THE REYNOLDS CASE.

SUPREME COURT OF THE UNITED STATES.

No. 180.—OCTOBER TERM, 1878.

George Reynolds, Plaintiff in Error,
vs.
The United States.

In Error to the Supreme Court of the Territory of Utah.

Mr. Chief Justice Waite delivered the opinion of the Court.

This is an indictment for bigamy under section 5,852 Revised Statutes, which, omitting its exceptions, is as follows:

"Every person having a husband or wife living, who marries another, whether married or single, in a Territory, or other place over which the United States have exclusive jurisdiction, is guilty of bigamy, and shall be punished by a fine of not more than five hundred dollars, and by imprisonment for a term of not more than five years."

The assignments of error, when grouped, present the following questions:

1. Was the indictment bad because found by a grand jury of less than sixteen persons?

2. Were the challenges of certain petit jurors by the accused improperly overruled?

3. Were the challenges of certain other jurors by the government improperly sustained?

4. Was the testimony of Amelia Jane Schofield given at a former trial for the same offence, but under another indictment, improperly admitted in evidence?

5. Should the accused have been acquitted, if he married the second time, because he believed it to be his religious duty?

6. Did the court err in that part of the charge which directed the attention of the jury to the consequences of polygamy?

These questions will be considered in their order,

1. As to the grand jury.

The indictment was found in the district court of the third judicial district of the territory. The act of Congress "in relation to courts and judicial officers in the Territory of Utah," approved June 23, 1874 (18 Stat., 253), while regulating the qualifications of jurors in the territory and prescribing the mode of preparing the lists from which grand and petit jurors are to be drawn, as well as the manner of drawing, makes no provision in respect to the number of persons of which a grand jury shall consist. Section 808, Revised Statutes, requires that a grand jury empaneled before any district or circuit court of the United States *shall consist* of not less than sixteen nor more than twenty-three persons; while a statute of the territory limits the number in the district [illegible] to fifteen. (Comp. Laws Utah, 1876,357.) The grand jury which found this indictment consisted of only fifteen persons, and the question to be determined is whether the section of the Revised Statutes referred to or the statute of the territory governs the case.

By section 1,910 of the Revised Statutes the district courts of the territory have the same jurisdiction in all cases arising under the Constitution and laws of the United States as is vested in the circuit and district courts of the United States, but this does not make them circuit and district courts of the United States. We have often so decided.—(American Ins. Co, vs. Canter, 1 Pet., 546; Benney vs. Porter, 9 How., 244; Clinton vs. Englebrecht, 13 Wall, 447.) They are courts of the territories invested for some purposes with the powers of the courts of the United States. Writs of error and appeals lie from them to the supreme court of the territory, and from that court as a territorial court to this, in some cases.

Section 808 was not designed to regulate the empaneling of grand juries in all courts where offenders against the laws of the United States could be tried, but only in the circuit and district courts. This leaves the territorial courts free to act in obedience to the requirements of the territorial laws in force for the time being. —(Clinton vs. Englebrecht, 13 Wall., 445; Hornbuckle vs. Toombs, 18 Wall., 648.) As Congress may at any time assume control of the matter, there is but little danger to be anticipated from improvident territorial legislation in this particular. We are, therefore, of the opinion that the court below no more erred in sustaining this indictment than it did at a former term, at the instance of this same plaintiff in error, in adjudging another bad which was found against him for the same offence by a grand jury composed of twenty-three persons. —(1 Utah Reps., 226.)

2. As to the challenges by the accused.

By the Constitution of the United States (Amend. VI.), the accused was entitled to a trial by an impartial jury. A juror to be impartial must, to use the language of Lord Coke, "be indifferent as he stands unsworn."—(Coke Litt., 155, b.) Lord Coke also says that a principal cause of challenge is "so called because if it be found true, it standeth sufficient of itself, without leaving anything to the conscience or discretion of the triers." (Id., 156 b.,) or as stated in Bacon's Abr., "it is grounded on such a manifest presumption of partiality, that, if found to be true, it unquestionably sets aside the * * juror."—(Bac. Abr., Tit. Juries, E 1.) If the truth of the matter alleged is admitted, the law pronounces the judgment; but if denied, it must be made out by proof to the satisfaction of the court or the triers.—Id., E 12.) To make out the existence of the fact, the juror who is challenged may be examined on his voir dire and asked any questions that do not tend to his infamy or disgrace.

All of the challenges by the accused were for principal cause. It is good ground for such a challenge that a juror has formed an opinion as to the issue to be tried. The courts are not agreed as to the knowledge upon which the opinion must rest in order to render the juror incompetent, or whether the opinion must be accompanied by malice or ill will, but all unite in holding that it must be founded on some evidence and be more than a mere impression. Some say it must be positive (Gabbet on Crim. Law, 391); others that it must be decided and substantial (Armistead's case, 11 Leigh, 659; Wormley's case, 10 Gratt., 687; Neely vs. The People, 13 Ill., 687); others, fixed (State vs Benton, 2 Dev. & Batt., 214-217), and still others, deliberate and settled (Staup vs. Commonwealth, 74 Penn. St., 458; Curly vs. Commonwealth, 84 Penn. St., 156). All concede, however, that, if hypothetical only, the partiality is not so manifest as necessarily to set the juror aside. Chief Justice Marshall, in Burr's Trial (1 Burr's Trial, 416), states the rule to be that "light impressions which may fairly be presumed to yield to the testimony that may be offered; which may leave the mind open to a fair consideration of the testimony, constitute no sufficient objection to a juror; but that those strong and deep impressions, which close the mind against the testimony that may be offered in opposition to them; which will combat that testimony and resist its force, do constitute a sufficient objection to him." The theory of the law is that a juror who has formed an opinion cannot be impartial. Every opinion which a juror may entertain need not necessarily have that effect. In these days of newspaper enterprise and universal education, every case of public interest is almost as a matter of necessity brought to the attention of all the intelligent people in the vicinity, and scarcely any one can be found among those best fitted for jurors who has not read or heard of it, and who has not some impression or some opinion in respect to its merits. It is clear, therefore, that upon the trial of the issue of fact raised by a challenge for such cause the court will practically be called upon to determine whether the nature and strength of the opinion formed is such as in law necessarily to raise the presumption of partiality. The question thus presented is one of mixed law and fact, and to be tried; as far as the facts are concerned, like any other issue of that character, upon the evidence. The finding of the trial court upon that issue ought not to be set aside by a reviewing court unless the error is manifest. No less stringent rules should be applied by the reviewing court in such a case than those which govern in the consideration of motions for new trial because the verdict is against the evidence. It must be made clearly to appear that upon the evidence the court ought to have found the juror had formed such an [illegible] it is manifest the law left nothing to the "conscience or discretion" of the court.

The challenge in this case most relied upon in the argument here is that of Charles Reed. He was sworn on his voir dire, and the whole of his testimony is in the record. It is as follows:

"Q [By the district attorney.] Have you formed or expressed any opinion as to the guilt or innocence of this charge?

"A. I believe I have formed an opinion.

"Q. [By the court.] Have you formed and expressed an opinion?

"A. No, sir; I believe not.

"Q. You say you have formed an opinion?

"A. I have.

"Q. Is that based upon evidence?

"A. Nothing produced in court.

"Q. Would that opinion influence your verdict?

"A. I don't think it would.

"Q. (By defendant.) I understood you to say you had formed an opinion; but not expressed it?

"A. I don't know that I have expressed an opinion; I have formed one.

"Q. Do you now entertain that opinion?

"A. I do.

This was all the evidence, and taken as a whole it shows that the juror "believed" he had formed an opinion which he had never expressed, and which he did not think would influence his verdict on hearing the testimony. We cannot think this is such a manifestation of partiality as to leave nothing to the "conscience or discretion" of the triers. The reading of the evidence leaves the impression that the juror had some hypothetical opinion about the case, but it falls far short of raising a manifest presumption of partiality. In considering such questions in a reviewing court, we ought not to be unmindful of the fact we have so often observed in our experience, that jurors not unfrequently seek to excuse themselves on the ground of having formed an opinion, when on examination it turns out that no real disqualification exists. In such cases the manner of the juror while testifying is oftentimes more indicative of the real character of his opinion than his words. That is seen below, but cannot always be spread upon the record. Care should, therefore, be taken in the reviewing court not to reverse the ruling below upon such a question of fact, except in a clear case. The affirmative of the issue is upon the challenger. Unless he shows the actual existence of such opinion in the mind of the juror as will raise the presumption of partiality, the juror need not necessarily be set aside, and it will not be error in the court to refuse to do so. Such a case, in our opinion, was not made out upon the challenge of Reed. The fact that he had not expressed his opinion is important only as tending to show that he had not formed one which disqualified him. If a positive and decided opinion had been formed he would have been incompetent even though it had not been expressed. Under these circumstances it is unnecessary to consider the case of Ransohoff, for it was confessedly not as strong as that of Reed.

3. As so the challenges by the government.

The questions raised upon these assignments of error are not whether the district attorney should have been permitted to interrogate the jurors while under examination upon their voir dire as to the fact of their living in polygamy. No objection was made below to the questions, but only to the ruling of the court upon the challenges after the testimony taken in answer to the questions was in. From the testimony it is apparent that all the jurors to whom the challenges related were or had been living in polygamy. It needs no argument to show that such a juror could not have gone into the box entirely free from bias and prejudice, and that if the challenge was not good for principal cause it was for favor. A judgment will not be reversed simply because a challenge good for favor was sustained in form for cause. As the jurors were incompetent and properly excluded, it matters not here upon what form of challenge they were set aside. In one case the challenge was for favor. In the courts of the United States all challenges are tried by the court without the aid of triers, (Rev. Stat., sec. 819,) and we are not advised that the practice in the territorial courts of Utah is different.

4. As to the admission of evidence to prove what was sworn to by Amelia Jane Schofield on a former trial of the accused for the same offence but under a different indictment.

The Constitution gives the accused the right to a trial at which he should be confronted with the witnesses against him, but if a witness is absent by his own wrongful procurement he cannot complain if competent evidence is admitted to supply the place of that which he has kept away. The Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts. It grants him the privilege of being confronted with the witnesses against him, but if he voluntarily keeps the witnesses away he cannot insist on his privilege. If, therefore, when absent by his procurement, their evidence is supplied in some lawful way, he is in no condition to assert that his constitutional rights have been violated.

In Lord Morley's case, (6 State Trials, 770,) as long ago as the year 1666, it was resolved in the House of Lords "that in case oath shall be made that any witness who had been examined by the coroner and was then absent, was detained by the means or procurement of the prisoner, and the opinion of the judges asked whether such examination might be read, we should answer that if their lordships were satisfied by the evidence they had heard, that the witness was detained by [illegible] means or procurement of the prisoner, then the [illegible] prisoner was matter of fact of which we were not the judges, but their lordships." This resolution was followed in Harrison's case, (12 State Trials, 851,) and seems to have been recognized as the law in England ever since. In Regina vs. Scaife (17 Ad. & El., N. S., 242,) all the judges agree that if the prisoner had resorted to a contrivance to keep a witness out of the way, the deposition of the witness, taken before a magistrate and in the presence of the prisoner, might be read. Other cases to the same effect are to be found and in this country the ruling has been in the same way.—(Drayton vs. Wells, 1 Nott & McCord, 409; Williams vs. State, 19 Geo., 403.) so that now in the leading text-books it is laid down that if a witness is kept away by the adverse party, his testimony taken on a former trial between the same parties upon the same issues, may be given in evidence.—(1 Greenl. Evc., sec. 163; 1 Taylor's Ev., sec. 446.) Mr. Wharton (1 Whart. Ev., sec. 178) seemingly limits the rule somewhat, and confines it to cases where the witness has been corruptly kept away by the party against whom he is to be called but in reality his statement is the same as that of the others, for in all it is implied that the witness must have been wrongfully kept away. The rule has its foundation in the maxim that no one shall be permitted to take advantage of his own wrong, and, consequently, if there has not been, in legal contemplation, a wrong committed, the way has not been opened for the introduction of the testimony. We are content with this long-established usage, which, so far as we have been able to discover, has rarely been departed from. It is the outgrowth of a maxim based on the principles of common honesty, and if properly administered can harm no one.

Such being the rule the question becomes practically one of fact, to be settled as a preliminary to the admission of secondary evidence. In this respect it is like the preliminary question of the proof of loss of a written instrument, before secondary evidence of the contents of the instrument can be admitted. In Lord Morley's case, supra, it would seem to have been considered a question for the trial court alone and not subject to review on error or appeal; but without deeming it necessary in this case to go so far as that, we have no hesitation in saying that the finding of the court below is at least to have the effect of a verdict of a jury upon a question of fact, and should not be disturbed unless the error is manifest.

The testimony shows that the absent witness was the alleged second wife of the accused; that she had testified on a former trial for the same offence under another indictment; that she had no home, except with the accused; that at some time before the trial a subpœna had been issued for her, but by mistake she was named as Mary Jane Schofield; that an officer who knew the witness personally went to the house of the accused to serve the subpœna, and on his arrival enquired for her, either by the name of Mary Jane Schofield or Mrs. Reynolds; that he was told by the accused she was not at home; that he then said, "Will you tell me where she is?" that the reply was, "No; that will be for you to find out;" that the officer then remarked she was making him considerable trouble, and that she would get into trouble herself, and the accused replied, "Oh, no; she won't till the subpœna is served upon her," and then after some further conversation, that "She does not appear in this case."

It being discovered after the trial commenced that a wrong name had been inserted in the subpœna, a new subpœna was issued with the right name, at nine o'clock in the evening. With this the officer went again to the house and there found a person known as the first wife of the accused. He was told by her that the witness was not there, and had not been for three weeks. He went again the next morning, and not finding her or being able to ascertain where she was by inquiring in the neighborhood, made return of that fact to the court. At 10 o'clock that morning the case was again called, and the foregoing facts being made to appear, the court ruled that evidence of what the witness had sworn to at the former trial was admissable.

In this we see no error. The accused was himself personally present in court when the showing was made and had full opportunity to account for the absence of the witness, if he would, or to deny under oath that he had kept her away. Clearly enough had been proven to cast the burden upon him of showing that he had not been instrumental in concealing or keeping the witness away. Having the means of making the necessary explanation, and having every inducement to do so if he would, the presumption is that he considered it better to rely upon the weakness of the case made against him than to attempt to develop the strength of his own. Upon the testimony as it stood, it is clear to our minds that the judgment should not be reversed because secondary evidence was admitted.

This brings us to the consideration of what the former testimony was and the evidence by which it was proven to the jury.

It was testimony given on a former trial of the same person for the same offence, but under another indictment. It was substantially testimony given at another time in the same cause. The accused was present at the time the testimony was given and had full opportunity of cross-examination. This brings the case clearly within the well established rules. The cases are fully cited in 1 Whart. Ev., sec. 177.

The objection to the reading by Mr. Patterson of what was sworn to on the former trial, does not seem to have been because the paper from which he read was not a true record of the evidence as given, but because the foundation for admitting the secondary evidence had not been laid. This objection, as has already been seen, was not well taken.

5. As to the defence of religious belief or duty.

On the trial, the plaintiff in error, the accused, proved that at the time of his alleged second marriage he was, and for many years before had been a member of the Church of Jesus Christ of Latter Day Saints, commonly called the Mormon Church, and a believer in its doctrines; that it was an accepted doctrine of that church, "that it was the duty of male members of said church, circumstances permitting, to practice polygamy; * * that this duty was enjoined by different books which the members of said church believed to be of divine origin, and among others the Holy Bible, and also that the members of the church believed that the practice of polygamy was directly enjoined upon the male members thereof by the Almighty God, in a revelation to Joseph Smith, the founder and prophet of said church, and that all male members of said church, when circumstances would admit, would be punished, and that the penalty for such failure and refusal would be damnation in the life to come." He also proved "that he had received permission from the recognized authorities in said church to enter into polygamous marriage; * * * that Daniel H. Wells, one having authority in said church to perform the marriage ceremony, married the said defendant on or about the time the crime is alleged to have been committed, to some woman by the name of Schofield and that such marriage ceremony was performed under and pursuant to the doctrines of said church."

Upon this proof he asked the court to instruct the jury that if they found from the evidence that he "was married as charged—if he was married—in pursuance of and in conformity with what he believed at the time to be a religious duty, that the verdict must be not guilty." This request was refused, and the court did charge "that there must have been a criminal intent, but that if the defendant, under the influence of a religious belief that it was right—under an inspiration, if you please, that it was right—deliberately married a second time, having a first wife living, the want of consciousness of evil intent—the want of understanding on his part that he was committing a crime—did not excuse him; but the law inexorably in such case implies the criminal intent."

Upon this charge and refusal to charge the question is raised whether religious belief can be accepted as a justification of an overt act made criminal by the law of the land. The enquiry is not as to the power of Congress to prescribe criminal laws for the territories, but as to the guilt of one who knowingly violates a law which has been properly enacted, if he entertains a religious belief that the law is wrong.

Congress cannot pass a law for the government of the territories which shall prohibit the free exercise of religion. The first amendment to the Constitution expressly forbids such legislation. Religious freedom is guaranteed everywhere throughout the United States, so far as congressional interference is concerned. The question to be determined is whether the law now under consideration comes within this prohibition.

The word "religion" is not defined in the Constitution. We must go elsewhere, therefore, to ascertain its meaning, and nowhere more appropriately, we think, than to the history of the times in the midst of which the provision was adopted. The precise point of the inquiry is what is the religious freedom which has been guaranteed.

Before the adoption of the Constitution attempts were made in some of the colonies and states to legislate not only in respect to the establishment of religion, but in respect to its doctrines and precepts as well. The people were taxed against their will for the support of religion, and sometimes for the support of particular sects to whose tenets they could not and did not subscribe. Punishments were prescribed for a failure to attend upon public worship, and sometimes for entertaining heretical opinions. The controversy upon this general subject was animated in many of the states, but seemed at last to culminate in Virginia. In 1784 the House of Delegates of that state having under consideration "a bill establishing provision for teachers of the Christian religion," postponed it until the next session and directed that the bill be published and distributed and that the people be requested "to signify their opinion respecting the adoption of such a bill at the next session of assembly."

This brought out a determined opposition. Amongst others, Mr. Madison prepared a "Memorial and Remonstrance," which was widely circulated and signed, and in which he demonstrated "that religion, or the duty we owe the Creator," was not within the cognizance of civil government.—(Semple's Virginia Baptists, Appendix.) At the next session the proposed bill was not only defeated, but another "for establishing religious freedom," drafted by Mr. Jefferson (1 Jeff. Works, 45; 2 Howison's His of Va., 298), was passed. In the preamble of this act (12 Henning's Stat., 84) religious freedom is defined, and after a recital "that to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy which at once destroys all religious liberty," it is declared "that it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order." In these two sentences is found the true distinction between what properly belongs to the church and what to the state,

In a little more than a year after the passage of this statute the convention met which prepared the Constitution of the United States. Of this convention Mr. Jefferson was not a member, he being then absent as minister to France. As soon as he saw the draft of the Constitution proposed for adoption, he, in a letter to a friend, expressed his disappointment at the absence of an express declaration ensuring the freedom of religion (2 Jeff. Works, 355) but was willing to accept it as it was, trusting that the good sense and honest intentions of the people would bring about the necessary alterations.—(1 Jeff Works, 79.) Five of the states, while adopting the Constitution, proposed amendments Three, New Hampshire, New York and Virginia, included in one form or another a declaration of religious freedom in the changes they desired to have made, as did also North Carolina, where the convention at first declined to ratify the Constitution until the proposed amendments were acted upon. Accordingly at the first session of the first Congress the amendment now under consideration was proposed with others by Mr. Madison. It met the views of the advocates of religious freedom and was adopted. Mr. Jefferson afterwards, in reply to an address to him by a committee of the Danbury Baptist Association (8 Jeff. Works, 113), took occasion to say: "Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of the government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should make no law respecting an establishment of religion or prohibiting the free exercise thereof, thus building a wall of separation between church and state. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore man to all his natural rights, convinced he has *no natural right in* opposition [illegible] Coming as this does from an acknowledged leader of the advocates of the measure, it may be accepted almost as an authoritative declaration of the scope and effect of the amendment thus secured. Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order.

Polygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon church, almost exclusively a feature of the life of Asiatic and African people. At common law the second marriage was always void (2 Kent's Com., 79), and from the earliest history of England polygamy has been treated as an offence against society. After the establishment of the ecclesiastical courts, and until the time of James I., it was punished through the instrumentality of those tribunals, not merely because ecclesiastical rights had been violated, but because upon the separation of the ecclesiastical courts from the civil, the ecclesiastical were supposed to be the most appropriate for the trial of matrimonial causes and offences against the rights of marriage, just as they were for testamentary causes and the settlement of the estates of deceased persons.

By the statute of 1 James I., chap. 11, the offence, if committed in England or Wales, was made punishable in the civil courts, and the penalty was death. As this statute was limited in its operation to England and Wales, it was at a very early period re-enacted, generally with some modifications, in all the colonies. In connection with the case we are now considering, it is a significant fact that on the 8th of December, 1788, after the passage of the act establishing religious freedom, and after the convention of Virginia had recommended as an amendment to the Constitution of the United States the declaration in a bill of rights that "all men have an equal, natural and unalienable right to the free exercise of religion, according to the dictates of conscience," the legislature of that state substantially enacted the statute of James I., death penalty included, because, as recited in the preamble, "it hath been doubted whether bigamy or polygamy be punishable by the laws of this commonwealth."—(12 Hening's Stat., 691.) From that day to this we think it may safely be said there never has been a time in any state of the Union when polygamy has not been an offence against society, cognizable by the civil courts and punishable with more or less severity. In the face of all this evidence it is impossible to believe that the constitutional guaranty of religious freedom was intended to prohibit legislation in respect to this most important feature of social life. Marriage, while from its very nature a sacred obligation, is nevertheless in most civilized nations a civil contract and usually regulated by law. Upon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal. In fact, according as monogamous or polygamous marriages are allowed, do we find the principles on which the government of the people, to a greater or less extent, rests. Professor Lieber says, polygamy leads to the patriarchal principle, and which when applied to large communities, fetters the people in stationary despotism, while that principle cannot long exist in connection with monogamy. Chancellor Kent observes that this remark is equally striking and