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Rendered at the October Term, 1878,

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THE UNITED STATES, Defendant in Error.

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It is proposed, in the following paragraphs, to examine the decision of the Supreme Court of the United States, in the case of George Reynolds, plaintiff in error, *versus* the United States, defendant. Reynolds was indicted in the District Court for the Territory of Utah, charged with having married one Amelia Jane Schofield; the said defendant being then already married to Mary Ann Tuddenham. The indictment was under Section 5352 of the Revised Statutes; which is as follows:

"Every person having a husband or wife living who marries another, whether married or single, in a territory or other place over which the United States have exclusive jurisdiction, is guilty of bigamy, 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 is absent for five successive years, and is not known to such person to be living; nor to any person by reason of any former marriage which has been dissolved by the decree of a competent court; nor to any person by reason of any former marriage which has been pronounced void by the decree of a competent court, on the ground of nullity of the marriage contract."

The first question that arises under the judgment of the court, is in respect to the constitutionality of the statute upon which the indictment was predicated. All the authority which Congress possesses, or may lawfully exercise over the Territories, or over whatever they may include, either directly, or at the hands of the judiciary, is conferred by the third section of the fourth article of the Constitution; which is as follows:

"The 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."

The rules of legal construction are universal, their purpose being to direct in the ascertainment of the true meaning and intent of the instrument to which they are applied. There is not one class of canons of interpretation applicable to constitutional clauses, another to statutes, and still another, to private instruments; much less is there one class for one section or article of the Constitution, and another for another. Palpably, by the most plain and obvious rules of construction, the clause here considered has respect to the proprietary rights of the United States and to these alone. The inhabitants of Utah, of Wyoming or of Arizona, are not the territory of the United States; they are 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 has nothing whatever to do with the proprietary rights of the United States, unless upon the presumption that the people of the Territories are chattels of the nation, that they stand to the government in the relation of serfs, having no rights which it is under either legal or moral obligation to consider, or as apprentices whose personalities are merged in and absorbed by the body politic to which belongs the unsold residue of the land in the region they inhabit. It is a very violent presumption. There is nothing in the physical, the moral, or the intellectual character, or phenomena of the people of the Territories by which they may be distinguished from those of the States. There is nothing to indicate want of competency in them to the regulation of their own civil affairs. It is not to be believed that, taking their lives in their hands and going forth into the wilderness, to plant and build and lay the foundations of other increments to this broad republic, they, either consciously or unconsciously, divested themselves of those qualities which—unless our entire system of political ideas is a falsehood, and the principles upon which it was erected fallacies—are inseparable from humanity.

The framers of the Constitution were wise men. They had just come out of a struggle for civil freedom, and appreciated the force of the phrase "human liberty," more vividly, perhaps, than the statesmen who are their successors. Every word of the instrument was carefully studied; and especially those in which legislative power was bestowed. They would not have conferred upon Congress so extraordinary, so exceptional, so unprecedented an authority as that to determine the social order, and fix the domestic relations of the people of the United States, or any portion of the same, and to sanction its enactments by fines and imprisonments, in terms in which there was a shadow of equivocality. Admitting the possibility of the vestment, by a Constitution, of such power in a legislative body, nothing but words admitting of no other interpretation, and circumstances of the most portentous description would justify its exercise. When the framers of the Constitution wrote: "The 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," they did not mean "The 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." They knew, if the statesmen of the present day do not, that no authority placed in the hands of a body liable to be inflamed by popular bigotries, and swayed by transient fanaticisms could be more perilous, or more apt to be hastily and unjustly exercised, than the authority to dig beneath the civil state and tamper with the social basis upon which it is founded; and they intended to confer no such authority.

There is no ground for the assumption, that the statesmen of the centennial are any more sagacious or far-seeing than the statesmen of the revolutionary period. There is no warrant for the conceit that, in the presence of real or imaginary, civil, social or domestic exigencies, the Constitution may be expanded to mean, whatever, for the time being, a legislative majority think it would have meant if they had been entrusted with the making of it. There is no basis for the presumption that the inhabitants of the Territories are less competent to comprehend, or to make provision for their own civil, social or domestic needs, tastes or requirements, than the inhabitants of the States, or that Congress is any wiser in respect to the one than in respect to the other.

There was a time when, under the pressure of a ferocious fanaticism, it became fashionable to characterize the people of the Territories by the opprobrious title of "squatters," to regard them in the light of unlicensed intruders into the public domain—not

only without warrant, but in derogation of the common peace and dignity; and, under the name of "squatter sovereignty," to reprobate and ridicule the notion that such vermin, either by natural inheritance, or as elements of a republican commonwealth, could constitute the tenants of liberties other than such as Congress, in its clemency, permitted them to enjoy. In the inflated party literature of the period, they appeared as aliens—interlopers, having no right beyond that of naked existence, nor freedom of action except by the sufferance of federal authority.

The enactment of such statutes and the rendition of such judgments as those under consideration, indicate but too palpably the effect of this species of literature upon the minds of legislators and magistrates, as well as of the people. While copiously, in generalities, by congressional orations and judicial opinions, the stated phrases significant of the natural prerogatives of man are rehearsed, and the doctrine that the federal government is one of enumerated powers reiterated, the ideas which properly correspond with these generous maxims and sentiments seem to have passed out of the legislative and judicial memory; their places being practically occupied by the conceit that human rights are things of donation; that free-agency is a commodity of which Congress is the creator, or, at least the custodian, to confer or to reserve according to its own supreme and irresponsible will and pleasure. This is not the law of the land. It is not the liberty to obtain which the revolution was prosecuted. It is not the popular freedom which the Constitution was ordained to institutionize and conserve.

It does not appear, from the opinion of the court, whether or not the question of the constitutionality of the statute upon which the indictment was predicated, was raised by the counsel for the plaintiff in error. Its summary disposal, by the court, in the following sentences, would seem to indicate otherwise:

> "In our opinion," the Chief Justice remarks, "the statute immediately under consideration is within the legislative power of Congress. It is constitutional and valid as prescribing a rule of action for all those residing in the Territories and in all places over which the United States have exclusive control."

It is of no importance whether or not the question of constitutionality was raised by the counsel for the plaintiff in error. In a tribunal of last resort, in cases wherein action is predicated upon a statute, the constitutional question is never absent. Officially,

the court is the embodiment of the Constitution—especially created to reflect its spirit, give to its clauses just interpretation, and to stand a sentinel between the people and the law-making power, vigilant to ensure that, in its name, and under pretense of its authority, no fanatical wrong shall be inflicted, no flagrant injustice grow into a precedent, with its manifold progeny of errors and injuries.

The question before the court, it is reported, was argued mainly upon the proposition that the statute of 1862, is adverse to the principles of religious liberty as laid down in the following words, in the first constitutional amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Whether or not there is a religious question involved in the issue is immaterial to this inquiry.

Future generations of lawyers and legislators would, perhaps, have grown up wiser if the Supreme Court of the United States had found it convenient to cite the canons of interpretation whereunder a constitutional clause which contemplates only property, affords legitimate sanction to a statute which contemplates only persons. It is no trivial problem to be disposed of properly in less than half a dozen lines: by a naked dogma, without show of reason or of precedent. It is an important problem—not only in its present, but in its possible other connections: worthy the labors of the ablest intellects, of the profoundest philosopher and the most impartial publicist; and it is equally an unhappy reflection upon the character of the court, whether it did or did not comprehend its significance. Not so have the predecessors of the present bench treated questions of constitutional interpretation; and when a constitutional clause which contemplates only public property is held competent to sustain a statute which contemplates only private persons, there is a chasm to be bridged, for the accomplishment of which enterprise, no amount of constructive ingenuity can be more than sufficient.

It is an universal rule of interpretation, that grants of power are to be construed strictly. Every express grant carries with it the implication that no more is granted than is expressed. Concessions of authority are therefore limitations of authority. They mean that, before the concession there was no authority; from which it follows that there is none beyond what is conceded. It is not an admissible presumption, in the law, that the authors of an instrument left gaps which it devolves upon judges to supply. If

after empowering Congress to make all needful rules and regulations in respect to the public property, the Constitution had continued; "and Congress shall have no power to make rules and regulations in respect to private persons," the prohibition to interfere with the social and domestic relations of the people of the Territories, would, according to accepted causes of construction, have been no more distinct and palpable, no more a thing of which courts are bound to take notice, than it is at present.

The question here to be presented is one of morals. It is the most essential and fundamental of moral questions; that of the right of a system of social and domestic order, established by the consent of its factors, and in harmonious existence, to continue unsubverted by exterior force, though clothed with a color of authority. The question includes an inquiry into the ultimate law of human society; the substratum and sanction of all laws of convention—statutes and constitutions—and the basis of the social, domestic and industrial economies; in short, the unwritten common law of humanity. There is such a law. It is the law which mankind represent, not in their doctrines, theories, bigotries or sentimentalisms, but in their lives; it is the law of constitution and character, not of faith, dogma or opinion.

Philosophers, in all ages, have exercised their ingenuities in attempts to formulate and establish an absolute standard of moral quantities, and always without success; each fresh systematizer starting from the predicate, that all past efforts had proved abortive. It needs an extensive study of systems, of so called moral science, to comprehend the persistency of the inquest, and the variety of the conclusions to which different scholastics have arrived. Thus—for a few examples—Aquinas made the ultimate rule in morals to depend upon "the nature of things;" Scotus upon "the authority of God;" Hobbes upon "the authority of the state;" Puffendorff upon "right reason among men;" Cumberland upon "natural laws independent of experience;" Cudworth upon "the eternal and immortal distinction of right and and wrong in the mind of God;" Malebranche upon "the law of universal order as it eternally existed in the Divine reason;" Shaftesbury upon the "moral sense;" Wollaston upon "the truth of things;" Adam Clarke upon "the fitness of things;" Adam Smith upon "the principle of sympathy;" Hume upon "utility;" Le Rochefoucauld upon "interest;" Helvetius upon "self love;" Kant upon "the highest happiness;" Fichte upon

"the perpetual striving of the mind to realize its own nature;" Hegel upon "the universal will;" Edwards and Dwight upon "benevolence;" Hickok upon "an imperative of reason," and so on for quantity.

The reason for this diversity of opinion is, that no abstract standard of collective morality is practicable. Humanity, infinitely various, is only measurable by itself. The ultimate rule of the moral is the actual. The relations into which communities of human beings spontaneously settle, by virtue of their intrinsic affinities and gravities, and under the impulsion of their tastes, desires and necessities, is the right as regards such communities; and, being the right, is their fundamental law. In other words, the principle upon which society organizes itself is the organic principle of such society; and, as such, is paramount to every rule of convention or enactment.

Society is the spontaneous expression by the people of their common character in relations. It obtains, wherever there is humanity, its aspects determined by the common disposition. It comes into being unconventionally, and can only be dissolved, legitimately, by natural decay, illegitimately, by the intrusion of exterior force. It is the basis upon which civil government is founded; and to protect its order, minister to its needs and interpret and enforce its relations, are the conditions upon which the title of government to maintain an existence depends. Such relations are, therefore, the embodiments of its supreme law. Hence, whether or not, an abstract standard for the admeasurement of moral qualities is, in the nature of things, possible, with such appraisals government can have no concern; for it is not in order for the creature to sit in judgment upon the creator.

Government is the conventional expression of the civil character of a people in institutes—organic and statutory—and in administration. In respect to authenticity, it differs from society in this: that the latter is the voice of the inherent qualities—the instincts—of the people, which are constant; the former of their opinions, which are variable. *Mores*—modes, manners, morals—the words have all the same signification—are manifestations of the fixed and durable; as, on the other hand, constitutions, statutes, precedents, decrees and resolutions, are of the fleeting and temporary. The former are natural facts—the out-croppings of underlying truth: the latter artificial contrivances; like their authors, transitory. The dynamics of the moral are the ana-

logues of those of the material universe. As no stream can rise to a level higher than that of the fountain from which it flows, so no government can attain to an eminence in virtue superior to that occupied by its creators; and every claim to such transcendence only testifies how inadequately its ministers comprehend its principles and purposes, and how unfit they are to be entrusted with its authorities.

Even if it were, in the nature of things possible to endow a government with power to prescribe to its subjects the terms upon which to order their social and domestic relations, and to punish them in case of recusancy, every principle which is fundamental in a popular government would insist that such power should be exercised only in conformity with the will of the components of the body politic to be affected by such prescription. Any other rule than this is a rule of despotism. If Congress had the authority to enact statutes regulative of the personal relations of the people of the Territories, and should exercise such authority in any other way or to any other extent, than the people of the Territories would legislate for themselves, it would commit an act of absolutism more wild and mischievous than, upon their loyal subjects, any of those "effete dynasties of the old world," which are permitted to figure so extensively in the United States, on the day of the national harlequinade, ever attempted. There could be no course of reasoning presented, or line of precedents consistent with the principles of human right adduced, by which such an act could be justified or even excused.

But there is no such power. There can be none. No government ever possessed it. No people ever conferred it upon their government. No government, so far as history records, but that of the United States ever attempted its exercise. It is altogether without a precedent in the annals even of despotism. Nowhere but upon this continent, and here, under the pressure of a fanaticism that is as ignorant as it is conceited, and as irrational as it is inexorable, has the idea been conceived that it is the purpose and the duty of government to burrow beneath its own foundations and to disintegrate and re-order the basis upon which it was constructed. The dynamics of the moral are the analogues of those of the material universe. In the latter, the result would be the destruction of the edifice; can it be anything less than anarchy in the former?

The social condition is the common law of the land; a law which antedates and dominates every law of convention. It is

always present in all the tribunals where justice purports to be administered. Here was the problem which it devolved upon the supreme judiciary of the land to consider: A statute without a single example, purporting to outlaw the domestic relations of a people and to reprobate all who had entered into them; professedly deriving its sanction from a constitutional clause with which it had no congruity, opening a field of legislation and correspondingly of judicial service hitherto unoccupied; and many thousands of loyal citizens whose nuptial bonds, personal liberties, domestic rights, legitimacy and title to inherit, depended upon the decision. It was a problem requiring for its proper solution an analysis of the most fundamental of all laws—of the principles of social order, the source and fountain from which the government derives its existence and authority. 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. How will the court decide? How did it decide? Let it not be said that the magistrates of the judicature of last resort in this great republic, are swayed from their equilibriums by the fantastical clamors of silly women; or that they permit their reasons to be overcome by communistic harangues, delivered by well-dressed visionaries in lecture halls, or spouted by vulgar ruffians from the steps of public edifices; or that they accept the platform of some party as an authority superior to law or reason. But where, unless from one or another of these sources, they obtained the instructions upon which their four lines of dictum were predicated, it is hard to conceive.

Special customs, in matters of human intercourse; the customs of cities, boroughs, districts and villages, when they have become fixed by time, have always been respected by courts as the law of the region in which they obtain, whether or not there are general statutes of the realm or doctrines of the common law with which they are in conformity. The term "immemorial custom," is applied to that which, when shown to exist, is, in respect to the subject matter, the highest law. In old countries, where the origin of the custom, as well as of the people, is beyond the memory of the living—admitting of the presumption that the two had a common beginning—it is not, practically, incorrect. The rule is founded upon the idea that the custom is expository of the character of the inhabitancy; of which immemoriality is one of

the evidences. In a new country, as the United States, there are no customs of which it may, in strictness be said "the memory of man runneth not to the contrary," and, hence, here, the term is not a complete expression of the principle. Every custom which is coeval with the community in which it prevails complies with the spirit of the rule under which immemorial customs have, in all ages, been held as the law.

The custom of plural marriages—polygamy—had its beginning with the birth of the community within which it prevails. It is therefore, to every legal intent and purpose, an "immemorial custom." It is the fundamental law of that community, and, as such is entitled to be judicially regarded. Whether or not the point was presented in this form, in the arguments of the counsel, does not appear from the delivered opinion. It may be said that, in order to take advantage of the local custom, it is essential that it be specially pleaded. This, in civil cases, at *nisi prius*, is true in general. But in the case before the court, it was the custom itself, which constituted the basis of the litigation. It was a criminal proceeding, in which the question to be determined was: Has this particular custom a right to exist? The court knew what it was called upon to decide, and what it was deciding. It was not ignorant of the fact that, in determining the case of the plaintiff in error, it was dictating the future of thousands of men, women and children; decreeing whether or not, in legal contemplation, in time to come, the men of a great and orderly community, were to be counted criminal profligates, the women criminal prostitutes and the children nameless illegitimates.

The court had the question before it. Substantially, it was the question it decided. It was not an unimportant question. The difference between human happiness and human misery is a momentous difference—a difference as wide as the human mind has the capacity to conceive. The annals of litigation, throughout all the ages, may be searched in vain for another instance in which the alternative between happiness and misery, to so great a multitude of human beings, was immediately involved.

Between official and individual knowledge there is a debatable land free to judicial discretion. A court may know much that it does not know, and not know much that it knows. The court, in the case in question, may have preferred to be ignorant of the fact that the plaintiff in error was one of a large community, the legal status of whose members would be determined by the con-

clusion to which it should arrive. On the other hand, inferring from the tenor of the decision, the judges were not, by any means, ignorant of—what outside of judicial quarters, might pass for a related circumstance—that, infesting a region somewhere between the Mississippi and the Pacific, there is a band of miscreants, wicked beyond all who dwell elsewhere within the boundaries of christendom. Also that these interlopers, squatters upon the public domain—which they have the insolence to turn into fields and gardens, and to satisfy their unhallowed appetites with the produce of the same—have a religion, which is neither Methodism nor Presbyterianism, nor Episcopalianism, nor Baptism, nor Congregationalism, nor Lutheranism, nor Quakerism, nor any other of the isms or sub-isms which prevail in the other States and Territories; and which, therefore, is beyond description corrupt, ungodly and infamous, and must have been adopted through the direct instigation of the arch-enemy of mankind. Furthermore that these reprobates, in order that they might practice their unholy rites, without interruption by the good and pious—who constitute the remainder of the citizens of the republic—retired into the wilderness, a thousand miles from the abodes of civilization and christianity, and thereby became obnoxious, of evil example and a pregnant source of infidelity, misbelief and corruption to the people at large and to christians in particular; by these means implanting and instituting a national sin to the intense disgust of the Almighty, who may, any day, be expected, in punishment thereof, to descend in person, without notice, to wipe out and eradicate, without discrimination, old and young, righteous and wicked, not sparing even Congress, the President nor the Judiciary.

To fill to overflowing the cup of their abominations, these reprobates, it is understood, have malignantly taken to imitating the example of holy Jacob and David and Solomon, and multiplying their marriages. This proves them—as it did the said holy Jacob and David and Solomon and the saints and patriarchs of the elder dispensation—beyond hope vile and incorrigible. The notion—which is one of theirs—that every woman is entitled to the privilege of bearing legitimate children, is proof of their inherent licentiousness. The practice which they pursue of absorbing all the females of the community, so that none shall be left over for prostitution, demonstrates how utterly they are depraved. The idea which they entertain, that the fraction of a

husband with a home, is more wholesome for a woman than neither husband nor home, shows how destitute they are of all the finer feelings of humanity.

It is not to be wondered at, considering the circumstances, that every sentimental virgin of mature age in the land, no matter how distant from the scene of operations, feels her own virtue imperiled so long as such depravity is allowed to go unexterminated. It is not surprising that strait-laced members of Congress, who, at once, console themselves for the absence of wives left at home and set a laudable example of economy to their children, by having a mistress, who keeps herself, in each of the departments, should feel the urgent need of doing something signal, as well to drag the nation from the verge of the abyss into which it is preparing to plunge, as to demonstrate their own domestic loyalty, and their indelible hatred of every form of luxurious indulgence. The people of the United States do not appreciate how highly rectified their legislators are—how unsullied in mind and irreproachable in conduct; and it is well, perhaps, that they do not; for, if by any means, a view of such quantities of purity should come upon them unawares, a hasty demand for the services of a legion of coroners might be the result.

A relic of barbarism at a distance, and of which his sole knowledge is obtained through exaggerated rumors and statements which, coolly examined, would disprove themselves, is enough to stir to its lowest depths the soul of a philanthropist. The Mormons of Utah have had against them two uneasy classes, which do not in general co-operate; the orthodox pietistics to wit, and the unorthodox humanitarians. They are heathens to the one and to the other barbarians; and as the Mormons are obdurate in their sins, the only reformatory process equal to the exigency is their eradication. The members of these uneasy classes have votes; and, as beech-nuts to a bear, so votes to a demagogue. These are the instrumentalities through which clamors are raised; that which passes for public sentiment manufactured; fanaticisms inflamed, and unjust and barbarous statutes, creating artificial crimes and menacing their commission with savage penalties, enacted.

Without doubt the Judges of the Supreme Court had been properly informed of the existence and the enormities of this nest of reprobates; how the moral sense of the good people was outraged by their presence; what a plague-spot they were upon

the land; how all Christendom held its nose when they were mentioned, and how God was getting out of patience at the slow progress that was making in their extermination. Without doubt they felt a profound sense of the obligations they were under; not to human right or the principles of universal justice; not to the body corporate and politic known as the United States of America; not to the plaintiff in error or to those in like manner to be affected; not to themselves as individuals, whose names might be honored or disparaged in the future accordingly as their acts, tried by the talisman of time, should be judged wise or otherwise; but to popular sentiment. Congress had done its duty—placing the obnoxious under the ban of a common outlawry; the President had nobly responded to the enlightened spirit of the times—appointing judges warranted to be a terror to the evil-doers; the courts below had executed their mission with exemplary faithfulness—so ruling as to ensure conviction to the accused, and nothing remained but for the tribunal of last resort to manifest like allegiance to the laws of propriety; like respect for the amenities of civilization; like reverence for the Christian faith, and like adequacy to the situation, by crowning the work which the others had so felicitously begun. Did it prove recreant to the trust which had been reposed in its man-millinerism? Perish the unworthy suspicion! *Salus populi est suprema lex.* Are human rights or the principles of justice, or the maxims of jurisprudence, or the relations of society, or immemorial usages to be allowed to stand as impediments where a moral pestilence prevails, a plague-spot which threatens universal contamination is to be cauterized, and a crying national sin eradicated? The court did not falter—it did not even hesitate. Like a headsman whose daily use is in capital operations, it applied the white-hot branding-iron with a coolness which, in contrast with the calidity of the implement, was truly admirable.

In the foregoing, it is alleged that the Act of Congress of 1862 carries a falsehood upon its face. This needs an explanation, to which a few sentences will have to be devoted. Marriage is a domestic relation entered into by man and woman, by private contract, which, in Protestant countries, is called "civil," to distinguish it from the mode of its completion in Catholic countries, where it is regarded as a sacrament. The essence of the relation is its contract quality. Any two persons of different sexes, of suitable age and sound mind, may thus contract, and the agree-

ment is binding, according to its terms, upon the parties. The terms are fixed by the custom of the society in which the parties are included, and such custom is the law. In the United States and throughout Christendom, custom has affixed to the nuptial compact a life duration, and upon this basis it is legislatively protected and judicially defined and enforced. Except in the case of a single community, custom, in the United States, prescribes one wife at a time as the proper domestic allotment; and, accordingly, where such is the rule, the marital covenant is monogamous in its conditions. The husband promises to marry no other woman, the wife, to marry no other man; and this agreement is enforced under statutes which provide to annul fraudulent after-marriages, and to punish the perfidious party for the commission of a crime, for centuries known to criminal jurisprudence as "Bigamy."

Bigamy is a fraudulent after-marriage by a person having a wife or husband living and undivorced. The essence of the crime is wilful breach of an express contract, and fraud committed upon one or more innocent parties. It is a crime of perfidy, and, as such, is properly regarded with dread, and its perpetrator with repugnance. Between this felony and the polygamy in Utah, except in the naked fact of pluralism, there is not the remotest resemblance; and yet, in the act of Congress of 1862, the two are dishonestly confounded. The words of the act are as follows:

"Every person having a husband or wife living who marries another, whether married or single, in any Territory or other place over which the United States have jurisdiction, is guilty of bigamy."

It will be seen that the act describes polygamy, gives it a name which, for centuries, the criminal law has specifically affixed to an infamous offense to which it bears no likeness, and, as such menaces it with severe and disgraceful penalties. And, strange as it may seem, this misnomer—which would be ludicrous if it were inadvertent, but, being intentional, is cruel—is adopted by the Supreme Court of the United States, in a laborious attempt to find a sanction for the anomaly it seeks to establish.

The Judges of the Supreme Court of the United States are lawyers. All of them have the experience of years of practice at the bar, and several of them upon the bench before they attained to their present positions; and, without doubt are more or less conversant with criminal forms and definitions. They could not otherwise than have known that bigamy was a crime at common

law before it became a statutory offense; that its characteristic quality is the fraud in which it is committed; that neither in England nor in the United States, have bigamy and polygamy been legally regarded as allied acts; and that in the few States and Territories where the latter is defined and forbidden, it is treated as a misdemeanor distinct from the former; and yet there is throughout the opinion of the court a visibly painful effort to make it appear that the two are identical. Thus the court remarks:

"From that day"—1785—"to this, we think it may safely be said there never has been a time in any State of the Union where polygamy has not been an offense against society, cognizable by the civil courts, and punishable with more or less severity."

This is simply untrue. In not many of the States has polygamy been forbidden by statute; and in the most, if not in all, the punishable offenses are defined and the penalties prescribed by acts of the Legislature. In all the States and Territories bigamy, and, in several of them, by recent acts, polygamy is prohibited. It is not agreeable to witness the supreme judiciary of the Republic laying down the doctrine that it is one of the functions of civil government to prescribe the conditions upon which domestic and social order are to be maintained; for that is proof of ignorance of the principles upon which civil governments are founded It is still less agreeable to witness the same tribunal laboring to erect a criminal common law upon the basis of the acts of local legislatures; and this especially when such acts are the creatures of the imagination; for that is an indication of something more to be deprecated than ignorance.

"Marriage," says the court, "while, from its very nature, a sacred obligation, is nevertheless, in most civilized nations, a civil contract, and usually regulated by law." Whatever else it may be, marriage is a private contract, the legal status of which is not affected by sacred or sentimental considerations; nor do the ethical principles which apply to it differ from those which are applicable to other compacts upon mutual considerations. If the parties are of the proper sexes, the proper age, of sound mind and contracting disposition, the agreement is interpretable and—if untainted by fraud or deceit—binding in accordance with its conditions. One of these conditions usually is, that the parties shall live and cohabit together, so long as they both survive.

The right and the custom of contract antedates government, and is more authentic. A fundamental civil maxim forbids

government to do ought to impair the obligations of contracts. Statutes by which such obligations are enfeebled are pronounced invalid. The principle upon which the maxim is based includes the denial to legislatures of authority to do ought to diminish the free agency of the citizen in contracting. Therefore, by the same rule, statutes whose effect is to impair or diminish such free agency are unlawful. To the operation of this principle, there can be no valid reason why a marriage contract, untainted by fraud and entered into in conformity with the custom of the community wherein it is executed, should be held to constitute an exception. If such contract is, in any sense the basis of a "sacred obligation," so much the more reason why, especially after it has been consummated by cohabitation, secular hands should not be laid upon it to work its outlawry and dissolution. There are those who profess to have penetrated deeper than ordinary mortals into the counsels of heaven, and to have obtained clearer views of the divine will in respect to the duties and relations of life; but they are persons whose suggestions it is not safe for such as are appointed to administer justice to accept.

And here—assuming that the Bible is the revealed word of God, given to mankind for their instruction, by precept and by example—it is proper to inquire into its teachings in respect to marriage. "The chosen people of God," as the Bible relates, practised polygamy from the days of the founder of the race, Abraham—who was a polygamist; as they do to this day, in countries where polygamy is customary. Polygamy is recognized as lawful by the Levitical precepts. The example of the rulers of the land and the leaders of society was in its favor, and throughout the Old Testament, there is not a word in its condemnation or to its disparagement. In the Pauline Epistles of the New, it appears that the author—who believed the end of the world to be near at hand—was opposed to marriages; and except in exceptional cases, advised the believers against them. As a measure of precaution, however, he was of the opinion that a presbyter, or teacher of religion, should be a married man; or, as the not altogether candid translation expresses it, "the husband of one wife." It was, at the most, a special and limited dispensation in favor of the clergy—the reasons for which, in the light of modern experience, are too obvious to need explanation. By means of free interpretation and abundant inference, nevertheless, these five words have been discovered, by theoretical ecclesi-

astics and sentimental millenarians, to embody a vast code of doctrine, instruction and commandment against marital pluralism; wherein the extremest wrath of God is menaced against offenders, and the direst judgments suspended over those nations wherein it is permitted. This is simply absurd. And yet absurd as it is, it has served as the basis of a fiery fanaticism, a violent agitation and a bitter persecution, under the influence of which, a statute has been passed which, for heartless malignity, may search the books of the law in vain for a parallel.

This, however, is not all that the New Testament contains touching the marriage relation. Again and again in the Gospels —and this, be it remembered, in a polygamous country—is the permanency and the inviolability of the marriage relation affirmed. For one cause, and for one cause alone, could it be rightfully abrogated. This, if the author of Christianity—"the Head of the Church"—is to be regarded as its rightful law-giver, is the fundamental law of Christendom upon the subject. A marriage contract, a polygamous marriage contract, except upon a single ground—the adultery of the wife—is pronounced indissoluble by human agency; and this in terms so direct and distinct that to mistake their meaning or to break their force by interpretation is impossible. Why did not the Supreme Court of the United States, while pronouncing "marriage from its very nature a sacred obligation," take a moment to consider upon the conditions to a sacred obligation? Is the obligation of marriage only sacred as between the parties to the contract, while to legislative bodies and judicial courts, it is so profane and secular that, by a single flourish of the pen, and without an inquiry into the character or the will of their parties, thousands of marriage contracts may be annulled, and such parties outlawed and punished for having entered into them?

The decision of the court is broader in effect than, upon its face it appears. It is a rule of the law that power over a particular subject matter, once vested in a legislative body, is plenary, in respect to such subject matter. The authority to enact statutes to forbid plural marriages and to punish the parties to them, implies the authority to provide for the prosecution and punishment of all who, whenever married, continue to live in pluralism; and thus, by a single penal enactment, a whole loyal people, living in content and harmony, may be transformed into felons, their domesticities dismembered, a horde of helpless women turned home-

less upon the world, and a multitude of unoffending children bastardized. Nor are the fanatical men and silly women, who generate the force which manifests itself through such statutes and such decisions, content with what they have obtained; and Congress is flooded with petitions praying for such further legislation and more extreme measures, as that the representatives of the great national sin and last relic of barbarism shall have no resting place but in houses of correction, and thus the plague spot be removed from the land. This consequence was before the court when it rendered its decision. The court could not otherwise than have been aware of the legal effects of the decree it pronounced. For all the untold and indescribable misery that has resulted and that may result from past and future legislation upon the subject, it is responsible. Placed where it is, to interpose a firm and inflexible impediment to tides of popular passion and floods of sectarian and sentimental fanaticism, it has given way at the very time and the very spot when and where it should have been most steadfast and resolute; and has, thereby, not only missed a supreme opportunity, but has placed upon record an enduring testimonial of its inadequacy to the obligations of the trust it holds and the seat it occupies.

In one sense, at least, the marriage bond includes a sacred obligation. It is an alliance, the *status quo ante* of which cannot be restored by its annulment. This may be of little moment to the male, but it is of incalculable importance to the female party. She is made homeless. She is an outcast in the eye of the law which has made her a criminal; and in the estimate of society, is depreciated. If there can be a duty resting upon a court of justice more sacred than another, it is the duty to interpose and guard the helpless against the machinations of the malignant.

It may be said that courts, in laying down the law, are not bound to consider the consequences of their decisions. This may, in a sense, be true; but it is true also that courts, in determining how justice should be administered, will, if they do their duty, consider the consequences of a decision one way or another, as a means of finding out what is just. 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 the 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. It had no difficulty in discerning the wants of those whose interest in the matter was purely fantastical and visionary; it failed altogether to perceive the needs of those whose interests were vital and momentous. Its whole body was full of light, and warmed with sympathy toward such as were not, it was shrouded in darkness and chilled with austerity toward those who were to be ground to powder and trodden into the earth, as the consequence of its decree. 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 over to the executioner.

It does not follow because, in times of dominating ecclesiastical influence, and under the auspices of a church—which always discountenanced marriage, and surrounded it with arbitrary rules and restrictions; some of which still remain—the British parliament passed an act to prohibit and punish polygamy, in a country where there was no polygamy, that it is just for the Congress of the United States to enact statutes which, in effect, dissolve the marriages of a community where polygamy has obtained, and institute disorder through the outlawry of its domestic relations. Here is a difference so broad that it would seem as if no extraordinary exercise of judicial perspicacity were needed for its comprehension. The statute of James the First was simply *brutum fulmen*—a piece of harmless theological thunder. It dissolved no pluralities; for there were none to dissolve. It prevented none; for there was no tendency to their contraction. The extreme punishment which it denounced against offenders—that of death—is proof of the barbarism of the period and the bigotry of the church to which it owed its origin. It is no credit to the Supreme Court of the United States to have unearthed this still-born and loathsome remain of past ecclesiastical despotism and regal superstition, and brought it to light, in the character of a law of opinion and conduct, in a land which so loudly professes to be emancipated from every form of prelatical and sacerdotal bondage. This is fishing in waterless pools and bringing forth the corpses of the reptiles that had famished there, to be resuscitated and recommissioned for more mischiefs and fresh empoisonments.

It does not follow even if there had been polygamy in England at the time, that the law of the age of that superstitious pedant

James the First is binding as a precedent upon the Supreme Court of the United States, or is a justification of its decrees in any case or under any circumstances. From the theologico-ethical notions of that period, the only safe rule is a wide departure. The parliament of Great Britain, of that era, may have been no wiser or freer from unwholesome influences, than the parliament of the United States of the present; and of the latter it may, not without justice, be said, that it is to be hoped its successors of two centuries in the future will be too prudent to follow many of its examples. At any rate, the fact that such a statute was passed at such a time, or at any other time, under such or any other auspices, is as frail a basis upon which to found a judgment, by a tribunal in this age and country, in a matter of incalculable importance to a great community, and involving their dearest rights highest interests and most sacred affections, as could well be discovered; and it is to be hoped that the court had the grace to feel a sense of littleness when it made the citation. It is the paltriness of pettifogging arrogance thus to grope among the relics of dead barbarisms to find excuses for oppression.

It would seem to be matter of doubt, judging from the tenor of the decision, whether the court very well understood itself; while in respect to its understanding of the relations between society and government, there can be no doubt whatever. While in one sentence it gives the information that society is founded upon marriage, and in the next that government is founded upon society, in the very next it conveys the astounding intelligence that it is within the legitimate power of government to take jurisdiction of the fabric of society and to appoint the relations in which its factors are to stand to each other. According to the deliberate opinion of the Supreme Court of one of the most enlightened of modern nations, society and government hold to each other the positions of mutual creators and created. Society creates government; government, by way of returning the favor, turns round and creates society. It does even more than this, it dives to the very bottom of things and ordains the relations upon which society rests for its foundation. Hints of another such an interchange of functions are to be found nowhere else than in some of the fantastical—sometimes called heathen—mythologies.

This is communism. It is the fundamental doctrine of modern communism that government is the creator of society, from which

it infers—and logically—that the jurisdiction of government comprehends not only the domestic, commutual and proprietary relations of the social elements, but their unrelated acts, conduct, habits, pleasures and indulgences. It is the doctrine which the malignant charlatan Phillips delivers in lecture halls to applauding audiences, and the vulgar ruffian Kearney roars in the sandlots to auditors equally enthusiastic; and it is the doctrine which tramps and vagabonds, in their own characteristic way, carry into effect when they enter houses and demand entertainment, destroy the labor-saving implements of the agriculturalist, cast railway trains from their tracks to rob the passengers, and burn the depots and rolling-stock of railway companies. It is a reflection of the spirit of the weak, the exhausted, the morbid and the depreciated, bent to make it the law that there shall be none braver, stronger, richer or more potent than themselves. It is the faith of the leveler, who clamors for uniformity; who would obliterate the difference between the sexes; would compel all the young to be educated according to a common measure and model; would equalize estates by division or by destruction; would war against property honestly acquired and tax the industrious to support the idle; would abolish all the great industrial enterprises on account of the incidental disparities of which they are the occasion, and institute a regimen of hate, envy and anarchy. To this cause the Supreme Court of the United States has, on several occasions, afforded efficient assistance, and in no instance more ill-advisedly than in the case here considered.

The decision of the court is broader in its consequences, perhaps, than even itself has suspected. It places in the hands of civil governments everywhere, absolute power over the marriage relation.

The relations of society, domestic, commutual and economical, are, all of them, in substance, contracts upon conditions, expressed or implied, and for mutual considerations. If one form or class of such contracts, and the right to enter into them, is within the scope of the written law, so, for a common reason, are they all; for they all have a common purpose: to contribute to the convenience, prosperity and happiness of the people. For the first time in the history of jurisprudence, the Supreme Court of the United States expresses the opinion that, at least in one instance, the relations of society are within the scope of the written law. Says the Chief Justice:

"There cannot be a doubt that, unless restricted by some form of Constitution, it is within the legitimate power of every civil government to determine whether polygamy or monogamy shall be the law of social life under its dominion."

The jurisdiction of the written law, is limited to that which it has created or erected. If it has authority to fix the terms of the domestic relations, it is because it has previously established or sanctioned such relations. Now, in all the records of legislation, organic or statutory, there is not to be found a single section or clause by which marriage is ordained. Even the Levitical law, which antedates all other known written institutes, takes the domestic relations as they pre-existed its delivery.

The unsound doctrine, in the foregoing, begins with the palpable fallacy that there can be no law of higher authority than that which is written in constitutions; and continues with the equally faulty precept that legislative power is absolute in cases in which it is not limited by express constitutional provisions. This makes human free, agency a matter of donation; and—in the absence of paramount written provisions to the contrary—reduces all the relations of life beneath the jurisdiction of the legislature assemblies. And, as a legislative power, when once vested is plenary, it makes every mode of contracting lawful or unlawful accordingly as such assemblies may see fit to prescribe. Wedlock ceases to be a natural right or an ordinance of divine appointment, and becomes a franchise which legislatures may, at their discretion, confer or withhold. According to this doctrine, it is as well within the power of these bodies to abolish monogamy as polygamy. This will be acceptable information to a large number of active social reformers in the United States, who find the marital league a bondage so severe and humiliating, a yoke so galling and oppressive, and a cause of so many evils and miseries, that they are unable to restrain their cries for relief through its abolition. Nor is there anything irrational in looking forward to the time when politicians will find it for their interest to sympathize with these sufferers under the despotism of custom and prejudice, as they have with others in similar distress; for if there is anything with which a politician who needs votes will not sympathize, that thing is yet to be discerned. When this state of things shall have arrived, legislative bodies, judging from the history of the past, will have no difficulty in finding reasons why the voice of the oppressed should be heard and the prayers of their petitions

granted; nor will judges have any in concluding that laws to abolish wedlock, and to punish those who indulge in it are strictly within the province of legislative authority.

There is no extravagance in this anticipation. The indictments which sexual communism—free love—brings against the state of society of which singular marriages are the basis, are severe; and, in many respects their truth is beyond denial. If, on account of the elements of social anarchy it includes, polygamy should be forbidden, a thousand times more should monogamy. The characteristic facts of the latter, which defy concealment, are domestic infidelity and prostitution. There is ground enough upon which to agitate; and when the order whose calling it is to abolish have completed the works now in progress, it is not unreasonable to apprehend that the marriage relation will come next in their line of attack. It would be but another step in that communistic progress to which statesmen and jurisprudents have already afforded so large a measure of aid and encouragement.

As one of its objections to polygamy, the court ventures the opinion that the principles of civil government vary with the character of the domestic relations of the people. Says the Chief Justice:

"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."

In support of this conclusion he cites Dr. Francis Lieber, a philosopher, who infers from the fact of certain coincidences, that a certain form of domestic order is correlative with a certain form of civil institutes: in other words that polygamy and arbitrary government are inherently allied. If it could be shown that monogamy and popular government were invariably, or even generally, coincident, the argument would have some validity. As the case stands, it has none whatever. There is no evidence that the principles of civil government vary with either domestic or social conditions. Principles do not change. Forms and rules of administration differ, as the civil character of one people differs from that of another; but there is nothing intrinsic in the unlikeness between the custom of singular and that of plural wedlock to indicate the need even of difference in forms and rules of administration.

The notion intended to be conveyed appears, from the context, to be that a more vigorous and absolute regimen is required

for the maintenance of social order in a polygamous than in a monogamous community. Proof that such is the fact in the United States has not yet appeared. More than anything else, the Mormons of Utah have presented the similitude of a flock of sheep surrounded by a horde of wolves. Amid the anarchy, terrorism and crime that has made horrid the vast region around where they are located they have been the one orderly community. They have divided with the aborigines the office of serving as subjects of lawless depredation. An irregular warfare of the most unscrupulous character has been prosecuted against them from the beginning of their history. Ecclesiastical bigotry has laid down the rule which unlicensed ruffianism has carried into execution. Domineering superstition, from the pulpit, the platform and the press, sounded the notes of assault; to which outlawry, hungry for plunder and thirsty for anarchy, made haste to respond. Venal authors have been hired to invent slanders to justify the outrages that have been committed. Scores of books have been written, thousands of sermons preached, and millions of newspaper diatribes published, by persons who never saw a Mormon, to prove them the most abandoned of mankind. Tale-bearers have gone among them in search of the materials of scandal; finding of course, all they had pre-determined to discover. Under a charge of barbarism, a system of unlicensed barbarity has been prosecuted against them, disgraceful to civilization and disreputable to christianity. They have something of which to complain. They would be either more or less than human if they did not, now and then, manifest a sense of injury and a feeling of resentment. If there is anything in their conduct to merit surprise it is their forbearance. They are sincere believers in their mode of worship and plan of social and domestic order, and suffer as other believers suffer when things which they hold sacred are disparaged and profaned. Whatever abstract opinions others may entertain of their system, it is agreeable to them. Under it, they enjoy harmony; and it might not unsuitably be asked: Has not the government of the United States enough on its hands of communities in disorder, that it needs to turn upon and inaugurate anarchy in another? Government may create a solitude and call it peace; it may institute confusion and call it crder; but such counterfeit peace and order are as horrid as the genuine are excellent; and a government which unadvisedly breaks up an established social

condition upon some procrustean theory of uniformity, manifests thereby its total unfitness to be entrusted with any species of authority.

The Supreme Court of the United States was not created to sit in judgment upon sentimentalisms. With the opinions which one class, order or integer of a people may entertain of another, it has no legitimate concern. There is nothing in its commission which constitutes it a judge of the abstract merits of states of society; such merits being matters of which there is no known standard by which they may be estimated. Nevertheless, as the court, in its wisdom, has seen fit to regard social qualities as within its jurisdiction, and to make its views thereon the basis of a decision of almost unprecedented portent, a brief comparison of the state of society which it approves with that which it condemns, will not be impertinent.

The factors of every mode of communital arrangement regard their own as the true expression of the perfect in principle. Practically it may exhibit grievous diseases and blemishes, but these are held to be not inherent but accidental; which only need the appliance of supervisions, penalties and other curative processes for their removal. Entertaining these views, they correspondingly look upon every other social mode as wilfully wrong, as sinful and malignant, as contrary to the laws of nature, or, as the case may be, to the commands of God; are prepared to pronounce it wicked and dangerous, inimical to good government, and in direct contravention of the dictates of civilization and the principles of christianity. Its defects are affirmed to be intrinsic; the necessary outgrowths of its unsound constitution. They are cankers, plague-spots, demanding the knife and the cautery, applied not merely to the diseased tissue, but to the body in which they originate. Hence they feel it their duty to agitate, and the uneasy of their species do agitate. They are prepared to make great sacrifices—not of their own goods and chattels, perhaps, but of the ease and peace of mind of the reprobates—in order that the land may be disenthralled. They find it in the line of their duty to make the naughty, uncomfortable. With agitation, heat is evolved, and communicated; and the sentimental pestilence takes on a malignant form and spreads. The pulpit, which makes haste to catch every prevailing malady, begins to resound. The platform, with its weather-cock out for popular breezes, becomes animated. The press, always on the watch for sensations and cir-

culation, opens out in unwonted wealth of misinformation and verbiage. Politicians, in no long time, find that there are votes latent in the movement. Party platforms expand their liberal bosoms to receive the new doctrine. Legislators become impressed with its magnitude and find it expedient to respond to so distinct an expression of popular sentiment; and judiciaries, not to be delinquent in so noble a cause, tax their ingenuities to find law to suit the situation. Thus it is that courts are constrained to sit in judgment upon sentimentalisms.

Nevertheless, states of society are not to be judged by their own sentimental law, which is always in their favor; nor that of others, which is uniformly against them. They are to be judged by the actual of their phenomena. They are not to be appraised by what Mr. Francis Lieber or any other abstractionist imagines to be their tendencies; but by their present facts through which their tendencies are visibly and authentically expressed. There is no difficulty in ascertaining what is the rule of judgment, for it is self-evident. It has been many times laid down, by writers upon social science, from the time of Grotius and Adam Smith to that of Herbert Spencer. That state of society is right in which the social particles are in harmony. The fact of concordant existence is proof absolute of the right to exist. It is evidence that the condition is the expression of the character of the factors; and neither legislature nor judiciary is authorized to infer—what none can safely predict—that the factors would be better disposed if the condition were reconstructed.

If the patriarchs of the Mormon community had set themselves deliberately to plan and construct a scheme of social and domestic order, wherein the most flagrant and harmful of the evils and plagues which infest society elsewhere should fail to obtain an entrance, they could not have acted with more wisdom than that by which their work was characterized. Foremost among these evils and plagues are conjugal infidelity and prostitution. Both are characteristic of and inseparable from a state of society founded upon singular marriages. They have been ever present with such states of society, and, both alike, have effectually resisted every effort for their removal or mitigation. The former is the parent of innumerable crimes and perfidies, and is the occasion of more acute unhappiness and deadly enmity than all other causes combined; the latter, the scatterer of the seeds of disease, decrepitude and death; the corrupter of the blood of nations; the sapper that undermines the collective constitution:

sending taints and rottenness down from progenitor to posterity —to reappear in scrofulous, tuberculous and cancerous complaints: in weaknesses, prematurities, effeminacies and inefficiencies. Conjugal infidelity holds society perpetually upon the verge of anarchy. Compelled to purchase order at the expense of hypocrisy, society dares not turn its reluctant senses upon the pool of corruption, only too palpable, in which it wades; and the clamors of an accusing conscience, or the protests of honest censure are met by pretenses of disgust, or promises of reform, or professions of piety, or complaints that the law does not execute its mission and restrain or punish the offenders.

In Mormondon effectual obstacles have been created to put an end to these plagues, and that by the simplest means: the providing of every marriageable woman with a husband and a home. There may be less of poetry in this arrangement, but there is more of safety; less of factitious sentiment, but more of intrinsic sincerity. In the Territory, conjugal fidelity is the rule; in the States—at least with one of the sexes—it is the exception. In the former, prostitution is not prohibited, but forestalled and prevented; in the latter, in the face of the menaces of law and the vigilance of administration, it survives undiminished; borne as a lesser evil than the disorder which, if the thing were possible, would attend upon its suppression. The majority of masculine mankind—the robust, the active and the enterprising are pluralists in fact. The difference between the men of the Territory and the men of the States, is in the hypocrisy of the latter which professes sentiments it does not feel, and pretends a continence which it neglects to practice.

Between singularism and pluralism, the question resolves itself into an inquiry: Which is the more wholesome, the legitimate and orderly or the illegitimate and disorderly? The very statute to prohibit and punish that which is dishonestly called "bigamy" in the Territories, was passed by men a majority of whom were living in concubinage. There are more practical pluralists in Washington, in proportion to the inhabitancy, than there are in Mormondom. The ratio of men in Congress who have supplementary wives in everything but name, honor and subsistence, is higher than that of the men who have such wives whom they love, honor and provide for in the tabernacle at Salt Lake City The Mormon limits his wives by his means; taking the future as well as the present into account; the statesman is subject to no

such restriction; for the public supports his concubines, and the relation is contingent upon the maintenance of his position.

Which is the more wholesome arrangement—the better state of society—the most in unison with the dignity of manhood and the purity of womanhood? Which is more significant of paternal loyalty and maternal truth, things of importance to the next generation? One is symbolical of human honor, faith and symplicity; the other of human meanness, selfishness and double-dealing. Which is which? Where is the rule by which, when these scenes and events stand, awaiting the final verdict, before the tribunal of the future, they are to be judged? Is it recorded in the act of Congress of 1862? Is it embalmed in the opinion of the Supreme Court of 1879? Assuredly in neither.

It is not proposed, in this inquiry, to examine the points under the law of evidence raised in the court below by the counsel for the defendant, nor to review the opinion of the court above, by which those of the former were sustained. The almost painful elaboration, by the latter, upon these—in striking contrast with its summary disposition of the principles involved in the main issue—would inspire a hope that the work was faithfully performed, in the face of the fact that the decisions were uniformly in favor of the prosecution. There is a point however under the laws, in respect to the qualifications of jurors, which invites examination; before proceeding to which, in order that the analysis may be intelligible, a survey of the situation is requisite.

Polygamy and bigamy are acts the knowledge of which has been present to the law as long, to say the least, as the English language has existed; the one as a custom, the other as a crime. Bigamy has been known, from the earliest period of English jurisprudence, as "a common law offense," polygamy was declared to be a crime by statute in the reign of that theological potentate James the First. In the United States, the characteristic distinction between the two acts has always been preserved. No lawyer at the bar, nor judge upon the bench, would have confounded the one with the other, any more than he would have overlooked the unlikeness between a purchase in open market and a robbery upon the highway.

The act of Congress of 1862 describes a polygamous marriage and calls it "bigamy," thereby creating a factious offense—a new-fashioned bigamy. Under the laws against the old-fashioned bigamy, only the party guilty of a fraud practised upon the other was

punished; under the act which generates the new, both parties are punished, as if guilty of a trespass each upon the other. In pursuance of this act, in October, 1876, George Reynolds was indicted, in the District Court of the United States for the Territory of Utah, for the crime of bigamy; he, the said defendant, having married one Amelia Jane Schofield, being then already married to one Mary Ann Tuddenham. The act was passed in 1862 previous to the marriage.

Before the passage of the act to marry one wife having another, was not illegal; and such as had so married were, and continue to be, in contemplation of the laws of the United States, good and lawful citizens. As no person can, by the same transaction, become both a bigamist and a polygamist, it follows that such had completed their marital adventures before the passage of the act, remained polygamists, while such as, after the passage of the act, entered into plurality engagements thereby became, in the eye of law, bigamists. In short, the act of 1862 established a broad distinction between bigamy and polygamy—between loyal and the criminal pluralists.

In the administration of injustice, equivocations are convenient; but the presence of the equivocation testifies to a contemplated injustice, The defendant was indicted for bigamy; but, as appears throughout from the proceedings, arraigned and tried for polygamy. Thus, on the trial of a person charged with a specific offense—with having, on a certain day, perpetrated an act of bigamy, a juror is put upon oath for an inquiry into his competency, and questioned in respect to his domestic relations. He is asked, "Do you live in polygamy?"—and it appearing to the satisfaction of the court that he does live in polygamy, he is found unfit, and excluded from the panel.

Jurors are tried by two processes: upon their *voir dire*, as it is called, and upon evidence *aliunde*, of third persons; but not by both; counsel, electing one, not being permitted to resort to the other. It is a rule of the law, that no person called as a juror shall be asked questions, the answers to which might tend to his general depreciation. No witness, in a court of justice, is compelled, out of his own mouth, to criminate, no juror to diminish himself; and yet, for no other purpose than that of disparagement and disqualification, this inquiry was allowed.

Here was a manifest violation of an established rule of judicial obligation. It did not follow, even if the disfranchised jurors—

of which there were several—lived in polygamy, that they were obnoxious to the provisions of the act of 1862, under which the defendant was indicted; nor that they were inimical to the law, or opposed to its execution. If there had been authority to begin the inquiry, justice would demand that it should be prosecuted until the exact status of the party had been ascertained; but there was no such authority. This was equally the right of the juror and of the defendant; but it is manifest, that, in contemplation of the court below, and of the court above—by which the decrees of the court below were approved—neither juror nor defendant had any rights which they felt themselves bound to respect. The court was appointed to be a terror to every evil-doer of the plurality species, whatever the grade or variety; and the uniformity with which it decided every provisional question raised by the prosecution in its favor, and every one raised by the defense against it, is evidence that, in the discharge of its mission, its heart knew no fear, its hand no hesitation.

Under the mechanical practice of the law, which makes the barrister a tradesman, and the text-writer an epitomist—neither of them having any conception of the philosophy that underlies their forms and precedents—it ceases to be known that the source of such forms and precedents was other than arbitrary. Men write and argue, for example, for and against the trial by jury; neither party comprehending how nor why it grew into existence, nor in what pressing human want it originated. It is forgotten, or regarded as of no significance, that the fundamental law of the trial by jury is, that men shall be judged by "their peers of the vicinage"—their equals, likes, neighbors; persons of a common measure with themselves; representatives of the feelings, sentiments, prejudices and beliefs of the social order to which they belong.

The trial by jury has no archaic history. It had no arbitrary or conventional beginning. It was a custom, doubtless, ages before it was a law. It grew into existence in response to a need that was felt, rather than to a conclusion that was formulated; was the product of intuition rather than of reflection. It was a thing in favor of justice, and to adapt its distribution to the circumstances and conditions of those among whom it was administered. The jury was the organ chosen by society to speak its voice. Its purpose was to mitigate the inflexibility of the written law, by the antagonism of fellow feeling and common sympathy. Its implied rule of conduct was, "we punish no man for being

no better than ourselves." With it, the question was not whether the accused had committed the act charged, but whether he was *guilty;* whether the deed was of such a nature that the common conscience demanded its punishment. The jurors are "judges of the law and of the fact;" that is to say, they are judges whether the character of the fact is such as to make expedient the application of the law.

According to this principle, in the trial of the case under consideration, Mormons were in no wise unfit for the position of jurors. On the other hand, they had every requisite legal and moral qualification. They were peers and of the vicinage, capable to speak the view of the community to which all alike belonged. Who better than they could judge what was suitable to its "peace and dignity?" By every consideration of right and justice their exclusion from the panel was an act of wanton and illegal oppression. According to the terms of the indictment, it was not the Territory of Utah, nor the Mormon body, nor the principles of Mormonism nor polygamy that was on trial; it was a single individual. If he was a criminal, and there were any interested in his punishment, it was the indiscriminate inhabitancy of his own neighborhood. If there were any who were able to judge whether, according to the common standard, he was too much of a reprobate to be allowed to go unrestrained, it was they who best knew his disposition.

But it was, in fact, Mormonism and its domestic relations that were on trial; and when the Act of 1862 was passed, the judgments against them was foreordained. The equivocation embodied in the statute has borne throughout its appropriate fruits, in sophistications of the law, in violation of the rules of jurisprudence, in the abandonment of fixed maxims and precedents, in the privation of the defendant of legitimate means of defense, and in the arbitrary and tyrannical disparagement of the whole of a numerous and loyal population. The court has done its work—all the courts have performed their respective parts in the programme, accordingly as the same were appointed; but they have not done justice. They have won a round of applause of a number of fanatical men and silly women, whose fanaticism and silliness, so far as lies in their power, they have made the law of the land. But they have done that against which every spark of true manhood will protest; a deed disgraceful to themselves, to civilization and to humanity.