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by an official phonographic reporter appointed by himself. When the Supreme Court of the Territory met on the 5th of February, Chief Justice McKean presiding, the record in the Hawkins case was not quite ready, because the clerk had not had time to prepare it in the short period that had passed since Judge McKean signed the bill of exceptions, whereupon the Chief Justice adjourned the Supreme Court until the third Monday in June next, I will not say to prevent the Hawkins case being heard and reversed by his associates, although I understand that such is the view Hawkins takes of it. But then Hawkins is probably prejudiced, his recollections of some of the proceedings in his case not having increased his confidence in the impartiality of the Chief Justice. Let me refer to a few of those proceedings.

The Act of Congress governing the mode of procedure in criminal cases in the courts of the United States, gives to the accused ten peremptory challenges to the jury against two accorded to the prosecution, while the Territorial law governing the mode of procedure in criminal cases in the Territorial Courts gives to the prosecution and the accused six challenges each. The Act of Congress referred to bars all prosecution for non-capital felonies (except forgeries) not instituted within two years from the date of the offense, while the Territorial laws contain no statute of limitations. The Territorial laws provide that in non-capital cases the jury which finds a defendant guilty may prescribe the punishment. The Act of Congress is silent upon this subject and of course leaves the power of sentence where in the absence of statutory regulation it would belong—with the judge.

As Judge McKean had ruled that his was a U. S. court the counsel for Hawkins asked the court to give their client the benefit of the ten challenges allowed by act of Congress. Judge McKean refused, and allowed only the six permitted under the laws of Utah. The defendant's counsel requested an instruction to the jury that the law of Congress protected the defendant for acts committed two years before the finding of the indictment. Judge McKean refused because the Territorial laws presented no limit for prosecutions. Then counsel asked the Judge to allow the jury to fix the punishment, as prescribed by the Territorial laws. He refused that also. He pursued the practice of a United States court when the jury were being selected, of a Territorial court when the jury were being peremptorily challenged. He pursued the practice of a Territorial court when the act of Congress would have limited the prosecution, of a United States court again when the jury might, under Territorial law, have been more lenient in prescribing punishment than the exigencies of a great, burning "mission" would warrant.

What authorities were cited? What precedents involved? What chain of reasoning offered to sustain these judicial usurpations? None. The section of the statute of Utah under which Hawkins was indicted, and his wife permitted to testify against him, both before the grand and petit jury, reads as follows—

"No prosecution for adultery can be commenced but on the complaint of the husband or wife."

The statutes of but few States make adultery a felony, and adjudicated cases upon such statutes are rare. In Minnesota, however, the statute on this subject is precisely the same as that of Utah, and the Supreme Court of Minnesota, in a case strikingly analogous to the Hawkins case, in the case of State vs. Armstrong, reported in the 4th volume of Minnesota Supreme Court reports, set aside a similar conviction obtained upon the testimony of the wife, and in its opinion used the following language—

"The Act provides that no prosecution for adultery shall be commenced, except on the complaint of the husband or wife.' Common statutes Minnesota, 728, sec. 1. "It is contended that this provision authorizes them to be sworn as witnesses against each other before the grand jury in making the complaint. We think, however, that such was not the intention of the Legislature, etc., etc. We could not, etc., consistently with the rules of construction of statutes, add another case to those in which the confidence of the marriage relation may be violated, while another reasonable interpretation will fully satisfy the statute. We think, in limiting the prosecution of the crime of adultery to cases in which the complaint shall be made by the husband or wife, the Legislature only meant to say, that it was a crime, which, if the parties immediately interested did not feel sufficiently injured by it to institute proceedings against the offender, the public would not notice it. It does not follow, because the prosecution of a case proceeds upon the complaint of a particular person, that therefore, that person must be the complaining witness. The person who moves the prosecution before the magistrate or grand jury, may not personally know anything about the facts of the case, but he can, nevertheless, put the investigation in motion, by entering a complaint and either producing the witnesses who can establish the facts, or putting the officers of the law in the way of doing so. It means that it must be upon the motion, and with the approbation of the interested party."

In the same case the Supreme Court of Minnesota says, upon another point—"Marriages and deaths in civil actions involving questions of inheritance, the legitimacy of heirs, etc., may often be proven by admissions of the parties, inscriptions upon tomb stones, memoranda in family Bibles, and a variety of circumstances which are admitted for convenience and from necessity. But in criminal prosecutions for bigamy, or in adultery, where the offence depends upon the defendant being a married man or woman, the marriage must be proven in fact, and a conviction cannot be had upon the admissions of the defendant." 7 John 314, People *vs.* Humphrey.

Yet, on the trial of Hawkins, Judge McKean permitted the prosecution to prove the marriage of Hawkins by evidence of his admissions to that effect.

Perhaps I weary the convention with all this, but as the necessity for a State Government in Utah arises largely from the character and conditions of the courts of Utah, I have thought best to recite some of the history of judicial proceedings here, that all may know the grievances of the people, and that those who sustain the course of Judge McKean, may understand what it is they endorse. Perhaps the legal profession may criticize my action in reviewing, before a public assemblage, the rulings made at a trial in which I participated as counsel. I can only reply that the prosecution in these Mormon cases have constantly appealed to the public for support. They have tried iheir cases on the streets, in the newspapers, at public meetings, by petitions, and over the telegraph wires by means of their leading adviser, the Salt Lake agent of the Associated Press, and I do but follow their example in presenting the matter to this convention. Let those who sustain Judge McKean by petition and mass meeting, without knowing whether he is right or wrong, take heed lest the hour arrive when they shall feel need of courts where the voice of passion and public clamor cannot enter, and where those rules of law which the wisdom of ages has prescribed, will not, for any social or political exigency, be set aside.

Thus it will be seen that the four important provisions of the discarded Cullom Bill, namely no chance of jurors except by a U. S. Marshal, no Mormon to serve as jurors, the abrogation of the common law rule that a wife cannot testify for or against her husband and the new doctrine that marriage in criminal cases can be proven by admission of the defendant—are all in successful operation. That legislation to meet a local difficulty in the way of enforcing the laws, which the Senate of the United States did not deem it wise or expedient to enact, has been decreed and established by James B. McKean. That course of procedure which Chief Justice Salmon P. Chase tacitly refused to pursue, even to meet a great popular demand for the punishment of Jefferson Davis, the Chief Justice of Utah has pursued to comply with a small popular demand for the punishment of a Mormon polygamist. The judge has made those bold innovations upon precedent the contemplation of which compelled the pause of the law-making power of a great nation. Who will doubt that whenever the exigency arises the same judge will overturn another common law rule, and establish another proposition of the Cullom Bill by allowing marriage to be proved in prosecutions for polygamy by evidence of general reputation? Who will doubt that any ruling will be made that is necessary to carry out the purposes of this crusade? And what unprejudiced citizen but will regard with apprehension the extension of this practice of judicial legislation? If it should ever reach beyond Utah and be adopted by the judges of our State and national courts of last resort, either a revolution would be induced, or a people who had lost their liberties would have occasion to remember John Randolph's epigram, that—"The book of Judges comes before the book of Kings."

Let me now recall some incidents in the history of the grand jury selected under the patent process to which I have referred. That grand jury found a number of indictments, not for any alleged violation of the anti-polygamy act of Congress, not for adultery as in the Hawkins case upon the evidence of the wife, but upon somebody's evidence—let us hope that the somebody was not merely public rumor—they indicted a number of prominent Mormons for the crime of "lewd and lascivious cohabitation." The law under which these indictments were found is a statute of Utah Territory and reads as follows—

"If any man or woman, not being married to each other, lewdly and lasciviously associate and cohabit together, ect., etc., every such person so offending shall be punished by imprisonment not exceeding ten years, etc., etc."

But one State in the Union has a statute exactly similar to this—the State of Massachusetts, and the Supreme Judicial Court of that State, in the case of Common-wealth *vs* Catlin, 1st Mass. reports, page 8, decided that "evidence of secret cohabitation cannot in any degree support an indictment for this offence."

Who supposes that the defendants in any of the cases of this character now pending in the Third District Court, will be proved to have committed any public act of cohabitation? And who does not conjecture that a petit jury selected as the grand jury was, and instructed as they doubtless will be, will probably find verdicts of guilty upon evidence of reputed secret cohabitation?

Let me return once more to the record history of the Third Judicial District Court.

Among the indictments for lascivious cohabitation is one charging that crime against Brigham Young, and charging it as having been committed with sixteen different persons at sixteen different times and places, ranging over a period of nineteen years. The counsel for the defendant asked the court to quash this indictment for multifariousness, or else compel the District Attorney to elect upon which count he would proceed. Let it be observed that there was nothing in this motion out of the regular course of proceedings in criminal cases. It was made upon legal grounds only, and supported by legal authorities. It was nowhere suggested or argued that 'lascivious cohabitation" was not a crime, a felony under the laws of Utah. It was nowhere suggested or argued that evidence of a polygamous marriage would be offered, or if offered could be received as a defence of the accusation. The motion to quash or compel an election was made before plea, and the Judge in passing upon that motion had no right to do anything except to grant or refuse it, and to express an opinion so far as to give his legal reasons for granting or refusing it.

What did he do? He went outside of the record, he assumed that the defendant was guilty before trial. He first denied the motion, giving his legal reasons therefor, and then he used the following remarkable language—

"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 judicially 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—*imperium in imperio*—whose policy and practices are, in grave particulars, 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 polygamous practices charged in the indictment are not crimes, this court will at once quash the indictment, and charge the grand jury to find no more of the kind."

What wonder that the New York *Law Journal*, one of the leading legal periodicals of the country, thus criticized this remarkable language of Judge James B. McKean.

"His decisions we do not question, but the language accompanying those decisions has been often so intemperate and partial as to remind one of those ruder ages, when the bench was but a focus where were gathered and reflceted the passions of the people."

What wonder that the counsel for the defendant felt compelled to notice this unprecedented action of McKean, by filing the next day the following protest:

Territory of Utah, } ss
Third District Court, }

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

To the Hon. Jas. B. McKean, Judge of the above entitled Court.

We, the undersigned, of counsel for the defendant in the above entitled cause, respectfully except to the following language of your honor in your opinion upon the motion to quash the indictment herein:

"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 judicially rule.' It is therefore proper to say that while the case at the 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—*imperium 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 the 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 mental, moral or social sciences, 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 indictment in this case charges the defendant with "lascivious cohabitation," and not with polygamy or treason. The statement of your honor that a system of polygamic theocracy is on trial in this case in the person of Brigham Young, coupled with your invitation to us to prove by authorities that the acts charged in the indictment are not crimes, is most prejudicial to a fair trial of the defendant, in that it assumes that the defendant has been guilty of the acts charged in the indictment, and that the law and not the alleged fact will be on trial.

No motion has been made to quash the indictment in this case on the ground that the acts charged therein are not crimes, nor has such a proposition been advanced on argument by any of defendant's counsel herein.

We submit that no "political and social condition of the country" can relieve the prosecution of the task of proving one or more of the acts alleged in the indictment, and that unless and until such proof is made, the guilt of the defendant ought not to be assumed or even conjectured by the judge before whom he is to be tried.

If any presumption is to be indulged in, it is that the defendant is innocent of the charges preferred against him, and that he will accordingly plead "not guilty" to the indictment, and that presumption remains until the defendant elects to plead either "guilty" or a special plea of justification, which latter has not been suggested by either defendant or his counsel. In so pleading "not guilty" the defendant will not say that the acts charged in the indictment are not crimes, but that he is not guilty of the acts charged in the indictment.

Then there will be a question of fact for a jury, and we submit that in the determination of that question the language of your Honor herein referred to cannot but tend to the prejudice of the defendant, and we therefore except to the same.

FITCH & MANN,
HEMPSTEAD & KIRKPATRICK,
SNOW & HOGE,
HOSEA STOUT,
A. MINER,
LE GRAND YOUNG.

Let not the filing of this protest be criticized as an unusual proceeding. If it be unusual, so was the occasion which