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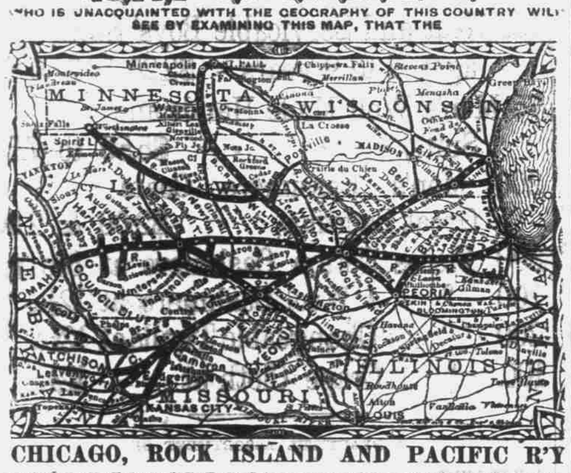

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EVENING NEWS.

Thursday - June 18, 1885

ATTORNEY BROWN'S BRIEF,

AS FILED IN THE SUPREME COURT, UTAH TERRITORY, JUNE TERM, 1885.

The United States, Respondents,
vs.
A. Milton Musser, Appellant.

APPELLANT'S BRIEF.

In this case the defendant relies mainly on the briefs already presented in the case of the United States against Cannon.

The leading features of the law in the case are therein discussed, and apply as well here. The facts are a little different, and we add the following points:

I.

The evidence was not sufficient to authorize or justify the verdict for the offense as defined by the Court.

If the Court erred in its definition of the offense, as has already been argued, of course we are entitled to a new trial on that ground; but there was no evidence tending to prove defendant guilty of that particular definition of the offense, although it might meet some other or different definition. There was no evidence that Musser ever held out to the world more than one woman as his wife after the passage of the act of Congress under which this prosecution is brought.

He never introduced more than one of these ladies as his wife; he never permitted more than one of these ladies to be called his wife in his own family. He never appeared in public with more than one lady as his wife. He never informed the world that he had more than one wife. He did nothing which, within the charge, constituted the facts of the offense. He did not live with more than one of these ladies, if the word "live" means to eat and sleep with her, or occupy the same bed or a room with her, or be with her; and as for the "habit and repute" of marriage, he neither had the habit of marriage nor the reputation of it. Not a witness swore to any fact tending to show the habit of marriage, and if public repute would find him guilty, he was not reputed to have stood in any other relation than that of ex-husband.

The only thing that the testimony tended to show, was some of the facts which the Court designated in his charge as immaterial, or as not necessary, to wit: "That the defendant should occupy the same bed with this lady or any of them," or "have sexual intercourse with them, or that a marriage should be celebrated between any of them." All the neighbors, the children, all the people most likely to know, were called by the prosecution. Not one of them testified that defendant ever spoke of, or to, or with any of these ladies as his then existing wife. Not one of them, that he ever treated either of them as a wife in the ordinary acceptation of the term. Not one of them that he ever caressed, or did anything else to them, or spoke to them on any other subject than those which were necessarily of common interest between them, and which ought to be of common interest.

And it is not criminal to treat the children of himself and either of these ladies as a subject of common interest. The judge who tried this case has decided, on other occasions, and stated (unless it is now to be changed) that it cannot be a criminal act for a man and woman who have children, to discuss together the welfare of those children; that duty, of course, must necessarily bring them together. It is not criminal for the father to provide for his children. The law expressly imposes that duty upon him, and this very act "legitimates" them and adds to the duty of the father. It is not criminal for the father to permit his own children to be called by his own name, after Congress has stepped in and made them legitimate, is it?

I call especial attention to this question, because in this Musser case the names, the ages, the birth of children born long before the passage of the act under which this prosecution is founded, are dwelt on and brought out as if the continuing relationship between father and child was to be made the subject of crime; and the prosecution have dwelt upon it as if that was the crime, to-wit: that the father had continued to recognize his own children.

Another feature of this branch of the case is, that the name of Musser continued to adhere to three ladies whom he was supposed to have married years before, and by whom he had children many years before the passage of this act. Was it criminal in him that they continued to retain the name by which other people knew them?

If he badly by forty divorces severed himself from them, and even if he had hid himself and never had seen them during these years, since the passage of the act, their name would have been the same.

Any person may assume any name he pleases. There is no law of nomenclature. Custom must fix that. Is Musser to be punished for the custom? Naturally having been with him, having been recognized as his polygamous wives, they assumed his name.

Did the Edmunds act expect them to change their names? They were the mothers of Musser's children, and would it not have been a strange custom for the mother of half-a-dozen of Musser's children to be called by the name of Miss Segmiller, or Miss Pratt, or Miss White? Did Congress expect it? And did Congress intend to inflict punishment upon anybody who afterwards dared to give the name of Musser? And if general custom gave the name of Musser, if they adhered to that name, did that constitute any crime of Musser's? If he should give them the name, by which they were known to all other men and women, was that a crime?

Counsel have it inserted, as an amendment in the bill of exceptions, that he actually deeded lands to them by the name of Musser, recognizing that as their true name. It was their true name.

Does the telling of that truth make him a criminal within the meaning of this act?

The only way he ever recognized them as his wives was by deeding his property to them; consulting with them as to the welfare of their own innocently born children. If the age of the child indicates that it was begotten since the act of Congress (which we deny; the evidence does not even point to it), that fact alone would not constitute the "habit and repute" of marriage, would it? He may have crawled secretly into the bed of one of these ladies; under the definitions given by the court below and his refusals to charge; that is an innocent act; if he but goes secretly to their bed, he may go each night and no crime will be committed. To hold them out or live in the "habit and repute" of marriage seems to be the offense. Is he to be tried by what his neighbors say about him, rather than by what he has done? Perhaps he might live neighbor to some of the detectives who wish to find him guilty; how easy then it is to have the "repute" without any act. Our theory is that no crime can be committed except by acts of the defendant; not by what people living near him may say about him. Some perhaps may dislike him or even try to make a case against him: repute of marriage may even be created by those that were watching to convict him of crime.

II.

The court admitted a vast amount of evidence showing the previous relationship between Musser and these ladies, that they had children, and that their names were "Musser," etc. It is pretended that this Act of Congress and this charge of the court does not make the act *ex post facto;* then why resort to evidence (as pointedly in this case) of things that occurred before the passage of the act, and prior to the 22nd day of March, 1882? It was not then a criminal act for this defendant to live with three ladies, or to have children by three ladies, either by Territorial or United States law.

Why dwell upon these facts that happened then; were they material to this case? Did the doing of these innocent acts raise a presumption or implication or the hint of guilt after the same acts became criminal? The truth is, and no unprejudiced man can read this record and this evidence without knowing it, that this whole trial was intended to punish a man because he was a Mormon, not because he had violated the Edmunds Act. The acts which were proven were acts which he did as a Mormon, prior to the passage of the law making it a crime or criminal. We raise this objection especially in this case, as it seems to be the groundwork of the action, the fundamental theory, that Musser's own children were actually known by the name of Musser, though they were from four to twenty years of age. The only child that was proven to have been of such an age that it might have been born since the passage of the Act, has not been proven to have been known by the name of Musser. The theory of the prosecution was, that the presumption of legitimacy must outweigh the presumption of innocence, or that the presumption in favor of a person not on trial for a thing that was not an offense should outweigh the presumption of the innocence of a man on trial for an offense.

III.

Having no other evidence, the prosecution amused themselves by proving the "habits and customs" of Bishop Warburton and Charles Browne, with regard to the record of the blessing of children, the marriages, the births, the deaths, the—I don't know what all, and that the book in which said records were said to have been kept had been lost, and the probable sequence therefrom. Why was this allowed to go to the jury? The Prosecuting Attorney did'nt even pretend that he expected to connect the defendant with it. No prosecuting attorney stated on his honor that if the book was produced it would contain the names of either this defendant or his children or any of the children which were connected with the case, or any children of these ladies. It was put in there for what earthly purpose? What connection had it with this defendant? What guilt of his can be proven by the fact of that record in which nothing of his acts are recorded? It was a bugboo, prepared to imagine a case, when in truth this prosecution had none and they didn't pretend to have any. When they got their evidence in, they didn't pretend to make any connection with it, and hence the Court erred in admitting that testimony.

IV.

The Prosecuting Attorney, or his assistant, introduced hearsay testimony asking one of the witnesses if she didn't swear so and so before the grand jury. What was the manifest effect of that question? It was a certificate from the Prosecuting Attorney to the jury that she did. The jury took it and received it as such, and must necessarily, coming from such a source, take it as such. All of the proceedings of the grand jury are secret, and the Prosecuting Attorney has no more right to throw them around and use them at his own sweet will than any juror. The expression of the Prosecuting Attorney, that he did it only to refresh the recollection of the witness, does not change the effect upon this defendant. The question had been put and the question had been answered and was permitted to be put. The injury it did is what we complain of. Any explanation the Prosecuting Attorney may now make cannot change the effect on this case.

Cr. Practice Act, Sec. 141.

V.

We are entitled to a new trial and a reversal of this judgment on account of the misconduct of the Assistant Prosecuting Attorney. In our last point we called the attention of the Court to the questions put to a witness. He made the closing argument. Of course no opportunity to reply was given. In the first part of that argument, he stated, in effect, that Musser had secreted his children and two of the ladies called his wives. Is there any justification in all the evidence for such a remark as that? Not one scintilla of proof. Why did he say that? Did he not think that the jury would believe him as Assistant District Attorney when stating what might be a fact within his official knowledge, and did he not try by that means to introduce testimony before that jury which had not been given in evidence? Didn't he try by that means to bring in evidence that which he knew he was not justified in giving? evidence which falls within the statutory definition of "Evidence out of court other than that resulting from a view of the premises?" If he knew any fact concerning the secreting of witnesses on the part of Musser, it was a material fact, and he should have gone upon the stand and testified to it, and laid himself subject to cross-examination. If he didn't know the fact, and attempted to give evidence before the jury when he didn't dare stand cross-examination, shall Musser be punished for it? It has been added to the bill of exceptions, and it is in evidence that after he was called to order by counsel, and the point was sustained by the Court, he didn't repeat that same comment. Of course not; there was no need of his continuing; he had already said it. Why re-say it? His failure to do so did not cure the error; the evil had been done. It could no more cure the difficulty than if a man had fired a fatal shot through the heart of another, and afterward said, "I will retract the shot." There is no cure.

The next thing we hear of him, on the argument of this case, is his rushing into another matter equally reprehensible by which he attempted to certify to the jury again, and attempted to bring in improper things and prejudice their minds by telling them about some man making finger gestures and signals to the jury; and again he is called to order, and again it is said he didn't repeat the remarks after the Court had stopped him. I call attention to the fact that the Court did not stop him. The Court permitted him to go on with this sort of unfair comment, until counsel insisted upon a ruling, and then the Court saw fit to intervene. Is that a fair trial? Should not the Court have said the moment the Prosecuting Attorney ventured on such remarks that that would not be permitted? Is it sufficient merely to say he sustains the point of order without any emphatic rebuke? These were both pieces of misconduct towards this defendant. The Court was heard to say nothing at the time, and it was only when counsel insisted on the point that he sustained the objection. Did that cure the error, or the wrong that had been committed?

We refer to the following authorities to show: First. That it was a wrong on which we had the right to a new trial. Second. That there is no cure.

People vs. Wolcott, 51 Mich., 615.
State vs. Kring, 2 Am. Cr., Law Rep., 314.
State vs. Smith, 1 Am. Cr., Law Rep., 581.
Ferguson vs. State, 1 Am. Cr., Law Rep., 589.
State vs. Graham, 17 N. W. R., 192.
Conn. vs. People, 11 Tex. App., 400.
Laubach vs. People, 12 Tex. App., 590.
Fox vs. People, 95 Ills. 78.
Angelo vs. People, 96 Ills. 218.
Tucker vs. Henniker, 41 N. H., 822.

It is not in Musser's alone nor in cohabitation cases alone; but this thing has become a common practice, and it is time that we knew whether the lives, liberty, and rights of defendants in criminal cases are to be put in jeopardy by such speeches to the jury, and whether the United States District Attorney, or his assistants, have unbridled license to add facts to the case, or to hint upon the fact that the defendant has not been sworn, or to do any acts which tend to prejudice the rights of any defendant.

Fox vs. People, 95 Ills. 78.

VI.

The Court did not fairly charge in this case that the defendant was entitled to the presumption of innocence. The point was expressly presented to him by Judge Sutherland's request at the close of his charge.

The charge was short, general, and vague. One point upon which we had asked an express instruction, as the record will show, seemed to have been omitted apparently by accident. Judge Sutherland called his attention to that fact before the jury retired.

Did the fact of innocently living with these ladies prior to the passage of the act raise a presumption that he was guilty after the passage of the act? If it did, that law was *ex post facto*. If it did not, we had the right to have the jury told so; the Court then and there by that refusal told the jury in effect that there was a presumption of his guilt from the fact of his prior conduct.

ARTHUR BROWN,
Attorney for Appellant.

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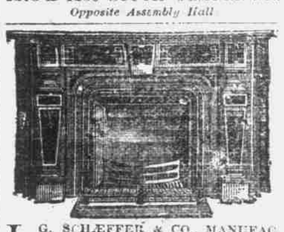

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SALT LAKE CITY, May 26, 1885.

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CYRUS H. GOLD,
Secretary.

Name.	No. of Certificate.	No. of Shares	Am't of A'sm't
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Cochrane Frank	42	8	3 20
" "	71	1	40
Cheeney Nathan	21	20	8 00
" "	73	11	4 40
Clawson H. B.	29	38	15 20
Cohn Henry	70	23	9 20
" "	68	12	4 80
Huntington G. W.	18	6	2 40
Hanson Nathan	43	2	80
Holt Charles	53	6	2 40
Jack James	27	24	11 60
Morris Elias	39	135	54 00
Neal George A.	60	7	2 80
Ruddy John	13	10	4 00
Rideout E. N.	22	5	2 00
Taylor Stanley	11	3	1 20
Thomas James W.	67	16	6 40

d30d

SALT LAKE CITY BREWERY

TO OUR PATRONS:

We are now selling our favorite Beer in

Four and Eight Gallon Kegs.

AT

$1.75 and $3.50 EACH

TO THE FAMILY TRADE.

☞ Orders will be promptly attended to and delivery made to any part of the City.

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Proprietors.
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Parents BUY Children's Shoes with TRADE A.S.T.Co. MARK
BLACK TIPS PROTECTING THE TOES.

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OPPOSITE ST. JAMES HOTEL,
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Wholesale
DRY GOODS
SALT LAKE CITY.
(HOOPER & ELDREDGE BUILDING.)

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Spring and Summer 1885.

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CLOTH AND TRIMMINGS BY THE YARD.

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FITTERS.

ARE PREPARED TO DO
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City Water Pipes and Fixtures put in on Reasonable Terms

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NEWS PRINT, BOOK,
MANILLA AND STRAW
PAPERS!

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CHICAGO.
FINEST PAINTS AND COLORS.
CARY, OGDEN & PARKER
RED CROSS COTTAGE COLORS
HANDY PAINTS.
PARKER'S CEMENT PAINT.
QUALITY GUARANTEED.
Cary, Ogden & Parker, manufacturers of Paints. For sale by Z. C. M. I. and its branches.

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CHARTER OAK STOVES
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