THE RUDGER CLAWSON CASE BEFORE THE SUPREME COURT OF THE UNITED STATES.

THE DEFENSE CLEARLY AND ABLY REPRESENTED.

There was an unusually large attendance of members of the bar, and visitors, at the Supreme Court on Wednesday, April 8th, 1885, to hear the arguments in the case of Rudger Clawson vs. the United States. All the Judges were present and listened attentively to the remarks of Counsel.

HON. WAYNE MACVEAGH

opened the case for the plaintiff in error by stating the facts as to his indictment and conviction, and saying that the important questions involved in the case were whether the grand and petit juries, as constituted, were legal juries by which the plaintiff in error could be lawfully presented and tried—all believers in the rightfulness of polygamy having been excluded from the grand jury, and eleven of the twelve petit jurors having been obtained by an open venire. He said:

"Packing a jury, in the abstract, has always been regarded as a grave offence, striking at the very foundation of an honest administration of the criminal law; but it often seems to zealous prosecutors and partisans, on the beneh as well as at the bar, to be justified in the particular case by their dislike of the accused, and their desire to see them punished. Of course they would prefer convictions without the disagreeable necessity of denying the defendant a proper panel of jurors, but the end seems to them so desirable as to justify the means, even when those means include keeping out of the jury-box the jurors duly summoned in order to allow the marshall to select and bring in jurors, about whose verdict there need be no doubt.

Some courts are still sufficiently old-fashioned to regard an end so obtained, however desirable in itself, as incapable of being defended. In the case of Williams vs. Commonwealth, (10 Norris, 493,) the Supreme Court of Pennsylvania reversed a conviction thus secured, saying, among other things, that there 'was good reason for not allowing a public prosecutor to come into court, challenge the array of jurors, and immediately force a prisoner to trial before those selected in the absence of all statutory safeguards against packing the jury. * * * Both the letter and the spirit of the statutes secure to persons charged with crime a trial when a regular panel of jurors is in attendance. The next desideratum to the pure administration of justice is the giving satisfaction to the suitors that their causes have been fairly and impartially decided.'

The learned judge then suggests that few district attorneys or judges could be found who would refuse to continue a trial until a regular jury could be obtained; and that the conviction even of a guilty man by a jury selected on the day of trial, under circumstances which usually surround such selection, would be 'an outrage done in the name of justice.'

We do not fear that the doctrine thus announced will be questioned on general grounds. The effort will rather be to show that persons living in Utah and accused of polygamy have no right which courts or juries are bound to respect, and that a proceeding which elsewhere would be 'an outrage done in the name of justice,' is there a virtuous effort to destroy a relic of barbarism.

The statement of facts accompanying the motion to quash shows that of the thirty names drawn from which to select a grand jury of fifteen, twenty-five had all the qualifications required by law, unless the fifteen rejected were disqualified by their answers to the special questions propounded by the district attorney relating to their belief in the doctrines of the Mormon Church set out in the statement, and the fifteen so answering were rejected under section 5 of the Edmunds act.

This act applies to all the Territories and to all places over which the United States have jurisdiction and that part of it which is claimed to be applicable to this case reads as follows:

'That in any prosecution for bigamy, polygamy, or unlawful cohabitation, under any statute of the United States, it shall be sufficient cause of challenge to any person drawn or summoned as a juryman or talesman * * * that he believes it right for a man to have more than one living and undivorced wife at the same time, or to live in the practice of cohabiting with more than one woman.'

The language of this section clearly shows, we think, that it is only applicable to petit jurors, and to them only in the special case of 'a prosecution for bigamy, polygamy, or unlawful cohabitation under any statute of the United States.' Is the impaneling of a grand jury a prosecution, and in this case was it under any statute of the United States? Bouvier, in his Law Dictionary, vol. 2, p. 389, defines a criminal prosecution as 'the means adopted to bring a supposed offender to justice, and punishment by due course of law. * * * In this country,' he says, 'the modes are by indictment, by presentment, by information, and by complaint.'

In a case like this, where the accused had not been held to answer, the prosecution could not begin until after the grand jury was impaneled, and the finding of the indictment was the commencement of this prosecution."

Counsel read Section 4 of the Act of Congress of June 23d, 1874, which provides for the selection and summoning of jurors, and insisted that its provisions clearly showed that after a panel of jurors had been drawn, a resort to the box could not be had by the court as a matter of discretion, and that the special list for the term must be legally exhausted before resorting to the general list. He continued: "The words of the law are that further names may be drawn when any additional grand or petit jurors shall be necessary! There was no necessity in this case except that caused by unlawfully rejecting qualified jurors, and therefore no authority for resorting to the general list. Five members of the grand jury as impaneled were not qualified. They belonged to a class of persons that only became qualified when another class was legally exhausted. Tue unlawful exclusion of members of that class would not render them eligible, hence there were but ten lawful jurors on the panel, and therefore it was not a legal grand jury.

The second assignment of error is, in substance, that the petit jury was not lawfully constituted, and the question involved is the right of the court to summon trial jurors on open venire.

The right to so summon a jury must be found, if it exists at all, in an implied grant of authority to be used as a necessary means of exercising powers and jurisdiction granted, for there is no statute, either Congressional or Territorial which in terms confers the power on the court to issue an open venire, or the authority on the marshal to summon jurors under it."

Counsel commented on the provisions of the Act of Congress providing jurors for the District Courts and insisted that it provided a complete jury system for the Territories and was exclusive in its character. After providing for the regular panel it said that 'If, during any term of the district court, any additional grand or petit jurors shall be necessary, the same shall be drawn from said box by the United States marshal in open court; but if the attendance of those drawn cannot be obtained in a reasonable time, other names may be drawn in the same manner.'

"This is the only method provided for obtaining additional jurors or talesmen and the Court has no authority to procure them in any other way.

The supreme court of Maine decided a question very similiar to this in the case of the State vs. Symond, (36 Maine, 131,) where there was a deficiency in the number of grand jurors, and the court issued an open venire to fill the panel. The supreme court said: 'The legislature has required that grand juries shall be selected and returned in the same manner as juries for trial; and, in respect to the latter, has authorized the court to complete the panel, when a sufficient number of the jurors duly drawn and summoned cannot be obtained for the trial of a cause, by causing jurors to be returned from the bystanders, or from the county at large; and in term time, to issue venires for as many as may be wanted. But in regard to the former it has conferred no power upon the court to complete a deficient panel, by causing jurors to be returned *de talibus circumstantibus*, or in any other manner. The whole subject is within the control of the legislature; they may give to the court the same power as to both juries, to complete a deficient panel or withhold it; but unless it be given, it cannot be lawfully exercised.'

So in this case, Congress or the Territorial Legislature has the right to confer the power on the courts to supply an exhausted panel by open venire or otherwise, or to withhold such power; it has been withheld, and untill expressly conferred the courts cannot legally exercise it.

In the case of Wright vs. Stuart, (5 Blackf., 120,) the supreme court of Indiana, in considering the power of the circuit court to supply a deficiency in the jury panel by an open venire, said:

'The board of commissioners had failed to have any jurors selected for the second week of the term, during which week this trial took place; on the calling of the cause, a jury was summoned and impaneled by the order of the court, and the defendant, under these circumstances, challenged the array. This challenge ought to have been sustained. According to the statute, the jurors for the second week should have been selected by the board of commissioners, and as there had been no such selection there could be no unobjectionable jury impaneled during that week. The defendant might, perhaps, have waived the objection, but he did not do so. He made the challenge at the proper time and the array should have been quashed.'

The supreme court of Mississippi, in the case of Leathers vs. The State, (4 Cush., 76,) declared that the directions of the law as to the drawing of jurors were designed for wise purposes, and must not be violated in any respect. And then the court said: 'They are all intended as guards to protect the liberty of the citizen, and should be held to constitute an important part of the right of trial by jury.'

Counsel then referred to the statutes of the different States and Territories of the Union, and showed how the legislatures had uniformly provided for talesman, and he argued that if the courts had possessed the inherent power to procure them by open venire their was no need for such enactments, but the courts had held that this was strictly a statutory power.

"Besides the authorities already cited, the case of Mosseau vs. Veedey (2 Oregon, 113) is in point. In that case the lower court having discharged the regular petit jury for the term, had sent into the body of the county for more jurymen, and it was held by the reviewing court that this was an act beyond its power. The statutes of Oregon provided that where the jury failed to attend, or where there were not enough jurymen present for a jury, the sheriff could summon talesmen from the bystanders or from the county. But the statutes as to talesmen were not to be extended to the case where the jury had been discharged. The court rested its concession of the right to complete a jury on the one hand, and its denial of the right to bring in a new jury by open venire on the other, strictly upon the statute. Said the court: 'We know of no other authority, and hence must hold that it was error in the Circuit Court to call such a jury or force defendant to trial.'

Counsel referred to numerous other authorities and said that it is to be noted that all the decisions which have been found that in any degree favor the position of the prosecutor are rested upon statutes unlike the statute of 1874 for Utah, and which permit the summoning of talesmen by open venire. Such is the case as to those cited in the opinion of the court below, as found in the transcript.

He then reviewed and criticized the cases referred to in the opinion, showing their inapplicability to the case at bar, and closed with an eloquent appeal to the court to preserve inviolate the right of trial by jury.

SOLICITOR GENERAL PHILLIP

presented the case, for the government. He claimed that the "Mormon" jurors were properly excluded under section 5 of the Edmunds Act, saying: "The word 'prosecution' in that act covers the whole procedure, from the impaneling of the grand jury to that of the petit jury. By the manifest reason of the thing, the impaneling of the grand jury made a special opportunity for the exercise of the functions of the prosecuting officer, and put him upon the *qui vive*. The drama opened there." After elaborating this point somewhat, without, however, adding anything to the clearness of his statements quoted above, he said, but "allowing, for the sake of argument, that the challenges given by the Edmunds Act concern the petit jury only, still a grand jury must be composed of 'good and lawful men,' and no man can be such, in the eye of the law, who believes it right to commit crime; for instance, 'right to commit' 'polygamy.' It is entirely inadmissible to impute to Congress an intention to strip courts of the protection of a fundamental common law principle like this, which is a very article of standing or falling justice." He said that heretofore he had discussed polygamy cases without declamation, but now the campaign had opened against the "Mormons" and they should be made to understand that they need expect no fun. He said they enjoyed religious liberty and freedom of conscience, as they were entitled to do, but must be made to understand that they could not violate the law. Continuing in this strain Mr. Phillips passed to the consideration of the open venire process and argued that because it was the old common law method in England of obtaining a jury, it followed as a matter of course that "so far as statutes have not expressly, or by necessary inference, taken away from a court this power it still continues." He said "the act of 1874 gives the rule to the extent that it gives any rule. It goes upon the evident presumption that the annual list of two hundred would, in fact supply the needs of the court. But it contains no anticipation of or provision for a case in which that list might fall short of supplying what was needed. There is nothing upon the face of the statute to indicate that Congress intended that the list of two hundred should be an absolute *sine qua non* for the execution of justice to the extent contended for by the plaintiff in error. There is no doubt a mandate for its use, but in view of the universally acknowledged duty owed by society to its own current peace and justice, very express words would be needed to improve such a mandate into a prohibition upon former methods, even where the new machinery had broken down. No such intention can be implied without absolute necessity." He spoke approvingly of the cases cited by the court below and then called attention to the Legislative acts of 1852 and 1859 in relation to jurors, and insisted that under them the courts still had power to obtain talesmen by open venire, and that this power was absolutely essential to the exercise of their jurisdiction, as had been shown in this case, and without it the courts in Utah would have to adjourn and discontinue jury trials. His argument was somewhat lengthy, but confined to the points stated with frequent allusions to the campaign against the "Mormons."

HON. F. S. RICHARDS

said in substance: "As to the legality of the grand jury, which is the first question involved in this case, I understand the eminent counsel for the government to claim that the "Mormon" jurors were properly excluded from the panel for two reasons—

First: Because Section 5 of the Edmunds Act authorized such exclusion, and,

Second: Because the jurors were not, as he claims, 'good and lawful men,' for the reason that they believed 'it right to commit crime,' 'polygamy,' and that no person entertaining such belief could be a lawful juror.

We respectfully submit that the Legislative Assembly of the Territory of Utah has determined the qualifications and eligibility of grand jurors, and that this was a rightful subject of legislation.

It is not denied but on the contrary is expressly admitted in the record that the persons excluded from the grand jury possessed all the statutory qualifications and were in every way eligible and entitled to serve as grand jurors unless section 5 of the Edmunds Act authorized their exclusion. The language of this section shows conclusively, we think, that it can have no possible application to grand jurors, and by its terms it does not apply to petit jurors except in 'a prosecution for polygamy, bigamy or unlawful cohabitation under a statute of the United States.'

The grand jury that found this indictment was the regular grand jury for the district, whose duty it was to inquire into all offences, as well under the laws of the Territory as under the laws of the United States, and the impaneling of that grand jury was no more 'a prosecution for polygamy' than it was a prosecution for burglary, because the jury was as likely to be called upon to investigate the one class of offences as the other. It was a proceeding had prior to the commencement of any prosecution, and was not 'under any statute of the United States,' for the impaneling of grand juries is regulated entirely by the territorial statute, and there is no law of Congress on the subject which applies to the Territories.

The construction of the Edmunds Act contended for by the prosecution changes its terms so as to make them applicable to all jurors in the Territories, and in effect creates a new cause of challenge to all jurors, which was clearly not the intention of Congress, because the act expressly limits the challenge to jurors in prosecutions for the special offences named.

But if the section is applicable at all to grand jurors, the terms of the law were not complied with, for none of the jurors who were retained on the panel were interrogated as to their belief in the rightfulness of cohabiting with more than one woman. If the jurors of the one class were disqualified because they believed it right to have more than one wife, those of the other class would also be disqualified by the same section if they believed it right for a man to cohabit with more than one woman, and it should have been ascertained whether or not there were any such persons on the jury. Certainly Congress never intended that members of one of these classes should be singled out and packed into a jury box to indict members of the other class. Nor can we believe that this Court will sustain the view which has to some extent prevailed in Utah, that the cohabitation referred to in the Edmunds Act is confined to 'the marriage relation,' or in other words that this provision can affect only the 'Mormon' part of the community, who alone sustain such relations; but on the contrary we confidently assert and maintain that it applies to all unlawful cohabitation, without regard to the marital relations of the parties.

As regards the second reason assigned by counsel why, as he claims, the 'Mormon' grand jurors were rightfully excluded from the panel, and his charge that they were not 'good and lawful men' because they believed it 'right to commit crime,' I desire first to call attention to the fact that the statute says nothing about grand jurors being 'good and lawful men;' but it does prescribe certain qualifications, all of which were possessed by those who were excluded. As a grave moral charge has been made against the entire "Mormon" people, and they have been accused of believing it 'right to commit crime,' I trust you will permit me to briefly answer this serious accusation, and, if I find it necessary to allude to facts not strictly within the record of this case, I feel that, under the circumstances, you will justify me in so doing.

In the consideration of this point it must not be forgotten that these people believe in plural marriage as a part of their religious faith, and regard it as a principle which has been revealed by God, and the practice of which has been commanded of Him. The belief in the rightfulness of this principle is as much a part of the religious faith of those 'Mormons' who have not a plurality of wives as of those who are actually living in that relation, and they could not be induced to either deny the correctness of the principle or assert that they believed the practice to be morally wrong. But while they entertain this implicit faith in its truth and divine origin, they neither ignore nor deny the unpleasant fact that, by an act of Congress, the practice of polygamy is made a crime, and when examined as to their competency as jurors in this class of cases, they have, time and again, asserted, under oath, that they would not hesitate, if an accusation were made against one of their number for violating that law, to either indict or convict, as the case might require; and that this statement was truthfully and honestly made, has been abundantly proven by the fact that 'Mormon' juries have indicted and convicted their brethren for these offenses against the law, believing that they were justified in so doing because the law of the land and their oaths required it, but denying that there was any moral guilt attaching to the commission of the act. In other words, these people say that plural marriage is not morally wrong, because God has said so, yet, who ever enters into it, while it is prohibited by law, must take the consequences of his acts, and, if proven guilty, must suffer the penalty. Is it just and right to say that a man who thus believes but has violated no law himself, is not a 'good and lawful man,' and that for such a belief the entire 'Mormon' people, who comprise at least four-fifths of the population of the Territory, may be excluded from the grand inquests of the communities in which they live, whose duty it is to enquire into the commission of all offenses against the law, whether congressional or territorial? May they be deprived of representation on the grand jury, which was regarded by the illustrious founders of this great commonwealth as one of the indispensable safeguards to liberty, and one of the most precious and important institutions of a free government? Can these most sacred rights and privileges of free men, to participate in the administration of justice in their own communities, be wrested from them—not because of any acts of theirs, but simply because they will not say they believe that to be wrong which Almighty God has declared to be right? If this be so, then it does seem to me a most solemn mockery to assert, as has been done in this honorable presence to-day, that these people enjoy religious liberty and freedom of conscience."

JUSTICE MATHEWS:

Is it not the practice, Mr. Richards, in many of the States, to ask jurors in murder cases if they have consciencious scruples against finding a verdict of guilty?

MR. RICHARDS:

"Yes, your Honor; but that rule only applies to trial juries in cases where the penalty might be death, and the juror's answer that he has such scruples shows conclusively that he could not find a verdict for the prosecution without violating his conscience, hence his incompetency to sit in the case. But here the principle is entirely different. There is no reason or custom authorizing such a question to be put to a grand juror, and even if there were, and it had been entirely admissable to ascertain the belief of these jurors on the point under discussion, and that belief proved to be as I have stated, then I say there could be no question as to their competency to act as grand jurors, for their consciences would have required an indictment from them if the facts warranted it. Of course we had no opportunity to show the exact state of mind of these jurors, but similar cases have come before your Honors where the record showed just the state of facts which I have supposed to exist here, and which from my intimate acquaintance with these people and my knowledge of them I feel fully justified in suggesting to you as the real facts in this case. And I most respectfully submit that for your Honors to sustain the views of counsel and exclude them from juries on the ground that they are not 'good and lawful men' would be to deprive them of a most sacred privilege solely because of a religious belief."

After reading and commenting upon the provisions of the statute prescribing the qualifications of grand jurors, the mode of challenging when the defendant has been held to answer, and the effect of a motion to set aside the indictment, when the defendant has not been previously held, counsel showed from the record that the objection to the grand jury had been regularly made in the court below and was one of the important points to be decided by this court.

Mr. Richards then took up the question of the illegality of the petit jury and the effect of the open venire issued in this case. He called attention to each of the jury laws enacted since the organization of the Territory and showed how the Act of 1853, referred to by the Solicitor General, had been superseded by the Act of 1859 and afterwards expressly repealed in 1878, and how the Act of Congress of 1874 had entirely done away with all former legislation upon the subject of juries. He analyzed the provisions of the latter law and, in answer to questions from Justices Waite and Miller, explained the practice under it as to the summoning of regular jurors and talesmen, insisting that this act constituted a complete jury system, and provided for every possible contingency, leaving no room or cause for an open venire.

He then said: "It is historical in Utah that, prior to the enactment of the section last quoted, complaint was made by members of the minority party there that the jury lists were all made by officers who came from the majority party, and that the minority was not properly represented. It was to remedy this supposed evil, and to secure to each party representation on juries, that the act of Congress above quoted was passed. It was believed that this could not be done with an open venire in the hands of either side, and that it must be excluded. In order to do this, a jury list of 200 was provided for, instead of 50, as the law then stood, and the larger number of 200 was deemed ample for four terms. That a contingency would arise by which a large part of the jurors would be disqualified was not contemplated, and that it has arisen cannot change the construction of the law, or the motives that actuated it, or the purposes sought by means of it. The provisions of the act, taken by themselves and in connection with its history, are sufficient to show, without express words of exclusion, that the act is a complete provision, and was intended by Congress to be the sole method of getting jurors in the District Courts. It not only prescribes the