LEGAL ASPECTS OF THE MORMON PROBLEM.

In considering what is called the "Mormon Problem," it is of the first importance to bear in mind the fact that its magnitude is greatly exaggerated in the minds of most persons by the tradition of the enormous trouble and turmoil it caused in the last generation. Appearing as a new religious sect in the thinly settled West, before the railroad period, when religious prejudices and animosities were much keener than they are now, and the subjects of national interest much fewer, the Mormons attracted far more attention than any similar phenomenon, were such a thing possible, would be likely to excite now in any part of the country. The pioneer West of that day was an eminently religious community, and its feeling toward sectarians who founded their religion upon an easily detected imposture was inspired by an honest religious zeal. When the Mormons made polygamy part of their religion, they, of course, greatly intensified this animosity, but they did not do this till after they had been for years a persecuted sect. Hunted as they were from State to State, and forced, willingly or unwillingly, into a chronic armed resistance to all lawful authority; recruiting their ranks from foreign countries, and consequently rapidly becoming a totally un-American body, they were for a generation a species of social monstrosity. The Mormon "wars" and Mormon migrations of those days were really small affairs, judged by the number of people who actually took part in them, but in the quiet annals of a country devoted to peaceful material pursuits they made a tremendous noise, the echoes of which have even yet not died away. As the country has grown in population, and railroads have been pushed through Utah, the relative proportions of Mormondom and the United States have so changed that what then seemed threatening to become a national difficulty has really dwindled down to a local nuisance, which everybody admits must, in the course of time, disappear altogether, from the operation of natural causes. There is still a Mormon "problem" at Washington, which every few years causes excitement and produces legislation. But this is somewhat different, even in kind, from that which led to the early wars and persecutions. It is really the problem of governing from a distance, under our peculiar system of law, a Territory whose population is divided between two hostile social systems. The questions and difficulties presented by it are mainly legal and constitutional.

The Mormons at present form the majority of the population of the Territory of Utah, and with regard to most of their internal concerns, find no difficulty in carrying on the ordinary affairs of life and government without serious trouble. The non-Mormon population is, however, hostile to them, as they are to it, on account, chiefly, of their practice of polygamy. It is now generally admitted that, were polygamy out of the way, the difference of religion would not constitute any insuperable obstacle to establishing harmonious relations between the Saints and the Gentiles. In the various attempts which have been made through legislation to put an end to this system of marriage, the Mormon troubles may be said to have entered upon their last stage—a stage in which confessedly the only weapons which can be resorted to against them are those furnished by judge, jury, and sheriff.

The statutes of the United States contain several provisions designed to put an end to the peculiar practices of the Mormons, and to break up their system of communal life. Of these we may dismiss at once, as of no importance, the act intended to limit their right to accumulate church property. Section 1890 of the Revised Statutes provides that "no corporation or association for religious or charitable purposes shall acquire or hold real estate in any Territory during the existence of the Territorial Government, of a greater value than fifty thousand dollars; and all real estate acquired or held by such corporation or association contrary hereto shall be forfeited and escheat to the United States; but existing vested rights in real estate shall not be impaired by the provisions of this section." This provision became law nearly twenty years ago, and formed part of the Bill for the suppression of Polygamy, to which we shall have further occasion to refer. Similar acts are to be found on the statute books of every State in the Union, and are, in principle, open to no objection whatever. The provision, however, with regard to vested rights, which it was probably necessary to incorporate in the act, in order that it might not be in conflict with the elementary principles of constitutional law and common justice, had the effect of making it entirely nugatory. The possessions of the Mormon Church were chiefly acquired before

its passage, and its enactment did not take them away. The experience of history shows that the properties of religious corporations cannot be broken up under law by any means short of confiscation, and confiscation under this act was expressly prohibited.

Other provisions of the same bill were, however, of more importance. Section 5352 of the Revised Statutes provides that "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."

This, together with the provision above quoted with reference to religious corporations, became law on the 1st of July, 1862. It was passed almost without debate in the Senate, and under the operation of the previous question in the House. It has since been passed upon by the Supreme Court of the United States in the case of Reynolds *v.* United States.* Reynolds had been indicted under the act of 1862, in the District Court for the Third Judicial District of Utah, for bigamy, and pleaded not guilty. He was found guilty, and sentenced to hard labor for two years and to pay a fine of five hundred dollars. On the appeal to the Supreme Court, among the principal objections raised by the accused to the judgment was the religious conviction of the accused as to the validity of his second marriage. The court devoted a good deal of attention to the consideration of this objection. The evidence showed that the Mormon Church made it the duty of the male members of the Church, circumstances permitting, to practice polygamy; that this duty was enjoined by books believed by the Mormons to be of divine origin, among others the Holy Bible, and that the members of the Church believed the practice to be directly enjoined upon them by God in a revelation to the founder and prophet of the Church; that a failure to practice polygamy, where it was possible, would be punished by damnation in a future life. It was also proved that the accused had received permission from the recognized authorities in the Church to enter into a polygamous marriage, and that the marriage which was made the foundation of the indictment was duly performed according to the doctrines and rites of the Church. Upon this evidence his counsel urged that the judgment was in conflict with the constitutional guarantee of the free exercise of religion. The Supreme Court, however, decided that the act of Congress was not in conflict with the constitutional guarantee. The following extracts show the ground of the decision:

"The only question which remains is, whether those who make polygamy a part of their religion are excepted from the operation of the statute. If they are, then those who do not make polygamy a part of their religious belief may be found guilty and punished, while those who do, must be acquitted and go free. This would be introducing a new element into criminal law. Laws are made for the government of 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 religious worship, would it be seriously contended 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 funeral pile of her dead husband, would it be beyond the power of civil government to prevent her carrying her belief into practice?"

"* * * A criminal intent is generally an element of crime, but every man is presumed to intend the necessary and legitimate consequences of what he knowingly does. Here the accused knew he had been once married, and that his first wife was living. He also knew that his second marriage was forbidden by law. When, therefore, he married the second time, he is presumed to have intended to break the law. And the breaking of the law is a crime. Every act necessary to constitute the crime was knowingly done, and the crime was therefore knowingly committed. Ignorance of a fact may sometimes be taken as evidence of a want of criminal intent, but not ignorance of the law. The only defense of the accused in this case is his belief that the law ought not to have been enacted. It matters not that his belief was a part of his professed religion; it was still belief and belief only."

This case was decided in 1878, sixteen years after the law against polygamy had been passed by Congress, and amply sustained, as will be seen, the constitutionality of that act. But notwithstanding this, it is admitted that the law is a dead letter. In 1874, in the House of Representatives, in the course of a speech on the Poland Bill, which we shall presently have occasion to consider, Mr. Potter, of New York, referred incidentally to the statute as "a law against polygamy which we never have enforced." The Reynolds case has not made this statement any the less true to-day than it was at the time of this speech.

The law has not been and never will be enforced, for reasons which grow out of the condition of society in Utah, and which are beyond the reach of ordinary legal machinery. To any one interested in the study of the limits of criminal legislation, the failure of the statute is a patent illustration of the absolute necessity of considering in the passage of such measures not merely the crime to be punished, but the means which the feeling of the community supplies for the purpose of setting in motion the judicial machinery for its punish-

* 98 U. S. R. (8 Otto) 145.

ment. The reason why bigamy is easily punished in monogamic communities, such as the States of our Union, is that the evidence necessary to convict the guilty party is generally ready to be furnished by a person who suffers from the crime; the sentiment of the community is opposed to polygamous unions, and the second marriage being universally looked upon as a mere nullity, the lawful wife as well as the children of the lawful marriage have a strong motive to supply evidence for the purpose of breaking up any such unlawful connection. The case in a community like Utah is the reverse of this. No member of the polygamous family has any adequate motive to come forward and furnish the evidence which would be absolutely necessary to secure a conviction. It is not merely that they all regard polygamy as the normal marriage state, but, as appears from the Reynolds case, they regard it as a religious duty, and a violation of this duty as entailing religious penalties much more serious than any possible inconvenience or discomforts which might arise from a continuance of their existing family system.

Judge Poland, of Vermont, who was the author of the bill known as the "Poland Bill," for the reorganization of the judicial system in Utah, saw clearly enough that much more drastic legislation than this was necessary if polygamy was to be extirpated by law, and, in 1870, he accordingly introduced a bill, which, had it passed, would certainly have had some very important effect upon the solution of the Mormon problem. It provided, among other things, that in all prosecutions for polygamy the wife should be a witness against the husband; that cohabitation should be *primâ facie* evidence to establish marriage in any prosecution under the law; that no statute of limitation should apply to the offense; that no alien who practiced polygamy should be naturalized; that no polygamist should hold any office, or be permitted to vote; that no polygamist should receive any benefit under the homestead and preëmption laws; that in any prosecution for polygamy, where the defendant absented himself from the Territory, his property might be confiscated, and finally, that the President of the United States should enforce the provisions of the bill by the use of the army. This bill, which reads as if it had been prompted by the legislative spirit of three centuries ago, if enforced, probably would have resulted in the extirpation of polygamy, but it would have been at the point of the bayonet, and would have left Utah a howling wilderness.

The Poland Bill which passed June 23d, 1874, and which must not be confounded with the original bill introduced by Mr. Poland, just referred to, was designed, as explained by him, to provide some kind of legal machinery by which the law of 1862 against polygamy could be enforced. According to the notions prevalent in Congress at the time, the difficulty in the way of enforcing that law being the sentiment of the community on the subject of marriage, the true way to get over this was to provide means for the selection of juries whose sentiments on the subject of marriage should be directly opposed to that of the accused; in other words, to pack the juries with anti-Mormons. As Mr. Poland said, in explanation of the provisions of the bill, "every United States officer in that Territory understood well when he undertook, under this law of Congress, to try anybody for polygamy, he had to stand up before twelve unblushing, undeniable polygamists." The Poland Bill was designed to put an end to this shocking state of affairs by a complete revolution in the judicial system of Utah. The importance of this measure may be inferred from the fact that it was a departure from the traditional system of government in the Territories. While the Constitution gives Congress absolute power of legislation over them, the practice of that body down to the time of the passage of the statute against polygamy had always been to leave the regulation of the domestic concerns of the community entirely to the local government, in analogy with the relations established by the Constitution between Congress and the various States.

The imposition upon a distant community of an entire system of law enacted in Washington, in obedience to the wishes and prejudices of another substantially foreign community, has never been tried, and probably never will be; but the statute against bigamy, as well as that with regard to religious corporations, and, finally, the Poland Bill, were all steps in this direction. This bill was aimed at the local probate courts of Utah. These tribunals, under the laws of the Territory, possessed a very wide jurisdiction, while the judges were said to be generally, if not universally, Mormon priests. By the provisions of the act, their general jurisdiction was taken away from them and committed to the district courts, from which appeals lie to the Supreme Court of the Territory, and thence to the Supreme Court of the United States. The most important provisions of the act, however, relate to the drawing of juries, which had previously been in the hands of these same probate judges. It modified this by dividing the duty between the clerk of the district court in each judicial district, and the probate judge.

These two officials were directed by it to prepare a jury list, from which grand and petit jurors should be drawn alternately, selecting the names of male citizens of the United States who had resided in the district for the period of six months next preceding, and who could read and write the English language. From the list of such citizens, which was to contain two hundred names, the United States marshal, or his deputy, was directed to draw by lot the necessary number of names for a grand or petit jury, or both. The *venire* was to be issued by the clerk of the district court to the marshal or his deputy, and the jurors summoned under it were to constitute the regular grand and petit jurors for the term, for all cases. The bill, as originally introduced in the House, contained a provision that "in the trial of any prosecution for adultery, bigamy, or polygamy, it shall be a good cause for principal challenge to any juror that he practices polygamy, or that he believes in the rightfulness of the same." This provision was strenuously objected to, on the ground that, as three-fourths of the men who reside in the Territory now do believe in polygamy and practice it, the result would be that they would all be absolutely excluded from the juries in such cases, and the jury, in all prosecutions for bigamy or polygamy, would therefore necessarily be made up of persons who were non-Mormons. The provision was subsequently struck out of the bill, and the law was passed without it. But, of course, the very object of the provision was to pack juries, and the objection mentioned brings us face to face with this fundamental difficulty in dealing with polygamy by legal methods—that no Utah jury, unless it were packed, would ever convict a Mormon of the crime. A majority of every jury in Utah, if drawn without applying the test of religious conviction as to polygamy, will consist of persons who believe as Reynolds believed, and as Reynolds's wives believed, that polygamy is a religious duty, and ought not to be punished by law, and would therefore have conscientious scruples against indicting persons for violation of the law. But any one familiar with the elementary principles of criminal law will see at a glance that no legislation is necessary for such a case as this. It is a universal principle of law that a person who, upon his conscience, could not find an indictment, cannot serve as a juryman to try an indictment. The same ground which would exclude him from the grand jury would also exclude him from the petit jury. As to the grand jury, this precise point came up in the Reynolds case, and was decided without the slightest difficulty by the Supreme Court of the Territory.* One of the parties appearing as grand juror in that case stated, in answer to a question by the prosecution, that he had conscientious scruples against indicting persons for violation of the statute of 1862, and on that ground he was challenged for cause. The Supreme Court of the Territory, with regard to this, says:

> "A person who, upon his conscience, could not find indictments under a law, would not make a good juryman to enforce that law. And if all members, or a majority of a grand jury, had like scruples, that ancient and venerable body would not only become useless, but also an absolute hindrance to the enforcement of the law. A party having these conscientious scruples would, if sworn upon the grand jury, have to commit moral perjury. He, upon oath, admits that his conscience forbids his aiding in the enforcement of a specific law, yet, as grand juryman, he swears to go counter thereto, and enforce the law. Such a party would be wholly incompetent to sit upon a petit jury. And the same ground which would exclude him from the grand jury would also exclude him from the petit jury."

A jury of polygamists to try an indictment for polygamy would indeed be a singular spectacle. To secure a conviction, the jury must be anti-Mormons. To secure a conviction in accordance with our modern ideas of justice, the jury must be fairly drawn and not packed. Technically, believers in polygamy would all have to be excluded from the jury, for the simple reason that a juror believing in the duty of polygamy would be committing perjury in sitting to try a person for it as a crime; but a jury obtained by the process of excluding polygamists would be necessarily a packed jury, and therefore a trial by it would be unfair. No plainer demonstration could be made of the impossibility of effecting by any change in the jury laws the enforcement of the statute against bigamy.

The failure of the attempt to break up the Mormon system by Congressional legislation does not, by any means, show that the Mormon system will ultimately prevail in Utah. The operation of natural causes is certain, in the long run, to sap the foundations of polygamy. The railroads have already brought the Territory into communication with the rest of the country, and the development of the mines must ultimately bring in a large Gentile population—almost altogether male. A strong tendency in the direction of marriages between Gentile men and the daughters of Mormon parents must spring up. Indeed, this is said to show itself already. There is no surplus of women in the West from which to recruit polygamous households; the births of the two sexes are always very nearly equal, and

* U. S. *v.* Reynolds, 1 Utah, 226, 231.

the Mormon population is no longer being rapidly increased from abroad, as it was in the times of the early persecution of the Church. It is now stationary, or nearly so, and being rapidly hemmed in by a community having a social system which all experience shows is the only one permanently adapted to modern industrial life. As the Territory fills up, and the Mormons are brought more and more into relations with the rest of the world, one of the strongest internal causes of disintegration will unquestionably be the sense of shame operating upon the younger female generation. In the natural course of things, some of the daughters of Mormon householders must marry Gentiles, and others, who do not marry outside the church, will be made keenly aware that they are surrounded by a community which regards their position as a degraded one. As long as they could keep themselves separated from the rest of the world, this Gentile feeling was of very little consequence to them. It did not affect them in their daily life; it was something remote from them, which they did not even need to disregard. This cannot continue forever, and indeed a change must begin, if it has not begun already, as soon as the surrounding monogamic Gentile system of marriage has a fair opportunity to enter into competition with its rival. Under these circumstances, there is nothing to be done with the Mormons but to let them alone. Persecution has been tried, and has only served to strengthen and increase them. Law has been tried, and has proved of no use, because it has not been enforced. From the circumstances of the case, it cannot be.

OLD MADAME.

"MISS BARBARA! Barbara, honey! Where's this you're hiding at?" cried old Phillis, tying her bandana head-gear in a more flamboyant knot over her gray hair and brown face. "Where's this you're hiding at? The Old Madame's after you."

And in answer to the summons, a girl clad in homespun, but with every line of her lithe figure the lines, one might fancy, of a wild-and-water nymph's, came slowly up from the shore and the fishing-smacks, with a young fisherman beside her.

Down on the margin, the men were hauling a seine and singing as they hauled; a droger was dropping its dark sails; barefooted urchins were wading in the breaking roller where the boat that the men were launching dipped up and down; women walked with baskets poised lightly on their heads, calling gayly to one another; sands were sparkling, sails were glancing, winds were blowing, waves were curling, voices were singing and laughing,—it was all the scene of a happy, sunshiny, summer morning in the little fishing-hamlet of an island off the coast.

The girl and her companion wound up the stony path, passing Phillis, and paused before a low stone house that seemed only a big bowlder itself, in whose narrow, open hallway, stretching from door to door, leaned a stately old woman on her staff,—a background of the sea rising behind her.

"Did you wish for Barbara, Old Madame?" asked the fisherman, as superb a piece of rude youth and strength as any young Viking.

She fixed him with her glance an instant.

"And you are his grandson?" said the old woman. "You are called by his name—the fourth of the name—Ben Benvoisie? I am not dreaming? You are sure of it?"

"As sure as that you are called Old Madame," he replied, with a grave pride of self-respect, and an air of something solemn in his joy, as if he had but just turned from looking on death to embrace life.

"As sure as that I am called Old Madame," she repeated. "Barbara, come here. As sure as that I am called Old Madame."

BUT she had not always been Old Madame. A woman not far from ninety now, tall and unbent, with her great black eyes glowing like stars in sunken wells from her face, scarred with the script of sorrow—a proud beggar, preserving in her little coffer only the money that one day should bury her with her haughty kindred—once she was the beautiful Elizabeth Champernoune, the child of noble ancestry, the heiress of unbounded wealth, the last of a great house of honor.

From birth till age, nothing that surrounded her but had its relation to the family grandeur. Her estate—her grandfather's, nay, her great-grandfather's—lay on a goodly island at the mouth of a broad river; an island whose paltry fishing-village of to-day was, before her time, a community where also a handful of other dignitaries dwelt only in less splendor. There were one or two of the ancient fishermen and pilots yet living when she died, who, babbling of their memories, could recall out of their child-