LEGACIES IN LAW:

FRANKLIN S. RIC

by Michael S. Eldredge

On Monday morning, April 7, 1873, Brigham Young rose before the congregation seated in the Tabernacle, and in a departure from his traditional hostile attitude towards the legal profession, addressed the General Conference session on the need for increased emphasis in legal education

> I think my brethren will agree with me that this is wise and practicable — for from one to five thousand of our young middle aged men to turn their attention to the study of law I would not speak lightly in the least of law, we are sustained by it; but what is called the practice of law is not always the administration of justice, and would not be so considered in many courts we have good and just men who are lawyers, and we would like to have a great many more
>
> If I could get my own feelings answered I would have law in our school books, and have our youth study law at school Then lead their minds to study the decisions and counsels of the just and the wise, and not forever be studying how to get the advantage of their neighbor This is wisdom (JD 16:9)

President Young's concern for the establishment of a strong and competent legal profession within the church was not without foundation in post Civil War Utah The struggles between the territorial government of Utah and the federal government were well underway, and by the 1870's had reached an alarming crescendo.

In 1875, Brigham Young's secretary, George Reynolds, agreed to be the test case for the Anti-Bigamy Law of 1862 Four years later, his conviction was upheld by the United States Supreme Court in *Reynolds v the United States*, leaving the church with no legal basis for the practice of plural marriage In the wake of *Reynolds*, the First Presidency summoned a young attorney from Ogden to assume the office of General Counsel for the church, a position that Franklin Snyder Richards would hold for the next several decades.

Richards had moved to Ogden shortly after his marriage to Emily S Tanner in December 1868, and almost immediately he was appointed as clerk for the county probate courts He was later elected Weber County Recorder at which time he began an extensive, self-taught course of study to master legal forms associated with his office Since there were no lawyers residing in Ogden, President Young counseled Richards to seek admission to the Bar, based on what the Church President saw as a keen ability in Richards

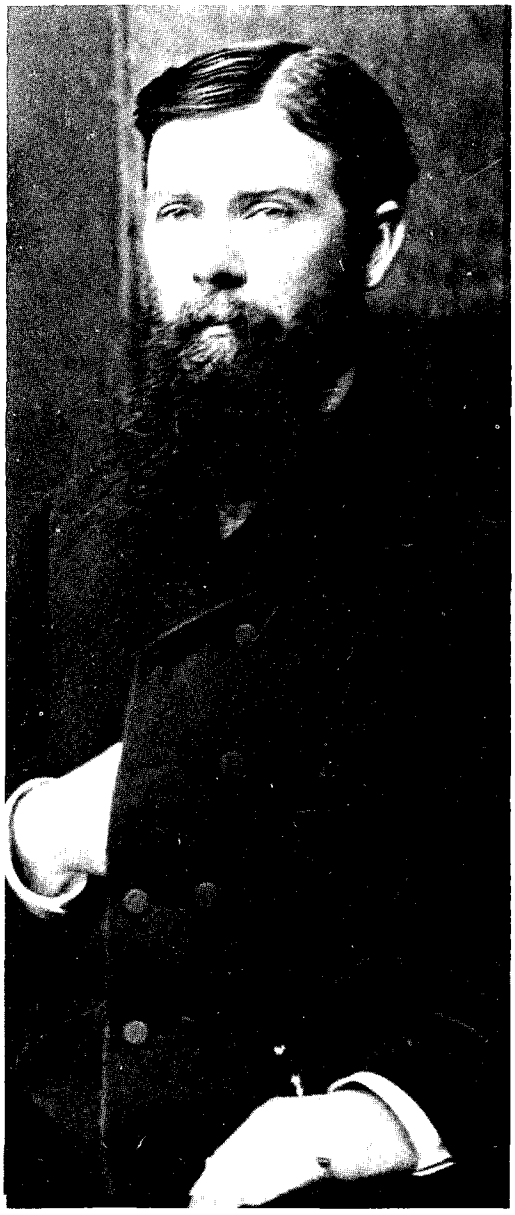
> ". . .To raise up a corps of young men armed with the Spirit of the Gospel, clothed with the Holy Priesthood, who can tell the judges in high places what the law is, and what equity is, and can plead for the cause of Zion, and help maintain the rights of God's people."

to master the complexities of law. Richards followed the counsel of President Young and began a more intensive study of law in the traditional manner of reading that was so characteristic of the legal profession up the 1870's On June 16, 1874, four days before his twenty-fifth birthday, Franklin S Richards was admitted to the Bar of the Third District Court in Salt Lake City.

Richards' first case was to defend a man accused of murder and assumed by many to be guilty without question The young lawyer threw himself into the case with the vigor of an experienced trial attorney, and much to the astonishment of everyone, won an acquittal for his client. However, before Richards was able to settle in to his new profession, a brief mission to Great Britain brought a hiatus to his law practice He returned to Utah in 1878 and immediately was retained to help sort out the quagmire of Brigham Young's estate

Shortly after his return from Great Britain, Richards formed a partnership with the former Chief Justice of the Kentucky Supreme Court, Rufus K Williams When complications in the estate of Brigham Young eventually resulted in a suit against the church by some of the dissatisfied members of his family, the firm of Richards and Williams was retained by the First Presidency, which ultimately led to Franklin Richards being appointed as General Counsel for the Church Richards did succeed in defending the church against claims totaling well over $1 million; claims that could have sent the financially troubled church into an economic tailspin Shortly thereafter, Richards was again called on by the

HARDS, ATTORNEY DURING CRISIS



In Washington, D C , circa 1885

church, this time to assist in preventing the disenfranchisement of Utah women Though Richards did "win the battle" when he succeeded in having the case dismissed, the "war was lost" with the subsequent passage of the Edmunds-Tucker Bill several years later in 1887

"... I would not speak lightly in the least of law, we are sustained by it; but what is called the practice of law is not always the administration of justice, and would not be so considered in many courts ..."

Richards' notoriety as a lawyer spread quickly throughout Zion and was met with mixed reactions by members of the church who had long been taught to avoid the avarices of a lawyer Somewhat dismayed by the lack of understanding displayed by many saints, Richards' father, Apostle Franklin D Richards, retorted to a congregation assembled in the Ogden Tabernacle in early 1885, how:

> a few days ago . . . a Bishop remarked that it looked very singular for one of the Apostles to raise up a lawyer, and thought there must be a screw loose somewhere It happens, however, once in a while that same Bishop wants my son to help defend them before the courts (laughter) I wonder if there is a screw loose there (JD 26:102)

Apostle Richards went on to reaffirm the call made by President Young years earlier,

> . . to raise up a corps of young men armed with the Spirit of the Gospel, clothed with the Holy Priesthood, who can tell the judges in high places what the law is, and what equity is, and can plead for the cause of Zion, and help maintain the rights of God's people. (JD 26:103)

Beginning with the Constitutional Convention of 1882, Franklin S. Richards had become actively involved with the drive for Utah statehood. Against the mounting pressure of congressional sanctions imposed on the church and the Territory of Utah, statehood seemed the only hope of immediate escape, and even then, the chances for statehood were slim indeed Following the Constitutional Convention of 1882, Richards accompanied John T Caine and David H Peery to Washington, D.C. to present the petition for statehood before Congress Though

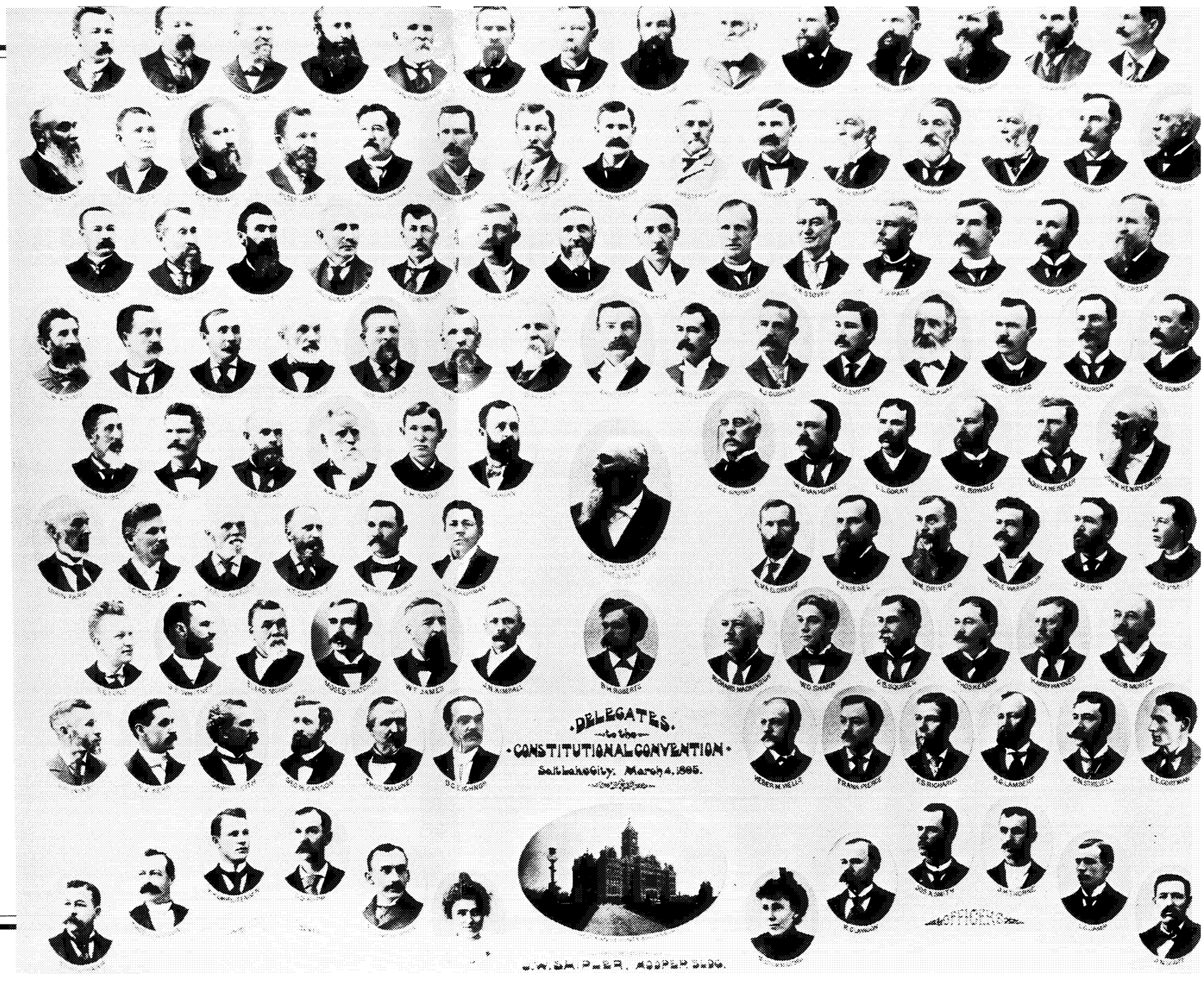
The Church's attorneys argued that the charter which created the church corporation was a constitutionally protected vested right of contract which could not be altered or repealed by any subsequent acts of either the territorial legislature or Congress.

the bid was unsuccessful, Richards did, however, succeed in winning the admiration of many influential members of Congress and other important people in the federal government, which proved to be most helpful in the rough years that followed.

Returning home to Utah, Richards was presented in the Fall of 1882 with the nomination of the People's Party to succeed George Q Cannon as the Territorial Representative to Congress. Although flattered by the honor, Richards declined in favor of his close friend, John T Caine, who was ultimately elected and went on to provide invaluable service to the Territory of Utah during the bleak years of the 1880's.

After serving several years as Ogden City Attorney and prosecuting attorney for Weber County, Franklin S. Richards moved his family to Salt Lake City, where in 1884 he became city attorney, a position he held until 1890. The move was in part necessitated by the increased strain between the Mormons and the federal government. As General Counsel for the church, his time and efforts were turning more and more towards the defense of polygamists who were being hunted vigorously Since Richards himself was not a practicing polygamist, he rapidly became one of the few visible figures of the church. With most of the polygamist General Authorities going underground, Richards became an important link between the church leadership *in absentia* and the outside world. For church members not in hiding, the increase in federally imposed sanctions and harassment brought confusion and distress from which there often seemed to be no escape. Richards quickly became a voice from whom the saints sought counsel, especially after the passage of the Edmunds-Tucker Act in 1887 When asked about the loyalty oath required of all voters, Richards calmly advised church members to take the oath as a means of preserving their voting rights, and promised to attack the apparently unconstitutional oath in court.

Richards' efforts in behalf of the church were being asserted on two fronts. On the positive side, he continued actively

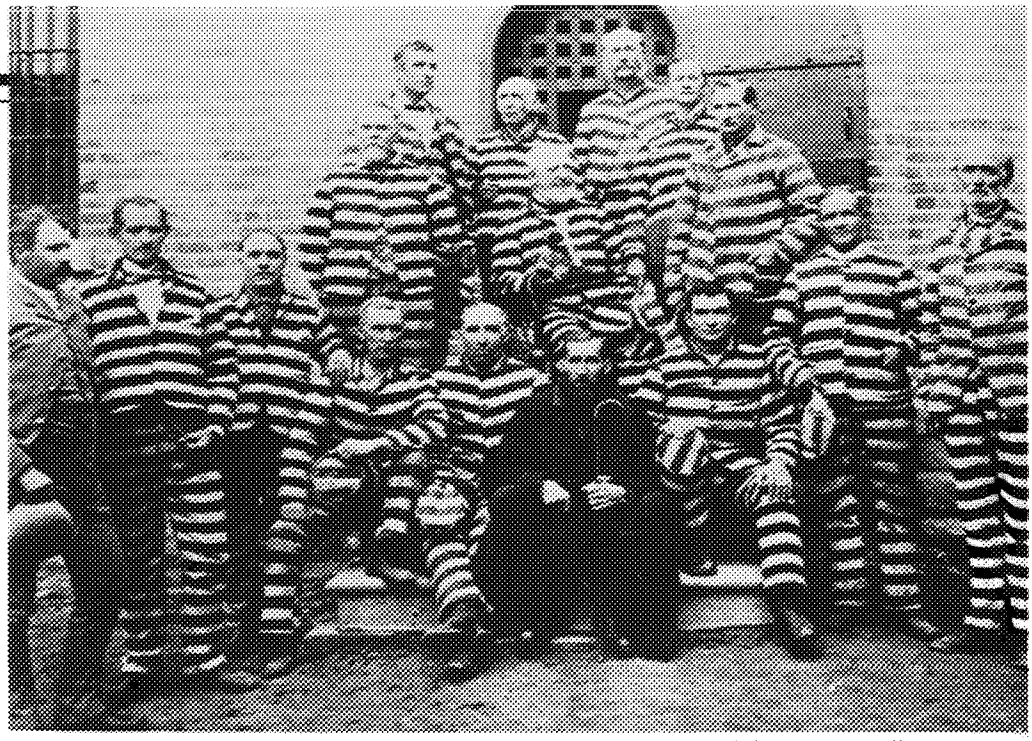


Several of the most prominent figures in Utah found their way to the Constitutional Convention of 1895, including Franklin S. Richards (lower right hand corner). Richards was most remembered for his famous debate with B.H. Roberts (center) over women's suffrage.

to support every attempt to gain statehood His popularity in Washington served to underscore the importance of his position as mediator which circumstances placed him in. Though both sides of the struggle often appeared deadlocked in a test of will, communications were kept open through the efforts of John T Caine and Franklin S Richards who made nocturnal visits to the hideouts of church officials to discuss developments and counterproposals before deciding on a particular strategy At these sessions Richards would convey informal comments made by congressional leaders that were possible indications of what actions by the church could acceptably resolve the differences that were holding up statehood For Richards, statehood was the most important goal to be sought, and like many others, he felt strongly that it was the only means by which the struggle could be resolved Accordingly, he pursued a conciliatory approach that would compromise with the federal government wherever it was doctrinally possible for the church Richards saw the protracted war of attrition with the federal government as potentially disasterous for the church and was anxious to resolve the most critical issues preventing statehood before the church was destroyed

At the Bar, Richards continued to defend the church and its polygamous members with vigor, but for the most part it was to be a losing struggle The territorial prison roster closely resembled an LDS Who's Who as church officers ranging from the First Presidency to stake presidents and bishops shared quarters in the overcrowded penitentiary While Franklin S Richards was involved in several prominent cases in the late 1880's, two cases in particular stand out in importance, one of which had a direct and important consequence on those Mormons incarcerated for cohabitation

In the late Fall of 1885, Apostle Lorenzo Snow returned from visiting in Wyoming and was immediately captured at his home in Brigham City He was subsequently indicted on three counts of unlawful cohabitation and eventually convicted, receiving three consecutive sentences of six months in prison under a new segregation ruling by Judge Charles S Zane President Snow entered the penitentiary in March of 1886 and served his first six month sentence, whereupon Franklin S Richards immediately brought a writ of habeas corpus on appeal before the U S Supreme Court stating that President Snow was being punished three times for the same offense of continuous cohabitation The Supreme Court agreed that there was but one entire offense and ordered President Snow released The victory was a tremendous boost for the morale of the church and a stunning defeat for the crusaders sent to solve "the Utah Problem" When President Snow was released from prison, he was met by a jubilant crowd that escorted him triumphantly into the city For Franklin S Richards the victory won him instantaneous respect and admiration in all corners of the Territory and in Washington Not only had he secured the release of President Snow, but well over one hundred others who had been convicted and sentenced under the unconstitutional segregation rule



The prisoner rolls at the Utah Territorial Penitentiary resembled a who's who of the L D S Church during the late 1880's Here George Q Cannon of the Church's first presidency is surrounded by fellow "cohabs"

Richards did not enjoy the same degree of success in the second major case of this period, and its effect was far more significant to the ultimate outcome of the struggle between the church and the federal government

"The territorial prison roster closely resembled an LDS Who's Who as church officers ranging from the First Presidency to stake presidents and bishops shared quarters in the overcrowded penitentiary."

Shortly before the passage of the Edmunds-Tucker Act in 1887, the church began preparing for the anticipated dissolution of the church as a corporate entity The provisions of the bill which allowed escheatment of all church property in excess of $50,000 to the federal government were known well in advance Preparations were made to dispose of much of the church's holdings to various select individuals, specially created nonprofit associations, and secret trusts overseen by numerous ecclesiastical authorities within the church Shortly after President John Taylor's death on July 25, 1887, George S Peters, the U S Attorney for the Territory of Utah brought suit against the church to recover all property held by the trustee-in-trust in excess of $50,000 under the enacted provision of the Edmunds-Tucker Act What ensued was a lengthy court battle lasting almost three years involving some of the best legal minds in the country, not the least of whom was Franklin S Richards

Beginning in the Territorial Supreme Court, *United States V The Late Corporation of the Church of Jesus Christ of Latter-Day Saints, et al* eventually found its way to the U S Supreme Court where oral arguments were heard in January 1889 Richards, along with John M Butler, James O Broadhead, and Joseph E McDonald, argued against the actions of the federal government on several grounds They asserted that Congress was without power to repeal the territorial charter under which the church had been

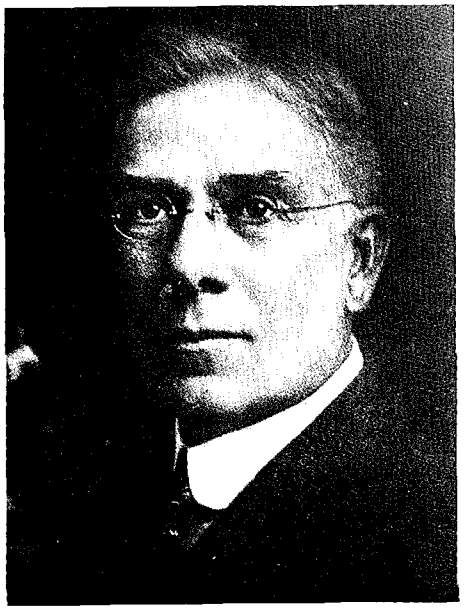
Utah Delegates in Washington front row, John T Caine, Mrs John T Caine (Margaret Nightingale Cain), Pres Joseph F Smith, Mrs Franklin S Richard, Franklin S Richards; back row, George F Gibbs, L. John Nuttall and Charles W Penrose

incorporated, and further, that the federal government was totally without power to seize the property of the corporation and hold it for the benefit of public schools in Utah Citing *Dartmouth College v Woodward*, the church's attorneys argued that the charter which created the church corporation was a constitutionally protected vested right of contract which could not be altered or repealed by any subsequent acts of either the territorial legislature or Congress. Turning to the issue of escheatment, they pointed out that there was no precedence to support Edmund-Tucker provisions of escheating personal property to the United States, nor was personal property subject to escheat because of the failure or illegality of the trusts to which it was dedicated at its acquisition and for which it had been used by the corporation Finally, the attorneys argued that the real property owned by the church could not constitutionally be taken by the federal government under the terms of the Edmunds-Tucker Act.

Seventeen months later, the Supreme Court handed down its decision on May 19, 1890, ruling against the church on virtually every issue, stating that the plenary power of Congress over territories gave them power not only to abrogate the laws of territorial legislatures, but also the power to legislate directly for the territory Congress thus had a full and perfect right to repeal the territorial charter and abrogate the corporate existence of the church The court further ruled that the federal government could dispose of the assets of the dissolved corporation so long as such disposition was used with due regard for the objects and purposes to which the property was originally devoted; in this case for religious and charitable uses Finally, the court addressed itself to the attempted disposition of church property before the Edmunds-Tucker Act became effective, calling the attempt an evasion of the law, and void

The effect of the decision was devastating both to the morale and the temporal power of the church Already in the congressional hopper was the new Cullom-Strubble Bill which was expressly designed after the Idaho Test Oath law to effectively disenfranchise the Mormon Church completely For months Franklin S Richards had fought desperately against the bill with petitions signed by non-Mormons urging Congress to defeat the proposal; but the Supreme Court's decision against the church had dealt a staggering blow to the move for *rapprochement* with the federal government With renewed vigor the crusaders against the "Utah problem" fought even harder for the passage of the Cullom-Strubble Bill, and when the Utah Commission strongly endorsed the measure on August 22, 1890, its passage seemed imminent

The passage of the bill loomed heavily over the church when Frank Cannon returned to Utah from Washington with what deemed to be a last chance appeal from the Republican Party for the church to abandon plural marriage Reporting to his father, George Q Cannon of the First Presidency, Frank was in turn informed that President Woodruff had sought the mind of the Lord and it appeared that a solution was near Indeed, one month after the report of the Utah Commission, President Wilford Woodruff declared on September 24 what has come to be known as the Manifesto, as a direct response to the press release of August 22. On October 6, the Manifesto was presented before the body of the church in Conference session whereupon it was sustained unanimously



Franklin S Richards shortly after the Smoot Hearings of 1906

The Manifesto seemed to bring about conclusively the denouement to the struggle between the church and the federal government, opening the door at last towards statehood To this end, Franklin S Richards continued his tireless efforts, first by solidifying the trust of Congress, and second, by pressing forward in yet another Constitutional Convention As chairman of the church's politically powerful People's Party, Richards moved on June 10, 1891 to disband the party which was sustained unanimously by the Territorial Central Committee, opening the door for the national two party system in Utah. Three years later, on July 16, 1894, President Cleveland signed into law the Enabling Act that provided for Utah's admission to the Union The following year, Franklin S Richards found himself again in the Constitutional Convention, but this time with the knowledge that efforts would not be in vain His participation was extremely active in all aspects of the framing of the Utah Constitution, and he was especially adamant in his defense of Women's suffrage as demonstrated by his famous debate with B.H. Roberts. Finally, on January 4, 1896, statehood was achieved, enabling Richards to turn more of his attention to the practice of law without having to concern himself with the

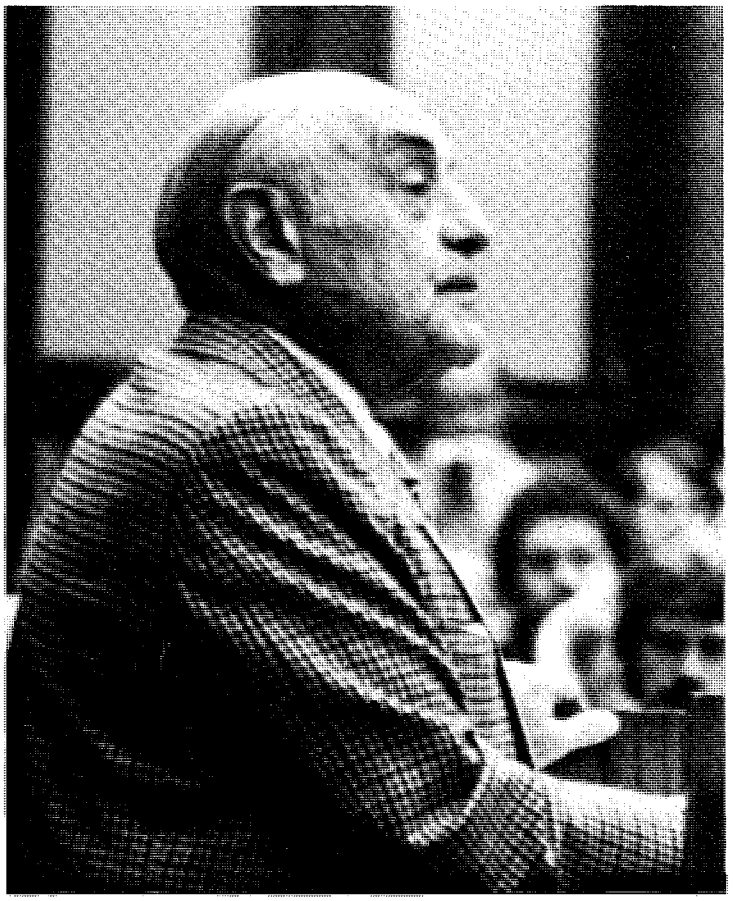
political pressures brought against the church

With the Mormon Church restored as a corporate entity, Richards turned his attention towards some of the problems that had been encountered prior to the Manifesto Of chief importance was the means of holding church property in a manner that would not be subject to mass escheatment if troubles were ever encountered again. To this end, Richards spent the next several years devising a system of ownership that previously had not been seen to any wide extent in America Using the sole corporation as his basis, Richards set about organizing ward and stake properties under the sole corporate ownership of the ecclesiastical leaders responsible at each level The sole corporation enabled Bishops to hold title to all church properties within his ward, and likewise, the Stake President for all stake properties under his exclusive stewardship A sole corporation was created in the Presiding Bishopric for all mission properties wherever the law permitted, and the President of the Church was incorporated to hold title to such properties as temples, educational institutions, and other real estate holdings The creation of such sole corporations enabled the automatic passage of title to property at various levels in the church hierarchy each time a successor was called to assume the Bishopric or Presidency For Franklin S Richards, the task was not only to develop a foolproof system of sole corporations, but also provide the means under which those corporations could exist He first sought legislation in those states where the church held the majority of its properties, including Utah, Wyoming, Idaho, Arizona, and Nevada. Next, those states wherein mission properties were located were approached to provide the statutory basis for sole corporations Finally, Richards' efforts took him outside of the United States to seek legislative support in those foreign countries where missions were located, requiring an astute knowledge of all aspects of international law and comparative legal systems In all, the project took several years to bring about and occupied much of Franklin S. Richards' time in his service to the church as General Counsel

In 1906, Franklin S Richards again stepped into the national limelight as the attention of America was once more focused on the Mormon Church, this time with the Senate Privileges and Elections Committee hearings on the seating of Senator Reed Smoot, an Apostle in the Council of the Twelve Once again the issue of polygamy had been raised at the national level and seriously threatened the relationship between the church and the federal government The first witness called to testify was Church President Joseph F Smith who was forced to undergo intensive interrogation covering all aspects of church affairs Seated at his side throughout the hearing was Franklin S Richards in his capacity as General Counsel for the church, calmly advising the Prophet on all aspects of the inquiry, a service that was rendered likewise to several other church officials called to testify

At their conclusion, the Smoot Hearings had resulted in bringing some degree of consternation to church officials, but for the most part, the church was able to weather the storm without any serious risk of again incurring the wrath of the federal government As had become so characteristic of his work, Franklin S Richards' service to the church had been invaluable

For well over a half century, Richards continued to serve as General Counsel for the church with no apparent diminution in intensity or vigor Although he remained in the center of political activity throughout his illustrious career, he never accepted or sought political office His interests were concentrated on insuring that government clearly understood where its bounds were drawn insofar as individual rights were concerned He saw law as the most important single avenue for the resolution of conflict, and as his patience at the height of crisis in the late 1880's had shown, he continued to demonstrate an unshakable faith in the American legal system When he died in 1934 at the age of 85, he stood as one of the most prominent and highly regarded members of the Utah State Bar His rise from reading law as Weber County Recorder to arguing in defense of the church at the bar of the U S Supreme Court within the short span of just over a decade is truly a legacy for Latter-day Saints and the law



B.E. Witkin — Expositor, Educator, and Entertainer

by Jack Haycock

"It is only in law schools that practice is regarded as a distasteful and alien intrusion upon the solemn task of teaching students to think Afterwards, in the law office or the courtroom, before or behind the bench, we discover that learning is even more important in performing the daily chores of the lawyer or judge."

B E Witkin

Bernard E. Witkin, California's foremost legal writer and lecturer, aptly described as the "Dean of the California Legal Community" presented three lectures at the J. Reuben Law School from October 10 to 11. Witkin's unbounded knowledge of law and of precedent was used to illustrate, in his own methodical style, that in the courts anything can happen, and usually does

Lecturing to Dean Lee and Professor Sabine's Appellate Advocacy class, Witkin exposed the uneven and prejudicial extraordinary writ procedure that has confounded the appellate process Witkin labeled his talk "The Joys of Appeal and the Vagaries of Extraordinary Writs", and described it as, the union of appellate jurisdiction with its illegitimate partner, extraordinary writs The author called for legislative reform to cure a nonsystem of judicial decision making, undernourished by a deficiency in *stare decisis* Witkin stated that he does not object to activist courts, so long as they apply any newly discovered justice equally to all people

In his second speech, Witkin addressed an overflow crowd of law students and professors in the Moot Court Room Speaking on "Look What's Happening to Contracts", Witkin proved that the common law can be most uncommon and that simple contracts can be anything but simple Witkin denied that the law of contracts is stale and stated that "social and economic pressures acting upon bold judicial legislators have bent and twisted the doctrines of consent, consideration and performance into a new and exciting shape " Interjecting wit into legal analysis, Witkin illustrated the evolving five corner contract by reference to hornbook law — law not yet undermined by socially motivated courts — and by citing the foolproof contract — although it proved not to be courtproof

Witkin described the borrowing from criminal law of diminished capacity for application to contracts as a concept conceived in a state "of wild cerebral turbulence." Further, to show that a contract based on mutual mistakes can be valid, Professor Witkin cited an illuminating case employing a classic bar examination tactic: a one-in-a million factual setting. Finally, Witkin cautioned lawyers not to become distressed, because so long as the courts continue to produce precedent shattering and mind boggling slants on the bargaining process, "no computer will take business away from the lawyer."

Witkin's final lecture was to the authors and editors of the *B.Y U. Journal of Legal Studies*. He hailed the first two editions of the *Journal's Summary of Utah Law* and encouraged *Journal* members to continue to provide lawyers with this necessary tool The student members were told that there are no other better qualified persons than themselves to write law summaries Witkin detailed the importance of distinguishing between the theory and the practice of law. As he left the room following his speech, Witkin was heard making verbal notes on what he would say next year to the members of "his" Journal.

B E Witkin has mastered summarizing, teaching and humorizing To find Witkin's treasure chest is to apply Mr Justise Frankfurter's advise not to reject wisdom merely because it comes late