

termine that. We don't want to deny her any privilege. If she is the lawful wife, as soon as that is ascertained her privilege will be freely accorded. It is not for her to say that it is a fact. The question of competency does not enter into the issue. The witness should be retained in the contempt.

Mr. Rawlins—I do not dispute that the court may pass upon these matters, for that is right. But the difficulty here is that the court has never decided whether the witness is competent or not. The court, in effect, told her to testify against the defendant, and said the grand jury could then say whether she was competent or not. We find this woman in the penitentiary, for what? For refusing to answer a material question? The court has not passed on that, nor will it, unless it overrules the Supreme Court of the United States. So that, in either event, she cannot testify. It is unnecessary to go into the question of the convenience of the grand jury. It is the law that we want. It is the function of the court, not of the grand jury, to pass on the competency of the witness. The court seeks to compel her to testify, before determining whether she is a competency or not.

Judge Sandford—May not the jury go into the question of her competency?

Mr. Rawlins—Not if the authorities are right. That is the very question ruled on in the Miles case. The lower court told the jury to inquire as to Caroline Owen's competency, and the Supreme Court of the United States said inquiry was unlawful. Language cannot be clearer than it is in this case. It says that as long as the first marriage is contested, the alleged second wife cannot testify on that point. You must override the law in order to require her to answer in this case. She could not be a competent witness in any event, as the matter stands. The grand jury can only receive lawful testimony. And yet the strong arm of the law sends to the penitentiary this woman, whom the highest court of the land has said has the right to take the course she has done. I ask the court, is not the question clearly in violation of the law as laid down by the Supreme Court of the United States? Nothing can be clearer than that this imprisonment is unlawful. All the testimony shows that she is the lawful wife, and there is absolutely nothing to show the contrary. Strange to say, while the district

attorney says he does not want to deal unfairly with her, he goes farther than the law allows, even if she was a competent witness. They sought to extort from her a statement that in no event could be made.

Judge Sandford—Take an adjournment till tomorrow at 10 a.m.

This left Mrs. Hendrickson in the custody of the marshal another night. When the court adjourned Judge Henderson is said to have told a deputy the witness must go to the penitentiary. It is stated that Ogden Hiles went out of his way to instruct the officer as to his duty in this regard. The spirit that prompted such a course can be judged from the fact that Mrs. Hendrickson, who is a lady of the highest respectability and honor, was confined in a room with two of the most depraved females that were ever incarcerated in jail. On Saturday, Sunday and Monday nights she could obtain no rest for the quarrelling of the two, while their fearful imprecations and vile words and actions were too horrifying for description. Of course the Marshal is not to blame, because these are the best accommodations that he has.

The Territorial Supreme Court on Jan. 17 reached a conclusion in the matter of the application of Mrs. Hester Hendrickson for discharge from custody because, as a legal wife, the law said she could not be compelled to testify against her husband. Both Judges Boreman and Sandford followed the course of Judge Henderson, and filed the following opinions:

IN THE SUPREME COURT OF UTAH TERRITORY.

January Term, 1889.

Ex parte Hester Hendrickson.

On petition for discharge from prison on writ of *Habeas Corpus*.

Boreman, Justice, delivered the opinion of the court:

The petitioner was adjudged guilty of contempt, and committed to prison, for refusing to answer a question propounded to her by the grand jury of the District Court at Ogden, when she was a witness. The grand jury had under investigation a charge of polygamy against one John Hendrickson, and had received testimony tending to show that said John Hendrickson had married two women on the 1st day of January, 1885, at the same time, by the same ceremony, or on the same day, namely, said Hester Hendrickson and another woman named Mary Lloyd. When the petitioner had been sworn as a witness before the grand jury, she claimed that she was the lawful wife of said John Hendrickson and

that as such she was exempt from giving testimony. Upon inquiry by the grand jury touching her claim of exemption, she testified, without objection, that she was married to said John Hendrickson on the first day of January, 1885. Further, with a view to ascertain whether in fact she was the lawful wife of said John Hendrickson as she claimed, the grand jury asked her whether John Hendrickson, on the same day that she married him, married another woman named Mary Lloyd? She declined to answer this question, and the matter was referred to the court. The grand jury and the witness were, by the court, instructed that it was the duty of the witness to answer the question and to answer all questions put by the grand jury touching the inquiry as to whether she really was the lawful wife, or not, of said John Hendrickson, and that her testimony could not be used by the grand jury against said John Hendrickson if it should appear that she was the lawful wife; that the inquiry was made with a view merely to ascertain whether she was such lawful wife or not.

Upon returning to the grand jury room she again declined to answer the question, and the matter was again referred to the court by the grand jury. The witness was asked by the court, in the presence of the grand jury, whether she would answer the question. She replied that she would not, and would not obey the order of the court requiring her to do so. The court adjudged her guilty of contempt and committed her to prison, there to remain until she should answer the question or be legally discharged.

The matter for our examination is whether the court had the authority to remit to the grand jury the question as to the competency of the petitioner as a witness, and this question depended upon the proof of a fact. If she were the lawful wife of said John Hendrickson she was *prima facie* a competent witness, under the first section of what is commonly known as the Edmunds-Tucker law of Congress. (Comp. Laws of Utah of 1888, p. 114.) But by the same law it appears that if she were the lawful wife she could not in a case against her husband be compelled to testify against her consent. In order to ascertain whether she was the lawful wife, it was necessary to ascertain whether she was the first wife. That was clearly a question of fact. The question which the grand jury asked the witness plainly showed that the object of inquiry was whether really the witness was the first wife as she claimed to be. If she were not, her claim of exemption from testifying would fall. Before the grand jury could require her to testify in the case against John Hendrickson, they must be satisfied that she was not the first wife. The question of the competency was one of mixed law and fact, but not a question of doubtful law, such an one as they would need the advice of the Court upon. The grand