Plea in Abatement in the Case of the People vs. Brigham Young.

THE TERRITORY OF UTAH,
IN THE THIRD JUDICIAL DISTRICT COURT
of said Territory,
REGULAR SEPTEMBER TERM
thereof, A. D. 1871,
HON. JAMES B. McKEAN, JUDGE.

THE PEOPLE OF THE UNITED STATES in the *TERRITORY OF UTAH*, against BRIGHAM YOUNG, Senior.

And the said, Brigham Young, who is complained of for the crime of openly and notoriously, lewdly and lasciviously associating and cohabiting with women not being married to them, in his own proper person, cometh into court and having heard the compiaint read, says: That he can only be indicted for the crime aforesaid by a Grand Jury duly selected, drawn, summoned and empanneled according to the laws of the Territory of Utah.

That said Grand Jury, by whom said pretended indictment was found, was not drawn according to said law; but an open venire was issued by order of the Hon. James B. McKean, Judge of said Third District Court, which order was in words and figures as follows; to wit:

"*To Wm S. WALKER, Clerk of the Third District Court in and for the Territory of Utah:*

SIR—It is hereby ordered that you issue to the United States Marshal for the said Territory, a venire, commanding him to summon, from the body of the Third Judicial District of the said Territory, eighteen good and lawful men to act as Petit Jurors, and twenty-three good and lawful men to act as Grand Jurors, at a session or term of the said court, to be held in the Court Room in Salt Lake City, on Monday, the 18th day of September instant; and that you make the same returnable then and there at 10 o'clock in the forenoon of that day and thereof fail not.

"Witness my hand at Salt Lake City, this 11th day of September, A. D. 1871;

JAS. B. McKEAN,
Judge of the 3d District Court.

"Which said order was endorsed as follows: Order received and venire issued, Sep. 11th, 1871.

Wm. S. WALKER, Clerk."

That said William S. Walker, Clerk of said court, issued a venire on said order in words and figures as follows, viz:

DISTRICT COURT, THIRD JUDICIAL DISTRICT,
Utah Territory,
REGULAR SEPTEMBER TERM, 1871,
HON. JAMES B. McKEAN, Judge.

TERRITORY OF UTAH, County of Salt Lake, } S.S.

"To M. T. Patrick, United States Marshal for the Territory of Utah, greeting:

"You are hereby commanded to summon twenty-three good and lawful men, residents of the Third Judicial District, to be and appear at the United States Court in Salt Lake City, on Monday, the 18th day of September inst., at 10 o'clock a.m., to serve as Grand Jurors for the Third Judicial District of the Territory of Utah, thereof fail not, and make due return of this venire with the panel thereon endorsed.

"Witness the Hon. James B. McKean, Judge, and the seal of said Court at Salt Lake City, this 11th day of September, 1871,

WILLIAM S. WALKER, Clerk."

That said venire was delivered to one M. T. Patrick, United States Marshal, selected and summoned the following named persons, by virtue of said writ of venire, the return of said Marshal being, in words and figures, to wit:

"I hereby return the within venire, having summoned, from the body of the said District of Utah, the following named persons, to serve as Grand Jurors:

1 Sharp Walker	2 Samuel Kahn
3 J Milton Orr	4 Chauncy C Nichols
5 Charles L Dahler	6 Hiram B Clawson
7 Elias B Zabriskie	8 James Townsend
9 Edwin D Woolley	10 Alfred S Gould
11 Frank D Clift	12 J T Miller
13 G L T Harrison	14 Geo Q Cannon
15 Christopher Deihl	16 James P Page
17 James Mathews	18 Frank Hurlburt
19 Samuel Howe	20 Charles Newbaldt
21 Nelson Lawrence	22 Charles Trobridge
23 Edward Ried	

M. T. PATRICK, U. S. Marshal."

Sept. 18, 1871.

That said jurors were called by the Clerk of said District Court, on the 18th day of September, 1871, in open court, and the following persons answered to their names, viz:

Sharp S Walker	J T Miller
Alfred S Gould	Chauncy Nichols
J Milton Orr	Elias L T Harrison
Elias B Zabriskie	James Townsend
Geo Q Cannon	Christopher Diehl
Hiram B Clawson	James Mathewson
James P Page	Samuel Howe
Frank Hurlburt	Nelson Lawrence
Charles Newbaldt	Edward Reid
Samuel Kahn	

That the following were excused:

Sharp S Walker	Edward Ried
Samuel Kahn	Alfred S Gould
J Milton Orr	George Q Cannon
Elias B Zabriskie	James Townsend
Christopher Diehl	Hiram B Clawson
Nelson Lawrence	

It was then ordered by the Court that Talesmen be summoned to fill out said jury; when the following persons were selected and summoned promiscuously from the body of the County by the United States Marshal, as Talesmen, and answered in Court, viz:

Charles Ried, Clayton L Hayeres, Hugh White, Edward Preble, James M Day, William S Woodhull, William M Johns, Alphonzo F Tilden, John W Morehouse, Jacob Engler, J B Meader, Ezra C Chase, John M Wallace, James W Hamilton, Geo W Bostwick, Thomas Carter and John Cunnington.

The following Talesmen were then excused:

Geo W Bostwick, Thomas Carter and John Cunnington.

The following persons were then impanneled, sworn and charged as a Grand Jury, to wit:

Samuel Howe, Chauncey C Nichols, J T Miller, Elias L T Harrison, James P Page, James Mathewson, Frank Hurlburt, Charles Newbaldt, Clayton L Haynes, Hugh White, Edward Preble, James M Day, William L Weodhull, William M Johns, Alphonza F Tilden, John W Morehouse, Jacob Engler, J B Meader, Ezra C Chase, John M Wallace, Chas Ried, and James W Hamilton, and constituted the Grand Jury, by whom the indictment was found and presented in this case.

That said jurors were selected by the United States Marshal, aforesaid, instead of being selected in accordance with the Territorial laws.

That they were summoned by the said United States Marshal, and not by either the Territorial Marshal, or Sheriff, as required by said Territorial laws.

That said Jurors and Talesmen were selected, chosen, designated and called by said United States Marshal promiscuously, and not by any drawing, or ballot, as prescribed by the laws of said Territory, and in contravention of each and every section of the laws of said Territory, prescribing the manner of drawing, selecting and obtaining jurors to serve in the District Courts of said Territory

That said jurors and Talesmen were not selected, summoned or called in accordance with the provisions of any Act of Congress of the United States, or in accordance with the practice or rules of any Court of the United States, or in accordance with any rule of this Court

That one Charles Reid had been summoned, attended and served as a juror in this court in the September term, A. D. 1870, and within two years prior to the time said Grand Jury, by whom the indictment in this case was found, was empaneled—he, the said Charles Reid, being the same person above named, and who was impanneled, sworn, and served on the said Grand Jury, by whom the indictment herein was presented, contrary to the Act of Congress, entitled "An Act to provide for the compensation of Grand and Petit Jurors in the Circuit and District Courts of the United States, and for other purposes," approved July 5th, 1870.

That one James Harrison, and one Elias L. T Harrison, were impanneled and sworn, and acted as members of the Grand Jury in finding the indictments in this case; and that said James Mathewson and Elias L. T. Harrison were never selected or summoned to serve on said Grand Jury, by any one or in any manner, as appears from the records in this Court.

That one, George R. Maxwell was present before said Grand Jury at the time of finding said indictment. That said George R. Maxwell was only present in the capacity of Deputy United States Attorney, as appears by the record of this Court, the legality of which appointment the said affiant denies, was not sworn, or otherwise present as a witness, and that he was an unauthorized person, and was illegally before said Grand Jury.

That at the time of the impanneling of said Grand Jury this defendant was not under arrest, in custody or on bail; nor was he charged with crime of any kind prior to the finding of said indictment; nor did he have any opportunity at any earlier date than the present, to interpose any challenge to said Grand Jury, or either of said jurors.

And this the said Brigham Young is ready to verify.

Wherefore he prays judgment of said indictment, and that the same may be quashed.

BRIGHAM YOUNG.

TERRITORY OF UTAH, County of Salt Lake. } S.S.

Brigham Young, being duly sworn, says he is the defendant in the above case. That he has read the above and foregoing plea, and knows the contents thereof, and that the same is true in substance and matters of fact, to the best of his knowledge and belief.

BRIGHAM YOUNG.

Subscribed and sworn to before me, this 9th day of October, A.D 1871.

WM. S. WALKER, Clerk.

TERRITORY OF UTAH
THIRD DISTRICT COURT.

The People of the United States, in the Territory of Utah *vs* Brigham Young. } September Term, 1871, Salt Lake City.

Opinion of Chief Justice McKean.

STATEMENT.

The defendant is indicted for lewd and lascivious association and cohabitation with sixteen women, not being married to them. The indictment is under the following statute:

"If any man or woman, not being married to each other, lewdly and lasciviously associate and cohabit together * * "Every such person so offending shall be punished by imprisonment not exceeding ten years and not less than six months, and fined not more than one thousand dollars and not less than one hundred dollars, or both, at the discretion of the Court." (Laws of Utah p. 53, Sec. 32.)

The indictment contains sixteen counts and charges as many offences, extending from the year 1854 to the present time, there being no statute of limitations. The defendant moves to quash this indictment on the following grounds.

"First, that in said indictment, as appears upon the face thereof this defendant is charged with sixteen distinct and different felonies, alleged to have been committed at sixteen different times and places, with sixteen different persons, the same not being different parts of one offense, nor different statements of the same offence, or such alleged felonies being in any wise connected with each other."

"2nd. That each and every count of said indictment, as appears upon the face thereof, is vague, uncertain, and indefinite in the allegation as to time when said offences, or any of them, were committed.

R. M. Baskin, U. S. Attorney, and G. R. Maxwell for the people.

Fitch and Mann, Hempstead and Kirkpatrick, Snow and Hodge, A. Miner, Legrand Young and Hosea Stout for the defendant.

McKEAN, C. J. Although the question of selecting, summoning, and empannelling the grand jury which presented the indictment is not involved in the motion before the Court, one of the counsel for the defendant saw fit, in his remarks, to denounce the jury as having been selected and empannelled in a manner unprecedented either in Europe or America. Had the counsel first investigated this question he would have found that when Brigham Young was governor of this Territory, and his selected friend, Judge Snow, now one of his counsel, sat upon the District and the Supreme Bench of the Territory, grand jurors were for years selected, summoned and empanneled precisely as they now are. And the counsel would also have found that in reported cases United States Judges, even within the States, have sometimes found the State statutes inapplicable, and have ordered juries to be procured substantially as they are procured in this Territory. But all this has nothing to do with the motion before the Court. The motion to quash assails the indictment—not the grand jury that found it. Let us return, therefore, to the record.

One of the counsel for the defendant has rightly said, that the Court should render such a decision upon this motion, as shall subserve the interests of the public and the rights of the defendant. What are those interests? What are those rights? It is agreed by counsel on both sides, that at common law the Court might either grant or refuse this motion, in the exercise of a sound discretion. Many authorities were cited on the argument sustaining this proposition: One of the counsel for the defendants sought to account for the fact that there seems to be a preponderance of authority against the granting of such motion to quash, by conjecturing that when such motions are granted they are not often reported. He also urged that this Court is not bound to respect any decisions rendered outside of this Territory, unless they be rendered by the Supreme Court of the United States.

Without pausing now to consider these arguments, let us proceed to enquire what are the interests of the public and the rights of the defendant, as involved in this motion. It is unquestionably to the interest of the public that a man indicted for crime, if guilty, should be convicted; if innocent, acquitted; and that too with as little delay as may be consistent with the rights of the accused, and with those safeguards which experience has approved. But will it promote the interests and rights either of the public or of an accused citizen to have many indictments and many trials for offenses of the same class, rather than one indictment and one trial covering the whole? The Court is bound to presume that the evidence before the Grand Jury authorized, nay, required the sixteen charges contained in this indictment. If, now, the Court should grant the motion of the defendant, and quash the indictment because it contains these sixteen counts, the grand jury, which is not yet discharged, would be in duty bound to find sixteen new indictments. Or, if the Court should compel the prosecution to elect to go to trial on some one count only—striking out the others, then the grand jury would be in duty bound to find fifteen new indictments. Thus, in either event, the defendant would be subjected to sixteen indictments and sixteen trials. How this could promote the interests and rights either of the public or of the defendant, it is not easy to perceive; nay, it is difficult to imagine anything more harassing and vexatious to the defendant. Indeed the learned counsel for the defendant failed to show wherein this would be any favor to their client. Had sixteen indictments been found in the first instance instead of one, could not the defendant's counsel urge, with irresistible arguments, that they should be consolidated?

But is there not some legislation bearing upon this question? By act of Congress, approved February 26, A. D. 1853, it is provided that—"Whenever there are or shall be several charges against any person or persons for the same act or transaction, or for two or more acts or transactions connected together, *or for two or more acts or transactions of the same class of crimes or offences which may be properly joined*, instead of having several indictments, the whole may be joined in one indictment in separate counts; and if two or more indictments shall be found in such cases, the court may order them consolidated." (10 Statutes at Large p. 162. 1 Brightley's Digest, p. 223, Sec. 117.

What is the just construction of this statute? Notwithstanding the ingenious efforts of one of the counsel to induce the court to disregard the views, reasonings and opinions of other courts, still it may be prudent first to listen to those courts and see if their decisions be reasonable. In *the United States vs. Bickford*, (4 Blatchford's Circuit Court Rep. 337) the indictment contained one hundred counts, each one being for a distinct felony, but of the same class. On motion to quash, the court refused, holding that the joinder of the distinct felonies was warranted by the statute cited above. In *the United States vs. O'Callahan* (6 McLean's Circuit Court Rep. 596.) the same doctrine is held. These decisions are entitled to great respect, having been rendered by eminent judges of the Supreme court of the United States and their Associate District Judges. Indeed so obviously reasonable and just are they that, were the question a new one, I do not see how I could reach a different conclusion.

In considering the second ground of motion to quash, the meaning of two words, "associate" and "cohabit" must be carefully kept in mind. Webster defines "associate" thus: "To join in company, as a friend, companion, partisan or confederate." * * "It conveys the idea of intimate union." He thus defines "cohabit." "To dwell or live together as husband and wife; usually or often applied to persons not legally married."

The offence charged in each count could not be predicated of any one moment or instant of time. To commit such an offense a continuous and somewhat protracted period of time is necessary. There is nothing in this obligation.

The learned counsel for the defendant need not be assured that any motion which they may make in behalf of their client, shall be patiently heard and carefully considered. Nor does the court intend to restrict them in their arguments, except upon questions already adjudicated. But let the counsel on both sides, and the court also, keep constantly in mind the uncommon character of this case. The Supreme Court of California has well said: "Courts are bound to take notice of the political and social condition of the country which they politically rule." It is therefore proper to say that while the case at bar is called "*The People versus Brigham Young*, its other and real title is *Federal Authority versus Polygamic Theocracy*. The government of the United States, founded upon a written constitution, finds within its jurisdiction another government—claiming to come from God—*imperiam in imperio*—whose policy and practice, in grave particulars, are at variance with its own. The one government arrests the other in the person of its chief, and arraigns it at this bar. A system is on trial in the person of Brigham Young. Let all concerned keep this fact steadily in view; and let that government rule without a rival which shall prove to be in the right. If the learned counsel for the defendant will adduce authorities or principles from the whole range of jurisprudence, or from mental, moral or social science, proving that the polygamic practices charged in the indictment are not crimes, this court will at once quash this indictment and charge the grand jury to find no more of the kind.

The pending motion to quash is overruled.

NOT SO RABID.—The New York *Herald* man, who writes from this city, we ought to commend a little, for he is evidently improving in his style—it is far more moderate than it was quite recently. He says—

Somebody must have *sent East* a very exaggerated statement of the situation here to create the intense excitement which appears to have existed there. Nothing has occurred here that would justify any fears of an outbreak.

True enough. Somebody, several somebodies, have sent East very exaggerated statements of the situation here, to create excitement. Further we quote from the same letter, Oct. 4—

They (the Mormons) are willing, nevertheless, to fight the battle in the courts. They don't expect justice there. The federal officials hoped for a great disturbance or a fight. In this they are disappointed. There will be no trouble, and capital will be as safe here as in any part of the United States.

It may be, as the correspondent says, that "the Federal officials hoped for a great disturbance or a fight." They ought to know the hope that was within them, and to be able to give a reason for the hope too. But we rejoice to hear that they will be disappointed in any such hope, also that "there will be no trouble," and that "capital will be safe here." If there is any trouble, it will not be incited by the "Mormons," that we should not fear to prophesy. Meantime let the *Herald* correspondent continue to improve. He couldn't do better than reform.

DIED.

At Ogden City, September 29th, of gravel, SHELDON NICHOLS, the aged father of Bishop A. Nichols; aged 83 years, 10 months and 16 days.

Deceased was born at Rutland, Vermont, and was the father of 13 children. He belonged to the Baptist denomination, and had been under the impression, from false rumors, that a Baptist could not stay among this people without losing his life. But in the fall of 1870, Bishop A. Nichols, his son, went to Canada and brought him, as well as his (the Bishop's) mother to Utah, where they have learned that anybody not belonging to our denomination can live in peace and perfect security here.

At the interment, which took place at 5 p. m., Oct. 1st, a procession of about 30 carriages and wagons followed the remains to the cemetery from the Bishop's residence, where deceased could be seen in an elegant coffin, on which were placed strawberry bushes having on them fruit in every stage of growth from blossoms to the fullest ripeness. About 170 gentlemen and ladies were present at the services, and Professor R. L. Fishburn's Choir sang appropriate hymns, and, on the request of the wife of the deceased, Elder W. L. Watkins read the 14th chapter of Job.—COM

In this city, Oct. 10th, of marasmus; ALBERT SHERITON, son of Zebulon and Frances W. Jacobs, aged 1 year, 7 months and 27 days.

In this city, Oct. 7, of teething and canker, SARAH, daughter of Jonathan and Mary Ann Needham. Born May 2, 1870.

Mill. Star, please copy.