplus revenue from the sale of public land and the savings made possible by the reduction of congressional salaries. Several of his proposals reflected his personal experiences and those of his people. He advocated prison reform; he thought that more penalties should take the form of labor on public works, and that prisons should be turned into "seminaries of learning." He would have abolished capital punishment except in the case of murder. He favored a constitutional amendment giving the President full power to send in troops to suppress mobs, and he called for the repeal of "that relic of folly" which makes it necessary for the governor of a state to request the President for troops in case of rebellion.\textsuperscript{186}

Joseph's candidacy should not be dismissed either as an example of his delusions or as an expression of his sense of humor. On the other hand, he never took the possibility of his being elected seriously. His candidacy served four broad purposes. First, it dramatized the Mormon cause and provided a platform from which to educate and propagandize the public about Mormonism. Second, his people were caught between the Whigs and Democrats in Illinois; regardless of which way they voted, they would alienate one or the other of the two parties. Joseph's nomination would solve the dilemma by affording them a way to vote an independent ticket. Third, the Prophet had begun to develop a philosophy of government, and a campaign would give him an
opportunity to express it. Fourth, since none of the leading presidential prospects had indicated that they would be of any special help, the Saints could boycott all of them and still "act consistently with their views of what ought to be done for the general good of the nation."\textsuperscript{187}

The Prophet was known to have made light of his candidacy. On one occasion, he commented, "When I get hold of the Eastern papers and see how popular I am, I am afraid myself that I shall be elected; but if I should be, I would not say, 'Your cause is just, but I can do nothing for you.'"\textsuperscript{188} A further indication that he had no serious designs on the presidency was the fact that at the same time that campaign strategy was being laid, he and the other leaders were planning to take the Church west. In fact, another Latter-day Saint memorial was introduced in the House of Representatives by John Wentworth of Illinois, on May 25, 1844, in which attention was called to the lawless and chaotic conditions prevailing in the intermountain area and on the Pacific slope.\textsuperscript{189} The memorial suggested that Joseph Smith be given authority to raise one hundred thousand armed volunteers for the purpose of bringing order and liberty to those regions. Church leaders were sent to Washington to urge its passage. No action was taken on the matter, and the representatives of the Church were informed that they had the right to go into the western territories without the leave of Congress.\textsuperscript{190}
Meanwhile, Mormon-Gentile relations had been disintegrating steadily. During the summer of 1841, the older residents demonstrated envy and bitterness over the growing prosperity of their new neighbors. Mormons were accused of various kinds of criminal activity:

No sooner had these people settled amongst us than they commenced those petty acts of stealing and other depredations upon property which were charged against them everywhere, and which were so annoying to their neighbors and provocative of hostility. . . .

And Bancroft has commented, "Were there any robberies for miles around, they were charged by their enemies upon the Mormons; were there any house-burnings or assassinations anywhere among the Gentiles, it was the Danites* who did it." 192

Both parties had become frustrated by the political vacillation of the Mormons, who voted as a unit for candidates who were friendly to them and their interests. 193

On June 28, 1841, a convention was held in Carthage, where members of both parties met to consult about methods of countering Mormon influence. The Anti-Mormon Party was the result. 194

Apparently sensing the rising enmity, the Church presidency issued the order that all the Saints must reside in Hancock county. 195 This was viewed by Gentile observers as evidence of Joseph's autocratic power and the Mormons'

*This supposedly was a secret Mafia-like organization, the members of which were sworn to do the bidding of the Church presidency and to operate against dissenters, as well as to protect the Saints against their enemies. The Church has always denied its existence.
clannish ways. The Nauvoo Legion became one of the best bodies—if not the best body—of militia in the state, and this awakened the fears of the Gentiles who looked upon the elaborate and efficient organization as a threat. Rumors circulated that Joseph intended to build a military-church to extend his faith. After the fall election of 1843, an attempt was made to prevent the elected Mormon officials from qualifying at the Carthage courthouse. Gentile meetings followed, where complaints against the Mormons were enumerated and defensive measures threatened.

To add to the increasingly unfriendly climate, the Nauvoo city council passed several ordinances of questionable wisdom and legality. In the eyes of the Gentiles, this served as confirmation of ulterior motives.

Prefaced by the counsel that people who desired to be married did not have to make a trip to the county clerk’s office in Carthage, an ordinance of February 17, 1842, provided for marriages to be performed in Nauvoo. All such marriages were to be registered with the city recorder, to whom a fee was to be paid. This appears to have been in contradiction of a state law which prescribed different procedure.

An ordinance of March 4, 1843, made only gold and silver coin legal tender in the city. A short time later, this was amended to allow the receipt of city scrip and treasury orders.
On July 5, 1842, the council ordained that "no citizen of this city shall be taken out of the city by any writ without the privilege of investigation before the Municipal Court, and the benefit of a writ of habeas corpus." The ordinance went on to explain that the purpose of this enactment was to protect the people of Nauvoo against illegal trials by their enemies.202

As a direct result of the Prophet's extradition problems, the city council passed "An extra Ordinance for the extra case of Joseph Smith and Others" on December 8, 1843. After a preamble explaining the difficulties with Missouri law, the ordinance provided that "hereafter, if any person or persons shall come with process, demand or requisition founded upon the aforesaid Missouri difficulties, to arrest said Joseph Smith, he or they shall be subject to be arrested by any officer of the city, with or without process, and be tried by the Municipal Court." The second section broadened the application "to the case of every and all persons that may be arrested, demanded or required, upon any charge founded in the aforesaid Missouri difficulties." It is indicative of Joseph's strong feelings in this matter that the ordinance provided life imprisonment in the city prison as the only punishment for violation of the ordinance. Furthermore, the convicted person could "only be pardoned by the Governor with the consent of the Mayor of said city."203

The preceding enactment was followed shortly by an ordinance to prevent unlawful searches and seizures by
foreign process. It pronounced that all writs and warrants issued outside the city must be approved by the mayor and be served by the city marshal. Any officer who attempted to execute such process was subject to a fine of from five to one hundred dollars or imprisonment for from one to six months, or both.²⁰⁴ Now, no process whatsoever could be served in Nauvoo if it arose out of the Missouri troubles, and in order to serve any other process, the approval of Joseph, as mayor, was necessary. An amendment hardly mitigated its sting: the council declared that "nothing in the foregoing ordinance shall be so construed as to prevent, hinder, or thwart the designs of justice, or to retard the civil officers of the State or county in the discharge of their official duties, but to aid and assist them within the limits of this city."²⁰⁵

The usurpation and derogation of state authority and, in some instances, federal authority, made possible by these ordinances, is obvious. The ordinance relating to habeas corpus interfered with the workings of both the state and federal court systems. The municipal court of Nauvoo frequently freed persons in the custody of officials from other jurisdictions; on at least one occasion, it released a person held under United States authority.²⁰⁶ Furthermore, as has been mentioned previously, the assumption of such broad habeas corpus jurisdiction by the municipal court was in excess of the power granted by the city charter. The ordinance enacted for the "extra case
of Joseph Smith and Others" encumbered the interstate extradition procedure prescribed by the Constitution and regulated by federal law. Requiring that the mayor approve pardons partially abrogated the governor's power of executive clemency. The nature of the punishment prescribed was drastic enough to render it "cruel and unusual." It should be pointed out here again that Joseph served as chief justice of the court which would sit on the case of any officer accused of trying to arrest him, and he was not disposed to disqualify himself. It was his permission, also, that, by the terms of the ordinance, was required before the governor could exercise his power of the pardon in such cases. The requirement that all "foreign" writs and warrants be approved by the mayor and served by the marshal was likewise an infringement upon the powers of state and federal governments.

It was not long before the Prophet realized that the passage of the ordinances relating to process arising out of the Missouri difficulties and concerning search and seizure was a mistake. They were repealed on February 12, 1844, along with the legal tender ordinance. 207

To cap Nauvoo's pretensions of independence, in December of 1843, the city council petitioned Congress to take the city directly under federal protection, reciting again the grievances suffered by the Saints in Missouri and Illinois and telling of future dangers. All in all, it appears that the object was to have the city made a
territory of the United States, with all the powers granted in the Nauvoo charter as well. In addition, it would have given the mayor of Nauvoo the power to call out federal troops when he determined that the public safety required it.208

A New System of Marriage

The L.D.S. Church records the beginning of the plural marriage system as July 12, 1843, the date assigned to the revelation which introduced the marriage system of the Church and permitted Joseph and his brethren to have more than one wife.209 Marriages which conform to all the requirements of Mormon doctrine on the subject are called "celestial marriages." It is a marriage for "time and all eternity," to be compared with the "until death do us part" of most other Christian marriages. It is designed to perpetuate into celestial worlds and be binding in and after the resurrection.210 Joseph became convinced of the righteousness of a plurality of wives much earlier, in 1831,211 and the charge of polygamy was made against the Church as early as 1835. It was, however, refuted officially. In August of that year, the following resolution was adopted at the Church conference:

... Inasmuch as this Church has been reproached with the crime of fornication and polygamy, we declare that we believe that one man should have one wife, and one woman but one husband, except in the case of death, when either is at liberty to marry again. ... 212
This declaration was followed by a series of denials of polygamy issued by the Mormon leaders until 1852, when it was finally admitted. According to Mormon historians, Joseph taught the new doctrine to the Twelve Apostles in the summer of 1841 and urged them to put it into practice. They were not all anxious to follow these directions because they were aware that it was contrary to the social customs and traditions in this country.

The "Expositor" Affair

Joseph's operations at Nauvoo gradually produced a small knot of hostile ex-Mormons, some of them once very influential members of the Church, who had apostacized or had been excommunicated. These seceders started an anti-Mormon newspaper called the Nauvoo Expositor, which accused Joseph of exercising illegal authority, alleged that the plural wife system was heresy, deplored the relaxation of the separation between church and state, and advocated the repeal of the Nauvoo charter. Only one number was published; the city council passed a resolution on June 10, 1844, abating the Expositor as a public nuisance. The minutes of the council meeting reveal a partly civil, partly ecclesiastical, ex parte, in rem proceeding. The publishers were not given notice of the inquiry, nor were they permitted to appear in defense. Ford has declared it "altogether the most curious and irregular trial that was ever recorded in any civilized country; and one finds
difficulty in determining whether the proceedings of the
council were more the result of insanity or depravity."217

Mayor Smith then ordered the city marshal to destroy
the press and to pie the type in the streets. His order
was obeyed, with the Nauvoo Legion standing by in case of
trouble.218 This drastic, high-handed, and anti-libertarian
action is justified by L.D.S. Historian Roberts as "a better
method of meeting the issue than by the action of a mob."219
Such a statement misses the objection entirely, although
the Mormons' justifiable fear of any gathering of angry
people may be recognized. The claim that the Saints' anger
at the publishers of the Expositor could not have been kept
in hand by Joseph's iron control over the Nauvoo Legion is
apocryphal.

Public indignation flared over the Expositor affair.
Meetings were held in Warsaw and Carthage, and resolutions
for the extermination of the Mormons were adopted.220 A
complaint charging riot was made against the officials
responsible for the destruction of the newspaper by its
publishers before a justice of the peace in Carthage.221
The accused were arrested, only to be released by the Nauvoo
court on a writ of habeas corpus.222 Mob forces threatened
Mormons in outlying settlements. There were reports that
the anti-Mormons were preparing for war, and that they
would be joined by the Saints' old foes from Missouri.223
The Nauvoo Legion was made ready, and the city was placed
under martial law.224
Since Governor Ford was agitated by conflicting versions of what had happened, he went to Carthage to investigate the situation for himself. He found a *posse comitatus* in the making and hurriedly put the proper militia officers in charge.\(^{225}\) After giving audience to spokesmen of both sides of the story, he concluded:

> It appeared clearly from the complaints of the citizens and the acknowledgments of the Mormon committee that the whole proceedings of the mayor, the common council, and the municipal court, were irregular and illegal, and not to be endured in a free country. . . . The common council violated the law in assuming the exercise of judicial power; in proceeding *ex parte* without notice to the owners of the property; in proceeding against the property *in rem*; in not calling a jury; in not swearing all the witnesses; in not giving the owners of the property, accused of being a nuisance, in consequence of being libelous, an opportunity of giving the truth in evidence; and in fact, by not proceeding by civil suit or indictment, as in other cases of libel. The mayor violated the law in ordering this erroneous and absurd judgment of the common council to be executed. And the municipal court erred in discharging them from arrest.\(^{226}\)

Ford ordered the accused to appear before the proper courts and offered protection to those who would go voluntarily to Carthage for trial.\(^{227}\) He collected the Mormons' weapons on the questionable theory that it was for their own good since the people would be suspicious and fearful if they were armed.\(^{228}\) Joseph and the others gave themselves up.

The May term of the Hancock county circuit court had been faced with four civil and two criminal actions against
Joseph: false imprisonment in two, slander and trespass; the grand jury had indicted him for perjury and adultery. Since the prosecution had not been prepared, a continuance was granted. Now other warrants were issued. Joseph and his brother, Hyrum, were arrested on charges of treason, "based upon the alleged fact of levying war against the State, by declaring martial law, and ordering out the Legion to resist the execution of the laws." The members of the city council were charged with riot for the destruction of the Expositor.

Neither prosecution nor defense being ready for trial on the charge of treason, Joseph and Hyrum were placed in the Carthage jail, without benefit of preliminary hearing. A detachment of the state militia called the "Carthage Greys" was assigned to stand guard, while a mob gathered outside. Governor Ford had planned to lead a contingent of militia to Nauvoo on the pretext of searching for counterfeit money, the idea being to intimidate the Saints with the display of military force. He assumed that since he would be in the midst of the Mormons, a concern for his safety would prevent any attempt upon the lives of the prisoners. When the march was only a few miles underway, Ford sensed a conspiracy to provoke war between the militia and Mormons, once in Nauvoo, as an excuse for the troops to murder and plunder. He did not want to inflict harm upon women and children; he feared the Mormon numbers and a possible cache of arms, should a war develop; and the
sympathy that any acts of barbarity might gain the Mormons would not be advantageous at that particular time. Thus, eight miles out of Carthage, he dismissed his troops and proceeded to Nauvoo to speak to the residents. 233

On June 27, 1844, a mob, disguised by painted faces, forced its way into the Carthage jail. Hyrum Smith was killed by a volley of bullets shot through the door. Joseph and two other brethren put up a defense, using a pistol that had been smuggled to them by visitors, but the attack was too strong. The Prophet was shot attempting to leap from a window and fell dead to the ground below. One of his companions was wounded; the other escaped unharmed. 234

There is little doubt that the murders were committed by men who had been part of the militia disbanded by Governor Ford. Evidence indicates that they were joined by other citizens and a few Missourians. According to Gregg, "They numbered one or two hundred, and were under command of Colonel Levi Williams." 235 Governor Ford has claimed that he had been ignorant of the plot:

... I had constantly contended against violent measures, and so had the brigadier-general in command; and I am convinced that unusual pains were taken to conceal from both of us the secret measures resolved upon. It has been said, however, that some person named Williams, in a public speech at Carthage, called for volunteers to murder the Smiths; and that I ought to have had him arrested. Whether such a speech was really made or not, is yet unknown to me. 236

There is also little doubt that the Carthage Greys helped the mob achieve its objective by offering only faint
resistance. The disbanded soldiers are reported to have received a message from the Carthage Greys promising not to interfere with any attack on the Smiths.237

Messengers intercepted Governor Ford's party on its return journey from Nauvoo to Carthage and informed him that the Smiths had been murdered. Fearful that the followers of the Prophet would take revenge, and finding it impossible to ally himself with either side, Ford retreated to Quincy, expecting war at any minute.238

Gregg has described the aftermath of the night's violence:

On the morning of the 28th of June, 1844, the sun rose on as strange a scene as the broad Hancock prairies had ever witnessed. At the three corners of a triangle, 18 miles asunder, stood a smitten city and two almost deserted villages, with here and there a group of questioning men, anxious to hear the news of the night. Toward the two villages the more courageous ones were returning to find their several abodes unsacked and untouched. The wet and heavy roads leading to the county seat from the south and east were being again traversed by the refugees of the night, now returning, and wondering that they had homes to return to. All know [sic] that a great crime had been committed, by whom they knew not; and they knew not how, upon whom, where, or in what manner retribution might fall.239

The Saints did not retaliate, which is somewhat surprising in view of the fact that they had at their disposal a body of about four thousand of the best-trained militiamen in the state and were well-armed with
weapons that had been held back at the time they were forced to surrender their arms.240

On May 19, 1845, the nine individuals who had been indicted by the grand jury the previous October were brought to trial in Hancock county circuit court for the murder of Joseph Smith. The first panel of jurors was set aside for prejudice; ninety-six men were summoned before a jury was qualified. The trial lasted until May 30, at which time the jury brought in a verdict of not guilty. The murder of Hyrum Smith was dismissed the next month for lack of prosecution.241

The prosecution's principal witnesses, two men who had been with the murderous militiamen, heard their plans, and saw them kill the Prophet and his brother, destroyed their effectiveness before they could be called to testify. In the interim between the murders and the trial, one was converted to the Church and wrote a pamphlet in which he glorified the martyrdom of the Prophet with an account of many improbable and supernatural occurrences in connection with what he had seen and heard. When he took the stand, he was forced to swear to these apocryphal statements, which discredited his testimony.242 Both "had been lying so constantly for some months professionally, . . . that they had utterly forgotten where they started from, and so embroidered their original facts with more recent fictions, that their evidence went for nothing."243 The third witness, a girl who had helped serve dinner to part of the
mob-militia in the Warsaw House after they had returned from Carthage, met a similar fate on the witness stand. Her memory was good to the excess, and her imagination and seal robbed her testimony of its impact.

John Hay, who was to become secretary of state under Presidents McKinley and Theodore Roosevelt, commented twenty-five years later, that "there was not a man on the jury, in the court, in the county, that did not know the defendants had done the murder." To the contrary, others have maintained that the defendants were worthy and respectable men, and it could not be proved that they had committed the murder. For example, Gregg wrote:

From all these facts it is very easy to say that a murder had been committed; that somebody had done the deed. But to say that among the Elcoits, Laws, and Fosters, and Bigbees, and the long list of men charged, those five or six who were on trial had done it, and the jury and court, and everybody else knew it, is SAYING A GREAT DEAL.

Most Mormon historians have been hard on Governor Ford; however, most of his sins seem due to omission rather than commission. He has been censured for placing his trust in elements of the Hancock county citizenry where such faith was not justifiable. Ford himself admits that he had been duped by these people on several occasions in the days preceding the killing. He has been blamed for calling out as militia the very men who were plotting against the Smiths, and for disarming the Nauvoo Legion when it had made no hostile moves. He has been criticized
for going to Nauvoo and leaving the prisoners helpless in the Carthage jail.\textsuperscript{246} It seems fair to say that he demonstrated either a complete lack of sensitivity to the blackening mood of the anti-Mormons or a blundering confusion about what action to take. In defending himself against these criticisms, Ford has claimed that his hands were tied, that he did not possess adequate authority over the militia, the law enforcement officers, or the judicial process.\textsuperscript{247} Determined that the ring-leaders should be brought to justice, he employed what he considered to be the most able lawyers available for the prosecution. He concluded that:

\begin{quote}
\ldots As to myself, I shared the fate of all men in high places, who favor moderation, who see that both parties in the frenzy of their excitement are wrong--espousing the cause of neither; which fate always is to be hated by both parties. \ldots \textsuperscript{248}
\end{quote}

The members of the city council who had been charged with riot were acquitted at the spring term of court. It appeared to be a case of "turn-about is fair play." Their jury was reportedly as Mormon as the one in the trial of Joseph Smith's murderers had been anti-Mormon.\textsuperscript{249}

In September of 1845, the anti-Mormons began to burn Mormon settlements. In about a week, well over one hundred houses were destroyed and their occupants left homeless.\textsuperscript{250} The technique has been described as follows:

\begin{quote}
\ldots To hasten their departure the house-burners were organized to destroy the farm houses of the Mormons. They worked quietly and methodically. They would call upon a
farmer, state the object of their visit and would then assist the family in removing their household effects to a safe distance. They would then set the torch to the house and, watching until it burned, they would depart for the next house as quietly as they came. They would leave behind them a bed of glowing embers, a jag of furniture and a weeping family with broken hearts. It was then easy to convince that family that it was time for them to leave Illinois.\textsuperscript{251}

The citizens of Quincy met on September 22 and resolved to inquire about the Mormon plans to move west.\textsuperscript{252} Governor Ford sent a message to Church leaders telling them that while he could not force them to leave, neither could he make the people of Hancock county accept them, and it would be better for them to go than to live in a state of continual war.\textsuperscript{253} Certainly, Ford's advice differed in kind and in tone from Bogg's extermination order, but once more, the chief executive of a state had admitted the failure of civil government to deal with a situation. Church leaders, on September 24, agreed to leave the following spring.\textsuperscript{254} A large anti-Mormon convention was held in Carthage on the first two days in October, where the representatives of nine counties (excluding Hancock) passed the following resolution, among others:

Resolved, That it is the settled and deliberate conviction of this convention, that it is too late to attempt the settlement of the difficulties in Hancock county upon any other basis than that of the removal of the Mormons from the State; and we therefore accept and respectfully recommend to the people of the surrounding counties to accept, the proposition made by the
Mormons to remove from the State next Spring, and to wait with patience the time appointed for removal.\textsuperscript{255}

The fall and winter of 1845 were taken up with feverish preparations for the exodus. The first to go were the Twelve Apostles and the high council, leading four hundred families across the Mississippi on the ice in early February, 1846. Other companies followed as soon as they were ready, and the bulk of the Church had left Nauvoo by the latter part of April.\textsuperscript{256}

The Nauvoo charter had been repealed in January of 1845.\textsuperscript{257} This action left the city without governmental organization, and the Church government, operating in lieu of city government, was the only agency for keeping a semblance of law and order until the evacuation.\textsuperscript{258}

The anti-Mormons began to suspect that the remaining Saints would not leave. They became restless and staged several menacing demonstrations.\textsuperscript{259} Writs were issued against several of the residents of Nauvoo on trumped-up charges, and a \textit{posse comitatus} marched into the city, ostensibly to serve the process.\textsuperscript{260} After a few days of fighting, the Mormons surrendered and agreed to the terms of a treaty:

1. The City of Nauvoo will surrender. The force of Col. Brockman to enter and take possession of the city to-morrow, the 17th of September, at 3 o'clock P.M.

2. The arms to be delivered to the Quincy Committee, to be returned on the crossing of the river.
3. The Quincy Committee pledge themselves to use their influence for the protection of persons and property from all violence; and the officers of the camp and the men pledge themselves to protect all persons and property from violence.

4. The sick and helpless to be protected and treated with humanity.

5. The Mormon population of the city to leave the State, or disperse, as soon as they can cross the river.

6. Five men, including the trustees of the Church, and five clerks (William Pickett not one of the number) to be permitted to remain in the city for the disposition of property, free from all molestation and personal violence.

7. Hostilities to cease immediately, and ten men of the Quincy Committee to enter the city in the execution of their duty as soon as they think proper. 261

Given that the document, per se, is remarkable, it is revealing to note that nothing was said about the arrest of the persons named in the writs held by the constable who called the posse, supposedly the object of the expedition. The special agent, sent to Hancock county by Governor Ford when signs of more trouble appeared, reported:

Presuming that there is not another such treaty extant—that it is the first and only one of its kind ever made among people professing to have learned the first rudiments of civilization and humanity, and trusting that it will be the last, I here give you a copy, as it was fully ratified and signed by the contracting parties. 262

After the agreement was signed, the posse degenerated into bands of armed men who rode through the city breaking into homes, throwing household goods out into the street,
and threatening the lives of the residents, forcing them from their homes onto the Iowa bank of the Mississippi, miserably unprepared for the journey. Many were taken sick and died.263

Once more, a whole people had been driven from a state, and, this time, from the American frontier.

Conclusions

The pre-Utah period of Mormon history produced the characteristics and attitudes that would lead to the establishment of a church-state in the valley of the Great Salt Lake and eventually to a clash with American society and the federal government.

First, among the earliest principles to be established was the legitimacy of ecclesiastical concern with temporal affairs. A prime example of this was the establishment of the communitarian "United Order" through divine revelation and under the aegis of the Church government. The interest of the Church extended to the smallest details of everyday life.

Second, perhaps the single most impressive lesson the Church leaders learned in Missouri and Illinois was the importance of having not only ecclesiastical control over a community but governmental authority as well. The Saints learned to distrust civil authority—the power of government was considered safe only when it was in their own hands. They found nothing inconsistent or anti-libertarian about Church leaders holding high civil positions in an almost ex officio manner; in fact, it was
the only guarantee that they would receive fair treatment and freedom to practice their religion. They became exceptionally interested in legal arrangements that affected them. They sent representatives to plead their cause before both state and national officials. After deciding what candidates for public office would be most advantageous to them, Church leaders issued instructions to the Saints who cast their ballots as a block in accordance with the directions. The courts were a special threat to the Mormons, but they applied themselves to mastering the vagaries of court processes, and their judges succeeded in securing considerable immunity from regular judicial interference. The Saints seemed to operate on the notion that whatever was good for them was law, and whatever operated to their disadvantage or injury could not possibly bear the stamp of legitimacy. They acted accordingly.

Third, they became clannish and desirous of being left alone. Once it became evident that the Church would not disintegrate after the death of Joseph Smith, it was little wonder that they moved as a group as far away from organized society as possible, and remained aggressively jealous of their isolation and freedom from outside control.

Fourth, it was during this period that the institution of plural marriage was established. Polygamy and Mormonism became synonymous in the minds of most people who were aware of either. This peculiar practice would later shock the national morality and prompt drastic punitive measures by the national government.
FOOTNOTES

CHAPTER I


3Smith, et al., op. cit. supra note 2, 519.

4Id., 428-439; Curti, op. cit. supra note 2, 199-204.

5Cross, op. cit. supra note 1, 9-13; Smith et al., op. cit. supra note 2, II, 12-13.

6Cross, op. cit. supra note 1, 4-5, 7.

7Frederick Jackson Turner, Rise of the New West (New York: Harper and Brothers, 1904), 22.

8Cross, op. cit. supra note 1, 6-8; Curti, op. cit. supra note 2, 308, identifies "come-outism" as an expression of democracy.


10Smith, et al., op. cit. supra note 2, 561.

11Cross, op. cit. supra note 1, 341-352.

12Id., 322-340; Curti, op. cit. supra note 2, 310.

13Cross, op. cit. supra note 1, 243.

14Curti, op. cit. supra note 2, 308-310; Smith, et al., op. cit. supra note 2, 563; Cross, op. cit. supra note 1, 31-36.
15 Curti, op. cit. supra note 2, 310-311; Smith, et al., op. cit. supra note 2, 11, 18-19; Gross, op. cit. supra note 1, 287-321.

16 Curti, op. cit. supra note 2, 201-203; Smith, et al., op. cit. supra note 2, 11, 14-15; Gross, op. cit. supra note 1, 14-29, 211-226.


19 Smith, op. cit. supra note 18, 11-14; Roberts, op. cit. supra note 18, 71-72. The Book of Mormon covers the period from 600 B.C. to 421 A.D. and deals with two nations, the Nephites and the Jaredites.

20 Smith, op. cit. supra note 18, 16; Roberts, op. cit. supra note 18, 80.

21 Smith, op. cit. supra note 18, 18; Roberts, op. cit. supra note 18, 85-86.

22 Smith, op. cit. supra note 18, 20-21, 33, 35, 39; Roberts, op. cit. supra note 18, 109, 119, 124-125. Joseph Smith also had a seer stone in addition to the "Urim and Thummim," and according to Roberts, he used them interchangeably. Id., 129.

23 Smith, op. cit. supra note 18, 84; Roberts, op. cit. supra note 18, 164.

24 Smith, op. cit. supra note 18, 54-55, 57-58; Roberts, op. cit. supra note 18, 137-139, 147. The statements of the witnesses are included in the preface to the Book of Mormon, and it is interesting to note that in spite of the fact that several either apostatized or were excommunicated from the Church later, none ever repudiated his testimonies. Brodie, op. cit. supra note 9, 78-80.

25 Smith, op. cit. supra note 18, 39-41, 60-70; Roberts, op. cit. supra note 18, 177-188.

26 Smith, op. cit. supra note 18, 75-79; Roberts, op. cit. supra note 18, 195-196. The original name was the "Church of Jesus Christ;" the words "of Latter-day Saints"
were not used until sometime after April 26, 1838, when they were added by revelation. *Doctrine and Covenants*, 115:4.

27Smith, op. cit. supra note 18, 79; Roberts, op. cit. supra note 18, 199.

28Most of these indictments can be found in Pomeroy Tucker, *Origin, Rise, and Progress of Mormonism* (New York: D. Appleton and Company, 1867) and Eber D. Howe, *History of Mormonism* (Painesville, Ohio: the author, 1840; 2nd ed.). Howe's book was originally published in 1834 under the title *Mormonism Unveiled*.

29Brodie, op. cit. supra note 9, 30-31; the court record is reprinted at 405-407.

30Prince, supra note 17.


32*Book of Mormon*, 1 Nephi 2:20, 2 Nephi 1:5; *Doctrine and Covenants*, 28:19; Curti, op. cit. supra note 2, 311.

33Smith, et al., op. cit. supra note 2, II, 80.

34Curti, op. cit. supra note 2, 306-313, at 313.

35*Doctrine and Covenants*, 1:12, 29:11; Tenth Article of Faith ("We believe . . . that Zion will be built upon this the American continent; that Christ will reign personally upon the earth; and that the earth will be renewed and receive its paradisiacal glory."); Ralph H. Gabriel, *The Course of American Democratic Thought: An Intellectual History Since 1815* (New York: The Roland Press Company, 1940), 96.


37Parrington, op. cit. supra note 2, II, iv-v.

38Smith, et al., op. cit. supra note 2, 519.


40Brodie, op. cit. supra note 9, 18-19. Joseph Smith was born in Sharon, Vermont, and spent most of his childhood in various communities of that state. Roberts, op. cit. supra note 18, 16, 29. The Smiths were said to have engaged in money-digging and related activities involving the use of seer-stones and divining-rods as a profession for a while. Linn, op. cit. supra note 31, 15-22.
41 Brodie, op. cit. supra note 9, 18; Cross, op. cit. supra note 1, 144.

42 Cross, op. cit. supra note 1, 81.

43 Roberts, op. cit. supra note 18, 26-27.

44 Turner, op. cit. supra note 7, 22-23, at 23.

45 Davis, supra note 36, 152.

46 Id., 154-155.

47 Id., 158; Smith et al., op. cit. supra note 2, II, 80-81; Doctrine and Covenants, 84:2.

48 An apostle of the LDS Church wrote in 1890: "The historical and other data upon which is based the current Christian faith as to the genuineness of the Biblical record are accepted as unreservedly by the Latter-day Saints as by the members of any sect; and in literalness of interpretation this Church probably excels." James E. Talmage, A Study of the Articles of Faith (28th ed.; Salt Lake City: The Church of Jesus Christ of Latter-day Saints, 1952), 236.

49 Joseph Smith was designated as "a seer, a translator, a prophet, and apostle of Jesus Christ, an elder of the church through the will of God the Father, and the grace of your Lord Jesus Christ." Doctrine and Covenants, 21:1.

50 Supra note 25.

51 Smith, op. cit. supra note 18, 79; Sixth Article of Faith ("We believe in the same organization that existed in the Primitive Church, viz., apostles, prophets, pastors, teachers, evangelists, etc.").

52 Doctrine and Covenants, 11:25; Ninth Article of Faith ("We believe all that God has revealed, all that He does now reveal, and we believe that He will yet reveal many great and important things pertaining to the Kingdom of God."). A revelation of July 12, 1843, gave Joseph Smith the exclusive power to receive revelations. Doctrine and Covenants, 132:7.

53 Second Article of Faith ("We believe that men will be punished for their own sins and not for Adam's transgression."); Third Article of Faith ("We believe that through the Atonement of Christ, all mankind may be saved, by obedience to the laws and ordinances of the Gospel."); Roberts, op. cit. supra note 18, 272-275.
Book of Mormon, 2 Nephi 9:22.


O'Dea, op. cit. supra note 9, 13-14.

Cross, op. cit. supra note 1, 143-144.

Smith, op. cit. supra note 18, 88, 97; Roberts, op. cit. supra note 18, 204, 213.

Smith, op. cit. supra note 18, 88; Roberts, op. cit. supra note 18, 205.

Smith, op. cit. supra note 18, 88-96; Roberts, op. cit. supra note 18, 205-208; Brodie, op. cit. supra note 9, 87-88; Linn, op. cit. supra note 31, 104.

Smith, op. cit. supra note 18, 120; Roberts, op. cit. supra note 18, 220-231; Andrew Love Neff, History of Utah 1847 to 1869 (Salt Lake City: The Deseret News Press, 1940), 7-8.

Smith, op. cit. supra note 18, 139; Roberts, op. cit. supra note 18, 241. The revelation is dated December, 1830. Doctrine and Covenants, 37.


Smith, op. cit. supra note 18, 199; Roberts, op. cit. supra note 18, 255-256.

This situation produced a certain amount of jealousy between the Kirtland Saints and those in Jackson county. Roberts, op. cit. supra note 18, 282-285.

Brodie, op. cit. supra note 9, 95.

Id., 106; Smith, op. cit. supra note 18, 146; Roberts, op. cit. supra note 18, 243.

Smith, op. cit. supra note 18, 173-174. The revelation, dated February, 1831, was printed originally in the Book of Commandments which was revised and published in 1835 as the Doctrine and Covenants. The later and much milder version which appears in the Doctrine and Covenants, 42:30-39, should not be confused with the original revelation as it appears in the Book of Commandments, 44:26-32, as follows:
26. If thou lovest me, thou shalt serve me and keep all my commandments; and behold, thou shalt consecrate all thy properties, that which thou hast unto me, with a covenant and deed which can not be broken; and they shall be laid before the bishop of my church, and two of the elders, such as he shall appoint and set apart for that purpose.

27. And it shall come to pass, that the bishop of my church after he has received the properties of my church, that it can not be taken from the church, he shall appoint every man a steward over his own property, or that which he has received inasmuch as is sufficient for himself and family:

28. And the residue shall be kept to administer to him who has not, that every man may receive according as he stands in need:

29. And the residue shall be kept in my storehouse, to administer to the poor and needy, as shall be appointed by the elders of the church and the bishop; and for the purpose of purchasing lands, and the building up of the New Jerusalem, which is hereafter to be revealed; that my covenant people may be gathered in one, in the day that I shall come to my temple:

30. And this I do for the salvation of my people.

31. And it shall come to pass, that he that sinneth and repenteth not shall be cast out, and shall not receive again that which he has consecrated unto me:

32. For it shall come to pass, that which I spake by the mouths of my prophets shall be fulfilled; for I will consecrate the riches of the Gentiles, unto my people which are of the house of Israel.

69 Examples of the deed-forms used in consecrating property to the Church and in securing the stewardship are reproduced in Smith, pp. cit. supra note 18, nn.365-367.


72 Id., 341; Brodie, op. cit. supra note 9, 140-142.

73 Linn, op. cit. supra note 31, 169.

74 Id., 170-171; Roberts, op. cit. supra note 18, 323.

75 Linn, op. cit. supra note 31, 170-172; Neff, op. cit. supra note 61, 11; Roberts, op. cit. supra note 18, 324-330.

76 Linn, op. cit. supra note 31, 174; Roberts, op. cit. supra note 18, 332-333. This was the first English-language newspaper west of the Mississippi.

77 Linn, op. cit. supra note 31, 175; Roberts, op. cit. supra note 18, 337-339.

78 Linn, op. cit. supra note 31, 176-177; Smith, op. cit. supra note 18, 476-478; Roberts, op. cit. supra note 18, 340.


80 Shoemaker, op. cit. supra note 79, 457; Roberts, op. cit. supra note 18, 345-346.


82 Linn, op. cit. supra note 31, 179.

83 Id., 185; Shoemaker, op. cit. supra note 79, 458-459.

84 Roberts, op. cit. supra note 18, 341-343; Shoemaker, op. cit. supra note 79, 457.

85 Smith, op. cit. supra note 18, II, 172; Roberts, op. cit. supra note 18, 353-354; Linn, op. cit. supra note 31, 184; Neff, op. cit. supra note 61, n.12.

86 Linn, op. cit. supra note 31, 184.

87 Smith, op. cit. supra note 18, II, 61-123; Roberts, op. cit. supra note 18, 358-359; Linn, op. cit. supra note 31, 180-181.

88 Linn, op. cit. supra note 31, 185; Shoemaker, op. cit. supra note 79, 459.
89 Bancroft, op. cit. supra note 81, 116-117. "It was well understood that war on the Mormons, war on their civil, political, and religious rights, may, on their presence as members of the commonwealth, or if need be on their lives, was part of the policy of the administration." Id., at 117.

90 History of Caldwell and Livingston Counties (St. Louis: National Historical Company, 1886), 112-113 (Hereafter called History of Caldwell).

91 In a letter dated February 4, 1834, Dunklin wrote, "I am very sensible indeed of the injuries your people complain of, and should consider myself very remiss in the discharge of my duties were I not to do everything in my power consistent with the legal exercise of them, to afford your society the redress to which they seem entitled. . . . For that which is the case of the Mormons today, may be the case of the Catholics tomorrow, and after them, any other sect that may become obnoxious to a majority of the people of any section of the state." Smith, op. cit. supra note 18, 476-478, at 476-477.

92 Smith, op. cit. supra note 18, II, 449-454; Linn, op. cit. supra note 31, 186; Shoemaker, op. cit. supra note 79, 459.

93 Laws of Missouri 1837, at 46.

94 Roberts, op. cit. supra note 18, 416, 420.

95 History of Caldwell, op. cit. supra note 90, 116-117.

96 Smith, op. cit. supra note 18, II, 85; Roberts, op. cit. supra note 18, 425.

97 Smith, op. cit. supra note 18, II, 528-529; Roberts, op. cit. supra note 18, 402-407.

98 When financial disaster threatened, the Saints set up a bank and had purchased, at great expense, plates for printing notes. The Ohio legislature refused to grant a charter. The Church leaders reasoned that if the establishment of a bank was prohibited, certainly an anti-banking society would be consonant with the will of the legislature. Thus, the Kirtland Safety Society Anti-Banking Company was formed. The plates were modified without much difficulty, and notes circulated for several months. Arrington, op. cit. supra note 70, 13-14; Linn, op. cit. supra note 31, 148-151; Roberts, op. cit. supra note 18, 401-402.

99 Linn, op. cit. supra note 31, 151-152; Roberts, op. cit. supra note 18, 403.
100 Linn, op. cit. supra note 31, 187; Roberts, op. cit. supra note 18, 424.

101 Brodie, op. cit. supra note 9, 210-211.

102 James H. Hunt, Mormonism: Embracing the Origin, Rise and Progress of the Sect, etc. (St. Louis: Ustick and Davies, 1844), 187-180, at 179-180.

103 Roberts, op. cit. supra note 18, 440-443.

104 Id., 447-449; Shoemaker, op. cit. supra note 79, 461-462; History of Caldwell, op. cit. supra note 90, 126.

105 Document Containing the Correspondence, Orders, Etc., in Relation to the Disturbances with the Mormons and the Evidence Given Before the Honorable Austin A. King, Judge of the Fifth Judicial Circuit of the State of Missouri (Published by order of the General Assembly; Fayette, Mo.: Boon's Lick Democrat, 1841), 20 (Microfilm, Utah Historical Society) (Hereafter called Document); Shoemaker, op. cit. supra note 79, 462.

106 History of Caldwell, op. cit. supra note 90, 127.

107 Id., 127-131; Shoemaker, op. cit. supra note 79, 462-463.


109 Id., 61.

110 Id., 69; Roberts, op. cit. supra note 18, 465-467; History of Caldwell, op. cit. supra note 90, 133.

111 Roberts, op. cit. supra note 18, 480-483; History of Caldwell, op. cit. supra note 90, 144-159.

112 Roberts, op. cit. supra note 18, 484-490; Shoemaker, op. cit. supra note 79, 454; History of Caldwell, op. cit. supra note 90, 134-136; Smith, op. cit. supra note 18, 111, 188-189.

113 The directive read: "Brigadier-General Doniphan--Sir: You will take Joseph Smith and the other prisoners to the public square at Far West, and shoot them at 9 o'clock tomorrow morning. Samuel D. Lucas, Major-General Commanding." History of Caldwell, op. cit. supra note 90, 137; Shoemaker, op. cit. supra note 79, 464.

114 The reply read: "It is cold-blooded murder. I will not obey your order. My brigade shall march for Liberty tomorrow morning, at 8 o'clock; and if you execute those men, I will hold you responsible before an earthly
tribunal, so help me God! A.W. Doniphan, Brigadier-General."


116 Id., 150.

117 Id., n.151.


119 *History of Caldwell*, op. cit. *supra* note 90, 144.

120 This argument is made also in Id., 143.


123 Id., at 551-552 (dictum).


125 *McKane v. Durston*, 153 U.S. 684 (1894). Justice Harlan, for the Court, stated:

> ... Whatever may be the scope of section 2 of article IV ... the Constitution of the United States does not make the privileges, and immunities enjoyed by the citizens of one State under the constitution and laws of that State, the measure of the privileges and immunities to be enjoyed, as of right, by a citizen of another state under its constitution and laws. ...</p>

Id., at 687.


127 *Linn, op. cit. supra* note 31, 217.
128 Bancroft, op. cit. supra note 81, 131-132.

129 Shoemaker, op. cit. supra note 79, 466; History of Caldwell, op. cit. supra note 90, 142.

130 Roberts, op. cit. supra note 18, 509-510.

131 Id., 511-515; Linn, op. cit. supra note 31, 216; Bancroft, op. cit. supra note 81, 134-135. For the act appropriating the two thousand dollars for the relief of citizens of Caldwell and Daviess counties, see Laws of Missouri 1838, at 314; for the act authorizing the borrowing of two hundred thousand dollars to defray the expenses of the fighting, see Laws of Missouri 1838, at 79.

132 Roberts, op. cit. supra note 18, 533.

133 This appears in a memorial to Congress. House Doc. No. 22, 26th Cong., 2nd Sess. 12 (1840).

134 Neff, op. cit. supra note 61, 15-18; Shoemaker, op. cit. supra note 79, 454-455; Gustive O. Larsen, Outline History of Utah and the Mormons (Salt Lake City, Deseret Book Company, 1958), 30.

135 Document, supra note 105, passim.

136 Linn, op. cit. supra note 31, 228. The Missouri press, also, "almost universally deplored the outrage." Brodie, op. cit. supra note 9, 137.

137 L.K., Shoemaker, op. cit. supra note 79, 466.

138 Roberts, op. cit. supra note 18, 539-559. The text of "Order No. 11" can be found in History of Caldwell, op. cit. supra note 90, 51-52.


141 Roberts, op. cit. supra note 18, II, 8-11.

142 Smith, op. cit. supra note 18, IV, 80; Roberts, op. cit. supra note 18, II, 29-30.

143 Congressional Globe, 26th Cong., 1st Sess. 149, 185 (1840).
The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign states. The prohibitions of the amendment include suits brought against a state by its own citizens; however, this was not decided until much later. \textit{Hans v. Louisiana}, 134 U.S. 1 (1890). (And, at any rate, the Saints soon became citizens of Illinois). Suit might have been brought against the state officials on the grounds that they acted unconstitutionally or in excess of their authority. \textit{Osborn v. Bank of the United States}, 22 U.S. (9 Wheat.) 738 (1824).

\textit{Roberts, op. cit. supra note 18, II, 35-38.}

\textit{Id., 27-28.}

\textit{Linn, op. cit. supra note 31, 219-221; Larsen, op. cit. supra note 134, 33; Gregg, op. cit. supra note 140, 270.}


\textit{Laws of Illinois 1840-1841}, at 52.


\textit{Rees, supra note 152.}

\textit{Laws of Illinois 1840-1841}, at 52.

\textit{Laws of Illinois 1840-1841}, at 54.

\textit{Laws of Illinois 1840-1841}, at 54.

\textit{Laws of Illinois 1840-1841}, at 53.

\textit{Laws of Illinois 1840-1841}, at 55.

\textit{Laws of Illinois 1840-1841}, at 55.

\textit{Laws of Illinois 1840-1841}, at 55.

\textit{Laws of Illinois 1840-1841}, at 56.
Laws of Illinois 1840-1841, at 57.

Ford, op. cit. supra note 150, 265.

John C. Bennett was elected mayor, but he had the temerity to displease Joseph Smith during a military display in May of 1842 and was forced to resign. His place was taken by the Prophet. Smith, op. cit. supra note 18, IV, 287, and V, 4, 12; Roberts, op. cit. supra note 18, II, 56, 140-141.

Nauvoo Neighbor, January 24, 1844, p. 3 (Microfilm, L.D.S. Church Historian's Office).

Times and Seasons, March 1, 1841, pp. 336-337 (Bound in two volumes, Utah Room, University of Utah Library).

In Beauchamais v. Illinois, 343 U.S. 250 (1952), the United States Supreme Court upheld a state statute making it a crime to display any publication in a public place which "exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy."

Smith, op. cit. supra note 18, IV, 198; Roberts, op. cit. supra note 18, II, 52-53.

Smith, op. cit. supra note 18, IV, 364-371; Roberts, op. cit. supra note 18, II, 78-81; Ford, op. cit. supra note 150, 266.

Smith, op. cit. supra note 18, V, 67, 86-87; Roberts, op. cit. supra note 18, II, 148-152; Gregg, op. cit. supra note 140, 288.

Smith, op. cit. supra note 18, V, 205-213; Roberts, op. cit. supra note 18, II, 156; Ford, op. cit. supra note 150, 313-314.

Ex parte Smith, 22 Fed. Cas. 373 (No. 12,968) (C.C.D. Ill., 1843).

Rev. Stat. sec. 5278-5279 (1875); 1 Stat. 302 (1793). The pertinent part of Article IV, Section 2, reads: "A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime."

The affidavit and requisition are printed in Ex parte Smith, supra note 172, at 374.

Id., at 379. It seems that the name of Rockwell, the principal in the case, was dropped from the extradition papers after the first attempt. Rockwell went east when
the trouble arose, and during his return trip, he was captured in St. Louis and taken to Independence for trial. The grand jury apparently did not find enough evidence upon which to indict him for the attempted murder. He had, however, attempted to escape from jail, and was indicted and convicted for this. The judge sentenced him to five minutes confinement in the county jail, which it is supposed he served. Herman C. Smith, "Mormon Troubles in Missouri," Missouri Historical Review, IV (July, 1910), 258-251, at 250-251. Author Smith comments: "When it is considered that all the machinery of the courts was in the hands of enemies of the church this whole affair about O.P. Rockwell attempting to murder ex-Governor Boggs and Joseph Smith being accessory before the fact, partakes of the nature of a huge joke." Rockwell's version of his adventure is found in Smith, op. cit. supra note 18, VI, 135-142.

176 Smith, op. cit. supra note 18, V, 440-460; Roberts, op. cit. supra note 18, II, 166-168; Gregg, op. cit. supra note 140, 291-292; Nauvoo Neighbor, July 5, 1843, p. 2.

177 Gregg, op. cit. supra note 140, 292.

178 Id., 293; Smith, op. cit. supra note 18, V, 461-475; Roberts, op. cit. supra note 18, 172-173. The Nauvoo Neighbor for July 12, July 19, and July 26, 1843, contain the record of the municipal court in this case.

179 Ford, op. cit. supra note 140, 316-317.

180 Gregg, op. cit. supra note 150, 293.

181 Laws of Illinois 1840-1841, at 55. (Author's italics).

182 Ford, op. cit. supra note 150, 325.

183 Smith, op. cit. supra note 18, VI, 63-65; Roberts, op. cit. supra note 18, II, 205.

184 Smith, op. cit. supra note 18, VI, 155-160, 376-377; Roberts, op. cit. supra note 18, II, 203-205.

185 Smith, op. cit. supra note 18, VI, 386-390; Roberts, op. cit. supra note 18, II, 207.

186 Smith, op. cit. supra note 18, VI, 197-209; Nauvoo Neighbor, May 8, 1844, p. 2.

187 Roberts, op. cit. supra note 18, II, 8; G. Homer Durham, Joseph Smith, Prophet-Stateeman (Salt Lake City: The Bookcraft Company, 1944), 145.
Smith, op. cit. supra note 18, VI, 243.

Congressional Globe, 28th Cong., 1st Sess., 624 (1844). The reading of the memorial on the floor was objected to and never finished.

Smith, op. cit. supra note 18, VI, 277; Roberts, op. cit. supra note 18, II, 212-215.

Gregg, op. cit. supra note 140, 272.

Bancroft, op. cit. supra note 81, 165.

Ford, op. cit. supra note 150, 329-330; Larsen, op. cit. supra note 134, 39. Joseph Smith said, "We care not a fig for Whig or Democrat: they are both alike to us; but we shall go for our friends, our TRIED FRIENDS, and the cause of human liberty which is the cause of God. . . . [T]hey have served us, and we will serve them." Times and Seasons, January 1, 1842, p. 651.

Gregg, op. cit. supra note 140, 276-277.

Smith, op. cit. supra note 18, IV, 362; Roberts, op. cit. supra note 18, II, 120-121.

Gregg, op. cit. supra note 140, 276.

Larsen, op. cit. supra note 134, 39; Roberts, op. cit. supra note 18, II, 59.

Roberts, op. cit. supra note 18, II, 196-198; Gregg, op. cit. supra note 140, 299.

Nauvoo Neighbor, September 20, 1843, p. 3. (This ordinance had been printed the preceding year, also).

The Wasp, March 8, 1843, p. 3. (The Nauvoo Neighbor replaced The Wasp).

Id., March 15, 1843, p. 2.

Id., July 16, 1842, p. 2.

Nauvoo Neighbor, December 13, 1843, p. 1.

Id., December 27, 1843, p. 3.

Id., January 10, 1844, p. 3.

One Jeremiah Smith was arrested in May of 1844, by a United States marshal in consequence of a warrant issued by Federal Judge Nathaniel Pope on a charge of illegally obtaining money from the United States treasury in
Washington. He was set free by the Nauvoo municipal court. Chief Justice Smith declared that he respected federal law, but that federal officers "have not right to trample our laws under their feet. The court is bound by oath to support the Constitution of the United States, and the State of Illinois and writ of habeas corpus. The Constitution of the United States and habeas corpus shall not be denied. If the court deny the writ of habeas corpus, they perjure themselves..." Smith, op. cit. supra note 18, VI, 416-423, at 419-420; Roberts, op. cit. supra note 18, II, n.244.

207 Nauvoo Neighbor, February 14, 1844, p. 3.

208 The ordinance merits quoting in full:

Section 1. Be it ordained by the Senate and House of Representatives of the United States of America in Congress assembled, that all the rights, powers, privileges, and immunities belonging to Territories, and not repugnant to the Constitution of the United States, are hereby granted and secured to the inhabitants of the city of Nauvoo, in addition to the spirit, letter, meaning, and provisions of the afore-mentioned charter, act of incorporation from the State of Illinois, until the State of Missouri restores to those exiled citizens the lands, rights, privileges, property, and damage for all losses.

Section 2. And be it further ordained, in order to effect the object and further intention of this ordinance, and for the peace, security, happiness, convenience, benefit, and prosperity of the said city of Nauvoo, and for the commonweal and honor of our country, that the mayor of Nauvoo be, and he is hereby empowered by this consent of the President of the United States; whenever the actual necessity of the case and the public safety shall require it, to call to his aid a sufficient number of United States forces, in connection with the Nauvoo Legion, to repel the invasion of mobs, keep the public peace; and protect the innocent from the unhallowed ravages of lawless banditti that escape justice on the western frontier; and also to preserve the power and dignity of the Union.

Section 3. And be it further ordained that the officers of the United States army are hereby required to obey the requisitions of this ordinance.

Section 4. And be it further ordained that, for all services rendered in quelling mobs and preserving the public peace the said Nauvoo Legion
shall be under the same regulations, rules, and the laws of pay as the troops of the United States.

Smith, op. cit. supra note 18, VI, 130-132, at 131-132.

209 Doctrines and Covenants, 132. "And again, as pertaining to the law of the priesthood—If any man espouse a virgin, and desire to espouse another, and the first give her consent, and if he espouse the second, and they are virgins and have vowed to no other man, then he is justified; he cannot commit adultery with that that belongeth unto him and to no one else. And if he have ten virgins given unto him by this law, he cannot commit adultery, for they belong to him, and are given unto him; therefore he is justified." Id., at verses 61-62. A previous revelation, given February 9, 1931, appeared to prescribe monogamy: "Thou shalt love thy wife with all thy heart, and shalt cleave to her and none else." Doctrines and Covenants, 42:22.

210 Roberts, op. cit. supra note 18, II, 93-95.

211 Id., 95-96.

212 Smith, op. cit. supra note 18, II, 247.


215 Ford, op. cit. supra note 150, 322-323; Gregg, op. cit. supra note 140, 302-303; Roberts, op. cit. supra note 18, II, 227.

216 The proceedings were published in the Nauvoo Neighbor, June 19, 1844, pp. 2-3. A synopsis appears in Smith, op. cit. supra note 18, VI, 434-448. The hearing consisted chiefly of each councillor's recitation of various character faults and bad deeds of the owners of the Expositor.

217 Ford, op. cit. supra note 150, 323.

218 Smith, op. cit. supra note 18, VI, 432, 448; Roberts, op. cit. supra note 18, II, 231; Gregg, op. cit. supra note 140, 317-318.

219 Roberts, op. cit. supra note 18, II, 232. The difference between the points of view of Joseph and Governor
Ford on the Expositor affair is striking. Joseph thought that "the loss of character by libel and the loss of life by mobocratic prints to be a greater loss than a little property." Smith, op. cit. supra note 18, VI, 539. Ford, on the other hand, believed that "there is more lost to rational liberty by a censorship of the press by suppressing information proper to be known to the people, than can be lost to an individual now and then by a temporary injury to his character and influence by the utmost licentiousness." Ford, op. cit. supra note 150, 326.

220 Roberts, op. cit. supra note 18, II, 235-236; Gregg, op. cit. supra note 140, 320.

221 Smith, op. cit. supra note 18, VI, 453-454; Roberts, op. cit. supra note 18, II, 237; Gregg, op. cit. supra note 140, 319.

222 Smith, op. cit. supra note 18, VI, 456-458, 460-461; Ford, op. cit. supra note 150, 324.

223 Smith, op. cit. supra note 18, VI, 492, 511-512, 516; Roberts, op. cit. supra note 18, II, 238.

224 Smith, op. cit. supra note 18, VI, 497; Roberts, op. cit. supra note 18, II, 241-243.

225 Ford, op. cit. supra note 150, 324.

226 Id., 325.

227 Smith, op. cit. supra note 18, VI, 536-537; Roberts, op. cit. supra note 18, II, 244-245.

228 Ford, op. cit. supra note 150, 336.

229 Gregg, op. cit. supra note 140, 301; Smith, op. cit. supra note 18, VI, 405, 412-413; Roberts, op. cit. supra note 18, II, 226-227.

230 Ford, op. cit. supra note 150, 337; Smith, op. cit. supra note 18, VI, 561-562; Roberts, op. cit. supra note 18, II, 254.

231 Smith, op. cit. supra note 18, VI, 567; Roberts, op. cit. supra note 18, II, 257.

232 Roberts, op. cit. supra note 18, II, 257-259, 263; Gregg, op. cit. supra note 140, 321.

233 Ford, op. cit. supra note 150, 339-346.

234 The official Church account of the murder which has been printed in the Doctrine and Covenants also
appears in Smith, op. cit. supra note 18, VI, 629-631; Roberts, op. cit. supra note 18, II, 284-287.

235 Gregg, op. cit. supra note 140, 324.
236 Ford, op. cit. supra note 150, 345.
237 Gregg, op. cit. supra note 140, 324-325; Ford, op. cit. supra note 150, 353-354.
239 Gregg, op. cit. supra note 140, 323.
240 Roberts, op. cit. supra note 18, II, 288-289; Ford, op. cit. supra note 150, 337.

241 John Hay, "The Mormon Prophet's Tragedy," Atlantic Monthly, XXIV (December, 1869), 669-678, at 678; Roberts, op. cit. supra note 18, II, 321-330; Gregg, op. cit. supra note 140, 329-330. Among the instructions to the jury was the following, at the request of the defendants: "That when the evidence is circumstantial, admitting all to be proven which the evidence tends to prove, if then the jury can make any supposition consistent with the facts, by which the murder might have been committed without the agency of the defendants, it will be their duty to make the supposition, and find the defendants not guilty." Id., 330.

242 Ford, op. cit. supra note 150, 367-368; Hay, supra note 241; Roberts, op. cit. supra note 18, II, 324-327.
243 Hay, supra note 241.
244 Ibid.
245 Gregg, op. cit. supra note 140, 331.
246 E.g., Roberts, op. cit. supra note 18, II, 337-341.
248 Id., 363.
249 Ford, op. cit. supra note 150, 168-169.
250 Gregg, op. cit. supra note 140, 340; Ford, op. cit. supra note 150, 407; Roberts, op. cit. supra note 18, II, 473-476.
251 Rees, supra note 152, at 513-514.
252 Roberts, op. cit. supra note 18, II, 504; Josiah B. Conyers, A Brief History of the Leading Causes of the Hancock Mob in the Year 1846 (St. Louis: Cathcart and Prescott, 1846), II. (Microfilm, Utah Historical Society).

253 Roberts, op. cit. supra note 18, II, 506; Ford, op. cit. supra note 150, 410-411. When asked to expel the Mormons, Ford refused, saying he had "no power to exile a citizen." Id., 351.

254 Roberts, op. cit. supra note 18, II, 508-510.

255 The Proceedings of a Convention Held at Carthage, in Hancock County, Ill.; on Tuesday and Wednesday, October 1st and 2nd 1845 (Published by order of the convention; Quincy: Quincy Whig Book and Job Office, 1845), 4. (Microfilm, Utah Historical Society). Among the other resolutions of the convention was:

Resolved, That we utterly repudiate the impudent assertion so often, and so constantly put forth by the Mormons, that they are persecuted for righteousness sake. We do not believe them to be a persecuted people. We know that they are not; but that whatever grievances they may suffer are the necessary, and legitimate consequences of their illegal, wicked and dishonest acts.

Ibid.

256 Roberts, op. cit. supra note 18, II, 540-541.


258 In answer to the inquiry of Mormon leaders, Governor Ford advised that Nauvoo be re-organized under the general law governing towns. He noted, however, that the law limited towns to one square mile in area and since Nauvoo was much larger than this, it would be necessary to organize a number of towns in order to cover the entire city. Since this would have required twelve incorporations, the Mormons made just a gesture in the direction of following Ford's advice, by organizing one small portion of the former city as the Town of Nauvoo.

Brigham Young, et al., The History of the Church of Jesus Christ of Latter-day Saints: Period II (Salt Lake City: The Deseret News Press, 1932), 396-400.

259 Gregg, op. cit. supra note 140, 345-346; Roberts, op. cit. supra note 18, III, 5-8.

260 Roberts, op. cit. supra note 18, III, 7-13; Ford, op. cit. supra note 150, 414-415. At the December term of the United States circuit court for Illinois, indictments were found against Church authorities for counterfeiting.
Ford has claimed that he held up the service of process because it might have hindered the exodus, but he gave the Mormons the impression that the President would send United States troops to enforce it in the spring, which made the Mormon leaders speed up the preparation for leaving. Ford, op. cit. supra note 150, 412-413.

261 Gregg, op. cit. supra note 140, 353.

262 Conyers, op. cit. supra note 252, 72.

263 Id., 73-74; Ford, op. cit. supra note 150, 424-429.
CHAPTER II

A BIBLE COMMONWEALTH IN THE GREAT BASIN

Since the rules and regulations governing the organization of the Mormon Church were silent on the matter of succession to the presidency, the death of Joseph Smith was followed by a struggle for power within the Church. Joseph himself had once indicated that, in the case of his death, leadership should devolve upon his brother, Hyrum, but the latter had also been killed in Carthage jail.¹ Joseph's first counselor, Sidney Rigdon, claimed the late Prophet's mantle for himself, asserting that he was Joseph's spokesman and the guardian of the Church.² Brigham Young soon called a halt to Rigdon's pretensions. At a meeting of the Church held on August 8, 1844, he addressed the congregation: "I will ask, who has stood next to Joseph and Hyrum? I have, and I will stand next to him."³ Legend has it that Brigham Young underwent a transfiguration during this speech; according to those who were in attendance, he suddenly looked and spoke like Joseph.⁴ The subsequent vote sustained the leadership of the Twelve Apostles, of which Brigham was president.⁵ Sidney Rigdon was later excommunicated.⁶ While this
maneuver alienated some of the membership, the great body of the Church solidified behind Brigham and the Twelve.7

The Flight of Modern Israel

In February of 1844, Joseph Smith had demonstrated the seriousness of his desire to take the Saints west:

I instructed the Twelve Apostles to send out a delegation and investigate the locations of California and Oregon, and hunt out a good location, where we can remove to after the temple is completed and where we can build a city in a day, and have a government of our own, get up into the mountains, where the devil cannot dig us out, and live in healthful climate, where we can live as old as we have a mind to.8

In the April conference of the Church, he told his followers, "The whole of America is Zion itself from north to south, and is described by the Prophets, who declare that it is the Zion where the mountain of the Lord should be, and that it should be in the center of the land."9 This was intended, no doubt, to keep the Saints from sorrowing over the loss of their Jerusalem in the midwest and to soften their reluctance to move into the western wilderness.

The Church leaders sent a letter to President James K. Polk, dated April 24, 1845, in which they again set forth their grievances, and asked him to convene a special session of Congress to "furnish an asylum, where we can enjoy our rights of conscience and religion unmolested." In lieu of this, they asked Polk to use the power and prestige of his great office in their behalf and to
"express our views concerning what is called the 'Great Western Measure' of colonizing the Latter-day Saints in Oregon, the northwestern territory, or some location remote from the states, where the hand of oppression shall not crush every noble principle and extinguish every patriotic feeling." On September 9, 1845, the general council of the Church authorities resolved to send a company of fifteen hundred men to investigate the possibility of settling in the valley of the Great Salt Lake.

Since a considerable number of the Saints had been driven from Illinois before they were fully prepared for the journey, death and deprivation accompanied them through Iowa. An additional, unexpected burden was placed upon those who had left Nauvoo earlier of their own accord and who were now called upon to share their equipment and provisions with their less-fortunate, later-coming brethren. They never lost their determination, however, and the testimonies to their courage and cheerfulness in the face of extreme hardship are numerous.

The end of the season for safe travel found most of the exiles grouped at two camps on the Missouri river, Council Bluffs and Winter Quarters. The contingent of Saints at the front of the migration, with Brigham and the Apostles, was called the "Camp of Israel," and it reached Council Bluffs on June 14, 1846. Saints from Nauvoo joined the first camps continuously, but since many were not able to overtake the main body that season,
they established intermediate camps at Garden Grove and Mount Pisgah, where the Camp of Israel had set in crops during the planting season. This procedure of preparing the way was followed throughout the journey: at intervals, they would stop, fence the land, and plant crops to be harvested by those who followed. Brigham, during this time, put into practice the views of land ownership that would later govern the founding of settlements in the Great Basin. Each man was given a plot of land to till, and if he did not work it, it was taken from him. Brigham decreed that "no man shall hold more land than he can cultivate." 14

As Professor Andrew Love Neff has pointed out, the Church leaders were uniquely qualified to lead a colonization of the west. 15 They had had extensive experience in temporal as well as spiritual matters. They had shared the uprootings and the wanderings of the Saints since Kirtland. Most had participated in the ill-fated march of Zion's Camp. They had supervised the building of Nauvoo and there had accumulated knowledge of law, politics, and government. Some had represented their people at the seats of state and national governments. A number of them had served foreign missions. They had spent their lives on the frontier. And, perhaps most important of all, the men and women they were to lead across the plains were accustomed to obey and follow them without doubt or question.
The Mormon Battalion

The end of the season found the Saints on lands recently purchased from the Indians, outside the boundaries of any state or territory, and under the jurisdiction of the federal government. There was some question about obtaining leave to spend the winter there, and past experience did not lead them to expect special treatment or favors from Washington. Jesse C. Little had been dispatched to the nation's capital with letters of introduction to various governmental officers in an attempt to secure possible aid from the federal government for the Mormons' journey west. He went by way of Philadelphia to enlist the support of a prominent federal judge, John Kintzing Kane. While Judge Kane agreed to intercede with federal officials on their behalf, this visit was more notable because it marked the first contact between the Mormons and the Judge's son, Colonel Thomas L. Kane, who became a trusted and faithful friend to the Mormons. Little arrived in Washington about a week after Congress had declared war on Mexico. He soon saw this as an opportunity to obtain contracts for the Mormons to carry supplies and provide other services to the United States army which would be marching to the southwest. He met with President Polk on June 3, and the latter expressed a disposition to help the Saints if he could. Two days later, Little was informed that some of his brethren would be taken into the army.

Enrollment of what was to become known as the Mormon Battalion began on July 13 at a big public camp meeting in
the area of Council Bluffs, and within a few days, the
roster of about five hundred men was completed.\textsuperscript{18} The
Mormon Battalion was outfitted at Fort Leavenworth, and
then marched, by way of Santa Fe, to San Diego where it
arrived in late January, 1847, having fought no battles.\textsuperscript{19}

The decision to give up so many able-bodied men at
such a crucial time was a difficult one. However, the
advantages were persuasive. First, the advance army pay
would help finance the winter’s provisions and outfits
for the trek to Salt Lake valley. Second, five hundred
of their number would be transported west without cost to
the Saints. Third, it would be a powerful refutation of
widespread rumors that the Mormons were traitors bent
upon establishing an independent government in the western
territory. Fourth, marching into California country under
the United States’ banner might help the Saints establish
a foothold for the Gospel there.\textsuperscript{20} The enlistment would
result in still another boon to the Mormons: permission
to remain on the Indian lands until the following season.\textsuperscript{21}

By January of 1847, there were about one thousand
log houses built at Winter Quarters. The town had been
divided into wards,\textsuperscript{*} and a bishop was appointed in each
ward “with instructions to look after both the spiritual

\textsuperscript{*}The affairs of the L.D.S. Church are administered
through regional units called "stakes," which bear ap-
proximately the same relationship to the general Church
government as a county does to a state. The stakes are
further divided into "wards." The ward is the smallest
ecclesiastical unit.
and temporal welfare of the people." Over the entire
settlement, a high council served in two capacities: as
an ecclesiastical governing body as well as a municipal
council. The same arrangement was put into effect in the
other settlements, and it provided the model for the later
fusion of the church and state in the Great Basin. 22

A pioneer camp of one hundred and forty-three men
and a handful of women and children was selected to blaze
the way, and on April 16, 1847, it began its journey west.
The same military-like organization was continued, and
Brigham served as lieutenant-general. 23 The half-way
mark was reached on the first of June, when the pioneer
group arrived at Fort Laramie, where they finally picked
up the Oregon Trail. 24 Up to this point they had
travelled the north bank of the Platte river, seeking to
avoid the traffic of the Oregon Trail. 25 On July 9, they
reached Fort Bridger, left the Oregon Trail, and headed
through the mountains to the Great Salt Lake. 26 On July 21,
members of an advance party sent out from the pioneer camp
entered Salt Lake valley; the next day, a second party
arrived. 27 On July 23, two hours after deciding on a
location, they began to plow the land, and before the
afternoon was very old, they had started to build a dam
for irrigation purposes. 28 The next day, Brigham, who
had been too ill to accompany the vanguard, entered the
valley and pronounced: "This is the right place. Drive
on." 29
The Mormons were colonizers, not explorers. The first white men had found the Utah country as early as 1776; Franciscan friars, who were searching for a direct route from Santa Fe to Monterey, had travelled as far north as Utah lake. In 1825 Jim Bridger was the first known white man to view the Great Salt Lake; and evidence indicates that trappers of Hudson's Bay Company and Rocky Mountain Fur Company were operating in this area that same year. All too often the Saints have been credited with being pathfinders. This is not the case. The Mormon leaders were well acquainted with sources of knowledge about the western country, such as Fremont's Journal and Hastings' description of Oregon and California. They had talked to explorers like Jim Bridger. All in all, Brigham had a reasonably precise idea of where he was going. And he had a pretty good idea of what he was going to do when he got there. On August 9, 1846, he had written President Polk, telling of the Mormon intention to locate in the valley of the Great Salt Lake, and, once settled, to petition the United States for a territorial government "bounded on the north by the British and south by the Mexican dominions, east and west by the summit of the Rocky and Cascade Mountains."33

Civil Law Comes to the Great Basin

The day after his arrival, Brigham Young decreed that the Ten Commandments and Christian ethics were in force in Salt Lake valley. He also announced a "land law"
to govern the ownership of real property. The pronouncement is a curious combination of Lockeian undertones and communitarian overtones:

No man should buy or sell land. Every man should have his land measured off to him for city and farming purposes, what he could till. He might till it as he pleased, but he should be industrious and take care of it.

He subsequently proclaimed that there would be no private ownership of the water streams and that wood and timber would also be community property. This, of course, amounted to an abrogation of the common law in regard to property and riparian water rights. These regulations served to prevent the monopolization of land, water, and timber by the early pioneers. Thus, civil law came to the Great Basin.\footnote{\textsuperscript{34}}

It is indicative of the kind of men these pioneers were that within a month after their arrival in the valley, they had explored as far as Cache Valley on the north, Utah Lake on the south, the Great Salt Lake on the west, and the surrounding mountains. They had irrigated, plowed, and planted one hundred acres. They had built an adobe stockade around ten acres, and had lined one side of the stockade with cabins.\footnote{\textsuperscript{35}} They had chosen a temple site and a location for Salt Lake City; they had begun a survey of the area.\footnote{\textsuperscript{36}} Another contingent of Saints arrived on July 29, along with some Battalion members who had been forced into winter quarters at Pueblo and consequently were in a good position to intercept the pioneers.\footnote{\textsuperscript{37}}
Other companies had followed the trail of the vanguard out from Winter Quarters and arrived in the valley from time to time. By October 10, 1847, the population of the valley was 2,095, women outnumbering the men.38

Meanwhile, in August, Brigham Young and two companies of pioneers started back to the Missouri to lead the next season's migration.39 A conference was held at Winter Quarters in late December, and the membership sustained Brigham as president of the Church and Heber C. Kimball and Willard Richards as his counselors. This action was repeated later by the Saints in Salt Lake valley at a conference held there the following October. It will be remembered that from Joseph's death until this time, there had been an apostolic interregnum in the government of the Latter-day Saints. During this period, the Twelve Apostles, as a quorum, had held the keys of authority, and Brigham held a foremost position merely by virtue of his status as president of that body. From this time until his death, he was sustained at every general conference as "President, Prophet, Seer, and Revelator."40

Brigham led off the trek west from Winter Quarters for the second time on June 1, 1848, and these companies arrived in Salt Lake valley in September and October.41 A population of five thousand had accumulated before the end of 1848.42 In 1849, one thousand four hundred more Saints made their way to Zion.43 According to the census for 1850, the population was 11,354.44
Democratic Theocracy

The need for social organization was self-evident. Making a home in this arid, barren, and unfriendly country would demand the fullest possible use of every resource the Saints could call forth. Harmony and cooperation were vital. There was no great problem posed, however, because the same all-purpose governmental machinery that had ordered their lives since Nauvoo was available to direct their efforts at making "the desert blossom as the rose."

Professor Neff has observed that "the two year period 1847-1849, comprises the period of maximum exercise of power and authority in both temporal and spiritual matters by the Mormon Church." Furthermore:

Curiously enough certain phases of the Puritan concept and viewpoint, slowly but surely losing its grip on the inhabitants of New England, were reborn and reinvigorated in this desert setting. In some respects it seemed as though Brigham Young had picked up the thread of life where Jonathan Edwards and Cotton Mather had laid it down. . . .

Government by High Council

At the October conference in 1847, the new colony was organized as a stake* of Zion. A stake presidency, composed of a president and his two counselors, was chosen, along with a twelve-man high council over which they presided. This body of fifteen men, having complete control over ecclesiastical affairs, also "assumed

*See page 94 supra.
provisional municipal powers by the common consent of the community," in December of 1847. At its frequent sessions, the high council dealt with a variety of temporal as well as ecclesiastical matters. It ordered that fencing operations begin. It granted timber and water privileges and permission to build sawmills; "stringent regulations for the preservation of timber" were enacted. It fixed the rates for grinding grain. Under its supervision, land was divided and apportioned among applicants. It levied taxes for the building and maintenance of public roads and bridges. Agents of the poor were appointed, to take donations and distribute relief among the needy.

The high council enacted ordinances defining certain crimes. A person could be fined between five and five hundred dollars and whipped up to thirty-nine lashes for "violence on person or property, threatening, or riot." For adultery and fornication, the fine could be as high as one thousand dollars and thirty-nine lashes. A person convicted of stealing, robbery, housebreaking, or arson could receive as many as thirty-nine lashes "on the bare back," and in addition, he was obligated to restore the property four-fold. The whipping post had been instituted because the Saints had no jails in those early days. Drunkenness, foul or profane language, and unreasonable shooting of guns were punishable by fine.

The council prohibited trading guns and ammunition with the Indians, making corn into whiskey, and
possessing fuel or fencing or building materials in excess of immediate needs.\textsuperscript{62} There were various ordinances regulating the responsibilities and rights of the owners of livestock.\textsuperscript{63} The militia, to be known as the Nauvoo Legion, was organized under the direction of the council.\textsuperscript{64} Provision was made to eliminate vagrancy. If a person was convicted of being a vagrant, his property would be sized and held by judge-appointed trustees for the support of his dependents. It was the responsibility of the trustees to see that he was gainfully employed and that his wages were applied to the support of his dependents.\textsuperscript{65} Marshals and deputies, assessors and collectors, and other officials were appointed.\textsuperscript{66} Groups of settlers were, from time to time, sent out to establish colonies.\textsuperscript{67}

The high council was also a court. It sat not only on ecclesiastical matters, but it had unlimited civil and criminal jurisdiction as well.\textsuperscript{68} In view of its complete executive, judicial, and legislative powers, one historian has compared it to the "informal courts which functioned in early England as an adjunct to the common law."\textsuperscript{69}

From October 3, 1847, to September 20, 1848, while Brigham Young was in Winter Quarters, the high council was the ruling governmental authority in Salt Lake valley. Whether the functions of the council changed when he returned is not clear; however, it is fair to say that he became the motivating force behind its decisions.\textsuperscript{70} It should be pointed out that the career of the high council
cannot be charted with complete accuracy. On January 6, 1849, the council supposedly relieved itself of municipal duties and turned these affairs over to the bishops; however, records reveal that policy decisions of a local governmental nature continued to be made in "council." Also causing confusion is the fact that ordinances passed from February 24 to December 29, 1849, are attributed to the "Legislative Council of Great Salt Lake City," rather than the "High Council of Great Salt Lake City," as it had been styled previously. All evidence indicates, however, that both groups of ordinances were the work of the same body. It has been suggested that, somewhere along the line, the high council simply transformed itself into a "Legislative Council," at least for certain purposes. The archive files of the ordinances are incomplete, so the exact number is not known, but references to ordinances in addition to those found in the files appear in various other accounts of the proceedings of the council.

Another source of legislation during this period was the Church membership. Assembled together in periodic conferences, the Saints considered such nonspiritual matters as the administration of roads. Regardless of the procedure used or the title of the agency, the rule-making authority was Church authority.

**Government by Bishops**

From January, 1849, until the incorporation of cities, the ecclesiastical wards served as municipal corporations,
taking on at least some of the responsibilities previously held by the high council. The bishops exercised the powers of civil magistrates. Edward W. Tullidge, sometimes called Utah's first real historian, has commented:

Under the government of the Bishops, Utah grew up, and, until the regular incorporation of Great Salt Lake City in 1851, they held what is usually considered the secular administration over the people. . . . Under their temporal administration all over Utah, as well as in Salt Lake, cities were built, lands divided off to the people, roads and bridges made, water-ditches cut, the land irrigated, and society governed. In fact, under them all the revenue was produced and the work done of founding Great Salt Lake City.

. . . . . . . . . . . . . . . . . . .
. . . In Utah, they soon became the veritable founders of our settlements and cities; and, having founded them, they also governed them and directed the people in their social organization and material growth. . . .

The bishops also sat as civil as well as ecclesiastical courts.

The social organization in Salt Lake valley from 1847 to 1849 has been called "theo-democratic." It was democratic in that there was no setting apart of a class of priests; no man was excused from any of the mundane and back-breaking tasks of colonizing because of his position in the Church. Moreover, in theory, any man could become a member of the First Presidency or one of the Twelve Apostles. Economic democracy, a major theme in Mormon philosophy since the announcement of the United Order, found expression in Brigham's land laws. Further, divine will was expressed through the progress of an entire
people, not just their leaders. Nonetheless, it was essentially a theocracy. The principle of popular sovereignty was lacking. The necessity of dealing with the periodic stresses and crises which composed the history of the Mormon Church had established the legitimacy of centralized power. This ecclesiastical authoritarianism was never successfully challenged; the periods of calm were never long enough to launch effective criticism, and the Mormons' cause—building the "Kingdom of God"—now demanded the immediate and full mobilization of their resources.80

Democratic forms were preserved. From the beginning, the membership was always called upon to ratify the appointment of leaders and the policy decisions.81 Women had always been allowed to vote in Church matters, and when the Church assumed temporal administration, they were allowed to vote in governmental matters also.82 However, there was never any choice between men or policies, and the occasions of "sustaining" decisions of Church authorities were more like plebiscites than referendums.83

Before making an indictment of this procedure, it is well to realize that the Saints did not want it any other way. This was the arrangement in which they had complete faith. The Church government had been the only government they had known since they had been driven across the Mississippi river two years before. It had met and solved staggering problems unequaled in the annals of emigrants who had gone before or who came after. The
machinery had been refined and well-tested. To any other people of Anglo-American heritage or allegiance, "twelve men, tried and true," would have suggested the common law jury, but it called to the Mormon mind something entirely different: the quorum of the Twelve Apostles. Dale Morgan has drawn attention to:

... the specific trust of the Mormons in their leaders, and the sense of responsibility held by the leaders toward their people—a conception of interresponsibility and mutual faith which was certainly a more vital ethical relationship than is ordinarily observed between governors and governed.84

And Professor Leland Hargrave Creer has written:

The activities of the Saints in providing for economic wants precluded any immediate consideration of civil government. In fact, there was no need for such. The organization and institutions of the Church met all the requirements. For a law-making power, there was the High Council; for courts, there were the ecclesiastical tribunals, namely, the Bishop, High Council, Travelling High Council, and the First Presidency; for a law-executing arm, the Nauvoo Legion; and for revenue, church tithes and offerings.85

Historians agree that in this early period there was a complete fusion of church and state in the Great Basin. However, in a sense, this sort of statement is a distortion. It would have been difficult to draw two separate spheres of action at that juncture. The awareness of the propriety of two distinct sets of rules, those of the church and those of the state, was absent.86 What could not be separated in the consciousness of the Saints in the first place, they certainly could not think of as fused. On this point, Morgan has suggested: "Civil and religious rule in
the Utah region therefore must not be conceived as separate and distinct institutions, but as dual aspects of a single authority.87 The motivation which forces the separation of church and state is, after all, religious diversity. There was no such diversity in the Great Basin from 1847 to 1849; on the contrary, there was complete religious homogeniety.

**The State of Deseret**

On January 24, 1848, gold was discovered at Sutter's mill in California.88 Among the employees of Captain Sutter at the time were Mormon Battalion members. After the Battalion had arrived in San Diego in late January of 1847, some stayed in California to find work for the winter. Having fulfilled their contracts with Sutter, however, they set out for Salt Lake valley to collect on a promise greater than that which the gold fields could offer.89 They arrived in Salt Lake City loaded with gold samples, and as might be expected, the news of the discovery was greeted with much excitement. Quickly perceiving that gold fever could mean disaster for Zion, the Twelve Apostles reproached the Saints for their avarice. To those who succumbed to the temptation, Brigham said, "If they have a golden god in their hearts they had better stay w[h]ere they are."90 The campaign to prevent defection to California was almost unbelievably successful. The overwhelming majority stayed to carry on the work they had begun. Brigham Young evaluated the situation this way:
Can you not see that gold and silver rank among the things that we are the least in want of? We want an abundance of wheat and fine flour, of wine and oil, and of every choice fruit that will grow in our climate; we want silk, wool, cotton, flax and other textile substances of which cloth can be made; we want vegetables of various kinds to suit our constitutions and tastes, and the products of flocks and herds; we want the coal and the iron that are concealed in these ancient mountains, the lumber from our saw mills, and the rock from our quarries; these are some of the great staples to which kingdoms owe their existence, continuance, wealth, magnificence, splendor, glory and power, in which gold and silver serve as mere tinsel to give the finishing touch to all this greatness. . . .

If we had all the gold in these mountains run into ingots and piled up in one huge heap, what good would it do us now? None, and we cannot form any calculation as to the amount of harm it would do us.91

So the "Battalion Boys" deposited their gold dust with the First Presidency, and upon its strength as a reserve, paper currency was issued—in part, the old Kirtland bank notes. The Mormons also coined gold dust for a brief time; however, the pure gold coins proved to be impractical, so soft that they wore away and were always underweight.92

The effect of the gold rush upon the Mormons cannot be told in terms of yellow metal alone or even primarily. Isolated before, Salt Lake City became a major way-station for the gold-rushers on their way to California. The market suddenly was flooded with goods that had been scarce or non-existent. The emigrants were willing to part with their possessions at a very low price in exchange for provisions and equipment for the remainder of their journey.
With the expansion of the market for food, agriculture flourished. Services were also in demand, and labor prospered. The Mormons could buy cheap and sell products at a high price. Transportation companies sprang up, to cater to the movement of people and goods. There was an increased demand for such internal improvements as roads and bridges.93

The gold rush also brought Gentiles to Salt Lake valley. It was, in part, in anticipation of this Gentile invasion that the Mormons recognized the need for civil government.94 It was probable, they reasoned, that the non-Mormon might question the legitimacy of their omnibus Church government. However, there were other motivations. They felt the desire to establish a stronger claim to the land than that of individual squatters.95 Furthermore, in fairness to the Saints, it should be made clear that they had not forgotten the tradition of civil forms entirely.96 They were aware, from the beginning, that sooner or later, they would be forced to deal with either Mexico or the United States.97 It proved to be the latter. By the Treaty of Guadalupe Hidalgo, of February 2, 1848, the United States had gained the Mexican territory north of the Rio Grande river and westward to the Pacific ocean—New Mexico and Upper California.98

Congress paid little attention to the new acquisition. In January of 1849, the House of Representatives failed to approve a resolution which would have authorized an inquiry
"into the expediency of so dividing the Territory of Upper California, as to organize and extend a distinct territorial government over that portion of said Territory which includes the white settlement in the vicinity of Salt Lake." The only action taken by Congress had been to make San Francisco a port of entry and to extend the revenue laws.

On February 1, 1849, Mormon signatures were attached to the following announcement:

Notice is hereby given to all citizens of that portion of Upper California lying east of the Sierra Nevada Mountains, that a convention will be held at Great Salt Lake City in said territory, on Monday, the fifth day of March next, for the purpose of taking into consideration the propriety of organizing a territorial or state government.

Accordingly, the convention met; a committee of nine, all prominent Churchmen, was appointed to draft a constitution. The product of their labor was presented to the delegates and adopted unanimously on March 10. It was ratified unanimously by the people two days later.

The Constitution of Deseret

This basic law created the "State of Deseret." The preamble declared that it was purely provisional in nature, to be adopted, "until the Congress of the United States shall otherwise provide for the Government of the Territory hereinafter named and described, by admitting us into the Union." The boundaries of the putative state were

**"Deseret" is a Book of Mormon word meaning "honey bee." 2 Ether 2:3.**
ambitious, to say the least, including all of present Utah, all except small fractions of present Nevada and Arizona, half of Colorado, the western part of New Mexico, slices of Wyoming, Idaho, and Oregon, and a substantial portion of California. This suggested inland empire covered an estimated 490,000 square miles, complete with a seaport—San Diego. The boundaries were drawn with obvious regard for the physical geography: the Continental Divide on the east, mountains and the ocean on the west; the contour of the Great Basin on the north, and the Mexican border on the south.

The constitutional convention addressed a memorial to Congress asking that the State of Deseret be admitted to the Union or that Congress provide some other form of civil government for the people. In April of 1849, another memorial was drawn up; this one contained an application for territorial government which included practically the same territory. The Saints apparently recognized the possibility that statehood might be denied. Dr. John Bernhisel was appointed to take this second memorial to Washington and to look after the interests of the Mormons in the nation's capital. Bernhisel made no effort to present the memorial. He journeyed to Washington by way of Philadelphia and Colonel Thomas L. Kane, who advised against asking for territorial government. They would be better off without any government, he said, unless
the territorial officers were appointed from among the Mormons, and this could not be guaranteed.\textsuperscript{106}

As constitution-makers, the Mormons were traditionalists. A relatively short document, the Constitution of Deseret contained nothing radical; it was much like other American constitutions.\textsuperscript{107} It affirmed the principle of popular sovereignty. The theory of the separation of powers was respected. It provided for a bicameral legislature. The governor was given the veto, which could be overridden by a two-thirds vote of the legislature; he also had the pocket-veto. Both houses of the legislature, the governor, lieutenant governor, secretary of state, treasurer, and auditor were to be popularly-elected. Executive officers and members of the upper house of the legislature were given four-year terms, and members of the lower house were to serve two-year terms. The constitution created a supreme court composed of a chief justice and two associate justices to be elected to four-year terms by a joint vote of the General Assembly; inferior courts were to be created by the legislature. There was a long Declaration of Rights, including a strong statement of the separation of church and state and freedom of religion:

\begin{quote}
All men shall have a natural and inalienable right to worship God, according to the dictates of their own consciences; and the General Assembly shall make no law respecting an establishment of religion, or of prohibiting the free exercise thereof or disturb any person in his religious worship or sentiments; provided he does not disturb the public peace, nor obstruct others in their religious worship; and all persons, demeaning themselves
peaceably, as good members of the state, shall be equally under the protection of the laws; and no subordination or preference of any one sect or denomination to another, shall ever be established by law; nor shall any religious test be ever required for any office of trust under this State.\textsuperscript{108}

Only white male residents over twenty-one years of age were granted the suffrage; this terminated the traditional Mormon practice of allowing women to vote.\textsuperscript{109} The Constitution of Deseret was silent on the matter of slavery. One of the more recent trends in constitution-making was reflected in the provision for popular ratification.

The first steps taken under the new organic law ignored its provisions. Article V, Section 4, provided that the first election would take place on the first Monday in the following May. Contrary to this directive, the election was held May 12,\textsuperscript{110} just two days after the convention finished its work, and the people ratified a slate of candidates that had been selected at a Church council meeting on March 4, the day before the convention met.\textsuperscript{111}

It would seem beyond all doubt that the whole process was planned and directed by the Church authorities. While the right hand should know what the right hand is doing, it appears that the convention had some independent ideas. It provided for offices that the council had not considered in its nominations, even though some of the members of the convention sat in on the council
deliberations. 112 The constitution provided for the offices of lieutenant governor and auditor; however, there is no record of any election for those offices on March 12. A lieutenant governor and an auditor appear later, but it is not clear just how this came about. For that matter, there is no official record of the election of the General Assembly at that time. In further disregard of the basic law, an attorney general, an assessor and collector, a marshal, and a supervisor of roads were elected, although the constitution did not prescribe the election of these officials. Furthermore, the members of the supreme court were elected by the people, instead of by a joint vote of the General Assembly, as the constitution provided. A final irregularity resulted from the election of the bishops as civil magistrates in their respective wards; the legislature was given the authority to provide for the inferior courts. 113

It would appear that in the battle between Brigham Young and the constitution, if indeed there was anything resembling a battle, the "Lion of the Lord" had his way. Mormon historians generally look upon this as "interesting" rather than "reprehensible." Professor Neff, for example, has reasoned that after all, the constitution "was nothing but a scrap of paper and Brigham was a better expression of popular will and opinion than even the convention itself." 114
Brigham Young was elected governor; his first counselor was chief justice of the supreme court, and later, lieutenant governor; his second counselor was secretary of state; the presiding bishop was chosen treasurer; the Twelve Apostles were represented among the office-holders; and the bishops were the agencies of civil government in the localities. As Morgan has observed, "the Mormons very simply had elaborated their ecclesiastical machinery into a political government." While civil government had been provided, it was fused with the Church machinery. "During the period of the existence of Deseret, the solid structure of church organization must be seen as a skeleton supporting governmental authority." Nevertheless, . . . the people had no real need for another kind of authority, and it would have seemed quite absurd to ask the people to nominate candidates from their ranks; the whole force and form of the Mormon social organization would have made any other choice by the church authorities quite out of the question.

Deseret in Congress

The General Assembly of Deseret met in early July, 1849. The session was devoted to organizational matters and applications to Congress for statehood. On July 5, Almon W. Babbitt was elected "delegate and representative to Congress," and the memorial that had been drafted by the constitutional convention was approved on July 9. The memorial drew attention to the fact that Congress had failed to provide civil government for any of the
Mexican cession. Congress was urged to admit Deseret into the Union on an equal footing or to provide "such other form of civil government as your wisdom and magnanimity may award to the people of Deseret." 118 Babbitt, the memorial, and the constitution were sent to Washington. 119

Senator Stephen A. Douglas presented the constitution and memorial to the Senate on December 27, 1849, explaining that the memorialists asked "admission into the Union as a State or the organization of a territorial government by Congress." 120 After a rather lengthy debate about the committee assignment, the matter was referred to the Committee on Territories. 121 Representative Linn Boyd of Kentucky finally succeeded in introducing the constitution in the House on January 28, 1850, after having been denied the opportunity to do so on several previous occasions. 122

During this time, Congress was also favored with anti-Mormon protests. On December 31, 1849, Senator Underwood of Kentucky introduced a memorial from William Smith, the younger brother of the Prophet, and others who claimed to be members of the true Church of Jesus Christ of Latter-day Saints. It charged that before leaving Nauvoo, the Salt Lake Mormons had sworn everlasting hostility toward the federal government and that they practiced polygamy and engaged in other criminal activity. The Senator then read a newspaper article in which it was alleged that the Mormons imposed duties on all goods taken
into Deseret. Douglas informed the Senate that Mr. Babbitt had assured him that the taxes were levied only upon goods to be sold in Salt Lake City, and that goods en route to another destination were not so burdened. On February 25, 1850, Representative Wentworth of Illinois presented a petition from citizens of Lee county, Illinois, charging that the leaders of Deseret were monarchists, robbers and murderers, and polygamists; the petitioners asked congressional protection of American citizens travelling through Salt Lake City. Another petition from William Smith and his friends was introduced on March 14, 1850, charging the Salt Lake Mormons with various crimes, including obstruction of the mails and suppression of freedom of speech, press, and religion; it urged Congress to provide protection against the tyranny of the "Salt Lake banditti" and to refuse Deseret admission as a state.

Meanwhile, the House was presented with the credentials of the delegate from Deseret, and on April 4, 1850, the Committee on Elections unanimously reported: "Resolved, that it is inexpedient to admit Almon W. Babbitt, Esq., to a seat in this body as a Delegate from the alleged State of Deseret." The matter was brought up again on July 19, and in the debate that followed, Representative Brown of Mississippi drew attention to the larger problem of congressional inaction:

... [D]o we govern New Mexico and Deseret? How, sir, in what manner have we governed these Territories? We have steadily refused
them all governments. The aegis of our protection has not been extended over them. We have sent them neither governors, secre-
taries, judges, or tax-gatherers. We have taken no cognizance of them, or of their condition. This state of things ought not so long to have existed. It was the solemn duty of Congress to have taken these people under its care—to have extended over them the shield of the constitution—to have given them laws and **government**. . . .

On the question at hand, however, the Representatives agreed with the Committee on Elections and decided not to give representation to Deseret. There were a number of reasons given for the refusal. It was suggested that the seating of Babbitt would amount to a recognition of the State of Deseret. Others pointed out that since Deseret was isolated and its boundaries nebulous, Congress could not know exactly what it was dealing with. Also, since there had been no steps taken to organize the region as a territory, the admission of a delegate would be improper. Finally, it was pointed out that the language of the me-
morial indicated that the people did not expect Babbitt to be seated until Congress had provided some kind of organization. Those who favored seating Babbitt drew attention to flaws in the arguments of the opposition and presented the advantages to taking affirmative action. They asserted that it was foolish to assume that the House, by itself, could admit a state into the Union—certainly granting a seat to a delegate did not constitute legal recognition of a state. Furthermore, they said, it was true that Deseret was vague, but this was all the more
reason to have its representative in Congress; he would serve as a source of information upon which to base possible federal legislation concerning the region. And, in the last analysis, Babbitt's advocates insisted, representation was a cardinal principle of American democracy. Neither slavery nor religion had any apparent influence on the vote. 128

It should be remembered that 1846 to 1849 were years of great debate in Congress over slavery. The territory acquired from Mexico under the terms of the Treaty of Guadalupe Hidalgo came to the United States with a built-in conflict over slavery. Whether slavery would be allowed in the anticipated territorial acquisition had bothered Congress as early as 1846, when an unsuccessful attempt was made to attach the Wilmot Proviso to an appropriation bill concerning the expenses of the dispute with Mexico. By the summer of 1848, various constitutional theories about slavery and the territories had been formulated. The anti-slavery group thought that Congress had a duty to abolish this institution in the territories, or, at least, that it had no power to establish it. The pro-slavery faction held that Congress was bound to deal with the western country in a manner that would serve the common good of all the states, and thus, had an obligation to protect the right of the southerner to move west with his slaves. A third doctrine was that of "squatter sovereignty," whereby it was advocated that Congress remain silent and
allow the people in the organized territories to decide whether slavery would be tolerated. Stephen A. Douglas, chairman of the Senate Committee on Territories, proposed still another solution: that the Missouri Compromise line be extended to the Pacific ocean. 129

Henry Clay started Congress on the road to compromise on January 29, 1850, 130 with a series of resolutions which were accepted, with minor changes, by both houses. 131 California was admitted as a free state. 132 New Mexico and Utah were organized as territories without any pronouncement about slavery. 133 The boundary between Texas and New Mexico was established and Texan claims were satisfied. The slave trade in the District of Columbia was abolished. 134 A more effective fugitive slave law was passed. 135

Unaware of the happenings in Congress, the General Assembly of Deseret, on September 11, 1850, voted to instruct Bernhisel and Babbitt to withdraw applications for anything but statehood. 136 It was two days too late—the Utah bill became law on September 9. 137

Meanwhile, President Zachary Taylor had dispatched General John Wilson, en route to California to serve as Indian agent, to Salt Lake City with a plan designed to solve two problems. First, it proposed a way of providing government for the western territory; and second, it took the slavery question out of the hands of Congress. The question of slavery was to be put to the vote of the
people, but this advocacy of "squatter sovereignty" was the least radical feature of the plan. The entire Mexican cession would be admitted to the Union as a single state, with a provision in its constitution which would allow the eastern part to break away and become another state in 1851.\textsuperscript{138} Brigham Young approved this arrangement, after making certain that the provision which guaranteed automatic statehood for Deseret in 1851 was clearly established:

\begin{quote}
. . . There must be no power, from any quarter, to alter the Constitution till after the dissolution of the State, and there must be no doubt of our becoming a State at the commencement of '51, without any further action of Congress.\textsuperscript{139}
\end{quote}

However, residents of California, having lost patience with Congress, called a convention and framed a constitution of their own which was approved by the people on November 13, 1849.\textsuperscript{140} By February of 1850, when Mormon spokesmen approached the legislature with the coalition state plan, the governmental operation was well under way. The representatives of Deseret explained that they now realized that the failure to include a prohibition of slavery in their own constitution had been a mistake, and the formation of the coalition state would provide a way to remedy the mistake. Bancroft has asserted that the real reasons were that, first, Deseret lacked sufficient population to become a state, and second, California was seeking admission to the Union with some of the territory claimed by Deseret. Governor Peter H. Barnett advised
against the venture, and the legislature refused to give it any consideration.\textsuperscript{141}

**Deseret in Action**

Since the first complement of federal officials did not arrive in Utah until the next August, the life of Deseret did not end with the passage of the Utah bill. It functioned effectively for two and one-half years, from March, 1849, to midsummer, 1851. The experience of Deseret constituted a rarity in American political history; there have been only four other attempts to create states without the guidance of Congress.\textsuperscript{142}

In December, 1849, the General Assembly of Deseret began its first regular session, and it met intermittently during January, February, and March of 1850. Special sessions were held in July, August, September, and October. The regular session began again in December of 1850 and ran well into February of 1851.\textsuperscript{143}

The legislature gave legal recognition to the militia that had been organized by the high council.\textsuperscript{144} An election law was passed.\textsuperscript{145} The University of Deseret was chartered.\textsuperscript{146} A judicial system was established.\textsuperscript{147} Revenue ordinances were passed.\textsuperscript{148} Provision was made for the construction and maintenance of public roads and bridges.\textsuperscript{149} Seven counties were created,\textsuperscript{150} and five cities were incorporated.\textsuperscript{151} The governor was given exclusive control over the manufacture and vending of "ardent spirits."\textsuperscript{152} An ordinance regulating vagrants was passed.\textsuperscript{153} The common
law of trespass was abrogated by the imposition of an affirmative duty upon land-owners to keep fences in good order. The General Assembly carried on the practice begun by the high council of granting to favored individuals, usually prominent Church members, special privileges such as timber and water rights, grazing privileges, mill sites, and franchises for toll roads and bridges.

A criminal code was enacted. The usual catalogue of crimes was compiled—murder, manslaughter, dueling, arson, breaking and entering, perjury, forgery, counterfeiting, cursing, disorderly conduct, trespassing, sexual offenses, abortion, assault and battery, robbery, kidnapping, fraud, unlawful detention, and bribing officials. This collection of criminal laws contains several notable features. Capital punishment, in those instances where it was prescribed, could take the form of shooting, hanging, or beheading; Utah law still allows a man convicted of a capital offense to choose between the first two alternatives. It is interesting to note that in almost all instances, the amount of the fine and length of imprisonment were left completely to the discretion of the court. However, in the case of adultery, stiff punishment was prescribed: up to five years imprisonment at hard labor, private damages, and a fine of as much as five thousand dollars. This set the stage for the equally harsh territorial statute on the same subject, which
later would figure in polygamy prosecutions. It also indicates that the Mormons did not think lightly of promiscuous sexual relations. Another unique feature was a carry-over from high council legislation: a person convicted of stealing or fraud was bound to restore four-fold, besides being subject to fine and imprisonment.

Two ordinances deserve special attention. The first incorporated the Perpetual Emigrating Fund Company, on September 14, 1850. This organization was created for the purpose of making loans to improverished Saints who could not finance their own way to Zion. The Perpetual Emigrating Fund would lend them the required amount of money, and once in Salt Lake valley, they would discharge the debt in the "Public Works," which was a series of mechanics shops on Temple Square, or on some other project. They would be provided with a house and the necessities of life from the Tithing Office until they became self-sufficient. Actually, this act merely gave legal recognition to operations that had been carried on since September 9, 1849, when the plan had been approved by the Church membership, in fulfillment of a promise made before leaving Nauvoo. The day after the ordinance was passed by the General Assembly, a conference of the Church elected Brigham Young president of the company and a number of other Church leaders as his assistants. As a financial aid, it was provided that stray animals which remained in the estray pound for over one month would be sold and the
proceeds given to the Perpetual Emigrating Fund. After helping many thousands cross the ocean and the plains, the Fund was dissolved by Congress in 1887.

The other notable enactment was the incorporation of the Church of Jesus Christ of Latter-day Saints. The charter provided for the election of a "trustee-in-trust" and up to twelve assistant trustees by the Church membership in conference. These trustees were authorized "to receive, hold, buy, sell, manage, use and control the real and personal property of said church." The Church was enjoined to keep records of marriages, births, and deaths for the inspection of its members. Section 3 contains an enumeration of the privileges and powers of the L.D.S. Church:

And be it further ordained, that, as said church holds the constitutional and original right, in common with all civil and religious communities, "to worship God according to the dictates of conscience;" to reverence communion agreeably to the principles of truth, and to solemnize marriage compatible with the revelations of Jesus Christ; for the security and full enjoyment of all blessings and privileges, embodied in the religion of Jesus Christ free to all; it is also declared, that said church does, and shall possess, and enjoy continually, the power and authority, in and of itself, to originate, make, pass, and establish rules regulations, ordinances, laws, customs, and criterions, for the good order, safety, government, convenience comfort, and control of said church, and for the punishment or forgiveness of all offences, relative to fellowship, according to church covenants: that the pursuit of bliss and the enjoyment of life, in every capacity of public association, and domestic happiness; temporal expansion; or spiritual increase upon the
earth, may not legally be questioned; provided, however, that each and every act, or practice so established or adopted for law, or custom, shall relate to solemnities, sacraments, ceremonies, consecrations, endowments, tithings, marriages, fellowship, or the religious duties of man to his Maker; inasmuch as the doctrines, principles, practices, or performances, support virtue, and increase morality, and are not inconsistent with, or repugnant to, the Constitution of the United States, or of this State, and are founded in the revelations of the Lord.

The obvious intention was to bestow the most extensive and unquestionable religious jurisdiction upon the Mormon Church. In making the grant of powers as omnibus as possible, the framers seem, at several points, to have not only overstepped the bounds of spiritual concerns, but to have overlooked the necessity of making sense. One can only wonder about the inclusion of some of the language. For example, it is not quite clear just exactly how a rule made by the Church could violate the federal constitution; and making the enjoyment of corporate privileges contingent upon observance of "revelations of the Lord" is a very strange exercise of legislative prerogative. This corporation was also abolished in 1887 by congressional enactment.167

The *Deseret News*, as early as August 24, 1850, took note of rumors that the compromise bill had been passed by Congress and that a territorial governor was on his way to Utah, but it expressed doubt that these were actual facts.168 It was not until November 30, 1850, that the newspaper was able to print a copy of the organic act.169 On December 2,
1850, Governor Er Brigham Young delivered his annual message to the General Assembly of Deseret, informing the legislators that "the government of Deseret will continue in all its departments until such time as it shall be superceded by an organization contemplated under the act of congress." By April 5, 1851, official steps had been taken, and the General Assembly formally voted its own dissolution. Among the resolutions passed at this time were:

That we cheerfully and cordially accept of the legislation of Congress in the Act to establish a Territorial Government for Utah.

That we welcome the Constitution of the United States--the legacy of our fathers--over this Territory.

The following September, the legislature of the Territory of Utah took over, and one of its first actions was to adopt those ordinances of Deseret not inconsistent with the organic act.

The "Ghost State of Deseret"

In many respects, the most fascinating part of the history of Deseret was yet to come. Deseret did not disappear with the arrival of territorial government, but persisted as a "ghost" state until 1870. The constitutional conventions that met in 1856, 1862, and 1872 refused to abandon the name "Deseret" and continued to propose it in applications for statehood.

In the same election in which the constitution of 1862 was approved, officials for the state so created were
also chosen. On April 14, 1862, the shadow legislature of Deseret met to hear the message of the shadow governor of Deseret. It then proceeded to pass "an act making the laws of the Territory of Utah in force in the State of Deseret," an action that was repeated annually for eight years.\footnote{174} The General Assembly periodically petitioned Congress for statehood, and on occasion, passed legislation of its own. The governor, of course, was Brigham Young, and usually, but not always, the General Assembly was composed of the same men who served in the territorial legislature.

In justification of the existence of this "ghost government," Brigham declared that the machinery of Deseret was to be kept oiled in anticipation of statehood. He advised the General Assembly:

\begin{quote}
. . . [I]t now devolves upon you to institute such further Legislation, if any be needed, as may be requisite to enable either yourselves or your constituents to promptly improve upon such action as Congress may take in the premises, with the hope that ere long we also will be privileged with those Constitutional franchises pertaining to a State Government so justly our due, and for which we have so long and so patiently waited and so loyally petitioned.\footnote{175}
\end{quote}

There is no record of a General Assembly session in 1871 or thereafter. One author has suggested that it faded out after 1870 because that year, the territorial legislature voted to hold biennial sessions instead of annual sessions. Since the territorial legislators did not convene in 1871, Deseret had no ready-made General Assembly. The continuity was broken.\footnote{176}
Morgan has made the following evaluation of this curious phase of Utah history:

... Regarded with the superior perspective of seventy years, the "ghost government" may seem ridiculous, perhaps pitiful. But one must respect the integrity of belief, the dignity of faith, of these legislators and officers of "Deseret." And if nothing more were to emerge from this chapter of Mormon history, the total lack of physical rebellion or rebellious thinking should be manifest. The State of Deseret was to come into existence not by violent means but by social processes under the American Constitution; and it was to triumph in the end, and bear to the world the Constitution, when all other governments should have failed. The State of Deseret alone would hold to "true principles," whether of government or directly of God. It was the form of the people's desire, the crystallization of their dream—a remarkable ideal, one of the most notable examples of applied idealism on record. 177

The Advent of "Carpetbagger Government"

On learning of the creation of Utah territory, the people submitted their nominations for the territorial offices. As might be expected, the list contained only Mormon names, and when they were not all accepted, there was a reaction of disappointment and anger. Gentile authority was not welcome. 178 Actually, President Fillmore had done comparatively well by the Saints. The Mormon wishes in regard to four of the seven major positions were respected. Brigham Young was appointed governor and Indian agent; Zerubbabel Snow, an Ohio Mormon, was named an associate justice; Seth M. Blair and Joseph Heywood were appointed United States attorney
and marshal, respectively. The Gentile officials were Secretary Broughton Harris, Chief Justice Lemuel Brandebury (Fillmore's first choice for this position, Joseph Buffington, had refused the commission), and Associate Justice Perry E. Brocchus. While having received their commissions in the fall of 1850, the outsiders did not occupy their posts until the summer of 1851. Chief Justice Brandebury arrived on June 7; Snow and Harris, accompanied by two Indian sub-agents, arrived on July 19; and Brocchus came on August 17.¹⁷⁹

Brigham Young took his oath of office on February 3, 1851,¹⁸⁰ and following the provisions of the organic act, proceeded to take a census, apportion the seats in the legislature, and set the first election for the first Monday in August.¹⁸¹ All this was done without benefit of the signature of the territorial secretary or the territorial seal, both of which were several months distant. Brigham cited this tardiness as a defense when he was criticized for the ad hoc procedure, and for not waiting for the proper forms and blanks.¹⁸² On August 8, he divided Utah into judicial districts. To the First District, composed of Salt Lake and Tooele counties, he assigned Chief Justice Brandebury; Weber and Davis counties formed the Second District, to which Judge Snow was assigned; Judge Brocchus was given the Third District, which embraced Utah, San Pete, and Iron counties.¹⁸³
The officials were welcomed warmly, but the honeymoon was short. The first public speech made by Judge Brocchus was construed as an insult to Mormon womanhood. The occasion was a Church conference in September, and Brigham took the opportunity to make some uncomplimentary remarks about the national government. Brocchus was then invited to address the congregation. Only a general account of what he said has survived, but according to reports, he began by expressing regret at the attitude of antipathy towards the United States and told the audience that the federal government was not responsible for their misfortunes; he expressed his gratitude at the friendly reception he had been given. Up to this point, his remarks were appropriate and well-chosen; but then he did an unthoughtful thing: he asked the ladies to be virtuous. Brigham, reflecting the insult felt by the entire congregation, retaliated with heated remarks. He insisted that the federal government was to blame for much of the suffering because of its failure to come to the aid of the Saints; he declared that Zachary Taylor was "dead and damned;" and he voiced his resentment of lectures on morals from "corrupt fellows" like Brocchus. The Judge later claimed that he had intended no offense, but he refused the invitation to apologize to the ladies of Utah.\(^{184}\) This refusal seems justified in view of Brigham's outburst, which was certainly more of an insult to Brocchus than the latter's remarks were to the ladies, because it was intentional.
Having started off on the wrong foot, the outsiders never managed to get in step. They lasted a little over a month. On September 28, Brandebury, Brocchus, Harris, and an Indian sub-agent departed for the States.\textsuperscript{185} However, they remained long enough to precipitate the first clash between the people of the territory and the federal courts. The territorial legislature, aware that the federal officers were planning to leave, passed a joint resolution on September 24, authorizing the United States marshal to seize all papers, money, and property pertaining to the office of territorial secretary.\textsuperscript{186} Harris refused to comply, and he applied to the territorial supreme court for an injunction forbidding the marshal to arrest him for his non-compliance. The injunction was granted, and Harris succeeded in keeping the territorial seal and funds which he took with him when he left.\textsuperscript{187}

The run-away officials, once they had reached the safety of the States, lost little time in sounding a general alarm about the state of affairs in Utah. This clamor prompted the House of Representatives to ask President Fillmore for a report on:

\textit{... the actual condition of things in the Territory of Utah, and especially to enable the House to ascertain whether the due execution of the laws of the United States has been resisted or obstructed; whether there has been any misapplication of public funds; and whether the personal rights of our citizens have been interfered with in any manner.}\textsuperscript{188}
Fillmore, in his second annual message, had mentioned the difficulties in organizing territorial government in Utah and promised to report to Congress on the matter at a later date. Accordingly, a report containing testimony of the "run-aways," rebuttals by Brigham Young and the delegate from Utah territory, and other documents was filed with the House of Representatives. Congress would become well-acquainted with the subject-matter.

And a new batch of federal officials was dispatched to the Territory of Utah.

Conclusions

Very little systematic attention has been given to the legal aspects of the pre-territorial Mormon experience. It was during this period that the peculiar Mormon attitudes toward law and government were crystallized. The seeds were planted in Missouri and Nauvoo, and when the Saints became independent of other authority, the fruits of their experience took concrete form. Identification of these attitudes is crucial to the identification of the real sources of conflict between the Mormons and the nation. This is the first and foremost reason why the attempt has been made here to chart, in such a detailed manner, Latter-day Saint legal history.

Secondly, not only must such attitudes be identified, but a concentrated effort must be made to understand them. To dismiss the Mormons simply as a "peculiar people" prevents making any sense at all out of what was a
significant juncture in the development of constitutional theory in this country. The Mormons require more searching analysis than do, say, the Jehovah's Witnesses. This is not because they contributed more importantly to judicial elaboration and explanation of the First Amendment provisions regarding religion. Certainly, such is not the case. There are other reasons. What prompted the Mormons to claim First Amendment protection is buried in history; this necessitates an excavation which is not necessary in regard to the matters of conscience invoked by such groups as the Witnesses, which have current impact and validity. Further, the Mormons were concentrated in one governmental unit, and they possessed a monopoly of political power by virtue of being an overwhelming majority. This is one of the few instances in the nation's history where a group claimed what are usually called minority rights, while still being in a position to control the operations of a level of government next in importance to the general government. Another such instance precipitated a civil war. The flag-salute cases, for example, seem to present simple, one-layer matters, when compared to the Supreme Court's task in the Mormon cases, each of which represented just one factor in a many-faceted situation. One at a time, the Mormon cases might seem single-dimensioned, but viewed as a group, they reflect the bulk of a much more complex situation.
The Latter-day Saints shared a great adventure, and in doing so, developed unique social patterns. True, they were peculiar, but they were many other things, too, and it is the aggregate that is important. This total picture has been obscured, and the Mormons themselves have contributed to the lack of understanding. When they were vilified because of their social and political practices, they claimed the absolute justification for their way of life: that every part of it was divinely inspired. The critics could not see the Mormons as a people for the handful of unacceptable behavioral traits. And the Mormons could not manage to get a good look at the objects of criticism because the Grand Plan blocked their view. Any effort which pretends to put this in proper focus must weigh as many of the pertinent factors as possible. Aside from leading what was construed to be a frontal attack on the sacred cow of monogamous marriage and failing to distinguish properly between church and state, the Mormons were a courageous, industrious, resourceful, constitution-loving, highly moral community—a truly remarkable people. These attributes condition their ability to present a "clear and present danger" and deserve notice in an evaluation of the governmental action taken to scotch their vices.

Third, a step-by-step review of the development of the politico-socio-religious system of the Mormons makes it possible to sort out the enduring elements of what was to become as much the object of national action against
them as polygamy. The policies and procedures of a theocracy have been charted. What were to become special bones of contention have been examined—such as the charter of the Church of Jesus Christ of Latter-day Saints and the Perpetual Emigrating Fund. An attempt has been made to explain the blind loyalty and obedience to the Mormon leaders, especially to the Latter-day Saint "Moses," Brigham Young; this discipline and loyalty would become a disabling thorn in the side of the federal government in its attempt to enforce anti-Mormon legislation.

Fourth, the steady contact between the national government and the Mormons revealed by the foregoing discussion is a pertinent consideration in an appraisal of the kind of action taken by the United States. The flow of memorials and petitions from and regarding the Mormons began at an early date. The first recognition given to these people by Congress was in 1840, and few sessions from that time until well after statehood went by without giving some attention to the "Mormon Problem." It became entangled with the most important policy question of the time—slavery. The President was kept well enough informed about their movements after they left Nauvoo to take good advantage of their position and destination in gathering an army for the war with Mexico. While later Presidents fell prey to false information about the situation in Utah, the fact remains that executive attention was drawn to it
repeatedly. From the beginning, the Saints appealed for either admission to the Union as a state or territorial government. They demonstrated neither an intent to rebel nor a desire to form a sovereign nation of their own. All this has a bearing upon any justification of the "conquered-province" treatment finally received by Utah at the hands of the federal government, and it is relevant commentary on federal action which was often marked by uncertainty and ignorance.
CHAPTER II

1In an address to the October conference, 1844, Brigham Young said, "Did Joseph ordain any man to take his place? He did. Who was it? It was Hyrum, but Hyrum fell a martyr before Joseph did." Times and Seasons, October 15, 1844, 683. Other evidence of Joseph's intent can be inferred from a variety of statements, commentary, and events.


3Young, et al., op. cit. supra note 2, 231-236, at 235.

4Id., n.236.

5Id., 239-242; Roberts, op. cit. supra note 2, 416-420.

6Young, et al., op. cit. supra note 2, 268-269; Roberts, op. cit. supra note 2, 425-428.

7For a discussion of the various splinter-groups that gathered around pretenders to Joseph's office see Roberts, op. cit. supra note 2, 429-445. There were also a few separatist movements after the Saints were established in Utah.

8Joseph Smith, History of the Church of Jesus Christ of Latter-day Saints: Period I, VI (6 vols.; Salt Lake City: Deseret News, 1902), 222. On August 6, 1842, Joseph had prophesied that the Saints would be driven to the Great Basin. Id., V, 85.

9Id., 318-319.

10Young, et al., op. cit. supra note 2, 402-404; at 403; Roberts, op. cit. supra note 2, 525-524. About this same time, a similar appeal was sent to the governors of all states, except Missouri and Illinois. Only Governor Thomas S. Drew, of Arkansas, replied, Id., 522-526.
11 Young, et al., op. cit. supra note 2, 439; Roberts, op. cit. supra note 2, 521.


13 E.g., Kane, op. cit. supra note 12, 35-64, passim; Bancroft, op. cit. supra note 12, 246-251. As soon as the Saints adjusted to the unexpected swell in their ranks, the organizational problems suffered in the early stages of the migration were remedied. The families were divided into "hundreds," then into "fifties," and further into "tens." Each group of ten wagons was placed under the command of a "captain;" a captain of "ten" was responsible to a captain of "fifty;" and the latter was, in turn, responsible to a captain of "hundred" or directly to a member of the high council. Each "fifty" had its guards, herdsmen, etc. The efficiency of this organization was one of the main reasons for the success of the Mormon trek across the plains, and it has attracted the compliments of many commentators. Roberts, op. cit. supra note 2, III, 52-54; Kane, op. cit. supra note 12, 34; Bancroft, op. cit. supra note 12, 267-268.

14 Roberts, op. cit. supra note 2, III, 50-51, 54-55, at 55; Andrew Love Neff, History of Utah 1847 to 1869 (Salt Lake City: Deseret News Press, 1940), 55-56.

15 Neff, op. cit. supra note 14, 50-51.

16 An interesting series of letters involving the Kanes, the Commissioner of Indian Affairs, the Secretary of War, and other officials, and dealing with this problem, is reprinted in The Private Papers and Diary of Thomas Leiper Kane, A Friend of the Mormons, ed. Oscar Osburn Winther (San Francisco: Gelber-Lillenthal, Inc., 1937), 37-46.

17 Roberts, op. cit. supra note 2, III, 67-75; Neff, op. cit. supra note 14, 59-64. Colonel Kane later acted as a special emissary to negotiate with the Mormons after President Buchanan sent federal troops to Utah during the so-called "Mormon War." Bancroft, op. cit. supra note 12, 524-528; James D. Richardson, Messages and Papers of the Presidents 1789-1897, V (10 vols.; Washington: Government Printing Office, 1897), 505.

18 Roberts, op. cit. supra note 2, III, 82-83.

19 The most valuable single source of information about the Battalion is Daniel Tyler, A Concise History of the Mormon Battalion in the Mexican War (1881); this is the
journal that Tyler, a sergeant in the Battalion, kept during the march. See also Hubert Howe Bancroft, History of California, VI (San Francisco: The History Company Publishers, 1888), 469-493; Roberts, op. cit. supra note 2, III, 105-121.


21. Supra note 16.

22. Roberts, op. cit. supra note 2, III, 148-149, at 149.

23. Id., 163-166. There were three persons classified as "colored" in the pioneer camp. Id., 187.

24. Id., 186.


26. Roberts, op. cit. supra note 2, III, 204-205.

27. Id., 217-218.

28. Id., 220-221; "Early Records of Utah," Bancroft Collection MS, Bancroft Library, University of California at Berkeley, 3 (This is composed of excerpts from Brigham Young's Manuscript History.) (Microfilm, Utah Historical Society).


33. Id., 88-90, at 90. The Saints had considered other locations. In 1847, English Saints had petitioned Queen Victoria and Parliament for permission to settle on Vancouver's Island. Oregon, Texas, and other parts of California (California was a rather vague concept at
that time) were considered. One by one, the alternatives were eliminated, often because of the fear of a possible clash with Gentile elements. Neff, op. cit. supra note 14, 73-74.

34 Roberts, op. cit. supra note 2, III, 268-269, at 269; Dale L. Morgan, "The State of Desert," Utah Historical Quarterly, VIII (January, 1940), 67-155, at 73. Morgan has made the observation that the Mormons have never been given sufficient credit for this significant contribution to water and property law in the west, and that the only reason that California can claim primary authorship of irrigation law is "the greater tendency of Californians to be litigious." Ibid.

35 Morgan, supra note 34, 68-69.

36 Roberts, op. cit. supra note 2, III, 279-282.

37 Id., 284; Bancroft, op. cit. supra note 12, 264. About one-third of the original Battalion did not complete the march to California. Neff, op. cit. supra note 14, 57.

38 Roberts, op. cit. supra note 2, III, 291, 301.

39 Id., 292-295; Bancroft, op. cit. supra note 12, 265-266.

40 Roberts, op. cit. supra note 2, III, 315-318. The Saints at Winter Quarters possessed authority to elect the First Presidency because, technically, the headquarters of the Church followed Brigham and the Twelve Apostles; wherever they were so also was the official body of the Church.

41 Id., 318-319. Descriptions of the trip across the plains can be found in William Clayton, William Clayton's Journal (Salt Lake City: The Deseret News, 1921), and Howard Egan, Pioneering the West, 1846 to 1878 (Salt Lake City: Shelton Publishing Company, 1917). For a discussion of the ill-fated handcart experiment of later years, see LeRoy R. Hafen and Ann W. Hafen, Handcarts to Zion (Glendale, California: The Arthur H. Clark Company, 1960); Bancroft, op. cit. supra note 12, 422-431; Roberts, op. cit. supra note 2, IV, 83-107.

42 Bancroft, op. cit. supra note 12, 284.

43 Roberts, op. cit. supra note 2, III, 338-339. A group of Saints on the eastern seaboard chartered a ship which left New York harbor on February 4, 1846, sailed around Cape Horn, and arrived in San Francisco Bay on July 29, 1846. Most of the passengers eventually made their way to Salt Lake valley. Id., 26-32, 36.
This census was taken by Brigham Young before the federal territorial officials arrived and was attacked as inaccurate. Bancroft, op. cit. supra note 12, 328.

Neff, op. cit. supra note 14, 108.

Id., 109.

Roberts, op. cit. supra note 2, III, 302-303. The first high council was organized in Kirtland, Ohio, on February 17, 1834. Doctrine and Covenants, 102. Each level of Church organization is headed by a plural executive—a bishop of a ward, a stake president, or, at the top, the president of the Church each has two counselors, whom he is free to chose. The power of the stake presidency is interlocked and shared with the stake high council. The same general kind of a relationship exists between the First Presidency and the Twelve Apostles. Outside this administrative organization are the various quorums of priesthood. For a discussion of L.D.S. government see G. Homer Durham, "Administrative Organization of the Mormon Church," Political Science Quarterly, LVII (March, 1942), 51-71.


Id., 36.

Id., 35, 36.

Id., 21, 45.

Id., 22.

While the original ordinances of the high council are held by the L.D.S. Church Historian's Office and are not available for reference anymore, they have been reprinted in an appendix to Morgan, supra note 34, 234-239. The writer will depend mainly upon this compilation in citing authority for the particular ordinances discussed; however, it should be noted that references to most of these, as well as other council action, may be found in other sources, e.g., "Early Records of Utah," supra note 28.

Morgan, supra note 34, 234:

Any person convicted of violence on person or property, threatening, or riot, shall be sentenced to receive a certain number of lashes on the bare back, not exceeding 39, or be fined in any sum not
less than five dollars, nor exceeding five hundred dollars, and shall give security for his good behavior, at the discretion of the judge or judges.

56 Id., 235:

Any person or persons convicted of the crime of Adultery or Fornication, shall be sentenced to receive a certain number of lashes on the bare back, not exceeding 39, and be fined in a sum not exceeding one thousand dollars, at the discretion of the judge or judges.

57 Ibid.:

Any person or persons convicted of any of said crimes ["Stealing, Robbing, House-breaking or maliciously causing the destruction by fire of any property"] shall be sentenced to receive a number of lashes on the bare back, not exceeding 39, and to restore four fold, and to give security for their good behavior in the future at the discretion of the judge or judges.


59 Morgan, supra note 34, 235.

60 "Early Records of Utah," supra note 28, 29.

61 Id., 44.

62 Morgan, supra note 34, 235.

63 Id., 235-239, passim.

64 "Early Records of Utah," supra note 28, 50, 78.

65 Morgan, supra note 34, 234.

66 "Early Records of Utah," supra note 28, passim, e.g., 45, 48, 69, 75.

67 Id., passim, e.g., 67.

68 Ieland Hargrave Creer, Utah and the Nation (Seattle: University of Washington Press, 1929), 61; Bancroft, op. cit. supra note 12, 272; Neff, op. cit. supra note 14, 111; Romney, op. cit. supra note 31, 91. Nebeker told of
serving as a "public complainer" and prosecuting cases before the high council. Supra note 58.

69Morgan, supra note 34, 72.

70Id., 71, 78.

71"Early Records of Utah," supra note 28, 42.

72Id., 42 et seq., passim. The Council probably retained a considerable portion of its power until the end of 1849, and in that year, it passed more legislation than the General Assembly of Deseret.

73Morgan, supra note 34, 234, 236.


75Morgan, supra note 34, 77-78.

76E.g., "Early Records of Utah," supra note 28, 37.

77Neff, op. cit. supra note 14, 111.

78Edward W. Tullidge, History of Salt Lake City (Salt Lake City: Star Printing Company, 1886), 57-58.

79E.g., Creer, op. cit. supra note 68, 66. In an address of July 31, 1859, Brigham Young declared:

> I believe in a true republican theocracy, and also in a true democratic theocracy, as the term democratic is now used; for they are to me, in their present use, convertible terms.

> What do I understand by a theocratic government? One in which all laws are enacted and executed in righteousness, and whose officers possess that power which proceedeth from the Almighty. That is the kind of government I allude to when I speak of a theocratic government, or the kingdom of God upon the earth. It is, in short, the eternal powers of the Gods.


80Morgan, supra note 34, 70-71.

81Doctrine and Covenants, 26:2 (revelation of July, 1830); "And all things shall be done by common consent in the church, by much prayer and faith, for all things you
shall receive by faith." Id., 28:13 (revelation of September, 1830): "For all things must be done in order, and by common consent in the church, by the prayer of faith."

82 Bancroft, op. cit. supra note 12, 272; Creer, op. cit. supra note 68, 62.

83 Morgan, supra note 34, 71.

84 Ibid.

85 Creer, op. cit. supra note 68, 59.

86 This sort of mentality during the Iowa period has been noted by Therald M. Jenson, "Mormon Theory of Church and State" (unpublished Ph.D. dissertation, University of Chicago, 1938), 47 (Microfilm, Utah Historical Society). Jenson also maintains that the "Mormon Church in assuming theocratic jurisdiction was operating in default of rather than in defiance of the civil government." Id., at 49. This sort of comment, very common among Mormon commentators, ignores the possibility that the Mormons might have been political men as well as religious men, that civil government might have existed among them as well as being imposed from the outside.

87 Morgan, supra note 34, 71.

88 Bancroft, op. cit. supra note 19, 32-33.

89 Id., 50-51.

90 Bancroft, op. cit. supra note 12, 301-304, at 304.


93 Neff, op. cit. supra note 14, 134-146; Bancroft, op. cit. supra note 12, 297.


95 Neff, op. cit. supra note 14, 112. Federal land laws were not enforced in Utah until a land office was established there in 1869. For a discussion of this subject see George C. Rollins, "Land Policies of the United States as Applied to Utah to 1910," Utah Historical
Quarterly, XX (July, 1952), 240-251. Rollins points out that for twenty-two years, "the Mormons held the land by squatter rights subject to the allotment plan set up by the Church." Id., at 244.

96 Morgan, supra note 34, 83-84. The municipal powers assumed by the High council in December of 1847 were expressly designated as "provisional." Early Records of Utah, supra note 28, 19.

97 Morgan, supra note 34, 79.


100 Morgan, supra note 34, 81-82.

101 Early Records of Utah, supra note 28, 44.

102 Id., 51-52, 65; Neff, op. cit. supra note 14, 115-116.

103 Preamble to the constitution, which can be found in the appendix to Laws and Ordinances of the State of Deseret (Utah). Compilation 1851 (Reprint: Salt Lake City: Shepard Book Company, 1919). "A copy of the oldest compilation of laws made by Anglo-Saxons west of the Missouri River."

104 Ibid. The preamble specified the boundaries in the following terms:

... Commencing at the 330, north latitude where it crosses the 1060, longitude, west of Greenwich, thence running south and west to the northern boundary of Mexico; thence west to, and down the main channel of the Gila river, (or the northern line of Mexico,) and on the northern boundary of Lower California to the Pacific ocean; then along the coast, northwesterly to the 1180, 30' of west longitude; thence North to where said line intersects the dividing ridge of the Sierra Nevada mountains; thence north along the summit of the Sierra Nevada mountains to the dividing range of mountains, that separate the waters flowing into the Columbia River from the waters running into the Great Basin; thence easterly along the dividing range of mountains that separate said waters flowing into the Columbia river on the north, from the waters flowing into the Great Basin on the south, to the summit of the Wind River chain of mountains; thence
southeast and south by the dividing range of mountains that separate the waters flowing into the Gulf of Mexico, from the waters flowing into the Gulf of California, to the place of beginning. . . .

105 Neff, op. cit. supra note 14, 117.
107 Note 103, supra.
108 Art. VIII, Sec. 3.
109 Art. V, Sec. 10.
111 Neff, op. cit. supra note 14, 120-121.
112 Id., 121.
113 Id., 119; Morgan, supra note 34, 86-87, n.88; Roberts, op. cit. supra note 2, III, 427. In January, 1850, Brigham met in council with the Twelve and nominated a second complement of supreme court justices to replace those who were incorrectly selected. Morgan, supra note 34, n.87; Roberts, op. cit. supra note 2, III, nn.427-428.
114 Neff, op. cit. supra note 14, 119.
115 Morgan, supra note 34, 87-88, at 87.
116 Id., 71.
117 Id., 84-85.
119 "Early Records of Utah," supra note 28, 93.
121 Id., 212.
122 Id., 229.
123 Id., 92.
124 Id., 413.
125 Id., 524.
126. Id., 633.
127. Id., 1415.
128. Id., 1413-1416, 1419-1423.
132. 9 Stat. 452 (1850).
133. 9 Stat. 446, 453 (1850).
134. 9 Stat. 467 (1850).
135. 9 Stat. 462 (1850).
137. 9 Stat. 453 (1850). The boundaries of the new territory were considerably more modest than those proposed by the Saints. There were later reductions in favor of Colorado, Nevada, and Wyoming.
138. Roberts, op. cit. supra note 2, III, 437-439; Morgan, supra note 34, 92-93.
139. Quoted in Morgan, supra note 34, 93.
140. Bancroft, op. cit. supra note 19, 284-305.
141. Id., 325-326.
142. There have been two other well-developed but unsuccessful attempts at the creation of states without the blessing of Congress. Settlers in the Willamette valley in Oregon organized a provisional government at Champoeg in 1843, and an organic act was approved by the people in 1845. Joseph Shafer, A History of the Pacific Northwest (New York: The Macmillan Company, 1943), 161-172. Having been neglected by North Carolina, inhabitants of Wautaga settlements in 1784 held a convention and drew up a constitution for a new state called Franklin. It was plagued with internal dissension, however, and North Carolina reasserted her jurisdiction. Franklin was included in the territory admitted to the Union as Tennessee in 1796. Samuel Eliot Morison and Henry Steele Commager, The Growth
of the American Republic, I (2 vols.; New York: Oxford University Press, 1950), 252-253. The efforts of Texas and California at self-creation were, of course, successful.

143 Neff, op. cit. supra note 14, 123. There is no single compilation containing all of the enactments of the legislature of Deseret, and consequently, various materials must be consulted. There are two basic sources for the ordinances: the 1851 compilation cited supra note 103, hereafter referred to as Laws and Ordinances of Deseret; and a compilation in the possession of the L.D.S. Church Historian's Office, which does not have a title-page, but which is usually cited as Ordinances of General Assembly of State of Deseret (Richards; Great-Salt Lake City, 1850), hereafter referred to as Ordinances of General Assembly (Microfilm, Utah Historical Society). While these two compilations duplicate each other to a great extent, several ordinances can be found in only one. Other available sources for the ordinances include the Deseret News. An unofficial collection of these ordinances can be found in Morgan, supra note 34, 156-233, Appendix A.

144 Ordinances of General Assembly, supra note 143, 12, 13, 15; Laws and Ordinances of Deseret, supra note 103, 32.

145 Ordinances of General Assembly, supra note 143, 9.

146 Ordinances of General Assembly, supra note 143, 30.

147 Ordinances of General Assembly, supra note 143, 17; Laws and Ordinances of Deseret, supra note 103, 22.

148 Ordinances of General Assembly, supra note 143, 23; Laws and Ordinances of Deseret, supra note 103, 5.

149 Ordinances of General Assembly, supra note 143, 26, 28; Laws and Ordinances of Deseret, supra note 103, 5, 20.

150 Ordinances of General Assembly, supra note 143, 28 (Weber, Great Salt Lake, Utah, San Pete, Tuilla, Little Salt Lake); Deseret News, October 19, 1850, (Davis).

151 Laws and Ordinances of Deseret, supra note 103, 8 (Great Salt Lake City), 34 (Ogden), 42 (Manti), 50 (Provo), 58 (Parowan). As Morgan has observed, the G.S.L.C. charter was "almost a verbatim copy of that for Nauvoo." Morgan, supra note 34, 108. For a section-by-section comparison of the two charters see Id., n.107. The other charters were almost identical to that of G.S.L.C.

152 Laws and Ordinances of Deseret, supra note 103, 73.

153 Laws and Ordinances of Deseret, supra note 103, 74. Section 9 extended the definition of vagrants to "all
loafers who hang about the corners of streets, court houses, or any other public place, who have no business, whether they have property or not." Brigham Young had no use for idle hands.

154 Laws and Ordinances of Deseret, supra note 103, 71.

155 Laws and Ordinances of Deseret, supra note 103, 25, Sec. 10.

156 Utah Code Ann. Sec. 77-36-16 (1953).

157 Laws and Ordinances of Deseret, supra note 103, 25, Sec. 24. As Romney has pointed out, "unchastity, next to the taking of human life, is considered by the Church to be the most serious in the whole category of sins." Op. cit. supra, note 31, 174. According to a kind of Mormon common law, a man found guilty of seducing a Mormon's wife was subject to the death penalty. Bancroft, op. cit. supra note 12, 448. During the first murder trial held in Utah, October, 1851, in which the defendant was accused of murdering a man who had seduced his wife, counsel for the defense declared:

... [I]n this Territory it is a principle of mountain common law, that no man can seduce the wife of another without endangering his own life. ... What is natural justice with this people? Does a civil suit for damages answer the purpose, not with an isolated individual, but with this whole community? No! it does not! The principle, the only one that beats and throbs through the heart of the entire inhabitants of this Territory, is simply this: The man who seduces his neighbor's wife must die, and her nearest relative must kill him!


160 Laws and Ordinances of Deseret, supra note 103, 25, Sec. 28, 33.
This Company, under the name and style aforesaid, shall have power to sue, and be sued, plead, and be impleaded, defend, and be defended, in all Courts of law or equity, and in all actions whatsoever; to purchase, receive, and hold property, real and personal; to receive, either by donation on deposit, or otherwise, money, gold dust, grain, horses, mules, cows, oxen, sheep, young stock of all kinds, as well as any and every kind of valuables, or property, whatsoever; to emit bills of credit and exchange; to sell, lease, convey, or dispose of property, real and personal; and finally to do and perform any and all such acts as shall be necessary and proper for the interest, protection, convenience or benefit of said Company.

Romney, op. cit. supra note 31, 190-192; Roberts, op. cit. supra note 2, III, 383-384; Benjamin G. Ferris, Utah and the Mormons (New York: Harper and Brothers, Publishers, 1856), 163-165. Ferris, a one-time secretary of the Territory of Utah, claimed that the system reduced the emigrants to a state of servitude. For a copy of the contract signed by the emigrant see Roberts, op. cit. supra note 2, III, 409-410.

The high council had also made such a provision. Morgan, supra note 34, 238.

The ambitious Mormon missionary system provided great numbers of candidates for P.E.F. loans. By the end of 1852, Mormon missionaries had extended proselyting activities to twenty-three countries all over the world. Whitney, op. cit. supra note 159, III, 112-114.

Laws and Ordinances of Deseret, supra note 103, 66.

Chapters IV and VIII, infra.

Deseret News, August 24, 1850, p. 84.

Id., November 30, 1850, pp. 161-164.

Id., January 11, 1851, pp. 185-186, at 185.
Id., April 8, 1851, p. 229. The legislators and officials of Deseret served without pay; only the salary of the governor was mentioned in the constitution. Morgan, supra note 34, 87.

Utah Laws 1851, at 205.

Morgan, supra note 34, 132-149.


Morgan, supra note 34, 149. While maintaining that the church councils proper were omnipotent, James B. Clark, professor of religion at the Brigham Young University, has claimed a considerable potency for the "ghost government:"

... In reality the federally established territorial government of Utah was the de jure government; the State of Deseret was the de facto government; and the Council of Fifty or the General Council was the policy-making body for the civil government of Utah from 1848 to 1870, if not later.


Morgan, supra note 34, 140.

Roberts, op. cit. supra note 2, III, 509-514.

Id., 501-502.

Morgan, supra note 34, 131.

Deseret News, July 12, 1851, p. 293.

Appendix to the Congressional Globe. 32nd Cong., 1st Sess. 87 (1851-1852); Roberts, op. cit. supra note 2, III, 529-530.

Deseret News, August 19, 1851, p. 309.

Roberts, op. cit. supra note 2, III, 520-526; Bancroft, op. cit. supra note 12, 457-458. Ferris has maintained that Brigham was prepared to take offense at any remarks Brocchus might have made. Ferris, op. cit. supra note 162, 344.
185 Roberts, op. cit. supra note 2, III, 534.

186 Utah Laws 1851, at 204.

187 Roberts, op. cit. supra note 2, III, 532-533; Bancroft, op. cit. supra note 12, 458-461. The seal, documents, and funds were turned over to the proper authorities.

188 Appendix to the Congressional Globe, op. cit. supra note 182, 84.

189 Richardson, op. cit. supra note 17, V, 127.

190 Appendix to the Congressional Globe, op. cit. supra note 182, 84-93.
CHAPTER III

JUDICIARY IN TRIPlicate

With the explosive beginning that has been described, Utah launched a forty-five-year open house for unhappy federal judges. This study can now take a more precise focus. The areas of conflict multiplied and mushroomed from the first altercation to the events leading to statehood. This study will concentrate on one area: the judicial activity prompted by congressional action to eliminate polygamy. While this is a task of no mean proportions, still, it is the writer's deep regret that she cannot weave a whole cloth. To ignore any facet of the developments from 1851 to 1896 is to understand less well the so-called "Mormon Problem."

Many of the specific peculiarities of Mormon Utah with respect to legal institutions and procedures will become evident in the discussion of the polygamy prosecutions. However, to begin with, attention should be given to the climate in which the federal judges and officers of the courts were forced to perform their duties.

Dale Morgan has observed that Utah differed radically from other frontier situations. The average westward-
moving pioneer took with him concepts of personal freedom, individual initiative, self-reliance, and natural justice. In most frontier states at the beginning, the pioneer population was heterogeneous, and there were no ideas of social order and political authority. The Latter-day Saints, on the other hand, were a thoroughly-integrated community. They shared a religious heritage which had only been strengthened by years of hardship and persecution inflicted upon them because of their religious beliefs and practices. They were, every one, dedicated to a common objective. The goal of the individual and that of the group were one and the same. They had acquired a healthy respect for social organization, discipline, and obedience to authority.\(^1\)

Their conception of law was not as a protector of private rights nor as a regulator of civil society. To them, individual rights were subordinate to the larger group goal, and the establishment of order was already an accomplished fact among the Saints. Law was something to be used to build the "Kingdom of God on Earth," and it was properly formulated and applied by the agency through which the objective was to be realized: the Church. The traditional classifications of law had no meaning. Rules were of one fabric and acquired legitimacy only when they were conducive to achieving the goal.
Under the Organic Act

Section 9 of the act creating the Territory of Utah gave the judicial power to a supreme court, district courts, probate courts, and justices of the peace. The territorial supreme court was composed of a chief justice and two associate justices, each of whom also sat as a district judge in one of the three districts into which the territory was divided. The justices were appointed by the President and confirmed by the Senate for terms of four years. The organic act provided that "the jurisdiction of the several courts herein provided for, both appellate and original, and that of the probate courts, and of justices of the peace, shall be as limited by law."

The only restrictions placed upon the territorial legislature in regulating jurisdiction were, first, that the justice courts could not hear controversies involving amounts of more than one hundred dollars or cases involving boundaries or titles to land, and second, "that the said supreme and district courts respectively shall possess chancery as well as common law jurisdiction."

The right of appeal from any decision of the district courts to the territorial supreme court was preserved, again in the manner to be prescribed by law. Writs of error and appeals from the final decisions of the territorial supreme court could be taken to the United States Supreme Court under the same conditions that such appeals could be taken from the circuit and district courts of the
United States. Congress prescribed that in most cases, an appeal would not lie to the highest court of the land unless the amount in controversy exceeded one thousand dollars. This was not necessary, however, in habeas corpus cases involving personal freedom, and moreover, such appeals could be taken directly to the United States Supreme Court from the decisions of the individual justices. The district courts were given the same jurisdiction in all cases arising under the Constitution and laws of the United States as was vested in the circuit and district courts of the United States. The supreme and district courts of the territory were given the same power to issue writs of habeas corpus which the judges of the United States in the District of Columbia possessed.

In Section 10, the organic act established the positions of United States attorney and United States marshal for the territory. Both were to be appointed in the same manner that the judges were appointed and for terms of the same duration. The United States attorney was authorized to act as the legal officer for the Territory of Utah; his precise duties were not indicated. The duty of the United States marshal was to "execute all processes issuing from the said courts when exercising their jurisdiction as circuit and district courts of the United States."
Under Territorial Laws

The actions of the first group of judicial appointees confirmed the worst suspicions of the Mormons. Judges, as a species, had been numbered among their enemies almost from the beginning, and the relationship obviously was not becoming any more congenial. While they were perfectly satisfied with the justice dispensed by their own ecclesiastical courts, the realization that they were saddled with civil jurisprudence forced them to devise a method of making it serve their purposes. As has been noted, the organic act left the territorial legislature relatively free to regulate the workings of the court system it outlined. The first territorial assembly, the roster of which read like a "Who's Who in the Church," wasted no time in making the necessary adaptations.

A judiciary act of February 4, 1852,³ provided for a probate judge in every county to be elected for a four-year term by a joint vote of the legislative assembly. The probate courts were given the usual jurisdiction in matters of wills, estates, and guardianships, but the statute awarded an additional bonus:

The several Probate Courts in their respective Counties, have power to exercise original jurisdiction both civil and criminal, and as well in Chancery as at Common Law, when not prohibited by Legislative enactment; and they shall be governed in all respects by the same general rules and regulations as regards practice as the District Courts.⁴

On March 6, jurisdiction of divorce cases was added to this already startling array of judicial powers.⁵ These
actions equipped the probate courts with jurisdiction concurrent with that of the district courts, except in cases arising under the Constitution and laws of the United States, and served to limit substantially the effectiveness of the latter.

An examination of the probate court records reveals the variety of cases heard. For example, from 1854 to 1876, the probate court of Iron county handled cases dealing with horse-stealing, impersonating a justice of the peace, seducing a woman from her husband, lewdness and cohabitation, divorce, replevin, settlement of estates, suit for wages, citizenship, murder, larceny, breach of contract, and suit for judgment on a note.6

In defense of this irregular enhancement of the probate courts, the Mormon law-makers reminded critics that two of the three district courts were judgeless, due to the unceremonious abdication of Brocchus and Brandebury, which placed an undue burden upon the remaining judge. In later years, they justified continuing the arrangement on the ground that the federal judges were absent from the territory a good deal of the time.7 There was a more philosophical justification, however. They asserted that this was part of the right of an American community to "exercise the largest possible measure of home rule consistent with the several provisions of the Constitution bearing upon the distribution and reservation of political power as related to government."8 Nowhere is the desire
of the Mormons to govern themselves seen so clearly as in matters involving the judiciary during the territorial period. A striking similarity in motives is evident between the wide probate jurisdiction in Utah and the extensive *habeas corpus* jurisdiction assumed by the Nauvoo city court during Mormon occupation.

The federal judges did not sit quietly under this assault on their authority. In some instances, they held the grant of such jurisdiction to the probate courts invalid, and in 1874, the situation came to the attention of the United States Supreme Court in the case of *Ferris v. Higley*. Higley brought suit against Ferris in the probate court of Salt Lake county and obtained judgment on a one thousand dollar note. When the case was appealed, the district court reversed the decision on the ground that the probate courts had no jurisdiction in such matters. The territorial supreme court upheld this judgment, and the case was taken to the United States Supreme Court on a writ of error.

The decision of the Utah supreme court was affirmed. Justice Miller, for the Court, conceded that the territorial legislature had power over all rightful subjects of legislation not inconsistent with the United States Constitution or the organic act, that regulating the jurisdiction of the probate courts was a rightful subject of legislation, and that the law did not violate the Constitution. However, the provision in the organic act that
the probate courts' jurisdiction was to be "as limited by law" did not mean that the determination of the territorial legislature was the exclusive measure of such jurisdiction. The proper role of the probate courts also "must be sought in the general nature and jurisdiction of such courts as they are known in the history of the English law and in the jurisprudence of this country:"

... It is sufficient to say that through it all, to the present hour, it has been the almost uniform rule among the people, who make the common law of England the basis of their judicial system, to have a distinct tribunal for the establishment of wills and the administration of the estates of men dying either with or without wills. These tribunals have been variously called Prerogative Courts, Probate Courts, Surrogates, Orphan's Courts, &c. To the functions more directly appertaining to wills and the administration of estates, have occasionally been added the guardianship of infants and control of their property, the allotment of dower, and perhaps other powers related more or less to the same general subject. Such courts are not in their mode of proceeding governed by the rules of the common law. They are without juries and have no special system of pleading. They may or may not have clerks, sheriffs, or other analogous officers. They were not in England considered originally as courts of record; and have never, in either that country or this, been made courts of general jurisdiction, unless the attempt to do so in this case be successful."

The surrounding provisions of the organic act reinforced this view. The supreme and district courts were specifically given common law and chancery jurisdiction. This jurisdiction, said Justice Miller, was very complete and well-understood; it included every matter that could be litigated in a court of justice, criminal or civil.
The act provided that cases might be appealed from the
district courts to the supreme court, but no provision
was made for appeals from the probate courts to the supreme
court. Such appellate review certainly would have been
included, if the probate courts were intended to have
jurisdiction like that of the district courts. It was
very unlikely that Congress, after having created the
supreme and district courts by federal authority and
authorizing the payment of judges' salaries from the
national treasury, intended to allow the territorial
legislature to bestow the same kind of jurisdiction upon
courts of its own creation and thus evade and obstruct
the former in the exercise of their powers.

Since an act of the territorial legislature, said
the Court, is void if it is inconsistent with the organic
act:

... We are of the opinion that the one
which we have been considering is incon-
sistent with the general scope and spirit
of that act in defining the courts of the
Territory, and in the distribution of ju-
dicial power amongst them, inconsistent
with the nature and purpose of a Probate
Court as authorized by that act, and incon-
sistent with the clause which confers upon
the Supreme Court and District Courts general
jurisdiction in chancery as well as common
law. ... 12

Not only did the Mormons move to disarm the federal
judges, but by an act of March 3, 1852, 13 they trimmed
the power of the United States attorney and marshal by
providing territorial counterparts, to be elected by a
joint vote of the territorial assembly for four-year
terms. The duty of the attorney general of the territory was:

... to keep his office at the seat of Government, to attend to all legal business on the part of the Territory, before the courts, where the Territory is a party, and prosecute individuals accused of crimes in the Judicial District in which he keeps his office, in cases arising under the laws of the Territory, and such other duties as pertain to his office.14

Territorial district attorneys were provided to perform the same function in the other judicial districts. Furthermore, the probate judges were empowered to appoint a prosecuting attorney in each county to attend to legal business in the county where the territory was a party and to prosecute crimes before the probate courts. The territorial marshal, and the deputies which he was authorized to appoint, were given power to:

... execute all orders, or processes of the Supreme or District Court, in all cases arising under the laws of the Territory, and such other duties as the executive may direct, or may be required by law pertaining to the duties of his office.15

The respective jurisdictions of the territorial attorney and marshal vis-a-vis the United States attorney and marshal also came before the courts. In May, 1870, Chief Justice Charles C. Wilson, sitting as a district judge, denied the right of the territorial marshal to exercise his office in the district court.16 This decision was upheld by the territorial supreme court at the same time it declared that the territorial attorney had no power to prosecute a crime under territorial law in
the district courts. In the latter case, a quo warranto proceeding was brought by the federal government on the relation of C.H. Hempstead, United States attorney for Utah, against Zerubabbel Snow, territorial attorney and former supreme court justice. The Utah supreme court ruled that since the district courts were courts of the United States, the United States attorney was the proper officer to prosecute cases before them. The act authorizing a territorial attorney and marshal to act in such situations was declared invalid. The case went to the United States Supreme Court on writ of error. The Court, in Snow v. United States, reversed the judgment.

Justice Bradley admitted that the duties of the United States attorney were not prescribed by the organic act. However, the extent of his power could be implied from other provisions. The district courts were specifically guaranteed the same jurisdiction as the United States district and circuit courts, and the United States marshal in Utah was authorized to execute process from the courts when they were exercising that jurisdiction. This indicates an intent to keep this business of the district courts separate from their business as ordinary courts of the territory. These provisions gave countenance to the action of the territorial assembly in creating a separate attorney and marshal to attend the courts when they were sitting on territorial matters. Justice Bradley expressed some reservation on constitutional theory grounds:
It must be confessed that this practice exhibits somewhat of an anomaly. Strictly speaking, there is no sovereignty in a Territory of the United States but that of the United States itself. Crimes committed therein are committed against the government and dignity of the United States. It would seem that indictments and writs should regularly be in the name of the United States, and that the attorney of the United States was the proper officer to prosecute all offenses. . . .19

However, "the practice has been otherwise, not only in Utah, but in other Territories organized upon the same type."20 The question, then, was whether this practice was inconsistent with the organic act. He could not find any such inconsistency. The legislative power granted to the territorial assembly was very broad. The position of the United States marshal could be considered as presenting an analogous situation, and could serve as a measure of the prerogatives of the United States attorney. The idea is consistent with the division of the business of the courts into "general government" and "territorial" categories which is implicit in the act creating the territory. In adding this to the weight of long practice, the Court concluded that there was no need to declare a conflict between the territorial law and the organic act.

The empanelling of juries also attracted the attention of the Utah legislature. An act of January 21, 1859,21 directed the county court, the governing body of that unit of government, to draw up annually from the assessment rolls a list of at least fifty men to serve as jurors during the year. The law provided that thirty
days before the beginning of the session of the district
court, the clerk of that court should issue a writ to
the territorial marshal or the sheriff, or a deputy of
either, directing him to summon grand and, if necessary,
petit jurors. The officer then was commanded to proceed
to the office of the county clerk and draw by lot the re-
quired number of names. There was no provision for the
issuing of open venire; if, during the term of court, the
list was exhausted, it remained to the county court to
select additional names. Needless to say, this placed
the selection of juries in the hands of the Mormons and
provided another ground for complaint by the federal of-
ficials. Mormon grand juries would not usually indict,
and if, by some fluke, a true bill was obtained, Mormon
petit juries would not convict.

The jury law was at issue in the case of Clinton v.
Englebrecht, \(^{22}\) decided by the United States Supreme Court
in 1872. Paul Englebrecht, one of the owners of a princi-
pally wholesale liquor business in Salt Lake City, refused
to take out the required retail liquor license. After he
had been arrested three times for selling liquor without
the license, the police raided his establishment and de-
stroyed twenty-two thousand dollars worth of stock. He
brought an action for malicious destruction of property
against the officers responsible, under a territorial
statute which allowed treble damages in such situations.
R.N. Baskin, his attorney, who had served as the United
States attorney for a brief time, viewed the case as a means of attacking the Mormon control of judicial business in the territory. First, the suit was brought before the district court, which was a direct challenge to the probate court; and second, it was the first instance in which the federal judges "packed" a jury in Utah. Instead of following the territorial law prescribing the mode of obtaining jurors, the district court judge issued an open venire for both grand and petit juries. The United States marshal then summoned the jury panels from the main body of the population of the county, at his own discretion. A verdict was returned for the plaintiffs; the territorial supreme court affirmed; and the case went to the United States Supreme Court on a writ of error.

The Court ruled that the territorial jury law was binding upon the district courts, and that the defendants' challenge to the array of jurors should have been allowed. Chief Justice Chase pointed out that the United States' policy toward its territories had always been based upon the principle that the local residents should possess as much power of self-government as possible under the ultimate supremacy of the federal government. Every territory from the time of the Ordinance of 1787 to the organic act of Montana in 1864 had passed legislation on the subject. None had been annulled by Congress, and since its right to disapprove was specifically reserved, tacit approval could be implied. The organic act of Utah was silent on the
subject of juries, and since this was a rightful subject of legislation, it was left to the territorial assembly. The Utah law had been on the statute books since 1859, which was sufficient time to allow for the expression of congressional disapproval. The Utah judges had no basis for concluding that they could utilize the federal jury law. The territorial courts were not courts of the United States and were not governed by the same regulations that applied to the latter. In the words of Chief Justice Chase:

There is no Supreme Court of the United States, nor is there any District Court of the United States, in the sense of the Constitution, in the Territory of Utah. The judges are not appointed for the same terms, nor is the jurisdiction which they exercise part of the judicial power conferred by the Constitution on the General government. The courts are the legislative courts of the Territory, created in virtue of the clause which authorizes Congress to make all needful rules and regulations respecting the Territories belonging to the United States.23

The trial court judge erred in summoning jurors on an open venire. The territorial act should have been followed, and since it did not authorize open venire, the jury was illegally constituted.

The Englebrecht decision was a serious set-back for the federal judges in Utah, who were certain that they had hit upon a way to end Mormon control of juries.24 The impact of Englebrecht upon attempts to punish polygamists will be treated in a later chapter.

The problems caused by the probate courts, the territorial attorney and marshal, and the jury law were
all finally solved by Congress with the Poland act of June 23, 1874. The district courts were given exclusive original jurisdiction in chancery and in suits at law where the amount in controversy was over three hundred dollars and in cases involving the title to land. The jurisdictional limit of the justice courts was extended to three hundred dollars. The probate courts were stripped of all criminal jurisdiction and were limited to matters involving wills, estates, and guardianships, save that they shared jurisdiction of divorce cases with the district courts. However, it was provided that a defendant in a divorce proceeding before a probate judge could have the case removed to a district court. The act also validated judgments and decrees of the probate courts which had been executed and upon which the time limit for appeal had expired. Finally, it was provided that where the district courts heard appeals from judgments of the probate courts, the cases were to be heard de novo.

The United States attorney in Utah was directed "to attend all the courts of record having jurisdiction of offenses as well under the laws of said Territory as of the United States, and perform the duties of prosecuting officer in all criminal cases arising in said courts." This preempted the field of criminal prosecution and eliminated the territorial attorney. The United States marshal was assigned to execute all processes, writs, orders, judgments, and decrees of the district and supreme courts.
Thus, the career of the territorial marshal was ended.

The Poland act also provided for the preparation of jury lists in each county by the probate judge and the clerk of the district court, and for the drawing and summoning of jurors by the United States marshal or his deputies. It took the selection of juries out of the hands of the Mormon county court, and in effect, provided that the jury list would be composed of equal numbers of Mormons and Gentiles. 27

The territorial judiciary act of February 4, 1852, contained two other noteworthy provisions. In Section 11, it provided that:

By the consent of the Court and the parties, any person may be selected to act as Judge for the trial of any particular cause or question; and while thus acting he shall possess all the powers of the District Judge in the case. 28

And in Section 45:

Any matter involving litigation may be referred to arbitrators, or referees, who may be chosen by the parties, or selected by the Court, as the parties shall elect; all such arbitrators have authority to subpoena witnesses, administer oaths, or affirmations, and issue process as the Court. And when they shall have made their decision, shall report the case, if necessary to enforce the same, to the Clerk of the County in which the case has arisen, or when the case has not arisen in any Court, to the Clerk of the Probate Court; and it shall be the duty of the Clerk in whose office any such decision has been filed, to make a record thereof, and proceed in the same manner, as if the case had been prosecuted and decided in the usual manner. 29

A joint resolution of March 6, authorized each county to
elect a council of twelve men to act as referees in such cases. 30

Whether the surrogate judge and the referees were ever used in a formal manner or whether the statute remained merely a legal curiosity is not clearly a matter of record. 31 However, it illustrates the Mormon preference for arbitration instead of litigation.

Church Courts

The Mormons had an elaborate system of ecclesiastical courts. Judicial power was vested primarily in three tribunals. At the lowest level was the bishop's court, a court of general original jurisdiction. The bishop was called the "common judge," and he and his counselors heard cases involving difficulties between members and questions of morality and church discipline. Appeals could be taken to the stake high council, which was composed of twelve high priests, presided over by a three-man presidency. In controversies between members of different wards, the high council was the court of the first instance—a sort of "diversity" jurisdiction. Even on appeal, the case was usually heard de novo. While the procedure in the church courts in general was much simpler and more informal than that of the civil courts, the high councils gave a more formal hearing than the bishops. The parties were given spokesmen from among the councilmen to aid them in pleading their causes; witnesses were called; and a genuine effort was made to bring out all the pertinent facts in the case.
Decisions of the high councils could be appealed to the First Presidency, whose decisions were final. In theory, there was the possibility of an appeal to the general conference of the Church, but this was extremely improbable.  

Even when civil courts were established in the territory, the Church tribunals continued to hear almost every kind of dispute:

... The minute books of the bishops' courts and of the stake high councils disclose an unbelievably wide range of cases: bankruptcy, debt, contract, ejectment, slander, libel, adultery, fornication, larceny, every type of dispute growing out of the use and distribution of water, assault, battery, trespass quare clausum fregit, trespass de bonis esportatis, drunkenness, traffic in liquor, non-support, disturbance of the peace, murder, blasphemy, profanity, estrays, failure to fence field, trusts, divorce, administration of decedents' estates, quarreling, backbiting, riding bucking horse within fort, trading with gentiles, suit to quiet title, vending liquor to Indians, apostacy.

The punishment varied with the crime. The usual policy was to excommunicate or disfellowship the offender, sometimes with the understanding that he could be re-baptized when he repented or mended his ways. Or, less drastic, the priesthood of the wrong-doer would be suspended. These penalties could be applied in addition to ordering the guilty party to perform a contract, pay damages (sometimes several-fold), or make a public confession, depending on the nature of the case. It has been alleged that there were instances of capital punishment.

After a visit to Utah in 1860, Richard F. Burton, an astute English observer, made this tongue-in-check
observation about trial by high council:

... I venture to recommend this form of special jury to those who have lost faith in a certain effete and obsolete "palladium of British liberty" that dates from the days of Ethelbert. After all, it is sometimes better, jurare in verba magistri, especially of an inspired master."

Mormon Attitudes Toward the Law and Lawyers

In 1851, an Illinois physician, who was contemplating a move west, wrote to Brigham Young for information about Utah—the economic system, the climate, the Indian menace, the fertility of the land, and other such conditions. Among his questions was: "Have you adopted the common law of England as the law of the territory, or have you a special code by which you are governed?" Brigham replied:

We have not adopted the common law of England, nor any other general law of old countries, any further than the extending over us the constitutional laws of the United States, by Congress, has produced that effect. We have a few territorial laws, principally directory in their provisions and operation. And we have a common law which is written upon the tablets of the heart, and "printed on the inmost parts, whose executors are righteousness, and whose executors are peace;" one of its golden precepts is "Do unto others as you would they should do unto you." This common law we seek to establish throughout the valleys of the mountains; and shall continue our exertions for its adoption as long as we shall continue to exist upon the earth, until all nations shall bow in humble acquiescence thereto; and the earth shall be redeemed from the thraldom that wicked and corrupt men have entangled her through their "entangling alliances," specious and unmeaning pretences, servile and absurd acquiescence in the whims, caprices, and dictation of profound ignoramuses, who being entitled, through a little brief authority, to wear
a cap or a feather, a surplice or a robe, a garter or a star, would be thought to be men of "legal learning," and would, if they could, fasten their peculiar dogmas upon all succeeding generations. 36

On another occasion, his annual message to the territorial assembly in 1853, he declared:

... Strip a Judge, or Justice of the legal mists and fog which surround him in this day and age, leave him no mook, or corner of precedent, or common law ambiguous enactments, the accumulation of ages, wherein to shelter, and it is my opinion, that unrighteous decisions would seldom be given.

... Let all of our laws have no other practice or rule of decision, save it be in the discretion vested in the bosom of the Court. ... 37

Despite the fact that the organic act seemed to assume that the common law would be followed in the Territory of Utah, the territorial legislature, by a statute of January 14, 1854, prohibited the invocation of legal precedents:

... [A]ll questions of law, the meaning of writings other than laws, and the admissibility of testimony, shall be decided by the Court; and no laws or parts of laws, shall be read, argued, cited, or adopted in any Court, during any trial, except those enacted by the Governor and Legislative Assembly of this Territory, and those passed by the Congress of the United States when applicable; and no report, decision, or doings of any Court shall be read, argued, cited, or adopted as precedent in any other trial. 38

This was not the final disposition of the matter, however. As would seem inevitable, the question of whether the common law was in force in Utah came up for judicial opinion. The territorial supreme court vacillated in its pronouncements on the subject. In People v. Green, 39 Justice C.W. Drummond ruled that the organic act extended the common law over
Utah, and therefore, the common law rules governing the size of a grand jury applied. However, approximately two decades later, the court declared that since the common law in the various places from which the Saints originally came was not uniform; "these diversities make it impossible to assume that any specific body of the Common Law was transplanted to the Territory by the fact of immigration." However:

They [the people] have tacitly agreed upon maxims and principles of the Common Law suited to their conditions and consistent with the Constitution and Laws of the United States, and they only wait recognition by the courts to become the Common Law of the Territory. When so recognized, they are laws as certainly as if expressly adopted by the law-making power.

The original Poland bill was introduced in the House with the following provision:

That the common law of England, as the same is defined and modified by the courts of last resort in those States of the United States where the common law prevails, shall be the rule of decision in all courts of said Territory so far as it is not repugnant to or inconsistent with the Constitution and laws of the United States and the existing statutes of said Territory.

However, this section was later eliminated in the Senate. Senator F.T. Freylinghuysen of New Jersey explained that it was feared that such a provision would be interpreted as conferring objectionable criminal jurisdiction. Whether this suggested a change in the thinking of the federal judges in Utah on the subject is not clear, but at any rate, in 1874, the territorial supreme court said:
Although the Common Law has not been adopted in this Territory by any Statute, we entertain no doubt that it should be regarded as prevailing here, so far as it is not incompatible with our situation and government, and that it is to be resorted to as furnishing to that extent the measure of personal rights and the rule of judicial decision. . . .\textsuperscript{45}

Once the common law had prevailed, however, the Utah legislature acted to prevent its wreaking any more damage than absolutely necessary. In 1882, it was enacted that "whenever there is any variance between the rules of equity and the rules of the common law, in reference to the same matter, the rules of equity shall prevail.\textsuperscript{46} And in 1884, the territorial assembly declared that the common law rule that statutes in derogation of the common law shall be strictly construed had no application to the code of civil procedure.\textsuperscript{47}

R.N. Baskin found a special reason for bemoaning the absence of the common law. He claimed that applicable English criminal law had become the common law of the colonies when they gained independence. Since bigamy was punishable in England, if the common law had been adopted in Utah, polygamy would have been a crime from the beginning.\textsuperscript{48}

Nor did Brigham Young have any use for technicalities and fine points of legal procedure. He urged that the courts should not be crippled with ancient and unwieldy practices, "as though there had been made no advancement in the sciences of the law."\textsuperscript{49} Accordingly, the first
judiciary act provided that "all technical forms of actions and pleadings are hereby abolished." Furthermore:

Any pleading which possesses the following requisites shall be deemed sufficient. First, when to the common understanding it conveys a reasonable certainty of meaning. Second, when by a fair and natural construction, it shows a substantial cause of action or defence. If defective in the first above particular, the Court shall direct a more specific statement. If in the latter, it is ground of demurrer; demurrers for formal defects are abolished, those for substantial defects must set forth the true ground of objection to the pleading demurred to, upon the determination of any demurrer, the party failing, may demand [sic], or plead upon such terms as the Court deems just, or as it may by general rule prescribe. As may be suspected from the foregoing discussion, the Mormons did not look upon lawyers with any particular fondness. This animosity toward those who plied the law as a profession likewise found its way into the statute books. Upon his arrival in the territory in 1865, Baskin's attention was drawn immediately to an act regulating attorneys. While Section 1 guaranteed the right to counsel, the second section provided that:

No person or persons, employing counsel in any of the courts of this Territory, shall be compelled by any process or law to pay the counsel so employed, for any services rendered as counsel, before or after, or during the process of trial in the case. And Section 5 provided:

Any Attorney, or person otherwise assuming to appear before any court in this Territory in any cause whatever, shall present all the facts in the case, whether they are calculated to make against his client or not, of which he is in possession, and shall present the best evidence that he
can in the case to the intent that the true state of the case in litigation may be presented before the court, and for a failure to do so, or to comply with all the requirements of this act, shall be liable to all the penalty hereinbefore provided for, and the further penalty of not less than one dollar at the discretion of the court.

The penalty for such withholding of facts was the same as that for using "indecent and exciting behavior" in court--disbarment and a fine of as much as one hundred dollars. 53 This attitude, combined with the fact that a great deal of the judicial business was done by the Church tribunals, made the legal profession one of the less lucrative. Indeed, some "returned to the East poorer lawyers than when they left—if such a thing were possible." 54

Mormon Attitudes about Going to Court

Apostle Franklin D. Richards, in 1880, said, "Theoretically, church and state are one. If there were no Gentiles and no other government, there would be no Civil Law." 55 This is an apt summary of the fundamentalist Mormon attitude. However, the coming of civil government modified their ideas to a certain degree. They grew to approve of judges and courts to enforce penal sanctions in serious cases. And they came to accept civil power to declare status and dispose of uncontested or ex parte matters, such as granting divorces and processing estates. But they deplored litigation and could think of few forms of life lower than lawyers. 56

The prevention of litigation appears to have been an obsession with Brigham Young in his gubernatorial
advice to the territorial assembly. To him, the chief virtue of a simple, unambiguous, and concise code of laws was that it lessened the likelihood that people would "go to law" with each other. Tullidge has commented:

Of course, in the founding of Utah, there was much that was peculiar to the people in their social and governmental methods; but in nothing were they more peculiar that in their judicial affairs. They did not believe in going to law one with another. They took their cases to the "High Council" and the courts of their bishops, or Ward Councils. Their judicial economy was after the patterns of the New Testament rather than after the patterns of Blackstone. It was this which made Mormon rule so obnoxious to Federal judges and Gentile lawyers. Federal judges could not possibly find their vocation in a purely Mormon commonwealth, nor could Gentile lawyers reach the pockets of the people.

The Deseret News of February 22, 1851, contained an account of a magistrate who refused the application of a Mormon for process to start a lawsuit, on the grounds that he had not been to the bishop's court first. The applicant did not have a letter from his bishop stating that he had "taken the gospel steps, toward his brother, in relation to the case in question, and that the brother had refused all satisfaction." Only when the bishop would make such certification, said the magistrate, was it "time enough for me to let loose the law upon him." The newspaper editorialized:

... A truly commendable decision, and worthy of all acceptance and action, by all magistrates in Deseret; for a professed Saint, who cannot be governed by the law of the gospel, is not fit to be called a Saint, and the sooner he is out
of the fellowship of Saints, the better, then the law, which is made for the lawless and disobedient, has claim on him as its own, and can lawfully enforce obedience to its requirements.59

Only slowly and reluctantly did the Church relax its ban on the civil courts.60 As Apostle Richards once explained, "It is a shame to go to law before the ungodly."61
FOOTNOTES

CHAPTER III


2 9 Stat. 453 (1850).

3 Utah Laws 1851, at 38.

4 Utah Laws 1851, at 43.

5 Utah Laws 1851, at 82.

6 Probate Court Records, Iron County, Utah, 1854-1876 MS, Utah State Archives (Microfilm). Bancroft has remarked, "Thus the probate courts, whose proper jurisdiction concerned only the estates of the dead, were made the judges of the living, with powers almost equal to those of the supreme and district courts." Hubert Howe Bancroft, History of Utah (San Francisco: The History Company, Publishers, 1890), 487. The probate judges were, in most instances, Mormon bishops. House Report No. 21, 41st Cong., 2nd Sess., I, 12 (1870).


8 B.H. Roberts, A Comprehensive History of the Church of Jesus Christ of Latter-day Saints, IV (6 vols.; Salt Lake City: Deseret News Press, 1930), 194-195, at 195. Also, it should be noted that Congress had provided in regard to the Territory of Montana:

... That the probate courts of the Territory of Montana, in their respective counties, in addition to their probate jurisdiction, are hereby authorized to hear and determine civil causes wherein the damage or debt claimed does not exceed five hundred dollars, and such criminal cases arising under the laws of the Territory as do not require the intervention of a grand jury. ...

There was a proviso that the probate courts could not hear cases involving title to land, chancery or divorce cases.
Appeals could be taken to the district courts from judgments of the probate courts. 14 Stat. 426 (1867).


1087 U.S. (20 Wall.) 375 (1874).

11Id., at 382.

12Id., at 384.

13Utah Laws 1851, at 56.

14Utah Laws 1851, at 57.

15Utah Laws 1851, at 56.

16Orr v. McAllister. This case is not reported; however, reference to it can be found in various places: General Records of the Department of Justice, supra note 9, Report from Chief Justice James B. McKeen to the U.S. Attorney General, November 12, 1873; Whitney, op. cit. supra note 7, II, 544; R.N. Baskin, Reminiscences of Early Utah (Salt Lake City: By the author, 1914), 32-33.

17Whitney, op. cit. supra note 7, II, 556. As early as December, 1858, Judge Charles C. Sinclair, in the Third District, had ruled that the U.S. attorney was the proper officer to prosecute all violations of territorial law in the district courts and that the U.S. marshal was the proper officer to serve process in such cases. General Records of the Department of Justice, supra note 9.

1885 U.S. (18 Wall.) 317 (1873).

19Id., at 321.

20Ibid.

21Utah Laws 1858-1859, at 5. The county court was composed of the probate judge and selectmen who were vested with the powers of county commissioners.

2280 U.S. (13 Wall.) 434 (1872).

23Id., at 447.
For an account of and commentary on the Englebrecht case see Baskin, op. cit. supra note 16, 32-35; Whitney, op. cit. supra note 7, II, 560-567, 681-688; Nels Anderson, Desert Saints: The Mormon Frontier in Utah (Chicago: University of Chicago Press, 1942), 267-268; Bench and Bar, op. cit. supra note 9, 30-32. The Englebrecht decision produced a problem in the mechanics of summoning juries. Since the territorial marshal, the officer designated by the territorial statute to summon jurors, had been ousted previously by Judge Sinclair, supra note 19, and the Englebrecht decision disqualified the U.S. attorney, there was no one to perform this function. General Records of the Department of Justice, supra note 9, Report of Chief Justice James B. McKeen to the U.S. Attorney General, November 12, 1873; id., Letter from Justice Cyrus M. Hawley to the U.S. Attorney General, January 15, 1873.

18 Stat. 253 (1874). In a special message to Congress on February 14, 1873, President Grant had asked Congress to restrict the power of the probate courts and to take the selection of jurors out of the hands of local authorities. James D. Richardson, Messages and Papers of the Presidents 1789-1897, VII (Washington: Government Printing Office, 1897), 208-210.

18 Stat. 253 (1874).

Whitney, op. cit. supra note 7, II, 740. The first grand jury empanelled under the Poland act indicted John D. Lee and others for their alleged participation in the brutal "Mountain Meadows Massacre" of September, 1857, in which an emigrant party from Missouri and Arkansas was slaughtered by "Indians" in southern Utah. Federal judges and attorneys had attempted to bring the persons responsible to justice for fifteen years, without success. It was charged that the butchery was done at the command of the Church authorities, but it was never proved that they had any hand in it. John D. Lee was later convicted and executed for his part in the massacre. Bancroft, op. cit. supra note 6, 543-571; Roberts, op. cit. supra note 8, IV, 139-179. The single most valuable source of information on the subject is Juanita Brooks, The Mountain Meadows Massacre (Stanford: Stanford University Press, 1950).

Utah Laws 1851, at 40.

Utah Laws 1851, at 47.

Utah Laws 1851, at 208.

Morgan, supra note 1, 132.

Roberts, op. cit. supra note 8, II, 372-376; Therald N. Jenson, "Mormon Theory of Church and State"
(unpublished Ph.D. dissertation, University of Chicago, 1938), 100-101; Franklin D. Richards, "Narrative of Franklin Dewey Richards" MS (1880), Bancroft Collection, Bancroft Library, University of California at Berkeley, 87-89. (The latter two are on microfilm at Utah Historical Society.) There were three other Church courts which are of no concern here, but which should be mentioned to complete the picture: temporary high councils abroad which were convened to hear a specific case, the travelling presiding high council—a quorum of the Twelve Apostles travelling abroad and from whose decisions there was no appeal, and a special court convened to try cases involving the First Presidency.

33Jenson, supra note 32, 98. Nels Anderson, who had access to the ecclesiastical court records of St. George Stake (southern Utah), has written a fascinating chapter on specific cases that were brought before the St. George high council. Such records are no longer available. Anderson, op. cit. supra note 24, 334-359.

34Anderson, op. cit. supra note 24, 334-359, passim; Jenson, supra note 32, 99; Richards, supra note 32, 87.


38Utah Laws 1853-1854, at 16.

391 Utah 11 (1856?).

40First National Bank v. Kinner, 1 Utah 100 (1873).

41Id., at 107.

42Ibid.

43Congressional Record, 43rd Cong., 1st Sess. 4467, 5417, at 4467 (1874).

44Id., 5417. On April 7, 1874, Congress passed an act to quiet uncertainties as to whether the chancery and common law jurisdictions of the territorial courts should be exercised separately. In pronouncing that this was not necessary, but that the two jurisdictions could be mingled in a uniform course of proceeding, Congress seemed to reaffirm the vitality of the common law in all territories. At least no exceptions were mentioned. 18 Stat. 27 (1874).
Thomas v. Union Pacific R.R. Co., 1 Utah 232 (1875), at 234.

Utah Laws 1882, at 73.

Utah Laws 1884, at 154.

Baskin, op. cit. supra note 16, 6-7.

Annual Messages of the Governors, op. cit. supra note 37, 22.

Utah Laws 1851, at 39.

Utah Laws 1851, at 39.

Utah Laws 1851, at 55.

Sections 2 and 5 of this statute were repealed by an act of February 20, 1874. Utah Laws 1874, at 7.

S.A. Kenner, Utah As It Is (Salt Lake City: The Deseret News, 1904), 65.

Richards, supra note 32, 87.


Annual Messages of the Governors, op. cit. supra note 37, 22, 37.

Edward W. Tullidge, Life of Brigham Young (New York, 1877), 199-200.

Deseret News, February 22, 1851, p. 213.

Anderson, op. cit. supra note 24, 354.

Richards, supra note 32, 88.
CHAPTER IV
THE NATION MOVES AGAINST THE
OTHER "TWIN RELIG"

"Celestial Marriage"

At a special conference of the Church in Salt Lake
City in August of 1852, the practice of plurality of wives
was formally announced. Since it had been a matter of
common knowledge for several years that leading elders
were practicing polygamy, a public announcement became
necessary to end the hypocrisy.¹ Captain Stansbury of
the United States Army Corps of Topographical Engineers,
who had spent a year exploring and surveying the Valley
of the Great Salt Lake in 1849-1850, had reported to
Congress:

... But that polygamy does actually exist
among them cannot be concealed from any one
of the most ordinary observation, who has
spent even a short time in this community.
I heard it proclaimed from the stand, by
the president of the church himself, that
he had the right to take a thousand wives
if he thought proper; and he defied any one
to prove from the Bible that he had not.
At the same time, I have never known any
member of the community to avow that he
himself had more than one, although that
such was the fact was as well known and
understood as any fact could be.²

Likewise, the report of the "run-away officials" to
President Fillmore in December of 1851 had charged that
"plurality of wives is openly avowed and practiced in the Territory, under the sanction and in obedience to the direct command of the Church."\textsuperscript{3}

While no attempt will be made here to explore the practical and moral values of polygamy, a brief review of the arguments, pro and con, which entered into the controversy is in order. Marriage was, and is, regarded as a religious duty by the Mormons. To them, the instruction "to be fruitful, and multiply, and replenish the earth" is as imperative as any of the divine commandments. Faithful Latter-day Saints are married not only for time, but for all eternity, and an unmarried person cannot be eternally saved or enter into the full enjoyment of the eternal life. Marriages which are not performed according to Church doctrines, so-called Gentile marriages, are not recognized by Mormons as valid; only when the union has been sealed in "celestial marriage" according to Church precepts, is it consecrated to ensure the participants of all the eternal blessings.\textsuperscript{4} Plural marriage was instituted in obedience to an alleged revelation from God to Joseph Smith, and consequently, the Mormons considered it a divine commandment, a part of the Latter-day Saint religion, and thus immune from governmental interference.\textsuperscript{5}

B.H. Roberts has identified as the chief justification for establishing "patriarchal marriage" the conviction that:

\begin{quote}
\ldots under the restriction and limitations under which the principle was to be practiced, it would give the opportunity to righteous men and women to have "a numerous and faithful
posterity to be raised up and taught in the principles of righteousness and truth. #6

Church doctrine maintained that polygamy was necessary in order to provide earthly bodies rapidly enough for the innumerable spirits awaiting the opportunity to become Saints on earth, which was a prerequisite to achieving exaltation in the eternal world. Further, the Church taught that not only was it necessary for men and women to be married in order to reach the highest degree of heavenly glory, but that the greater the number of wives a man had, the greater his reward would be.

The Mormons depended to a great extent upon the Bible for examples of divinely-sanctioned polygamous arrangements; Biblical precedent gave weight to the claim that the plurality of wives was indeed a bona fide part of religion. They also pointed to historical examples, which appear continuously from the time of ancient Egypt.

Under attack, the Saints defended plural marriage on more practical grounds. They insisted that monogamy could not be proved morally superior to polygamy: infidelity, divorce, prostitution, mistresses, and the like were common in monogamy, while such evidences of immorality were almost absent among the Mormons. They asserted that the Gentile objection was not to a man's having more than one woman, but to his calling more than one woman his wife. They explained that "celestials marriage" as practiced by the Mormons differed from bigamy as it was understood by the rest of the world; bigamy was clandestine and a
shameful betrayal of the women involved, but Mormon plural marriage was not. The parties to a Mormon marriage understood that the husband would take other wives if he were to live his religion to the fullest. They insisted that the plural wives were not concealed from the first wife and that all wives and their children enjoyed equal status and rights. Polygamy was not instituted merely to satisfy the lustful desires of Mormon men; the great expense and responsibility of more than one family was so prohibitive that only the sincerely religious would undertake it. Moreover, since Congress later subjected polygamists to disfranchisement, disqualification, and arrest, it was difficult to maintain that such a price would be paid for lust alone. The Mormon polygamist had more than one wife because it was a command of his religion. Given the guarantee of freedom of religion in the United States, they claimed that governmental interference with the exercise of religious freedom could be justified only when the religious acts were injurious to others. The plurality of wives could not be proved harmful to society because it did not destroy family life—Mormon family life was admirably vital, harmonious, and healthy. The plural wives were not coerced; on the contrary, they enjoyed the utmost freedom in regard to marriage. If the harm could not be measured, government could not interfere. Further, it was claimed that polygamy saved women from the degrading and catastrophic experience of spinsterhood; since the death
rate for men was higher and some men would choose to remain bachelors, there were always more eligible women than men. Women would be happier because the onerous duties of wifehood could be shared with others.

The critics insisted that the monogamic order was the highest form of family life and that with polygamy, civilization took a step backward. They insisted that polygamy sprang from the seeking of sexual gratification, at the expense of a more refined society. The most progressive cultures and the most successful civilizations and nations had been monogamic. Furthermore, it was not equitable; since men and women were born in roughly equal numbers, if some men had more than one wife, others would have none. Also, this numerical equality of the sexes suggested that pairs were the order of nature. Finally, it was inevitable that where a man had a number of wives and many children, some would be neglected, since there was a limit to time or money, or both. 7

Two radically different contemporaneous views of Mormon polygamy were provided by Captain Stansbury and Benjamin G. Ferris, a self-admitted adventurer and territorial secretary in Utah for a brief period in 1852-1853, both of whom were Gentiles. Ferris has described conditions in Utah in the following terms:

A wife, in Utah, can not live out half her days. In families where polygamy has not been introduced, she suffers an agony of apprehension on the subject which can scarcely be conceived, much more described. There is a sad, complaining, suffering look,
obvious to the most ordinary observer, which tells the story, if there were no other evidence on the subject. In most cases, it is producing premature old age, and some have already sunk into an early grave under an intolerable weight of affliction. The man, from the moment he makes up his mind to bring one or more concubines into the family, becomes always neglectful, and in most cases abusive to his wife. In every instance where it has been introduced, it has totally destroyed all union of affection and interest previously existing. The wife has no further motive to labor and economize for the family, because she finds one or more intruders who have the right to share in the benefits of her exertions; and the concubine, for a similar reason, feels no interest and makes no effort. The wife hates them for interfering with her comforts, and estranging the affections of her husband; they, on the other hand, hate the wife and each other, and the children of each other. The husband hates the wife on whose affections he has trampled, and over whom he has tyrannised, and hates each concubine, of whom he tires when a fresh one is introduced; and the children hate each other as cordially as a band of half-starved young wolves. It is hate, and strife, and wretchedness through the whole family circle. . . .

He insisted, as many others were to do, that the Mormon women were enmeshed in polygamy because they had been made to believe that their salvation depended upon it. 9

Stansbury, however, saw another side:

. . . Since the return of the expedition, it has appeared evident that the nature of the domestic relations of the Mormons has been very generally misapprehended. It seems that the "spiritual wife system," as it has been improperly denominated, has been supposed to be nothing more nor less than the unbridled license of indiscriminate intercourse between the sexes, either openly practised by all, or indulged, to the invasion of individual rights, by the spiritual leaders. Nothing can be further from the real state of the case. The tie that binds a Mormon to his second, third, or fourth wife, is just as strong, sacred,
and indissoluble as that which unites him to his first. Although this assumption of new marriage bonds be called "sealing," it is contracted, not secretly, but under the solemn sanctions of a religious ceremony, in the presence and with the approbation and consent of relatives and friends. Whatever may be thought of the morality of this practice, none can fail to perceive that it exhibits a state of things entirely different from the gross licentiousness which is generally thought to prevail in this community, and which, were it the case, would justly commend itself to the unmingled abhorrence of the whole civilized world. . . .

Stansbury came to the conclusion that most plural marriages seemed to work out well, and that there was friendliness and affection among the different families.¹¹

The Opening Shots

It was ten years after the public announcement of the system of plural marriage by the Mormons before Congress got around to passing an anti-polygamy law. The delay was not due to a lack of attention. The Utah situation was one of the major topics of the decade, and reform elements pressed for corrective measures. Drastic steps were taken by the executive branch in 1857, when President Buchanan sent federal troops into the Territory to suppress what was represented to him to be anti-republican and rebellious actions on the part of the Mormons. The army failed to find the Territory in armed insurrection, and the entire expedition accomplished very little. In fact, the so-called "Utah War" was later labelled "Buchanan's Blunder" by some of the more irreverent historians.¹² The Mormons had chosen this inopportune time to make a second application
for statehood; the work of the constitutional convention of 1856 was rewarded with a military invasion. 13

The American people, were, in general, indignant and outraged at the violation of the country's moral principles by the Mormons. However, the polygamy question became enmeshed with the other and foremost moral issue of the era, which was also a symbol of the fundamental conflict between the North and South that would lead eventually to the Civil War. Consequently, polygamy became a pawn in the game of sectional politics. Both polygamy and slavery were classified as "domestic institutions;" the controversy in both matters revolved around the question of congressional power over the territories. The Republican party platform of 1856 had called them the "twin relics of barbarism." 14

Each served as a brake on attempts of Congress to deal with the other. While polygamy apparently was not involved in the debate surrounding the Compromise of 1850, it figured rather largely in the Kansas-Nebraska controversy of 1853 and 1854. Reform elements were quick to realize that the nation's aversion to polygamy could be used in the attack on slavery. This suggested political arguments to the anti-slavery politicians, who were successful in maintaining that the relationship of master and slave was of the same general nature as that of husband and wife, and therefore, if Congress could prohibit polygamy in the territories, it could also prohibit slavery, and vice versa. 15 This reasoning placed many Southerners in a
strange position: they were forced either to deny that the federal government had power to extirpate the practice of polygamy, which was extremely obnoxious to them, or to admit congressional power to abolish the foundation of their own social and economic system, or to appear hopelessly inconsistent. This dilemma prompted attempts to distinguish between the "twin relics," which despite the logic of the arguments, failed to make any decisive impression.16

The Kansas-Nebraska bill adopted the principle of squatter sovereignty implied in the Compromise of 1850 and gave it specific statement in regard to the two territories it created, announcing the doctrine of non-intervention by the national government in slavery matters in the territories. Polygamy was repeatedly used as a weapon against it. The bill passed, chiefly as the result of the skillful leadership of Stephen A. Douglas and the strength of the Southern bloc in Congress. What the Kansas-Nebraska act actually did was a rather hazy proposition. The North could take some solace in viewing it as a democratic measure guaranteeing local self-determination; on the other hand, Southerners could see it as favorable to the extension of slavery, decidedly an improvement over the Missouri Compromise.17

In the autumn of 1854, Douglas was forced to defend the Kansas-Nebraska measure on the campaign trail in Illinois. His opponents attacked his principle of territorial popular sovereignty on the grounds that it not only
gave an advantage to the Southern slave system, but that it fostered polygamy as well. Lincoln's biographer, Albert J. Beveridge, had reported that "the anti-Douglas press and speakers thundered against Mormonism as an evil which the Kansas–Nebraska law protected as much as the twin wickedness of slavery. . . . Polygamy continued to be a popular argument against the doctrine of Congressional non-intervention." After accusations of his being soft on polygamy, and because of the Republican party's firm stand against it, Douglas, in view of his presidential aspirations, made his famous 1857 Springfield speech, in which he declared:

... [T]he knife must be applied to this pestiferous, disgusting cancer which is gnawing into the very vitals of the body politic. It must be cut out by the roots and seared over by the red hot iron of stern and unflinching law. . . . Should all efforts fail to bring them [the Mormons] to a sense of their duty, there is but one remedy left. Repeal the organic law of the territory, on the ground that they are alien enemies and outlaws, unfit citizens of one of the free and independent states of the confederacy.

The first attempt to discourage polygamy in Utah was made in connection with a bill debated in the House of Representatives in May of 1854 which sought to establish the office of surveyor-general and a method of securing land to original settlers in Utah Territory. Section 3 of the bill contained the proviso: "That the benefits of this act shall not extend to any person who shall now, or at any time hereafter, be the husband of more than one wife."
In moving to strike the proviso, Delegate Bernhisel from the Territory of Utah set in motion the now-familiar debate centering around the similarity in nature of polygamy and slavery, the evils of both, and the power of Congress to deal with such matters in the territories. Representative Stephens of Georgia maintained that Congress had no authority to deal with morals in the territories, that the nation's law-makers could interfere only with actions that were *mala prohibita* and could not touch actions designated as *mala in se*. Representative Simmons of New York ascribed the backwardness of Asian civilizations to their system of plurality of wives and condemned the institution as a pernicious evil. Representative Walsh of New York, an example of the cooler heads that would not prevail, expressed what would become the view of many reasonable and temperate men in face of rising feelings over the "Mormon menace" throughout the decades to follow:

... [Time, example, good precepts, and persuasion, will do more to remove polygamy from that Territory than all the laws you can pass here. Do nothing. I would impress upon the members of this House the propriety of doing nothing to insult the prejudices of a people already goaded into madness by the wrongs and oppressions which they suffered before they reached their present location. They are rapidly gaining in strength and numbers. ... I trust that the liberality of this House will not disgrace itself by endorsing so narrow and contemptible a species of legislation.

After considerable discussion, the entire bill was laid aside. 21
The Act of 1862

The next action came in the spring of 1856, when anti-polygamy bills proper made their first appearance in Congress. Representative Ball of Ohio proposed a resolution instructing the Committee on the Judiciary to inquire into the propriety of an anti-polygamy law. The House refused to suspend the rules so that he could introduce it.\textsuperscript{22} Two months later, Representative Justin S. Morrill of Vermont reported a bill from the Committee on Territories to punish and prevent polygamy in the territories of the United States. He noted that there was a question concerning the power of Congress to do this, but he pointed to the constitutional provisions authorizing Congress to make rules and regulations for the territories.\textsuperscript{23} No action was taken on it. At the beginning of the next Congress, Morrill again introduced an anti-polygamy bill. It was referred to the Committee on the Judiciary, but not until after some horseplay when a representative moved to refer it to the Committee on Naval Affairs because "polygamy is practiced more generally in the naval profession than in any other."\textsuperscript{24} Later in the session, Morrill inquired after his bill, but it could not be located in committee.\textsuperscript{25} Later, in 1858, the Senate refused to approve a joint resolution "authorizing the appointment of commissioners to examine into the difficulties in the affairs of the Territory of Utah, with a view to their settlement."\textsuperscript{26}

On February 15, 1860, Representative Morrill made a third attempt to do something about polygamy.\textsuperscript{27} This time,
the bill managed to make it through committee, and one month later, the Committee on the Judiciary reported it back to the House with the recommendation that it be passed. The committee pointed out that bigamy and polygamy had always been looked upon as offenses by the English and European ancestors of the American people and were crimes in the American colonies when the Constitution was adopted. Further, it pronounced that the monogamous system of marriage is the foundation of American society and must be protected. On the question of congressional power, the report called attention to the fact that Congress had specifically reserved, in the organic act, the right to control the legislation of Utah. It was true that Congress delegated power to the territorial legislature, but this was not a forfeiture of general legislative power over the Territory. As if unconvinced by this argument, the committee proceeded to invoke the rights of property. The United States had acquired Utah and the other territories as property, and the right to govern was a consequence of the right to acquire property. The bill not only prescribed punishment for the practice of polygamy, but also invalidated certain objectionable acts of the territorial assembly. The law incorporating the L.D.S. Church seemed to be particularly obnoxious. The report termed it a matter of wonderment that:

... in the midst of the blaze of the light of the nineteenth century, clouds and darkness should overshadow one of the Territories of the American Union, and an effort should be
made, in a remote and almost inaccessible part of the confederacy, to bring our holy religion into contempt, to defy the opinions of the civilized world, and to invoke the vengeance of Heaven by a new Sodom and a new Gomorrah to attract its lightnings and appease its wrath. . . . [T]he very attempt to incorporate the Church of Jesus Christ of Latter Day Saints, is an effort to accomplish in Utah, what has nowhere else been effected by our authority upon this continent—the establishment of one form of religious worship to the exclusion of all others.29

The committee was of the opinion that the charter was a violation of the First Amendment because of the "monstrous powers" bestowed upon the Church.

There was a vigorous discussion of the bill on the floor of the House of Representatives. The character, morality, and loyalty of the Mormons were attacked; polygamy was called "a scarlet whore" and "an adjunct to political despotism." There was the inevitable "parade of the horribles:" If polygamy were allowed to masquerade under the name of religion, so, too, could such abominations as Thugism and Suttee. Also inevitable was a controversy over Congress' power to punish polygamy in the territories. Those who defended slavery but favored this bill, insisted that slavery had legal basis in fifteen states, and that since the territories must be held for the common good of all the states, the rights legally recognized in the states must be recognized in the territories; however, polygamy could claim no such legal basis, and thus, no such immunity from congressional action.30

Some had serious doubts about the wisdom of such a measure, among them Representative Keitt of South Carolina
who warned:

... Are you prepared to start the Government upon this crusade against manners and morals? Are you willing to clothe it with power to ravage the Territories, to substitute the sword for trial by jury, and to carry out, by flame and violence, an indictment against a whole community? If these people are the crazy fanatics you charge them to be; if they are the religious zealots we are told they are, then your war is against opinion, and nothing but extermination will close it. You may pile statute upon statute, up to the very skies; you may send forth laws, backed by armed legionaries, but if a hostile religious opinion confronts them, both statute and law will fall to the dust worthless and dead, unless the bayonet steps in and terminates the conflict. Is a result like this worth the fearful aggrandizement of the Federal Government? 31

The bill was passed by the House of Representatives, but not the Senate. However, an almost identical bill was introduced by Morrill in 1862, 32 and since it had been given a thorough working-over by the preceding Congress, it was enacted into law with very little difficulty. There was no discussion in the House. 33 The Senate clarified the definition of what was to be punished to include only bigamy and polygamy proper; the House bill had been construed to permit punishment of cohabitation without marriage. The Senate also added the first mortmain law ever enacted by Congress, the declared object being "to prevent the accumulation of the property and wealth of the community in the hands of what may be called theocratic institutions, inconsistent with our form of government." 34 The House accepted the amendments, 35 and on July 1, 1862, it was signed by the President. 36 Undeterred by the happenings
in Washington, the residents of Utah framed another constitution and for the third time, applied for statehood. 37

Section 1 of the act of 1862 provided that any person who, having a husband or wife living, married another person in a territory of the United States was guilty of bigamy. It was punishable by a fine of up to five hundred dollars and imprisonment for a term not exceeding five years. The second section invalidated the territorial law incorporating the Church of Jesus Christ of Latter-day Saints and all other statutes and parts of statutes which served to "establish, support, maintain, shield, or countenance polygamy." There was a proviso:

That this act shall be so limited and construed as not to affect or interfere with the right of property legally acquired under the ordinance heretofore mentioned, nor with the right "to worship God according to the dictates of conscience," but only to annul all acts and laws which establish, maintain, protect, or countenance the practice of polygamy, evasively called spiritual marriage, however disguised by legal or ecclesiastical solemnities, sacraments, ceremonies, consecrations, or other contrivances.

Section 3 made it unlawful for any religious or charitable association to acquire or hold real property of over fifty thousand dollars value in any of the territories. Any property held in excess of this limit would be forfeited and escheat to the United States. This section was qualified by a rather cryptic proviso: "That existing vested rights in real estate shall not be impaired by the provisions of this section." This would become an object
of interest and speculation when the United States later moved against Church property.

The Mormons viewed this statute as a patently unconstitutional attempt to persecute them because of their religion. In 1867, the Utah legislative assembly addressed a memorial to Congress urging repeal of the 1862 law. The memorial alleged that it violated the provisions of the First Amendment, and since the plurality of wives was a part of the Mormon religion ten years before the act was passed, it was also an *ex post facto* law. The memorialists reiterated that the plural wife system was adopted, "not for lustful purposes, but from conscientious motives and as a portion of religious faith." Finally, they pointed out that no cases had been tried under it in spite of the fact that the Saints had agitated for a case to test its constitutionality in the courts. The House Committee on the Judiciary, to which the memorial had been referred, would not consider the suggestion, declaring that the repeal of the act by Congress would amount to an approval of polygamy by the American people. To the contrary, the committee proposed the following resolution:

That it is the sense of this house that the law of the United States entitled "An act to prevent and punish the practice of polygamy in the Territories of the United States," ought not to be repealed, but that it should be fully enforced, and that if the judges of the courts refuse or neglect to enforce the same, as alleged in the memorial of the legislative assembly of the Territory of Utah, they should be removed from office, and that if, for reasons beyond the control of the said judges, said law is not enforced in any Territory, it becomes the duty of the President of
the United States to take care that it be faithfully executed.39

The Mormons were frequently chastized for continuing to carry on practices which they knew were against the law. In a speech in Salt Lake City on October 5, 1869, Vice President Schuyler Colfax told the Saints that if they wanted to challenge the constitutionality of the law, the courts were open, but that until a decision was made and the law pronounced invalid, it must be obeyed. He said that he did not doubt that polygamy was part of the L.D.S. religion, but that illegal acts could not be cloaked with the immunity granted religious practices. In a heated and frequently sarcastic reply to Colfax, Elder John Taylor, who would later succeed Brigham Young as president of the Church, exclaimed:

... Now who does not know that the law of 1862 in relation to polygamy was passed on purpose to interfere with our religious faith? This was as plainly and distinctly its object as the proclamation of Herod to kill the young children under two years old, was meant to destroy Jesus; or the law passed by Pharaoh, in regard to the destruction of the Hebrew children was meant to destroy the Israelites. ... It could not have been more plain, although more honest, if it had said the "Mormons" shall have no more wives than one. It was a direct attack upon our religious faith. ...

But we are graciously told that we have our appeal. True, we have an appeal. So had the Hebrew mothers to Pharaoh; so had Daniel to Nebuchadnezzar; so had Jesus to Herod; so had Caesar to Brutus; so had those sufferers on the rack to Loyola; so had the Waldenses and Albigenses to the Pope; so had the Quakers and Baptists of New England to the Puritans. Why did they not do it? Please answer.

...
... [W]e must submit to law. ... Jesus was crucified according to law. Who can complain? Daniel was thrown into a den of lions strictly according to law. ... The massacre of St. Bartholomew was in accordance with law. The guillotine of Robespierre of France, which cut heads off by the thousands, did it according to law. But these things were done in barbarous ages. ... It is so much more pleasant to be proscribed and killed according to the laws of the Great Republic, in the "asylum for the oppressed," than to perish ignobly by the decrees of kings, through their miserable minions, in the barbaric ages. 40

The act of 1862 remained a dead letter. Federal officials claimed that as long as the Mormons controlled the jury process, no polygamist would ever be indicted, let alone convicted. Frustrated lawmakers were almost constantly considering proposed solutions to the "Mormon problem." It was suggested that the Territory of Utah be abolished and its area divided among adjacent territories. 41 Another plan was to abolish the territorial assembly and authorize the President, with the consent of the Senate, to appoint a legislative council for the Territory, which, in conjunction with the governor, would exercise the law-making power. 42 Another proposal would have denied payment of salaries to polygamists employed by the United States government. 43 Several proposals were aimed at facilitating bigamy convictions, such as making the wife of the accused in polygamy trials a competent witness, requiring certificates and records of marriages, and allowing admissions and actions of the accused to be introduced as evidence of marriage in polygamy trials. There were attempts, some rather vicious, to wrest the judicial process from Mormon
hands and to reduce local self-government. It was suggested that giving the suffrage to the women of Mormondom would enable them to cast off their chains. A number of provisions became quite popular and cropped up rather frequently in the various bills. The first real threat after the 1862 law was posed by the lengthy, stringent Cullom bill, which was passed by the House of Representatives on March 23, 1870. Representative Shelby M. Cullom of Illinois introduced the bill, but it was drafted largely by Salt Lake City Attorney R.N. Baskin. While the bill did not become law, having foundered in the Senate, most of its important provisions found their way into the Poland, Edmunds, and Edmunds-Tucker acts.

Although an analysis of the bill is not pertinent here, a review of the proceedings of Congress is useful in charting the progress of congressional thinking on the subject. The House Committee on Territories, which reported the Cullom bill, was plagued by none of the pre-war uncertainty about Congress' power to legislate against polygamy in the territories:

The right to exercise such power has never been denied; though in the days of the famous Kansas and Nebraska bill the question of the policy of Congress exercising control over the Territories was doubted, and the result of the legislation of those days upon the subject was to leave the people of the Territories free to determine whether slavery, the question about which the people of the country were then divided, should be allowed to exist in the Territories or not. From the earliest period of the history of our legislation in reference to Territories Congress
has, either by direct legislation or by implication, claimed the right to control the legislation of the Territories... . 48

The committee recognized the fact that the 1862 anti-polygamy act had been on the books for eight years without a single conviction. Furthermore, "the evidence before the country is, that under the present condition of things, with the law as it now stands, a conviction is a moral impossibility." 49

Testimony before the committee and debate on the floor of the House revealed that there was disagreement about what course of action to pursue in regard to the Mormons. The superintendent of Indian affairs in Utah, Franklin Head, made this analysis, when asked by the committee whether the anti-polygamy law should be strengthened and enforced:

I think it would be very difficult to frame any legislation to affect the matter, without being oppressive. Such a law would be in the position of the fugitive slave law in the northern States before the war. Everybody considered the law to be wrong, so nobody would obey it, and disobedience to it could not be punished. As Edmund Burke said, "It is difficult to indict a whole community." 50

On the other hand, Witness Baskin and others were in favor of strong measures. 51 It was evident from the discussions that polygamy was not the only target that the supporters of the Cullom bill had in mind; they also wanted to break the hold of the Mormon Church over the lives of people in the Territory of Utah. Cullom called Mormonism a "pretended system of religion" and declared:
The power of these priests and presidents and apostles and bishops over them must be destroyed, so that the light of Christianity and civilization may reach their benighted understandings. . . . Under such a system of things it is not to be wondered that these ignorant and deluded people . . . become passive or active agents in the hands of their leaders to carry out their infamous designs.52

Others thought that the bill was unnecessarily strong. Representative Axtell of California was of the opinion that it was "harsh, ill-considered, . . . a law which will of necessity break up and destroy what is now a prosperous community."53 Representative Fitch of Nevada conceded that the elimination of polygamy was a laudable objective, but that the cure would be worse than the disease because "they believe in their faith as deeply as the Mohammedan believes in the Koran or the Christian in the crucifixion of his Redeemer. Assail that faith with armies and you will consolidate and strengthen and infuse them with more ardent zeal." Furthermore:

. . . This polygamic community has been nursed into strength by the tolerance of this Government. We have given them title to their lands; we have recognized them in various ways; we have permitted them without interference or warning to collect adherents and gain recruits from all parts of Europe. Their numbers have swelled beyond our apprehensions. History nowhere makes mention of a colony of equal age more industrious, more united, more powerful, or more self-sustaining. They have towns containing thousands of people, with newspapers and telegraph lines, factories and foundaries hundreds of miles south of Salt Lake City. They are industrious, thrifty, temperate; they are free from every vice comparatively, except polygamy, and that according to their creed is not vice, but a religious duty.54
Fitch contended that while polygamy was an undesirable institution, it violated nothing but the sentiments of the American public: "It makes no interference with the controlling power, nor asks the nation to be responsible for its existence, its advancement or its destiny. It assails no human right; it assails no human privilege." It was his opinion that government simply was not equipped to deal with a problem like the Mormons, but he was confident that other forces would take care of the situation:

... I believe polygamy has run its course. I believe that the railroad which deprived the Mormons of their isolation has struck it a mortal blow. Every locomotive bell resounding through the gorges of the Wasatch mountains is sounding its death-knell. I believe in the persuasive power of progress and the logical force of attrition. I believe that for want of the invigorating element of truth the institution will fall to decay. I do not believe that a practice which is at war with the interests of society, hostile to the spirit of the age, and opposed to the instincts of human nature, can even when sustained by religious convictions, maintain itself against the silent, insidious, persistent, resistless assaults of the social forces arrayed against it.

Fitch concluded that the Gullom bill was as "inoperative, as ill-considered, as worthless for all practical purposes in detail as it is generally unwise and premature."

Representative Sargent of California supported Fitch's views and added that since the Mormons would certainly retaliate with force, and isolate the west coast, the passage of the bill would be deleterious to California. He also thought that time, intercourse with the outside world, and the influence of other Americans
moving into or passing through Utah would lead to the abandonment of polygamy, and he saw signs of this happening. 57

Others were not at all persuaded to this laissez-faire approach. Representative Ward of New York doubted that the ordinary course of events would solve the problem:

... I have heard a great deal attributed to the Pacific railroad. I knew it was a great institution ... , but I never supposed that it was to fulfill the high office of a moralizer, that it was to break down the walls of sin, that it was to be the little stone cut from the mountain that was to abolish all these fabrics of crime that centuries have reared among us. ... 58

The proponents of the bill made the usual anti-Mormon accusations: that the Saints were immoral, that many crimes were committed in Utah on order of the Church and went unpunished, that Brigham Young ruled with the iron hand of a despot, that the Saints were disloyal to the United States, that their doctrine was founded upon fraud and foolishness, and so on. Such remarks would always seem to have an incendiary effect on the discussion, regardless of whether they had anything to do with the subject at hand or not. 59

Senator Cragin of New Hampshire ended his speech introducing the bill into the Senate with the following hysterical pronouncement:

If a religious sect should spring up in one of our Territories whose creed required that fifty human beings should be crushed daily beneath the wheels of Juggernaut, and in another a sect requiring the casting of children into the yawning mouth of a red-hot idol, and in another a sect that required that all
widows should be burned on the funeral piles with dead husbands, what would the good Christian people of this country say and do? I apprehend if laws could not be passed and executed to prevent such things the people would take the matter into their own hands, in spite of the cry of "religious liberty," and make an end of it. None of these things would be more immoral or hardly less barbarous than polygamy. 60

The Cullom bill prompted a rash of mass protest meetings. In January of 1870, an estimated five to six thousand of the so-called "downtrodden women of Mormondom" met in the Salt Lake Tabernacle and adopted resolutions denouncing the passage of the Cullom bill and similar measures. They pledged support to their brethren in standing firmly upon their beliefs and opposing efforts to suppress plural marriage. In denying that they were degraded, coerced, and broken-hearted, they accused critics of being inadequately informed about the true state of affairs in Utah. 61 When the news that the Cullom bill had passed the House reached Utah, a great mass meeting gathered in Salt Lake City and adopted a remonstrance and memorial urging the Senate not to follow suit. The document set forth several claims of unconstitutionality, alleged that the system of plural marriage was a bona fide religious belief, and pointed out the manner in which the way of life of an entire people would be damaged. The memorial closed with the following challenge:

That forty millions of enlightened American citizens, with half a million of priests, philanthropists and editors, ought to be able to control, without the aid of legislative enactments, an
institution, which they call objectionable and immoral, through the influence of religion, the power of the press, and moral suasion, against one hundred and fifty thousand people who consider it a divine institution.\(^\text{62}\)

The Forty-second and Forty-third Congresses were kept occupied with prescriptions for the treatment of the "Mormon problem,"\(^\text{63}\) and a fourth application for statehood by the residents of Utah in 1872 was ignored.\(^\text{64}\) This activity culminated, for the time being, in the Poland act of June 23, 1874, which has been discussed in Chapter III. The Poland act liberated the judicial process from Mormon control and gave the federal judges and federal officers attending the courts increased authority. The statute also contained a provision dealing directly with polygamy:

\[\ldots\text{A writ of error from the Supreme Court of the United States to the supreme court of the Territory shall lie in criminal cases where the accused shall have been sentenced to capital punishment or convicted of bigamy or polygamy.}\(^\text{65}\)\]

**Presidential Attitudes**

The executive branch of the national government began to demonstrate increased interest in the polygamy problem as the memory of "Buchanan's Blunder" faded and became a less sensitive subject. The contrast between the attitude toward the Mormons of President Lincoln and that of President Hayes, less than two decades later, is striking. It is true that Lincoln was occupied with the more pressing problem of preserving the Union, but there is reason to believe that his formula for dealing with the Saints would
have been the same even in a less critical atmosphere. It has often been said that Lincoln had a three-word policy toward the Mormons: "Leave them alone." When he was asked what he intended to do about the situation, he replied with a story about a log on his farm: "It was too heavy to move, too hard to chop, and too green to burn. So we just plowed around it." In his third annual message to Congress on December 4, 1871, President Grant stated:

In Utah there still remains a remnant of barbarism, repugnant to civilization, to decency, and to the laws of the United States. Territorial officers, however, have been found who are willing to perform their duty in a spirit of equity and with a due sense of the necessity of sustaining the majesty of the law. Neither polygamy nor any other violation of existing statutes will be permitted within the territory of the United States. It is not with the religion of the self-styled Saints that we are now dealing, but with their practices. They will be protected in the worship of God according to the dictates of their consciences, but they will not be permitted to violate the laws under the cloak of religion.

He suggested that it might be humane for Congress to authorize the Utah legislature to legitimize children born prior to the 1862 law. On February 14, 1873, he dispatched a special message to Congress recommending a readjustment of the workings of the judicial system in Utah. He renewed the recommendation in December, after the decision in Clinton v. Englebrecht denying the power of the United States marshal to summon juries, which, after the decisions of the Utah court denying the power of the territorial
marshal to do so, brought jury trials to a halt in the Territory.\textsuperscript{70} Grant's seventh annual message in December of 1875 called for the extirpation of "licensed immorality, such as polygamy."\textsuperscript{71}

President Hayes, in his third annual message in December of 1879 called the attention of every department of government to the deliberate violation of the anti-polygamy law by even the most eminent and influential citizens of Utah. Since the United States Supreme Court had ruled that the 1862 act did not violate freedom of religion, there was no justification for further delay or hesitation in enforcing it. If it is not effective, he said, it should be amended:

... I recommend that more comprehensive and more searching methods for preventing as well as punishing this crime be provided. If necessary to secure obedience to the law, the enjoyment and exercise of the rights and privileges of citizenship in the Territories of the United States may be withheld or withdrawn from those who violate or oppose the enforcement of the law on this subject.\textsuperscript{72}

Hayes' fourth annual message, December 6, 1880, aptly illustrates the change that was taking place in the thinking of those who were bent upon doing something about the situation in Utah:

... Polygamy will not be abolished if the enforcement of the law depends upon those who practice and uphold the crime. It can only be suppressed by taking away the political power of the sect which encourages and sustains it.\textsuperscript{73}

Focus was shifting from polygamy to the Mormon Church. Hayes went on to say that Mormon influence was spreading
into the other territories, and if the sanctity of marriage and the separation between church and state were to remain the cornerstones of American society, the government of Utah must be reorganized. He recommended that the Territory be governed by the governor and federal judges, or by a commission appointed by the President and confirmed by the Senate. However, if Congress chose to retain the local government, then at least the people who practiced or "uphold" polygamy should be barred from voting, holding office, and sitting on juries.

James A. Garfield's inaugural address of March 4, 1881, included the following statement:

... The Mormon Church not only offends the moral sense of mankind by sanctioning polygamy, but prevents the administration of justice through ordinary instrumentalities of law.

In my judgment it is the duty of Congress, while respecting to the uttermost the conscientious convictions and religious scruples of every citizen, to prohibit within its jurisdiction all criminal practices, especially of that class which destroy the family relations and endanger social order. Nor can any ecclesiastical organization be safely permitted to usurp in the smallest degree the functions and powers of the National Government.\(^4\)

President Arthur, in his first annual address, continued the Hayes' approach. Since the Mormons were spreading into Idaho, Arizona, and other western territories, he urged that the federal government act promptly and effectively to destroy "the barbarous system which rests upon polygamy as its cornerstone."\(^5\) He suggested congressional action which would, first, make the wife of the accused in polygamy trials a competent witness, and
second, require that a certificate of every marriage performed in the Territory be filed with the Utah Supreme Court.

The Mormons repeatedly asked Congress to suspend action on special legislation for Utah and to send an investigating committee "with instructions to inquire into alleged abuses in our territorial affairs, and with authority to send for persons and papers needed in the prosecution of their inquiry." These requests went unheeded, although congressional debates reveal ignorance and misunderstanding of many aspects of the situation in regard to which so many members were anxious to legislate. There were also more requests for repeal of the Poland act and the act of 1862. In January of 1876, Congress received a petition signed by 22,626 Utah women, in which these two statutes were described as:

. . . special and unconstitutional measures directed against the people of Utah, holding the peace and happiness of our lives in constant jeopardy by imperiling the safety of our husbands and fathers, by daily and hourly subjecting them to danger of arrest and imprisonment, which would not only deprive us of their society, but also of their support and protection. . . ."

The Edmunds Act

In the first session of the Forty-seventh Congress, beginning in December of 1881, there were 139 petitions for the suppression of polygamy submitted by citizens, churches, state legislatures, and other groups. Such petitions were not unusual and had started arriving much earlier, but the large number indicated the rising tide
of public indignation. One of the first bills laid before this Congress was for the abolition of polygamy,\textsuperscript{79} introduced by Senator George F. Edmunds of Vermont, chairman of the Committee on the Judiciary, to which it was referred and which reported it back to the Senate favorably several weeks later.\textsuperscript{80}

The Senate debate began on February 15, and the bill was passed the next day, amid applause from the galleries.\textsuperscript{81} On March 8, the Senate version was read in the House of Representatives.\textsuperscript{82} Debate began on March 13, under the "gag rule," and the same day it received House approval.\textsuperscript{83} The Edmunds act amended the act of 1862.\textsuperscript{84} Section 1 changed the language of the provision making it a crime for a person having a husband or wife living, to marry another; this crime was now designated as "polygamy" rather than "bigamy," and it also included "any man who hereafter simultaneously, or on the same day, marries more than one woman." Section 2 provided that this new definition should not affect prosecution or punishment of an offense already committed under the 1862 act. Section 3 made it a misdemeanor for any man to cohabit with more than one woman; punishment could be a fine of up to three hundred dollars and/or six months imprisonment. Since there was no marriage law in the Territory of Utah, and the Mormon ceremonies were performed in secret, it was virtually impossible to prove an unlawful marriage; it was thought that unlawful cohabitation would be easier to prove and would provide a
means through which to punish polygamists. Section 4 provided that counts under the first and the third sections could be joined in the same indictment.

Section 5 made it grounds for challenge to a juror summoned to serve in a prosecution for bigamy, polygamy, or unlawful cohabitation, first, "that he is or has been living in the practice of bigamy, polygamy, or unlawful cohabitation with more than one woman" or that he is or has been guilty of an offense punishable by this act or the act of 1862, and second, "that he believes it right for a man to have more than one living and undivorced wife at the same time, or to live in the practice of cohabiting with more than one woman." Section 6 gave the President power to grant amnesty in such cases, under whatever conditions he thought proper. Section 7 legitimized children of polygamous Mormon marriages born prior to January 1, 1883; Congress was considerate enough to allow an ample gestation period for children already conceived. Section 8 took away the right to vote and hold public office from any "polygamist, bigamist, or any person cohabiting with more than one woman," and any "woman cohabiting with any of the persons described as aforesaid in this section." It is interesting to note that belief was made a ground for disqualifying a juror, but not a voter. These provisions applied in the territories and other places over which the United States had exclusive jurisdiction.

Section 9 was special legislation for Utah. It declared vacant all registration and election offices in Utah,
and transferred the powers and duties of these offices to
a board of five persons to be appointed by the President
and confirmed by the Senate. This board was given full
powers over the registration of voters, conduct of
elections, receiving or rejecting votes, canvassing and
returning the votes, and issuing of certificates of
election in the Territory of Utah. It was to become known
as the Utah Commission, an independent regulatory commission,
clothed with quasi-legislative, quasi-judicial, and quasi-
executive powers. The only real limitation on its au-
thority was:

... Provided, That said board of five persons
shall not exclude any person otherwise eligible
to vote from the polls on account of any opin-
ion 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; but each house of such
assembly, after its organization, shall have
power to decide upon the elections and qualifi-
cations of its members. And at, or after
the first meeting of said legislative assembly
whose members shall have been elected and re-
turned according to the provisions of this act,
said legislative assembly may make such laws,
conformable to the organic act of said Terri-
ty and not inconsistent with other laws of
the United States, as it shall deem proper
concerning the filling of the offices in said
Territory declared vacant by this act.

As has been noted, the removal of the privileges of
citizenship from polygamists had been urged for many years;
the Cullom bill of 1870 had included such provisions. The
Edmunds act was also a step in the direction of taking away
the power of self-government from Utah, for which there had
been substantial support for a long time.
The debate in Congress indicates that, in spite of the speedy passage, there were sharp disagreements concerning the justice and wisdom of various parts of the bill. The remarks of a number of members make it clear that at least a portion of the nation's law-makers had not been satisfied with anti-polygamy legislation, but were aiming at bigger and better things—for example, Senator Bayard from Delaware:

. . . The government of Utah to-day has no semblance to republican government. It is a theocracy; it is a theocratic government, with the mere name and form of such republican doctrine as Congress chose to place in its organic act. All that was intended to be conserved of republican institutions and theory has been displaced by a system of theocracy. And therefore for the purpose of obtaining the spirit and meaning and principle of republican government it is necessary that that theocracy shall be displaced. . . .

Likewise, Senator Garland of Arkansas seemed to accept the identification of republican government in Utah as the point to be argued. He introduced expert opinion to the effect that true republican government was incompatible with polygamy—polygamy produced tyranny because the women become slaves, and the men become tyrants.

The Mormons had defenders among the Senators, however. George G. Vest of Missouri made several able speeches against the bill, as did John T. Morgan of Alabama, Joseph Brown of Georgia, Wilkinson Call of Florida, and George Pendleton of Ohio. Vest claimed that depriving polygamists of political privileges without a judicial trial was a deprivation of liberty without due
process of law: "The principle of taking away the right of suffrage or the right to hold office before conviction for a crime is unknown in the legislation of this country or its jurisprudence." Morgan agreed, adding that such disqualification was indeed punishment; the persons described were obviously being punished for practicing polygamy by being deprived of the elective franchise. He also objected to placing such vast power over citizens' rights in the hands of five commissioners whom the statute left almost entirely free to proceed as they saw fit. It was his opinion that the Edmunds bill qualified for the United States Supreme Court's definition of ex post facto laws and bills of attainder. Polygamy might be an evil, Morgan said, but "I am not willing to persecute a Mormon at the expense of the Constitution of the United States." Brown and Pendleton conceded congressional power to punish people in the territories for polygamous practices, but only after a judicial proceeding, as Vest and Morgan contended. Since the cause of the disqualification was essentially a criminal act, the right to vote and hold office could not be taken away until after a criminal trial. The rebuttal to this assertion was, of course, that government could prescribe reasonable qualifications for exercising the suffrage and that the right to vote was a privilege, not a property right. Edmunds pointed out that when states excluded paupers, a previous judicial determination was not necessary; afterward, there was recourse to the courts.
Brown reminded his colleagues that the persecutions of religious sects which had occurred from time to time throughout history had always been condemned later, and that laws punishing Mormons were just a reopening of the floodgates of religious intolerance. He warned that such legislation would merely provide precedent for popular vengeance, once it had finished with the Latter-day Saints, to turn on another group.93

Senator Call declared the bill to be "in my judgment the most extraordinary bill that has ever been presented in the history of this country:"

... [W]hile the bill avows itself to be a bill for the punishment of bigamy, it is avowed in the argument here and is known in the current history of the country to be a bill in which the population of a particular Territory, by a large majority entertaining particular views and opinions, which they regard as religious and others believe in practice are criminal, ... are by the organization of a government against their wishes sought to be deprived of all political power and subjected to trial by partial courts and by partial juries. That is the bill in its true purpose and its true object. It actually constitutes a court unfriendly to them, avowedly so, for their trial and conviction as a means of suppressing their religion; and that is justified in the argument and discussion here. It is a court carefully prepared to give a partial verdict, and composed of men selected because of their unfriendliness to that population of 130,000 people, be they criminals or not. They are citizens of the United States by express declaration of our Constitution, subject to the equal protection of our laws.94

Pendleton found fault with the provision that a juror might be challenged if he "is now or ever has been living in the practice of bigamy or polygamy, or unlawful
cohabitation." This provided disqualification for a past act that he might have renounced and behavior that he might have abandoned. He also objected to disqualifying jurors on account of their belief in polygamy.95

Senator Sherman from Ohio had objections of a different nature. He was in favor of the general objects of the bill and its provisions, but he felt it would be ineffective:

... I believe that if anyone is convicted under either of the first six sections of this bill, it will only make him a martyr, make him more influential in the Territory of Utah. That has been the effect thus far. For thirty-two years this institution of polygamy has existed in Utah; various efforts have been made to convict persons guilty of practicing it, under the law; but it has been very difficult... 

... I am strongly inclined to think that the singling out of two thousand or twenty-five hundred persons will only make them more conspicuous. They will rule the rest; there will be enough Mormons left to elect the Legislature, and these leading men, who hold the property, who are the men of intelligence, many of them men of education, of great power, and great wealth there, will rule and govern the Mormons who will elect the Legislature.96

Senator Lamar of Mississippi thought it "a cruel measure, and will inflict unspeakable sufferings upon large masses, many of whom are the innocent victims of the system."97

Most of the same objections were raised in the House of Representatives, and the same justifications made. Representative Townshen of Illinois insisted that Congress must return republican government to the Territory of Utah.98 Representative Cassidy of Nevada thought that the bill was
not tough enough to dislodge the political power of the polygamist element in Utah; he advocated "mailed hand" instead of "kid-glove" legislation. Some speakers, such as Representative Singleton of Illinois, objected to the bill because it did not go so far as to outlaw adultery, fornication, lewdness, and related moral offenses. House opponents denounced what they claimed were bill of attainder and ex post facto features, the reduction of local self-government, the infliction of punishment by taking away the right to vote and hold office without conviction for polygamy or unlawful cohabitation, and the disqualification of jurors because of belief and the resultant packing of juries with anti-Mormons. Representative Carlisle of Kentucky, among others, warned that the bill would not effect law and order in the Territory of Utah, but that it would create anarchy by deposing an asserted nineteen-twentieths of the office-holders. Representative Mills of Texas was unable to understand exactly how placing elections in the hands of a returning board would result in the reestablishment of republican government in Utah. Representative Blanchard of Louisiana complained that "a returning board is too great a punishment even for a Mormon."

The Edmunds bill became law on March 22, 1882. This same year, apparently unmindful of the hostile climate in Washington, the people of Utah approved a constitution and applied for admission into the Union for the fifth time.
Instead of being granted statehood, they were stripped of political control of their territorial government.

The immediate effect of the Edmunds act was a vindication of those who had predicted that it would produce anarchy. The Utah Commission was not able to get mobilized for the August, 1882, elections, which meant that there were no legally qualified voters in the Territory, since all the election offices had been vacated. So Congress was forced to append to the civil appropriations bill a provision authorizing the governor of Utah to appoint officers to fill such vacancies as were caused by the failure to hold the election. This was the so-called "Hoar Amendment." After strong objections that the Utah Commission might not authorize an election and thus the entire territorial government would be in the hands of the governor indefinitely, the term of such appointees was limited to eight months.

Bancroft has said that the act of 1862 and the Poland act were "among the clumsiest specimens of legislation as yet devised by man," and the Edmunds act served "to cap the climax of absurdity." He has pronounced the latter "virtually a penal statute." Moreover:

... It is also an ex post facto law, a bill of pains and penalties, wherein the judicial function, after being misinterpreted, is usurped by the legislature and the executive—one that might not have been amiss in the days of the star chamber, but is directly at variance with the spirit and letter of the American constitution. ...
The Mormons did not suffer in silence. They vigorously protested the passage of the 1862 and 1882 acts and urged Congress not to take further action against them. One of the chief Mormon protesters was B.H. Roberts, who commented, "Perhaps I shall be pardoned for suggesting that it is just possible that Congress and the Supreme Court, to satisfy the popular clamor, sacrificed the liberties of the people of Utah." He conceded that perhaps the Edmunds act had been favorable to the Saints in one respect: it had prompted wide discussion and inquiries which could only lead to a discovery of the truth: that plural marriage was a legitimate part of Mormon doctrine, that it was not injurious to anyone, and that governmental interference with this practice was a constitutionally-proscribed "law respecting an establishment of religion."

In answer to those who denied constitutional protection to polygamy on the grounds that criminal actions cannot masquerade under the guise of religion, Roberts distinguished between kinds of criminal actions. Human sacrifice, he said, was *malum in se*, in and of itself a crime and destructive of the rights of others; plural marriage was not. He indulged in a bit of appropriate sarcasm:

"... Judging from their expressed apprehensions our legislators and judges fear, if they grant plurality of wives to be a part of the religion of the Latter-day Saints, that the Hindoos may come to this land and insist upon burning widows upon the funeral pyres of the husbands; or that others, perhaps the Thugs, will claim the right to commit murders as a part of their religion."
But is there no difference between burning women and marrying them? . . .

The Edmunds act, Roberts charged, deprived a right more important than property because the suffrage was preservative of other rights. Furthermore, the claim that it was not punishment was contradicted by the fact that it amended a criminal statute. The whole history of the Edmunds act led to the conclusion that the sections which take away the right to vote and hold office were intended as punishment. This punishment was inflicted without a judicial trial.

The Edmunds–Tucker Act

The ink was hardly dry on the Edmunds act before agitation began for additional federal legislation to strengthen it. At its very next session, Congress considered a bill introduced by Edmunds to amend his earlier act; it died in the Senate. The bill was resurrected in the next Congress; this reissue, which was passed by the Senate on June 18, 1884, but buried in the House, contained a number of new provisions. In December of 1885, it was rescued again. This round was successful. It passed the Senate on January 8, 1886, and the House passed a considerably altered version on January 12, 1887. A conference committee drafted a compromise that was approved by the House on February 17, 1887, and by the Senate the next day. It became known as the Edmunds–Tucker act, after Senator Edmunds and Representative John
Randolph Tucker, chairman of the House Committee on the Judiciary. 121

Strong measures had been called for by the nation's chief executives. In December of 1883, President Arthur urged that since polygamy was so deeply entrenched, only the strongest possible measures would move it:

... I favor, therefore, the repeal of the act upon which the existing government depends, the assumption by the National Legislature of the entire political control of the Territory, and the establishment of a commission with such powers and duties as shall be delegated to it by law. 122

Again in December of 1884:

... I still believe that if that abominable practice can be suppressed by law it can only be by the most radical legislation consistent with the restraints of the Constitution. I again recommend, therefore, that Congress assume absolute political control of the Territory of Utah and provide for the appointment of commissioners with such governmental powers as in its judgment may justly and wisely be put into their hands. 123

In his first annual message, President Cleveland condemned polygamy at some length, declaring that "there is no feature of this practice or the system which sanctions it which is not opposed to all that is of value in our institutions." Since Mormon numbers were increasing by immigration, he recommended passage of a law designed to prevent the entry of Mormons into this country. 124

The Edmunds-Tucker Act satisfied all but the wildest demands of the anti-Mormon antagonists, and included all but the most outrageous features of the anti-polygamy proposals of the past. Section 1 made the lawful husband
or wife of the accused in a bigamy, polygamy, or unlawful cohabitation prosecution a competent witness. The original bill had provided that such testimony could be compelled; however, the compulsion feature was eliminated, and it was provided that the spouse would not be permitted to testify about confidential communications between husband and wife during the marriage. 125 Section 2 provided that in any prosecution for bigamy, polygamy, or unlawful cohabitation, an attachment for any witness could be issued by the court without a previous subpoena when it was determined upon oath or affirmation that the witness would not obey a subpoena. It was provided that witnesses so attached could be freed upon bond. Section 3 made adultery punishable by as much as three years in the penitentiary. Section 4 prohibited incest, which was defined as marriage, cohabitation, or sexual intercourse between two people related within the fourth degree of consanguinity, and made it punishable by from three to fifteen years in prison. Section 5 set the penalty for fornication at up to six months imprisonment and a fine of up to one hundred dollars. Section 6 annulled the territorial law which provided that prosecutions for adultery could be initiated only upon the complaint of the spouse. 126

Section 7 gave to commissioners appointed by the federal courts in Utah the same powers and jurisdiction as the justices of the peace and the commissioners of the United States circuit courts. Section 8 gave the United
States marshal the same powers exercised by the sheriffs and constables in Utah and they were charged generally with keeping the peace. Section 9 declared that every marriage must be certified, and such certificate, containing the required information concerning the participants, was to be filed with the probate court and made a matter of permanent record. Such records were required to be open for inspection on the same basis as other public records. The certificate was declared to be *prima facie* evidence of the marriage that it reported. Section 10 declared that no provision of this act could be construed to prevent the admission of other legally admissible evidence to prove marriages. Section 11 rendered void all territorial statutes which provided that illegitimate children could inherit from their fathers, provided that this would not apply to any illegitimate child born within twelve months after the passage of this act or to children legitimized by the Edmunds act. Section 12 limited the jurisdiction of probate courts to decedents' estates and persons of unsound mind.

Section 13 directed the United States Attorney General to institute proceedings to forfeit and escheat to the United States property held by corporations in violation of the act of 1862, the proceeds to be applied to the common schools of the territory involved. However, no buildings used exclusively for worship of God, parsonages, or burial grounds were subject to forfeiture. Section 14
gave the courts summary power to compel the production of books, papers, records, and documents involved in such proceedings. Section 15 dissolved the Perpetual Emigrating Fund Company and made it unlawful for the legislative assembly "to pass any law for the purpose of or to accomplish the bringing of persons into the said Territory for any purpose whatsoever." The following section directed the United States Attorney General to start proceedings against the Perpetual Emigrating Fund, the property and assets of which were to escheat to the United States. It was made the duty of the Secretary of the Interior to dispose of such property for the benefit of the common schools. Section 17 dissolved the corporation of the Church of Jesus Christ of Latter-day Saints and annulled the territorial laws regarding it; the Attorney General was directed to take steps to wind up its affairs.

Section 18 restored the right of dower in the territories. Section 19 provided that the probate judges, formerly elected by the territorial legislature, would be appointed by the President and confirmed by the Senate. Section 20 made it unlawful for women to vote in the Territory of Utah. Section 21 ensured the secret ballot in the Territory of Utah. Section 22 authorized the territorial governor, territorial secretary, and the Utah Commission to redistrict the territory and reapportion representation in the legislative assembly. Section 23 continued the operation of the provision of
the 1882 act concerning the Utah Commission, until the territorial legislature should provide for the conduct of elections in a manner which Congress would approve.

Section 24 required that as a prerequisite to registration or voting in the Territory of Utah, every eligible male was required to make a statement under oath before a registrar. He was required to swear that he possessed the necessary age, residence, and citizenship qualifications and to give his full name, place of business, and if married, the name of his lawful wife. Further, he was required to swear that he would support the Constitution and the laws of the United States, especially the anti-polygamy acts, and that "he will not, directly or indirectly, aid or abet, counsel or advise, any other person to commit any of said crimes." The oath was likewise a prerequisite to holding public office or serving as a juror in the Territory. Further, no person who had been convicted of any crime under either the act of 1882 or this act, or who was a polygamist or cohabited polygamously was entitled to vote, hold office, or to serve on a jury. Section 25 abolished the office of territorial superintendent of district schools created by the territorial legislature and transferred the duties of that office to a territorial commissioner of schools to be appointed by the territorial supreme court. The commissioner was given the authority to prohibit the use of sectarian textbooks and was specifically directed to report the Mormon-Gentile
ratio of pupils and teachers in the district schools. Section 26 protected the right of religious associations to hold, through trustees appointed by the probate courts, real property necessary for houses of worship, parsonages, and burial grounds. The last section abolished the Nauvoo Legion.

The Edmunds-Tucker act became law without the signature of President Cleveland, who reportedly had serious doubts about its constitutionality. He is said to have told Delegate George T. Caine, "Tell your people that the law shall not be harshly administered. While it is my duty to see it enforced, I promise that it shall be executed as other laws are, impartially, and in the spirit of justice and humanity." 132

The committee reports and debates on the various bills that finally evolved into the Edmunds-Tucker act provide a record of the reasoning which prompted the various provisions and the arguments of the opposition. Female suffrage was abolished in Utah, according to Senator Edmunds, because:

... [I]t appeared that female suffrage in that Territory was so far as it relates to the Mormons a suffrage of servitude, that the females vote exactly as their lords and masters require them to do, be they many or few; and that counts to keep up in this hierarchy and polygamous really governed Territory as it has been, the power of those guilty of the crimes that we wish to repress. 133

This was a complete reversal of earlier thinking on this matter. Senator Hoar commented upon the slimness of the
evidence that Mormon women were forced by their husbands to vote in accordance with the Church hierarchy. He also challenged Edmunds to own up to his real objective, which was to disfranchise all Mormons; if all wives could be disfranchised because they voted as their husbands directed, the men could be excluded because a majority cast their ballots according to the wishes of the Church. He drew attention to the dangers of this kind of thinking:

... [W]hatever evils the exercise of the right of suffrage by this class of persons may operate in a particular class, the assertion of the right by the Government to control the suffrage with a view of making that control a lever or instrumentality in regard to certain opinions, however erroneous they might be, was the assertion of a vicious and most dangerous general principle, worse, if anything could be worse, than Mormonism itself. ... 134

It was argued that allowing a wife to testify against her husband was an unwise abrogation of a time-honored principle of the common law designed to preserve the sanctity of marriage.135 Those in favor of this provision pointed out that it was impossible to prove Mormon marriages, due to the secrecy that surrounded them, and to make the wife a competent witness was a way to establish the fact of marriage.136 They also called attention to the fact that it was a common occurrence for a wife to testify against her husband when he was being tried for a crime upon her person.137 Senator Garland of Arkansas made the amazing statement that he did not think any marriages contracted under the aegis of the Mormon Church were lawful:
I do not believe there is a lawful wife in the Territory of Utah if the marriage is contracted by persons believing in what is called the Mormon religion and according to the ritual and the doctrine of that church. . . . I believe that for the purpose of suppressing this crime, . . . it would have been better and it would have been legal to have not recognized the first, second, third, or any other marriage in that country according to the religion of that church. . . . 138

The provision authorizing summary attachment of witnesses also received appropriate criticism. Senator Call objected to it on Fourth Amendment grounds, and compared it to a 1656 Massachusetts statute allowing Quakers to be arbitrarily arrested and imprisoned without charge or evidence. 139 Representative Bennett of North Carolina pointed out that it was not necessary to present evidence that the witness did not intend to appear; a person could be seized upon mere suspicion or the untrustworthy word of a professional informer. 140

There were cries of writs of assistance. It was charged that it allowed punishment for contempt where no contempt had been committed. 141 The House Committee on the Judiciary had recommended that the affidavits of two credible witnesses be required. 142

The test-oath was attacked as a violation of republican principles. Senator Brown of Georgia was especially vociferous in his objections:

Now I submit with all due deference that that is in open violation of the Constitution of the United States. . . . We say, and I do not object to that, that the bigamist or polygamist shall not vote or hold office;
but how do we determine whether he is a bigamist or polygamist? We do it by putting a test-oath to him, and if he will not take the test-oath we exclude him; in other words, we convict him because he refuses to take and we inflict punishment on him because he will not take the test-oath. I think every Senator here must know that we have no right to take from a man his office because he refuses to take a test-oath or to swear whether he is guilty or not guilty of a particular offense. . . . 143

The advocates of the test-oath insisted that because opinions were not the subject of the oath, it was constitutional. The majority report of the House Committee on the Judiciary justified the oath on the following grounds:

Your committee recommend this as being right. None but those who will do the things prescribed in the oath should vote—for they are not good citizens; and none but those who will not do those things should esteem the oath a hardship as a prerequisite to taking part in the affairs of a government which must conform to the Constitution and laws of the United States. 144

Some objected to disinheriting the children of polygamous unions. As Senator Vest pointed out, it was enough to punish the adult; to strike at innocent offspring was an unjust visitation of the sins of the fathers upon the sons. 145

The severe provisions dealing with the dissolution of the L.D.S. Church corporation and the Perpetual Emigration Fund received the most important attention. The proponents of this action alleged that all of the governmental action taken under the State of Deseret, which included these two acts of incorporation, was void ab initio because the General Assembly of Deseret had no
legal existence or authority, and later territorial acts adopting the laws of Deseret were ineffectual. Moreover, the actions of Deseret illustrated the scheme to establish Mormon supremacy and a merger of church and state in Utah. The offensive polygamous system could be outlawed by Congress because it was a matter of overt actions and not merely religious beliefs. Furthermore, the laws incorporating the L.D.S. Church and the Perpetual Emigrating Fund were both unconstitutional because they gave preference to the Mormon Church and were laws "respecting an establishment of religion." The federal government should check the monopoly of power held by the L.D.S. Church, and a precedent for this action could be found in the mortmain laws which were the result of the danger of allowing religious corporations to accumulate vast amounts of property. It was alleged that the Perpetual Emigrating Fund Company interfered with congressional power over foreign emigration.

Again it was pointed out that Congress, in the organic act, specifically reserved the power to annul acts of the territorial assembly which it did not approve. Since the power of the federal government over the territories was plenary, the House Committee on the Judiciary advised Congress "to cut up by the roots this church establishment, with the Emigration Fund Company as its attachment, and to authorize judicial proceedings, under the direction of the Attorney General, for dealing with the property rights according to law and equity."
In answer to complaints that the charters were contracts and the proposed action would amount to an "impairment of the obligation of contract," attention was drawn to the fact that the Article I, Section 10 contract clause of the Constitution was a limitation only upon the states and not the federal government; therefore the rule of the Dartmouth College case had no application. Even if this were not so, the L.D.S. Church and the Perpetual Emigrating Fund were not merely private corporations. They had no assignable stockholders. Territorial law had given them status as institutions of the body-politic, and since they had accumulated considerable power over that body-politic, Congress could move to correct the evils of the situation.\textsuperscript{147}

Those opposed to such action pointed out that since it was claimed that the acts of the General Assembly were void \textit{ab initio}, the authors of the bill proposed to dissolve corporations that they insisted had never existed, which betrayed some confusion on this point. The whole process, said the opponents, could only serve to throw into litigation large amounts of property in which the United States had no interest. It was a matter of some doubt to them whether the United States could maintain a suit in which it had no pecuniary interest, where it was attempting to take property belonging to a corporation and held in trust for the benefit of its members.\textsuperscript{148} In answer to this objection, it was claimed that the L.D.S.
Church was a corporation contrary to public policy, and that Congress had a right to abolish a trust fund established for an illegal and immoral purpose. Opponents conceded the power of Congress to outlaw the practice of polygamy, but denied that it had the right to abolish the church that embraced it, infringing upon freedom of thought and belief. Senator Call claimed that the provision:

... declares that the chartered rights of succession and ownership of property granted to the religious establishment of the Mormon church shall not only be taken away from them, but that their property shall be confiscated, taken from them, and used according to the will and discretion of Congress; and to what end? To the avowed end declared in the bill, that this form of heretical belief, that this false religious establishment, shall be suppressed and destroyed, to the end that true religion, as we conceive it to be, may be maintained.

... Sir, we cannot indirectly legislate for the purpose of destroying any religion, whether false or true. We can not take away its chartered rights which have been given to it by law, selecting it as one out of many to the end that it may be destroyed, without violating not only the principles of the Constitution, but the essential principles of the religion of Christ.

There was some question about whether Congress could take private property for a public purpose, the schools, without giving just compensation. Senator Vest labelled it "naked, simple, bold confiscation, and nothing else."

Throughout the evolution of what was to become the Edmunds-Tucker act, there were some who continued to object to the entire premise upon which it was based. In 1884, Senator Call declared:
I am opposed to this entire bill, and I am opposed to it because it is an attack upon the principles of the Christian religion, upon the instrumentalities of the Christian religion; because it ignores and denies the power of our system of civilization and of morals to overcome error, whether secular or religious; because it proposes to revive the practices of the Dark Ages, and to substitute for the freedom of the press, for the power of religious thought, for the teaching of the gospel the sword of civil justice, the power of the secular arm, the force of criminal law to punish thought and create opinions by law, that has been tried in all times. . . . And it proposes to do it not only in defiance of the principles of the Constitution, but of the very letter of the Constitution.\textsuperscript{154}

He urged an entirely different approach:

. . . However great may be our detestation of polygamy, let us recognize the power of a Christian civilization to overcome it by the aid of these very virtues which even in a polygamous community are possible only because of the light and influence of our Christian civilization, and which will surely make polygamy disappear in the further development of these people under the influence of a public opinion and a public policy adverse to it, unless we unwisely give to it the force and energy which persecution and severe laws will create.\textsuperscript{155}

The Senator later vigorously attacked the compromise bill that was finally enacted, alleging that while each provision was defensible as within the letter of the Constitution, since each provision was aimed exclusively at the Mormon Church and at Mormons because they were Mormons, it violated the spirit of the Constitution. It was, he claimed, a "law respecting an establishment of religion," and to deny this was hypocrisy.\textsuperscript{156}

The Utahns, again demonstrating a critical malfunction in their sense of timing, chose 1887 to make
their sixth application for statehood.\textsuperscript{157} And Congress, responding in characteristic fashion, as Nels Anderson has commented, "placed Utah in the position of a conquered province."\textsuperscript{158}

Other approaches to the problem were considered. In 1886, Congress appropriated forty thousand dollars for the establishment of an Industrial Home in Utah "to provide employment and means of self-support for the dependent women who renounce polygamy, and the children of such women of tender age, in said Territory, with a view to aid in the suppression of polygamy therein."\textsuperscript{159} The project was a miserable failure, due to the scarcity of disillusioned and cast-off polygamous wives and children. The Home was finally remodeled into offices for the Utah Commission.\textsuperscript{160}

Also, there were, from time to time, proposals for a constitutional amendment to abolish polygamy. In May of 1886, the House Committee on the Judiciary recommended the passage of such an article, with the following explanation:

The evils of the Mormon system are deeper than can be cured by ordinary legislation. To punish the offender may be accomplished by law, but to extirpate the system, to eradicate it from this Union of free and civilized Commonwealths, will require a change in the Constitution of the United States.\textsuperscript{161}

Such concern was prompted by the anticipation of statehood for Utah. Since once admitted, Utah would be on an equal footing with the other states, it would be possible
to reinstate polygamy. The committee maintained that such an amendment would neither limit the autonomy of the states nor violate religious liberty. It would merely allow the rest of the states to set a standard for admission and make it stick, to define the character of a state. The report recommended that polygamy be defined, in the amendment, as a status, that it be made "a criminal act in its inception and in its continued existence." It was suggested that marriage be made provable by contract, and also by "fact"—the "holding out to the world and by that mutual recognition of the relation of husband and wife which constitutes marriage."\textsuperscript{162} As a rule, the object of these amendments was not to preempt the field for the federal government, but "to clothe the General Government with concurrent power with the several States to suppress the crime of polygamy within the States."\textsuperscript{163}

The provisions of the federal anti-polygamy statutes met various fates. Some were repealed. Some were only temporary measures. Some were executed. Some were special acts which had no further application after Utah became a state. Some became obsolete. Three lonely remnants remain in force today:

First,

No polygamist, bigamist, or any person cohabiting with more than one woman, and no woman cohabiting with any of the persons described as aforesaid in this section, in any Territory or other place over which the United States has exclusive jurisdiction, shall be entitled to vote at any election held in any such Territory, or other place,
or be eligible for election or appointment to
or be entitled to hold any office or place of
public trust, honor, or emolument in, under,
or for any such Territory or place, or under
the United States.164

Second,

No corporation or association for religious
or charitable purposes shall acquire or hold
real estate in any Territory, during the exis-
tence of the Territorial government, of
greater value than $50,000; and all real estate
acquired or held by such corporation or associ-
ation contrary hereto shall be forfeited and
escheat to the United States; but existing
vested rights in real estate shall not be im-
paired by the provisions of this section.165

Third,

All religious societies, sects, and congrega-
tions shall have the right to have and to hold,
through trustees appointed by any court exer-
cising probate powers in a Territory, only on
the nomination of the authorities of such society,
sect, or congregation, so much real property for
the erection or use of houses of worship, and
for such parsonages and burial grounds as shall
be necessary for the convenience and use of the
several congregations of such religious society,
sect, or congregation.166

Conclusions

Two major aspects of the curious progression in the
theory which governed congressional actions against Utah
and the Mormons in the period between 1856 and 1887 stand
out in disturbing relief.

Attention has been called to the first aspect at
various points in this discussion: the shifting of gears
from the decision that polygamy was an evil and should be
outlawed to the conclusion that since it was practiced by
the Mormons, the entire Mormon system was evil and should
be broken. Those who made the policy decisions came to accept arguments which justified anti-polygamy legislation also as justification for destroying the entire way of life of a religious group. They seemed to proceed upon the assumption that Mormons and Mormonism were synonymous with polygamists and polygamy, and once governmental power to extirpate the latter was established, it justified a full-scale attack on the former.

The congressional majorities which passed the Edmunds and Edmunds-Tucker acts seemed to be composed of two elements. First were the well-meaning, but myopic, men who desired the extirpation of polygamy, but who were unable to keep separate in their minds the evil at hand from the system of which it composed only a small part. Senator Edmunds expressed this frame of mind when he thundered, "Whenever you promote Mormonism, you promote polygamy; whenever you promote the power of that church, you promote polygamy. They are one and inseparable." In the second group were those who wished the destruction of Mormonism, and used polygamy as the needed excuse for the attack. This element was represented by such men as Representative Burrows of Missouri who said, "If I were to frame an indictment against the Mormon Church, as founded on its history in Utah, it would read something like this: 'lawlessness, perjury, polygamy, lewdness, profanity and vulgarity, theft and murder,' and to which I would add blasphemy and religious fanaticism." Regardless of the motives, it was
unmistakable that polygamy became not the only, or even
the primary, target of congressional action.

In making this transition, Congress not only displayed
faulty logic, but did violence to the principles upon which
the exercise of freedom depends. The stage was set by the
House Committee on the Judiciary which, after considering
the Morrill bill of 1860, it will be remembered, came to
the conclusion that the legal position of the L.D.S. Church
was a proscribed "establishment of religion." The pro-
nouncement was qualified by a statement which is disturbing
to a liberal mind of the mid-twentieth century. The com-
mittee said it was a law respecting an establishment of re-
ligion, but only "if the odious and execrable heresy of
Mormonism can be honored with the name of religion."169
This is illustrative of the general tenor of the report.
It embodied an extremely restrictive interpretation of the
First Amendment protection of religious liberty. The com-
mittee alleged that when the framers of the Constitution
included a guarantee of freedom of religion, "they did not
mean to dignify with the name of religion a tribe of Latter
Day Saints disgracing that hallowed name, and wickedly im-
posing upon the credulity of mankind;" they meant to dignify
by the term "religion" only "a belief founded on the pre-
cepts of the Bible."170

Such flagrantly anti-libertarian language appeared
time and time again in official and unofficial pronouncements
upon the Mormons. Attention is called to it because it
involves the crucial matter of presumptions, both in the precise judicial sense and in the larger philosophical sense. Presumptions are the balancing blocks in striking a balance between majority rule and minority rights, between liberty and order, between established social rules and religious freedom. When it is judged that a particular action or practice cannot be religious in nature, it loses the presumption that it is constitutionally protected. This presumption is not inconsequential; when it exists and is respected, it places the single most important barrier in the path of a majority attempt to suppress a minority, and the barrier is the first one—it must be overcome before such an attempt can progress any further. This matter of presumptions assumed great significance in regard to the Mormons because the rejection of the initial presumption seemed to pave the way for any kind of action Congress desired to take. As the years passed, and the volumes of official pronouncements increased, the line between what was valid and what was supposedly invalid, or at least legitimately subject to invalidation, in the religion of the Latter-day Saints became blurred.

Secondly, Congress was scrupulous about giving lip-service to the test of justifiable interference by government with religion, as announced by the United States Supreme Court. Senator Hoar's exposition of the formula was typical:

The Mussulman, the fire-worshipper, the Mormon, the atheist have the tribunal of their
own breast, the realm of their own creed, the liberty of their own conscience sacred from the profane interposition of any human authority whatever. But when those beliefs, whether genuine or pretended, find expression in acts, find expression in conduct toward other men, they must then be brought to the test of the law which the law-making power deems for the safety of the State.\footnote{171}

However, the mid-twentieth century student cannot help wondering if the words meant anything to those who spoke them. In perusing these proceedings, one rarely finds a member of Congress whose suggestions for practical application of the formula in regard to the Mormons did not violate its language. An excellent illustration of this was the attempt of Representative John Randolph Tucker to interpret the rule of \textit{Reynolds v. United States}\footnote{172} in the terms of Jefferson's famous pronouncement:

\begin{quote}
. . . If you are not a polygamist in act I do not care what you believe; but I do care very much what you do. When religious belief breaks out into the overt act of polygamy it is time for the civil government to interfere to preserve the peace, purity, and good order of society.\footnote{173}
\end{quote}

This statement assumed that polygamy was one of the "overt acts against peace and good order."\footnote{174} There seemed to be no concern with determining the actual existence of a "clear and present danger."

It is a matter of regret that the nation did not give more searching consideration to these words of Madison:

\begin{quote}
. . . The settled opinion here is that religion is essentially distinct from civil Government, and exempt from its cognizance;
\end{quote}
... that if new sects arise with absurd opinions or over-heated imaginations, the proper remedies lie in time, forbearance, and example. . . .175

In a wave of hysteria, however, little heed is paid to reasonable men who suggest that perhaps the cure will be more destructive than the disease.
FOOTNOTES

CHAPTER IV

1 B. H. Roberts, A Comprehensive History of the Church of Jesus Christ of Latter-day Saints, IV (6 vols.; Salt Lake City: Deseret News Press, 1930), 55. The system of plural marriage practiced by the Latter-day Saints is more properly designated as polygyny. Polygyny is a system under which one man is married to more than one woman at the same time; polygamy is the plurality of wives and husbands at the same time. Apparently, the confusion surrounding the meaning of the two terms originated in the United States and specifically grew out of the Mormon experience. The practice of one man's having several wives was by no means unknown in both ancient and modern times. Encyclopaedia Britannica, XVII (1964), 188-189; Encyclopedia Americana, XXII (1963), 330.


3 Appendix to the Congressional Globe, 32nd Cong., 1st Sess. 89 (1851).


5 Supra, p. 40.

6 Roberts, op. cit. supra note 1, 57.

7 Bancroft, op. cit. supra note 4, 370-388; Roberts, supra note 4, 52-54; Id. (March, 1885), 208-209; Ready References (Salt Lake City: The Deseret News Company, Printers and Publishers, 1887), 129-141; Orson Spencer, Patriarchal Order, or Plurality of Wives (Liverpool: S.W. Richards, 1853); Orson Pratt and Dr. J.P. Newman, Does the Bible Sanction Polygamy? (Salt Lake City: Deseret News Steam Printing Establishment, 1877). Often cited in defenses of polygamy was a 1780 treatise in which polygamy was advocated; it contains a curious, scholarly, elaborate attempt to prove that polygamy was in accordance with Christianity: Martin Madan, Thelyphthora; or a Treatise on Female Ruin, in its Causes, Effects, Consequences,


9Id., 263.

10Stansbury, op. cit. supra note 2, 4-5.

11Id., 137-138.


14Congressional Record, 41st Cong., 2nd Sess. 3573 (1870).

15For example, Senator Charles Sumner of Massachusetts, in the debate over Kansas-Nebraska, reasoned:

... The relation of master and slave is sometimes classed with the domestic relations. Now, while it is unquestionably among the powers of any State, within its own jurisdiction, to change the existing relation of husband and wife, and to establish polygamy, I presume no person would contend that a polygamous husband, resident in one of the States, would be entitled to enter the national Territory with his harem—his property if you please—and there claim immunity. Clearly, when he passes the bounds of that local jurisdiction, which sanctions polygamy, the peculiar domestic relation would cease; and it is precisely the same with Slavery.

Appendix to the Congressional Globe, 33rd Cong., 1st Sess. 268 (1854).

From the commencement of the discussion upon the Nebraska question to this day, scarcely a southern man has spoken who has not sneered at, condemned, and repudiated all attempts "to interfere with the domestic institutions of our Territories." They are now in favor of interfering with the domestic institution of marriage in Utah, among the Mormons.

How long are we to sit here, and see gentlemen assume one position to-day and another to-morrow? When will gentlemen upon this floor learn that the people of this great nation expect something like consistency of action on the part of their statesmen?

Congressional Globe, 33rd Cong., 1st Sess. 1092 (1854).


Roberts, op. cit. supra note 1, II, 186. It will be remembered that Douglas had been a friend to the Mormons in Nauvoo. On May 18, 1843, Joseph Smith dined with then-Judge Douglas and prophesied:

Judge, you will aspire to the presidency of the United States; and if you ever turn your hand against me or the Latter-day Saints, you will feel the hand of the Almighty upon you; and you will live to see and know that I have testified the truth to you; for the conversation of this day will stick to you through life.

The Mormons look upon his failure to achieve the highest office in the land as retribution for his renunciation of them and a fulfillment of the words of the Prophet. Id., 183-189, at 183.

Congressional Globe, 33rd Cong., 1st Sess. 1092 (1854).

Id., 1093-1102, 1109-1114, at 1097.

Id., 34th Cong., 1st Sess. 895 (1856).

Id., 1491.

Id., 35th Cong., 1st Sess. 184-185 (1858).
25 Id., 2114.
26 Id., 35th Cong., 2nd Sess. 119 (1858).
27 Id., 36th Cong., 1st Sess. 793 (1860).
28 Id., 1150-1151.
31 Appendix to the Congressional Globe, 36th Cong., 1st Sess. 198 (1860).
33 Id., 1847-1848).
34 Id., 2506-2507, at 2506.
35 Id., 2906.
36 12 Stat. 501 (1862). The entire statute is reprinted in Appendix A.
39 Id., 4.
42 Id., 1410.
43 Id., 39th Cong., 1st Sess. 69 (1865).
44 Id., 39th Cong., 1st Sess. 3503 (1866); Id., 41st Cong., 2nd Sess. 5 (1869). These are the Wade and Cragin bills, described in Orson F. Whitney, History of Utah, II (4 vols.; Salt Lake City: George Q. Cannon and Sons Company, Publishers, 1892), 211, 391.
45 Congressional Globe, 41st Cong., 1st Sess. 72 (1869).
The Cullom bill can be found reprinted in Id., 1367-1369. Representative Cullom's analysis of it can be found in Id., 1369-1373.

R.N. Baskin, Reminiscences of Early Utah (Salt Lake City: by the Author, 1914), 28.


Id., 3.

Id., III, 5.

Id., I, 11-19.

Congressional Globe, 41st Cong., 2nd Sess. 1372-1373 (1870).

Id., 2179.

Id., 1517.

Ibid.

Id., 1518.

Id., 1519-1520.

Id., 2143.

Id., 1369-1373, 1517-1520, 2142-2152, 2178-2181, 3571-3582.

Id., 3581.


Senate Misc. Doc. No. 112, 41st Cong., 2nd Sess. 7 (1870).

E.g., the Freylinghusen bill reprinted in Congressional Globe, 42nd Cong., 3rd Sess. 1780-1781 (1873).

House Misc. Doc. No. 165, 42nd Cong., 2nd Sess. (1872). The Ordinance that prefaced the 1872 constitution contained what has been interpreted by some to be an invitation to Congress to add a prohibition of polygamy:

That such terms, if any, as may be prescribed by Congress as a condition for the admission of the said
State into the Union, shall, if ratified by a majority vote of the people thereof, at such time and under such regulations as may be prescribed by this convention, thereupon be embraced within and constitute part of this ordinance.

65 18 Stat. 253 (1874).

66 Roberts, op. cit. supra note 1, V, 25; Bancroft, op. cit. supra note 4, 624.

67 Quoted in Gustive O. Larsen, Outline History of Utah and the Mormons (Salt Lake City: Deseret Book Company, 1958), 196.


69 Id., 208.

70 Id., 250.

71 Id., 356.

72 Id., 560.

73 Id., 606.

74 Id., VIII, 11.

75 Id., 57.

76 Congressional Record, 43rd Cong., 1st Sess. 1527 (1874).


78 Index to the Congressional Record, 47th Cong., 1st Sess. 328 (1881-1882).

79 Congressional Record, 47th Cong., 1st Sess. 68 (1881).

80 Id., 577.

81 Id., 1152-1163, 1195-1217.

82 Id., 1732.

83 Id., 1732, 1845-1877.

84 22 Stat. 30 (1882). The entire statute is reprinted in Appendix B.
It has been claimed that the Utah Commission was the first independent regulatory commission, differing, however, from its later counterparts, such as the Interstate Commerce Commission, in that it exercised political, rather than economic, control. Stewart Lofgren Grow, "A Study of the Utah Commission 1882-1896" (unpublished Ph.D. dissertation, University of Utah, 1954), 1-2.

It was pointed out that since "polygamist" was defined by Webster as one "who practices polygamy or maintains its lawfulness," the Edmunds bill would punish those who believed in it, which meant that almost the entire population of a territory would be disfranchised and barred from holding public office. Congressional Record, 47th Cong., 1st Sess. 1202-1203 (1882). Because of such objections, this proviso was added. Representative House from Tennessee drew attention to the fact that this still allowed the disqualification from holding office for opinions. Id., 3011.

Id., 1156.
Id., 1159.
Id., 1157.
Id., 1196-1199, at 1199.
Id., 1204, 1210.
Id., 1162, 1213.
Id., 1205.
Id., 1207-1208.
Id., 1210.
Id., 1211-1212.
Id., 1212.
Id., 1868.
Id., 1862-1863.
Id., 1870.
Id., 1873.
Id., 1861.

Appendix to the Congressional Record, 47th Cong., 1st Sess. 27 (1882).
House Misc. Doc. No. 43, 47th Cong., 1st Sess. (1882). This same year, George Q. Cannon, after serving as delegate from Utah for four terms, was refused a seat in the House. He was a polygamist, and had been for many years. Congressional Record, 47th Cong., 1st Sess. 3001-3011, 3045-3075 (1882). The report of the Committee on Elections is found in House Report No. 559, 47th Cong., 1st Sess. (1882).

22 Stat. 313 (1882).

Congressional Record, 47th Cong., 1st Sess. 6796 (1882).

Bancroft, op. cit. supra note 4, 683.

Id., 684-685.

Roberts, supra note 4 (February, 1885), 172.

Id., 171.

Id. (March, 1885), 209.

Id. (April, 1885), 253.

A copy of the bill can be found in Congressional Record, 47th Cong., 2nd Sess. 3056-3057 (1883). The last heard of it was on February 24, 1883. Id., 3187.

Id., 48th Cong., 1st Sess. 709 (1883).

Id., 5298. An explanation of the bill can be found in Id., 4564-4565.

Id., 49th Cong., 1st Sess. 122 (1885).

Id., 565. The bill, as it passed the Senate, is reprinted in Id., 566-567.

Id., 49th Cong., 2nd Sess. 596 (1887).

Id., 1882. The vote was 202 yeas; 40 nays; 76 not voting.

Id., 1904. The vote was 37 yeas; 13 nays; 26 absent.

24 Stat. 635 (1887). The entire statute is reprinted in Appendix C. Tucker, it will be remembered, was opposed to the Edmunds bill, but he explained that his opinion had been changed by Supreme Court decisions upholding its constitutionality. Congressional Record, 49th Cong., 2nd Sess. 592 (1887).
Richardson, op. cit. supra note 68, VIII, 184.

Id., 250.

Id., 362. Stokes reports that in 1879, the United States government sent circulars to American ministers in foreign countries instructing them to ask the governments to which they were accredited to discourage the preaching of Mormonism and prevent the emigration of admitted Mormons to the United States. The governments replied that "they could not undertake to inquire into the religious beliefs of emigrants." Anson Phelps Stokes, Church and State in the United States, II (3 vols.; New York: Harper and Brothers, Publishers, 1950), 279-280, at 280. And this, as Pfeffer has said, "to the country that gave the world the concept of religious freedom." Leo Pfeffer, Church, State, and Freedom (Boston: The Beacon Press, 1953), 532.

An act of the Utah territorial legislature of March 9, 1882, provided:

... A husband cannot be examined as a witness for or against his wife, without her consent; nor a wife for or against her husband, without his consent; nor can either, during the marriage or afterward, be, without the consent of the other, examined as to any communication made by one to the other during the marriage, but the exception does not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other. Utah Laws 1882, at 79.

An act of the Utah territorial legislature of March 6, 1852, provided that "no prosecution for adultery can be commenced but on the complaint of husband or wife." Utah Laws 1851, at 122.

An act of the Utah territorial legislature of March 3, 1852, provided:

Illegitimate children and their mothers inherit in like manner from the father, whether acknowledged by him or not, provided it shall be made to appear to the satisfaction of the court, that he was the father of such illegitimate child or children.

Utah Laws 1851, at 71.
An act of the Utah territorial assembly of March 3, 1852, concerning estates of decedents, provided:

... or if he has had more than one wife, who either died or survived in lawful wedlock, it shall be equally divided between the living and the heirs of those who are dead, and such heir taken by right of representation.

Utah Laws 1851, at 71. In 1872, the legislature provided that "no right of dower shall exist or be allowed in this Territory." Utah Laws 1872, at 27. It was generally understood that dower was abolished to break down the distinction between polygamous and lawful wives. Whitney, op. cit. supra note 44, III, 61.

The right to vote had been conferred upon the women of Utah by the territorial legislature in 1870. Utah Laws 1870, at 8.

In 1878, the Utah territorial legislature had provided that ballots should not be marked in any manner. Utah Laws 1878, at 32. However, previously, it had been the law that each voter would provide his own ballot, that his vote would be numbered, and that a list would be kept of each voter's name and the number of his ballot. Utah Laws 1852-1853, at 10.

The Utah Commission had prescribed a test-oath which required a voter to swear that he was not living with more than one woman "in the marriage relation." Congressional Record, 48th Cong., 1st Sess. 2319 (1884). Senator Brown pointed out that this allowed a Gentile with one wife and a dozen mistresses to vote, but denied the same privilege to a Mormon who lived with and supported only two women whom he called his wives. Id., 4555. The United States Supreme Court later ruled that the Utah Commission lacked statutory power to prescribe such an oath. Murphy v. Ramsey, 114 U.S. 15 (1885), to be discussed in Chapter VII, infra.

Whitney, op. cit. supra note 44, III, 575.

Congressional Record, 47th Cong., 2nd Sess. 3057 (1883).

Ibid.

Id., 49th Cong., 1st Sess. 550 (1886).

Id., 48th Cong., 1st Sess. 5238 (1884).

Id., 4564.
Id., 5235.

Id., 49th Cong., 1st Sess. 508 (1886).

Id., 49th Cong., 2nd Sess. 1879 (1887).

Id., 49th Cong., 1st Sess. 5282 (1884); House Report No. 2735, 49th Cong., 1st Sess., II, 3 (1886).

House Report No. 2735, supra note 141, I, 1.

Congressional Record, 48th Cong., 1st Sess. 5290 (1884).

House Report No. 2735, supra note 141, I, 10.

Congressional Record, 48th Cong., 1st Sess. 5291 (1884).


Id., 8.

Id., II, 5-6.

Congressional Record, 48th Cong., 1st Sess. 4564 (1884).

Id., 49th Cong., 2nd Sess. 1898, 1902 (1887).

Id., 49th Cong., 1st Sess. 507 (1886).

Id., 506-507.

Id., 49th Cong., 2nd Sess. 1897 (1887).

Id., 48th Cong., 1st Sess. 5287 (1884).

Id., 5289.

Id., 49th Cong., 2nd Sess. 1900-1903 (1887).

House Misc. Doc. No. 104, 50th Cong., 1st Sess. (1888). Article XV, Section 12 of the 1887 constitution contained a prohibition of polygamy:

Bigamy and polygamy being considered incompatible with "a republican form of government," each of them is hereby forbidden and declared a misdemeanor.

Any person who shall violate this section shall, on conviction thereof, be punished by a fine of not more than $1,000 and imprisonment for a term not less than
six months nor more than three years, in
the discretion of the court. This section
shall be construed as operative without
the aid of legislation, and the offenses
prohibited by this section shall not be
barred by any statute of limitation within
three years after the commission of the
offense; nor shall the power of pardon ex-
tend thereto until such pardon shall be
approved by the President of the United
States.

158 Nels Anderson, Desert Saints: The Mormon Frontier
159 24 Stat. 252 (1886).
For the report of the Board of Control of the Industrial
Christian Home, see Senate Exec. Doc. No. 57, 50th Cong.,
1st Sess. (1887).
161 House Report No. 2568, 49th Cong., 1st Sess. 7
(1886).
162 Id., 11.
167 Congressional Record, 49th Cong., 1st Sess. 511
(1886).
168 Appendix to the Congressional Globe, 47th Cong.,
1st Sess. 37 (1882).
170 Id., 2.
171 Congressional Record, 48th Cong., 1st Sess. 4505
(1884).
172 98 U.S. 145 (1879). In this case, the U.S. Supreme
Court upheld the constitutionality of the act of 1862.
173 Congressional Record, 49th Cong., 2nd Sess. 593
(1887).

PART II

THE ANTI-POLYGAMY LAWS IN COURT
CHAPTER V

CRIMINAL PROSECUTIONS: POLYGAMY

The first criminal prosecution of a polygamist in the Territory of Utah took place under local, not federal, law. At the September term of court in 1871, an indictment was returned against Thomas Hawkins for adultery. The grand jury had been impanelled on an open venire, as was the petit jury later. The Englebrecht case, which would invalidate this method of constituting juries, had not yet reached the United States Supreme Court. In the meantime, the federal judges made good use of the open venire; the grand jury which indicted Hawkins was generally regarded as "packed."\(^1\)

The Hawkins case was initiated in the only manner in which an adultery prosecution could be initiated under Utah law—on the complaint of his wife.\(^2\) She and Hawkins joined the Mormon Church and came to Salt Lake City, where apparently they lived happily, until he took a plural wife. The first Mrs. Hawkins repeated her accusations of his "adulteries" before the grand jury, and at the trial, she and her daughter were the prosecution's only witnesses. Hawkins was found guilty, fined five hundred dollars and sentenced to three years at hard labor. Defense counsel objected to
allowing a wife to testify against her husband, which, he pointed out, was a violation of the common law. The Utah adultery statute was identical to that of Minnesota, and he drew attention to a ruling of the Minnesota supreme court that the statute did not require the wife to be a complaining witness, but was just an expression of public policy to the effect that the interest of the state in a prosecution for adultery was dependent upon whether the wronged spouse wished to complain or not. The trial judge ruled that his legal wife could testify because the "adulteries" were offenses against her, and in such cases, the common law allowed her testimony. The court also admitted in evidence Hawkins' own admission of his marriage, which the defense objected to as a deprivation of constitutional rights and which the Minnesota court had not allowed. 3

The judge in the Hawkins case, and in other notable cases to follow, was James B. McKeen, who served as chief justice of the Utah territorial supreme court from 1870 to 1875. He was said to be a "mission jurist," to whom cleansing the country of polygamy became a sort of religious cause. 4 His zeal was brought to the attention of Congress by Senator Carpenter of Wisconsin, who charged that the territorial judges in Utah were "under the impression that they are commissioned, I do not say by the Government of the United States, but by that higher Power which rules the universe, to extirpate Mormonism and polygamy in that Territory," and that "the chief justice
of that court entered upon this crusade."⁵ Be this as it may, McKean's reputation was that of a conscientious jurist, concerned with precision and even application of the law.⁶ Consequently, his inconsistency in handling the case of Thomas Hawkins is startling. It appears that he was bent upon a conviction and utilized whatever laws suited his purpose. In the method of summoning juries, he followed the practice in the United States courts. In allowing challenges to jurors, he relied upon territorial law, which gave the defense only six peremptory challenges instead of the ten allowed by federal law. Defense counsel asked that the jury be instructed about the two-year federal statute of limitations, but McKean refused, depending upon the absence of a statute of limitations in territorial law. When it came to sentencing, he rejected Utah law which allowed the jury to pronounce sentence, and relied upon the practice in the courts of the United States, where, when the law was silent, the fixing of penalties was left to the judge.⁷ McKean, pronouncing sentence, said "Thomas Hawkins, I am very sorry for you, very sorry."⁸

Several commentators have noticed that McKean, in the Hawkins case, gave effect to four provisions of the feared Cullom bill which had been defeated in Congress: first, making the wife of the accused a competent witness in polygamy trials; second, allowing the admissions of marriage made by the defendant to be introduced as evidence; third, authorizing the United States marshal to select
juries; fourth, disqualifying Mormons from jury service. In a prophetic statement, defense counsel predicted that if judicial thinking continued on the course it appeared to be taking, in future trials, the courts would allow a marriage to be proved by general reputation.9

The same grand jury which indicted Thomas Hawkins also indicted Brigham Young and other Church dignitaries for violation of a territorial statute prohibiting "lewd and lascivious cohabitation."10 Brigham's indictment contained sixteen counts. Prosecution was initiated under this statute undoubtedly because none of Brigham's wives would make the required complaint for adultery. In overruling a motion to quash the indictment, Judge McKean is reported to have said, "It is therefore proper to say, that while the case at bar is called, 'The People versus Brigham Young' its other and real title is, 'Federal Authority versus Polygamic Theocracy.'"11

It was obvious that the Mormons had not intended the adultery and lewd and lascivious cohabitation laws to apply to their plural marriage system. No such statutes appear in the 1876 and 1888 compilations of Utah law, and until the federal statutes of 1882 and 1887, neither crime was punishable in the Territory of Utah.12

Both Brigham Young and Thomas Hawkins, as well as others, were rescued by the decision of the United States Supreme Court in Clinton v. Englebrecht,13 which invalidated the summoning of jurors on open venire. Hawkins had served
a good portion of his sentence by April 15, 1872, when the
decision was announced, but Brigham's case had not come to
trial, due to several continuances and an intervening in-
dictment against him for murder, plus the fact that the
wheels of justice were turning rather slowly in Utah be-
cause neither the United States Treasury nor the terri-
torial legislature would provide funds for operating the
courts.\textsuperscript{14} The Englebrecht decision, apart from being a
personal defeat for Judge McKeen, had wide repercussions.
It operated to free approximately one hundred and thirty-
eight persons held illegally, and to invalidate proceedings
in the district courts for the preceding two years.\textsuperscript{15} The
territorial court granted a motion for a \textit{nolle prosequi}
to be entered in the cases of all persons held under in-
dictments found by grand juries constituted in the manner
condemned by Englebrecht and issued orders for their re-
lease. Further court orders released persons held on
examining magistrates' warrants and cancelled all bonds
given by persons previously indicted for lewd and lascivious
cohabitation. McKeen reversed the conviction of Thomas
Hawkins in the Utah supreme court.\textsuperscript{16} As has been pointed
out elsewhere, these events left the judicial process in
Utah in shambles. There were no juries, since the federal
judges had ruled that the marshal created by territorial
law could not summon jurors, and the United States Supreme
Court had ruled that the United States Marshal could not
do so. It remained for the Poland act of 1874 to restore
order.\textsuperscript{17}
In the interim, a notable event occurred: Brigham Young was sued for divorce by his most recent plural wife, Ann Eliza. The suit began on July 28, 1873, in McKean's Third District court. Ann Eliza claimed that she had been mistreated, and she demanded a divorce, permanent support for herself and her children by a former marriage, alimony, sustenance pendente lite, and attorney's fees. She alleged that Brigham Young had an income of forty thousand dollars per month and asked one thousand of it for herself as an ad interim monthly allowance. Brigham denied mistreating her and refused to admit to an income as substantial as her estimate. More crucially, he denied that she was his legal wife for either or both of two reasons: first, he claimed that she had never been divorced from her previous husband; and second, he insisted that she could not be his legal wife because the first woman he married, in Kirtland in 1834, was still living. After nineteen months, McKean ordered the Lion of the Lord to pay Ann Eliza maintenance of five hundred dollars a month from the beginning of the litigation and three thousand dollars for attorney's fees. Brigham refused to comply within the time limit stipulated and he was cited for contempt, fined twenty-five dollars, and spent one night in the penitentiary.

At this point, McKean was removed, and David P. Lowe was appointed in his place. It should be noted that in making the award to Ann Eliza, McKean at least tacitly granted the validity of plural marriages. Lowe did not
agree with this, and refused to grant a motion to punish Brigham for contempt because a valid marriage had not been proved. From this point on, the proceedings became complicated to the point of comedy. Lowe resigned, and an associate justice, Jacob S. Boreman, reviewed the case and ordered Brigham imprisoned until he paid the amount assessed by McKeen. In the meantime, Alexander White had been appointed to succeed Lowe, and when he arrived, he granted habeas corpus to Brigham on the grounds that Boreman's action reversing Lowe was unauthorized and, therefore, invalid. But there was another turn-over of chief justices, and Michael Shaeffer, White's successor, reduced the maintenance pendente lite. Since Brigham still refused to pay, some of his property was seized and auctioned in partial satisfaction of the order. Finally, the case came to trial. Judge Shaeffer, the fifth judge to sit on the case, declared the polygamous marriage between Ann Eliza and Brigham null and void. He revoked all orders for temporary alimony and assessed court costs against Brigham.\(^{18}\) Ann Eliza, a plucky and resourceful girl, went on to write a book and lecture widely on her "life in bondage" and the horrors of polygamy.\(^{19}\)

**The Reynolds Case**

Meanwhile, a case designed to test the constitutionality of the federal anti-bigamy act of 1862 was set in motion.\(^{20}\) The Saints were certain that it was an interference with their freedom of religion, contrary to the First Amendment,
and that the courts would so declare. In the summer of 1874, Mormon leaders conferred with United States Attorney William Carey, and they agreed upon the terms of a test-case. The volunteer defendant was George Reynolds, a respected and prominent member of the Latter-day Saint community. According to the agreement, Reynolds was to provide the evidence against himself, and in return, punishment was to be suspended. On Friday, October 23, 1874, the grand jury of the Third District found a true bill against him for violation of the anti-bigamy statute, and he presented himself to be taken into custody. Three days later, he entered a plea of not guilty and was admitted to bail, which was set at twenty-five hundred dollars.

An Englishman by birth, Reynolds was converted to Mormonism as a youth, and after attaining a measure of prominence in the Church in England at a remarkably young age, he came to Utah. He later returned to Great Britain to fulfill a mission, and during this time, he served as assistant editor of the Millenial Star. He became secretary to Brigham Young in 1868, a post which he held until Brigham's death in 1877. The church and civic positions occupied by Reynolds were an indication of his stature and reputation. He was a member of the city council, a regent of the University of Deseret, a director of Zion's Cooperative Mercantile Institution, Zion's Savings Bank, and Deseret Telegraph Company, and treasurer of the Deseret Sunday School Union. He held a high place in the priesthood.
He was also a well-known man of letters; during the time he spent in prison, his writings frequently appeared in various publications; he was the author of an exhaustive concordance to the Book of Mormon. More crucial to the judicial proceedings under consideration here, however, was the fact that he had two wives. He married Mary Ann Tuddenham on July 22, 1865, and on August 3, 1874, he married Amelia Jane Schofield.21

There were two trials. The first one began on March 31, 1875, and lasted two days. R.N. Baskin, a prominent Gentile attorney in Salt Lake City, has taken full credit for obtaining the witness whose testimony made the conviction possible. While Baskin was not assisting the United States attorney in an official capacity, he apparently had been his confidant and advisor. According to Baskin's account, it became quite evident during the trial that the prosecution would not be able to prove the second marriage, whereupon:

... I asked the marshal if the plural wife had been subpoenaed, and he said that she had not. I then secured a subpoena for the plural wife ... and it was placed in the hands of Arthur Pratt, a deputy marshal, with instructions to procure a buggy and bring the witness to the court house as soon as possible. In about twenty minutes Pratt appeared in the courtroom with the witness, and she was immediately sworn. ...22

When Amelia Jane found herself on the witness stand, she had only two choices: to admit the second marriage or confess to being a concubine. She chose the former. A
jury of seven Mormons and five non-Mormons found the
defendant guilty of bigamy; he was fined three hundred
dollars and sentenced to one year in prison.

Reynolds appealed to the territorial supreme court,
which reversed the judgment on the ground that the grand
jury was illegally constituted.23 Territorial law provided
that the grand jury should be composed of fifteen men,
while the one that indicted Reynolds numbered twenty-three.
The court ruled that the federal jury law, which would
have allowed this number, was not applicable, because,
according to Clinton v. Englebrecht, the territorial
courts were not "courts of the United States," and were
not governed by provisions regulating the latter. Since
the Poland act was silent on the size of grand juries, the
territorial law would apply.

On the other questions raised on appeal, the terri-
torial supreme court most certainly dampened the hopes of
the challengers. It ruled that a prospective grand juror
who could not, consistent with conscience, find indictments
against polygamists was properly excluded: "A party having
these conscientious scruples would, if sworn upon the Grand
Jury, have to commit moral perjury."24 The claim that the
trial judge had erred in refusing to admit evidence that
would establish polygamy as a part of Reynolds' religion
was disposed of by Justice Boreman, speaking for the court,
with the terse pronouncement that "this objection of the
Appellant, is, as we conceive, based upon neither reason,
justice nor law, and therefore we dismiss it without further notice."

There is some controversy concerning the Mormon insistence that there was indeed a bargain made between the government and the Church in the Reynolds case, and that the government welshed on its part. On the one hand, some commentators, notably Baskin, have denied that any such deals were made. He has maintained that the case was an honestly antagonistic contest from beginning to end, which would not have been necessary if a prior agreement had been made. Furthermore, he has denied that Reynolds supplied the evidence against himself, pointing to his own part in obtaining the critical witness. On the other hand, there is persuasive testimony to the making of such a pact, an example of which is the following statement of a contemporary observer:

... In making these assertions I do not rely upon the record, but partly upon the testimony of one of the grand jury by which the indictment was found—the late James Horrocks, a prominent citizen of Ogden, whose statement to this effect was published by me in the Junction of that city along about 1878. He said without equivocation that the jurors were instructed, or at least advised, that there was no disposition to inflict punishment but merely a design on the part of the Government's representatives to make sure of their ground before going further.

Reynolds was indicted again on October 30, 1875, by a new grand jury, composed of seven Mormons and eight non-Mormons. On December 9, a second trial began. Mormon historians grant that by this time, the hostile attitude
of the prosecuting attorney indicated that he was not
viewing it as a test-case any more:

During this trial the unfair efforts
of the prosecuting attorney, aided by the
arbitrary rulings of the court against the
prisoner, showed that Carey had departed
from his agreement to try the case as a
test on the constitutionality of the law,
and that he was doing his utmost to fasten
criminality upon the prisoner and to secure
his punishment. When this treachery was
discovered, the defendant, of course, did
his utmost to thwart the prosecution and to
save himself. . . . 28

The treatment given the testimony of Reynolds' plural wife
in the second trial is cited as the chief illustration of
this change. Amelia Jane, it seems, "could not be found
when the second trial came." 29 Deputy Pratt testified
that he had attempted to serve her with a subpoena, but
that when he inquired after her at the Reynolds' home, the
defendant told him, "You will have to find out," and added
that "she does not appear in this case." 30 Since she failed
to appear in person, the court admitted the testimony that
she had given previously, and Reynolds was convicted once
more. This time, he was fined five hundred dollars and
sentenced to two years at hard labor, despite the absence
of any provision for hard labor in the statute. He made
a second appeal to the territorial supreme court, 31 and in
the meantime, was released on a bond of ten thousand dollars.

The territorial supreme court heard arguments on
June 13, 1876. Reynolds again raised questions about the
exclusion of jurors. He claimed that it had been error
for the court to allow challenges to one juror who had
been reluctant to answer the question of whether he was living in polygamy, and to another who refused to answer on the grounds that it would incriminate him. Boreman, again speaking for the court, declared:

The Court cautioned the jurors that they need not answer, if the answer would tend to criminate them. They declined, upon that ground, to answer. The inevitable conclusion is that these jurors were guilty of the crime of polygamy. This is not like asking a juror on a trial for larceny, whether he has stolen anything, or on a trial for murder, if he had ever committed murder. The question is not, "Did you ever commit the crime of polygamy?" But it was, "Are you now doing so?" They virtually admit that they are. Would such men make impartial jurors, or such as the law requires? They cannot be such if they are at that very moment practicing the same crime as that charged upon the prisoner. . . .

It was also charged that the defendant's challenge to jurors who had already formed an opinion as to the guilt or innocence of the accused, but said that it would not influence their judgment, should have been allowed. The court said that since the defense did not ask them to reveal their opinions, which it easily could have done, they were properly qualified.

Objection was made to the introduction of the testimony given by the defendant's plural wife at the first trial. The court conceded that the defendant had no affirmative duty to help provide a witness against himself. However, since she lived at his home, and when the officer came to serve her a subpoena, Byngolds defiantly refused to reveal her whereabouts, he was obstructing justice and had
no right to object when her previous testimony was intro-
duced.

Another error was assigned to the part of the in-
structions to the jury which charged them to consider the
innocent victims of polygamy—the women and children. The
supreme court said:

... There is nothing whatever in this
language to warrant the supposition that
the jury might believe that they could
convict upon anything but the facts. We
are unable to comprehend in the language
thus objected to anything beyond a caution
to the jury to give earnest and careful
consideration to the case. ... There was
therefore no impropriety in the language
used by the Court, but it was in all re-
spects proper, especially when we remember
that some of the jurors might have been
supposed to be of the opinion that this
was not a great crime, the doctrine that
polygamy is right having been shamelessly
preached and proclaimed and practiced in
this Territory from its first settlement
to the present time, in defiance of the
statute of the United States against crime,
and especially, too, when we remember that
this crime has a blighting and blasting in-
fluence upon the consciences of all whom it
touches, as is everywhere witnessed through-
out this Territory.\(^{33}\)

There were several other less important assignments
of error, but it should be noted that the issue of freedom
of religion was not even mentioned in this opinion.

The case was taken to the United States Supreme
Court on a writ of error, as provided in the Poland act
for cases involving capital punishment and bigamy. The
Court called it up on November 14, 1878—over two years
after the decision of the territorial supreme court. On
January 6, 1879, the judgment of the Utah courts was af-

firmed.\(^{34}\)
Brief of the Plaintiff in Error

The argument of the plaintiff in error presented six points. The first objection was to the grand jury which returned the indictment. While in the first appeal, the defense had claimed that it was error not to follow the Utah law which set the size of the grand jury at fifteen, it was now claimed that since federal law prescribed no less than sixteen for grand juries before United States district and circuit courts, a fifteen-man grand jury was illegal in the second trial. Reynolds attempted to distinguish his case from the Englebrecht case on the ground that while Englebrecht was tried under a territorial law, his own case arose under federal law. He asserted that when a district court tried an indictment under a United States statute, it was bound to follow the procedure in the United States courts.

The second contention was that the trial court erred when it refused to allow the defendant's challenges to two jurors who said that they had formed an opinion but that it would not affect their verdict. After citing considerable authority on this point, the brief concluded that a juror who had formed an opinion as to the truth or falsity of the charge in the indictment was incompetent. The crucial difference between a "positive" and a "hypothetical" opinion was explained:

The American cases in the Federal and highest State Courts, many of which are here collected, show that a juror who has formed a positive opinion as to the guilt
or innocence of the prisoner, which he entertains on entering the jury box, is incompetent to try the cause; that an opinion is "positive" as opposed to hypothetical, when it is an opinion as to the truth or falsehood of the facts to be tried on the indictment, and not merely an opinion that if such facts should be true, the prisoner is guilty. 36

Furthermore:

... It is indifferent whether the opinion, if positive, has been expressed or not; and it is expressly decided that where a juror admits that he has formed an opinion as to the prisoner's guilt, and is therefore incompetent, it is incumbent on the prosecution, not the prisoner, to make it appear that the opinion was merely hypothetical, or not such as to prejudice or bias his mind. ... 37

The brief asserted that when the opinion was about the truth or falsity of the charges in the indictment, it did not matter whether the juror thought that it would not affect his verdict: "That is not what the prisoner has a right to. His right is to a fair and impartial jury ... 'with minds open to receive and weigh the evidence and balanced in regard to the matters to be tried.'" 38

The third point was that the court erred in allowing jurymen to be asked, on voir dire, whether they were living in polygamy:

The present law, in regard to the examination of a juror on challenge, is laid down in the early English cases, viz.: that a juror can never be himself examined as to any criminal or infamous matter in order to sustain a challenge. 39

The fourth argument was against the admission of the testimony given by Reynolds' plural wife at the first trial. The plaintiff in error charged that the prosecution had offered no proof that Amelia Jane had given such testimony
at an almost identical previous trial, nor that what was printed upon the paper read at the trial was in fact her testimony. Further, it was claimed that the witness who presented the paper to the court was not shown to have had any previous knowledge of what it was, when it was written, or by whom. The brief pointed out that there was nothing in the record to show that the absentee witness had been summoned and then kept away from the trial by an adverse party; in fact, the record showed that she was not summoned.

In making his fifth point, the plaintiff in error asserted that bigamy was not a malum in se, such as "murder, theft, false swearing, and offenses affecting the rights of others," and that there was a great difference between bigamy as generally understood and the kind of bigamy outlawed by the 1862 statute:

This crime ordinarily involves deception on the part of the person committing it. No man in most of the United States could commit it without concealing a prior marriage. But here the woman (or man) with whom bigamy is committed, knows beforehand of the prior marriage. The woman, to whom a man already married is again married, is not deceived nor injured against her own will, or without her own knowledge.

Bigamy is not prohibited by the general moral code. There is no command against it in the decalogue. Its prohibition may, perhaps, be said to be found in the teachings of the New Testament. Granted, for the purpose of the argument. But a majority of the inhabitants might be persons not recognizing the binding force of this dispensation. In point of fact, we know that a majority of the people of this particular Territory deny that Christian law makes any such prohibition. We are therefore led to the assertion that as to the people of this Territory the supposed offense is a creature of positive enactment.
Had Congress a right to fasten this burthen upon them?

We deny that it had, and shall contend that the passage of this statute was beyond its powers. In other words, there is always an excess of legislative power, when any attempt is made by the Federal Legislature to provide for more than the assertion and preservation of the rights of the General Government over a Territory, leaving necessarily the enactment of all laws relating to the social and domestic life of its inhabitants, as well as its internal police, to the people dwelling in the Territory.

... One who commits or abstains from an act under a belief that it is God's will that he should do so, is free from guilt. So here, one who contracts the relation forbidden by statute, in the belief that it is not only pleasing to the Almighty, but that it is positively commanded, cannot have the guilty mind which is essential to the commission of a crime. He may make himself CIVILLY responsible for the results of his act, because of its effect upon others is altogether independent of motive. But he cannot be CRIMINALLY responsible, since guilty intent is not only consciously absent, but there is present a positive belief that the act complained of is lawful, and even acceptable to the Deity. . . .

The plaintiff in error insisted that inhabitants of the territories could not be ruled as "mere colonists;" that the amendments to the Constitution operated in full force in the territories, and that the assertion of unlimited congressional power over the territories was inconsistent with republican government.

The sixth and final objection was to the instruction given by the trial judge to the jury that:

... I think it not improper in the discharge of your duties in this case, that you should consider what are to be the consequences to the innocent victims of this delusion. As the contest goes on they multiply, and there are
innocent children—in a sense even beyond the degree of innocence of childhood itself. These are to be the sufferers; and as jurors fail to do their duty, and as these cases come up in the Territory, just so do these victims multiply and spread themselves over the land.41

Reynolds cited authority to demonstrate "how improper it is for the Judge trying a cause to allude to matters of public policy, which may tend to influence the jury. In the case at bar the Court left the jury no alternative but to convict the prisoner."42

The Opinion of the Court

The United States Supreme Court dealt with the objection to the size of the grand jury as the territorial court had done, ruling that this matter was governed by the decision in the Englebrecht case.

The Court refused to reverse the ruling on the acceptance of jurors, saying that before this was justified:

... It must be made clearly to appear that upon the evidence the court ought to have found the juror had formed such an opinion that he could not in law be deemed impartial. The case must be one in which it is manifest the law left nothing to the "conscience or discretion" of the court.

... The affirmative of the issue is upon the challenger. Unless he shows the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality, the juror need not necessarily be set aside, and it will not be error in the court to refuse to do so. ...43

The record did not reveal that the jurors demonstrated partiality to this extent.
The allowance of the prosecution's challenges was also upheld, for the reason that in polygamy cases, polygamists would not be free from bias and prejudice, and thus would not be impartial jurors.

On the admission of the previous testimony of Reynolds' plural wife, the Court declared that since the defendant was the cause of her non-appearance, he could not complain of being deprived of his constitutional right to confront witnesses against him:

... The Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts. ... If, therefore, when absent by his procurement, their evidence is supplied in some lawful way, he is in no condition to assert that his constitutional rights have been violated. ...

... The rule has its foundation in the maxim that no one shall be permitted to take advantage of his own wrong. ...

The record revealed that his plural wife had no other home but his, that he refused to cooperate with the deputy marshal who came to summon her, and that when these facts were presented in court in his presence, he made no attempt to explain them. All this indicated that he had something to do with her disappearance, and under these circumstances, the testimony was properly admitted.

The Court could find nothing wrong with the instruction to the jury to consider the consequences of polygamy. All the trial judge did, said the Court, was to call the attention of the jurors to the object of the legislation involved and remind them of their duty. Although it might
be pointed out that burdening one defendant with all the legislative reasons for the enactment of the statute was unfair, the Court did not think so: "The effort of the court seems to have been not to withdraw the minds of the jury from the issue to be tried, but to bring them to it; not to make them partial, but to keep them impartial."45

The major issue was, of course, whether the application of the statute violated Reynolds' freedom of religion. The defendant maintained that plural marriage was of divine origin, part of his religion, and thus immune from governmental interference. He asked the judge to instruct the jury that if they found that he was married the second time—providing they found a second marriage—in accordance with what he believed at the time to be a religious duty, they must find him innocent. The judge refused, instructing, instead, that if he had "deliberately married a second time, having a first wife living, the want of consciousness of evil intent—the want of understanding on his part that he was committing crime—did not excuse him, but the law inexorably, in such cases, implies criminal intent."46 The Court agreed with this refusal. The question was, Chief Justice Waite said, "whether religious belief can be accepted as a justification of an overt act made criminal by the law of the land."47 In order to answer this, it was necessary to determine what kind of religious freedom was protected by the Constitution. After a brief history of the framing of the First Amendment and
the ideas of its framers, the Court concluded that "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order." 48

Polygamy had always been an "odious" practice among northern and western Europeans; it was almost exclusively a practice of backward Asian and African civilizations. From earliest England, it had been an offense against society; at first it was punished by the ecclesiastical tribunals, but a statute of James I made it punishable in the civil courts, and the penalty was death. It had been outlawed in the American commonwealths. In view of this evidence:

... [I]t is impossible to believe that the constitutional guaranty of religious freedom was intended to prohibit legislation in respect to this 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 society 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 fact, according as monogamous or polygamous marriages are allowed, do we find the principles on which the government of the people, to a greater or less extent, rests. ... 49

Furthermore, Waite alleged that polygamy was anti-republican because it led to patriarchy, which was just a step away from despotism.

Government could certainly act to prevent Suttee or human sacrifice, the Chief Justice stated, even if such practices were disguised in the form of religion; while
government might not interfere with belief, action in
pursuance of belief might be regulated:

... Laws are made for the government of
actions, and while they cannot interfere with
mere religious belief and opinions, they may
with practices. Suppose one believed that
human sacrifices were a necessary part of re-
ligious worship, would it be seriously con-
tended that the civil government under which
he lived could not interfere to prevent a
sacrifice? Or if a wife religiously believed
it was her duty to burn herself upon the fu-
neral pile of her dead husband, would it be
beyond the power of the civil government to
prevent her carrying her belief into practice?50

To permit a man to excuse his criminal actions on the basis
of religious opinion would be "to make the professed
doctrines of religious belief superior to the law of the
land, and in effect to permit every citizen to become a
law unto himself. Government could exist only in name
under such circumstances."51

Justice Field recorded a partial dissent. It was
his opinion that the prosecution did not establish a suf-
cient foundation for the introduction of the testimony
of the plural wife.

The "at hard labor" part of Reynolds' sentence was
later eliminated, and payment of the fine was remitted.
On June 14, 1876, the corrected sentence was pronounced,
and on June 16, Reynolds was sent to the Nebraska State
Prison at Lincoln, where the Department of Justice had
ordered him. He remained there for twenty-five days, and
then was returned to Utah where he entered the penitentiary
on July 17. A petition bearing the signatures of thirty-
two thousand people was sent to President Hayes, requesting executive clemency for Reynolds, on the grounds that his was a test-case, submitted to the courts under an agreement which guaranteed the suspension of punishment if he were convicted. The petition was ignored.

While in prison, Reynolds was given a great deal of liberty to visit with family and friends, to study and write. He even taught a school for some of the inmates for a time. He was released on January 20, 1881, with the remission of one hundred and forty-four days of his original sentence for good behavior. He was welcomed back by the Saints as a "living martyr:"

"... [W]ithout executive clemency or special favors, Elder Reynolds has paid the penalty our country has imposed upon her children, who desire to serve God as well as the Constitution. He has proved himself a man of God; and though restricted in the exercise of citizenship, has maintained nobler qualifications for citizenship than those who have degraded themselves by persecuting him for conscience sake.

"... He emerges from the prison walls a living martyr to the cause of Zion, with a history hardly paralleled in the lives of the martyrs of olden or modern times. He was not only a prisoner for conscience sake, but a representative prisoner suffering for the conscientious faith of the whole people. He has stood the test that God suffered to be put upon him, and has been found true and faithful, having never murdered or complained, but patiently endured the unholy persecution, which he was willing to suffer for the sake of his brethren, his religion and his God. We welcome him home again and feel to praise him in the gates. All Israel honors him. He will be held in remembrance forever for his heroic integrity in suffering martyrdom for conscience sake, and his example will nerve the faith of thousands in the day of similar trial."
The judgment of the Court attracted a volume of commentary. The logic, constitutional theory, and fairness of the decision were examined thoroughly. The official Church view was expressed in a pamphlet written by Apostle George Q. Cannon. Cannon began:

... I had hoped that the Court would give to this question—one of the most important that has ever been submitted to it—the most calm, profound and unprejudiced attention; that they would examine it thoroughly and exhaustively, and render a decision that would be read with interest and delight by every lover of freedom and the rights of man. No grander opportunity was ever offered to a court... than the Reynolds case afforded. But one has only to read the document to perceive that the Court failed to grasp the magnitude of the question, or to rise to its proper conception. I venture to say that no constitutional lawyer—and in fact no layman who has given the questions involved in this case any consideration whatever—who takes pride in the reputation of the Court, can help having a feeling of regret in reading the decision. It is superficial, careless and immature. It reads more like the plea of an advocate than the well-considered, thoroughly weighed and ripe decision of great judges upon an important and long agitated constitutional question..."

Cannon then proceeded to a lengthy and scholarly discussion of the views of Jefferson and Madison concerning religious freedom, since the Court had identified their ideas as an index to the meaning of the First Amendment. Cannon concluded from this exposition that its true meaning was much broader than that given it by the Court. He claimed that Jefferson and Madison admitted of only two instances where governmental interference with the free
exercise of religion was permissible: when such conduct was injurious to others and when it disrupted the public peace. Polygamy was not objectionable on either score.

He insisted that the Court failed to recognize the difference between polygamy and the garden variety of bigamy. He objected to the Court's equation of plural marriage with human sacrifice and the like; the latter were mala in se, while the former was merely malum prohibit:

But human sacrifice, or the slaying of an infant for its blood, is a crime. It is murder, against which all nature, without the enactment of human statute, cries out in abhorrence. It is a crime against the destruction of life. . . . In the name of common sense, what possible analogy can there be between the destruction of life and the solemnization of marriage, between practices which extinguish life and an ordinance which prepares the way for life to be kindled and perpetuated? . . . 55

He declared his inability to understand exactly whom the Court thought harmed by plural marriage: the women were not coerced; the men were not overpowered; the children of plural marriages were just as legitimate as those of the first. He drew attention to the fact that the law of 1862 was enforced only against Mormons, and to what he considered the total irony of the situation:

. . . Our crime has been: We married women instead of seducing them; we reared children instead of destroying them; we desired to exclude from the land prostitution, bastardy and infanticide. If George Reynolds is to be punished, let the world know the facts. Conceal them not under the thin veil of hypocritical pretense. Let it be published to the four corners of the earth that in this land of liberty, the most blessed and glorious
upon which the sun shines, the law is swiftly invoked to punish religion, but justice goes limping and blindfolded in pursuit of crime.\textsuperscript{57}

A critic who called himself "An Old Lawyer" concentrated his attack on the Court's definition of congressional power over the territories.\textsuperscript{58} When the framers of the Constitution included the provision that "Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States," he said, they did not mean that "Congress shall have power to prescribe the social order of the people of the Territories, and regulate their domestic relations, and to enforce the same by appropriate penalties."\textsuperscript{59}

He claimed that the Article IV, Section 3 grant concerned only proprietary rights of the United States, that the inhabitants of the territories were:

\ldots in no sense public property. They are human beings, entitled, according to the principles upon which alone, it is affirmed, rightful government can be founded, to life, liberty and the pursuit of happiness, in their own way under the rule: Freedom in each to do whatever is not inconsistent with equal freedom in every other.

The statute in question [the federal anti-bigamy statute of 1862] has nothing whatever to do with the proprietary rights of the United States. \ldots \textsuperscript{60}

His was essentially an argument for strict construction of constitutional grants of power. However, he also maintained that it was beyond the power of government to prescribe moral standards. According to his view, morals--
and manners, mores, or whatever else it was called—which became established in a community were the organic principles upon which that society was based, and thus superior to the decisions of civil government, civil government being just one form in which society expressed itself. "The social condition is the common law of the land," he said, "a law which antedates and dominates every law of convention." The Supreme Court was faced with a problem: "Upon the one hand was the social fact, which is and forever must remain the law; upon the other a statute having upon its face a falsehood and, in its substance a despotism." Polygamy was, among the Mormons, he said, an "immemorial custom. It is the fundamental law of the community, and, as such is entitled to be judicially regarded."61

In an open letter to the people of his state, to Congress and to the nation, "a Citizen of Massachusetts" claimed that when the Supreme Court declared Congress "free to reach actions which were in violation of social duties, or subversive of good order," it said something that the Constitution did not authorize it to say.62 "'Social duties and good order' are words not in the Constitution," he said, and "are unwarranted, injected interpolations, and utterly subvert the meaning of that instrument."63

It was his contention that Congress had no right to interfere with the enjoyment of the "blessings of liberty" in order to deal with "social relations" and "social obligations"—the power to accomplish these objects, he said,
simply was not delegated. He called attention to the variety of definitions of "good order" and "social duties," and asserted that the terms could not have the exact and precise legal meaning necessary for use by courts of law. Further, he insisted, "By the evidence of the Mormons, and of many other competent and credible witnesses, 'social duties' are as well performed, and as 'good order' exists, among the Mormons in Utah as in any one of the United States."\(^6^4\)

He thought that the Court's justification of the anti-bigamy act on the basis of the fact that polygamy had always been "odious" to northern and western Europeans was especially lame:

... Not only has polygamy been "odious," but so has democracy been "odious" among the northern and western nations of Europe; but that is no good argument why democracy would not exist in the United States. Whether a matter or an institution is odious or not odious, is a question of taste, and not of natural rights. ...\(^6^5\)

The irrepressible Brigham H. Roberts commented:

We are graciously told by our judges that the religious liberty vouchsafed to us by the Constitution means freedom to believe whatever we choose, to entertain such opinions as we please; but we are not at liberty to practice our religious belief, nor to act in accordance with our opinions. If this is what is meant by the guarantee of religious liberty in the Constitution, then "What thrice mocked fools are we!" ...\(^6^6\)

Brigham Young did not live to hear the pronouncement of condemnation; he died on August 29, 1877.\(^6^7\)

The Mormons did not admit defeat. They remained in what they considered a position of perfect loyalty to the
Constitution and to the United States government, insisting that the courts had not read the First Amendment correctly. In a sense, they were not defeated; as Nels Anderson has pointed out:

The decision in the Reynolds case settled nothing, because he had been treated as a bigamist when his crime was of a different character. He was cohabiting with a plural wife, but his marriage was not a civil union. Even the Gentiles had been forced to realize this distinction. . . .

Reflection

Chief Justice Waite's opinion in the Reynolds case is the classic judicial statement of what is protected by the First Amendment guarantee of freedom of religion. It is usually remembered as giving a rather generous construction to this provision, and the now-familiar selection of quotations usually taken from the opinion seem solid and stable with calm reasonableness. But while it dutifully invoked the words of Madison and Jefferson, the reader finds little of the tone of temperateness that marked the statements of those men. The opinion has the same undercurrent of hysteria that pervades the pages of the Congressional Record which preserve the debates on the "Mormon problem"—muted, perhaps, as the result of the operation of the judicial temperament, but there, just the same. The argument for the constitutionality of governmental action against polygamy flows very logically: Government has the power to prohibit practices which threaten the well-being of society or legitimate social
values; such practices cannot be excused because they are a part of religious belief, because if religion can be used as a cloak for activities and actions that government has pronounced destructive of the interests of the community, government loses its authority; thus, the First Amendment protects freedom of religious belief absolutely, but only those religious practices which are not destructive of peace and good order. This is all very understandable until the attempt is made to connect it to the polygamy question: the Court never quite explained why plural marriage was a threat to the public well-being. Somehow, this whole question became confused with Suttee and human sacrifice, and the conclusion was that since these practices could not be tolerated in the name of religion, neither could polygamy. The Reynolds opinion was an admirable statement of the test, but it failed to make the mechanics clear, or perhaps more precisely, it failed to define the requirements for a positive application of it. It is reminiscent of what the Court did to the "clear and present danger doctrine" in Dennis v. United States, although the theory of judicial approaches to First Amendment questions had not yet begun to develop in 1879. Thus, the categories familiar to us today—the clear and present danger doctrine, the dangerous tendency doctrine, etc.—are not strictly applicable, but the similarities in reasoning may be noted. The Court, in effect, appeared to step back and allow Congress to make the decision, which, to
say the least, is not a rigorous test of congressional power.

The Court designated as the primary justification of the anti-polygamy law the proposition that polygamy is an evil which strikes at the foundation of American society. The assumption implicit in this assertion is that monogamy is the basis of American society. That government has the power of self-protection, that it can eliminate practices which threaten its life as a political system, cannot be disputed. But whether monogamy is one of those elements crucial to its political life is questionable. The Court said that polygamy leads to patriarchy, and patriarchy leads to despotism. This statement is not self-evident at all. If, then, polygamy cannot be established as the antithesis of republican government, and it can be established as a part of religious doctrine, it has a preferred position. The government must overcome the presumption so created, and the Court must strike a balance.

There was no question of balance in the Reynolds opinion. The presumption of First Amendment protection was taken away by an exercise of judicial notice which legitimately can be questioned. The objection is not that it is impossible to find polygamy incompatible with social values, but that the Court did not make adequate explanation.70

The Miles Case

Soon after the United States Supreme Court decision
in the Reynolds case, another polygamy case was brought to trial. However, this one was not a test-case; it was instigated by a jealous plural wife of the accused. John H. Miles married three women at about the same time: Emily, Carrie, and Julia. He had become fond of Carrie while in England as a missionary and brought her to Utah to become his wife. He married Emily and Carrie in the Endowment House, where all such ceremonies took place, on the same day. Carrie agreed to his having more than one wife, as long as she had the status of first wife. After consulting with Church authorities, however, it was decided that the three wives should be ranked according to age—Emily first, Carrie second, and Julia third—and they were married in that order. It was not long before Carrie discovered the truth, and in a fit of pique, she went to the United States marshal with the information that led to Miles' arrest. She regretted her hasty actions and was reconciled briefly with Miles, but later renewed charges.71

The case came to trial in April of 1879. The big problem faced by the prosecution was to prove Miles' first marriage, to Emily, since Carrie's was conceded. The man who allegedly performed the ceremony, Daniel Wells, was imprisoned for contempt when he refused to answer questions about Endowment House ceremonies. Carrie testified that she had seen Emily at the Endowment House on the day of her own wedding and that Emily was dressed in the costume invariably worn at wedding ceremonies, that Wells had
commented at her own wedding that Miles' "first wife" should have been present, that at the reception afterwards, Emily was introduced as his wife, and that Miles admitted to her that he had married Emily first.

Miles was convicted, and after a rehearing was denied, he was sentenced to five years imprisonment and fined five hundred dollars. He appealed to the territorial supreme court.\(^7\)

The defendant claimed that it was error for the prosecution to ask jurors if they believed in polygamy or belonged to the Mormon Church. The supreme court cited a territorial statute making actual bias a ground for challenge and defining actual bias as a state of mind which would not allow the juror to act impartially, and ruled that since strong religious belief in Mormon doctrine might cause a juror to lean toward acquittal, the questions were proper. Both the question about adherence to the doctrine and the question of membership in the Mormon Church were inquiries into belief with a view to determining this:

\[\ldots\] It is one of the leading doctrines of the Mormon Church that polygamy is divinely appointed; that it is ordained of God, and to be revered as such. It is likewise one of the cardinal teachings of the church that as it is God's law it is above man's law, and that when the practice comes in conflict with the laws of the land, the law of the church must be obeyed, and the law of the land disobeyed. One belonging to a church holding the offense charged to be of divine sanction and above the civil law, might also be influenced by the probable action of his church toward him if he failed in the jury box as well as elsewhere to uphold its doctrine.\(^8\)
The defendant claimed that since Carrie was his "accomplice" in the polygamy, he could not be convicted on her testimony, unless it could be corroborated. The court dismissed this contention, saying that there was no such thing as an accomplice in a trial for bigamy or polygamy. The court ruled that it was not error to admit testimony regarding the sort of dress worn at Endowment House ceremonies and establishing the fact that a person was seen there wearing a particular costume. If a woman was at the Endowment House dressed in clothes worn only for marriages, it could be presumed that she was there to get married. Testimony concerning the conduct of the defendant toward his alleged first wife and his own admissions was also properly admitted:

The admissions of the first marriage, with corroborating circumstances, ought to be sufficient in Utah, if anywhere, for here there is no statute upon marriage, and to cover up this crime of polygamy, every possible precaution is taken to prevent any proof of such marriages, and direct proof is nearly, if not entirely, impossible. Whatever of ceremony there is, takes place in secret, and such secrecy is enjoined by oaths of great affected solemnity. Such oaths, although illegal and void, are generally, by those taking them, treated as binding either from a mistaken notion of their validity or from a fear of the consequences to themselves of a violation thereof. The public demonstrations and the general condition of society here, show the praise that is awarded to such as shrink from their duty to uphold and obey the law and divulge these secrets, and such things also point unerringly to the ignominy and ostracism which the friends of this crime of polygamy seek to visit upon those who are honorable enough and brave enough to expose those hidden criminalities.
The object of such secrecy, no doubt, is to render the law against polygamous marriages a virtual nullity by making its execution an impossibility. It is the duty of courts not to uphold any such shield for crime, but to render it wholly unavailing. Polygamy is no more sacred than any other crime and other crimes are daily in courts of justice established by circumstantial evidence and admissions. 74

Since all this established that Carrie was his second wife, it was proper to permit her to testify.

From the judgment of the territorial supreme court affirming the conviction, Miles took his case to the United States Supreme Court on a writ of error. 75 The objection to questioning jurors about their belief in polygamy was raised once more. Since triers had found sufficient evidence of partiality, and because the record did not reveal any reason to contradict them, their findings were pronounced conclusive. The Court said that since the Reynolds case had established that religious belief was not a defense in a polygamy prosecution, a juror could not claim constitutional immunity from a question about his belief. And if the jurors themselves had no grounds for complaint, none was available to the accused. While the ruling is correct, such a statement leads inescapably to the conclusion that the nature of the distinction between belief and action drawn by the Court in Reynolds was not clearly understood. The Court also approved the introduction of the admissions of the defendant in regard to his first marriage. Justice Woods, speaking for the Court, said, "To hold that, on an indictment for bigamy, the first marriage can only be
proven by eye-witnesses of the ceremony, is to apply to
this offense a rule of evidence not applicable to any
other.”

However, it was held that the admission of Carrie's
testimony, while the identity of Miles' first and legal
wife remained undetermined, was reversible error. Terri-
torial law prohibited spouses from testifying against each
other. While a bigamous wife could testify against her
husband because she was never his wife at all, until a
previous marriage was established, Carrie was prima facie
his legal wife, and could not be a witness against him
until the opposite was proved as a fact. The Court de-
clared:

The testimony of the second wife to
prove the only controverted issue in the
case, namely, the first marriage, cannot be
given to the jury on the pretext that its
purpose is to establish her competency. As
her competency depends on proof of the first
marriage, and that is the issue upon which
the case turns, that issue must be estab-
lished by other witnesses before the second
wife is competent for any purpose. Even
then she is not competent to prove the first
marriage, for she cannot be admitted to
prove a fact to the jury which must be es-
tablished before she can testify at all. The
opinion ended with an invitation to Congress to rid
the judiciary of this bothersome fetter:

It is made clear by the record that
polygamous marriages are so celebrated in
Utah as to make the proof of polygamy very
difficult. They are conducted in secret,
and the persons by whom they are solemnized
are under such obligations of secrecy that
it is almost impossible to extract the facts
from them when placed upon the witness stand.
If both wives are excluded from testifying.
to the first marriage, as we think they should be under the existing rules of evidence, testimony sufficient to convict in a prosecution for polygamy in the Territory of Utah is hardly attainable. But this is not a consideration by which we can be influenced. We must administer the law as we find it. The remedy is with Congress, by enacting such a change in the law of evidence in the Territory of Utah as to make both wives witnesses on indictments for bigamy.78

Miles was not brought to trial again. Carrie Owens Miles took a position as a government clerk in Washington, where she lobbied enthusiastically for the passage of the Edmunds bill.79 Whitney has claimed that the Miles case triggered the Edmunds act and provided "the spark which kindled the conflagration that swept over all Mormon dom during the latter part of the decade of 'the eighties.'"80 Situations like that involved in the Miles case were undoubtedly the reason why the 1862 definition of bigamy was changed by the Edmunds act. As has been mentioned previously, the 1862 act made bigamy a crime; the 1882 act relabeled it polygamy and added another kind of action to the description of offenders: "any man who hereafter simultaneously, or on the same day, marries more than one woman."81

Polygamy prosecutions were not numerous, due to the difficulty of proof. Most of those accused of polygamous practices were charged with unlawful cohabitation under Section 3 of the Edmunds act. However, the Utah territorial supreme court made important law in the handful of polygamy cases it did consider.
United States v. Simpson

Thomas Simpson was convicted of marrying Emma Everett, while his first wife, Hannah, was still living and undivorced. The territorial supreme court upheld the conviction. The defendant objected to the charge to the jury concerning the proof necessary to establish marriage. The jury was instructed that it was not necessary to produce eye-witnesses to the ceremony nor a certificate or any other record evidence, that admissions of the defendant would be sufficient. However, they were cautioned that they must be convinced beyond a reasonable doubt that he was guilty. Justice Powers, for the court, explained that marriage in the Territory of Utah was according to the common law, that a "consensual marriage" was in all respects valid: "Under our law a marriage depends solely upon the mutual consent of the contracting parties. They may enter into the marriage relation secretly, and the fact may be unknown to all save the man and woman." What, then, was necessary to prove the fact of marriage? Justice Powers made it clear that it was not necessary to prove cohabitation, that cohabitation was not necessary to the marriage relation: "The marriage is complete when there is a full, free and mutual consent by the parties capable of contracting, though not followed by cohabitation." The court then proceeded to prescribe the nature of the evidence which could be taken into consideration:
Proof that two parties have treated each other as husband and wife, have lived together as such, and have held each other out to the world as such, is sufficient to enable a court or jury to find that at some previous time the parties did, as a fact, consent to be married; did, as a fact, agree to be husband and wife. . . . The previous actual consent or agreement to be husband and wife is the ultimate and essential fact the jury must find. The mode of life, the holding out, the declarations or admissions of the accused, and the like, are circumstantial evidence from which the fact may be inferred. 85

The jury had been made the sole judge of the credibility of the witnesses, and since none of the testimony given at the trial had been brought up with the record, the court assumed that it was sufficient enough to convince the jury of guilt beyond a reasonable doubt.

**United States v. Bassett**

In *United States v. Bassett*, 86 the territorial supreme court ruled that since the *Miles* case had established that lawful marriage could be proved by the defendant's own admissions, a plural marriage could be established in that manner also. Besides, there had been corroborating evidence of Bassett's plural marriage, and the court ruled that the evidence supported the conviction. The case also involved the competency of Bassett's lawful wife as a witness. He married her in 1872 in Wales, and they came to Utah, where he took a plural wife in a marriage ceremony that allegedly was performed in August of 1884. In 1886, Bassett and his first wife separated. He was convicted on her testimony that he had told her about
the second marriage. He cited the common law rule and the territorial law which prohibited a wife from testifying against her husband in a criminal case without his consent, except where violence was committed against her. The court ruled that she was competent. In entering into a polygamous marriage, the husband committed a crime against the wife; it was a breach of the marriage contract which had been made criminal. The purpose of the common law rule that husband and wife could not testify against each other was to avoid disturbing familial peace and destroying conjugal confidence, according to Chief Justice Zane, but "a man in the bed of a strange woman is in a very unfavorable situation to insist upon preserving inviolate the sacred concord of marriage, and harmony and confidence on the part of his wife."$^{87}$

Bassett, bishop of a Salt Lake City ward, appealed to the United States Supreme Court on the point of his wife's competency. The high court reversed the judgment of the territorial supreme court.$^{88}$ The decision involved the interpretation of two territorial statutes. The code of civil procedure, enacted in 1884, provided:

A husband cannot be examined for or against his wife, without her consent; nor a wife for or against her husband without his consent; nor can either, during the marriage or afterward, be, without the consent of the other, examined as to any communication made by one to the other during the marriage; but this exception does not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other.$^{89}$
The code of criminal procedure, enacted in 1878, provided:

> Except with the consent of both, or in cases of criminal violence upon one by the other, neither husband nor wife are competent witnesses for or against each other, in a criminal action or proceeding to which one or both are parties. 90

The crucial difference was that the latter allowed the wife to testify only if there had been criminal violence upon her person, while she was competent under the former merely if a crime had been committed against her. The government contended that polygamy qualified under the code of civil procedure as a crime against a legal wife, and since this provision had been enacted more recently than the code of criminal procedure, it should apply. The Court disagreed. It was clear, said Justice Brewer, that Bassett's wife was not competent under the code of criminal procedure, and it could not be assumed that the code of civil procedure was intended to make any change. The rule that a wife cannot testify against her husband in criminal prosecutions unless it involved a crime upon her person, or to divulge personal communications between them, was a well-known, sound, and deeply-regarded principle of the common law. Legislative intent to abrogate it should not be implied without substantial reason:

> ... We do not doubt the power of the legislature to change this ancient and well-supported rule; but an intention to make such a change should not lightly be imputed. It cannot be assumed that it is indifferent to sacred things, or that it means to lower the holy relations of husband and wife to the material plane of a simple contract. So, before any departure from the rule
affirmed through the ages of the common law,—a rule having its solid foundation in the best interests of society,—can be adjudged, the language declaring the legislative will should be so clear as to prevent doubt as to its intent and limit. . . . 91

As to the claim that since the code of civil procedure was enacted later than the code of criminal procedure and thus should be considered conclusive of the legislative intent, the Court said, "When a code is adopted, the understanding is that such code is a declaration of established law, rather than an enactment of new and different rules." Since there was no clear and obvious attempt to abandon the rule announced in the code of criminal procedure, both provisions should be construed to mean the same thing. The Court concluded that the outcome was "simply an affirmation of the old familiar and just common law rule." 92

On the question of whether polygamy qualified as one of the exceptions to the rule, Justice Brewer declared, "Polygamy and adultery may be crimes which involve disloyalty to the marital relation, but they are rather crimes against such relation than against the wife." The common law allowed exception only when violence was done upon the person of the wife; it was undoubtedly true that the wife in a polygamous household might feel humiliated and betrayed, "but the question presented by this statute is not how much she feels or suffers, but whether the crime is one against her." 93 It was not.
**United States v. Cutler**

Another polygamy case, *United States v. Cutler,* which was decided before the United States Supreme Court decision in the *Bassett* case, also involved the competency of a wife to testify against her husband, and it was disposed of by the territorial supreme court on the basis of its previous ruling in *Bassett.* The *Cutler* case, however, prompted an interesting dissent from Chief Justice Zane, who had written the opinion in *Bassett.* He now felt that although a man did commit a crime against his lawful wife when he took a plural wife, the Utah statute should not be used in the trial of a person accused of violating federal law. Territorial legislatures, he said, should not be allowed to prescribe rules of evidence in federal criminal trials.

**United States v. Harris**

Convicted polygamist Thomas F. Harris appealed to the territorial supreme court on the grounds that the evidence did not justify the verdict of guilty. After stating that it was the duty of the jury to weigh the evidence and decide whether a plural marriage had taken place, the court ruled that it could have done so upon the evidence presented in this case. There was evidence to establish cohabitation with his plural wife—admissions of the defendant, his recognition of a marital relation, and her testimony; a child was born to them. All this could be combined by the jury in a manner to show that there was a contractual agreement
between them when they began to cohabit. While cohabitation and the birth of a child were not necessarily conclusive proof of marriage, the behavior of the principals with regard to these factors might indicate that a marriage had taken place, due to the change in the way they conducted themselves toward each other.

One of the rare instances in which a polygamy prosecution was dismissed was a case involving a man who acted as a proxy in a Church ceremony which "sealed" a woman to her dead husband. The true facts were brought to the attention of the United States attorney, who informed Judge Zane that the defendant had merely been a stand-in for the deceased, with whom the woman wanted to be united in celestial marriage. "'A celestial marriage?' queried Judge Zane, smiling: 'Well, I guess that's beyond our jurisdiction; the case is dismissed.'"96

Polygamy in Arizona

The anti-polygamy crusade was carried on in Arizona and Idaho, too, where there were substantial Mormon populations. A.M. Tenney, C.I. Kempe, and P.J. Christofferson were convicted in Arizona courts for polygamy under the Edmunds act. The Arizona supreme court upheld the convictions in all three cases, which had been submitted and argued together.97 The defendants had been indicted for unlawful cohabitation as well as polygamy, and they charged as error the inclusion of language referring to unlawful cohabitation in the count for polygamy. The Arizona court
rejected the claim, stating that it was clear that polygamy was the offense charged in the count, and that the subsequent language alleging unlawful cohabitation after marriage was merely surplusage and not prejudicial to the defendants.

In the Tenney case, error was assigned to the allowance of testimony regarding the reputation of Tenney and his wives in the community. The jury was instructed that this alone could not prove marriage, but, taken into consideration with other evidence, it could be used to determine whether a marriage existed, in the absence of proof of an actual marriage ceremony. Justice Fitzgerald, for the court, decided that since Congress had not prescribed rules for the admissibility of evidence in polygamy cases, the trial court had correctly applied the Arizona rule of evidence on the subject, which provided:

It shall not be necessary to prove either of said marriages by the register or certificate thereof, or other record evidence, but the same may be proved by such evidence as is admissible in other cases; and when such second marriage shall have taken place without this territory, cohabitation in this territory after said second marriage shall be deemed the commission of the crime of bigamy.98

Tenney married his first wife in Utah and allegedly his second in Arizona. He objected to certain testimony regarding events in Utah that happened more than three years before the trial. The court declared that it was the defense that had "opened the door" to such testimony by itself introducing evidence as to what happened in Utah,
in order to establish facts favorable to the defendant's cause. Consequently, there could be no valid objection to the prosecution's availing itself of the opportunity. Further, the jury was instructed that none of the defendant's behavior prior to the effective date of the Edmunds act should create any presumptions against him. The instructions to the jury clearly stated that it was necessary to prove that the second marriage took place in Arizona, and that if both marriages had taken place in Utah, subsequent cohabitation with both wives would not justify a conviction for polygamy in Arizona. Considering the charge to the jury as a whole, Fitzgerald said, the trial court adequately protected the interest of the defendant.

Tenney claimed that a second marriage could not have taken place because the fact that his first wife was still living and cohabiting with him was known to both him and the woman alleged to be his plural wife. The court disposed of this in short order:

"... Upon this point we agree with counsel that under no definition of marriage, as understood by Christian people,—a union of one man with one woman, for life,—can these polygamous unions be looked upon as marriage. But counsel lose sight of the fact, which caused the enactment of the law in question, that there are such arrangements and unions, under which a man takes to himself two, three, or more women, and lives with them under a claim of marriage. These arrangements or unions are what the Edmunds law aims to punish and suppress. ... It is not necessary, in order to make out the offense, that the second marriage should be a valid one. Every bigamous or polygamous marriage is void, and it is the entering into the void..."
marriage while a valid one is in existence that the law punishes. . . . Neither has knowledge of the fact that a prior wife was living, anything to do with the question. That knowledge usually exists, and it is one of the unfortunate consequences of the practice of polygamy. . . .

Justice Pinney wrote a separate opinion in which he pointed to evidence that Tenney had, at various times, acknowledged both women to be his wives, paid their bills, and had the general reputation of being a husband to both. He thought that such admissions should have as much weight as the admission of a precise, formal contract by the defendant or the testimony of the person who performed the marriage—at least prima facie evidence that there was a marriage contract between them.

Conclusions

The following table, compiled from the reports of the Utah Commission, shows the number of polygamy convictions each year:

<table>
<thead>
<tr>
<th>Year</th>
<th>Number</th>
<th>Year</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>1875</td>
<td>1</td>
<td>1885</td>
<td>2</td>
</tr>
<tr>
<td>1876</td>
<td>0</td>
<td>1886</td>
<td>4</td>
</tr>
<tr>
<td>1877</td>
<td>0</td>
<td>1887</td>
<td>4</td>
</tr>
<tr>
<td>1878</td>
<td>0</td>
<td>1888</td>
<td>1</td>
</tr>
<tr>
<td>1879</td>
<td>1</td>
<td>1889</td>
<td>6</td>
</tr>
<tr>
<td>1880</td>
<td>0</td>
<td>1890</td>
<td>10</td>
</tr>
<tr>
<td>1881</td>
<td>0</td>
<td>1891</td>
<td>3</td>
</tr>
<tr>
<td>1882</td>
<td>0</td>
<td>1892</td>
<td>0</td>
</tr>
<tr>
<td>1883</td>
<td>0</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1884</td>
<td>3</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td><strong>Total</strong> 35</td>
</tr>
</tbody>
</table>
Section 3 of the Edmunds act, which outlawed unlawful cohabitation, as will be demonstrated in the following chapter, was much more productive of convictions than Section 1, which made polygamy a crime. However, when a comparison is made between the courts' prescription of the kind of evidence necessary to establish a polygamous marriage and that deemed proper to prove unlawful cohabitation, a striking similarity is evident. In proving a second marriage in the Simpson case, it was sufficient to exhibit circumstantial evidence that the two parties had treated each other as man and wife—enough to establish a "holding out" of a relation that could be said to have arisen from an agreement to be man and wife. It was declared unnecessary to prove cohabitation—cohabitation was used obviously in the narrow sense of what was usually regarded as marital cohabitation. In the Harris case, it was decided that such a contractual agreement could be inferred from the birth of a child, the acknowledgements of the principals, etc. This same sort of evidence would be pronounced sufficient to establish cohabitation of the variety proscribed by Section 3 of the Edmunds act. It became obvious that the crime was the same, in substance, regardless of what it was called. Given a disposition to be thankful for small favors, it might be pointed out that the penalty for unlawful cohabitation was much less severe.
FOOTNOTES

CHAPTER V


2 Utah Laws 1851, at 122.


5 Congressional Globe, 42nd Cong., 3rd Sess. 1804 (1873).

6 Baskin, op. cit. supra note 3, 52-53. The Albany Law Journal commented:

That Chief Justice McKean is a pure and honest man, we know, having known him for years before his elevation to the bench; but we know him also to be a man of strong convictions and unyielding prejudices. These latter qualities he has displayed in his present position in a manner scarcely becoming the ermine. Justice ought to be severe, and awful, too, but it ought at the same time to be impartial—to sit calm and unmoved above the storms of prejudice and passion that rage beneath. His decisions we do not question, but the language accompanying those decisions has been often so intemperate and partial as to remind one of those ruder ages when the bench was but a focus where were gathered and reflected the passions of the people.

7Whitney, op. cit. supra note 1, 616; Bench and Bar, op. cit. supra note 3, 35.

8Whitney, op. cit. supra note 1, 617; Bench and Bar, op. cit. supra note 3, 36.

9Whitney, op. cit. supra note 1, 614; Bench and Bar, op. cit. supra note 3, 34.

10Utah Laws 1851, at 122.


12Baskin, op. cit. supra note 3, 54.


16Whitney, op. cit. supra note 1, 688-689; Baskin, op. cit. supra note 3, 57.

17Supra, Chapter III, note 25.

18Whitney, op. cit. supra note 1, 756-767; Anderson, op. cit. supra note 11, 291-292.


20The following materials, in addition to the court opinions, have been used as sources for the discussion of the Reynolds case: Whitney, op. cit. supra note 1, III, 46-56; Baskin, op. cit. supra note 3, 61-72; Edward W. Tullidge, History of Salt Lake City: Biography (Salt Lake City: Star Printing Company, 1886), 145-148; Transcript
of Record, Reynolds v. United States, 98 U.S. 145 (1879) (Microfilm, National Archives, 1984).


23. United States v. Reynolds, 1 Utah 226 (1875).

24. Id., at 231.

25. Id., at 227.


27. S.A. Kenner, Utah As It Is (Salt Lake City: The Deseret News, 1904), 89-90.


29. Ibid.

30. Transcript, supra note 20, p. 42.

31. United States v. Reynolds, 1 Utah 319 (1876).

32. Id., at 321.

33. Id., at 323.

34. Reynolds v. United States, 98 U.S. 145 (1879).


36. Id., p. 21.

37. Ibid.

38. Id., p. 33.

39. Id., p. 36.

40. Id., pp. 54-57, passim.

41. Transcript, supra note 20, p. 7.

42. Brief, supra note 35, p. 63. The brief for the United States consisted of approximately two and one-half pages of terse replies to each of the exceptions in the bill of exceptions.

Id., at 158-159.

Id., at 168.

Id., at 150.

Id., at 162.

Id., at 164.

Id., at 165-166.

Id., at 166.

Id., at 167.

A microfilm copy of this handwritten petition can be found at the Utah State Historical Society.

Tullidge, op. cit. supra note 20, 147.

George Q. Cannon, A Review of the Decision of the Supreme Court of the United States in the Case of George Reynolds vs. The United States (Salt Lake City: Deseret News Printing and Publishing Establishment, 1879). Cannon became notable later for his flight to avoid capture and trial under the Edmunds act. He was first counselor in the first presidency of the Church at the time. For an account of his adventures, see Whitney, op. cit. supra note 1, III, 478-499, 634-639. He jumped bail of forty-five thousand dollars. See United States v. Eldredge and Others, 5 Utah 161 (1887) and United States v. Eldredge and Others, 5 Utah 189 (1887) for proceedings to recover the bond from Cannon’s sureties.

Cannon, supra note 54, 4.

Id., at 34.

Id., at 52.

"An Old Lawyer" [Henry Reed], A Review of the Opinion of the Supreme Court of the United States, Rendered at the October Term, 1878, in the Case of George Reynolds, Plaintiff in Error, vs. The United States, Defendant in Error (New York, 1879).

Id., at 5.

Id., at 4.

Id., at 10-11.
62 "A Citizen of Massachusetts" [Alfred E. Giles], Marriage, Monogamy and Polygamy on the Basis of Divine Law, of Natural Law, and of Constitutional Law (Boston: James Campbell, 1882).

63 Id., at 44.
64 Id., at 43.
65 Id., 44–45.
67 Bancroft, op. cit. supra note 14, 669.
68 Anderson, op. cit. supra note 11, 291.
70 Bruce R. Trimble, Waite's biographer, has pointed out that the Chief Justice himself referred to his opinion in Reynolds as his "sermon on the religion of polygamy," in a letter to an acquaintance. Bruce R. Trimble, Chief Justice Waite, Defender of the Public Interest (Princeton: Princeton University Press, 1958), n.244. Trimble, after reviewing the first part of the Reynolds opinion, has commented: "The Chief Justice then went on to deliver one of the most scathing indictments of what he considered an immoral practice which he ever delivered from the bench."

71 The following sources, in addition to the court opinions, have been consulted for the discussion of the Miles case: Whitney, op. cit. supra note 1, III, 56–60, 64–75; Anderson, op. cit. supra note 11, 308–309.
72 United States v. Miles, 2 Utah 19 (1879).
73 Id., at 22.
74 Id., at 29–30.
75 Miles v. United States, 103 U.S. 304 (1880).
76 Id., at 311.
77 Id., at 313. In 1874, the territorial supreme court ruled that while the law excluded only the legal wife from testifying against her husband, in a suit on a promissory note, the plural wife would also be excluded because the court would not decide the legality of the marriage. If she was acknowledged as a "wife," the court would so accept. Friel v. Wood, 1 Utah 160 (1874).
In 1887, Congress accepted the invitation by making the legal wife a competent witness in prosecutions under the Edmunds and Edmunds-Tucker acts. 24 Stat. 635 (1887).

Anderson, op. cit. supra note 11, n.331.

Whitney, op. cit. supra note 1, III, 57.

12 Stat. 501 (1862); 22 Stat. 30 (1882).

United States v. Simpson, 4 Utah 227 (1885).

Id., at 229.

Id., at 228.

Id., at 229-230.

Utah 131 (1887). For a discussion of this case, see Whitney, op. cit. supra note 1, III, 520-523; Baskin, op. cit. supra note 3, 40-41.


Bassett v. United States, 137 U.S. 496 (1890).

Compiled Laws of Utah 1888, Sec. 3878.

Compiled Laws of Utah 1888, Sec. 5197.

Bassett v. United States, supra note 88, at 505-506.

Id., 506.

Ibid.

Utah 608 (1888).

United States v. Harris, 5 Utah 621 (1888).

Quoted in Whitney, op. cit. supra note 1, III, 324.

United States v. Tenney, United States v. Kemp, United States v. Christofferson, 8 Pac. 295 (1885). On rehearing, United States v. Tenney, 11 Pac. 472 (1886); United States v. Christofferson, United States v. Kemp, 11 Pac. 480 (1886). For comment on these cases, see Whitney, op. cit. supra note 1, III, 341-343, 521.

United States v. Tenney, supra note 69, 8 Pac. 295, at 300.

Id., 11 Pac. 472, at 479.
Reports of the Utah Commission (Bound volume Utah State Archives). It should be mentioned that these figures did not correspond exactly with those reported to the House of Representatives by the Attorney General in 1888. Comparison is difficult, however, because the Attorney General's statistics did not separate polygamy and unlawful cohabitation prosecutions. One discrepancy might be noted here, however. Since there was no provision for unlawful cohabitation before 1882, the pre-1882 statistics should jibe on polygamy, but the Attorney General listed one in 1881. Also, it should be noted that the Utah Commission's figures did not include convictions in other territories; the Attorney General listed the convictions in Idaho, but again, the report did not separate the polygamy convictions from the unlawful cohabitation convictions, and there were no convictions in Idaho before 1884. "Letter from the Acting Attorney-General in Reply to the Resolution of the House in Relation to Convictions for polygamy in Utah and Idaho," House Exec. Doc. 447, 50th Cong., 1st Sess. 1 (1888). This report also lists the individual cases with full information on the disposition of each. Id., 2-9.
CHAPTER VI

CRIMINAL PROSECUTIONS: UNLAWFUL COHABITATION AND ADULTERY

The Crusade Begins

On August 23, 1884, Charles S. Zane arrived in Salt Lake City to begin his duties as chief justice of the Territory of Utah and judge of the important Third Judicial District. With the coming of Zane was launched the holy war against the "cohabs," the name given to polygamists who were allegedly cohabiting with more than one woman, in violation of Section 3 of the Edmunds act.¹

In terms of the effectiveness of the campaign against plural marriage, "Judge Zane made Judge McKean's record look like a thing of shreds and patches."²

The first problem that he encountered was the empanelling of the grand jury in the Third District. The Poland act³ directed that in each district every year, the probate judge and the clerk of the district court would prepare a jury list of two hundred names, from which the grand and petit juries would be drawn, by lot, by the United States marshal or his deputy. Before the grand jury was completed at the September term, the jury list had been exhausted, and the Poland act was silent
about the procedure to be followed in such event. The motion made by the United States attorney for an open venire to be issued caused a sensation, in view of the pre-Poland act decision in Clinton v. Englebrecht and the past experience with the use of open venire by federal judges to pack juries with anti-Mormons. After hearing considerable argument, pro and con, Zane issued an open venire.4

The Clawson Case

The first important case that came before Judge Zane was United States v. Clawson. Rudger Clawson, the son of Bishop H.B. Clawson, had been indicted for polygamy and unlawful cohabitation at the April term in 1884. He was convicted on both counts, which had been joined in the same indictment, in accordance with Section 4 of the Edmunds act. The sentence for polygamy was three years and six months in prison and a fine of five hundred dollars; for unlawful cohabitation, he received a sentence of six months in prison and a fine of three hundred dollars. The territorial supreme court affirmed the judgment.5 His case went before the United States Supreme Court twice.

The first appearance was on appeal6 from the denial of a writ of habeas corpus by the territorial supreme court, which upheld the refusal of the trial court to admit Clawson to bail pending his appeal to the territorial supreme court. The trial court ruled that there was no extraordinary reason shown why bail should be granted.
Clawson claimed that territorial practice had been to allow bail pending appeal in all but capital cases, and that the trial judge had ignored a territorial statute which entitled him to use his discretion in the matter. The United States Supreme Court affirmed the judgment. Since the case had not come on appeal from the decision of the court of original jurisdiction, the Court could not consider the question of whether the territorial statutes had been interpreted correctly. The only question, Justice Harlan said, since this was a habeas corpus proceeding, was whether, under the statutes, Clawson had a clear right to be admitted to bail. He did not.

From the decision of the territorial supreme court affirming the conviction, the case went to the United States Supreme Court on a writ of error. Clawson claimed that the grand jury which indicted him was improperly constituted. The jury list had been drawn up in January according to the provisions of the Poland act, and "those having even numbers opposite to their names were selected by the probate judge, and were reputed Mormons, and those having odd numbers opposite to their names were selected by the clerk of court, and were reputed not to be Mormons." In March, 1884, thirty names were drawn for the grand jury; thirteen were marked with even numbers (Mormons), and seventeen had odd numbers (non-Mormons); five did not appear, leaving ten even-numbered names and fifteen odd-numbered names. All of those with even numbers were
interrogated about their belief in the doctrines of the Mormon Church and plural marriage; they all answered that they believed in both and were excluded. None of those bearing odd numbers were questioned about such matters, and ten were finally accepted. Since the grand jury was still incomplete, the judge ordered ten more names to be drawn; all were designated by odd numbers, and five of them were added to the ten already selected. None of these five was asked any questions about his belief in polygamy and Mormonism. The defense objected to allowing challenges to the reputed Mormons on the basis of their answers to questions about religious opinions. The United States attorney justified such questions on the basis of Section 5 of the Edmunds act which provided "that in any prosecution for bigamy, polygamy, or unlawful cohabitation," it was a ground for challenge to a juror "that he believes it right for a man to have more than one living and undivorced wife at the same time, or to live in the practice of cohabiting with more than one woman." The defense excepted, claiming that the empanelling of a grand jury was not properly a "prosecution." Since the indictment had not been found at that point, it was only the first step in the investigation that might—and only might—produce an indictment upon which a prosecution could be based. Therefore, the Edmunds act did not intend to authorize challenges to grand jurors on the basis of belief in polygamy. Clawson's attorney also claimed that since the grand jury would sit on other
cases besides polygamy and unlawful cohabitation, the Edmunds act did not allow disqualification.

The United States Supreme Court ruled that the terms "juryman or talesman" in the statute included grand jurors. To assert that it did not, said the Court, was to assert an interpretation that would defeat the very object of the act. Such a construction would make it difficult, if not impossible, to obtain indictments. The challenges to grand jurors on their attitudes toward polygamy were properly allowed. Further, there was no merit to the claim that since the reputed non-Mormons were not asked about their beliefs, the grand jury was improperly constituted. The statute made belief a possible ground for challenge, but it was not a requirement.

Clawson also objected to the manner in which the petit jury was impanelled. By this time, the entire jury list was exhausted, and eleven out of the twelve were summoned from the body of the community by the marshal on an open venire. The defendant claimed that Section 4 of the Poland act prescribed the only legal manner in which juries could be constituted, and since it did not provide for open venire, such a procedure was illegal. This reasoning, Justice Blatchford suggested, would bring the judicial process to a halt when the prescribed two hundred names had been drawn. Certainly, he said, this could not have been the intention of Congress, in view of the fact that the Poland act also required the district
courts to hold four terms each year. There was nothing in the statute which expressly prohibited the use of supplementary measures to deal with situations upon which it was silent. Moreover, the Edmunds act referred to "talesmen," implying that there might be others than those on the regular jury list called to serve. The courts, Justice Blatchford declared, had the power to do what was necessary to enable them to exercise their jurisdiction. The power to resort to supplementary measures to summon jurors in such circumstances was inherent in the power of the district court to hold court and try indictments. Open venire was a well-known, ordinary process, agreeable to legal usage and custom, and was properly issued in this case. It would have been an entirely different question, however, if open venire had been issued before the jury list was exhausted; such action would have been in direct violation of the Poland act.\textsuperscript{11}

Clawson had been convicted on a retrial. His first trial ended with a hung jury. However, in the interim, his plural wife, who had been unavailable previously, reappeared. She was served with a subpoena, but refused to take the witness stand. She was cited for contempt and spent a night in the penitentiary; however, Clawson intervened and directed her to testify. At the retrial the next day, she admitted that they had been married on June 1, 1883. Clawson had married his first wife on August 1, 1882.\textsuperscript{12} Mrs. Clawson was only one of several plural wives who refused
to testify against their husbands and as a result were sent to prison. Belle Harris spent three months in the Utah penitentiary with her infant child for refusing to answer questions before a grand jury investigating her husband for polygamy. She informed the court that she thought the questions improper. 13 Lucy Devereau, another plural wife, was imprisoned with a small child for six weeks. 14 There were others. 15 One accused polygamist made a deal with the United States attorney to plead guilty to an unlawful cohabitation charge in exchange for the withdrawal of a polygamy charge and the release of his plural wife, who had been sent to prison for almost three months for refusing to answer questions before a United States commissioner and a grand jury. 16

The "Polygamy War"

There were few acquittals for Edmunds act violations during Zane's tenure; to be tried was, in effect, to be convicted. 17 The ranks of the United States marshals in the territory were swelled with the addition of an army of deputies, sent to help root out the polygamists.

Soon after the passage of the Edmunds act, many of the leading elders ceased to live with their wives and gave them separate homes, while still continuing to provide for their families. Such precautions were of no avail. Whitney has said of one polygamist who could not afford such an arrangement:
... But even had he been able to give each wife, with her children, a separate home; had he made a hermit of himself and remained utterly apart from his family and fellow men, it would not have protected him from the operations of the crusade. So long as he was reputed to have more than one living and undivorced wife, he was in danger, regardless, of how he conducted himself.18

Hundreds were forced into hiding under the pressure of the crusade. In a farewell address in the Tabernacle on February 1, 1885, Mormon President John Taylor advised his polygamist brethren to stop fighting and run. Soon afterward, he dropped from public sight, and many of the Apostles and other Church leaders followed him.19 President Taylor died in exile on July 25, 1887.20 Those who had money fled to Europe and Mexico. Others went "on the underground," moving from hiding-place to hiding-place, often under the very noses of the marshals. Many of the houses and barns in the territory were equipped with hidden rooms and underground chambers, where polygamous husbands and fathers could be concealed when the danger of arrest threatened.21 Nels Anderson has commented that "to list the names of polygamists arrested or hunted in 1885 would amount to a roll call of all church leaders, from bishops up to apostles. On this roll would appear the name of many women who refused to testify."22

"Hunting cohabas" became a favorite pastime and a source of income for a large corps of informers. Congress appropriated a sum of money which became known as the "spotters' fund."23 "Spotters," or informers, reportedly
were paid an average of twenty dollars for each polygamist whose arrest they brought about. They were an insidious lot, capable of perpetrating every conceivable kind of insult and invasion of privacy. They assumed a variety of disguises—tourists, peddlars, tramps, artisans—in order to acquire useful intelligence or to gain entrance to houses. Night-pro killers were common and became bolder as the campaign progressed. They attempted to pry information out of neighbors and questioned small children on the streets about the sleeping arrangements in their homes. The United States marshals were also often guilty of being less than scrupulous about respecting the right against unreasonable searches and seizures. It is a fact deserving of no little wonder, that, during this entire siege, not one United States official was harmed by an embattled community.24

After the first successful unlawful cohabitation prosecutions, the Church set up plans for defense. In 1885, circulars were sent out to stake presidents and bishops prescribing measures for self-protection, methods of raising money for the defense of accused polygamists, and instructions about dealing with the deputy marshals.25 Nels Anderson has said of these directions:

This determination to avoid arrest and conviction involved resistance, by running and hiding, rather than active obstruction. It involved withholding information from strangers and telling nothing to federal officials that would help them in their hunting and convicting. It permitted giving false information and
all but required wives to disown their husbands and children to deny knowing their fathers. This policy made a virtue of any tactics that would hinder the administration of the law.  

United States Attorney Charles S. Varian has expressed

the government's view of the situation:

The fact of the matter is, that practically an entire people were in open hostility and rebellion against the government of the United States. They were not in arms, it is true, but they denied the authority of Congress to enact laws and prescribe offenses, and the authority of courts to interpret those laws and the constitution; and they denounced officers who had taken oaths to enforce the laws of the government, because they had refused to close their eyes to violations of laws and stay their hands from executing them. They only admitted the authority of the courts when the decisions were in accord with their views, and from adverse decisions, appeal was always made to a "higher law than the constitution."  

"Cohabitation" Defined

United States v. Cannon

After the initial blush of success, the federal officials turned their eyes to bigger game. The drive against prominent Church officials began with the arrest of Angus M. Cannon, president of the Salt Lake Stake of Zion, on January 20, 1885.  

He was charged with polygamy and unlawful cohabitation and was taken before a United States commissioner for examination. He had married three wives before the Edmunds act was passed, but there was no evidence on which to prove a fourth marriage, so the polygamy charge was dismissed. During
the examination, the commissioner made a remark which predicted later judicial theory on unlawful cohabitation: he said that it was not necessary to prove sexual intercourse between the man and woman involved, but that if a man merely held out to the community as his wives more than the legal number of women, he was guilty of cohabiting with them within the meaning of the Edmunds act.

The trial of Angus Cannon began on April 27, 1885. He was charged with cohabiting with Clara Cannon and Amanda Cannon on June 1, 1882, and other days and continuously between June 1, 1882, and February 1, 1885. Clara testified that she had married the defendant ten years previously, that she had one living child by him, and that she shared the defendant's house with Amanda, who was also reputedly the defendant's wife, and Amanda's nine children. Clara further testified that the defendant divided his meal-times among her family, Amanda's family, and a third belonging to Sarah, another of his alleged wives who lived in a separate house near-by, taking one-third of his meals in each household. She also testified that for the preceding three years, she had slept in a bedroom in the northeast corner of the house, the defendant in a room in the southeast corner, and Amanda in a bedroom in the southwest corner, and that the bedrooms on the east were adjoining.

The prosecution objected to the attempt by the defense to introduce evidence to prove the impossibility
of marital relations between Cannon and Clara during the period named in the indictment. The defense had tried to show that he could not have had access to her bedroom and that they had made and kept an agreement to cease living together as man and wife after the passage of the Edmunds act, even though he could not afford to give her a separate home. The trial court sustained objections to this kind of testimony as immaterial, and the reason became obvious in the instructions to the jury:

... If you believe from the evidence, gentlemen of the jury, 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 his time or thereabouts, and that he held them out to the world by his language or his conduct, or by both, as his wives, you should find him guilty.

It is not necessary that the evidence should show that the defendant and these women, or either of them, occupied the same bed, or slept in the same room, neither is it necessary that the evidence should show that within the time mentioned, he had sexual intercourse with either of them.29

Judge Zane said that the crime of unlawful cohabitation under the Edmunds act was complete if a man held out to the community, by word or deed, more than one woman as his wives. As a result, it became unnecessary to establish the kind of intimate relations necessary to prove cohabitation in almost every other kind of situation known to criminal law.

Cannon was convicted. Zane informed him of the court's discretion in pronouncing sentence and offered to
exercise it if he would promise to obey the law and in-
struct others to do so. Cannon replied:

I cannot state what I will do in the future. I love the country. I love its institutions, and I have become a citizen. When I did so I had no idea that a statute would be passed making my faith and religion a crime; but having made that allegiance, I can only say that I have used the utmost of my power to honor my God, my family and my country. In eating with my children day by day, and showing impartiality in meeting with them around the board, with the mother who was wont to wait upon them, I was unconscious of any crime. I did not think I would be made a criminal for that. My record is before my country; the consciousness of my heart is visible to the God who created me, and the rectitude that has marked my life and conduct with this people bears me up to receive such a sentence as your Honor shall see fit to impose upon me. 30

Consequently, the full penalty was imposed—six months in prison and a fine of three hundred dollars.

Cannon appealed to the territorial supreme court. 31 His first assignment of error was that the indictment did not clearly identify him as a male person, and therefore, was insufficient, because Section 3 of the Edmunds act applied only to "male persons." The supreme court ruled that further identification was not necessary since "Angus" was sufficiently known as a male name; moreover, it was foolish to think that the grand jury would have returned an indictment against a woman, given the language of the provision. The court could not see how failure to make this designation hurt the cause of the defendant. Cannon also claimed that the indictment was faulty because in
alleging that he was living with the two women named, it did not charge that he was living with them as wives. Justice Boreman, for the court, ruled that this would not have made the indictment any clearer, and besides, since the statute did not contain this language, to add it would be improper. The language of the statute was considered adequate to describe the crime charged in an indictment, he said, unless it had been a crime at common law or the statute was too general and vague; neither exception was applicable in the case at hand. The indictment was pronounced sufficient.

Cannon maintained that sexual intercourse was necessarily included in the definition of "cohabit," and this must be proved before he could be found guilty of the crime. Justice Boreman rejected this interpretation, holding that cohabitation did not necessarily include even occupying the same bedroom, and that the prosecution's objections to the introduction of evidence tending to prove non-access were properly sustained:

. . . We find nothing whatever in the language or context to lead us to believe that Congress meant to apply the statute to lewd and lascivious cohabitation, which would be the case if the construction contended for by the appellant were correct.

. . . Had it been the intention of Congress to include the common sexual vices in this provision, it appears unreasonable that it should not have said so. . . .

Further, if sexual relations were a necessary element in the crime, as the defendant asserted:
...[T]hen the prosecution might have shown that the defendant and these women lived together, in the same house and company, that they were continually walking, talking, acting as husband and wife, treating each other so before their neighbors and the public generally, calling each other husband and wife respectively, having all their dealings before the world as husband and wife—he might be providing for all her wants of clothing, food, house and household affairs, and claim the women as his wives, and doing many more like things, and yet if the prosecution did not prove that defendant had sexual intercourse with these women, the prosecution would have to fail. The prosecution would have to prove adultery when adultery was not charged, would have to prove fornication and lewd and lascivious cohabitation when none of these charges had been made, and all such offenses had been purposely left out of the act by the law-making power. It seems to us preposterous that Congress could ever have intended such a thing when the law was enacted. . . .

What, then, was congressional intent in enacting this statute? According to Boreman:

...It was, judging from the whole act, intended to be an aid in breaking up polygamy and the pretense thereof. The well recognized difficulty of reaching the polygamy cases, by reason of having to prove marriage, and by reason of the fact that the statute of limitations bars prosecution after three years, no doubt led Congress to pass the act. It was sought to break up the polygamic relation. It was necessary in effect to make polygamy a continuous offense, without requiring proof of marriage. Whether marriage took place or not, the pretense of marriage—the living, to all intents and purposes, so far as the public could see, as husband and wife—a holding out of that relationship to the world were the evils sought to be eradicated. ...It was living and dwelling together under the appearance of being married. . . .

Justice Powers concurred in a separate opinion. He declared that the union of one man with more than one
woman could not be called a marriage. Monogamic marriage, he said, was "the parent and not the child of society, for it is the very basis of the whole fabric of civilized society." Anything that served to degrade it was an injury to the world; since polygamy so operated, Congress, in passing the anti-polygamy laws, passed laws protecting "true marriage." The purpose of Section 3 of the Edmunds act was to punish those who contracted plural marriages before the law against polygamy was passed, by making it a crime to carry on the appearance of such marriages. Powers did have some objections to the instructions given the jury, but he termed them "errors without prejudice." He thought that more elaborate explanation should have been given about the meaning of cohabit, and that it should have been made clear that Cannon's pre-Edmunds act conduct should not be considered. In view of the nature of these objections, his designating them as "errors without prejudice" is extremely questionable.

The Cannon case went to the United States Supreme Court on a writ of error, and the decision of the territorial supreme court was affirmed on December 14, 1885. The plaintiff in error renewed his objections to the construction of "cohabit." He urged, among other definitions of the same general import, that "the cohabitation which is made a misdemeanor by this section is an habitual residence or dwelling by a man with two or more women in intimate sexual relations." He insisted that it must
be shown that they occupied the same apartments in the manner usual to people living in marital intimacy, at least an intimacy equivalent to sharing a bed.

Justice Blatchford, for the Court, after identifying the central issue as the meaning of "cohabit" in Section 3 of the Edmunds act, ruled that the trial judge had instructed the jury properly on this point. This interpretation, he said, was indicated by the language throughout the statute, which was directed at marriage or the maintenance of the existence of marriage. Section 1 prohibited polygamous marriages; Section 3 singled out the man and made it unlawful for him to cohabit with more than one woman; Section 4 allowed the joinder of charges under both sections in the same indictment. Bigamy, polygamy, and unlawful cohabitation were all combined in Section 5 and made bases for challenges to jurors. All three were again classed together in Sections 6 and 8. There was no evidence of any attempt to affect cohabitation outside of the marriage relation. Blatchford concluded:

... It is the practice of unlawful cohabitation with more than one woman that it is aimed at--a cohabitation classed with polygamy and having its outward semblance. It is not, on the one hand, meretricious, unmarital intercourse with more than one woman. General legislation as to lewd practices is left to the Territorial government. Nor, on the other hand, does the statute pry into the intimacies of the marriage relation. But it seeks not only to punish bigamy and polygamy when direct proof of the existence of those relations can be made, but to prevent a man from flaunting in the face of the world the ostentation and opportunities
of a bigamous household, with all the outward appearances of the continuance of the same relations which existed before the act was passed; and without reference to what may occur in the privacy of those relations. . . . 40

As to the value of the non-intercourse pact between Cannon and Clara, the Court said that this was no substitute for a monogamous marriage, which was the only kind tolerated by the statute, and besides, such agreements were easily broken when the foundation of the relationship continued.

After further justifying its interpretation of "cohabit" by establishing it as consonant with the ordinary, contemporaneous understanding of the word as "to dwell with," "reside in the same place," and "live together as husband and wife," the Court revealed its real reason for taking a view so contrary to the most accepted legal definition of the term:

. . . Bigamy and polygamy might fail of proof, for want of direct evidence of any marriage, but cohabitation with more than one woman, in the sense proved in this case, was susceptible of the proof here given; and it was such offence as was here proved that section 3 of the act was intended to reach—the exhibition of all the indicia of a marriage, a household, and a family, twice repeated. . . . 41

Justice Blatchford dealt quickly with the charges that the indictment was insufficient. Since only a male person could commit the statutory offense, it was not necessary to describe the defendant specifically as such in the indictment. In view of the definition given
"cohabit," it was not necessary to allege in the indictment that Cannon was living with the two women as his wives, either; this was an element of the offense as it was defined.

Near the end of the opinion, Justice Blatchford referred to a question which the polygamists had asked of courts and judges and government attorneys and marshals innumerable times in the past, and would continue to ask in the future:

... [T]his court was asked to indicate what the conduct of the husband toward them [his plural wives] must be in order to conform to the requirements of the law. It is sufficient to say, that, while what was done by the defendant in this case, after the passage of the act of Congress, was not lawful, no court can say, in advance, what particular state of things will be lawful, further than this, that he must not cohabit with more than one woman, in the sense of the word "cohabit," as hereinbefore defined. ..."42

The conduct of a man toward his plural wives, was he said, "to be regulated by considerations which, outside of [Section] 3, are not covered by the statute, and which must be dealt with judicially, when properly presented."43 It was like all other answers to this question, of little practical value.

Justice Miller, joined by Justice Field, dissented:

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 actual 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.\textsuperscript{44}

The Cannon case was the green-light, and the round-up of Church dignitaries was continued with increased vigor. It was of little significance that only a few months later, the Court vacated the judgment, recalled the mandate, and dismissed the writ of error,\textsuperscript{45} on the basis of the subsequent decision in Snow v. United States that it had no jurisdiction over such matters. The substance of the ruling was undamaged, and the lower courts acted and enlarged upon it.

In one sense the ruling in Cannon was a favor to the Saints. As Anderson and others have pointed out, the indignities suffered by the members of the Mormon community were mild compared to the grossness of the investigations that would have been required in order to prove unlawful cohabitation if sexual intercourse had been declared a necessary element.\textsuperscript{46}

United States v. Musser

About the same time of the Cannon trial, Milton A. Musser was found guilty of unlawful cohabitation with three women.\textsuperscript{47} Testimony revealed that until four weeks before the trial, Belinda and Mary lived in the same house with the defendant, and Annie lived next door. Witnesses described the arrangement of the bedrooms. Belinda subsequently moved into a house of her own, and
Musser gave all three women the deeds to their respective homes. Testimony further indicated that he recognized all three women as his wives and their children as his family, that he paid for goods they purchased, and that he did chores around all three of the houses where the women lived. The jury had been instructed to return a verdict of guilty if they believed beyond a reasonable doubt that the defendant had lived "in the habit and repute of marriage" with the women named in the indictment.

Judge Zane, with a view to lenience if Musser would promise to obey the law, told him that he must cease to live with his wives, as wives. Musser replied:

... It would be impossible for me to comply with such demands. If a gentleman were to meet me on the street, and ask me to make a concession of that character, I would tell him it was a personal insult. I mean no disrespect whatever. He might as well ask me what I would take in dollars and cents for one of my children, or to sell one of my wives for money. I cannot consent to anything of the kind, and I am willing to meet any consequences that the court feels duty bound to impose. 48

He was given the full penalty allowed by law.

Musser appealed to the territorial supreme court. 49 Chief Justice Zane, for a divided court, followed previous rulings in interpreting "cohabit" as a very flexible term meaning to reside or dwell together. In using the term in the Edmunds act, said Zane, Congress meant to prohibit matrimonial cohabitation. Adverbs like "lewdly, lasciviously, or adulterously" were not used to describe the kind of cohabitation intended; if Congress had meant to
prohibit lewd, lascivious, adulterous cohabitation, it would have said so. The purpose of the statute, according to Zane, was "to protect the monogamous marriage by prohibiting all other marriage, either in form or appearance only, whether evidenced by a ceremony, or by conduct and circumstances alone." Where statutory language was not clear, he said, it was the duty of the court to arrive at a fair interpretation of legislative intent. The courts could conclude that Congress had the marriage relation in mind, since the entire framework of the law was based upon that idea. Congress wanted to prohibit any kind of marital relationship which was not monogamous. Since actual polygamous marriages were difficult to prove, Congress prohibited the form or appearance of such marriages. The evidence admitted at the trial was pronounced sufficient to reveal a marital relationship with at least two of the women and was thus sufficient to sustain the conviction.

The defense objected to the introduction of evidence tending to show his marriages to the women before the act was passed. Musser wanted to have it made clear that his conduct prior to the effective date of the law was not to be considered, and he asked that the jury be instructed "that the law presumed the defendant ceased to cohabit with this wives when the law took effect." Zane said that since the trial court had instructed that the law presumed him innocent until proved guilty beyond a
reasonable doubt, the refusal to use his instructions was not error. The evidence as to the previous marriages was properly admitted:

If a lawful relationship is formed, and its continuance is made unlawful, the law presumes the parties thereto intend to obey the law, and that they terminate or change the relationship so as to make it conform to an innocent intent. . . . If the relationship was unlawful in the beginning, and the intent was also, and the name of the offense is simply changed, or punishment is simply imposed on that which was unlawful before, the presumption remains the same as though no change had been made in the law. In either case the law presumes innocence till guilt is proven. A disposition and intention to violate the law in entering into the relationship with these women being shown, it affords an inference of some effect upon the mind when considered with the other evidence at the time of the offense charged. The inference against the defendant from his marriage to these women before the law went into force with the inferences from his own conduct towards them, and the circumstances within the time limited in the indictment strengthens the latter. In determining how this man lived between the dates named, the public would take into view his inclination and disposition to cohabit with the women as shown by his conduct and example before the law took effect, because in that way his mode of life contributes to the example which injures society. The common law has been in force in this territory for more than a generation. And an act of Congress against bigamy for more than twenty-two years. None of the conduct or circumstances in evidence extend back so far. They tended to prove a relationship unlawful in its inception. . . .52

Justice Powers agreed with the court's construction of the Edmunds act, but he thought that the Musser case differed substantially enough from the Cannon case to warrant the supreme court to come to a different conclusion.
He pointed out that if Musser's polygamous children were born prior to the Edmunds act, it legitimized them. Musser was, therefore, obligated to continue treating them as a father would, to take meals with them, live with them under the same roof, talk with them, be friendly and attentive to them, as long as he did not treat their mothers as his wives. As to what treatment of plural wives, in his opinion, was required by the Edmunds act:

. . . [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 his children; he may be required by the decree of the court to support his wife. . . . 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 as a husband associates with his 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 polygamists, whatever it was. It says that the relationship must cease. . . .

Powers objected to the introduction of testimony of the clerk and bishop of Musser's ward that the record book of births and baptisms, which undoubtedly contained vital facts about his children, had been stolen mysteriously by unknown hands. As Powers pointed out, it was immaterial and tended to draw the attention of the jurors away from the pertinent facts and plant suspicion in their minds.
The trial judge committed another error, said Powers, by making a statement which implied that Musser's wives and children had been spirited away some place to keep them out of the reach of the court. The judge had no right to verbalize such an implication, which might have been taken as fact by the jury. Further, the prosecuting attorney made some intemperate remarks, and while inadvertent, they might have had an effect on the jury contrary to the defendant's interests.

Further, he felt that the jury should have been instructed that the Edmunds act created the presumption that those who were living polygamously had ceased to do so after its passage. Therefore, it was error for the trial judge to refuse Musser's request for instruction that:

\[\ldots\] the law distinguishes between the continuing of the status of a polygamous marriage and cohabitation between the parties. The former is not unlawful, and its continuance affords no ground for inference of the fact of cohabitation. It is not necessary that the parties to a polygamous marriage should divorce themselves in some effectual way, in order to entitle themselves to the presumption of innocence of the offense of cohabitation.\]  

He thought that the testimony as to Musser's conduct toward his wives before the Edmunds act was passed was immaterial and improperly admitted. All in all:

\[\ldots\] It may be that this defendant should be convicted, but the fact that he should be convicted, if such is the fact, does not deprive him of his right to a fair trial according to the law and the evidence.\]
United States v. Clark

Joseph Clark was convicted of unlawful cohabitation between January 1, 1885, and February 21, 1887. According to the evidence, he married three wives. He made his home with his third wife, Frances, but testimony indicated that he was in the habit of visiting Sarah, his first wife. The question was, given his admitted cohabitation with his third wife, did his conduct toward his lawful wife constitute cohabitation with her also? The jury was instructed that a lawful marriage created a presumption that they were cohabiting. The defense counsel objected to the court's giving an individual and emphatic charge on this point. Since the presumption of cohabitation from a lawful marriage, and the presumption from Clark's visits to his wife that he was visiting her as a husband, were only disputable presumptions of fact and not presumptions of law, he claimed that the emphasis was improper.

On appeal, the territorial supreme court ruled that the instruction was not error. The presumption was not conclusive, however, and could be rebutted with evidence, and the trial judge so indicated. Chief Justice Zane said that it was not a case of just mere presumption of fact. Since the whole institution of marriage was based upon the presence of matrimonial association, there was a strong presumption that a man would discharge so high an obligation. A lawful marriage, said Zane, "raises a *prima facie* presumption of matrimonial cohabitation." This
had a bearing on the other presumption, that he made his visits to his lawful wife as a husband, and dictates that a man should not be presumed to have made them as a friend.

**United States v. Smith**

United States v. Smith also involved the proof of cohabitation with the lawful wife, and the territorial supreme court followed the holding in the Clark case. Zane, once more speaking for the court, again approved instruction to the jury that the appearance of a polygamous relation violated the law, and that it was not necessary to prove a sexual connection. He repeated the presumption created by a lawful marriage and approved the following charge to the jury regarding the evidence needed to prove cohabitation with a lawful wife as compared with that required to prove the same with an unlawful wife: "In proving cohabitation under the statute, it is not necessary to show the same facts as to cohabitation with the legal wife as with the plural, because the law presumes that a man does what it is his legal duty to do." This was accepted on the ground that it merely stated that a lawful marriage created a stronger presumption of cohabitation than an unlawful one.

The testimony given at the trial indicated that Smith married Sarah thirty years previously and Christina three years later, that he lived with both in the same house for twelve years, and that then he alternately lived with each of them in their separate houses, until seven years previous
to the trial, when he began living exclusively with Christina. There was further testimony that he was in the home of his lawful wife only once during the period in which the indictment charged the unlawful cohabitation had occurred, and this occasion was a funeral. He had, however, been seen in Sarah's yard, at her well, and on her doorstep; further, he operated a blacksmith's shop a short distance from her home. The territorial supreme court found this evidence sufficient to support the verdict.

There was a final evidentiary question raised. During the trial, a witness testified that he had heard the defendant say that plural marriage would never be abandoned, that the Edmunds act was unconstitutional, and that he had as much right as the courts to decide it. Defense objected to the introduction of this testimony; the court overruled the objection; and it was assigned as error. The supreme court ruled that the objection had been properly overruled. A voluntary admission or confession, said Zane, was admissible against the defendant, when he made these statements, he was voicing his intentions, which legitimately might be considered by the jury.

United States v. Peay

The sufficiency of the evidence necessary to establish cohabitation was also raised in United States v. Peay. On appeal to the territorial supreme court from a conviction for unlawful cohabitation, Peay's principle assignment of
error was that:

... the verdict was contrary to the evidence in this: that it is conclusively shown that, upon defendant knowing of the passage of the Edmunds law, he ostensibly ceased cohabiting with any woman except his lawful wife, and no acts of his toward either of his plural wives afterwards, that imply cohabitation with either of them, have been proved or testified to.61

The court, speaking through Justice Boreman, said that Peay seemed to convey the idea that if he had ceased to live with his wives ostensibly, he could not be convicted legally, although he might be guilty in fact. It was a common thing, Boreman said, for a polygamist to complain that he was given no direction about how to treat his plural wives, in order to escape prosecution under the Edmunds act, but it was preposterous to assume that the gist of the offense was to live ostensibly with more than one wife.

The court found that the evidence justified the verdict. Testimony indicated that he married his first wife twenty-seven years previously, his second wife two years later, and that his third wife had been recognized as such by his family for twenty years. All three had children by him, all of whom bore the defendant's name with his consent. He provided homes for all three families; the two plural wives lived together on his farm, and the legal wife lived in a house owned by him in Provo. Witnesses revealed that he took meals at both households, that children of his lawful wife worked on his farm, that
he took general supervision of the farm, making fifty to
one hundred overnight trips there every year. All in all,
said Boreman, his conduct toward his plural wives did not
change after the passage of the Edmunds act, except for
the pretense of living with his lawful wife:

. . . But it clearly appears from the evi-
dence that it is all a pretense, and nothing
more. He did not in fact do so. A man can-
not live in the promiscuous style of the de-
fendant, with three different women, and yet
expect to escape arrest and punishment merely
upon a pretense or claim that he is obeying
the law. He must lay aside all indicia of
the crime. He must act in good faith, and
separate himself entirely from his polyga-
rous women. . . . His acts must correspond
with his claim or pretense. . . .62

The court ruled that the testimony regarding the de-
fendant's conduct toward his wives prior to the Edmunds
act was properly admitted. This evidence had reference to
the marriage and the continuance of the marital relation
so established. This was permissible because the court
distinctly told the jury that such evidence could not be
used as the basis of a conviction for the period named in
the indictment.

The defense objected to the instruction to the jury
that "the law aims at the wrongful example of an apparent
as well as an actual continuance of a polygamous relation,
without reference to what actually occurs with his plural
or polygamous wives."63 The supreme court approved. It
was not necessary to prove that the defendant was in fact
living with his wives: "A man cannot display all the
indicia of a married life, and yet plead its non-existence
successfully. He must put away the evidences. 64

Peay, like most of his brethren before him, asked
for an explanation of what treatment the Edmunds act per-
mitted him to give his pre-Edmunds act plural wives. The
court quoted from his brief:

... The contention of appellant is this: That he is now incarcerated in the peni-
tentiary, not for any act or acts he has
done in violation of law, but because he
has not dissolved the relation in which
this law found him, and which he knows
no legal way of dissolving. If the law
commanded its dissolution, it would point
out a mode, but it neither commands or
points out a way for its dissolution. It
simply says, refrain from all acts in
this relation, which this defendant has
done; but yet, because of these errors
of law in court and jury, he exists as a
convict, without even the privilege of
bail, pending this appeal, solely be-
cause he has no way of severing those
relations. 65

Boreman answered, "This language is of startling simplicity.
But if the defendant has been unable to find out any way
to cease living with his polygamous women, it is not the
fault of the law that he suffers from this imperfect
knowledge." 66

United States v. Harris

John Harris was convicted of unlawful cohabitation,
and he appealed to the territorial supreme court, 67 as-
assigning as error the following instructions to the jury:

If in this case, or any other, the
legal wife of the defendant lives in the
same vicinity with him, in a household
maintained in part by him, that is co-
habitation with his legal wife. It is
absolutely and conclusively cohabitation
with his legal wife. 68
Harris alleged that this did not state facts sufficient to warrant a conviction for the offense charged. He admitted cohabitation with his plural wife, but insisted that he and his legal wife had made a separation agreement.

The court, affirming the conviction, said that this was only a part of the instructions, and when taken as a whole, the charge to the jury was not objectionable. After the general charge, the jury came back for further instructions, and the judge made it clear that the presumption arising from a lawful marriage was not conclusive. The trial judge also said that when a man visited his lawful wife, it was as a husband; since self-divorce was against public policy, they could not, by themselves, make a valid agreement to end the relation. In reviewing this language, the supreme court decided that the judge merely made it clear that the only thing necessary to prove cohabitation was the "outward semblance of polygamy." The court approved the instruction that if the jury found that the defendant had a wife living when he married the second, the presumption was that the relationship with the legal wife continued. If there was additional evidence that he lived near her, supported her, visited her, and that she was recognized by the community as his wife, the proof of cohabitation was complete: "It is often in these cases, as in other criminal cases, that direct proof cannot be made, but circumstances can be shown from which the ultimate facts can be inferred."\textsuperscript{69}
United States v. Clark

In 1889, in a second case involving Joseph Clark, the territorial supreme court overruled its own decision in the first Clark case, the Harris case, and the Smith case regarding the presumption which could be drawn from a lawful marriage:

... We think that when a polygamist has a lawful wife living within the jurisdiction of the court, known and understood to be such, and lives and cohabits with another woman as his wife, he is guilty of a violation of the statute; that the presumption that he cohabits with the legal wife is a legal one, and is conclusive, if it is a presumption at all. His status in relation to each of the two women, in our opinion, is such that, as a matter of law, he cohabits with them within the meaning of the statute. ... 71

In other words, the presumption could no longer be rebutted by evidence. It is questionable whether it ever was, actually, when it was considered a matter of fact. This was the doctrine of "constructive cohabitation."

Smith's lawful wife had testified that he had abandoned her without her consent three years previously and had called at her house only once or twice during the time covered by the indictment.

Justice Henderson, for the court, declared that if cohabitation was made a matter of fact, then a man who ceased living in polygamy could abandon his lawful wife in favor of a plural wife; such a construction would place lawful and plural marriages on equal ground. Since the protection of the monogamous home was the object of
congressional action, the court must construe it in the manner which would give the most protection to monogamy. The conviction was upheld.

The Edmunds Act in Idaho

The Idaho territorial supreme court also contributed to the judicial interpretation of the Edmunds act in United States v. Langford,72 in which it reversed a conviction for unlawful cohabitation. Its construction of "cohabit" was much narrower than that of the Utah judiciary. The court declared that allowing the prosecution to ask a question concerning the general reputation in the community of the relationship between the defendant and one of the women named in the indictment was improper. "Cohabit," said Justice Logan, meant "to dwell or live together as husband and wife," and:

... The defendant's guilt may be established by his own acts, but certainly to assume the guilt without proof of the acts would be manifestly improper. Proof of marriage was not necessary, but proof of cohabitation was; and under no circumstances would this form of question be proper in a case of this kind. Cohabitation might be inferred by the jury from the acts of the defendant, but such acts should not be inferred from general reputation. ...73

The court also upheld the defendant's objection to the following charge to the jury:

In determination of this you will consider whether, under the facts as proved, the acts of the defendant have been such as to lead the public to believe that the relations of husband and wife still continued. If they have been such as to induce others to believe,
or the public to believe, that the marital relations still continue, then the acts of the defendant are unlawful.\textsuperscript{74}

Justice Logan commented:

\ldots If the court had charged the jury that if, from all the facts which had been proven in the case, (if there were any,) they came to the conclusion that by such acts the defendant had held out to the public that the marital relation existed between himself and the two women named in the indictment, that then they should find the defendant guilty, the charge might have been proper; but the court did not so charge. Taking into consideration the evidence which had been admitted, and the charge of the court as given, it is clearly misleading; for in it the jury were told, in effect, that, if the defendant had by his acts induced the public to believe him guilty, then they must find him guilty. \ldots \textsuperscript{75}

He pointed out that the instruction implied that if the general public thought that his relationships with the women were marital relationships, he could be found guilty, regardless of the nature of the acts that caused the public to so believe: "It may well be said that this was a conviction based upon public opinion."\textsuperscript{76} The court denied that the Cannon case was a precedent for such a charge.

Justice Berry, dissenting, thought that general reputation was a good index to whether the defendant was "flaunting" his polygamous life in the face of the world, and thus was admissible under the Cannon rule.

In \textit{United States v. Kuntze},\textsuperscript{77} the defendant claimed, as Angus Cannon had done, that the failure of the indictment to state that he had cohabited with the women named, as wives, was error. The Idaho supreme court disagreed, dealing with the question as the Utah supreme court and
the United States Supreme Court had done. The meaning of cohabitation and the intent of Congress were well understood, said Justice Logan, and failure to include certain language did not defeat the indictment. On the basis of this decision, the conviction in another Idaho case, United States v. Cozzens, was affirmed.

"Segregation"

United States v. Snow

In September of 1885, the policy of "segregation" was initiated by Judge Zane in his instructions to the grand jury of the Third District. This was the theory that although the maximum penalty for unlawful cohabitation was six months in prison and a fine of three hundred dollars, there was nothing to preclude dividing the period covered by the offense into years, months, and weeks, and issuing a separate indictment for each. Thus, said Zane, if it could be established that a man had been cohabiting for three years, he could be indicted on from three (years) to one hundred and fifty-six (weeks) counts, and he could be fined almost fifty thousand dollars and imprisoned for a lifetime. Zane obviously did not have quite as much imagination as Judge Powers of the First District, who instructed his grand jury that an indictment could be found against a man guilty of cohabitation for every day that he offended.

Hugh S. Gowans, president of the Tooele stake was the first to be indicted under the segregation principle,
but the signal case on this point involved Apostle Lorenzo Snow. 80 Apostle Snow was arrested on November 20, 1885, after being ferreted out of an underground chamber beneath the floorboards of his home in Brigham City by federal authorities. The grand jury found three indictments against him for unlawful cohabitation. They were identical, except for the fact that each covered a different period of time: the first, from January 1 to December 31, 1885; the second, from January 1 to December 31, 1884; and the third, from January 1 to December 1, 1883. They were issued and tried in inverse chronological order for a specific reason: so that on the second and third indictments, he could not claim that he was being tried for the same crime supposedly committed previously to the one at hand. All three were based on the testimony of the same witnesses and on one oath and examination. Substantially the same testimony was given by the same witnesses at all three trials. Snow was convicted on all three indictments and received the usual "six months and three hundred" on each. At the second and third trials, he pleaded his previous convictions as a bar to prosecution. Each time, the court upheld the government's demurrer to the plea. Snow appealed from all three convictions to the territorial supreme court.

There were several facets of the Snow cases which were notable. Lorenzo Snow, who would later become the president of the Mormon Church, was seventy-two years old
at the time of his first trial; he had married nine women, of whom two had died; and his youngest child was three months of age. He admitted that he had married them all, that he supported the remaining seven and their families, and that he claimed all of them as his wives. He also admitted that he had lived with his youngest wife since he married her, but he denied cohabitation with any of the other six from the date of his last marriage. His other wives, one by one, testified that he had not lived with them since then and that, apart from occasional visits, they were not in his company very often anymore. Sarah, Harriet, and Eleanor shared the old homestead; Adeline and Pheobe lived two blocks away; Mary lived in another part of town; Snow lived with Minnie in her home.

On the appeal from the judgment in the first trial, the territorial supreme court accepted Sarah as his legal wife. Sarah was admitted as a witness, there being no objection from the defendant, and testified that he had paid occasional calls on her, but had not slept at her house since he married Minnie, nor had there been any husband-wife contact at all. The territorial supreme court, in reviewing the first conviction, framed the crucial question: Since the evidence clearly established cohabitation, during the period covered by the indictment, with Minnie, did the evidence show that he cohabited with any of the other six women during that period? The court, speaking through Chief Justice Zane, concluded that he had.
A lawful marriage, said Zane, afforded a strong presumption of cohabitation. Since the second Clark case had not been decided at this time, the presumption was not yet conclusive, but the defendant provided Sarah with a home, contributed to her support, and represented her to the community as his wife. The law did not require that the husband and wife be constantly together in order to be legally cohabiting—salesmen and sailors who spent less time with their wives than the defendant did could be cohabiting with them in the eyes of the law. In construing the term "cohabit," Zane said, the entire statute and its import should be taken into consideration to determine the intent of Congress. The statute was directed at the flaunting of a bigamous household before the world; cohabitation was living "in the habit and repute of marriage." The statute was intended to prevent the appearance, as well as the fact, of polygamous unions. Sarah was held out to the community as his wife; Snow, therefore, was cohabiting with her as well as Minnie within the terms of the Edmunds act.

It seemed to make no difference that on the second appeal, the court found Adeline, not Sarah, to be the legal wife of the defendant. The outcome was the same. In view of the strong presumption of cohabitation from a lawful marriage, he could be considered as cohabiting with her, too. The court also stuck by its guns on Sarah, maintaining that since he supported her, paid her
children's medical bills, and had been seen riding with her in a carriage, his conduct with her, plus their reputation in the community, constituted cohabitation. Since he admitted living with Minnie, there was no problem in sustaining the conviction. Again, the court stressed that the object of the Edmunds act was to destroy the outward semblance of plural marriage, as well as the marrying of more than one woman. Justice Boreman said, "The highest court of the land—the court of last resort—holds that bigamy or polygamy is the marrying of two or more women, and that cohabitation is the pretending or making show to the outside world of keeping up the polygamous or bigamous relations." Further:

The term "cohabitation" in the statute means, in general terms, the dwelling or living together as man and wife. It does not necessarily mean to live in the same house—the word "house" is not used in the definition of it. The man and woman may dwell or live together in an open field, or on a railroad train, or in the same house. They are to be conveniently situated as to each other, and to act in regard to each other in such manner as to lead the world to believe that the bigamous relationship exists between them. In these polygamic relations there never is, and cannot be, that intimate association and habitual attention, given by the man to the various women, as exist between a husband and his wife in the monogamic state.

Boreman went on to say that when new wives were taken, the old wives were discarded and pushed into the corner. This, he said, "is the natural result of a system founded in sensualism, and is the same here as
in every other country where polygamy or any other system exists to shield the lust of men.  

In defense of the segregation principle, the supreme court cited a Massachusetts case in which the defendant was convicted for maintaining a tenement for each of several consecutive days.

In the opinion affirming the third conviction, Justice Powers reviewed the United States Supreme Court decision in the Reynolds case. He interjected dicta asserting that it was impossible to be a Mormon and not believe that polygamy was right and accusing the Mormons of bringing in alien converts to serve the advance of plural marriage. On the question at hand, the court again found that Snow was cohabiting with his lawful wife:

... As the husband goes about his daily avocation he is living with his wife. When he rides with her, walks with her, or talks with her, when he visits her, he is living with her. If he sees her daily, or but a few times a year, he is living with her; he is cohabiting with her. ... 

Again, he held her out to the world as his wife, and:

... By that is meant and by that is understood such language and conduct as leads the world to believe that the parties are living and associating as husband and wife. That is the meaning of the term "holding out." ... Under such a state of facts, and adding the further facts stated in the opinion of Justice Boreman in the case for 1884, a case in which the facts are identical with this, the strong presumption of cohabitation which arises from the simple fact of lawful marriage becomes conclusive, and cannot be rebutted. 

Powers asserted that if Snow had gone to live with his
lawful wife when the Edmunds act was passed, he would have been above suspicion. It is suggested that this would have been quite a trick, given the court's indecision about which woman was his lawful wife.

Chief Justice Zane dissented from the opinions in the second and third cases. He approved of segregation, but not of what approximated, if not equalled, constructive cohabitation:

... I think it essential to cohabitation with defendant's lawful wife that he should have been in her company some part of the time mentioned in the indictment. Association together to some extent is an element of the crime of cohabitation as defined in the Edmunds law. It is not sufficient that a man and his lawful wife should live in the same neighborhood or the same city. ...  

United States v. Grosbeck

The segregation principle was also upheld by the territorial supreme court in United States v. Grosbeck. The defendant was represented by the A.G. Sutherlands, father and son, who were often found at the counsel table in Edmunds act cases; the name would later grace the bench of the United States Supreme Court. Nicholas A. Grosbeck was convicted on two counts of unlawful cohabitation in the same indictment; from January 1 to June 30, 1884, and from July 1 to December 31, 1884. The indictment named the same three women on both counts. The defense insisted that the offense was a continuous one, set in motion by a single set of acts, and, therefore, could not be divided off into time periods. The segregation principle was
contrary to the general rule that continuing offenses could not be cut into pieces and support separate indictments and prosecutions; defense counsel pointed to the fact that Massachusetts was the only jurisdiction which had adopted the principle that the court had adopted. Further, it was claimed, the facts in the case did not reveal a single interruption in the relationship between the defendant and his wives, so such a partition was entirely artificial. Even supposing that the offense might be segregated and that several counts might be joined in one indictment, the court could not impose a separate indictment on each, because there was no basis for this in the common law nor was there any statutory authorization for it. The defendant also objected to allowing the same jurors to sit on both counts, because they would be influenced in one by the evidence given on the other.

The territorial supreme court upheld the judgment of the lower court. Chief Justice Zane ruled that the issue had been settled in the Snow cases, and proceeded to explain the logic of the segregation rule with a hypothetical example: "A" lives with three wives continuously for three years; "B" lives with three wives for one year, then withdraws for a year, and then resumes living with them the third year; without the segregation principle, "A" would be guilty of one offense, and "B" would be guilty of two offenses. Such a result would not be just, Zane complained, because greater punishment would
be given for the lesser offense. It is suggested that the hypothesis is destroyed by one fatal flaw: under the court's interpretation of "cohabit," it would have been practically impossible for "B" to cease cohabiting for the interim year, in the eyes of the law.

Zane rejected the assertion that allowing the same jury to decide both counts was unfair. It had been the practice, he said, in cases involving a single charge, to allow the jury to consider evidence pertaining to the defendant's action before and after the period named in the indictment. The effect of such procedure differed in no important way from the procedure at hand. The purpose was to enable the jury to more accurately assess the defendant's feelings and conduct toward his wives in the specified time period.

To justify the joinder of both counts in the same indictment and punishment for each, the court cited the federal statute allowing joinders.

The conviction in a similar case, United States v. Bromley, was upheld on the basis of the Groesbeck decision.

The United States Supreme Court and "Segregation"

In Re Snow

The Snow cases went to the United States Supreme Court the first time on a writ of error, where George Ticknor Curtis argued eloquently in behalf of Apostle Snow and religious freedom. After examining the statutes
which provided for review of the decisions of territorial courts, the Court dismissed the cause for want of jurisdiction.

In the organic act for the Territory of Utah, it was provided that United States Supreme Court review was available only in cases involving over one thousand dollars and writs of habeas corpus involving personal freedom. The Snow cases did not come to the Court on habeas corpus. The Poland act of 1874 provided that a case could be taken to the highest court in the land if it involved bigamy or capital punishment. However, when Congress amended the anti-polygamy statute in 1882, it did not change it to allow such a procedure in unlawful cohabitation cases, and unlawful cohabitation was a crime entirely separate from bigamy or polygamy. In 1885, Congress provided that no case could be taken to the United States Supreme Court from the supreme court of the District of Columbia or territorial supreme courts unless it involved an amount in excess of five thousand dollars or involved the validity of a federal law or treaty or an exercise of federal authority. The case at hand, said the Court, did not qualify under this last statute, because the record did not reveal a challenge to the constitutionality, but merely to the construction, of the Edmunds act. The complaint of the plaintiff in error was that the manner in which the lower court applied the law to him was in excess of its authority, not that the statute itself was invalid. Further, the power conferred
upon a court to hear and determine cases was not the kind
of exercise of federal authority meant by the law of 1885—
if it were, every case decided by a territorial court would
qualify for United States Supreme Court review.

According to this decision, then, the Court had had
no jurisdiction of the Cannon case, which came to it in a
like manner and presented a similar question. The mistake
was promptly corrected.\(^{94}\)

The Court had not heard the last of Lorenzo Snow,
however, for after serving the sentence for the first
conviction, he applied for a writ of \textit{habeas corpus}
to challenge the legality of his imprisonment on the other
sentences, alleging that he was being punished more than
once for the same crime. The Third District court refused
to grant the writ, and from this judgment, the matter was
taken to the United States Supreme Court on appeal.\(^{95}\)

The judgment of the lower court was reversed, and
the case was remanded with directions to grant the writ
of \textit{habeas corpus} applied for. Justice Blatchford said:

\begin{quote}
\ldots The offense of cohabitation, in the
sense of this statute, is committed if
there is a living or dwelling together as
husband and wife. It is, inherently, a
continuous offence, having duration; and
not an offense consisting of an isolated
act. \ldots \(^{96}\)
\end{quote}

The indictments, on their faces, supported this view.
The indictments stated that the defendant did "continuously"
cohabit with the seven women named; the judgment indicated
a continuing offense, recording that the crime was committed
"during" the time stated. The division of the total period--two years and eleven months--into three time segments, said Blatchford, was completely 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 indictment covering every week, with imprisonment for seventy-five years and fines amounting to $44,440; and so on, ad infinitum, for smaller periods of time. . . .

To prevent such arbitrary application of penal laws, it had been established that a continuing offense could only be committed once prior to the time the prosecution began. The Court cited English and American cases in support of this rule. For example, where a law prohibited pursuing a trade on Sunday, a baker could not be given the statutory penalty for every loaf of bread he sold in violation of it--it was a continuing offense and could be committed only once on any given Sabbath. Likewise, the crime of keeping a house for the illegal sale of liquor on two specific dates and on various unnamed days in the interim was a single continuing offense.

The proceedings in this case, said the Court, displayed all the earmarks of a single offense. All three of the indictments were found on the same day by the same grand jury; the same seven women were named in each; the same witnesses were heard; even the judgments were not separate, since the beginning of sentences on the second and third convictions was made contingent upon the
expiration of the sentences preceding each.

Why did the United States Supreme Court avoid Lorenzo Snow's case in 1886 and accept it the next year? Given the fact that it involved a double jeopardy question, it could have been argued that this was a challenge to the validity of the kind of exercise of United States authority that Congress intended to include in the 1885 statute, and therefore, it could be reviewed on a writ of error. Certainly, this was not merely a challenge to the ordinary power of a court to hear and determine cases. Apart from the reason given in the 1886 opinion, Whitney has identified other motivations. First, a writ of error would have required a review of the entire proceedings, including the sticky question of constructive cohabitation; the habeas corpus requested the second time did not. Second, the Court was behind on its calendar, and to have accepted cases like Snow's would have invited a flood of such appeals. Third, the Court may have developed some sympathy for the venerable old gentleman, who, by the time his freedom was ordered, had served all but seven months of his eighteen-month sentence. Fourth, the stringent Edmunds-Tucker act was about to become law, and the segregation principle would not be so crucial. In addition, the unjust effects of segregation had become obvious.98

A number of polygamists serving sentences in the Utah penitentiary were granted pardons. Many of them were older men, who, it may be surmised, were thought to
be capable of no further damage. Other reasons given for
the grant of executive clemency were poverty, ill health,
good conduct, and recommendations of the governor, judges,
or the United States attorney. In many cases, the ex-
convict was given a hero's welcome by his community. An
accused polygamist was expected to stand firmly by his
faith under the scrutiny of the court, and his loyalty and
courage were rewarded. Those who compromised and denounced
their belief in plural marriage or agreed to cease prac-
ticing it in exchange for the dismissal of charges against
them, lighter punishment, or a pardon, were condemned and
ostracized by their Latter-day Saint brothers and sisters.

One of the first acts of Governor Caleb W. West
after he arrived in Utah was a visit to Lorenzo Snow at
the penitentiary on May 13, 1886, to inform him of the
United States Supreme Court decision dismissing his writ
of error. The Governor, Chief Justice Zane, and United
States Attorney Dickson apparently had decided to approach
him with the proposition that if he would agree to obey
the law, they would recommend executive clemency. Snow
replied that he had declined a similar offer made by the
trial judge: "I considered it a question they had no
business to ask. I had obeyed the laws and had been
convicted illegally and wrongfully, and I did not con-
sider it was a personal question as to the future."

West told him that he wanted to prevent the suffering
that the people were enduring as a result of the polygamy
prosecutions. Snow answered that the people knew what was right and were willing to suffer, as many righteous people had suffered for the sake of religious opinion. When in- formed that the Mormons were not being punished for their religious belief, Snow said, "Oh, no more than the Roman Empire persecuted the Apostles for opinion's sake."\textsuperscript{103}

Snow expressed his distrust of the courts and the federal judicial officials:

\ldots I have no confidence in the courts. Even if I was to make a promise, I have no idea in the world that the courts would administer us justice. Let them first administer us justice and administer the laws correctly, and then we will see.

\ldots They send us here without a particle of evidence. It is through the counsel given to the jury by the Judge—by Judge Zane, who is influenced by Dickson. I have not a particle of confidence in those men. If you had came [sic] entirely alone, without the names of those men, we would have more confidence in the propositions.\textsuperscript{104}

West's visit was a failure. He could elicit no promises from the imprisoned polygamists. George Ticknor Curtis had this to say about West's tactics in a letter to the Secretary of the Interior in 1886:

\ldots When a man is in the penitentiary of a Territory, suffering imprisonment for an offense against the United States that is entirely new, to tell him that the condition on which he can have the President's pardon is that he shall promise to obey the laws as they are construed by a set of local judges, over whose decisions there is no appellate jurisdiction, and when obedience to the law, as so construed, requires him to renounce religious and moral duties to others who are dependent upon him, is to subject him to a moral torture worse than any physical pain to which the human frame can be subjected. \ldots\textsuperscript{105}
Ex Parte Nielsen

An issue similar to the one decided in the Snow case was raised by the enforcement of the Edmunds-Tucker act. Hans Nielsen was indicted in September of 1888 for unlawful cohabitation under the Edmunds act and for adultery under the Edmunds-Tucker act.106 The first indictment charged unlawful cohabitation from October 15, 1885, to May 13, 1888, with two women; the second indictment charged adultery with one of the previously named women on May 14, 1888, the day after the period covered by the first indictment. Both arraignments were held on the same day. Nielsen pleaded guilty to the charge of unlawful cohabitation and was fined one hundred dollars and sentenced to three months in prison. He then claimed the previous guilty plea as a bar to prosecution for adultery. After serving his sentence for unlawful cohabitation, he came up for trial on the other indictment. He pleaded the former sentence, claiming that the adultery was part of the other offense. Since the same woman was involved in both, and since unlawful cohabitation was a continuing offense, his criminal action continued until the prosecution began, including the date on which the adultery allegedly took place. He was convicted and sentenced to a term of twenty-five days in the penitentiary. He brought suit for a writ of habeas corpus, on the ground that he was being punished twice for the same offense. It was refused by the judge of the First District court, and the
case went to the United States Supreme Court on appeal. The government maintained that unlawful cohabitation and adultery were designated as two separate crimes by federal statutes, that each required different proofs, and that, consequently, the defendant could be punished for both.

The Court reversed, remanded, and ordered *habeas corpus* to issue. Justice Bradley, for the Court ruled that Nielsen's offense of unlawful cohabitation included his adultery also. It was true that in order to prove adultery, it was necessary to establish sexual intercourse. This was not mandatory to convict for unlawful cohabitation, but certainly it could be a factor, since unlawful cohabitation was defined as living together as man and wife. Further, it was well known that both the Edmunds and Edmunds-Tucker acts were intended to remedy the same evil—polygamy. The Court said:

\[\ldots\] The case was the same as if the first indictment had in terms laid the unlawful cohabitation for the whole period preceding the finding of the indictment. The conviction on that indictment was in law a conviction of a crime which was continuous, extending over the whole period, including the time when the adultery was alleged to have been committed. The petitioner's sentence, and the punishment he underwent on the first indictment, was for that entire, continuous crime. It included the adultery charged. To convict and punish him for that also was a second conviction and punishment for the same offense. \ldots\]

Justice Bradley pronounced this in accord with the accepted rule that the greater offense included the lesser,
and a conviction for the former was a bar to prosecution for the latter. To rule otherwise would be to violate a constitutional right, because where "a person has been tried and convicted for a crime which has various incidents included in it, he cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offense."\textsuperscript{109}

An unconstitutional conviction and punishment under a valid law was, said Bradley, as violative of constitutional rights as conviction and punishment under an invalid law. The case was likened to the Snow case, where, also, "it was not a case of mere error in law, but a case of denying to a person a constitutional right. And where such a case appears on the record, the party is entitled to be discharged from imprisonment."\textsuperscript{110}

This same problem was raised in two other habeas corpus cases decided by the territorial supreme court in 1889. In \textit{In re Maughan},\textsuperscript{111} the defendant was convicted for adultery and unlawful cohabitation. He applied for habeas corpus on the ground that since the same woman was involved in both charges, it was actually the same offense. The supreme court ruled that the record did not show that the women mentioned were one and the same. Had this point been properly pleaded and proved at the time, the previous conviction for unlawful cohabitation would have been a good defense to the adultery prosecution. However, habeas corpus could not be used to examine
questions not included in the record, regardless of their merit. In re Barton also involved adultery and unlawful cohabitation convictions. Again, the same woman was named in both indictments. The adultery allegedly took place during the period covered by the other indictment. Sentence was suspended on the unlawful cohabitation conviction, but Barton was sent to prison for adultery. He brought suit for a writ of habeas corpus, claiming that the adultery was included in the offense of unlawful cohabitation, for which he had been convicted previously, and that this barred any further proceedings. The territorial supreme court denied the original petition, stating that the record showed no irregularity. The point should have been brought up at the trial. The plea of a former conviction, said Justice Henderson, was a matter of fact, to be determined by the jury.

United States v. West

When the two offenses charged were bigamy and adultery, the objection raised in the Nielsen case was not successful. The indictment against Jacob J. West contained two counts, bigamy and adultery, both allegedly committed the same day with the same woman. West claimed that both acts were part of the same offense and that to prosecute them as separate acts was error. He further assigned as error the joinder of two offenses in the same indictment. On appeal, the territorial supreme court affirmed the verdict. The joinder was pronounced proper, under both territorial statutes and at common law.
The defendant could be punished on both charges. The bigamy was complete when, after having another wife living and undivorced, the defendant married another woman. Since the second marriage was void, if he then had sexual intercourse with the woman, he was guilty of adultery.

**Competency of Wives to Testify**

A wife's competency to testify against her husband was presented in an unusual way in *United States v. White*. Bernard White was charged with cohabiting with two women, Diana and Jane, during 1884. At his trial in March of 1886, Jane was called to the witness stand over the defendant's objection that she was his legal wife and therefore incompetent. Evidence established that he had married Diana first and took Jane as a plural wife later. Diana, however, died in January of 1886, and on April 12, a month after the indictment had been returned against him, White married Jane. Testimony revealed that the sole object of the marriage had been to prevent the court from obtaining Jane as a witness against him. On appeal, the territorial supreme court ruled that it made no difference when the marriage took place, and regardless of the motive, she was his legal wife and an incompetent witness.

The competency of a plural wife in an adultery trial under the Edmunds-Tucker act was at issue in *United States v. Kershaw*. In this case, the territorial supreme court rejected the argument that the testimony of the
defendant's plural wife had to be corroborated because she was his accomplice. Besides her testimony, it said, there was other evidence to connect him with the crime, among which were the facts that she lived on his property with children that were presumably his and was recognized as his wife.

Conclusions

The following year-by-year analysis of convictions for unlawful cohabitation, adultery, fornication, and incest was compiled from the reports of the Utah Commission:

<table>
<thead>
<tr>
<th>Year</th>
<th>Unlawful Cohabitation</th>
<th>Adultery</th>
<th>Fornication</th>
<th>Incest</th>
</tr>
</thead>
<tbody>
<tr>
<td>1882</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1883</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1884</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1885</td>
<td></td>
<td>39</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1886</td>
<td></td>
<td>123</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1887</td>
<td>228</td>
<td>4</td>
<td>6</td>
<td></td>
</tr>
<tr>
<td>1888</td>
<td>107</td>
<td>4</td>
<td>2</td>
<td></td>
</tr>
<tr>
<td>1889</td>
<td>294*</td>
<td>46</td>
<td>11</td>
<td></td>
</tr>
<tr>
<td>1890</td>
<td>88</td>
<td>46</td>
<td>8</td>
<td></td>
</tr>
<tr>
<td>1891</td>
<td>72</td>
<td>27</td>
<td>7</td>
<td></td>
</tr>
<tr>
<td>1892</td>
<td>37</td>
<td>22</td>
<td>9</td>
<td>1</td>
</tr>
<tr>
<td>Totals</td>
<td>988</td>
<td>149</td>
<td>43</td>
<td>1</td>
</tr>
</tbody>
</table>

*This includes adultery, fornication, and incest in the Second District.

A decade of judicial reasoning had a singular effect on the Edmunds act; it was transformed into a weapon of destruction beyond the fondest hopes of its authors. It is practically impossible to determine what percentage of
the polygamists were convicted of Edmunds and Edmunds- Tucker act violations, since authoritative figures are not available. The highest estimate of the number of polygamists is ten times the lowest.

The variety of crimes defined by the Edmunds and Edmunds-Tucker act suggests that Congress did not have a clear conception of the nature of the evil that it was attempting to extirpate. The chief difficulty, as has been pointed out previously, was that Mormon plural marriages were not civil contracts amenable to the ordinary processes of civil law; they were spiritual unions, recognized and regulated by ecclesiastical law, which imposed certain temporal obligations upon those who entered into them. Judges and law-makers finally realized this, not in exactly these terms, but in the sense that they discovered that the actual fact of a plural marriage could not be demonstrated in court. Consequently, Congress resorted to the shot-gun approach, scattering penal provisions like buck-shot, in the hope that at least one or two would prove applicable to that intangible relationship that existed between a man and his plural wives, which could be understood only by Mormons.

The tactic was successful, but not without help from the courts. The possibilities of the unlawful cohabitation provision were discovered, and the Utah judges tailored it to fit the situation. In doing so, they violated time-honored principles of law and prohibited the performance
of certain duties, harmless in and of themselves, which arose from religious doctrine.

The first step was to construe "cohabitation" to mean something that it had never meant before in a criminal statute. When the courts were finished with it, a man could "cohabit" with a woman if he and that woman: dwelled together, with sexual intercourse; dwelled under the same roof, but without sexual intercourse; lived in different houses, but saw each other occasionally, without sexual intercourse; lived in different towns, but visited each other occasionally, with no sexual intercourse; exchanged acts of kindness and attention over a period of years, although not living together and without sexual intercourse. When the presumption of cohabitation arising from a lawful marriage was made conclusive, a man was "cohabiting" with his lawful wife, even though he had never been in her company in the period covered by the indictment. "Cohabitation," the judges declared, could happen under the Edmunds Act only if it arose in the context of what was recognized as a marital arrangement. This, in spite of the fact that the court had said plural marriages could not be marriages at all, and in spite of the fact that the punishment of cohabitation had never been applicable to marital situations and had always involved the proof of sexual intercourse. The time-honored canon of statutory construction that penal laws should be strictly construed was ignored and violated many times over. It would be almost impossible to conceive how the construction of "cohabit" could have been
any broader than that given it by the Utah judges.

The courts authorized the punishment of the "example" of the "appearance" of cohabitation arising from plural marriages. It would be interesting to witness an attempt to draft a statute embracing that concept. Even more interesting would be the spectacle of such a statute before a court when challenged on the grounds of notice and vagueness. It is a fundamental principle of constitutional law that a statute shall give effective notice of the precise nature of the conduct that is being punished.\textsuperscript{119} The fact that the judges could not tell the polygamists how to remove themselves from the operation of the law indicates an inability to identify the exact elements of the crime. The polygamist could not obtain a divorce from his plural wife because a plural marriage was not a true marriage, but he could be punished for "living in the habit and repute of marriage"—time and time again, the judges pointed out that the marital relation, and only the marital relation, was the object of the act.\textsuperscript{120} Neither could he and his plural wife make an agreement to cease living together as man and wife, because "self-divorce" was against public policy. It seems too obvious to mention that, taking into consideration the pronouncements in the various individual cases, a divorce would not have placed a man under the severe strictures in regard to his treatment of his former wife that the courts seemed to think should operate against a polygamist in his behavior toward a plural wife.
That the motive behind the prosecution in unlawful cohabitation cases was actually to punish the plural marriage itself is further demonstrated by the kind of evidence admitted at the trials. The rule against the introduction of hearsay evidence was abused. In most of the cases heard by the Utah territorial supreme court, testimony regarding the defendant's behavior before the period named in the indictment was allowed, and in many cases, witnesses were allowed to testify to conduct and incidents occurring even before the Edmunds act was passed. Testimony regarding alleged unlawful marriages was accepted. The motive was obviously to introduce as much support as possible to the idea that a plural marriage had taken place, so that the continuation of same, at which the unlawful cohabitation was directed, could be punished. The point is that the defendants were not being tried for polygamy; they were being tried for unlawful cohabitation. To allow the inference of the latter from factors that could not even establish the former, and had no direct bearing on the charges in the indictment at hand, was improper.

Two conclusions can be drawn from the preceding discussion: first, that the judges were not concerned about whether the conduct fit the crime; they remedied the discrepancy by making the crime fit the conduct; and second, that Mormon plural marriage was not polygamy, as it was usually understood, nor cohabitation, as the law had recognized it, nor was it adultery or fornication as
these two terms had been defined. It belonged in none of the established categories of offenses against the marriage relation. It is this last consideration which prompts the final criticism, which is a First Amendment objection.

George Ticknor Curtis, in his impressive argument before the United States Supreme Court in the first Snow appeal, said, "A penal statute, breaking in suddenly upon domestic relations that have existed for a long time, cannot be construed without some reference to what has gone on before." ¹²¹ Plural marriage had existed among the Saints for almost forty years before the 1882 law was passed prohibiting unlawful cohabitation. During this time, many men undertook the obligations imposed by plural marriages in accordance with their religious belief, having no idea that the fulfillment of those obligations would later be made unlawful "cohabitation." Many of these marriages were entered into before 1862, before there was any law against contracting plural marriages, but the fact that those who married polygamously between 1862 and 1882 did so in violation of the law should have no bearing on the unlawful cohabitation point, because it is an offense entirely separate from polygamy—unlawful cohabitation was not a crime until after they entered into the forbidden union. After Congress moved to outlaw unlawful cohabitation, when the courts construed it to mean "living in the habit and repute" of plural marriage and punished the performance of the obligations entered into before the law was passed,
when that conduct did not violate the usual legal meaning of cohabitation, they made the performance of religious obligations criminal.

It is not asserted that Congress could not punish the contracting of plural marriages; further, it is not asserted that Congress could not allow liberal rules regarding the admission of evidence to prove such marriages. Neither is congressional power to outlaw unlawful cohabitation challenged. But when courts construed harmless acts of attention, the expression of consideration, and the provision of the necessities of life, performed in satisfaction of an obligation imposed by religious duty and assumed before the act was passed, as unlawful "cohabitation," they infringed upon religious beliefs.

The courts divined legislative intent to be the prohibition of the kind of cohabitation that exists in an unlawful marriage relation. This is granted for the purpose of the argument. Three points deserve notice. First, the Mormons were the only persons who recognized the performance of such duties as incidents of a legitimate marriage. Second, when polygamists ceased to live with more wives than one, in obedience to what they thought were the provisions of the Edmunds act, they continued to support and recognize their other wives in obedience to the doctrines of their religion. Third, these polygamists were not in fact cohabiting with more than one woman; as Chief Justice Zane pointed out, a reasonable interpretation of cohabitation
required the proof that the man and woman involved at least spent some time together. It was often said that a man was required to treat his polygamous wives as if he had divorced them. Certainly a divorced man might contribute to the financial support of his wife and children—in fact, he might be ordered to do so; he might visit his wife; he might ride in a carriage with her; if his place of business were near her home, he would not be required to move it. Yet these were the kinds of acts that the courts construed to be unlawful cohabitation, when the actors were polygamists.

Curtis told the United States Supreme Court that such associations and acts were "of a kind that could not have been dictated by anything but a religious obligation and duty:"

These duties are natural; they spring from the law of nature.
They are of moral obligation.
They are of perpetual obligation.
They are of sacred obligation.

Such acts were not only harmless, but, indeed, they were laudable, Curtis contended, and:

It is the function of this high tribunal, raised above all prejudice, free from passion, to discriminate between those outward acts which the law may punish because they are injurious to society, and that conduct which is in itself innocent, is dictated by a sense of religious duty, is harmless and praiseworthy, and therefore incapable of being made criminal, because it is under the shield of the Constitution. There is no difficulty in making this discrimination. Every day we analyze here the processes of the human mind. Every day we determine here the difference
between one thing, the product of one man's ingenuity, and another thing made by another man; and in that severe analysis we lay bare the anatomy of the human intellect. Are we so dull that we cannot discriminate between that conduct which the law may prohibit and that which it may not, when the religious constitutional rights of our fellow citizens are involved?  

As any informed student of Mormon polygamy must concede, the system was not founded upon the lust and carnal desire of men. What motivations Joseph Smith might have had in announcing "celestial marriage" as a divine command are not relevant here. The fact of the matter is that those who followed him believed it to be so and acted upon that belief. This is the important thing. In no other way could the endurance of such great humiliation and suffering by the entire Mormon population be explained. When such considerations are recognized, what George Ticknor Curtis called "public equities" make certain demands. These "public equities," according to Curtis, called "for a construction of this one word, 'cohabitation,' that will confine its meaning and operation so as not to require these men to renounce every possible duty to these women and force them to turn them and their children adrift upon the world."  

The irony of the judicial treatment of the polygamists under the Edmunds act was that, on the one hand, the courts pronounced one of the chief evils of polygamy to be that the older wives were neglected and forgotten in favor of the newest wife, while on the other hand, they declared
that the consideration and support in fact given to the previous wives was criminal. Curtis commented:

Oh, rare judicial consistency! These unfortunate Mormons are first charged with neglecting their elder wives, and pushing them off to lead lonely lives, and then such kindness and attention and care for the elder ones as they do show is used to convict them of unlawful cohabitation, by the aid of a legal presumption that they cohabit with the older ones, notwithstanding they have pushed them off! Can judicial folly go farther than this?125

It would seem that the only way that a polygamist could dispose of a plural wife to the satisfaction of the courts was to either publicly drive her and her children into the streets with a whip or to bring about her demise. Of this latter alternative, Curtis said:

... [A]nd when the death-bed scene comes, and the husband stands there for the last farewell, and when all is over for this life, he follows her remains to the grave, and writes on the grave-stone, Harriet, wife of Lorenzo Snow—that, too, is unlawful "cohabitation."

It was an uneven contest. The Mormons were concentrated in the Territory of Utah, where they had carved a flourishing agricultural society out of the barren desert. The leading elders might have been polygamists, but they were also respectable, educated, highly-responsible citizens, with a deep sense of moral obligation. Many of them had survived the persecutions of Missouri and Illinois, and those who had not been participants were imbued with the tradition of defending their religious beliefs in face of
persecution, governmental and otherwise. They were not thieves, who could commit offenses and steal off into the night. Consequently, they were captive suspects in the most concentrated crusade against "crime" in the nation's history.
FOOTNOTES

CHAPTER VI


2 S.A. Kenner, Utah As It Is (Salt Lake City: The Deseret News, 1904), 96.

3 18 Stat. 253 (1874).

4 Whitney, op. cit. supra note 1, 283-292.


6 Clawson v. United States, 113 U.S. 143 (1885).

7 Clawson v. United States, 114 U.S. 477 (1885).

8 Id., at 480.

9 22 Stat. 31 (1882).

10 U.S. Attorney Charles S. Varian claimed that in this instance, such belief would have authorized a challenge to the favor at common law. R.N. Baskin, Reminiscences of Early Utah (Salt Lake City: By the author, 1914), 213.

11 In 1887, Clawson asked the territorial supreme court to allow him the advantages of a statute which provided that sentences could be reduced for good behavior and which was passed after his sentencing. The court refused the request, saying that to apply the statute retroactively would allow the legislature to interfere with the executive power of the pardon. In re Rudder Clawson, 5 Utah 358 (1887). Clawson was finally pardoned by President Cleveland after he had served three years, one month, and ten days of his four-year term. History of the Bench and Bar in Utah (Salt Lake City: Interstate Press Association, Publishers, 1913), 49 (hereafter referred to as Bench and Bar).

12 Whitney, op. cit. supra note 1, 299, 310-314.
The territorial supreme court upheld the contempt action in *In re Belle Harris*, 4 Utah 5 (1884), saying that since her husband's first marriage had been established, Belle was required to answer the questions put to her. This incident is mentioned in Whitney, op. cit. supra note 1, 276-278; Bench and Bar, op. cit. supra note 11, 51.

Whitney, op. cit. supra note 1, 394.

E.g., *Ex parte Hester Hendrickson*, 6 Utah 3 (1889).

Whitney, op. cit. supra note 1, 394-395.

Bench and Bar, op. cit. supra note 11, 50-52; Anderson, op. cit. supra note 5, 323-324.


*Id.*, 187-188.

Anderson, op. cit. supra note 5, 318.

*Id.*, 314.

24 Stat. 252 (1886).

Whitney, op. cit. supra note 1, 332-334. There was one killing in the polygamy war. A suspected polygamist named Edward M. Dalton was shot while trying to escape from a U.S. deputy marshal. The deputy was later acquitted of manslaughter. *Id.*, 525-536; Anderson, op. cit. supra note 5, 321; Baskin, op. cit. supra note 10, 219-222; Roberts, op. cit. supra note 19, 116-121.

Anderson, op. cit. supra note 5, 314.

*Id.*

Baskin, op. cit. supra note 10, 216-217.


*United States v. Cannon*, 4 Utah 122, at 149-150 (1885).

Bench and Bar, op. cit. supra note 11, 59.

*United States v. Cannon*, 4 Utah 122 (1885).

*Id.*, at 132-133.
Id., at 136-137.

Id., at 131-132.

Id., at 142.

Id., at 143.

Cannon had requested the following instruction, which was refused by the trial court:

The law presumes innocence, and, therefore, that all persons who were cohabiting when the Edmunds law took effect, contrary to the provisions of that act, then ceased to do so.


Id., at 67. The trial court denied a total of twenty-four instructions requested by the defense.

Id., at 72.

Id., at 75.

Id., at 79. Cannon had requested the following instruction which was refused by the trial judge:

This Act does not command polygamous fathers to abandon their children nor to break off all communication with their mothers. Such fathers are at liberty, and under the strongest moral obligation, to support both. He may hold any friendly and familiar relations, other than sexual, naturally incident to the proper discharge of such duties. All his social familiarity with the mothers of such families, established prior to the passage of said Act, not shown to include all the particulars of cohabitation as the Court has defined it, should be considered by the jury with the legal presumption of innocence, and the failure to establish such cohabitation entitles the defendant to acquittal.

Id., at 68-69.

Id., at 79.

Id., at 80.
45 Cannon v. United States, 118 U.S. 355 (1886). In United States v. Kuntze, 21 Pac. 407 (1889), the Idaho court expressed the effect of the Cannon case: "Although it is true that this case cannot be considered as authority, yet the opinion of the court upon the questions raised is of as much value as if the case was of the most binding authority." Id., at 407.

46 Anderson, op. cit. supra note 5, 318.

47 For a discussion of the Musser case, see Whitney, op. cit. supra note 1, 373-377, 392-393.

48 Bench and Bar, op. cit. supra note 11, 61.

49 United States v. Musser, 4 Utah 153 (1885).

50 Id., at 157.

51 Id., at 164.

52 Id., at 164-165.

53 Id., at 168-169.

54 Id., at 175.

55 Id., at 174.

56 United States v. Clark, 5 Utah 226 (1887).

57 Id., at 231. Most authorities recognized the following categories of presumptions: 1. conclusive presumptions of law; 2. disputable or prima facie presumptions of law; 3. strong presumptions of fact; 4. slight presumptions of fact.

58 Utah 232 (1887).

59 Id., at 235.

60 Utah 263 (1887).

61 Id., at 264.

62 Id., at 266.

63 Id., at 268.

64 Ibid.

65 Id., at 271.

66 Ibid.
67 United States v. Harris, 5 Utah 436 (1888).
68 Id., at 436.
69 Id., at 441.
70 United States v. Clark, 6 Utah 120 (1889).
71 Id., at 127-128.
72 21 Pac. 409 (1889).
73 Id., at 409.
74 Id., at 410.
75 Ibid.
76 Ibid.
77 21 Pac. 407 (1889).
78 21 Pac. 409 (1889).
79 Whitney, op. cit. supra note 1, 415-417.
80 For a discussion of the Snow cases see Whitney, op. cit. supra note 1, 439-443, 460-475, 508-510, 537-543.
81 United States v. Snow, 4 Utah 280 (1886).
82 Id., at 290.
83 United States v. Snow, 4 Utah 295 (1886).
84 Id., at 298.
85 Id., at 298-299.
86 Id., at 299.
87 United States v. Snow, 4 Utah 313 (1886).
88 Id., at 319-320.
89 Id., at 324-325.
90 Supra, note 83, at 312.
91 4 Utah 487 (1886).
92 4 Utah 498 (1886).
93 Snow v. United States, 118 U.S. 346 (1886).
94 Cannon v. United States, supra note 45.

95 In re Snow, 120 U.S. 274 (1887).

96 Id., at 281.

97 Id., at 282.

98 Whitney, op. cit. supra note 1, 544–545.


101 Gov. West and the Polygamists, reported by Adam S. Patterson, Third Judicial District Reporter (Original pamphlet, Utah Historical Society).

102 Id., 2.

103 Id., 3.

104 Ibid.


106 For a discussion of the Nielsen case, see Whitney, op. cit. supra note 1, 672–674.

107 Ex parte Nielsen, 131 U.S. 176 (1889).

108 Id., at 187.

109 Id., at 188.

110 Id., at 184.

111 6 Utah 167 (1889).

112 6 Utah 264 (1880).

113 For comment on the West case, see Baskin, op. cit. supra note 10, 45.

114 United States v. West, 7 Utah 437 (1891).

115 Utah 499 (1886).
116 Utah 618 (1888).
117 Reports of the Utah Commission (Bound volume, Utah State Archives). See also Chapter V, note 72, supra.
118 82 C.J.S. Statutes Sec. 389 (1956).
119 24 C.J.S. Criminal Law Sec. 24 (2); 16a C.J.S. Constitutional Law Sec. 580 (1956).
120 This argument loses some of its cogency when the provision outlawing adultery in the Edmunds-Tucker act is considered. Adultery, by definition, can only occur outside the marriage relation.
121 George Ticknor Curtis and Franklin S. Richards, Pleas for Religious Liberty and the Rights of Conscience, Arguments Delivered in the Supreme Court of the United States (Washington: Gibson Bros., Printers and Bookbinders, 1886), 33-34.
122 Id., 19-20.
123 Id., 32.
124 Id., 41.
125 Id., 21.
126 Id., 20. Near the end of his argument, Curtis said:

Nor can I leave it without taking shame to myself that I have for so many years lived in ignorance of the condition of things in that devoted Territory. I have spent, on mere pecuniary interests, on lower politics, in the delight of letters and the pleasures of life, precious time that ought to have been given to the oppressed. If now my example, tardy as it is and feeble as it is, shall do something to arouse younger and more important men to a sense of their duty on this great problem, I shall have the consolation that I have done something to atone for my share in whatever blame rests upon this nation.

Id., 42.
CHAPTER VII

CIVIL DISABILITIES

Disfranchisement

Congress authorized a two-pronged attack on polygamy, imposing civil as well as criminal sanctions upon those who practiced it. Crucial to the implementation of the non-penal provisions was the Utah Commission, which itself was a sort of penalty against the residents of Utah, replacing the entire corps of local election officials. The first chairman of the Commission was Alexander Ramsey, ex-governor of Minnesota, ex-United States senator, and secretary of war under Hayes. The other four original members were A.S. Paddock, A.B. Carlton, G.L. Godfrey, and J.R. Pettigrew. Its mission was "to expedite the extirpation of polygamy through achieving the transfer of political power in the Territory of Utah from the hands of the ruling polygamist 'elite,' centered primarily in the hierarchy of the Mormon church to the hands of the non-polygamist and non-Mormon."2

The commissioners did not arrive in Salt Lake City until August 18, 1882, too late to make provisions for the August election.3 Less than a week later, they issued the first set of voting rules, of which a test-oath was the most
objectionable feature. The registrars were directed to administer the following oath to each voter:

I . . . . . . . being first duly sworn, (or affirmed) depose and say, that I am over twenty-one years of age, and have resided in the Territory of Utah for six months, and in the precinct of . . . . . . . one month immediately preceding the date hereof, and (if a male) am a native born or naturalized (as the case may be) citizen of the United States, and a tax payer in this Territory, (or if a female), I am native born, or naturalized, or the wife, widow, or daughter, (as the case may be) of a native born or naturalized citizen of the United States; and I do further swear (or affirm) that I am not a bigamist nor a polygamist; that I have not violated the laws of the United States prohibiting bigamy or polygamy; that I do not live or cohabit with more than one woman in the marriage relation, nor does any relation exist between me and any woman which has been entered into, or continued in violation of the said laws of the United States prohibiting bigamy or polygamy; (and if a woman) that I am not the wife of a polygamist, nor have I entered into any relation with any man in violation of the laws of the United States concerning polygamy or bigamy.4

Murphy v. Ramsey

After having been denied the right to register to vote in the autumn of 1882, Jesse J. Murphy, James M. Barlow, Mrs. Mary Ann Pratt, Mrs. Alfred M. Randall, and Mrs. Hiram B. Clawson brought suits for damages against the Utah Commission, the registration officer of Salt Lake county, and various deputy registration officers.5 The latter two ladies were joined by their husbands who sued in their wives' right. Each had refused to take the testament oath prescribed by the Commission, but each had offered
his or her own affidavit designed to establish that he or she satisfied the requirements for the suffrage and was not disqualified by the Edmunds act. All had been refused by the deputy registrars, and the refusal had been upheld by the county registrar and the Utah Commission. From a decision of the territorial supreme court affirming this action,\textsuperscript{6} the plaintiffs appealed to the United States Supreme Court.\textsuperscript{7} They claimed that the test-oath was unauthorized, that the officials acted illegally in refusing to accept their affidavits. The wrong complained of in each case was "that the defendants, and each of them, intending to wrongfully deprive the plaintiff of the elective franchise in said Territory, wilfully and maliciously, by the acts and in the manner aforesaid, refused the plaintiff registration, as a voter, . . . and deprived the plaintiff of the right to vote."\textsuperscript{8}

The Court agreed that the test-oath was unauthorized. The Edmunds act, said the Court, gave the Commission no power over registration, other than the appointment of the registration officials. Since it provided that the registration officials would perform their duties as territorial law directed, the Commission had no power to supervise even the mechanics of registration, let alone, to prescribe qualifications for the suffrage and make them prerequisite to registration. It lacked statutory power to do anything but: first, appoint election officials; second, canvass the returns; and third, issue certificates to those lawfully
elected. The defense had argued that since Section 9 specifically prohibited the Commission to deprive a person of his right to vote because of his beliefs, it could be inferred that the Commission had control over qualifications for the suffrage. The Court rejected this argument, construing the prohibition to refer to the canvassing of the votes or else to apply in a general way to the entire process covered by the statute.

Further, said the Court, there was no principal-agent relationship between the Commission and the registration officers. Since the rule prescribing the test-oath had no force or effect, the registrars administered it on their own responsibility, and were individually liable for their action.

The Court then turned to the causes of the individual plaintiffs. Each had denied that he or she was disqualified by the 1882 act, said Justice Matthews, but the questions remained whether any of their affidavits stated sufficient facts to exclude them legally and specifically from the disqualification imposed by Section 8 of the Edmunds act:

That no polygamist, bigamist, or any person cohabiting with more than one woman, and no woman cohabiting with any of the persons described as aforesaid in this section, in any Territory or other place over which the United States have exclusive jurisdiction, shall be entitled to vote at any election held in any such Territory or other place, or be eligible for election or appointment to or be entitled to hold any office or place of public trust, honor, or
emolument in, under, or for any such Territory or place, or under the United States. 9

After examining the statements of each, the Court ruled in favor of two of the plaintiffs and against the remaining three. Mrs. Pratt's only husband had died before the Edmunds act was passed. Mrs. Randall had not lived with her only husband since the passage of the Edmunds act. However, Mrs. Clawson's statement did not exclude the possibility that her husband might be a polygamist or cohabiting with another woman, and Murphy and Barlow both neglected to state that they were not polygamists or bigamists at the time they tried to register; these qualifications, said the Court, could not be inferred.

The Utah Commission had been faced with the necessity of defining the terms "bigamist" and "polygamist" as used in Section 8. They proceeded to do it in such a way as to exclude every person who had ever entered into a polygamous marriage. On September 1, 1883, the Commission issued an order in answer to the following question submitted by the registration officer for Juab county:

If, in any case, a man has violated the laws of the United States, prohibiting bigamy or polygamy, and is not at the time he may apply to be registered as a voter, actually living with two or more wives, should he, or should he not, be deemed a legal applicant for registration? 10

The Commission replied:

That any person, male or female, who, in violation of the Act of Congress, approved July 1st, 1862, (sec. 5352, Revised Statutes, United States), or who, in violation of section 1 of the Act of Congress, approved
March 22d, 1882, entitled "An Act to amend Section 5352 of the Revised Statutes of the United States, in reference to bigamy, and for other purposes," has entered into any of the relationships described in section 8 of said last named act, is not a legal voter, and cannot be registered.\(^1\)

The further question was asked, "Can any person, male or female, who lived in polygamous relations after July 1, 1862, register to vote?" The Commission answered, "No."\(^2\)

The effect of this pronouncement was "once a polygamist, always a polygamist," and in \textit{Murphy v. Ramsey}, the Court disapproved of this definition, declaring a polygamist or bigamist to be one:

\[\ldots\text{ who, having previously married 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 22, 1882, until the day he offers to register and to 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 relation it was a prohibited and punishable offence, or whether by reason of lapse of time since its commission a prosecution for it may 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.}\ldots\ \text{\(3\)}

The Court struggled to avoid the complaint that it unfairly penalized an act done in the past:

\[\text{It is not, therefore, because the person has committed the offence of bigamy or polygamy, at some previous time, in violation of some existing statute, and as an additional punishment for its commission, that he is disfranchised by the act of Congress of March 22, 1882; nor because he is guilty of the offence, as defined and punished by the terms of that act; but, because, having at some time entered into a bigamous or polygamous relation, by a marriage}\]
with a second or third wife, while the first was living, he still maintains it, and has not dissolved it, although for the time being he restricts actual cohabitation to but one. . . . Cohabitation is but one of the many incidents to the marriage relation. It is not essential to it. . . . The statute makes an express distinction between bigamists and polygamists on the one hand, and those who cohabit with more than one woman on the other. . . . 14

Finally, Justice Matthews stated flatly that this construction of the provision could not be ex post facto. Since polygamy and unlawful cohabitation were made punishable by criminal penalties in Sections 1 and 3, the disfranchisement could not be punishment of the criminal variety which was necessary to invoke the ex post facto ban. Regardless of this, "the disfranchisement operates upon the existing state and condition of the person, and not upon a past offence;" 15 a person could be a polygamist and not be guilty of any offense, as a result of the statute of limitations, and he might not be actually cohabiting with more than one woman, but he still could be guilty of being a polygamist within the meaning of Section 8 if he maintained the status--"the fixed habit and practice of his living." Inquiries into such conditions were clearly within governmental authority. Under its power to define the suffrage, the sovereign could declare that only married persons were entitled to vote, and election officials would be compelled to make similar investigations to determine valid marriages.

As for congressional competency to disfranchise polygamists, the Court had no doubts. Congress had supreme
legislative power over the territories; Congress had conferred the suffrage upon the residents of Utah and could take it away. It was within congressional authority to say who might exercise the right to vote and under what circumstances. Congress, in enacting the anti-polygamy legislation, was promoting the progress of the territories to self-government and statehood. The foundation of self-governing commonwealths, including the American, was monogamy. In withdrawing political power from polygamists, Congress was withdrawing it from elements hostile to the kind of morality necessary for the social progress and political improvement which marked the American civilization.

The freedom of religion question did not enter into the decision on the case. The power of Congress to extirpate polygamy was established in the Reynolds case over First Amendment objections. Given this, it was an easy matter to invoke congressional power over the suffrage as a justification for the means prescribed by the Edmunds act to accomplish this object. The Court exercised its often-invoked prerogative to reach constitutional questions last, and not first; the case could be, and was, decided on non-constitutional grounds.

The Court's definition of "polygamist" is interesting in view of judicial pronouncements on the meaning of "unlawful cohabitation." A man was, according to the Court, for the purpose of disfranchisement, a "polygamist" if he had married another woman while he had a wife living and the
plural relations still existed as a "status which the fixed habit and practice of his living has established," even though "he restricted actual cohabitation to but one." Obviously, the Court here was giving a narrow interpretation to the term "cohabitation" and gave an expanded meaning to the term "polygamy." In the criminal prosecutions under the Edmunds act, the Court did just the opposite: "polygamy" came to have restricted application, and "cohabitation" came to include something akin to the "status which the fixed habit and practice of his living has established," considerably short of the kind of cohabitation Murphy v. Ramsey recognized. In terms of total effect, it mattered little what any degree of Mormon plural marriage was called. The whole concept was under the ban, and wherever the idea or suggestion of a plural marriage existed, it was doomed.

After the United States Supreme Court decision in Murphy v. Ramsey, the Commission submitted a purely "advisory" oath to registration officers for their guidance, "to aid in securing uniformity of action."\textsuperscript{16}

Davis v. Beason

The question of the constitutionality of an anti-polygamy test-oath was decided by the United States Supreme Court in Davis v. Beason in 1890.\textsuperscript{17} This case did not arise under the federal statutes, but under an act of the Idaho territorial legislature of 1885, which provided:

\textldots{} [N]or any person who is a bigamist or polygamist, or who teaches, advises, counsels
or encourages any person or persons to become bigamists or polygamists, or to commit any other crime defined by law, or to enter into what is known as plural or celestial marriage, or who is a member of any order, organization, association which teaches, advises, counsels, or encourages its members or devotees, or any other persons, to commit the crime of bigamy or polygamy, or any other crime defined by law, either as a rite or ceremony of such order, organization, or association, or otherwise, is permitted to vote at any election, or to hold any position or office of honor, trust, or profit, within this Territory.18

The prospective voter was required to subscribe to an oath that he satisfied the legal requirements for the suffrage and that he was affected by none of the disabilities prescribed by law, and:

. . . I do further swear that I am not a bigamist or polygamist; that I am not a member of any order, organization, or association which teaches, advises, counsels or encourages its members, devotees, or any other person to commit the crime of bigamy or polygamy, or any other crime defined by law, as a duty arising or resulting from membership in such order, organization or association, or which practices bigamy or polygamy, or plural or celestial marriage, as a doctrinal rite of such organization; that I do not, and will not, publicly or privately, or in any manner whatever, teach, advise, counsel, or encourage any person to commit the crime of bigamy or polygamy, or any other crime defined by law, either as a religious duty or otherwise. . . .19

In April of 1889, Samuel D. Davis and others were indicted in the territorial district court for "conspiracy to unlawfully pervert and obstruct the due administration of the laws of the Territory,"20 by attempting to register to vote in Oneida county and taking the oath prescribed by the territorial law before a registrar, when they allegedly were not entitled to vote under the provisions of the law.
It was not alleged that they practiced or taught polygamy, but merely that they were members of the Church of Jesus Christ of Latter-day Saints. The jury found Davis guilty as charged, and he was fined five hundred dollars. When he did not pay the fine, he was sentenced to a term not to exceed two hundred and fifty days in the county jail. That same day, he filed suit for a writ of *habeas corpus*, claiming that he was illegally imprisoned because, first, the facts did not show a public offense since the charge against him was not punishable under territorial law, and second, that the law which disfranchised him was unconstitutional. The writ was issued; he was given a hearing; and the court ruled that sufficient cause for his discharge was not shown. He appealed from this judgment to the United States Supreme Court.

On appeal, Davis claimed that the legislature could not take the right to vote and hold office away from a person who had never committed a crime, simply on the ground that he belonged to an organization, when membership in that organization was not a crime. Such action, he said, was a proscribed law respecting an establishment of religion and an unconstitutional infringement of religious freedom:

> The Constitutional guaranty involves more than mere opinion and belief. It not only protects a man in the enjoyment of his religious opinions, but also in the free exercise of religion. This free exercise of religion must embrace his right to enjoy the benefits of a church, to worship according to its forms and ceremonies, to
participate in its ordinances and partake of its sacraments, and this he could not do without being a member of the church organization. It does not necessarily follow from such membership that he must believe all the dogmas or doctrines of the church. He may disbelieve any or even all of them, but its ceremonies, forms and associations may be of such a character as comport with his ideas of worship and duty to his Creator. No matter what his belief is, if he violates no law, he may freely exercise his religion according to such forms and ceremonies. If he cannot, he is deprived of the free exercise of religion. This must be so, otherwise the words of the Constitution, "or prohibiting the free exercise thereof" are surplusage and without meaning. It requires no such declaration as this to secure only freedom of opinion and belief.

The appellant violated no law, he did not practice bigamy or polygamy, nor did he advise anyone else to do so. It does not appear that he even believed in these practices, and certainly he repudiated them by this oath. He simply belonged to the Mormon Church and claimed his right to worship in that church. This act undertakes to say that he shall not do this without forfeiting his franchise, one of the most sacred rights of citizenship.

Even supposing he did believe in polygamy:

It will not do to say he is disfranchised, not because of his belief, but because of his membership in the church. That would be sticking in the bark, because some reason must be found for saying that he shall not belong to such a church, and that reason, as cannot be disguised, is belief in its doctrines as to bigamy and polygamy. Therefore this is disfranchisement on account of belief. "Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices." [quoting Reynolds]

The appellant might safely rest his case on this definition, for as we have already shown, he has been guilty of no "overt act against peace and good order," because mere membership in the church is not an overt act against peace and good order. . . .21
Furthermore, the statute violated the constitutional provision that no religious test should ever be required to hold an office under United States authority; it was such a religious test because the disqualification did not operate unless the organization in which membership was held taught polygamy as a doctrinal rite. He also alleged that with the congressional anti-polygamy laws, the federal government had preempted the field which the Idaho law attempted to regulate.

The Court affirmed the judgment of the district court and upheld the constitutionality of the statute. Justice Field made it clear that since this was a *habeas corpus* proceeding, the questions of whether the L.D.S. Church was an organization that taught polygamy as a religious duty, and whether the evidence was sufficient to prove that Davis was a member, were not before the Court. The only justifiable issue was whether the offense charged in the indictment was one over which the district court had jurisdiction. There was no doubt about this.

The bulk of the opinion was a rehash of the justification for governmental action to extirpate polygamy given in the *Reynolds* case and *Murphy v. Ramsey*. Bigamy and polygamy, said Justice Field, were crimes in all civilized and Christian countries:

... They tend to destroy the purity of the marriage relation, to disturb the peace of families, to degrade woman and debase man. Few crimes are more pernicious to the best interests of society and receive more general or more deserved punishment. To extend
exemption from punishment for such crimes would be to shock the moral judgment of the community.

Furthermore, "if they are crimes, then to teach, advise and counsel their practice is to aid in their commission, and such teaching and counselling are themselves criminal and proper subjects of punishment, as aiding and abetting crime are in all other cases." 22

As for the constitutional protection given to freedom of religion:

... It was never intended or supposed that the amendment could be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order and morals of society. ... However free the exercise of religion may be, it must be subordinate to the criminal laws of the country. ... Probably never before in the history of this country has it been seriously contended that the whole punitive power of the government for acts, recognized by the general consent of the Christian world in modern times as proper matters for prohibitory legislation, must be suspended in order that the tenets of a religious sect encouraging crime may be carried out without hindrance. 23

... It is assumed by counsel of the petitioner, that because no mode of worship can be established or religious tenets enforced in this country, therefore any form of worship may be followed and any tenets, however destructive of society, may be held and advocated, if asserted to be a part of the religious doctrines of those advocating and practising them. But nothing is further from the truth. Whilst legislation for the establishment of a religion is forbidden, and its free exercise permitted, it does not follow that everything which may be so called can be tolerated. Crime is not the less odious because sanctioned by what any particular sect may designate as religion. 24

However, in restating the now-familiar formula designed to test the constitutionality of governmental
regulation of religion, the Court did something that it has consistently maintained that it is not competent to do. Justice Field presumed to define what qualified as religion:

The term "religion" has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will. It is often confounded with the cultus or form of worship of a particular sect, but is distinguishable from the latter. . . .25

Therefore,

. . . The first amendment to the Constitution . . . was intended to allow every one under the jurisdiction of the United States to entertain such notions respecting his relations to his Maker and the duties they impose as may be approved by his judgment and conscience, and to exhibit his sentiments in such form of worship as he may think proper, not injurious to the equal rights of others. . . .26

It is mildly frightening to contemplate the position of the person who has no views regarding a Maker, had this assessment of the First Amendment protection endured. In fact, it would seem that Justice Field's ideas of the limits of legitimate "religion" were coterminous with the doctrinal boundaries of Christianity.

He then pronounced that Mormon polygamy could not be a part of religion: "To call their advocacy a tenet of religion is to offend the common sense of mankind."27 Leo Pfeffer has commented:

. . . [I]t may be suggested that the Supreme Court had no constitutional jurisdiction or competence to cast out of the religion of Christianity a denomination calling itself
a Church of Jesus Christ. It is not for a
civil court under the American system of the
separation of church and state to adjudicate
what Christ did or did not command. Nor was
it within the court's constitutional competence
to be shocked at the Mormon assertion that the
practice of polygamy is "a tenet of religion."
The approach in the Reynolds case was much
more consistent with the constitutional prin-
ciples envisaged by Jefferson and Madison. It
did not deny that the practice of polygamy may
be a tenet of religion; nor did it imply that
it is the function of civil courts to protect
orthodox Christianity from less conventional
sects. It was based on the fact that marriage
is a relationship created, regulated, and pro-
tected by civil authority, and that the pres-
ervation of the monogamous family unit is more
important to American society than the unre-
strained religious liberty of believers in
polygamy.28

At long last, the Court approached the issue at hand.
Under the organic act of Idaho, the territorial legislature
had wide authority over the exercise of the suffrage.
Congress had prescribed only age and citizenship qualifi-
cations and certain regulations regarding military person-
nel. The legislature had power to prescribe any reasonable
qualifications of voters not inconsistent with these limi-
tations. The Idaho law, said Field, "is not open to any
constitutional or legal objection:"

... It simply excludes from the privilege
of voting, or of holding any office of honor,
trust or profit, those who have been convicted
of certain offences, and those who advocate a
practical resistance to the laws of the Terri-
tory and justify and approve the commission of
crimes forbidden by it.29

The test-oath was disposed of in short order by a
similar declaration. It was declared "not open to any
valid legal objection to which our attention has been
called."30
In regard to the last objection, that federal legislation on the subject had superseded territorial law, the Court said:

... The act of Congress does not touch upon teaching, advising and counselling the practice of bigamy and polygamy, that is, upon aiding and abetting in the commission of those crimes, nor upon the mode adopted, by means of the oath required for registration, to prevent persons from being enabled by their votes to defeat the criminal laws of the country.\textsuperscript{31}

The Court spent considerable time explaining why polygamy could not be tolerated, and why even advocacy of polygamy was properly punished as a crime, but it did not attempt to explain the danger of mere membership in an organization which taught polygamy and why it was a substantial enough evil to warrant legislative prohibition. Here again, the Court is found one step short of answering the question that it was asked. It is one thing to claim that the right to vote is not a natural right, but a privilege, and that government can impose reasonable qualifications upon its exercise. It is quite another thing to assert that government can put a man in prison for trying to exercise it, merely because he belongs to an association which teaches doctrine deemed inimical to the public interest. In the case of Davis, apart from the question of governmental power to prescribe voting qualifications, there is a question of a substantive due process kind. It must be established that prohibiting persons who merely belonged to the proscribed organization was a reasonable means of achieving the public interest in the
extirpation of polygamy, or even that this was a reasonable means of preventing polygamists from voting. While Davis did not have a right to be registered, he did have a right not to be put in jail because he tried to register, without the question of the reasonableness, or the due process, of the action being considered. It would have been an entirely different issue if he had been denied the right to register and had brought suit to challenge this denial. In Pfeffer's estimation:

The effect of this decision was to make it criminal to be a Mormon as long as the tenets of the church required plural marriages. For it was not charged that the defendant had himself either practiced or preached polygamy; it was charged only that he was a member of the Church of Jesus Christ of Latter Day Saints, which, he knew, taught and counseled polygamy. This meant that no one could be a Mormon unless he believed in polygamy. It meant further that no one could be a Mormon without either practicing or counseling polygamy, and therefore no one could be a Mormon without ipso facto committing a crime. This was guilt by association with a vengeance. . . .

Moreover, it is difficult to reconcile the court's statement that the Constitution protects beliefs but not actions, with its affirmance of a conviction based exclusively on membership in the church. In this respect the case is entirely different from the conviction of the Communist Party leaders upheld by the Supreme Court in Dennis vs. United States. In the latter case the indictment and conviction were based not on membership in the Communist Party—which itself is still not criminal—but on conspiracy to teach its doctrines. In Davis vs. Beason there was no charge other than that the defendant was a member of the Mormon Church.32

Idaho

The validity of the test-oath was upheld in two other decisions of the supreme court of the Territory of Idaho.
Innis v. Bolton involved a suit for damages by James B. Innis against the judge of election of Bear Lake county for refusing to allow him to cast his ballot when he was challenged by another elector. He declined to take the oath prescribed by law, and his offer to take the following oath was rejected:

I do solemnly swear that I am a male citizen of the United States, over the age of twenty-one years; that I have actually resided in this territory for four months last past, and in this county thirty days; that I am not a bigamist or polygamist; that I do not cohabit with more than one woman, and that I have not previously voted at this election. So help me God.

The trial court dismissed his complaint, and he appealed to the territorial supreme court on the grounds that the requirement of the oath violated the First Amendment. The supreme court cited Reynolds as authority for the validity of governmental action against polygamy and that conduct in violation of the law could not be excused on the basis of religious belief. The court pointed out, citing Murphy v. Ramsey, that since the statute of limitations on Edmunds act offenses expired after three years, it was possible that a person living in a polygamous state without cohabitation would not be subject to criminal penalties, but that he would still be disfranchised by the Idaho law. The object of the statute was to withdraw political privileges from all who encouraged and counselled polygamy as well as those who practised it. This was justifiable because polygamy was contrary to public policy.
It was not another way of punishing a crime, nor was the measure of the right to vote the measure of liability to criminal action. Test-oaths were not new in this country, said the court, and the suffrage was a privilege granted by Congress, not a right.

Innis also claimed that the law was superceded by congressional disfranchisement of polygamists in the Edmunds act. The court disagreed, ruling that the Territory was left wide power over the suffrage by Congress, that territorial and congressional power in the matter were concurrent, and that since the territorial act did not conflict, but was in accord, with congressional enactments, it was valid.

**Wooley v. Watkins** was an action for mandamus to compel Registrar Watkins to register Wooley to vote. An alternative writ of mandamus was issued and Watkins answered that Wooley was not a qualified voter solely because he was a member of the Mormon Church, which taught, advised, counseled, and encouraged its members to commit polygamy as a religious duty and a doctrinal rite. One H.M. Bennett was allowed to intervene on behalf of the public. He alleged that the suit was collusive because the Mormon Church was in a position to control both of the litigants, and that it had directed the defendant to deny registration so that suit could be brought.

The Idaho territorial court ruled that the evidence established that the plaintiff was a member of the Mormon
Church and that the Church taught polygamy as a duty arising out of membership. It again sustained the statute against the claim of federal preemption. The test-oath statute was also upheld against freedom of religion objections, again with substantial dependence upon Reynolds:

... Orders, organizations, and associations, by whatever name they may be called, which teach, advise, counsel, or encourage the practice or commission of acts forbidden by law, are criminal organizations. To become and to continue to be members of such organizations or associations are such overt acts or recognition and participation as make them particeps criminis, and as guilty, in contemplation of criminal law, as though they actually engaged in furthering their unlawful objects and purposes.36

The court further denied that it was ex post facto, since it dealt only with the present and future conduct and actions. Finally, it was not a deprivation of life, liberty, or property without due process of law; since the right to vote was not an inviolable right, it might be granted, abridged, or taken away at the discretion of the government.

Justice Berry concurred. He quoted excerpts from Mormon standard works, which, he claimed, indicated intentions subversive to "the blessings of liberty."

A test-oath enacted by the first Idaho state legislature was upheld in Shepherd v. Grimmett,37 decided by the Idaho supreme court in 1892. The pertinent part of the oath was:

... [T]hat since the first day of January, A.D. 1888, and since I have been eighteen years of age, I have not been a bigamist or
polygamist, or have lived in what is known as patriarchal, plural or celestial marriage, or in violation of any law of this State, or of the United States, forbidding any such crime; and I have not, during said time, taught, advised, counseled, aided or encouraged any person to enter into bigamy, polygamy, or such patriarchal, plural or celestial marriage, or to live in violation of any such law, or to commit any such crime. Nor have I been a member of, or contributed to, the support, aid or encouragement of any order, organization, association, corporation or society which, through its recognized teachers, printed or published creed, or other doctrinal works, or in any other manner, teaches or has taught, advises or has advised, counsels, encourages or aids, or has counseled, encouraged or aided, any person to enter into bigamy, polygamy, or such patriarchal or plural marriage, or which teaches or has taught, advises or has advised, that the laws of this State or of the Territory of Idaho, or of the United States, applicable to said Territory, prescribing rules of civil conduct, are not the supreme law. That I will not commit any act in violation of the provisions in this oath contained. . . . 38

It was much more stringent than the territorial oath, containing several starkly retroactive features. It amply covered past, present, and future conduct. It was impossible for anyone to vote who had, after reaching majority, ever been a member of the Mormon Church. The Church abandoned polygamy in 1890, but the law disqualified anyone who was or had been affiliated with an organization which "teaches or has taught, advises or has advised, counsels, encourages or aids, or has counseled, encouraged or aided" any person to practice plural marriage. Furthermore, it eliminated anyone who had "contributed to the support, aid, or encouragement" of any proscribed organization; it was not even necessary to have been a member to fall under the ban. A
more flagrant memorial to religious intolerance can scarcely be imagined.

The Idaho court ruled that it did not violate the provision of the state constitution which prescribed the qualifications for the suffrage; the legislature was given the express power to add to the list of voting qualifications. The reasoning in Davis v. Beason was cited in answer to claims of interference with religious freedom. It was not an ex post facto law, because ex post facto referred to criminal and penal laws only. It was not a bill of attainder, because the deprivation of the right to vote was not punishment, since it took away no natural right, only a privilege. The court distinguished the famous decisions of the United States Supreme Court in Cummings v. Missouri and Ex parte Garland, in which test-oaths as conditions of being allowed to follow the ministry and to practice law before the federal courts were struck down as ex post facto laws and bills of attainder. These cases, said the court, involved a natural right, the right to follow a chosen profession.

It is suggested that if the Idaho supreme court had read Justice Field's opinion in Cummings with greater care, or sympathy, as the case may be, it would have found language at least a little bit disturbing to its conclusion:

. . . The deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of the deprivation determining this fact. Disqualification from office may be punishment, as in cases of conviction upon impeachment. . . .
And:

The theory upon which our political institutions rest is, that all men have certain inalienable right—that among these are life, liberty, and the pursuit of happiness; and that in the pursuit of happiness all avocations, all honors, all positions, are alike open to everyone, and that in the protection of these rights all are equal before the law. Any deprivation or suspension of any of these rights for past conduct is punishment, and can be in no otherwise defined.42

Nevada

The supreme court of Nevada declared a test-oath statute contrary to the constitution of that state.43 In 1887, the Nevada legislature declared that "no person shall be allowed to vote at any election in this State ... who is a member of or belongs to the 'Church of Jesus Christ of Latter-Day Saints,' commonly called the 'Mormon Church.'"44 The regular oath administered to voters was amended to include a statement that the voter was not a member of the Mormon Church. Article II, Section 1 of the Nevada constitution prescribed the qualifications for the suffrage. The court declared that:

... The act was a direct attempt, in violation of the provisions of the constitution, to disfranchise the members of the Mormon church; to deny them the right of suffrage regardless of the question whether or not they possessed the qualifications of an elector as defined in the constitution.

... The right of suffrage, as conferred by the constitution, is beyond the reach of any such legislative interference. It cannot be changed except by the power that established it, viz., the people in their direct sovereign capacity. ...45
The claim that the statute was merely a regulation of the manner in which the suffrage should be exercised was rejected; on the contrary, the court ruled, it was a deprivation of the right itself.

The Arizona legislature in January of 1887 repealed the test-oath excluding Mormons from the franchise in that state.46

**Disqualification from Office**

The right of a polygamist to hold office was considered by the Utah territorial supreme court in* Wenner v. Smith*.47 Elias Smith had been elected probate judge of Salt Lake county in 1880 and held it continuously until 1884, despite the fact that the governor appointed Wenner to this position in September of 1882, in accordance with the Edmunds act and the Hoar Amendment. Smith was a Mormon who had married two women before 1862 and had continued to live with them as wives. The Edmunds act excluded polygamists and persons cohabiting unlawfully from public office. Since the Utah Commission did not arrive in time to organize the fall election in 1882, the Hoar Amendment allowed the governor to make interim appointments of eight months to positions in which vacancies resulted. Wenner presented his commission to Smith, who refused to relinquish his office. When the term of the appointment had expired, he brought suit against Smith for the fees and emoluments of the office for those eight months.
It should be noted here that the Hoar Amendment did not expressly authorize the governor to turn polygamists out of office; it merely enabled him to fill vacancies caused by the failure to hold elections. Despite this, the trial court awarded judgment for the plaintiff, and the territorial supreme court affirmed. The supreme court, speaking through Justice Powers, ruled that the Edmunds act automatically disqualified Smith because he was a polygamist. This being true, there was a vacancy in the office, and the governor was empowered to make a temporary appointment. Powers said:

... There can be no doubt but that Congress, by the Edmunds act, intended to vacate all offices held by polygamists, and to disqualify all such persons from holding office, without reference to whether they had committed the crime of polygamy as described and defined in the first section of the act. Congress knew at the time of the passage of this law, and this court must take judicial notice of the fact, that polygamy had existed in this territory.

The commission, said the court, gave Wenner "prima facie title to the office. It imposed upon any one contesting the burden of showing better title... In establishing a better title the qualifications of the defendant would have been the issue—the question would have arisen whether he was or was not a polygamist." The defendant, therefore, was the usurper, and since he did not surrender the office, it was his mistake, for which he must suffer the consequences.

There were several instances of incumbents refusing to surrender their offices to gubernatorial interim
appointees. The first of these cases to be heard by the territorial supreme court was *Kimball v. Richards*, 51 decided in February of 1883, in which it affirmed the decision of the district court issuing a mandate to oust Apostle Franklin D. Richards as probate judge in Ogden. Richards appealed to the United States Supreme Court, and while the appeal was pending, the eight-month term of his would-be successor expired, so the appeal was withdrawn. While he did not succeed in obtaining a reversal of the territorial supreme court's decision, he did win the point—the appeal held off a territory-wide "office grab." 52

**Jurors**

The qualification of jurors under the Edmunds act presented several problems. It will be remembered that in the *Reynolds* case, the United States Supreme Court upheld the allowance of challenges to prospective jurors who refused to answer the question of whether they were living in polygamy, on the ground that they could not be deemed impartial. And for the same reason in the *Miles* case, the Court ruled that asking jurors about their belief in polygamy and membership in the Mormon Church was proper. Both of these cases were decided prior to the act of 1882, which made it a ground for challenge to a juror that he was living in polygamy or unlawful cohabitation or believed that it was right to do so; it also provided that if he refused to answer on self-incrimination grounds, he was automatically disqualified. The Edmunds-Tucker act imposed a test-oath to this effect on jurors.
In People v. Hopt, the territorial supreme court ruled that Section 5 of the 1882 statute disqualified a polygamist from jury duty only in bigamy, polygamy, and unlawful cohabitation cases. A juryman was declared not to be an "office of public trust, honor and emolument" from which polygamists and persons cohabiting unlawfully were excluded by Section 8. The Edmunds act singled out jurors for special treatment in Section 5, which would not have been necessary if they were disqualified by Section 8. This was a murder case.

The question of packing a jury with non-Mormons was raised in a case involving Brigham Y. Hampton, a prominent member of the Church and the Salt Lake City police force. The case was not without its humorous aspects. Hampton and others, in the spring of 1885, decided to infiltrate the business of prostitution, with the declared object of obtaining information which would enable city authorities to put an end to it. They set up houses of ill-fame, which were arranged so that activities in any room could be observed by spies stationed at strategic points to gather evidence, and staffed them with imported prostitutes. They succeeded in luring prominent Gentiles into the carefully-laid trap, and after enough evidence was gathered, they shut down the houses, shipped the scarlet women away, and began prosecutions for morals offenses. It is said that the purpose of the plan was to get even with the Gentiles for all the grief suffered by the Mormons as a result of the polygamy prosecutions.
The United States attorney moved to dismiss the prosecutions in district court on the ground that they arose out of a conspiracy to force the commission of crime. Hampton was later convicted of conspiracy to establish houses of ill-fame, contrary to territorial law. One of the assignments of error on appeal to the territorial supreme court was that the United States marshal, who summoned the jurors on an open venire, had intentionally neglected to summon any persons who were members of the Mormon Church. The marshal testified that his only object had been to obtain an impartial jury, and he did not think that Mormons could be impartial in this case. The supreme court ruled that the defendant's challenge to the entire panel was properly denied by the trial judge. The defendant, said Justice Powers, could demand only an impartial jury. He was not entitled to jurors of his religious faith. He was, however, guaranteed that members of his religion should not be systematically excluded. In this case, the marshal had passed over Mormons, not because they were Mormons, but because, in his opinion, they were not free from bias.

Another issue considered by the territorial supreme court in the Bassett case, discussed in Chapter V, was whether a juror who had been convicted of polygamy and unlawful cohabitation and later pardoned by the President was properly qualified, given the Edmunds act provisions prohibiting persons who practiced polygamy or cohabited
unlawfully, or believed in the righteousness of same, to serve on juries. The court pronounced him competent. The pardon had the effect of making him "before the law as if he had never practiced either of the crimes mentioned." It had been issued without condition or limitation and restored him to full rights and privileges.

In People v. Chalmers, the territorial supreme court ruled that the trial court did not err in denying a motion to administer the oath prescribed in the Edmunds-Tucker act to jurors, when the act had not officially become law. The jury had been empanelled on March 2, 1887, and on March 3, the statute became effective. The court said that the law was not intended "to disqualify such as were competent at the time they entered upon the trial. . . . If the members of a jury cannot be changed during the trial, their qualifications ought not to be." Anticipating that some might be excluded by the oath, the court stated:

. . . The accused party is placed in jeopardy when the jury is sworn. In contemplation of law, the trial then commences. A discharge of the jury trying a party charged with felony, unless for an overwhelming necessity, or at the request of such party, effects his acquittal. . . .

This was a trial for assault with intent to murder.

The defendant in United States v. Brown was convicted of perjury for testifying that he did not believe it was right for a man to have more than one wife, on voir dire to determine competence to serve as a grand juror. He appealed from the conviction on the ground that it was
not supported by the evidence. Witnesses testified that a short time previously, he had advocated plural marriage, that he had been a missionary and was a member of a Mormon priesthood, both of whom had a duty to preach plural marriage as part of Church doctrine, and that after he became a grand juror, he said that he knew polygamy was right. In view of all this, the jury legitimately could have concluded that he believed in the rightfulness of polygamy. In answer to the assertion of counsel for the defense that the defendant's statements regarding belief made under oath should be given precedence over other of these statements, the court said:

... If this claim of the defendant is correct, then it would be impossible to show that the testimony is untrue, unless he had been actually guilty of polygamy or unlawful cohabitation, and such persons are disqualified from serving on juries by other provisions of the statute than those above quoted; but the statute goes beyond this, and disqualifies persons having a certain belief, and authorizes the Court to make inquiry under oath of persons presented or proposed as jurors as to that belief. If the testimony in this case does not fairly tend to show that the testimony given is false, it is hard to be shown, and the statutes would have no force whatever. ...

"United States v. Christensen" involved a juror in an unlawful cohabitation trial who falsely stated on voir dire that he had not formed an opinion about the guilt or innocence of the defendant, that he did not know the defendant, that he did not know any of the witnesses listed on the back of the indictment, and that he had not talked to anyone about the case. It was discovered that he had
served on the grand jury which indicted the defendant. A new trial was granted on motion of the defense, and the government appealed to the territorial supreme court from the order. The supreme court ruled that although the juror might not have participated in finding this particular indictment, or had voted against it, or had forgotten about it, the presumption was that he had formed an opinion about the guilt or innocence of the defendant and could be challenged for bias. His failure to tell the truth might have deprived the defendant of a fair trial by an impartial jury. Where jurors did not answer truthfully, said the court, the accused is deprived of his right to challenge for cause and might also be prevented from exercising the right of peremptory challenge.

S.A. Kenner has commented on the jurors who sat on Edmunds and Edmunds-Tucker act cases:

... Are men who, by means of a regular routine, are made to know what kind of findings are expected from them and that failure to so find means immediate dismissal, in possession of the receptive frame of mind which Alfred the Great contemplated when he invented the jury system?

... The "professionals" spoken of have been seen, like a lot of supernumeraries at the wings of a theatre stage, waiting for their cue to march on and take their machine-like parts in the play, and sometimes one set, or several of any particular panel, would "try" a number of cases without once leaving the vicinity of the court room. I once heard one of these worthies complaining because he had been called away by sickness or something, and in the meantime several "cohab." trials had been reeled off and thereby he had lost his regular fees as a juror in those cases!
His name was Coalter, or something like that; I seem to have forgotten it, partly, and am willing to forget it altogether.64

The Idaho territorial supreme court had occasion to consider the question of Mormon juries. In _Territory v. Evans_, the defendant was convicted of resisting an officer. On appeal, he claimed that the trial court erred in qualifying a Mormon as a juror. Territorial law provided that jurors must be citizens of the United States and electors of the county in which they resided. Territorial law further provided that no person who belonged to an organization that taught polygamy could be an elector. The prosecution argued that when the jury law was enacted, the voting qualifications did not include this, and it should not be assumed that jurors had to have the same qualifications as voters now did. Further, since to be an elector, a person had to be registered, a strict application of this view would exclude many able people from jury duty. And, in some counties where most of the people were members of the Mormon Church, it would be impossible to get a jury.

The court reversed the conviction. Where general statutes conflict, the presumption was that the later one repealed the earlier one. In the case at hand, the 1887 Idaho legislature had made a complete revision of the laws, including the two at issue here, so the voting qualifications then approved were construed to be applicable to jurors. The court dismissed as inaccurate the assertion that because a juror must possess the qualifications of an elector,
he must be registered to vote, declaring that registration
did not go to his qualifications. Assuming that the legis-
lature recognized the unlawful teachings of the Mormon
Church and the iron discipline it exercised over its mem-
ers, the court stated that "the legislature meant to ex-
clude from jury service those belonging to the so-called
'Mormon Church.'" The fact that some counties would
have few competent jurors did not seem to the court a
sufficient reason for invalidating the requirement.

United States v. Kirkwood involved the competency
of witnesses at the subsequent trial on an indictment re-
turned by the grand jury upon which they had served. The
defendant in this case was convicted for unlawful cohabi-
tation. He had testified before the grand jury. At his
trial members of the grand jury were called to testify
about what he said before them. He had admitted that he
had lived with the women later named in the indictment as
wives for three years and that he had held them out to
the world as his wives. The defendant appealed to the Utah
territorial supreme court, charging that the admission of
this testimony was error because he was not on trial for
perjury nor was there any question of the inconsistency of
his testimony, and further, because his statement before
the grand jury was not voluntary.

The supreme court held that the grand jurors were
competent witnesses. Although territorial law imposed
secrecy upon members of grand juries, the intent was to
prevent information about grand jury deliberations from circulating, which would be harmful to the judicial process. The object was not to shield the defendant from the just effects of his confession. The language of the secrecy statute did not expressly prevent disclosures such as the one at hand, and the courts must be allowed discretion to see that justice was done. Admissions made before a grand jury were as reliable, said Chief Justice Zane, as if made in any other place. Furthermore, since a witness before a grand jury took the oath voluntarily, his subsequent admission could not be challenged as involuntary. Also, confessions under oath were likely to be reliable.

Inheritance

Provisions of the federal anti-polygamy laws raised questions regarding the right of polygamous children to inherit from their fathers. In 1852, the Utah territorial legislature provided that: "Illegitimate children and their mothers inherit in like manner from the father, whether acknowledged by him or not, provided it shall be made to appear to the satisfaction of the court, that he was the father of such illegitimate child or children." In 1862 the federal anti-polygamy act nullified all territorial laws "which establish, support, maintain, shield, or countenance polygamy."

The 1876 compilation of Utah law contained the following provision: "Every illegitimate child is, in all cases, an heir to its mother. It is also heir to its
father when acknowledged by him.\textsuperscript{70} In the Edmunds act of 1882, Congress included a provision legitimizing the issue of polygamous marriages born prior to January 1, 1883.\textsuperscript{71} And in 1884, the territorial legislature passed a statute which provided:

Every illegitimate child is an heir of the person who acknowledges himself to be the father of such child; and in all cases is an heir of his mother; and inherits his or her estate, in whole or part, as the case may be, in the same manner as if he had been born in lawful wedlock. The issue of all marriages null in law, or dissolved by divorce, are legitimate.\textsuperscript{72}

Section 11 of the Edmunds-Tucker act of 1887 annulled acts of the Utah legislature which provided that illegitimate children could inherit from their fathers.\textsuperscript{73} However, this was made inapplicable to children legitimized by the Edmunds act and to children born within twelve months of the passage of the Edmunds-Tucker act.

George Handley died intestate in 1874. His plural wife and their children petitioned the probate court for a distributive share of his estate, depending upon the 1852 territorial statute. The claim was denied, and they appealed\textsuperscript{74} to the territorial supreme court. Justice Henderson identified the central issue to be whether the 1852 territorial inheritance statute was nullified by the 1862 federal law as an encouragement or protection of polygamy. Henderson said that the system of plural marriage prompted the Utah legislature to pass the law in the first place; it was felt necessary to protect the legal status of polygamous children.
Regardless of how unjust it was to punish innocent children by depriving them of a share in their father's estate, still such a policy was a potent factor in preventing sexual irregularities. Congress had approved such means of regulating polygamy by specifically including provisions on the subject in the laws of 1882 and 1887. The petitioners had argued that if the 1862 federal statute had annulled the 1852 territorial statute, then the provision of the 1887 statute disinheriting children born thereafter was unnecessary. By including this provision, they claimed, Congress recognized that such children had been inheriting from their fathers previously. Not so, said the supreme court; it was necessary because the 1882 act legitimized children born prior to the effective date it named. Furthermore, if illegitimate children had continued to inherit from their fathers according to the 1852 territorial statute, it would have been unnecessary to legitimize them in 1882. The court concluded that the 1862 federal law nullified the 1852 territorial law.

Justice Blackburn dissented. He said that the purpose of the 1862 federal act had been to extirpate the practice of polygamy, and if the inheritance rights of illegitimate children has been on Congress' mind, it would have said so. Courts did not annul statutes by implication; laws were never construed to repeal other laws unless they were clearly in conflict:

... It cannot be supposed that Congress intended any such thing. Courts are human, and sometimes not overburdened with wisdom, and it would be, if such a thing can be
supposed, a more dangerous exercise of legislative authority to form laws so as to leave to judicial interpretation their enlargement and annulling. Where the law would begin, and where it would end, would be left to conjecture and uncertainty. ... 75

Allowing illegitimate children to inherit from their fathers was not to "establish, support, maintain, shield, or countenance polygamy," because "it is consistent with the severest punishment of polygamy and its entire overthrow." 76 Furthermore, Justice Blackburn pointed out, the 1852 territorial statute did not even mention polygamous children as the legitimization provisions of the 1882 federal law did. If the territorial law was construed to countenance and support polygamy, federal law did much more than this, and such a conclusion was not reasonable. Moreover, the 1887 law allowed inheritance rights to illegitimate children born within twelve months; this allowed three months for such children to be conceived—since the normal gestation period is nine months—which was certainly an encouragement to polygamous parents.

About this same time, the territorial supreme court heard In re Cope's Estate. 77 The justices split evenly on the question; Chief Justice Zane and Justice Anderson disqualified themselves, and Henderson and Blackburn maintained the positions they took in the Handley case. Because it involved the same question, the judgment of the lower court in the Cope case was affirmed on the basis of the supreme court's decision in the Handley case.
Cope v. Cope went to the United States Supreme Court on appeal. Thomas Cope died intestate in August of 1864, leaving a legal wife and a legitimate son and a plural wife and an illegitimate son. The Utah courts found that the former were his legal heirs and denied the latter any share in his estate.

The judgment was reversed. Justice Brown, speaking for the Court, began his opinion by stating that while the Utah statute was in derogation of the common law and a novelty among such statutes, there was no reason why it should be declared invalid. The subject-matter came within the power given the territorial assembly by the organic act. Further, illegitimate children inherited from their mothers in many jurisdictions, and there was no reason why the legislature could not provide that the same would be true in the case of their fathers. While it was true that statutes in derogation of the common law should be strictly construed, there was no legal principle which "would authorize us to pronounce a statute of this kind, which is plain and unambiguous on its face, void, by reason of its failure to conform to our own standard of social and moral obligation." Brown further stated:

It is true that the peculiar state of society existing at the time this act was passed, and still existing in the Territory of Utah, renders a law of this kind much wider in its operation than in other States and Territories; but it may be said in defence of this act that the children embraced by it are not responsible for this state of things, and that it is unjust to visit upon them the consequences of their parents' sins.
To recognize the validity of the act is in the nature of a punishment upon the father, whose estate is thus diverted from its natural channel, rather than upon the child; while to hold it to be invalid is to treat the child as in some sense an outlaw and a particeps criminis. 80

In regard to the claim that the Utah law was annulled by the federal act of 1862 as a law which encouraged and countenanced polygamy, the Court pointed out that it did not make the children of polygamous marriages legitimate; to the contrary, it treated them as illegitimate. In view of this, and in view of the lack of proof to the contrary, it could not be said that it was one of those laws which "establish, support, maintain, shield, or countenance polygamy." A statute would not be repealed by implication. In order for the territorial law to be subject to annulment by the act of 1862, its tendency to have the proscribed effect must be clear and direct. A law would not be declared void because it might possibly or indirectly qualify under an annulling act. Legislation for the protection of children was not necessarily favorable to polygamy; the protection of those unfortunates was a legitimate object of legislative concern. If it had been passed in any other jurisdiction, there would have been no basis for complaint. Moreover, the reasoning of the respondents would lead to the conclusion that illegitimate children could inherit as long as they were not the products of polygamous marriages, which would be ridiculous.

Regardless of this, Brown said, the history of legislation on the subject after 1862 cleared up any doubt. In
1876, the Utah legislature declared that illegitimate children could inherit from their fathers when recognized by them; in 1882, Congress legitimized all children born prior to January 1, 1883. If the territorial act protected and promoted polygamy, the Edmunds act was also guilty of doing so. The 1887 congressional action was a very careful disapproval of Utah legislation recognizing the capacity of illegitimate children to inherit from their fathers—they were given a twelve-month grace period. In both instances Congress made them "the special object of its solicitude, and at the same time offers to the parents an inducement, in the nature of a locus penitentiae, to discontinue their unlawful cohabitation."\textsuperscript{81}

The territorial supreme court followed the Cope decision in a case\textsuperscript{82} involving the estate of Orson Pratt, a prominent Church leader, who died intestate in 1881, leaving many polygamous as well as legitimate children. The court ruled that "all of the children acknowledged by him as such in his lifetime, or proved to be such by satisfactory evidence, shall share in the distribution of the estate."\textsuperscript{83}

\textbf{Naturalization}

The federal district court judges also had the practice of denying naturalization to aliens who were members of the Mormon Church. The object of such action, no doubt, was to prevent a swelling of the ranks of Mormon voters and jurors. This was not an insignificant problem; the ambitious Mormon
missionary system and the Perpetual Emigrating Fund brought many converts to Utah from foreign lands. Census figures show that in 1870, over 35 percent of the population of the Territory of Utah were foreign-born, compared to not quite 13 percent in Oregon.  

Judges McKeen and Hawley, in the early 1870's, had both refused to naturalize Mormons because of their views on polygamy, rejecting such applicants as lacking "good moral character." In 1889, Judge Anderson held special sessions of his district court to pass on applications for citizenship in order that persons might be qualified in time to vote in the coming elections. Mormon applicants were asked about their opinions regarding plural marriage, and if they admitted belief in it, they were rejected as "men of immoral character." Anderson first took the view that a person's religious opinions should not be a factor, but he was persuaded that Mormons should be barred simply because they were Mormons:  

The evidence in this case establishes unquestionably that the teachings, practices and aims of the Mormon Church are antagonistic to the government of the United States, utterly subversive of good morals and the well being of society, and that its members are animated by a feeling of hostility towards the government and its laws, and therefore an alien who is a member of said church is not a fit person to be a citizen of the United States.  

This was in accordance with the view urged by attorneys of the Liberal party (Gentile) who were interested in preventing the qualification of more Latter-day Saints for the February, 1890, election.
After the Church formally renounced polygamy in 1890, this practice was abandoned. One of the first to recognize the sincerity of this declaration of intent to obey the laws was Judge Zane. On October 7, 1890, during a naturalization proceeding, he stated, "Hereafter, I will not make the simple fact that an applicant is a member of the Mormon Church a bar to his admission to citizenship." The other judges followed suit.

Conclusions

The federal government succeeded in barring polygamists from the enjoyment of every important privilege of citizenship—the suffrage, public office, jury service. A test-oath was employed. Those who believed in the rightfulness of polygamy, which included all conscientious Mormons, were excluded from juries. The privilege of becoming a citizen of the United States was denied to anyone who belonged to the Mormon Church, on the ground that Mormons were not of "good moral character." The vote was taken away from the women of Utah, on the theory that they cast their ballots in conformance with the dictates of the polygamist-dominated Church hierarchy. The plural families of a deceased man were excluded from a share in his estate. The Utah Commission governed elections in the Territory of Utah for fourteen years.

These provisions prompt several conclusions. First, Congress and federal officials demonstrated an intention to impose further penalties upon polygamists, who were already abundantly covered by criminal provisions. Second, and most
important, the government manifested a desire to break the hold of the Mormon Church as a social and political power.
FOOTNOTES

CHAPTER VII


3 Whitney, op. cit. supra note 1, 207.


5 For a discussion of this case, see Whitney, op. cit. supra note 1, 233-235, 251-253.

6 Apparently, these cases were not reported in the Utah Reports.


8 Id., at 35.

9 22 Stat. 31 (1882).

10 Report of the Utah Commission, supra note 4, 30.

11 Id., 30.

12 Id., 31.

13 Murphy v. Ramsey, supra note 7, at 41.

14 Id., at 42.

15 Id., at 43.

16 Report of the Utah Commission 1887, supra note 4, 16-17. The oath:

I, being duly sworn (or affirmed), depose and say that I am over twenty-one years of age, that I have resided in the
Territory of Utah for six months last past, and in this precinct for one month immediately preceding the date hereof; and that I am native born (or naturalized, as the case may be) citizen of the United States; that my full name is __________; that I am __________ years of age; that my place of business is __________, that I am a (single or) married man; that the name of my lawful wife is __________, and that I will support the Constitution of the United States, and will faithfully obey the laws thereof, and especially will obey the act of Congress approved March 22, 1882, entitled "An act to amend section 5352 of the Revised Statutes of the United States in reference to bigamy and for other purposes," and that I will also obey the act of Congress of March 3, 1887, entitled "An act to amend an act entitled 'An act to amend section 5352 of the Revised Statutes of the United States in reference to bigamy, and for other purposes,' approved March 22, 1882," in respect of crimes in said act defined and forbidden, and that I will not, directly or indirectly, aid or abet, counsel or advise any other person to commit any of said crimes defined by acts of Congress as polygamy, bigamy, unlawful cohabitation, incest, adultery, and fornication.

Note that the voter was no longer required to swear that he was not cohabiting with more than one woman "in the marriage relation." There were objections to this phrase on the ground that the Edmunds act did not include such language. Whitney, op. cit. supra note 1, 229; also see Chapter IV, note 131 supra.

18Revised Statutes of Idaho 1887, Sec. 501.
19Revised Statutes of Idaho 1887, Sec. 504.
20Davis v. Beason, supra note 17, at 334. The indictment read, in part:

... [Davis and others named] did unlawfully, wickedly, maliciously, and corruptly conspire, combine, confederate, and agree together, unlawfully, to commit acts for the perversions and obstruction of the due administration of the laws of Idaho Territory, which acts they
then and there so conspired to commit were
that they each and all should then and there
unlawfully and wilfully procure themselves,
each and all and each other, unlawfully to
be admitted to registration as electors of
Oneida county . . . when they each and all
were not entitled to be admitted to such
registration under the laws of Idaho Terri-
tory . . . by then and there each personally
appearing before the respective registrars
of the election precincts of said county in
which they . . . respectively resided, and
then and there taking and causing to be duly
administered to them by the said registrars,
respectively, the eleetor oath prescribed
by the statute of said Territory . . .
. . . When in truth and in fact they and
each of them were then and there members
of an order, organization, and association,
namely, the Church of Jesus Christ of Latter-
Day Saints, then and there otherwise and com-
monly known as the Mormon Church, which, as
each and all of them then and there well knew,
taught, advised, counselled, and encouraged
its members and devotees to commit the crimes
of bigamy and polygamy as duties arising and
resulting from membership. . . .

Transcript of Record, pp. 3–4 (Microfilm, National Archives,
1964).

21 Brief for Appellant, pp. 13-15, passim (Microfilm,
National Archives, 1964). Davis also claimed a violation
of the Fourteenth Amendment, asserting that while it was
directed at states, its provisions also had become funda-
mental concepts of the American constitutional system and
embraced whatever rights a citizen had under the Consti-

22 Davis v. Beason, supra note 17, at 341-342.

23 Id., at 342-343.

24 Id., at 345.

25 Id., at 342.

26 Ibid.

27 Id., at 341-342.

28 Leo Pfeffer, Church, State and Freedom (Boston: The
Beacon Press, 1953), 532.

29 Davis v. Beason, supra note 17, at 347.
Ibid.
Id., at 348.
Pfeffer, op. cit. supra note 28, 531-532.
17 Pac. 264 (1888).
Id., at 265.
22 Pac. 102 (1889).
Id., at 106.
31 Pac. 793 (1892).
Laws of Idaho 1890-1891, at 69.
71 U.S. (4 Wall.) 277 (1866).
71 U.S. (4 Wall.) 333 (1866).
Cummings v. Missouri, supra note 39, at 320.
Id., at 321-322.
State ex rel. Whitney v. Findley, 19 Pac. 241 (1888).
Laws of Nevada 1887, at 107. This also disqualified
bigamists and polygamists and members of any organization
which "sanctions or tolerates" bigamy and polygamy or plural
or celestial marriage.
State ex rel. Whitney v. Findley, supra note 43, at
242.
Whitney, op. cit. supra note 1, 520. The law can be
found in Laws of Arizona 1885, at 214; Title XXI of Revised
Statutes of Arizona 1887, covering elections, contains no
such provision.
Utah 238 (1886).
22 Stat. 302 (1882):
The governor of the Territory of Utah is
hereby authorized to appoint officers in said
Territory to fill vacancies which may be caused
by a failure to elect on the first Monday in
August, eighteen hundred and eighty-two, in
consequence of 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," approved March twenty-second, eighteen hundred and eighty-two, to hold their offices until their successors are elected and qualified under the provisions of said act: Provided, That the term of office of any of said officers shall not exceed eight months.

49 Wrenner v. Smith, supra note 47, at 244.

50 Id., at 244-245.

51 This case was not reported; however, reference to it will be found in Id., at 245.


53 Utah 396 (1884). This case went before the United States Supreme Court several times on other questions, and the judgment of the Utah supreme court was reversed. Hopt v. People, 110 U.S. 574 (1884), 114 U.S. 488 (1885), 120 U.S. 450 (1887).

54 For a discussion of this case, see R.N. Baskin, Reminiscences of Early Utah (Salt Lake City: By the author, 1914), 223-229.

55 People v. Hampton, 4 Utah 258 (1886).

56 United States v. Bassett, 5 Utah 131 (1887).

57 Id., at 133.

58 5 Utah 201 (1887); rehearing denied, 5 Utah 274 (1887).

59 Id., at 202.

60 Id., at 203.

61 6 Utah 115 (1889).

62 Id., at 119-120.

63 7 Utah 26 (1890).

64 S.A. Kenner, Utah As It Is (Salt Lake City: The Deseret News, 1904), 97-98.

65 23 Pac. 232 (1890).

66 Id., at 233.
67 5 Utah 123 (1836).
68 Utah Laws 1851, at 71.
70 Compiled Laws of Utah 1876, Sec. 714.
71 22 Stat. 31 (1882).
72 Compiled Laws of Utah 1888, Sec. 2742.
73 24 Stat. 637 (1887).
74 In re Estate of George Handley, 7 Utah 49 (1890).
75 Id., at 59.
76 Id., at 60.
77 In re Estate of Thomas Cope, 7 Utah 63 (1890).
78 Cope v. Cope, 137 U.S. 682 (1891). The Handley case also was taken to the United States Supreme Court, but it was dismissed on jurisdictional grounds. 151 U.S. 443 (1894). For further developments in the Handley case, see 15 Utah 212 (1897), which involved an attempt by the first Utah state legislature to provide new trials in cases where the courts had decided adversely to the issue of polygamous marriages. The Utah supreme court declared it an unconstitutional attempt by the legislature to interfere with the powers and prerogatives of the judiciary, a violation of the principle of the separation of powers. The court said:

If we were to affirm the validity of the law in question, we would, in effect, say that the legislature may exercise judicial powers, authorize and require the courts to set aside final judgments and decrees, divest titles, and destroy and annihilate vested rights. The people of the state have not intrusted such powers to the legislature. . . .

79 Cope v. Cope, supra note 78, at 685.
80 Ibid.
81 Id., at 689.
82 In the Matter of the Estate of Orson Pratt, 7 Utah 278 (1891).
83 Id., at 279.


86 Whitney, op. cit. supra note 1, 693-698; Baskin, op. cit. supra note 54, 89-92.

87 The Inside of Mormonism. A Judicial Examination of the Endowment Oaths Administered in All the Mormon Temples, by the United States District Court for the Third Judicial District of Utah, to Determine Whether Membership in the Mormon Church Is Consistent with Citizenship in the United States (Salt Lake City: The Utah Americans, 1903), 92-93. This pamphlet is taken from the stenographic report of the proceedings and contains testimony of witnesses and the opinion of the court.

88 Whitney, op. cit. supra note 1, 749.

89 The Utah Commission, in its annual report for 1884, estimated that twelve thousand voters had been disfranchised by reason of polygamy between August, 1882, and April, 1884. Report of the Utah Commission 1884, supra note 4, 2. The Utah legislature of 1884 passed an election law, in order to comply with the provisions of the Edmunds act, but the governor vetoed it. House Misc. Doc. No. 238, 49th Cong., 1st sess. 3 (1886).
CHAPTER VIII

THE CHURCH ESCHEAT CASES

The anti-bigamy act of 1862\(^1\) not only prohibited plural marriage in the territories, but it was also the first mortmain law ever enacted by Congress. Section 3 provided:

That it shall not be lawful for any corporation or association for religious or charitable purposes to acquire or hold real estate in any Territory of the United States during the existence of the territorial government of a greater value than fifty thousand dollars; and all real estate acquired or held by any such corporation or association contrary to the provisions of this act shall be forfeited and escheat to the United States. . . .

However, it was qualified by the proviso that "existing vested rights in real estate shall not be impaired by the provisions of this section." Section 2 of this statute annulled the territorial act incorporating the Mormon Church and all other laws that encouraged or maintained polygamy, but again, a proviso was appended:

. . . That this act shall be so limited and construed as not to affect or interfere with the right of property legally acquired under the ordinance heretofore mentioned, nor with the right "to worship God according to the dictates of conscience," but only to annul all acts and laws which establish, maintain, protect, or countenance the practice of
polygamy, evasively called spiritual marriage, however disguised by legal or ecclesiastical solemnities, sacraments, ceremonies, consecrations, or other contrivances.

Both of these provisions became subjects of controversy when the United States moved against the property of the Church of Jesus Christ of Latter-day Saints, in pursuance of the provisions of the Edmunds-Tucker act of 1887.

Section 17 of the Edmunds-Tucker act\(^2\) disapproved and annulled all acts of the Utah territorial legislature "incorporating, continuing, or providing for" the corporation of the L.D.S. Church, "so far as the same may now have legal force and validity." It also dissolved the corporation, "in so far as it may now have, or pretend to have, any legal existence." This section further made it the duty of the Attorney General of the United States to start proceedings in the Utah territorial supreme court "to wind up the affairs of said corporation, conformably to law," and empowered the court to make the necessary decrees to transfer title to the designated kind of real estate to the trustees provided for in Section 26. This latter section allowed religious groups to nominate trustees for appointment by a probate court to hold as much real estate as was necessary for the building and maintenance of houses of worship, parsonages, and burial grounds.\(^3\)

Section 13 directed the Attorney General to institute proceedings to forfeit and escheat to the United States property of corporations which was acquired in violation of Section 3 of the act of 1862. It further dedicated the
proceeds of such property to the use and benefit of the common schools in the territory. A proviso protected from forfeiture any building and grounds "held and occupied exclusively for purposes of the worship of God, or parsonage connected therewith, or burial ground." Section 14 authorized summary attachment of books, papers, and records involved in such proceedings.

The act incorporating the Mormon Church, it will be remembered, was originally one of the ordinances of the provisional State of Deseret which were adopted by the first territorial legislature in 1851 and re-enacted in 1855, when a revision of the laws was approved. The corporate powers and privileges so conferred were numerous and plenary, and under the generous terms of the charter, one single corporation held all of the property that had been acquired by the Church in all its settlements since its incorporation. The danger of this condition was recognized, and the Church took steps to protect its property. Stakes and wards were individually incorporated under a general territorial statute providing for the incorporation of religious and charitable institutions and associations; and they were given title to Church property within their respective jurisdictions—local meeting houses, tithing houses, granaries, capital stock in community herds, general stores, irrigation projects, and other local enterprises in which the Church was involved. The various tithing offices held considerable wealth in the form of
cattle, horses, sheep, lumber, hay, all kinds of grain, dairy products, meat, fruits and vegetables, building materials, farming implements, merchandise, money, and other articles of personal property, which was dispersed among the stake associations on February 28, 1887, by President John Taylor. On advice of counsel, Taylor also conveyed the deeds to various parcels of real estate to individuals to be held in secret trust for the Church.⁵

On May 19, 1887, shortly after the Edmunds-Tucker act became law, the presiding bishopric of the Church, which was composed of William B. Preston, Robert T. Burton, and John R. Winder, appeared before the probate judge of Salt Lake county and according to Section 26 of the act, were appointed trustees of the unincorporated religious society known as the Church of Jesus Christ of Latter-day Saints. President Taylor then transferred to them, on June 30, title to the Temple Block in Salt Lake City, and on July 2, the persons to whom the president's home and the general tithing office property had been conveyed previously by Taylor in secret trust transferred their deeds to the three trustees.⁶

Proceedings Begin

On July 30, 1887, the day following the burial of President Taylor, the United States started proceedings in the Utah supreme court against the "late corporation known and claiming to exist as the Church of Jesus Christ of Latter-Day Saints" and the "late assistant trustees in
trust of the said corporation," under Section 17 of the Edmunds-Tucker act. The bill of complaint charged that the corporation, a religious corporation, had acquired and held large amounts of real and personal property after July 1, 1862, the date on which the anti-bigamy act became effective; that more than fifty thousand dollars in real property had been acquired by the Church corporation after July 1, 1862, which was not used for place of worship, parsonages, or burial grounds; that by the terms of the 1862 act of Congress and because the Edmunds-Tucker act dissolved the corporation, such property was subject to escheat to the United States; that there had been no person authorized to manage and preserve such property since February 19, 1887, when the bill dissolving the corporation passed Congress, and the property was subject to loss and destruction. The bill prayed that a receiver be appointed, that the court decree the dissolution of the corporation, that the property which would be used for places of worship, parsonages, and burial grounds be set aside for the use of the unincorporated L.D.S. Church association, and that proceedings to wind up the affairs of the corporation be ordered, plus other equitable relief.

In early November, 1887, the Utah supreme court granted the complainant's motion to have a receiver appointed for the property of the late corporation. Chief Justice Zane, for the court, reviewed the provisions of the corporate charter and the general state of affairs surrounding it.
He noted that when the corporation was created, it embraced nine-tenths of the inhabitants of the Territory of Utah and that, in 1887, it included more than one hundred and twenty thousand people throughout the entire territory and that it was continuing to grow. These people, he said, claimed to be directed by inspiration above man-made laws, and were led by a purported prophet and seer who professed to receive revelations from God. The charter in effect declared that "all the Mormon people, who at the time of its enactment were, or who might afterwards become, residents of the territory, are a body corporate, with perpetual succession."\(^{10}\) The charter conferred unprecedented authority upon a religious body, Zane said, and:

The purposes of the corporation as indicated by the powers conferred upon it by this charter are numerous and varied. Some of them, it is true, are expressed in vague terms; but the capacity is granted to act in various ways, and to make laws and regulations with respect to very many subjects. The corporation is confined to no particular purpose. No precedent can be found for conferring upon a private corporation such a variety of capacities. Some of them, it is believed, are above the reach of human laws. . . .\(^{11}\)

Among the extraordinary powers were the right to acquire unlimited real and personal property free from taxation, the authority to regulate marriage and to solemnize marriages according to revelation, the continuous and inherent power to make laws for the good order, safety, government, and convenience of the Mormon people, and the power to inflict punishment according to Church covenants. A wide field of human conduct was declared free from legal
questions, including the "pursuit of bliss," the "enjoyment of life," "domestic happiness," "temporal expansion," and "spiritual increase upon the earth." The Chief Justice pronounced it safe to assume that this was the first instance of a legislature's attempting to contract away the power to regulate marriage and tithing, and he found the whole situation out of harmony with the general rules that a charter should specify the purpose for which a corporation was organized and that a public corporation should not be allowed to engage in general business.

Zane denied that the charter was a contract which granted a vested right which could not be taken away. Legislatures, he said, were agents of the people, and had no power to barter away incidents of sovereignty; it was impossible for the territorial assembly to give away the kind of authority that this law attempted to grant to the L.D.S. Church. Congressional power over the territories was complete and primary; it was analogous to the kind of power a state had over its municipalities. Congress could disapprove acts of the territorial legislature, pass laws directly for the territory, or revoke the organic act entirely. The right to annul acts of the Utah territorial assembly was specifically reserved in the organic act; Congress could annul the act incorporating the L.D.S. Church, and failure to exercise the prerogative previously did not signal its waiver.
The Chief Justice also rejected the Church's claim that even if the granting of the charter itself did not create a vested right, the act of Congress of 1862 did so by annulling only the parts of the act which countenanced polygamy, protecting property which had been acquired previously, and guaranteeing freedom of conscience. Zane said that there was nothing to indicate that Congress, in the act of 1862, intended to adopt any part of the charter, and such an intent could not be attributed by implication.

The court reviewed the provisions of the federal laws affecting the Church corporation and concluded that Congress had interfered with no vested or constitutional rights. He pointed out that religious corporations had been limited in the amount of property they might hold ever since the Magna Charta. The court concluded that:

... the defunct corporation has in its possession real property in value far exceeding $50,000, the limit fixed by the act of Congress of 1862, and that a portion of it is not a building or the grounds appurtenant thereto held for the purpose of the worship of God, or the parsonages connected therewith, or burial ground, and that the title to a large portion of the same property was acquired subsequently to the time the act of 1862 took effect. 12

The court was of the opinion that a receiver should be appointed.

After this decision, the court named Frank H. Dyer, the United States marshal for the Territory of Utah as receiver. Chief Justice Zane dissented from the selection. 13
The Opposing Views

The following day, the court granted the petition of Preston, Burton, and Winder to be made parties defendant. Between this time and the final hearing, several other persons, who claimed interests in various parcels of the property involved, were made parties defendant. Angus Cannon claimed an interest in certain Church coal lands affected by the proceedings. Francis Armstrong, Jesse W. Fox, Jr., and Theodore McKean alleged that they held certain real estate in trust for the Church.

The late corporation and the other defendants, answering the government's bill of complaint and protesting the appointment of the receiver, claimed that its charter constituted a contract which could not be altered or repealed, that under the charter, it possessed power to hold real and personal property without limit, and that the dissolution of the corporation and escheat of its property was an unconstitutional impairment of the obligation of contract. Further, it alleged that on March 3, 1887, when the Edmunds-Tucker act became law, the corporation owned only three parcels of land. They claimed that one was acquired before July 1, 1862, and was also used exclusively for the worship of God; that the second had been acquired before July 1, 1862, and constituted a "vested right in real estate" which was protected by the 1862 law; and that the other, which was acquired after July 1, 1862, had always been used as a parsonage, and was thus
exempted by the act of 1887. The three parcels of real estate had since been transferred to the trustees authorized by the act of 1887, except one plot which had been overlooked by mistake and the legal title to which was in McLean's name. Finally, it alleged that although the act of 1887 was passed by Congress on February 19, it did not become effective until March 5, when it became law without the President's signature, so that the conveyance made by John Taylor on February 28 of the personal property of the general Church corporation to the various stake associations was valid, and that therefore, when the law took effect, the late corporation owned no personal property except furniture, fixtures, implements, and the like, for its houses of worship and parsonages.

A petition of intervention was filed by George Romney, Henry Dinwoody, James Watson, and John Clark, on behalf of themselves and all other members of the Mormon Church. They claimed that Receiver Dyer had illegally and wrongfully seized seven parcels of land and personal property, including stocks, promissory notes, sheep, and money. They alleged that this property formerly belonged to the corporation of the Church of Jesus Christ of Latter-day Saints, a religious and charitable organization; that it was donated by the members for religious and charitable purposes, and that the receiver was withholding it from its intended purpose. Further, they claimed that they and those persons whom they represented were equitably the
owners of the property. They asked, in case the corporation was declared dissolved, for an order decreeing, first, that the property belonged to the members who comprised the late corporation and that they could appoint a trustee or trustees to hold and manage it for its original purposes, and second, that the receiver surrender the property to the trustees so named, and third, that other equitable relief be given as the court saw fit.

The United States filed an answer denying the claims of the petitioners. This particular exchange was significant, because, as Justice Bradley later pointed out, "the last-mentioned petition of intervention and the answer thereto are in the nature of an original bill and answer, but serve to present the whole controversy in all its aspects." The government denied that the property involved belonged to the Mormon Church at the time that the receiver took it, since the corporation was dissolved on February 19, 1887. Further, the real property was acquired, not by voluntary donations and contributions, but by purchase for valuable consideration, as was most of the personalty also; and that, therefore, the petitioners could not be considered owners of the property, equitably or otherwise. It was cited as proof of this that proceedings in the nature of information against the real property named in the petition were then pending in the Third District court, which allegedly demonstrated that it had escheated to the United States. It was also alleged that the late corporation had no corporate objects in the usual pecuniary sense, nor stockholders. The
only object of the corporation was the spread of Mormon doctrine; the power to appoint trustees, the only persons authorised to hold its property, ended with its dissolution, so the personal property had no legal claimant except the United States. Moreover, it was charged that the personal property was used largely to aid in the promulgation of Mormon doctrine, of which polygamy was a fundamental tenet, and polygamy was opposed to law and good morals; that since the dissolution of the corporation, the unincorporated L.D.S. Church association had continued such teachings; and that to place the property in the hands of its trustees would be to dedicate it to the same illegal and immoral purposes.

The Decree

The territorial supreme court then made a number of findings of fact. First, it found that the Church of Jesus Christ of Latter-day Saints was a corporation for religious and charitable purposes from January 19, 1855, to March 3, 1887, when its charter was repealed by an act of Congress passed February 19, 1887, and that since the latter date, it had existed as a voluntary unincorporated religious sect with Preston, Burton, and Winder as trustees. It was also found that on February 19, 1887, the corporation had no outstanding debts, and that it owned seven parcels of real property with the following values:

1. The Temple Block, valued at $500,000.
2. The Garde House and grounds, valued at $50,000.
3. The Historian's Office and grounds, valued at $20,000.
4. Two plots used for tithing offices and grounds, one valued at $25,000, and the other at $50,000.
5. The Church farm, valued at $110,000.
6. The coal lands in Summit county, valued at $30,000.

The court found that the Temple Block was possessed and occupied by the Church from 1848, when it was part of the national domain, to February 19, 1887; that legal title to it was obtained in 1871, under the federal town-site act of 1867; and that on July 30, 1887, President Taylor signed an indenture transferring title to the three trustees, Preston, Burton, and Winder. It was found that Brigham Young owned the Garbo House at the time of his death; that it was transferred by his executors to Taylor in trust; and that Taylor conveyed it to Theodore McKean in secret trust on April 24, 1878; and that on July 2, 1887, the latter attempted to convey it to Preston, Burton, and Winder. In regard to the Historian's Office and grounds, the court found that the Church historian had kept his home, office, and the Church records and documents there from 1848 on; that the Church purchased the land in 1855, and that the historian, who obtained legal title to it in 1872, transferred it to his wife and granddaughter, who later transferred it to McKean in secret trust for the use and benefit of the Church. The court found that the Tithing Office property was possessed by the Church in 1848, and occupied and used continuously by it until dissolution, and that valuable improvements had been made upon it before 1862; one piece was transferred in secret trust for the Church
by President Taylor to Edward Hunter, who later conveyed it in like manner to Robert Burton, who then attempted, on July 2, 1887, to have it transferred to himself, Preston, and Winder, as trustees of the unincorporated Mormon Church; the Church began acquiring parts of the other parcel from 1856 on, through a series of miscellaneous acts, purchases, and court proceedings, and on February 19, 1887, legal title to it was held by Burton, who, on July 2, 1887, tried to convey it to himself and the other two trustees. The court found that the rest of the property had been purchased before July 1, 1862, but that legal title had always been held in secret trust for the corporation by some individual. The court also found the corporation in possession of certain personal property—safes, desks, chairs, a letter press, stocks, sheep, and money. Further, it was found that the sole purpose of the L.D.S. Church corporation was to teach Mormon doctrine and dispense charity according to its precepts; that it had never had any other corporate authority or objects, and that no other natural persons had been authorized to hold any property of the corporation, except the trustees provided for in the charter, which had been repealed; that the personal property had been devoted to preaching Mormon doctrine, including polygamy, and that the succeeding voluntary religious sect continued the same teachings; and that to set aside the property in trust to members of the late corporation would amount to dedicating it to the purposes of the voluntary religious sect. Finally, the court found that the Temple Block was used exclusively for religious purposes at the time of the passage of the act of 1887.
Upon these findings, on October 8, 1888, the court issued a decree. First, it was decreed that on March 3, 1887, the corporation of the Church of Jesus Christ of Latter-day Saints was dissolved and had no further legal existence. Second, the court declared invalid the attempted conveyances of the Temple Block, the Gardo House, and the Tithing Office and grounds to Preston, Burton, and Winder—all were annulled and set aside. Third, the Temple Block was set apart as a place of worship for the unincorporated Mormon Church, and Receiver Dyer was ordered to turn this property over to the three trustees. Fourth, the court denied the petitions of Preston, Burton, and Winder to have any of the remainder of the property set aside to them in trust, ruling that none of it was used for the worship of God, parsonages, or burial grounds, or was necessary for the use of the unincorporated Church. Fifth, the court decreed that legal title to this property had not been obtained until well after July 1, 1862, and that prior to that date neither the corporation or its trustees had any vested interest in any of it. Sixth, the petition of Romney, et al., was denied, neither the intervenors nor the persons whom they represented having any claim on the property in question. Seventh, that there did not exist at that time, or at the time of the dissolution of the corporation, any declared or intended objects or purposes to which the personal property might be dedicated which was not in whole or in part against public morals or contrary to law and public policy. Further, since there were no natural persons
who were legally entitled to any portion of the personalty, nor were there any legal trusts upon which the court could administer the personal property, it was declared subject to escheat to the United States. Eighth, since there was no person, after March 3, 1887, authorized to control and manage the real and personal property of the late corporation; the receivership was ordered continued and the receiver was directed to possess all real and personal property of the late corporation, except that portion set aside for the unincorporated L.D.S. Church; the court authorized the remainder to be proceeded against by information.

From this order, the defendants appealed to the United States Supreme Court, and the intervenors, Romney, et al., took a separate appeal. 23

Meanwhile, the receiver petitioned the territorial supreme court requesting that certain personal property be turned over to him. The Church claimed that the property was transferred in trust to the Church Association of the Salt Lake Stake of Zion on February 28, 1887, by President John Taylor; it was later transferred again in trust to the presiding bishop of the Church. The Church asserted that the receiver succeeded to the rights of the late corporation at the time of dissolution, and since Taylor could not have impeached his own conveyance, neither could the receiver. 

In a decision 24 of May 2, 1888, the territorial supreme court, speaking through Justice Boreman, ruled that the receiver was not so limited, because he also represented the government and all people who had an interest in the
property; he did not come to act as a successor to the corporation, but to act for the court, under authority of law, in holding all the corporate property pending disposal according to law. The court, Justice Boreman said, was in no sense a representative of the late corporation—it was directed by an act of Congress to take charge of the corporation's affairs for the purpose of winding them up.

Now, was the transfer made by Trustee-in-Trust Taylor to the stake association valid? A majority of the court thought not. Since the transfer was not of special benefit or advantage to the trustee-in-trust or the stake association, and in view of the fact that an act of Congress which would forfeit such property to school purposes was awaiting the President's signature, it could be concluded that the conveyance was made to avoid forfeiture. It was a transfer designed to defraud the government and thus void: "The real gist of the transfers was intended to be a conveyance by the church as incorporated to the church not incorporated." The stake association was part of, and controlled by, the late corporation—for all intents and purposes, the property remained in the same hands. Given this, it was still held in trust for the benefit of the late corporation, and subject to the control of the receiver. The presiding bishop was ordered to surrender it.

Chief Justice Zane dissented, maintaining that the Church Association of the Salt Lake Stake of Zion was organised under the general law of the territory and was not the corporation dissolved by the 1887 act of Congress,
that it was not obvious that the association had no valid title to the property, and that, consequently, the court could not act in such a summary fashion. Zane pointed out that the 1887 act did not forfeit all of the property of the late corporation to the United States, but just so much as was acquired and held in violation of the 1862 act and was not used for the worship of God, parsonages, and burial grounds. He thought that the stake association should be given its "day in court."

After this successful suit, the receiver threatened to bring a series of vexatious petty actions, and to avoid the waste and aggravation, the Church suggested a compromise, which was accepted by the receiver and approved by the court. In exchange for a payment of $157,666.15, all the minor suits were dismissed. By July 11, 1888, the receiver had an estimated one million dollars worth of Church property.

Before the United States Supreme Court

On January 16, 17, and 18, 1889, the United States Supreme Court heard arguments on the bill to have a receiver appointed to hold the property of the late corporation.

Brief for the Appellants

The brief for the appellants conceded that Congress had supreme and plenary power over the territories, but insisted that it was limited in its actions toward them by the prohibitions of the Constitution. Congress might not
take away property without due process of law, and principles of fairness and justice dictated that the federal government must abide by its contracts. The organic act gave the Utah territorial assembly wide legislative powers, among which was the power to create corporations. The Church of Jesus Christ of Latter-day Saints was incorporated by the Utah legislature, and the charter gave it power to acquire and hold real and personal property and to make rules for the government of the Church organization. Having established this foundation, the appellants proceeded to make seven major points.

First, Congress could not repeal, alter, or amend the franchises and powers granted to the Church corporation by its charter. The act was a contract which could not be repealed by either the territorial legislature or Congress. While it was true that the organic act reserved to Congress the power to annul acts of the Utah legislative assembly, this did not refer to contracts—an act granting a corporate franchise, asserted the appellants, was more than just a law. The right to alter or repeal a contract must be reserved in the contract itself or by a special general law applying to all corporations. The brief depended upon the Dartmouth College case and Fletcher v. Peck as authority for the proposition that the government could not revoke such a grant:

We claim, therefore, that the reservation contained in the organic act of the Territory of the right to disapprove acts passed by the Territorial Legislature is not a reservation upon all the grants of
power contained in that section of the organic act, or rather to that part of the section which gives them the right to legislate upon all rightful subjects of legislation. . . .

The reservation was, in fact, merely a sort of declaration of sovereignty. While recognizing that the contract clause of the Constitution was directed at state action impairing the obligation of contract, the appellants insisted that the national government was similarly limited by concepts of due process of law and the principles of republican government.

Second, "the charter of the church corporation received the implied sanction of Congress, and thereafter Congress could not impair the contract nor dissolve the corporation, either by disapproving the act of incorporation, or by repealing the charter." The act of 1862, the appellants asserted, taking into consideration the whole of Section 2, together with the proviso, did not annul the entire act of incorporation, but only so much of it as encouraged or protected polygamy. Further, Section 3 of the act protected vested rights in real property, and because the corporation was the only beneficiary of such a provision, this amounted to a recognition of its continued existence—only the late corporation could have had such vested rights. Moreover, the act of 1857 recognized the existence of the corporation; if its charter had been repealed by the act of 1862, it would not have been necessary for the Edmunds-Tucker act to dissolve it. However, if it was decided that Congress had the power to dissolve the
corporation in 1862, and did so in fact, the property should go to the members who composed the former corporation, for their use and benefit. If dissolution had occurred in 1862, then the property had devolved upon the unincorporated Church association, because Congress obviously had recognized somebody's vested interest in it. Consequently, the petition of Romney and the other members should be granted—the rights of shareholders were not extinguished when a corporate charter was repealed, and courts should protect such rights.

Third, "the act of March 3, 1887, was an act of judicial legislation, and for this reason beyond the power of the legislative department of the general government; it is, therefore, unconstitutional." The brief cited various cases in which acts of confiscation were declared to be legislative judgments and decrees, arbitrary exertions of power, and encroachments by the legislature upon the functions of the judiciary. Everything in the Edmunds-Tucker law beyond the disapproval of the act of incorporation was new legislation; it not only purported to do this, but declared the dissolution of the corporation and confiscated its property. The act of 1862 gave the government no claim to property in which a vested right was acquired before July 1, 1862, nor did either act give it claim to any personal property. The appellants concluded:

In other words, the act of Congress declares in effect that the corporation is dissolved; that the property which belonged to the corporation now belongs to the United States; that the affairs of the corporation
shall be wound up conformably to law, and that the court, a special tribunal appointed for this purpose, shall set apart so much real property to this religious society, sect or congregation as shall be necessary for its convenience and use. What is this but a judicial determination on the part of the law-making power that all this property belongs to the Government...?

Further, speaking of the decree of the Utah supreme court:

... It is difficult to understand why the Court did not decree the real estate escheated and forfeited to the United States, as well as the personal property, for there was just as much authority to do the one as the other and there was no legal authority to do either.35

Fourth, once more in regard to the personality, the appellants proclaimed that "there is no such thing known to the jurisprudence of the United States as escheat. There is no rule of law by which personal property of any kind can escheat to the United States."36 The doctrine of escheat, they said, belonged to the common law, which varied with acts of Parliament, and there was no common law of the United States. No property could be forfeited to the federal government except by express statutory provision, and there was no federal statute prescribing the escheat of personal property to the United States upon defect of heirs.

Fifth and further, "the personal property is not subject to escheat to the United States on account of any failure or illegality of the trusts to which it was dedicated at its acquisition and for which it has been used by the corporation."37 There was no rule of chancery, the brief continued, which allowed property that had been used for an illegal or immoral purpose to be declared forfeited or escheated. Where statutes authorized a chancellor to
handle such situations, the doctrine of escheat would be avoided in favor of the doctrine of equitable conversion. Both the act of 1862 and that of 1887 recognized the ability of the Church, in some capacity, to hold real estate—the act of 1862 protected vested interests and the act of 1887, in Section 26, provided that the unincorporated L.D.S. Church could hold some real property through its chosen trustees. It was obviously assumed that this exempted property would be used for the purposes and objects of the Mormon faith.

It was contrary to reason and equity to hold that the Church could possess real estate, but could not hold personal property because its objects were illegal and immoral. Furthermore, the brief alleged, the court not only ignored the sufficiency of the criminal sanctions against the practice of polygamy and imposed the additional penalty of confiscation, but it took the property of those who did not practice it as well as those who were guilty. A court of equity should uphold a charitable trust when there are, among many purposes, some permissible objects, even though one or two might be improper. There were doctrines of Mormonism, other than polygamy, which were legitimate. A court of equity should not confuse the innocent with the guilty and deprive all members of a congregation of their property because a few had engaged in an illegal practice.

Sixth, the appellants insisted that the Church had vested rights in real estate, acquired property prior to July 1, 1862, and that it was entitled to real property up to fifty thousand dollars in value, plus property used for
the worship of God, parsonages, and burial grounds. The Temple Block, the Historian's Office and the tithing grounds had all been possessed and occupied by the Church, through one trustee or another, since 1848, and although legal title was not obtained until the property was filed under the town-site act of 1867, still the right of possession while looking to the benefit of the town-site act had been recognised as a vested right: "[T]he act of 1867 had the effect of vesting an inchoate right in the settler upon the land, which inchoate right commenced at the time of settlement." In Lamb v. Davenport, among other cases, the United States Supreme Court had ruled that before federal land laws were extended over a territory, while legal title could not be established, the federal government recognized "possessory rights." The Church then held a legitimate equitable interest in the three parcels of real estate, which the act of 1862 protected. As for the other real estate at issue, the Garbo House was the home of the president of the Church, and was, therefore, a parsonage within the meaning of the 1867 statute, and the value of the Church farm and the coal lands fell within the fifty thousand dollar limit allowed by the 1862 act. All this was advanced on the assumption, for the purpose of argument, that the legislation was valid, which the appellants denied.

Seventh, there was no authority to appoint a receiver, because, first, the bill of complaint did not describe any property that the government claimed was subject to forfeiture and escheat; second, the bill of complaint did not claim that
the personal property was subject to escheat, and third, there was no averment in the bill that the property was in danger of loss or injury.

The brief described the proceedings in the case, charging that the court had decreed the dissolution of the corporation and had seized all its property, real and personal, before trial or investigation and before an answer to the bill was filed. The appellants finished their argument:

Can such proceedings be justified except upon the ground that the Government of the United States, its legislators, its courts and their officers, are not bound to regard that provision of the fundamental law of all free governments, that no person shall be deprived of life, liberty, or property, without due process of law? We think not. Here is a judgment without a hearing, a seizure without a cause and an escheat without the pretense of any authority of law. The decree appealed from must certainly be reversed. 40

Brief for the United States

The government's brief 41 advanced five major points. Its first proposition was a defense of the validity of the acts of 1862 and 1887. Congress had full and direct power over the territories. It not only possessed general legislative power over them, but it had the right to annul acts of a territorial legislature, even if such right was not specifically reserved in the organic act. In the organic act for Utah such reservation was made, and it operated on the act of incorporation of the L.D.S. Church as effectively as if it had been written into the charter. Every law passed by the territorial assembly took effect subject to the condition that Congress could later annul it, and there was no
time limit on this power. The brief pointed out that even in cases which did not involve Congress, a general law reserving the right to alter corporate charters was effective, without including the reservation in each charter. The government concluded: "We maintain therefore that the alleged contract set up in this charter was not impaired by the repealing acts, as the power exercised is the express power reserved, which entered into and constituted part of the alleged contract."42

Further, the purported charter was void because it was an unconstitutional law respecting an establishment of religion, contrary to the First Amendment. Consequently, it was not a rightful subject of legislation under the organic act—the organic act could confer no power that the Constitution forbade. The act of incorporation, the United States asserted, founded the rights of the Church on something outside of and above the Constitution. The Church was given a "constitutional and original right;" this referred to those inherent rights of man which were held "in common with all civil and religious communities." It implied that something besides positive law governed the actions of Mormons and that a higher law might be invoked against the law of man when it dictated certain religious duties and obligations which were contrary to the law of man. It gave the Church power to regulate marriage. It conferred wide powers to make rules and govern behavior, to be exercised by the corporation "in and of itself," that is, without reference to any other government. Under this charter, heresy might be punished by death, and the
tithe might be turned into a sort of taxation. Further, the charter gave the corporation power over the territory embraced by the mythical State of Deseret.

Even if the charter were valid, the corporation was a public corporation and not subject to the Dartmouth College rule. In order to qualify as a private corporation, there must be a voluntary agreement of the members to submit civil and political rights; there was no such agreement in this instance. The late corporation was analogous to a municipal corporation in that its charter gave full power to make rules and impose sanctions upon its members, and the only redress a person had was to move out of its geographical jurisdiction; consent of members was not asked or obtained; and the language of the charter granted power over not only present, but future, "residents." In view of all this:

It is therefore concluded that, as the alleged corporation was not a voluntary one; that it was endowed by taxation under the law and not by voluntary contributions; that it was granted political powers by law and not by any act of the parties subject to it, it is a public corporation. . . .

And over a public corporation, "the legislature, as the trustee or guardian of the public interest, has the exclusive and unrestrained control." The legislature could create, modify, and destroy such corporations as it deemed the public interest to require; public corporations were, said the United States, auxiliaries of government, and could not pretend to sustain their powers and privileges by contract.

Even if the Mormon Church had been a valid private corporation, its charter was rightfully revoked, because it
misused its corporate powers. The court found that it had used its property to teach polygamy, a practice that had been made a crime. Using a corporate charter to spread crime was an abuse of the powers and privileges granted and a ground for dissolution and forfeiture of those privileges.

Regardless of whether it was a private or a public corporation, legal or de facto, or whether it had or had not abused its powers, the United States concluded, the dissolution was a legitimate exercise of Congress' police power. Government could not barter away its power to protect the public peace, safety, and morals; it could not barter away an incident of sovereignty. Charters, it was alleged, did not place corporations beyond the reach of subsequent laws passed in the public interest. Since polygamy was a crime against the public morals, a corporation which encouraged and taught it became a proper subject for an exercise of the police power by Congress through the acts of 1862 and 1887.

Second, "Congress had the power to declare the dissolution of the corporation directly, without a judicial determination of the facts." If a judicial proceeding were required before such action could be taken, the reservation of the power to annul laws in the organic act in this case was meaningless.

Third, Congress could dissolve the corporation regardless of whether it were only de facto, as well as if it were de jure. The law of 1887 stated that the corporation of the L.D.S. Church was dissolved "in so far as it may now have, or pretend to have, any legal existence." A corporation
formed under an invalid law was not a corporation at all, but it could not be claimed as a defense that it never had a legal existence.

It and those who dealt with it as corporators up to that date [February 19, 1887] are therefore estopped from denying its existence, and are subject to the same consequences, whether it was a corporation de jure or de facto at the date of the passage of the act for its dissolution.

Fourth, the brief maintained, the receiver was lawfully appointed and retained. Section 17 of the Edmunds-Tucker act directed that the affairs of the corporation be wound up. The first step in the winding up process was to have its property taken over for protection and preservation. In doing this, a receiver acted as an officer of the court. Since the corporation of the Mormon Church had been dissolved, there was no one legally qualified to take over the property.

Fifth, the distribution of the property was valid. All of the real estate described was prima facie acquired after July 1, 1862. This was adequate basis upon which to justify placing it in the hands of the receiver, until there was a hearing on the facts. As far as the personal property was concerned, since the corporation was a public corporation, upon its dissolution, its property became vested in the sovereign. Even in the case of the dissolution of a private corporation, while the real estate reverted to the grantor or his heirs, the personality went to the state or the people, who succeeded to this prerogative of the Crown under the common law. While the common law had been changed in regard
to moneyed corporations, and statutes provided methods of
distributing personal property to creditors and stockholders,
the L.D.S. corporation was not a moneyed corporation and had
no creditors or stockholders. Further, there were no equi-
tics that entitled the intervenors or the members of the
voluntary religious society to an interest in the property.
The assets of the corporation were the products of the char-
ter power to collect tithes. All of the real estate and
most of the personal property was acquired through purchase
for valuable consideration, and not by donation. Moreover,
the property acquired after July 1, 1862, was more than
fifty thousand dollars in value. Finally, the declared
purpose of the federal statutes of 1862, 1882, and 1897
precluded the recognition of an equitable claim, for the
reason that the voluntary religious society and the inter-
venors, on the facts, would use it for the propagation of
polygamy. The membership of the late corporation and its
unincorporated successor were substantially the same; the
latter continued to teach the same doctrine as had been
promulgated by the former.

A short addendum was added to the brief for the United
States after its attorneys received the appellants' brief.
The government then drew special attention to the fact that
Section 3 of the act of 1862 prohibited the holding, as well
as the acquiring, of property in excess of fifty thousand
dollars in value.

The Opinion of the Court

After an elaborate and lengthy statement of the facts
in the case and the contentions of each side, Justice Bradley, speaking for a divided Court, identified the two main questions in the case.\textsuperscript{47} First, could Congress repeal the charter of the Church of Jesus Christ of Latter-day Saints? And second, could Congress and the courts seize the property of said corporation and hold it for the purposes named in the decree? The answers to both questions were in the affirmative, but with reservations in the event of the need for modifications in future proceedings.

Congressional power over the territories, said Justice Bradley, was plenary and general and arose from, first, the power to acquire new territory, and, second, the power to make needful rules and regulations to govern it. The power to acquire new territory arose from the war and treaty-making powers, and was an incident of sovereignty. In exercise of this power, Congress could abrogate territorial laws or legislate directly for the territories. The Bill of Rights did not seem to bother Bradley to any noticeable extent in measuring Congress' authority in this area:

\textit{... Doubtless Congress, in legislating for the Territories would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments; but these limitations would exist rather by inference and the general spirit of the Constitution from which Congress derives all its powers, than by any express and direct application of its provisions.}\textsuperscript{48}

The organic act for the Territory of Utah expressly reserved to Congress the power to disapprove acts of the territorial assembly. The acts confirming the legality of
the ordinance incorporating the Church of Jesus Christ of Latter-day Saints were subject to congressional disapproval, like any other act of the territorial legislature. If Congress could repeal, it could modify, and the act of 1862 was a valid exercise of congressional power:

... Whatever may be the effect or true construction of this act, we have no doubt of its validity. As far as it went it was effective. If it did not absolutely repeal the charter of the corporation, it certainly took away all right or power which may have been claimed under it to establish, protect or foster the practice of polygamy, under whatever disguise it might be carried on; and it also limited the amount of property which might be acquired by the Church of Jesus Christ of Latter-Day Saints; not interfering, however, with vested rights in real estate existing at that time. If the act of July 1, 1862, had but a partial effect, Congress had still the power to make the abrogation of its charter absolute and complete. This was done by the act of 1887. ... 49

It was not necessary to make the operation of the 1887 act contingent upon the violation of the act of 1862:

"Congress, for good and sufficient reasons of its own, independent of that limitation, and of any violation of it, had a full and perfect right to repeal its charter and abrogate its corporate existence, which of course depended upon its charter." 50

Justice Bradley then moved on to the second question. It was an ancient and established rule that when a public or charitable corporation was dissolved, its real property reverted to the donors and its personal property became subject to the disposal of the sovereign, like a man who died without heirs. The late corporation qualified under
this rule. The grantor of its real property was the United States by the town-site act of 1867, and moreover, all real estate was acquired in violation of the 1862 act, because legal title could not have been acquired until after the town-site act became law in 1867. In view of this, the United States was the only place to which the real property could revert. The fact that the property had been held in trust for the corporation presented no difficulties; the outcome was the same. The equitable or trust estate was vested in the corporation; the trustee held it for no other purpose, and when the corporation was dissolved, the purpose was ended. The trust estate devolved into the hands of the United States just as the legal estate would have been had it been in the hands of the corporation; the trustee then was no longer trustee for the corporation, but became the trustee for the government.

When a charitable trust was dissolved and no private donor appeared to be entitled to its real estate, the sovereign was charged with the responsibility of disposing of it, with due regard for the purposes to which it was directed. However, in this case, the purpose was the teaching and encouragement of polygamy, which was so abhorrent to the sensibilities of the civilized world that it had been made a crime. The Mormon missionaries continued to preach it as a tenet of Mormon doctrine. The property would not be restored to the same unlawful purposes. The Mormons, said Bradley, had defied governmental authority almost from their inception, and they had attempted to establish an independent
community in Utah, driving non-sympathizers from the territory. Of Mormon history, Bradley said:

... The tale is one of patience on the part of the American government and people, and of contempt of authority and resistance to the law on the part of the Mormons. Whatever persecutions they may have suffered in the early part of their history, in Missouri and Illinois, they have no excuse for their persistent defiance of law under the government of the United States. 51

As for the assertion that polygamy was part of the religious belief of the Latter-day Saints and thus protected from governmental interference by the First Amendment, Justice Bradley said:

... This is altogether a sophistical plea. No doubt the Thugs of India imagined that their belief in the right of assassination was a religious belief; but their thinking so did not make it so. The practice of suttee by the Hindu widows may have sprung from a supposed religious conviction. The offering of human sacrifices by our own ancestors in Britain was no doubt sanctioned by an equally conscientious impulse. But no one, on that account, would hesitate to brand these practices, now, as crimes against society, and obnoxious to condemnation and punishment by the civil authority. 52

Since both the late corporation and the unincorporated Church association claimed to use the property to promote the practice of polygamy, government had a right to seize the property, when it found it without owners, and cause it to be applied to "objects of undoubted charity and usefulness—such for example as the maintenance of the schools—for the benefit of the community whose leaders are now misusing them," 53 while setting aside sufficient portions to the Church association for places of worship, parsonages, and burial grounds.
The property in question had been dedicated to public and charitable uses, and it did not matter whether it was the product of private contributions, or taxes, or business profits; it was clearly marked by the charitable uses for which it was held. Where there was no positive law to govern a problem in charitable uses, the Court said, principles of reason and public policy must be applied. One principle of the law of charities was that property devoted to charitable and worthy objects which promoted the public good should be applied to the purposes for which it was intended; if the exact object of the dedication was improper, because it no longer existed or had been made unlawful, then the property would be applied to something of like nature, to preserve the substance of the dedication. Bradley then proceeded to cite various precedents for the proposition that the court could distinguish between the object and the charity, and carry into effect the latter by applying the property to some charitable use:

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 law 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 near as may be, to the original intention of the donor.

The authority to do this arose, in part, he said, from the power of the court of chancery over trusts, and in part from the right of government, as parens patriae, to supervise
acts of public and charitable institutions. If the funds of such a corporation became bona vacantia, the sovereign could cause them to be applied in such a manner as justice and equity required. This prerogative, originally belonging to the Crown, devolved upon the people acting through their law-makers. Like other subjects which belonged to the sovereign as pares patriae—infants, idiots, lunatics, etc., charities often needed the protection of government because of an inability to vindicate their rights without assistance.

In this case, the Court conceded, it would be impossible to determine the donors of the property of the late corporation, which had accumulated over a long period of time from many thousands of petty contributions. The only reasonable course was to let the government take over and apply it as nearly as possible to the objects for which it was intended. The impracticability of any other course was not the true reason for this rule of charity law, however:

... The true ground is that the property given to a charity becomes in a measure public property, only applicable as far as may be, it is true, to the specific purposes to which it is devoted, but within those limits consecrated to the public use, and become part of the public resources for promoting the happiness and well-being of the people of the State. Hence, when such property ceases to have any other owner, by the failure of the trustees, by forfeiture for illegal application, or for any other cause, the ownership naturally and necessarily falls upon the sovereign power of the State. ... The funds are not lost to the public as charity funds; they are not lost to the general objects or class of objects which they were intended to subserve or effect. The State, by its legislature or its judiciary, interposes to preserve them from dissipation and destruction, and to set them up on a new basis of usefulness, directed to
lawful ends, coincident, as far as may be, with the objects originally proposed.\textsuperscript{55}

The organic act expressed the intention of Congress to establish the general system of common law and equity in the Territory of Utah, which made the law of charities, and with it, this particular rule, applicable in this instance. Further, the defendants' answer to the bill and the petition of the intervenors conceded that the general law of charities as it was understood in Anglo-American jurisprudence governed the disposition of this case. Justice Bradley stated, "It is not our province to pass judgment upon the necessity or expediency of the act of February 19, 1887, under which this proceeding was taken. The only question we have to consider in this regard, is as to the constitutional power of Congress to pass it."\textsuperscript{56} Bradley declared:

Then looking at the case as the finding of facts presents it, we have before us—Congress had before it—a contumacious organization, wielding by its resources an immense power in the Territory of Utah, and employing those resources and that power in constantly attempting to oppose, thwart and subvert the legislation of Congress and the will of the government of the United States. Under these circumstances we have no doubt of the power of Congress to do as it did.\textsuperscript{57}

The Court emphasized the fact that its duty in this case was only to determine whether the named property could be possessed and held by a receiver pending the final disposition, not to decide whether the property was escheated—later proceedings would decide the escheat question. The Court made it clear that the property of the late corporation which was judged escheated would be subject to more absolute control by the government and would be applied to the common
schools, while that which was found not subject to foreclosure and escheat would be applied to charitable uses. The Court further ruled that the attempts made by President John Taylor to transfer legal title to property to other persons after February 19, 1887, was an attempted evasion of congressional law and, as such, void. The claim of Romney, et al., was denied on the ground that the final determination would take into consideration the rights of the Church members, and, until then, the property should remain in the hands of the receiver.

Chief Justice Fuller wrote a dissenting opinion in which he was joined by Justices Field and Lamar. It was their contention that Congress was restrained not only by express constitutional limitations on its power, "but also by the absence of any grant of power, express or implied," and that the Constitution did not grant the kind of power asserted in this case. The legislative power of Congress was delegated, they stressed, not inherent. The Chief Justice conceded that Congress had the power to suppress crime in the territories and could include the prohibition of polygamy in a criminal code directed at 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 ex parte, the dissenters argued, was a doctrine of construction, not of administration, and Congress had no counterpart to the royal prerogative in the disposition of the property of a defunct 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 contravention of specific limitations in the Constitution; unauthorised, expressly or by implication, 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.61

A rehearing was requested, mainly because the Edmunds-Tucker act did not authorise the taking of personal property; the request was denied. Four days later, the Court set aside the decree, and the whole cause was postponed until the following term. Congress began to look rather awkward and uncomfortable in its new ogre-like role and was obviously aware of having created what was becoming something of a monster. Senator Edmunds proposed a bill to legalize the seizure of the personal property and apply it, like the real estate, to the common schools; it passed the Senate on June 21, 62 but went no further. In the summer of 1890, the Mormon question looked messy indeed.

In the meantime, there was litigation on the side which concerned the amount of compensation to be awarded the receiver and his attorneys. As indicated previously, the receiver was the United States marshal for the Territory of Utah; he selected George S. Peters, United States attorney for Utah, to be one of his two attorneys. Territorial school trustees, claiming an interest in protecting school funds, filed a petition of intervention in protest of the fees allowed the receiver and counsel and charging that the receiver
had not performed his duties effectively. Counsel for the trustees was former Chief Justice Zane, whose place on the bench had been taken, temporarily, by a new appointee. It will be remembered that he had dissented from the appointment of Dyer, on the ground that his position as marshal would interfere with the performance of his duties as receiver.\textsuperscript{63}

The territorial supreme court refused the petition of the trustees,\textsuperscript{64} ruling that their interest in the forfeiture and escheat proceedings involving L.D.S. property was too remote and insufficient to allow them to intervene to protect the property and the proceeds therefrom. The court exonerated Dyer of the charges of fraud and misconduct, and ruled that there was no incompatibility between the offices of United States attorney and counsel for the receiver. On the amount of compensation, the court held that it was reasonable to allow compensation of ten thousand dollars to the receiver, five thousand and five hundred dollars to one attorney, and four thousand dollars to the other. An examiner appointed by the court had recommended twenty-five thousand dollars for the receiver and ten thousand dollars for each of his attorneys.

This exchange was spiced with several threats of contempt. Receiver Dyer did not appear to answer the questions of the court-appointed examiner, but the court was satisfied that he had acted in good faith and upon the advice of counsel, and excused him from punishment. The trustees later confessed that they had not been serious about preferring charges of fraud and misconduct against Dyer, but had
entered the complaint merely to get themselves admitted to the case as parties, so that they could protect the school fund. After delivering a stern lecture about trifling with the judicial process and bringing charges irresponsibly, the court ordered them to appear and show cause why they should not be cited for contempt. The trustees appeared and offered what evidence they had to the court; when several charges proved true and they agreed to withdraw the allegedly contemptuous paper that they had filed, the court was convinced that they had acted in good faith and merely required them to pay the cost of the contempt proceeding.

The Utah Courts Carry On

On May 25, 1891, the United States Supreme Court issued a decree modifying the decree of the Utah supreme court. It declared that the personal property of the Church:

... ought to be limited and appointed to such charitable uses, lawful in their character, as may most nearly correspond to those to which it was originally destined, to be ascertained and defined (unless in the meantime Congress should otherwise order) by reference to a master for due examination, inquiry and report thereon, subject to the approval of the court; and to be established, administered and carried out in such manner and according to such scheme as may be suggested and reported by said master and approved by the court. ...66

In accordance with this decree, the territorial supreme court appointed a master in chancery to report a plan for applying the personal property of the Mormon Church to lawful charitable purposes, which were to correspond to the intentions of the donors as closely as possible. The master
in chancery recommended that the property be used for the public schools, and the defendants filed a bill of exceptions. On November 2, 1892, the majority of the court ruled that the money and other personalty in the hands of the receiver, amounting to four hundred thousand dollars, should be turned over to a court-appointed trustee who would supervise its use by the Mormons for two purposes: places of worship and poor relief. Chief Justice Zane, who had been returned to the bench, pointed out that the United States Supreme Court had merely stated that since the property had been used previously for the propagation of polygamy, among other purposes, it should not be returned to the same hands; it did not distinguish between the lawful and unlawful purposes to which the property had been devoted. The high court had stated specifically that the question of the disposition of the property was not before it. It had not denied the interest of the members of the unincorporated L.D.S. Church in the property, but had in fact stated that they would be taken into consideration in the proper proceedings. It would appear, said Zane, that the only unlawful purpose identified by the Court was polygamy; it could not be assumed that the Court proscribed expenditures for houses of worship and poor relief by the Mormons, when such expenditures would be regarded as commendable if they were made by any other group.

The court restated the conclusion of the United States Supreme Court that the personal property of the Church was not subject to forfeiture and escheat, but must
be disposed of according to the law of charities, the control of the government over it not being as absolute as in the case of forfeited and escheated real estate. Chief Justice Zane then reviewed the doctrine of *by prea* and concluded that a court of equity could not devote any portion of the fund dedicated to charity to any use not intended by the donors. According to that doctrine, where the donation was to general objects, like religious purposes, and it was used for a specific object which became illegal, like polygamy, then the court must apply it to objects as nearly like the general purposes of the donation as possible. The court could not infer that the members of the Mormon Church intended their contributions to go to the public schools: they paid taxes for the support of the public schools, above and beyond their tithes. The court could not assume a superior knowledge and tell the Mormons that public schools were a more worthy cause. In view of all this, the report of the master in chancery could not be accepted.

Zane was alone in the opinion that the personal property should be given back to the Church, since the Mormons had abandoned polygamy in 1890 and had demonstrated that they had taken the action in good faith. The Mormon might still believe in the rightfulness of plural marriage, Zane said, but:

... It [the government] cannot divest any individual or any class of the people of their property, or deny to them the right to control it or to devote it to any object they may choose, simply because they may entertain wrong political or religious beliefs. The doing of either would be a plain violation
of those principles of civil and religious liberty which underlie our whole political system. The intent and the resulting act may together be defined as crime and punished; but the intent alone cannot be. The perceptions, the feelings, the beliefs, or the consciences of mankind cannot be regulated by human laws. . . .

In 1893, the Utah territorial supreme court reviewed the actions of the trial court in escheating the Tithing Office and grounds, the Garro House and grounds, the Historian's Office and grounds, the Church farm, and the Church coal lands.

In United States v. Tithing Yard and Offices, the territorial court ruled that while federal law provided that no suit for forfeiture or escheat could be commenced unless it was within five years from the time the property became subject to forfeiture and escheat and while the tithing property was acquired more than five years before the beginning of this action, it was held illegally within the preceding five years, and the statute of 1862 prohibited the holding, as well as the acquisition, of real property in excess of the limit it prescribed. However, the court ruled that it came within the definition of "vested rights in real estate" protected by the 1862 act. The land was possessed by the unincorporated Church in 1848, and then after 1855, by the Church corporation. Valuable improvements had been made upon it by the time the 1862 act was passed. While legal title was not obtained until November of 1871, when it was entered under the town-site act of 1867, still vested rights in it had been established. When Congress
passed the act organizing the Territory of Utah, it tacitly invited people to come in and make their homes. It became necessary for the settlers to organize towns and other units of local government. In 1862, Salt Lake City contained several thousand families and large sums had been spent to improve the land. While the question of property rights under the due process clause of the Fifth Amendment was not before it, the court thought it questionable whether Congress, consistently with that provision, could have taken the lands away. The United States Supreme Court had upheld ownership of land acquired in the Territory of Oregon before the federal land laws were extended over it. The same ruling should govern the situation at hand—while legal title to land in the Territory of Utah was held by the United States, possessory rights of settlers were recognized in 1862. If the proviso in Section 3 of the 1862 statute did not protect such possessory rights, there were no rights it could have served to protect, and Congress must have been aware of this. There was no federal land office in Utah until well after 1862. Furthermore, it was a matter of common knowledge, the court said, that the act of 1862 was directed at the Mormon Church. If this Church, then, in 1862, could not have acquired legal rights in real estate, the "vested rights" referred to should be generously construed. It had been Congress' intention to prevent further acquisition of real property. The judgment of the lower court was reversed and the case remanded, with instructions to dismiss the action.
In United States v. Gardo House and Historian Office, the territorial supreme court ruled that the Church had not established vested rights in the Gardo House property in 1862, so that the decree to forfeit and escheat it was affirmed. However, the Historian's Office and grounds had been acquired in 1855 and possessed by the Church continuously thereafter. Valuable improvements had been made upon the land. It was, therefore, a "vested right" in 1862, and not subject to escheat. The decision of the trial court in this instance was reversed.

The court went on to make a statement which it said should have been included in the case involving the Tithing Office property. The government counsel had alleged that the United States Supreme Court had already ruled on the validity of the forfeiture and escheat in all of these cases. Not so, said the court—the case heard by the United States Supreme Court was initiated under Sections 17 and 26 of the Edmunds-Tucker act and under which the court was limited to taking two actions: first, the appointment of a receiver, and second, the setting apart and placing in the hands of the trustees of the unincorporated Church of adequate property for places of worship, parsonages, and burial grounds. The United States Supreme Court did not consider the right of the government to escheat specific property. The actions involved in the series of cases at hand were instituted under Section 13 of the 1887 statute, and were entirely independent of any actions authorized by Section 17.
In accordance with the rules of law established in these two cases, the territorial supreme court affirmed the judgments of the trial court to escheat the Church farm\textsuperscript{71} and coal lands.\textsuperscript{72} Neither had been acquired until after 1862.

**Property Restored**

On October 25, 1893, Congress decided that the Mormon Church had "discontinued the practice of polygamy and no longer encourages or gives countenance in any manner to practices in violation of law, or contrary to good morals or public policy," and that if its personal property were returned, "it will not be devoted to any such unlawful purpose." The joint resolution that followed ordered the receiver to deliver the personality and money in his possession, less the expenses of the receivership, to the First Presidency of the Church. The Church was instructed to apply it "generally to the charitable uses and purposes of said church," to wit:

\[\ldots\] For the payment of the debts for which said church is legally or equitably liable, for the relief of the poor and distressed members of said church, for the education of the children of such members, and for the building and repair of houses of worship for the use of said church, but in which the rightfulness of the practice of polygamy shall not be inculcated. \ldots\]

In recognition of this action, the United States Supreme Court reversed\textsuperscript{74} the judgment of the territorial supreme court regarding the personal property and remanded the cause for proceeding's consistent with the resolution.
The Court pointed out that while the joint resolution did not presume to control judicial action, its previous decree had ordered a course to be pursued in the absence of congressional legislation, and since this was remedied, appropriate action should be taken by the courts.

The real property was not returned until after statehood was granted to Utah. In the meantime, the Church had rented the General Tithing Office, the Historian's Office, the Gardo House, the Church farm, and even, for a time, the Temple Block, at relatively high rents. On March 28, 1896, Congress passed another joint resolution ordering the receiver to return the property to the First Presidency, after deducting the expenses of the receivership. In view of this, the United States Supreme Court, on April 20, reversed judgments in the cases involving the Gardo House, the Church farm, the coal lands, and the Tithing Office property, and the causes were remanded to the territorial supreme court for proceedings consistent with the resolution.

Conclusions

As with the other aspects of this study, there is the temptation to engage in an expose of the small inconsistencies, contradictions, and vacillations which marked the action of the federal government, legislative and judicial, toward the Mormons. The escheat proceedings provided excellent opportunities in this direction. It could be pointed out that the difference between the operation of Sections 13 and 17 of the Edmunds-Tucker act obviously was never clearly understood or explained by the courts, although they repeatedly
drew attention to the difference. In its 1890 decision, the United States Supreme Court expressly disclaimed any power to decide the question of escheat, insisting that the appointment of a receiver was the only issue before it, and then proceeded to anticipate the questions involved in the escheat actions. There was left the unmistakable impression that the United States was determined to shoot down the Mormon Church, regardless of whether the letter of the law allowed the exact steps required, an approach not unlike that used in the criminal prosecutions under the Edmunds act. It could also be noted that the 1893 joint resolution returning the personal property to the Church imposed a condition which amounted to an infringement upon religious belief: it was provided that the personal property could not be applied to the inculcation of the "rightfulness of the practice of polygamy." This was an attempted control of something other than religious conduct. However, such wrangling is unsatisfactory, for the simple reason that there was a larger wrong done.

Hubert Howe Bancroft has correctly pointed out that:

After all that can be said about Mormonism and polygamy in their social or moral relations, it is only when we come to consider them in their political aspect, in their relations to government and governing, that we touch the core of the matter. . . .78

Having fined and imprisoned polygamists, barred them from the polls and public office and eliminated them from juries, the nation destroyed the Mormon Church, and not satisfied with this, seized its property. The nation was successful.
Leonard J. Arrington has commented, "The temporal Kingdom, for all practical purposes, was dead—slain by the dragon of Edmunds-Tucker."79

It seemed to make no difference that such action penalized the innocent along with the guilty, that the legitimate exercise of religious beliefs was abolished as well as that which had been adjudged contrary to social values. To view this action as merely the retraction of a privilege exercised at the leave of government—corporate existence—is to ignore the facts of the situation. The Edmunds-Tucker act not only dissolved a corporation, but it destroyed a church. This was the first and only occurrence of its kind in the history of this country, and it bears closer examination. It is suggested that to evaluate this event in terms of the incidents of national sovereignty or the doctrine of *cy pres* is to abdicate from a truthful accounting.

The First Amendment states that "Congress shall make no law respecting an establishment of religion." It meant, in Jefferson's words, to erect "a wall of separation between the church and State."80 Madison declared that under the Constitution, "there is not a shadow of right in the general government to intermeddle with religion," which was, "for the honor of America, perfectly free and unshackled. The government has no jurisdiction over it."81 There is little doubt about the intentions of the two men whose ideas contributed most to the formulation of the First Amendment: church and state were to leave each other alone. In *Everson v. Board of Education*,82 the United States Supreme Court
The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. . . .

It reasonably might be charged that in carrying into effect the provisions of the Edmunds-Tucker act, the government did "participate in the affairs" of a religious group, within the meaning of the Everson statement—the receiver, acting under the color of federal law, managed the property of the Mormon Church for almost a decade.

However, there is an objection of more importance and of a different nature. It is fairly obvious that under the First Amendment, Congress could not establish a church; whether the language also prohibits Congress to dis-establish a church is a question which has never been answered directly. This matter of literalness of interpretation aside, the spirit of the First Amendment, which is clearly against established churches, would dictate that Congress could correct those aspects of the relation between a church and a territorial government which constitute and establishment of that church.
However, this does not necessarily mean that Congress might also abolish that church. In abolishing the Church of Jesus Christ of Latter-day Saints, Congress overstepped the legitimate bounds of its authority to preserve the separation of church and state, and infringed upon the religious freedom of the Mormons.

While the property was finally returned, the receivership was managed rather badly, and much waste and unnecessary agitation resulted. B.H. Roberts has commented:

Thus ended an act which, had it been carried to the end proposed by those who projected it, would have virtually involved the federal government of the United States in an act of confiscation that would have been most discreditable and indefensible. As it was, though not carried to the final end of despoilation proposed in the beginning of the action, yet it profoundly disturbed a whole community through about nine years, involved them in vexatious and very expensive litigation by which much of their community substance contributed to charitable and religious purposes was wasted, and their sense of justice outraged.84

In retrospect, apart from the precise constitutional issues involved, the whole dissolution and escheat affair seems rather pointless, and consequently, unfair. The property was taken; much of it was dissipated; and then it was returned. The Church has always maintained that the government took a full purse and returned an empty one. Failure to observe the minimum requirements of "public equities" is again apparent.
FOOTNOTES

CHAPTER VIII

1 12 Stat. 501 (1862).

2 24 Stat. 635 (1887).

3 Sections 15 and 16 prescribed essentially the same fate for the Perpetual Emigrating Fund Company.

4 See Chapter II, pp. 78-79, supra.


6 Roberts, op. cit. supra note 5, 196.

7 "Letter from the Attorney-General transmitting, in response to Senate resolution of December 10, 1888, a statement relative to the execution of the law against bigamy," Senate Exec. Doc. 21, 50th Cong., 2nd Sess. 1 (1888). This report contains a copy of the complete transcript of record filed with the United States Supreme Court in the Church escheat case. It should be noted that proceedings had already been instituted in the Third District court to have the real estate, except the Temple Block, declared forfeited and escheated, in pursuance of Section 13 of the Edmunds-Tucker act. The two series of proceedings arose from different provisions of the law, were of a different nature, and this difference should be kept in mind.

8 The complaint estimated that the Church held real estate worth two million dollars and personal property valued at one million.

9 United States v. Church of Jesus Christ of Latter-Day Saints, 5 Utah 361 (1887). Hereafter, in second references to cases involving this defendant, defendant will be cited simply as L.D.S. Church.

10 Id., at 367.

11 Id., at 365-366.
12Id., at 381.

13Senate Exec. Doc. 21, supra note 7, 9. Proceedings had also been initiated against the Perpetual Emigrating Fund at the same time, and Dyer was appointed receiver for its property also. Arrington, op. cit., supra note 5, 368.

14Senate Exec. Doc. 21, supra note 7, 10.

15Id., 38-39.

16Id., 19.

17Id., 47. Preston, Burton, and Winder also filed several petitions asking to have the property set aside to them. Id., 41, 43, 45.

18Id., 49.

19The Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, at 19 (1890).

20Senate Exec. Doc. 21, supra note 7, 51.

2114 Stat. 541 (1867).

22Senate Exec. Doc. 21, supra note 7, 63.

23In United States v. Church of Jesus Christ of Latter-Day Saints, 5 Utah 394 (1888), decided January 18, 1888, the territorial supreme court ruled that the defendants could not take an appeal to the United States Supreme Court from the order appointing the receiver. The appointment was not a final decree within the meaning of the federal statute governing such appeals.

24United States v. Church of Jesus Christ of Latter-Day Saints, 5 Utah 538 (1888).

25Id., at 545.


27The actual estimate was $800,000, but values were not given for several items listed. Arrington, op. cit., supra note 5, 370. President Cleveland, in his annual message on December 3, 1888, also noted this, as he informed Congress of the successful suit abolishing the Mormon Church and the Perpetual Emigrating Fund. James D. Richardson, Messages and Papers of the Presidents 1789-1897, VIII (10 vols.; Washington: Government Printing Office, 1897), 794. Arrington also notes that the receiver recovered less than one-third of the value of the total property owned by the Church when
the Edmunds-Tucker act was passed. Arrington, op. cit.
supra note 5, 371.


30 10 U.S. (6 Cranch) 87 (1810).

31 Brief, supra note 28, pp. 61-62.

32 Id., p. 73.

33 Id., p. 83.

34 Id., p. 89.

35 Id., p. 91.

36 Ibid.

37 Id., p. 95.

38 Id., p. 106.

39 85 U.S. (18 Wall.) 307 (1873).

40 Brief, supra note 28, p. 118.


42 Id., p. 15.

43 Id., p. 25.

44 Ibid.

45 Id., p. 32.

46 Id., p. 39.

47 The Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1 (1890).

48 Id., at 44.

49 Id., at 45-46.

50 Id., at 46.
Id., at 49.
52 Id., at 49-50.
53 Id., at 50.
54 Id., at 56.
55 Id., at 59.
56 Id., at 64.
57 Id., at 63-64.
58 Id., at 67.
59 Id.

60 By press means "as near to," and the object of the doctrine is to permit the main purpose of the donor of a charitable trust to be carried out as nearly as possible when it cannot be done to the letter. This is also called the doctrine of "nearerness" or "approximation." 14 C.J.S. Charities, Sec. 52 (1939).

61 L.D.S. Church v. United States, supra note 47, at 68.
62 Congressional Record, 51st Cong., 1st Sess. 5883, 6328-6332 (1930).
63 Whitney, op. cit. supra note 26, 660-662.
64 United States v. Church of Jesus Christ of Latter-Day Saints, 6 Utah 9 (1889).
65 The Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States, 140 U.S. 665 (1891).
66 Id., at 666.
67 United States v. Church of Jesus Christ of Latter-Day Saints, 8 Utah 310 (1892).
68 Id., at 349.
69 9 Utah 273 (1893).
70 9 Utah 285 (1893).
71 United States v. Church Farm, 9 Utah 289 (1893).
72 United States v. Church Coal Lands, 9 Utah 288 (1893).
73 28 Stat. 980 (1893).
United States v. The Late Corporation of the Church of Jesus Christ of Latter-Day Saints, 150 U.S. 145 (1893).

Arrington, op. cit., supra note 5, 368-369; Whitney, op. cit. supra note 26, 601.

29 Stat. 758 (1896).

Certain Real Estate known as the Gardo House v. United States; United States v. Certain Real Estate known as the Gardo House; Certain Real Estate known as the Church Yard v. United States; Certain Real Estate known as the Coal Lands v. United States; United States v. Certain Real Estate known as the Tithing Yard and Offices, 163 U.S. 680 (1896).

Hubert Howe Bancroft, History of Utah (San Francisco: The History Company, Publishers, 1890), 360-361.

Arrington, op. cit. supra note 5, 379.

Reynolds v. United States, 98 U.S. 145, at 164 (1879).


4d., at 15-16.

Roberts, op. cit. supra note 5, 200-201.
CHAPTER IX

CONCLUSIONS

The Manifesto and Statehood

During the summer of 1888, the judicial crusade against the polygamists was relaxed, due to several factors. First, a split in Gentile opinion had developed: while some still pressed for more extreme measures, such as a legislative commission to govern the Territory of Utah, others felt that the Mormons had been punished enough.¹ This division of sentiment was mirrored in the reports of the Utah Commission which soon contained minority dissents. The Mormons owed a great deal to this schism; it meant that all Gentiles could not be persuaded to support, or even tolerate, a policy of "rule or ruin."² Second, there was a disposition on the part of the Cleveland administration to display humanity in the enforcement of the Edmunds and Edmunds-Tucker acts.³ The third factor resulted from the second: the change in judicial personnel in the Territory of Utah. In July of 1888, Elliott Sandford was appointed to replace Chief Justice Zane, and John W. Judd was assigned to preside over a new district court created by an act of Congress of June 25, 1888.⁴ Sandford and Judd both took the view that the anti-polygamy acts should be
treated as other criminal statutes, and that the usual burdens of proof and rules of evidence should be observed in enforcing them. This relaxation of the harshness and severity of the administration of justice in Utah drew the criticism of more radical Gentiles, and the two judges were denounced for their leniency. When Harrison became President, Sandford, having refused to tender his resignation, was removed, and Zane was reappointed. It appeared that the latter had become possessed of a more kindly attitude during his temporary retirement; his reforming spirit had dimmed, and the crusade never regained its former vigor. Zane eventually achieved a good measure of popularity among the Mormons and later became the first chief justice of the State of Utah.\(^5\)

It is not difficult to imagine the helplessness felt by the Mormon Church in the summer of 1890. Hundreds of its leading elders were in prison. Hundreds more were in exile. Its real and personal property was in the possession of the United States government. The constitutionality of the escheat laws had been upheld by the courts, and with this judicial action, the last hope of relief had been extinguished. The Cullom-Struble bill, which would have disfranchised all members of the Mormon Church, was pending in Congress. Every attempt to secure statehood had failed. The Saints were weary of harassment; the running and hiding, the searches and seizures had worn them down, and many were questioning the practicability and value of maintaining
patriarchal marriage in the face of such seemingly unsur-
mountable odds. Their non-Mormon friends counselled abandon-
ment. 6

On September 25, 1890, President Wilford Woodruff
made this entry in his journal:

I have arrived at a point in the history
of my life as the president of the Church of
Jesus Christ of Latter-day Saints where I am
under the necessity of acting for the temporal
salvation of the church. The United States
government has taken a stand and passed laws
to destroy the Latter-day Saints on the subject
of polygamy, or patriarchal order of marriage;
and after praying to the Lord and feeling in-
spired, I have issued the following proclamation
which is sustained by my counsellors and the
twelve apostles. 7

That same day, he issued the famous "Woodruff Manifesto:"

To Whom it may Concern:

Press dispatches having been sent for po-
itical purposes, from Salt Lake City, which
have been widely published, to the effect that
the Utah Commission, in their recent report to
the Secretary of the Interior, allege that
plural marriages are still being solemnized and
that forty or more such marriages have been
contracted in Utah since last June or during
the past year, also that in public discourses
the leaders of the Church have taught, en-
couraged and urged the continuance of the
practice of polygamy——

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

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

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

There is nothing in my teachings to the Church or in those of my associates, during the time specified, which can be reasonably construed to inculcate or encourage polygamy; and when any Elder of the Church has used language which appeared to convey any such teaching, he has been promptly reproved. And I now publicly declare that my advice to the Latter-day Saints is to refrain from contracting any marriage forbidden by the law of the land.8

The Church membership, by an almost unanimous vote, gave its approval at the October conference.9

The Manifesto raised questions which were discussed and argued for many years. As might have been expected, it met the stubborn opposition of some who, refusing to recognize it as a bona fide revelation, rejected its validity.10 Others thought that the language was vague and that it did not necessarily put an end to Mormon polygamous marriages.11 Still others argued about whether it prohibited living in polygamous relationships formed previously, as well as the contracting of future polygamous marriages. Evidence indicates that it may have been violated on occasion, and it obviously was not enforced rigorously against those members of the Mormon community whose polygamous relationships were long-standing and who had formed them in accordance with what they had accepted as a divine command.12

The immediate reaction on the part of Gentiles was to doubt the sincerity of the Mormons. While polygamy was not
eradicated with this ultimatum, it was unreasonable to expect it to evaporate instantaneously, and although the odious practice twitched hard enough in its death-pangs on several occasions afterwards to remind the nation of its existence, the Manifesto did indeed signal its destruction. Many Mormons welcomed the abandonment of plural marriage; most had always considered it permissive rather than mandatory. The Mormon attitude was that while polygamous marriage was an innocent and lawful thing, per se, the obligation to obey it as a divine command was discontinued, and they should submit themselves to the law. The practice of plural marriage was abandoned without expectation that it would be revived as long as the climate remained as it was.

The Mormons consider the Manifesto to be the word of God. The Church has always maintained that it did not surrender to man, but waited for God to indicate that patriarchal marriage was finished, and this sign was given through the only man on earth who had the authority to speak for Him. To answer the charge that it acted inconsistently and improperly in putting an end to what it had previously claimed was a divinely-inspired institution, the Church has said:

... First, when a commandment is given to the children of men and they are effectively hindered by their enemies in carrying out that commandment, then it is for God to accept their offering and require that work at their hands no more; second, the authority which gives a commandment has the right and power to revoke it.

In a petition dated December 19, 1891, the Church leaders asked President Harrison to grant amnesty to those
who had in the past violated the laws against polygamy and unlawful cohabitation. Influential non-Mormons and the Utah Commission had also urged this action. There had been, since the Manifesto, a sort of gentlemen's agreement between the Mormons and Gentiles in Utah that existing polygamous unions would be left alone. On January 4, 1893, Harrison granted amnesty to persons who were subject to prosecution for polygamous cohabitation, if they had abstained from such cohabitation since November 1, 1890, and upon the condition that they would obey the Edmunds act in the future.

On July 16, 1894, Congress passed "an act to enable the people of Utah to form a constitution and state government, and to be admitted into the Union on an equal footing with the rest of the States." In Section 3, it was declared "that perfect toleration of religious sentiment shall be secured, and that no inhabitant of said State shall ever be molested in person or property on account of his or her mode of religious worship; Provided, That polygamous or plural marriages are forever prohibited."

The following September, President Cleveland announced that he was satisfied that the Mormons were finally living in obedience to the anti-polygamy statutes, and "that the time has now arrived when the interests of public justice and morality will be promoted by the granting of amnesty and pardon to all such offenders as have complied with the conditions [of Harrison's proclamation]." He proclaimed amnesty in broader terms than Harrison had done:
Now Therefore, I, Grover Cleveland, President of the United States, by virtue of the powers in me vested, do hereby declare and grant a full amnesty and pardon to all persons who have in violation of said acts committed either of the offenses of polygamy, bigamy, adultery or unlawful cohabitation under the color of polygamous or plural marriage, or who, having been convicted of violations of said acts, are now suffering deprivation of civil rights in consequence of the same, excepting all persons who have not complied with the conditions contained in said executive proclamation of January the fourth, 1893.20

The constitutional convention which met in Salt Lake City in March of 1895 provided as an irrevocable ordinance:

Perfect toleration of religious sentiment is guaranteed. No inhabitant of this State shall ever be molested in person or property on account of his or her mode of religious worship; but polygamous or plural marriages are forever prohibited.21

This was not the first time that the people of Utah had acted against polygamy. In 1892, the territorial legislature outlawed polygamy, unlawful cohabitation, adultery, incest, and fornication in terms almost identical with those of the comparable federal statutes.22 This 1892 law became an issue in the constitutional convention of 1895. Charles S. Varian, a former United States attorney for Utah and a leading Gentile lawyer, was the spokesman for the point of view that the new constitution should offer more than a simple declaration that polygamy would no longer be tolerated in Utah. It was his opinion that since such a provision would not be self-operative, the convention should provide punishment to manifest good faith to Congress. He suggested that the following language be inserted in the Schedule:
The act of the Governor and Legislative Assembly of the Territory of Utah, entitled, "An Act to punish polygamy and other kindred offenses," approved February 4th, A.D. 1892, in so far as the same defines and imposes penalties for polygamy, is hereby declared to be in force in the State of Utah.  

His suggestion was accepted.  It should be noted that only the part of the law of 1892 that punished polygamy was made operative. The purpose was to provide against future plural marriages, but to leave already-existing plural marriages undisturbed. This—the only rational approach to the situation—became the policy of the state toward polygamy, despite the fact that the state legislature subsequently revitalised the part of the statute which prohibited unlawful cohabitation and related offenses.

On January 4, 1896, President Cleveland announced Utah's admission to the Union. Polygamy would again agitate the nation's councils, however. In 1900 Brigham H. Roberts of Utah was denied a seat in the House of Representatives, on the ground that he was a polygamist, and the Senate Committee on Privileges and Elections accumulated four fat volumes of material concerning the right of Utah's Senator-elect Reed Smoot to take his seat in 1903, in which the polygamy issue was frequently raised. Patriarchal marriage was around to bother the United States Supreme Court as late as 1946, when several Fundamentalists ran afoul of the Mann act.

The Church, also, was forced to make a further pronouncement on the subject. In 1904, President Joseph F. Smith, in answer to rumors that the Church had performed
plural marriages contrary to the 1890 Manifesto, issued a second "manifesto." This statement clarified and reiterated the position of the Church: that plural marriages were forbidden and that those who performed or entered into them were subject to excommunication. This declaration was ratified unanimously by the Church membership assembled in the April conference of 1904.

**Freedom of Religion Prior to 1879**

The United States Supreme Court, in the *Reynolds* case, placed the stamp of legitimacy upon the federal anti-polygamy statutes and announced a test for the constitutionality of laws challenged on freedom of religion grounds. It was the Court's first direct encounter with the First Amendment provisions regarding religion. In declaring that freedom of religious belief is absolute, but that actions in pursuance thereof can be regulated in the public interest, the Court cited no legal precedent, but depended almost exclusively upon the ideas of the men instrumental in the framing of the First Amendment for a guide to its construction. Jefferson's famous pronouncement in the Virginia statute of religious freedom provided the keynote:

> . . . [O]nly suffer the civil magistrate to intrude his powers into the field of opinion and to restrain the profession or propagation of principles, on the supposition of their ill tendency, is a dangerous fallacy, which at once destroys all religious liberty, because he being of course judge of that tendency, will make his opinions the rule of judgment, and approve or condemn the sentiments of others only as they shall square with or differ from his own; . . . it is time enough for the rightful purposes of
civil government, for its offices to interfere when principles break out into overt acts against peace and good order. . . . 33

The distinction between conscience and conduct was a persistent strain throughout Jeffersonian thought on the subject of religious liberty. On another occasion, he wrote:

... The error seems not sufficiently eradicated, that the operations of the mind, as well as the acts of the body, are subject to the coercion of the laws. But our rulers can have no authority over such natural rights, only as we have submitted to them. The rights of conscience we never submitted, we could not submit. We are answerable for them to our God. The legitimate powers of government extend to such acts only as are injurious to others. But it does me no injury for my neighbor to say there are twenty gods, or no God. It neither picks my pocket or breaks my leg. . . . 34

It seems, however, that this interpretation remained dormant, as far as the First Amendment is concerned, until it was given a judicial statement in the Reynolds case. One searches the major treatises on constitutional law of the period—Story, Cooley, and Kent, among others—in vain for an indication that this principle had found its way into the body of legal precedent construing the First Amendment. Kent, in fact, stated flatly:

The free exercise and enjoyment of religious profession and worship, may be considered as one of the absolute rights of individuals, recognized in our American constitutions, and secured to them by law. . . . 35

The Court had dealt with religious issues, tangentially, in a handful of previous cases—Vidal v. Girard's Executors, 36 Perwoll v. New Orleans, 37 Watson v. Jones. 38 In the Watson case, Justice Miller indicated an acceptance of the idea that the protection given religious liberty in this country was not absolute:
In this country the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect. . . .

However, this was dictum, and the facts of the case did not require an application of the idea expressed.

Perhaps the major reason for the lack of legal precedent construing the First Amendment was the fact that during this period, regulatory measures which might have intruded upon religious liberty were almost exclusively the province of state governments. Since the Court had ruled, in 1835, that the Bill of Rights did not serve as a limitation on state actions, the federal courts had little opportunity to contemplate the meaning of the First Amendment.

The Court's long silence on this matter did not necessarily indicate that American jurisprudence lacked a body of judicial rulings concerning the kinds of religious conduct subject to governmental regulation. Chief Justice Waite used to good effect the ideas of Jefferson and Madison to determine the intent of the framers. But it is one thing to outline an idea, as Jefferson did; it is another thing to apply the idea to a specific set of facts, as courts are required to do. In accomplishing this latter task, Waite did not break new ground. State courts had been construing state constitutional provisions regarding religious liberty for many years. Such a body of rulings undoubtedly created a legal atmosphere by which the Court was influenced, even
though it cited no specific precedent.

The writer does not presume to draw conclusions regarding federal constitutional law from principles of state constitutional law. The difficulties involved are well recognized. State and federal constitutional principles, as well as provisions, on this matter differed greatly. The idea that principles embodied in the Bill of Rights could control state constitutional principles is very much a product of the twentieth century. Another difficulty is that, in those early days, there was no clear-cut distinction between the twin concepts of the separation of church and state and freedom of religion. The suggestion is made, however, that a thorough investigation of the pre-1879 state cases involving the invocation of religious liberty would shed valuable light on the legal development of the idea of religious freedom in this country from the framing of the First Amendment to the Reynolds case. The writer makes no pretense to having done this. However, a cursory examination of some of the more well-known cases indicates that state courts had wrestled with the kind of distinction between belief and action made by the Court in the polygamy cases. For example, in the famous Maine Bible-reading case of 1854, the state supreme court said, in a statement surprisingly pertinent to the subject of this study:

The Legislature establishes general rules for the guidance of its citizens. It does not necessarily follow that they are unconstitutional, nor that a citizen is to be legally absolved from obedience, because they may conflict with his conscientious views of religious duty or right.
To allow this would be to subordinate the State to the individual conscience. A law is not unconstitutional, because it may prohibit what a citizen may conscientiously think right, or require what he may conscientiously think wrong. The State is governed by its own views of duty. The right or wrong of the State, is the right or wrong as declared by legislative Acts constitutionally passed. It may pass laws against polygamy, yet the Mormon or Mohamedan cannot claim an exemption from their operation, or freedom from punishment imposed upon their violation, because they may believe, however conscientiously, that it is an institution founded on the soundest political wisdom, and resting on the sure foundation of inspired revelation. . . .42

The Court, at least, had a climate of judicial thinking in which to operate when it pronounced the formula for dealing with the question of Mormon polygamy. The next inquiry is how well the formula, as a guide to governmental action regarding the Mormons, served the guarantee of religious liberty.

An Evaluation

The content and application of the federal statutes regarding polygamy and the Mormons have been analyzed in detail in preceding chapters. It remains, at this point, to evaluate the total effect. Several conclusions can be drawn from this study.

One. There can be little doubt that above and beyond the vehement objection to the practice of polygamy, the Mormons attracted the wrath of the nation for other reasons. The Church made enemies of the bitterest kind from the moment it began its public ministry. The Saints were driven from four states, across the breadth of the nation, leaving
in their wake hostility and hatred. It is no surprise to the student of Latter-day Saint history that in New York as late as 1892, it was a ground for libel to call someone a Mormon. They were a vocal people, constantly calling public attention to their trials and tribulations; their progress was well-attended by the press. They repeatedly became engaged in conflicts of the most obvious and public nature, so that legislative, executive, and judicial branches of government on both the national and state levels were cognizant of their existence from almost the beginning. All this made an ideal climate for nurturing national anger with stories of murder, robbery, civil disobedience, and immorality in the Great Basin. It is impossible to read the half-century of congressional debates on the "Mormon problem" without noting a constant and substantial body of opinion which held that the Mormons were "bad people."

The Mormons compounded the situation by causing difficulties in areas over which Congress clearly had effective control: legal institutions and procedures. While for a period of time after they reached Utah, it was not decided whether Congress had power to regulate the two great moral issues of the era, slavery and polygamy in the territories, there was no doubt that Congress could prevent the residents of a territory from subverting congressional intent with regard to the judicial system. In attempting to take the judicial process into their own hands, the Saints gave the nation another, and more concrete, objection.
Not only did the people of Utah entertain a most unacceptable arrangement of domestic relations and substitute their own judges, juries, and rules of law, but the territory was dominated by the Mormon Church. The manifestations of a merger of church and state which have been described in earlier chapters could not have failed to arouse the opposition of a nation which, long before, had turned its back on established churches. One turns very few pages in the Congressional Record, when the Mormons were being discussed, without encountering a reference, in some degree of outrage, to the "theocratic despotism" wielded by Brigham Young and the priesthood over the people of Utah.

On top of all this, the Mormons were accused of being disloyal to the United States. They were said to be seeking revenge against the United States for its failure to come to their aid in time of crisis in Missouri and Illinois and to help them obtain reparation for their losses. The establishment of the State of Deseret was seen as an attempt to create an independent power. They held the distinction of being the enemy in the only military expedition against a territory ever made by the United States army. This reputation of rebellion was strengthened when territorial judges and governors fled the territory in the face of real or imaginary threats and regaled the eastern states with tales of burned court records, Danites, and assassination of non-sympathizers.

This climate of anti-Mormon opinion in this country is crucial to an understanding of the events that followed.
Phillip Kurland has said, "At this distance in time it is somewhat difficult to realize the hatred for the Mormons in this country during the second half of the nineteenth century. It was by no means confined to the areas in which they settled." James Bryce, perhaps the most astute foreign commentator on the American scene, saw much more than just an abhorrence of polygamy in the national attitude toward the Mormons:

... So the hostility to Mormonism was due not merely to the practice of polygamy, but also to the notion that the hierarchy of the Latter Day Saints constitutes a secret and tyrannical imperium in imperio opposed to the genius of democratic institutions."

Two. Consequently, the so-called anti-polygamy laws were intended, consciously or unconsciously, to accomplish much more than the prohibition of plural marriages. First, the application of the criminal provisions of the Edmunds act was extended far beyond the crime of maintaining actual polygamous living arrangements, to reach an intangible relationship created as the result of religious belief, and the zeal and concentration of the campaign against this "crime" is unequalled in the annals of federal law enforcement. Second, almost every other important liberty of free citizens was curtailed—the right to vote, to hold public office, to serve on juries, and to possess and dispose of property; a test-oath was imposed as a prerequisite to exercising the privileges of citizenship. Third, for a period of almost fifteen years, a federally-appointed returning board exercised complete control over the elective process
in the Territory of Utah. Fourth, the Mormon Church itself, of which polygamists comprised only a relatively small part, was abolished, and its real and personal property seized. To maintain that the national government was engaged only in the eradication of plural marriage is to ignore the scope of the provisions and application of the laws.

In the enforcement of the criminal provisions of the Edmunds and Edmunds-Tucker acts, the government was given every possible aid to prosecution. Plural marriage in every degree was covered—polygamy proper, unlawful cohabitation, adultery, fornication, and incest. The offense of unlawful cohabitation was defined in the most liberal and unusual terms. The government was given help in obtaining witnesses and acquiring their testimony once they were obtained. It was made certain that juries would not be staffed with persons who either practiced or believed in the righteousness of polygamy. Rules of evidence were relaxed and burdens of proof shifted to favor the accuser. A legion of deputy marshals was sent into the territory to aid in hunting down polygamists and gathering evidence. A congressional appropriation supported an army of informers. All this, to catch just one kind of "criminals," who were, to begin with, in a very real sense, held captive by their circumstances. It is difficult to imagine how federal attorneys and judges could have been better equipped.

The plight of the polygamist who had acquired more than one family before the federal anti-polygamy laws were enforced deserves special attention. With the courts'
broad definition given unlawful cohabitation and the tailor-made rules of evidence, he remained vulnerable to the law, regardless of how he rearranged his domestic life. The responsibility he felt toward those who had become dependent upon him should be obvious. It seems ironic that outraged Christian America preferred him to abandon his polygamous families, leaving them destitute and unprotected, rather than to allow him to provide for their basic human needs. It must have been a higher order of logic which decreed that the "helpless victims of polygamy" would be better served by taking away in fines money needed for their food, clothing, and shelter and imprisoning their only provider. Punishing polygamists who limited their actual cohabitation to one family, but who fulfilled responsibilities toward the other families who were previously acquired in consequence of a religious teaching, was not punishing action contrary to social values, but was punishing the belief that valid binding ties were created by each of those unions. George Ticknor Curtis told the United States Supreme Court:

... I do not need to be told that it is your province not to make laws, but to interpret them. Nevertheless, it does happen under our system of government, that even when there is nothing to be determined but the construction of a law, constitutional provisions must be taken into consideration; and when that is not the case, it also happens that the time of enactment of the law, the circumstances which led to it, the public facts and public equities which surround it, each and all are of fit and proper consideration in determining the meaning and application of the language of the legislature to successive cases as they arise.
The provisions barring a polygamist from the polls and public office, imposing a test-oath, taking away woman suffrage, disinheriting polygamous children, and abolishing and confiscating the property of the Church and the Perpetual Emigrating Fund were extensions of the unjustifiable theory that the Mormon community was a "lump, all tainted with polygamy." Since the extirpation of polygamy had been declared a legitimate object of the federal police power, such reasoning would have rendered no aspect of community life immune from governmental interference. Taken to its logical conclusion, such reasoning would have justified placing the Mormon community in a rehabilitation camp, to break the system. It also justifies the penalizing of innocent people—people whose only crime was membership in the Church, since only a minority of the Latter-day Saints practiced polygamy.

It was argued that disfranchising polygamists and barring them from public office would serve as a discouragement to the practice of polygamy. This was to be accomplished by the use of a test-oath. When used in this manner, the granting and taking away of these privileges of citizenship took the aspect of further punishment for conduct which had been made criminal. A libertarian might well ask whether this was a reasonable means to achieve the destruction of polygamy, especially when failing to take the oath placed a man under suspicion of having violated criminal statutes. There was a further rationale for this action: that taking away the franchise and the right to hold office
was a method of taking power away from the ruling polygamist elit. Whether it was proper to use the privileges of citizen.ship as levers to dislodge those who held political power by virtue of majority support is a legitimate inquiry. Given that the announced objection here was not to the holding of political power, but to the practice of polygamy, whether, in this instance also, the means used bore a reasonable relation to the object of governmental action can be seriously questioned.

For Congress to abolish the entire Church of Jesus Christ of Latter-day Saints because some of its members engaged in an unacceptable social practice is open to criticism on several grounds. First, Congress might disestablish a church in the territories—that is, remedy those elements in the relationship of the government to a church which violated the separation between church and state, but to abolish that church was an infringement upon the freedom of its members to practice their religion. Second, seizing property devoted to many purposes besides the propagation of polygamy was unfair. Here, too, the "lump theory" is apparent. Third, all of the members of an organization were deprived of the benefits of their donations because of the practices of a few. Again, this cannot be justified on the grounds that the Church to which they belonged sanctioned polygamy; this argument infringes on the freedom of belief of those who thought that plural marriage was right, but did not practice it. Fourth, the equity of taking property
to compel conformance to a pattern of society when that property is not directly involved in the anti-social action is questionable.

Three. The formula announced by the United States Supreme Court in Reynolds v. United States as a guide to measuring the legitimacy of governmental action challenged as a violation of freedom of religion did not adequately protect the minority rights of the Mormons. The reasonableness or fairness of each of the categories of penalties imposed by Congress has been discussed above. In each instance, damage was done to the liberties of free men. It seemed that, taken separately, the invasion could be justified in each instance on the theory that the threat to social values presented by polygamy was enough to justify the limitation placed upon the exercise of liberty. What is lost in this kind of an analysis is the view of the total damage done to the Mormon community. It was this view, which combines an informed, intelligent understanding of the Mormon experience and condition with an understanding of the total effect of the federal anti-polygamy legislation, that George Ticknor Curtis invoked when he appealed for the granting of "public equities." An anonymous pamphleteer of the time stated it this way:

... It is proof of the wrongfulness of a judgment when its effect is to inflict a great and manifold general injury. The fact that a rule works oppression is proof that it is wrong; proof that an element has been omitted from this analysis, by which the result is depraved. The court had eyes enough to see one side of the situation, if it had
not enough to see the other. . . . If its mission had been to pronounce upon the fate of a horde of rats, instead of that of a colony of human beings, it could not have manifested more tenderness in behalf of those with whom its sensibilities were in unison, nor more indifference to the sufferings of those whom it delivered to the executioner. 48

The concern for "public equities" becomes sharp when it is realized that every individual infringement on the freedom of the Mormons was justified by an appeal to the Reynolds decision. In that case, the presumption which should be accorded to practices pursuant of religious beliefs was taken away by the simple declaration that Mormon polygamy was contrary to American social values. Almost every peculiar or unusual religious conduct could be disposed of in that manner, but the First Amendment guarantees much more. It guarantees a minority the right to be told why its behavior cannot be tolerated in a free society. This summary removal of the presumption that Mormon polygamy was a legitimate exercise of religious freedom did away with the initial and most important weapon that a minority has against the majority.

It should be clear by this time that the power of Congress to prohibit polygamy in the territories is not denied. The complaint is against the failure of the Court in the Reynolds opinion to make a practical application of the formula it announced. In its first exercise in balancing minority rights against majority rule, in the field of religion, it failed to give the minority the full measure of protection afforded by the First Amendment. The tragedy
is that subsequent penalties against the Mormon community were not evaluated in terms of their own reasonableness, but were justified because Reynolds pronounced that polygamy was a social evil which could claim no protection from the First Amendment.

Four. One cannot help but wonder if the Edmunds and Edmunds-Tucker acts did not, in a sense, hinder the demise of polygamy. The attack of the national government forced the Mormons to band together and concentrate their opposition. They, who had been accustomed to closing ranks against a common enemy, did this almost automatically, as an involuntary reflex. Polygamy then became a cause and a matter of principle, and as a result, its place in the spectrum of Mormon doctrine was drastically exaggerated—in their own minds as well as in the minds of their accusers. This period of retreat behind the barricades of their common experience prevented the free flow of ideas and contact with the rest of the country. The nation, in fact, lost completely the effectiveness of a quarter-century's worth of persuasion, while battling polygamy with force.

Part of the difficulty was the failure of the federal government to come to grips with the problem at the outset. It was seventeen years before the validity of the 1862 law was established; for twenty years, Congress left the Mormons to wonder whether it was really serious about doing something about polygamy. It is suggested that, from the very beginning, the rational and practical course
of action was the policy eventually adopted after the Manifesto: to punish the future contracting of plural marriages and to allow those formed in the past to run their course. In terms of specific provisions:

First, Congress should have enacted a comprehensive law regulating marriage in the Territory of Utah. Since marriage was the root of the problem and the failure of the territorial assembly to legislate on the subject was apparent, this would seem the logical place to start. The fact that proof of marriage was the fundamental problem in polygamy prosecutions would give additional support to this proposal.

Second, the basic penal provisions of the 1862 act would have been sufficient, if coupled with a relaxation of the rules of evidence regarding the proof of marriage. Marriage could have been proved by the sort of evidence which was later admitted by the courts to establish unlawful cohabitation.

The nation should not have expected polygamy to disappear overnight. While this apparently would have come as somewhat of a shock to many people, it should have been realised that polygamous family-life could be as strong and vital as any other kind. Patterns of family living were as well-established, even though of a different nature, as those in monogamous households. Familial responsibilities were the same in Zion as in any other section of the country. The practice of plural marriage had existed for forty years
before the country became incensed. Once polygamous families had been started, they could not be shut down like factories. The nation could very well declare that thereafter, no more multiple families could be launched, but it refused to recognize natural human tendencies when it tried to abolish, by governmental fiat, those that already existed.

There is merit to the view that eventually, as the Saints came into greater and more frequent contact with the rest of American society, polygamy would have died a natural death. Monogamy was very much alive in Utah—only a minority of the Church membership ever practiced patriarchal marriage, and there had always been an element opposed to its practice from its inception. If, at the beginning, the national government had taken a firm and realistic stand against future plural marriages, and the nation had found patience to allow social forces to operate, much of the injustice done to Mormon Utah could have been avoided.49
FOOTNOTES

CHAPTER IX


2 E.g., the 1887 report, Reports of the Utah Commission (Bound volume, Utah State Archives). Here the minority expressed the opinion that the anti-polygamy campaign had left the Mormon people feeling insecure and disquieted, and recommended that an end be put to special legislation and government by commission; a constitutional amendment outlawing polygamy was suggested. Id., 1887, 33-41.

3 Whitney, op. cit. supra note 1.


5 Whitney, op. cit. supra note 1, 632-634, 668-670.


7 Roberts, op. cit. supra note 6, 220.

8 The Manifesto can be found at the end of the Doctrine and Covenants.

9 Roberts, op. cit. supra note 6, 222. The motion to approve the Manifesto was made by Lorenzo Snow:

I move that, recognizing Wilford Woodruff as the President of the Church of Jesus Christ of Latter-day Saints, and the only man on the earth at the present time who holds the keys of the sealing ordinances, we consider him fully authorized by virtue of his position
to issue the Manifesto which has been read in our hearing, and which is dated September 24th, 1890, and that as a Church, in general conference assembled, we accept his declaration concerning plural marriages as authoritative and binding.

This also can be found at the end of the Doctrine and Covenants.

10 It is true that the status of the Manifesto in the Doctrine and Covenants differs from that of the other revelations. However, it had been many years since the president of the Church had proclaimed a revelation.

11 President Harrison, for example, in his second annual message, pointed out that Woodruff did not denounce the doctrine of plural marriage, but merely advised abstinence from the practice, and that the belief that it was divinely-inspired remained unchanged. Harrison continued:

... Now, it is quite true that the law should not attempt to deal with the faith or belief of anyone; but it is quite another thing, and the only safe thing, so to deal with the Territory of Utah as that those who believe polygamy to be rightful shall not have the power to make it lawful. (Author's italics).

This statement is just another illustration of the general failure to make a meaningful distinction between belief and action in religious matters. James D. Richardson, Messages and Papers of the Presidents 1789-1897, IX (10 vols.; Washington: Government Printing Office, 1897), 118.

12 This fact was substantiated several times by the testimony of those who appeared before the Senate Committee on Privileges and Elections in the matter of seating Senator-elect Reed Smoot of Utah in 1905. Senate Doc. 486, 59th Cong., 1st Sess. (1905-1906). For example, see the testimony of Joseph F. Smith, president of the Mormon Church.


14 This, too, was expressed in testimony during the Smoot hearings. Senate Doc. 486, supra note 12.

15 Roberts, op. cit., supra note 6, 224-226.

16 Id., 222.

17 Senate Doc. 486, supra note 12, I, 153.
18 Stat. 1058 (1893).

19 Stat. 107 (1894). The hearings on statehood for Utah can be found in House Report No. 4156, 50th Cong., 2nd Sess. (1889).

20 Stat. 1257 (1894).

21 Utah Constitution, Art. III, Sec. 1.

22 Utah Laws 1892, at 5. In 1888, the Utah legislature finally passed a law regulating marriage, in which it prohibited marriages where one of the parties had an undivorced wife or husband living, however, no criminal penalties were attached. Utah Laws 1888, at 88.

23 Utah Constitution, Art. XXIV, Sec. 2.

24 The debate on the "Irrevocable Ordinance" can be found in Records of Utah Constitutional Convention 1895, II (2 vols.; Salt Lake City: Star Printing Company, 1898), 736-749.

25 Revised Statutes of Utah 1896, Sec. 4209-4212. The matter is discussed in Roberts, op. cit. supra note 6, 324-329.


27 Congressional Record, 56th Cong., 1st Sess. 1217 (1900).

28 Senate Doc. 486, supra note 12. Smoot was seated. Congressional Record, 59th Cong., 2nd Sess. 3429-3430 (1907).


30 Roberts, op. cit. supra note 6, 400-402.

31 98 U.S. 145 (1879).

32 The Court did mention Regina v. Wagstaff, which it admitted had no precedent value. Id., at 147.

The Writings of Thomas Jefferson, op. cit. supra note 33, 221.


44 U.S. (3 Haw.) 589 (1845).
45 80 U.S. (13 Wall.) 679 (1871).
46 Id., at 728.

For a discussion of state cases pertaining to this subject, see Carl Zellmann, "Religious Liberty in American Law," Selected Essays on Constitutional Law, Book 2: Limitations on Governmental Power (Chicago: The Foundation Press, Inc., 1938), 1108-1150. Much of the same material can be found in the same author's American Civil Church Law (New York: Columbia University, 1917), 9-37.

42 Donahoe v. Richards, 38 Maine 379, at 410 (1854).

43 Wither v. Jones, 17 N.Y.S. 491 (N.Y. Common Pleas, 1892). The court said that the word Mormon "imports a disparaging imputation, and . . . its necessary tendency is to expose the object of it to hatred, contempt and ridicule." Id., at 493.


The phrase is an abbreviation of Chief Justice Swayne's description of how the property of the Mormon Church had been viewed: "the whole lump appears to have been regarded as tainted with polygamy." United States v. Church of Jesus Christ of Latter-Day Saints, 9 Utah 310, at 325 (1892).
"An Old Lawyer" [Henry Reed], Bigamy and Polygamy. A Review of the Opinion of the Supreme Court of the United States, Rendered at the October Term, 1876, in the Case of George Reynolds, Plaintiff in Error, Vs. The United States, Defendant in Error (New York: 1879), 20-21.

In a review of recent Utah cases involving the Fundamentalists, one commentator has observed:

It is possible that the polygamists could more successfully be dealt with if no effort were made to enforce the anti-polygamy laws. . . . [I]f Fundamentalist families were allowed to relax their constant vigilance and to live freely in the community they would be more likely to absorb the culture of the community. Their children would associate with others and tend to conform to the general pattern of thought and behavior. It is certainly open to argument, whether polygamists are hindered or helped by prosecution.

APPENDIX A


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

SEC. 2. And be it further enacted, That the following ordinance of the provisional government of the State of Deseret, so called, namely: "An ordinance incorporating the Church of Jesus Christ of Latter Day Saints," passed February eight, in the year eighteen hundred and fifty-one, and adopted, reenacted, and made valid by the governor and legislative assembly of the Territory of Utah by an act passed January nineteen, in the year eighteen hundred and fifty-five, entitled "An act in relation to the compilation and revision of the laws and resolutions in force in Utah Territory, their publication, and distribution," and all other acts and parts of acts heretofore passed by the said legislative assembly of the Territory of Utah, which establish, support, maintain, shield, or countenance polygamy, be, and the same hereby are, disapproved and annulled: Provided, That this act shall be so limited and construed as not to affect or interfere with the right of property legally
acquired under the ordinance heretofore mentioned, nor with the right "to worship God according to the dictates of conscience," but only to annul all acts and laws which establish, maintain, protect, or countenance the practice of polygamy, evasively called spiritual marriage, however disguised by legal or ecclesiastical solemnities, sacraments, ceremonies, consecrations, or other contrivances.

SEC. 3. And be it further enacted, That it shall not be lawful for any corporation or association for religious or charitable purposes to acquire or hold real estate in any Territory of the United States during the existence of the territorial government of a greater value than fifty thousand dollars; and all real estate acquired or held by any such corporation or association contrary to the provisions of this act shall be forfeited and escheat to the United States; Provided, That existing vested rights in real estate shall not be impaired by the provisions of this section.

APPROVED, July 1, 1862.
APPENDIX B


Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section fifty-three hundred and fifty-two of the Revised Statutes of the United States be, and the same is hereby, amended so as to read as follows, namely:

"Every person who has a husband or wife living who, in a Territory or other place over which the United States have exclusive jurisdiction, hereafter marries another, whether married or single, and any man who hereafter simultaneously, or on the same day, marries more than one woman, in a Territory or other place over which the United States have exclusive jurisdiction, is guilty of polygamy, and shall be punished by a fine of not more than five hundred dollars and by imprisonment for a term of not more than five years; but this section shall not extend to any person by reason of any former marriage whose husband or wife by such marriage shall have been absent for five successive years, and is not known to such person to be living, and is believed by such person to be dead, nor to any person by reason of any former marriage which shall have been dissolved by a valid decree of a competent court, nor to any person by reason of any former marriage which shall have been pronounced void by a valid decree of a competent court, on the ground of nullity of the marriage contract."

SEC. 2. That the foregoing provisions shall not affect the prosecution or punishment of any offense already committed against the section amended by the first section of this act.

SEC. 3. That if any male person, in a Territory or other place over which the United States have exclusive jurisdiction, hereafter cohabits with more than one woman, he shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not more than three hundred dollars, or by imprisonment for not more than six months, or by both said punishments, in the discretion of the court.
SEC. 4. That counts for any or all of the offenses named in sections one and three of this act may be joined in the same information or indictment.

SEC. 5. That in any prosecution for bigamy, polygamy, or unlawful cohabitation, under any statute of the United States, it shall be sufficient cause of challenge to any person drawn or summoned as a jurymen or taleman, first, that he is or has been living in the practice of bigamy, polygamy, or unlawful cohabitation with more than one woman, or that he is or has been guilty of an offense punishable by either of the foregoing sections, or by section fifty-three hundred and fifty-two of the Revised Statutes of the United States, or the act of July first, eighteen hundred and sixty-two, entitled "An act to punish and prevent the practice of polygamy in the Territories of the United States and other places, and disapproving and annulling certain acts of the legislative assembly of the Territory of Utah", or, second, that he believes it right for a man to have more than one living and undivorced wife at the same time, or to live in the practice of cohabitation with more than one woman; and any person appearing or offered as a juror or taleman, and challenged on either of the foregoing grounds, may be questioned on his oath as to the existence of any such cause of challenge, and other evidence may be introduced bearing upon the question raised by such challenge; and this question shall be tried by the court. But as to the first ground of challenge before mentioned, the person challenged shall not be bound to answer if he shall say upon his oath that he declines on the ground that his answer may tend to criminate himself; and if he shall answer as to said first ground, his answer shall not be given in evidence in any criminal prosecution against him for any offense named in sections one or three of this act; but if he declines to answer on any ground, he shall be rejected as incompetent.

SEC. 6. That the President is hereby authorized to grant amnesty to such classes of offenders guilty of bigamy, polygamy, or unlawful cohabitation, before the passage of this act, on such conditions and under such limitations as he shall think proper; but no such amnesty shall have effect unless the conditions thereof shall be complied with.

SEC. 7. That the issue of bigamous or polygamous marriages, known as Merma marriages, in cases in which such marriages have been solemnized according to the ceremonies of the Merma sect, in any Territory of the United States, and such issue shall have been born before the first day of January, anno Domini eighteen hundred and eighty-three, are hereby legitimated.

SEC. 8. That no polygamist, bigamist, or any person cohabitating with more than one woman, and no woman cohabiting with any of the persons described as aforesaid in this section,
in any Territory or other place over which the United States have exclusive jurisdiction, shall be entitled to vote at any election held in any such Territory or other place, or be eligible for election or appointment to or be entitled to hold any office or place of public trust, honor, or emolument in, under, or for any such Territory or place, or under the United States.

SEC. 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 returning 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, not more than three of whom shall be members of one political party; and a majority of whom shall be a quorum. The members of said board so appointed by the President shall each receive a salary at the rate of three thousand dollars per annum, and shall continue in office until the legislative assembly of said Territory shall make provision for filling said offices as herein authorized. The Secretary of the Territory shall be the secretary of said board, and keep a journal of its proceedings, and attest the action of said board under this section. The canvass and return of all the votes 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; but each house of such assembly, after its organisation, shall have power to decide upon the elections and qualifications of its members. And at, or after the first meeting of said legislative assembly whose members shall have been elected and returned according to the provisions of this act, said legislative assembly may make such laws, conformable to the organic act of said Territory and not inconsistent with other laws of the United States, as it shall deem proper concerning the filling of the offices in said Territory declared vacant by this act.

Approved, March 22, 1882.
APPENDIX C


Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,
SEC. 1. That in any proceeding or examination before a grand jury, a judge, justice, or a United States commissioner, or a court, in any prosecution for bigamy, polygamy, or unlawful cohabitation, under any statute of the United States, the lawful husband or wife of the person accused shall be a competent witness, and may be called, but shall not be compelled to testify in such proceeding, examination, or prosecution without the consent of the husband or wife, as the case may be; and such witness shall not be permitted to testify as to any statement or communication made by either husband or wife to each other, during the existence of the marriage relation, deemed confidential at common law.

SEC. 2. That in any prosecution for bigamy, polygamy, or unlawful cohabitation, under any statute of the United States, whether before a United States commissioner, justice, judge, a grand jury, or any court, an attachment for any witness may be issued by the court, judge, or commissioner, without a previous subpoena, compelling the immediate attendance of such witness, when it shall appear by oath or affirmation, to the commissioner, justice, judge, or court, as the case may be, that there is reasonable ground to believe that such witness will unlawfully fail to obey a subpoena issued and served in the usual course in such cases; and in such case the usual witness fee shall be paid to such witness so attached: Provided, That the person so attached may at any time secure his or her discharge from custody by executing a recognizance with sufficient surety, conditioned for the appearance of such person at the proper time, as a witness in the cause or proceeding wherein the attachment may be issued.

SEC. 3. 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.

SEC. 4. That if any person related to another person within and not including the fourth degree of consanguinity computed according to the rules of the civil law, shall marry or cohabit with, or have sexual intercourse with such other so related person, knowing her or him to be within said degree of relationship, the person so offending shall be deemed guilty of incest, and, on conviction thereof, shall be punished by imprisonment in the penitentiary not less than three years and not more than fifteen years.

SEC. 5. That if an unmarried man or woman commit fornication, each of them shall be punished by imprisonment not exceeding six months, or by fine not exceeding one hundred dollars.

SEC. 6. That all laws of the legislative assembly of the Territory of Utah which provide that prosecutions for adultery can only be commenced on the complaint of the husband or wife are hereby disapproved and annulled, and all prosecutions for adultery may hereafter be instituted in the same way that prosecutions for other crimes are.

SEC. 7. That commissioners appointed by the supreme court and district courts in the Territory of Utah shall possess and may exercise all the powers and jurisdiction that are or may be possessed or exercised by justices of the peace in said Territory under the laws thereof, and the same powers conferred by law on commissioners appointed by circuit courts of the United States.

SEC. 8. That the marshal of said Territory of Utah, and his deputies, shall possess and may exercise all the powers in executing the laws of the United States or of said Territory, possessed and exercised by sheriffs, constables, and their deputies as peace officers; and each of them shall cause all offenders against the law, in his view, to enter into recognizance to keep the peace and to appear at the next term of the court having jurisdiction of the case, and to commit to jail in case of failure to give such recognizance. They shall quell and suppress assaults and batteries, riots, routs, affrays, and insurrections.

SEC. 9. That every ceremony of marriage, or in the nature of a marriage ceremony, of any kind, in any of the Territories of the United States, whether either or both or more of the parties to such ceremony be lawfully competent to be the subjects of such marriage or ceremony or not, shall be certified by a certificate stating the fact and nature of such ceremony, the full names of each of the parties concerned, and the full name of every officer, priest, and person, by whatever style or designation called
or known, in any way taking part in the performance of such
ceremony, which certificate shall be drawn up and signed by
the parties to such ceremony and by every officer, priest,
and person taking part in the performance of such ceremony,
and shall be by the officer, priest, or other person solemn-
izing such marriage or ceremony filed in the office of the
probate court, or, if there be none, in the office of court
having probate powers in the county or district in which
such ceremony shall take place, for record, and shall be
immediately recorded, and be at all times subject to inspect-
ion as other public records. Such certificate, or the
record thereof, or a duly certified copy of such record,
shall be prima facie evidence of the facts required by this
act to be stated therein, in any proceeding, civil or criminal,
in which the matter shall be drawn in question. Any person
who shall willfully violate any of the provisions of this sec-
tion shall be deemed guilty of a misdemeanor, and shall, on
conviction thereof, be punished by a fine of not more than
one thousand dollars, or by imprisonment not longer than two
years, or by both said punishments, in the discretion of the
court.

SEC. 10. That nothing in this act shall be held to
prevent the proof of marriages, whether lawful or unlawful,
by any evidence now legally admissible for that purpose.

SEC. 11. That the laws enacted by the legislative
assembly of the Territory of Utah which provide for or
recognize the capacity of illegitimate children to inherit
or to be entitled to any distributive share in the estate
of the father of any such illegitimate child are hereby
disapproved and annulled; and no illegitimate child shall
hereafter be entitled to inherit from his or her father or
to receive any distributive share in the estate of his or
her father: Provided, That this section shall not apply to
any illegitimate child born within twelve months after the
passage of this act, nor to any child made legitimate by
the seventh section of the act entitled "An act to amend
section fifty-three hundred and fifty-two of the Revised
Statutes of the United States, in reference to bigamy, and
for other purposes", approved March twenty-second, eighteen
hundred and eighty-two.

SEC. 12. That the laws enacted by the legislative
assembly of the Territory of Utah conferring jurisdiction
upon probate courts, or the judges thereof, or any of them,
in said Territory, other than in respect of the estates of
deceased persons, and in respect of the guardianship of the
persons and property of infants, and in respect of the
persons and property of persons not of sound mind, are
hereby disapproved and annulled; and no probate court or
judge of probate shall exercise any jurisdiction other than
in respect of the matters aforesaid, except as a member of
a county court; and every such jurisdiction so by force of
this act withdrawn from the said probate courts or judges
shall be had and exercised by the district courts of said Territory respectively.

SEC. 13. That it shall be the duty of the Attorney-General of the United States to institute and prosecute proceedings to forfeit and escheat to the United States the property of corporations obtained or held in violation of section three of the act of Congress approved the first day of July, eighteen hundred and sixty-two, entitled "An act to punish and prevent the practice of polygamy in the Territories of the United States and other places, and disapproving and annulling certain acts of the legislative assembly of the Territory of Utah", or in violation of section eighteen hundred and ninety of the Revised Statutes of the United States; and all such property so forfeited and escheated to the United States shall be disposed of by the Secretary of the Interior, and the proceeds thereof applied to the use and benefit of the common schools in the Territory in which such property may be: Provided, That no building, or the grounds appurtenant thereto, which is held and occupied exclusively for purposes of the worship of God, or parsonage connected therewith, or burial ground shall be forfeited.

SEC. 14. That in any proceeding for the enforcement of the provisions of law against corporations or associations acquiring or holding property in any Territory of the United States in excess of the amount limited by law, the court before which such proceeding may be instituted shall have power in a summary way to compel the production of all books, records, papers, and documents of or belonging to any trustee or person holding or controlling or managing property in which such corporation may have any right, title, or interest whatever.

SEC. 15. That all laws of the legislative assembly of the Territory of Utah, or of the so-called government of the State of Deseret, creating, organizing, amending, or continuing the corporation or association called the Perpetual Emigrating Fund Company 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; and it shall not be lawful for the legislative assembly of the Territory of Utah to create, organize, or in any manner recognize any such corporation or association, or to pass any law for the purpose of or operating to accomplish the bringing of persons into the said Territory for any purpose whatsoever.

SEC. 16. That it shall be the duty of the Attorney-General of the United States to cause such proceedings to be taken in the supreme court of the Territory of Utah as shall be proper to carry into effect the provisions of the preceding section, and pay the debts and to dispose of the property and assets of said corporation according to law.
Said property and assets, in excess of the debts and the amount of any lawful claims established by the court against the same, shall escheat to the United States, and shall be taken, invested, and disposed of by the Secretary of the Interior, under the direction of the President of the United States, for the benefit of common schools in said Territory.

SEC. 17. 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. That it shall be the duty of the Attorney-General of the United States to cause such proceedings to be taken in the supreme court of the Territory of Utah as shall be proper to execute the foregoing provisions of this section and to wind up the affairs of said corporation conformably to law; and in such proceedings the court shall have power, and it shall be its duty, to make such decree or decrees as shall be proper to effectuate the transfer of the title to real property now held and used by said corporation for places of worship, and parsonages connected therewith, and burial grounds, and of the description mentioned in the proviso to section thirteen of this act and in section twenty-six of this act, to the respective trustees mentioned in section twenty-six of this act; and for the purposes of this section said court shall have all the powers of a court of equity.

SEC. 18. (a) A widow shall be endowed of third part of all the lands whereof her husband was seized of an estate of inheritance at any time during the marriage unless she shall have lawfully released her right thereto.

(b) The widow of any alien who at the time of his death shall be entitled by law to hold any real estate, if she be an inhabitant of the Territory at the time of such death, shall be entitled to dower of such estate in the same manner as if such alien had been a native citizen.

(c) If a husband seized of an estate of inheritance in lands exchanges them for other lands, his widow shall not have dower of both, but shall make her election to be endowed of the lands given or of those taken in exchange; and if such election be not evinced by the commencement of proceedings to recover her dower of the lands given in exchange within one year after the death of her husband, she shall be deemed to have elected to take her dower of the lands received in exchange.
(d) When a person seized of an estate of inheritance in lands shall have executed a mortgage, or other conveyance in the nature of mortgage, of such estate, before marriage, his widow shall nevertheless be entitled to dower out of the lands mortgaged or so conveyed, as against every person except the mortgagee or grantee in such conveyance and those claiming under him.

(e) Where a husband shall purchase lands during coverture, and shall at the same time execute a mortgage, or other conveyance in the nature of mortgage, of his estate in such lands to secure the payment of the purchase-money, his widow shall not be entitled to dower out of such lands, as against the mortgagee or grantee in such conveyance or those claiming under him, although she shall not have united in such mortgage; but she shall be entitled to her dower in such lands as against all other persons.

(f) Where in such case the mortgagee, or such grantee or those claiming under him, shall, after the death of the husband of such widow, cause the land mortgaged or so conveyed to be sold, either under a power of sale contained in the mortgage or such conveyance or by virtue of the decree of a court if any surplus shall remain after payment of the moneys due on such mortgage or such conveyance, and the costs and charges of the sale, such widow shall nevertheless be entitled to the interest or income of the one-third part of such surplus for her life, as her dower.

(g) A widow shall not be endowed of lands conveyed to her husband by way of mortgage unless he acquire an absolute estate therein during the marriage period.

(h) In case of divorce dissolving the marriage contract for the misconduct of the wife, she shall not be endowed.

SEC. 19. That hereafter the judge of probate in each county within the Territory of Utah provided for by the existing laws thereof shall be appointed by the President of the United States, by and with the advice and consent of the Senate; and so much of the laws of said Territory as provide for the election of such judge by the legislative assembly are hereby disapproved and annulled.

SEC. 20. That it shall not be lawful for any female to vote at any election hereafter held in the Territory of Utah for any public purpose whatever, and no such vote shall be received or counted or given effect in any manner whatever; and any and every act of the legislative assembly of the Territory of Utah providing for or allowing the registration or voting by females is hereby annulled.

SEC. 21. That all laws of the legislative assembly of the Territory of Utah which provide for numbering or
identifying the votes of the electors at any election in said Territory are hereby disapproved and annulled; but the foregoing provision shall not preclude the lawful registration of voters, or any other provisions for securing fair elections which do not involve the disclosure of the candidates for whom any particular elector shall have voted.

SEC. 22. That the existing election districts and apportionments of representation concerning the members of the legislative assembly of the Territory of Utah are hereby abolished; and it shall be the duty of the governor, Territorial secretary, and the Board of Commissioners mentioned in section nine of the act of Congress approved March twenty-second, eighteen hundred and eighty-two 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", in said Territory, forthwith to redistrict said Territory, and apportion representation in the same in such manner as to provide, as nearly as may be, for an equal representation of the people (excepting Indians not taxed), being citizens of the United States, according to numbers, in said legislative assembly, and to the number of members of the council and house of representatives, respectively, as now established by law; and a record of the establishment of such new districts and the apportionment of representation thereto shall be made in the office of the secretary of said Territory, and such establishment and representation shall continue until Congress shall otherwise provide; and no persons other than citizens of the United States otherwise qualified shall be entitled to vote at any election in said Territory.

SEC. 23. That the provisions of section nine of said act approved March twenty-second, eighteen hundred and eighty-two, in regard to registration and election officers, and the registration of voters, and the conduct of elections, and the powers and duties of the Board therein mentioned, shall continue and remain operative until the provisions and laws therein referred to be made and enacted by the legislative assembly of said Territory of Utah shall have been made and enacted by said assembly and shall have been approved by Congress.

SEC. 24. That every male person twenty-one years of age resident in the Territory of Utah shall, as a condition precedent to his right to register or vote at any election in said Territory, take and subscribe an oath or affirmation, before the registration officer of his voting precinct, that he is over twenty-one years of age, and has resided in the Territory of Utah for six months then last passed and in the precinct for one month immediately preceding the date thereof, and that he is a native-born (or naturalized, as the case may be) citizen of the United States, and further state in such oath or affirmation his full name, with his age,
place of business, his status, whether single or married, and, if married, the name of his lawful wife, and that he will support the Constitution of the United States and will faithfully obey the laws thereof, and especially will obey the act of Congress approved March twenty-second, eighteen hundred and eighty-two, 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," and will also obey this act in respect of the crimes in said act defined and forbidden, and that he will not, directly or indirectly, aid or abet, counsel or advise, any other person to commit any of said crimes. Such registration officer is authorized to administer said oath or affirmation; and all such oaths or affirmations shall be by him delivered to the clerk of the probate court of the proper county, and shall be deemed public records therein. But if any election shall occur in said Territory before the next revision of the registration lists as required by law, the said oath or affirmation shall be administered by the presiding judge of the election precinct on or before the day of election. As a condition precedent to the right to hold office in or under said Territory, the officer, before entering on the duties of his office, shall take and subscribe an oath or affirmation declaring his full name, with his age, place of business, his status, whether married or single, and, if married, the name of his lawful wife, and that he will support the Constitution of the United States and will faithfully obey the laws thereof, and especially will obey the act of Congress approved March twenty-second, eighteen hundred and eighty-two, 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," and will also obey this act in respect of the crimes in said act defined and forbidden, and that he will not, directly or indirectly, aid or abet, counsel or advise, any other person to commit any of said crimes; which oath or affirmation shall be recorded in the proper office and indorsed on the commission or certificate of appointment. All grand and petit jurors in said Territory shall take the same oath or affirmation, to be administered, in writing or orally, in the proper court. No person shall be entitled to vote in any election in said Territory, or be capable of jury service, or hold any office of trust or emolument in said Territory who shall not have taken the oath or affirmation aforesaid. No person who shall have been convicted of any crime under this act, or under the act of Congress aforesaid approved March twenty-second, eighteen hundred and eighty-two, or who shall be a polygamist, or who shall associate or cohabit polygamously with persons of the other sex, shall be entitled to vote in any election in said Territory, or be capable of jury service, or to hold any office of trust or emolument in said Territory.
SEC. 25. That the office of Territorial superintendent of district schools created by the laws of Utah is hereby abolished; and it shall be the duty of the supreme court of said Territory to appoint a commissioner of schools, who shall possess and exercise all the powers and duties heretofore imposed by the laws of said Territory upon the Territorial superintendent of district schools, and who shall receive the same salary and compensation, which shall be paid out of the treasury of said Territory; and the laws of the Territory of Utah providing for the method of election and appointment of such Territorial superintendent of district schools are hereby suspended until the further action of Congress shall be had in respect thereto. The said superintendent shall have power to prohibit the use in any district school of any book of a sectarian character or otherwise unsuitable. Said superintendent shall collect and classify statistics and other information respecting the district and other schools in said Territory, showing their progress, the whole number of children of school age, the number who attend school in each year in the respective counties, the average length of time of their attendance, the number of teachers and the compensation paid to the same, the number of teachers who are Mormons, the number who are so-called gentiles, the number of children of Mormon parents and the number of children of so-called gentile parents, and their respective average attendance at school; all of which statistics and information shall be annually reported to Congress, through the governor of said Territory and the Department of the Interior.

SEC. 26. That all religious societies, sects, and congregations shall have the right to have and to hold, through trustees appointed by any court exercising probate powers in a Territory, only on the nomination of the authorities of such society, sect, or congregation, so much real property for the erection or use of houses of worship, and for such parsonages and burial grounds as shall be necessary for the convenience and use of the several congregations of such religious society, sect, or congregation.

SEC. 27. That all laws passed by the so-called State of Deseret and by the legislative assembly of the Territory of Utah for the organization of the militia thereof or for the creation of the Nauvoo Legion are hereby annulled, and declared of no effect; and the militia of Utah shall be organized and subjected in all respects to the laws of the United States regulating the militia in the Territories; Provided, however, That all general officers of the militia shall be appointed by the governor of the Territory, by and with the advice and consent of the council thereof. The legislative assembly of Utah shall have power to pass laws for organising the militia thereof, subject to the approval of Congress.

Received by the President, February 19, 1887.
[NOTE BY THE DEPARTMENT OF STATE.—] The foregoing act having been presented to the President of the United States for his approval, and not having been returned by him to the house of Congress in which it originated within the time prescribed by the Constitution of the United States, has become a law without his approval.]
**TABLE OF CASES**


In re Barton, 6 Utah 264, 21 Pac. 998 (1880).

Bassett v. United States, 137 U.S. 496 (1890).


Certain Real Estate known as the Gardo House v. United States; United States v. Certain Real Estate known as the Gardo house; Certain Real Estate known as the Church Farm v. United States; Certain Real Estate known as the Coal Lands v. United States; United States v. Certain Real Estate known as the Tithing Yard and Offices, 163 U.S. 680 (1896).

Clawson v. United States, 113 U.S. 143 (1885).

Clawson v. United States, 114 U.S. 477 (1885).


In re Estate of Thomas Cope, 7 Utah 65, 24 Pac. 677 (1890).


Davis v. Beason, 133 U.S. 333 (1890).


Donahoe v. Richards, 38 Maine 379 (1854).


First National Bank v. Kinner, 1 Utah 100 (1873).

Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810).


In re Estate of George Handley, 7 Utah 49, 24 Pac. 673 (1890).

In re Belle Harris, 4 Utah 5, 5 Pac. 129 (1884).

Ex parte Hester Hendrickson, 6 Utah 3, 21 Pac. 396 (1889).

Innis v. Bolton, 2 Idaho (Hasb.) 442, 17 Pac. 264 (1888).

Kimball v. Richards (not reported).


The Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1 (1890).

The Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States, 140 U.S. 665 (1891).

In re Maughan, 6 Utah 167, 21 Pac. 1088 (1889).

McKane v. Durston, 153 U.S. 684 (1894).

Miles v. United States, 103 U.S. 304 (1880).

Murphy v. Ramsey and others, Pratt v. Ramsey and others,

Ex parte Nielsen, 131 U.S. 176 (1889).

Crr v. McAllister (not reported).

People v. Chalmers, 5 Utah 201, 14 Pac. 131 (1887).

People v. Green, 1 Utah 11 (1856?).

People v. Hampton, 4 Utah 258, 9 Pac. 508 (1886).

People v. Hopt, 3 Utah 396, 4 Pac. 250 (1884).


In the Matter of the Estate of Orson Pratt, 7 Utah 278, 26 Pac. 576 (1891).
Reynolds v. United States, 98 U.S. 145 (1879).
Shepherd v. Grimmett, 3 Idaho (Hasb.) 403, 31 Pac. 793 (1892).
Ex parte Smith, 22 Fed. Cas. 373 (No.12,968) (C.C.D.Ill., 1843).
Snow v. United States, 118 U.S. 346 (1886).
In re Snow, 120 U.S. 274 (1887).
Territory v. Evans, 2 Idaho (Hasb.) 651, 23 Pac. 232 (1890).
United States v. Bromley, 4 Utah 498, 11 Pac. 619 (1886).
United States v. Brown, 6 Utah 115, 21 Pac. 461 (1889).
United States v. Cannon, 4 Utah 122, 7 Pac. 369 (1885).
United States v. Christensen, 7 Utah 26, 24 Pac. 618 (1890).
United States v. Christofferson, 2 Ariz. 29, 8 Pac. 295 (1885); 2 Ariz. 127, 11 Pac. 480 (1886).
United States v. Church Coal Lands, 9 Utah 288, 34 Pac. 60 (1893).
United States v. Church Farm, 9 Utah 289, 34 Pac. 60 (1893).
United States v. Church of Jesus Christ of Latter-Day Saints, 5 Utah 361, 15 Pac. 473 (1887).
United States v. Church of Jesus Christ of Latter-Day Saints, 5 Utah 394, 16 Pac. 723 (1888).
United States v. Church of Jesus Christ of Latter-Day Saints, 5 Utah 538, 18 Pac. 35 (1888).
United States v. Church of Jesus Christ of Latter-Day Saints, 6 Utah 9, 21 Pac. 503, 524 (1889).
United States v. Church of Jesus Christ of Latter-Day Saints, 8 Utah 310, 31 Pac. 436 (1892).
United States v. Clark, 5 Utah 226, 14 Pac. 288 (1887).
United States v. Clark, 6 Utah 120, 21 Pac. 463 (1889).
United States v. Clawson, 4 Utah 34, 5 Pac. 689 (1885).
United States v. Cozzens, 2 Idaho (Husb.) 486, 21 Pac. 409 (1889).
United States v. Cutler, 5 Utah 608, 19 Pac. 145 (1888).
United States v. Gardo House and Historian Office, 9 Utah 285, 34 Pac. 59 (1893).
United States v. Groesbeck, 4 Utah 487, 11 Pac. 542 (1886).
United States v. Harris, 5 Utah 436, 17 Pac. 75 (1888).
United States v. Harris, 5 Utah 621, 19 Pac. 197 (1888).
United States v. Kemp, 2 Ariz. 29, 8 Pac. 295 (1885); 2 Ariz. 127, 11 Pac. 480 (1886).
United States v. Kershaw, 5 Utah 618, 19 Pac. 194 (1888).
United States v. Kirkwood, 5 Utah 123, 13 Pac. 234 (1886).
United States v. Kuntze, 2 Idaho (Husb.) 480, 21 Pac. 407 (1889).
United States v. Langford, 2 Idaho (Husb.) 561, 21 Pac. 409 (1889).
United States v. The Late Corporation of the Church of Jesus Christ of Latter-Day Saints, 150 U.S. 145 (1893).
United States v. Miles, 2 Utah 19 (1879).
United States v. Musser, 4 Utah 153, 7 Pac. 389 (1885).
United States v. Peay, 5 Utah 263, 14 Pac. 342 (1887).
United States v. Reynolds, 1 Utah 226 (1875).
United States v. Reynolds, 1 Utah 319 (1876).
United States v. Simpson, 4 Utah 227, 7 Pac. 257 (1885).
United States v. Smith, 5 Utah 232, 14 Pac. 291 (1887).
United States v. Snow, 4 Utah 280, 9 Pac. 501 (1886).
United States v. Snow, 4 Utah 295, 9 Pac. 686 (1886).
United States v. Snow, 4 Utah 313, 9 Pac. 697 (1886).
United States v. Tenney, 2 Ariz. 29, 8 Pac. 295 (1885); 2 Ariz. 127, 11 Pac. 472 (1886).

United States v. Tithing Yard and Offices, 9 Utah 273, 34 Pac. 55 (1893).

United States v. West, 7 Utah 437, 27 Pac. 84 (1891).


United States v. White, 4 Utah 499, 11 Pac. 570 (1886).


Wenner v. Smith, 4 Utah 238, 9 Pac. 293 (1886).


Wooley v. Watkins, 2 Idaho (Hasb.) 590, 22 Pac. 102 (1889).
BIBLIOGRAPHY

Public Documents--General

Arizona. Laws of Arizona 1885.

Arizona. Revised Statutes of Arizona 1887.

Idaho. Laws of Idaho 1890-1891

Idaho. Revised Statutes of Idaho 1887.


Missouri. Document Containing the Correspondence, Orders, Etc., in Relation to the Disturbances with the Mormons and the Evidence Given Before the Honorable Austin A. King, Judge of the Fifth Judicial Circuit of the State of Missouri. Published by order of the General Assembly. Fayette, Mo.: Boon's Lick Democrat, 1841.

Missouri. Laws of Missouri 1837, 1838.

Nevada. Laws of Nevada 1887.


U.S. Congressional Globe, 1840-1873.

U.S. Congressional Record, 1873-1896.

U.S. Constitution.


U.S. Revised Statutes (1875).

U.S. Statutes at Large. Vols. IX-XXIX.


Utah. Compiled Laws of Utah 1876.

Utah. Compiled Laws of Utah 1888.

Utah. Constitution.


Utah. Probate Court Records, Iron County, Utah, 1854-1876.


Utah. Reports of the Utah Commission. (Bound volume, Utah State Archives).

Utah. Revised Statutes of Utah 1898.


Utah. Utah Laws 1851-1896.

Public Documents—Congressional

House Doc. No. 22, 26th Cong., 2nd Sess. (1840).

Books


Baskin, R.N. Reminiscences of Early Utah. Salt Lake City: By the Author, 1914.


The Book of Mormon.


The Doctrine and Covenants.

Does the Bible Sanction Polygamy? Salt Lake City: Deseret News Steam Printing Establishment, 1877.


Gov. West and the Polygamists. Reported by Adam S. Patterson, Third Judicial District Reporter. (Original pamphlet, Utah Historical Society).


Howe, Eber D. History of Mormonism. Painesville, Ohio: By the Author, 1840. (Originally published in 1834 under the title Mormonism Unveiled).

Hunt, James H. *Mormonism: Embracing the Origin, Rise and Progress of the Sect, etc.* St. Louis: Ustich and Davies, 1844.

*The Inside of Mormonism. A Judicial Examination of the Endowment Oaths Administered in all the Mormon Temples, by the United States District Court for the Third Judicial District of Utah, to Determine Whether Membership in the Mormon Church is Consistent with Citizenship in the United States.* Salt Lake City: The Utah Americans, 1903.


Kenner, S.A. *Utah As It Is.* Salt Lake City: The Deseret News, 1904.


"An Old Lawyer" [Henry Reed]. A Review of the Opinion of the Supreme Court of the United States, Rendered at the October Term, 1878, in the Case of George Reynolds, Plaintiff in Error, vs. The United States, Defendant in Error. New York, 1879.


Spencer, Orson. Patriarchal Order, or Plurality of Wives. Liverpool: S.W. Richards, 1853.


Talmage, James E. A Study of the Articles of Faith. Salt Lake City: Church of Jesus Christ of Latter-day Saints, 1952.


Tullidge, Edward W. Life of Brigham Young. New York, 1887.


Tyler, Daniel. A Concise History of the Mormon Battalion in the Mexican War. (Salt Lake City?) 1881.

The Utah Pioneers. Salt Lake City: Deseret News Printing and Publishing Establishment, 1880.


Articles and Periodicals


Deseret News, 1850-1896.


Millennial Star (Manchester, England), May 19, 1852.


The Nauvoo Neighbor (Nauvoo, Illinois), 1843, 1844.


Smith, Herman C. "Mormon Troubles in Missouri," Missouri Historical Review, IV (July, 1910), 238-251.

Times and Seasons (Commerce and Nauvoo, Illinois), 1839-1846. ( Bound in two volumes, Utah Room, University of Utah library).

The Wasp (Nauvoo, Illinois), 1842, 1843.


Briefs and Transcripts of Record


Unpublished Material and Other Sources

"Early Records of Utah." Bancroft Collection MS, Bancroft Library, University of California at Berkeley. (Microfilm, Utah Historical Society).


The Proceedings of a Convention, Held at Carthage, in Hancock County, Ill.; on Tuesday and Wednesday, October 1st and 2nd, 1845. Published by order of the Convention. Quincy, Ill.: Quincy Whig Book and Job Office, 1845.

TITLE OF THESIS  The Mormons and the Law: The Polygamy Cases

Full Name  Orma Linford

Place and Date of Birth  Cedar City, Utah—April 10, 1935

Elementary and Secondary Education  Kaysville, Utah; Grade School; North Davis

Junior High School (Clearfield, Utah); Logan, Utah; High School

Colleges and Universities: Years attended and degrees

Utah State University, 1952-1956; B.S.

University of Wisconsin, 1956-1961; M.S.

Membership in Learned or Honorary Societies


Major Department  Political Science

Minor(s)  Law

Date  August 1, 1964  Signed  David Tolman

Professor in charge of thesis