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Guardian Sale of Real Estate.

NOTICE IS HEREBY GIVEN, THAT in pursuance of an order of the Probate Court of Iron County, Utah Territory, made on the 13th day of May, A. D. 1887, in the matter of the Estate and Guardianship of Joseph Clayton Mitchell, a minor, the undersigned, William C. Mitchell, guardian of the person and estate of Joseph Clayton Mitchell, will sell by private sale, to the highest bidder, lawful money of the United States of America, and subject to the confirmation by said Probate Court, on Wednesday, the 8th day of June, A.D., 1887, at 12 o'clock m., at the office of N. W. Clayton, No. 55 S Main Street, Salt Lake City, Salt Lake County, Utah Territory, all the right, title, interest, and estate of the said Joseph Clayton Mitchell, in and to all those certain lots or parcels of land, situate, lying and being in the said city and county of Salt Lake, and Territory of Utah, described as follows, to-wit: The south half of lot four (4) in block fifty-six (56), plot "B" Salt Lake City survey, containing one hundred (100) square rods; also lots one and two, in block one hundred and twenty-nine (129) plot "D" Salt Lake City survey, containing two hundred (200) square rods.

All bids must be in writing and submitted before the said 8th day of June.

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Guardian of the Person and Estate of Joseph Clayton Mitchell. dtd

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LOOK AT THIS:
Men's CALF and KIP BOOTS, hand made, from $5.00 upwards. All Full Stock.
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I make a Specialty of REPAIRING, at LOWEST PRICES.
Soleing and Heeling Men's Boots and Shoes, from 75cts. up. Other Repairing equally cheap. All work guaranteed First Class, and with dispatch. dtf

LEGAL NOTICE.

In the Probate Court in and for Salt Lake County, Territory of Utah.

In the matter of the Estate of Jacob Jensen, Deceased.

Order appointing time and place for settlement of final account and to hear petition for distribution.

ON READING AND FILING THE PETITION of Christian Jensen and Daniel McRae, Executors of the last will of Jacob Jensen, deceased, setting forth that they have filed their final account of their administration upon said estate in this Court; that all the debts have been fully paid, and that a portion of said estate remains to be divided among the heirs of said deceased, and praying among other things for an order allowing said final account and of distribution of the residue of said estate among the persons entitled.

It is ordered that all persons interested in the estate of the said Jacob Jensen, deceased, be and appear before the Probate Court of the County of Salt Lake, at the Court Room of said Court, in the County Court House, on the 23rd day of June, 1887, at 10 o'clock a. m., then and there to show cause why an order allowing said final account and of distribution should not be made of the residue of said estate among the heirs and devisees of the said Jacob Jensen, deceased, according to law.

It is further ordered that the clerk cause copies of this order to be posted in three public places in Salt Lake County and published in the DESERET EVENING NEWS, a newspaper printed and circulated in Salt Lake County, three weeks successively prior to said 23rd day of June, 1887.

ELIAS A. SMITH,
Probate Judge.

Dated May 21st, 1887.

Territory of Utah, } ss.
County of Salt Lake, }

I, John C. Cutler, Clerk of the Probate Court in and for the County of Salt Lake, in the Territory of Utah, do hereby certify that the foregoing is a full, true and correct copy of order appointing time and place for the settlement of final account and for distribution in the matter of the Estate of Jacob Jensen, as appears of record in my office.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court, this 21st day of May, A. D. 1887.

[SEAL.] JOHN C. CUTLER,
Probate Clerk.
d

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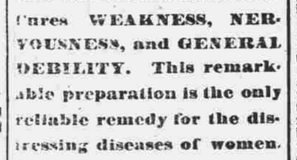

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EVENING NEWS.

Friday, - - - June 10, 1887.

AGAINST THE BONDSMEN.

The Suit against H. S. Eldredge and F. Armstrong.

In the Territorial Supreme Court on June 9th, Judge Boreman delivered the opinion of the court in the suit for $10,000, on the last bond given for the appearance of President Geo. Q. Cannon, as follows:

The principal facts in the case are the same as in case No. 6,599 heretofore decided at the last January term, except as to the time of the alleged unlawful cohabitation, and except that in this case, two prosecutions, instead of one, are pleaded.

The two prosecutions thus pleaded in defense in this action are the indictment of the 24th of March, 1885, and the prosecution in which the undertaking sued on in case No. 6,599 was given. Both of those cases, as in the present one, were for unlawful cohabitation.

It is contended that unlawful cohabitation is one continuous offense, and that it cannot be divided into two or more offenses, and that the present prosecution is not the one on which the accused could have been held. It will be proper for us, therefore, first to examine whether the prosecution in which the undertaking herein sued on was given, could or could not have been the proper one.

The Supreme Court of the United States has lately decided in the case of *ex parte* vs. Lorenzo Snow, not yet reported, that unlawful cohabitation is a continuous offense, yet that an indictment for that crime would not preclude another prosecution for the same offense committed at a time subsequent to the finding of such indictment. The cohabitation in the present case is alleged to have been committed at a time subsequent to the indictment of the 24th of March, 1885, and as a consequence that indictment would be no bar to the prosecution on which the undertaking herein sued on was given, and cannot be pleaded as a defense in this action.

With the indictment of the 24th of March, 1885, eliminated from the case before us, there remains for our consideration the question whether the other prosecution, the one on which the undertaking sued on in case No. 6,599 was given, is a bar to the present action.

The complaint for the arrest of the accused in that case, and the complaint in the present one, were filed before the Commissioner on the same day, but the one represented by case No. 6,599, was prior in time.

The warrants were issued on the same day; the accused was brought before the Commissioner on the same day on both warrants, and the undertakings in both cases were on the same day.

The appellants, the sureties on the undertaking herein sued on, claim that if they had surrendered the accused, or if he had appeared at the time appointed, he would have been entitled to his immediate discharge from custody; that since the institution of this action, the Supreme Court of the United States having decided that there could be but one prosecution for this offense, therefore the holding of the accused on the charge in this case was unlawful and void, and hence that the holding of the sureties on the undertaking is unlawful and void.

The Supreme Court of the United States did not decide that there could be but one prosecution instituted, nor could that idea have been intended to be conveyed. It would have been contrary to the settled doctrine.

It is not infrequent that a second or even a third indictment is found for the same offense, but on one alone is the party tried, and the others are dismissed. In all such cases there can be but one judgment, of either conviction or acquittal; and any such judgment can be pleaded in bar of any other prosecution for the same offense. But here the accused had not been convicted or acquitted on the charge pleaded at bar, nor on any other charge for the offense of unlawful cohabitation. The defense set up by the sureties is one that the accused himself could not have availed himself of, in his defense on the charge upon which this case is based, much less then, it would seem, could his sureties do so.

The doctrine of the Supreme Court of the United States, as set forth in the case of *ex parte* Lorenzo Snow, above referred to when applied to this case, is that for the time between the findings of the indictment of the 24th of March, 1885, and the date of the complaints before the commissioner, to wit, the 16th day of February, 1886, there could be but one conviction; and not that the pendency of one indictment or prosecution was a defense to a trial, or conviction upon another for the same offense. It is a well settled rule of law that the pendency of one indictment is no bar to the trial or conviction on a second or subsequent indictment for the same offense. 1 Chitty's Crim. Law, 447. Com. vs. Murray. 11 Cush., 472. Wharton's Crim. Pl., 472. United States vs. Herbert, 5 Cranch. C. Cr., 87. Kalloch vs. Superior Court, 56 Cal., 236. 1 Archbold's Com. Pleadings, 110-111.

The pendency of the former prosecution, that represented by case No. 6,599, would not preclude the prosecution in this case. Had the former prosecution been carried forward to trial and judgment, it could have been pleaded at the bar of the action in which the undertaking herein sued on was given, and also of this action. But as the accused did not appear, and was surrendered, there could be no trial or judgment. One prosecution for the time subsequent to the indictment of March 24th 1885, as we have seen, was proper and legal. The prosecution in which the undertaking sued on was given, was subsequent to that indictment. Its being subsequent would not, therefore, it seems, render it invalid or illegal. It might be legal. The pendency of the former prosecution being no defence to this action, we are not in a position to say that the present action is illegal or unauthorized. If the accused could have been prosecuted to judgment, the bond to require him to appear was not invalid. Had the accused appeared at the time appointed for the trial, he could not have interposed any legal objection to proceeding to trial in the case in which the undertaking herein sued on was given; nor could his sureties have made any such objection. Besides, had he appeared then a new indictment might have been presented against him, covering the whole time subsequent to the indictment of the 24th of March, 1885, and by the undertaking herein sued on, he was bound to answer to it. He would not have been entitled at least to be discharged *ex debito justicie* at that time. The accused should have appeared at the time and his surety should have seen that he thus complied with the requirements of the undertaking. They were to some extent his jailors, and could have arrested and restrained him to the extent necessary to produce him at the appointed time. They failed to do their duty in not having him there, and he failed to appear of his own will, and the undertaking was duly forfeited. They did not deny then that he was liable to arrest, nor did he deny it. It would seem that they are now estopped from denying that he was liable to arrest upon the charge, to answer which the undertaking herein sued on was given. 2 L. D. Raymond, 1535. 8 Tend. 481.

It was not for the accused nor for his sureties to judge of the propriety or necessity of his attendance at the time, when it was the obvious policy of the law to refer that question to the court whither he was required to repair. If, to use the language of the supreme court of New Jersey, he had appeared, and there had been nothing against him, it might have been sufficient cause for the court to have discharged his recognizance and given him leave to depart, but was not in itself such leave or discharge.

A recognizance in general binds to three particulars—First, to appear to answer either to a specified charge or to such matters as may be objected; second, to stand to and abide the judgment of the court; and third, not to depart without the leave of the court, and each of these particulars is distinct and independent. The party is not to depart until discharged, although no indictment should be found against him by the grand jury although he be tried and a verdict of acquittal rendered. (Citation of authorities.) The same doctrine is laid down by the Supreme Court of Maine, which says that "the right to enforce a recognizance in no way depends upon the question of the guilt or innocence of the accused, and that question can only be determined by trial upon the complaint," that, "the defendant was bound to appear," etc., and "he cannot set up the repeal of the statute." (Authorities).

In Pennsylvania it is held that in an action on a recognizance, which originated before a justice of the peace, the validity of it cannot be questioned either by proof that it was illegally taken or that it was fraudulently taken. (Citation of authorities).

It New York it is held that sureties on an undertaking of bail, in an action against them after breach, cannot question the liability of the principal to arrest or imprisonment; that they cannot defend upon the ground of the illegality of the arrest; they should have moved for exoneration at the proper time. (Authorities.)

Various other States hold the same doctrine. The Supreme Court of the United States has held in the case of Beers vs. Haughton, 9 Pet. 329, that where the accused would have been entitled to his immediate discharge if he had been surrendered at the appointed time, the sureties could plead that fact in the bar, and thereon be discharged from their recognizance.

Since the decision of the Supreme Court of the United States, the Circuit Court of the United States (9 circuit) Judge Field presiding, held that whilst the accused was testing the validity of the indictment on the ground that it stated no offense, he might be admitted to bail, and if he were, the recognizance which he would give would be valid and binding, although the indictment itself should subsequently be adjudged to be void, as charging no offense. (Authority).

The Circuit Court in the case last named, said that "the authority of the court to pass upon the validity of the action of the grand jury, and over the defendant whilst this validity is under consideration, is not an usurped authority, but is an authority essential to the exercise of the general jurisdiction with which the court is clothed over all offenses cognizable under the laws of the United States." If the doctrine contended for by the appellants is correct, then to use the language of Judge Field again, in the last named case, "If the court should refuse to look into the indictment and to pass upon its validity the judges would be justly censurable for neglect of duty; but if the court detained the defendant in custody whilst considering its validity, the judges would be liable to an action for false imprisonment if their ultimate decision be that the indictment was void. At the time that the accused in the case before us was required to appear, the question was under consideration in the courts, although not in this case, whether unlawful cohabitation was a continuous offense or whether it could be segregated into two or more offenses, and it had not then been held that it was one offense only. In this case the point had not even been raised, nor was it ever raised by the accused at any time, nor by the sureties themselves until this action on the undertaking was instituted. The principal might have raised the question at the time of giving the bail, but he made no such objection then, nor did he make any such objection upon the trial, not having appeared for trial. The denial of his liability to arrest was a privilege which belonged to him to be made at the proper time, and it did not belong to his sureties after the time had expired for an application for exoneration for the sureties and after the bail had become fixed. (Authorities)—In the case of Beers vs. Haughton, above referred to, there was no question pending as to the validity of the charge or of the arrest; there was no question of doubt to be settled, but the accused's right to a discharge from custody was absolute, clear and unqualified. Had there been any such unsettled question, as in the present case, it is manifest, that the court would have held that the accused was not entitled to his immediate discharge had he been surrendered or had he appeared at the proper time. The doctrine of Beers vs. Haughton is grounded upon the idea that the surrender of the accused would have been an idle ceremony, because he would have been immediately released from custody, and the bail could plead that, as much as they could have pleaded the death of the accused. Duncan vs. Darst, 1 How., 308. But the death of the principal could not have been pleaded after the bail was fixed. Davidson vs. Tayler, 12 Wheat, 604, and others.

So we do not see that the doctrine of Beers vs. Haughton is at all applicable to the case at bar, for nothing whatever appears in this case to show that the accused would have been entitled to his immediate discharge if he had appeared or been surrendered. On the contrary, he could have been held and tried upon the charge to answer which the undertaking herein sued on was given.

There can be no doubt of this fact. The only ground that could have been urged against his being so held and tried, would have been that he had already been tried and convicted, or acquitted, upon another charge for the same offense. If such had been the fact, then of course it could not have been pleaded or urged. There is therefore no ground nor reason for saying that the undertaking herein sued on is a nullity. The charge being valid, the undertaking to answer thereto is valid. The action upon the other undertaking, the one sued on in case No. 6,599, above referred to, has gone to judgment, but such judgment was not paid nor otherwise discharged, nor pleaded in defense to this action, but that case is still contested and pending on appeal to the Supreme Court of the United States, from the judgment therein. With the present case in judgment then, two judgments will exist against the bail of the accused, on two separate charges for the same offense. It is an anomolous situation, but one of the accused's and his sureties' own making; for this double responsibility could have been avoided by the accused having been produced in court at the appointed time. Trial and judgment upon one of the charges or indictments would thus have been rehashed, the accused then could not have been called to trial upon the other, and the undertaking on the charge not tried would never have been forfeited and the sureties thereon could never have been held liable. It is not the province of the accused nor of his sureties to decide upon which charge he should have been prosecuted or held to answer. That was a matter for the government to decide. As a consequence, neither the accused nor his sureties can question the validity of either undertaking, for his appearance at the appointed time. The other question arising in the case, arose in a case between the same parties, decided at the last January term of this court, and for our views thereon we refer to the opinion filed in that case. We see no reason for holding the undertaking herein sued on to be invalid; nor do we see any error of law in the case. The judgment of the district court is therefore affirmed. Zane, C. J., concurs, Henderson, A. J., concurs.

If the sureties could plead exoneration from an undertaking by reason of the existence of the other, it is possible that it might have been done in case No 6,599, where it might have been said, if said at all, that the second arrest for the same offense should release the sureties on the first undertaking (authorities) out of this we express no opinion. The question was not raised on the former case; it certainly cannot be raised in the present one.

Notice of an appeal was given, and the two suits, each for $10,000, will be carried to the Supreme Court of the United States.

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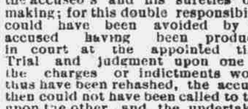

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BEST
SIX-CORD
Spool Cotton
IN
WHITE, BLACK AND COLORS,
FOR
Hand and Machine Use.
FOR SALE BY
Z. C. M. I. and its Branch Stores.

STRAW HATS.

Noble, Wood & Co.,
THE ONLY EXCLUSIVE HATTERS!
SALT LAKE CITY.

STRAW HATS

D. M. OSBORNE & CO.,
Are again to the Front with their
STEEL FRAME
BINDERS!
30,000 having been Sold during the harvest of 1886.

We now present them to the Farmers of Utah and surrounding Territories for the Harvest of 1887 as being the most perfect Machine ever brought here.

Our No. 4 Mower and No. 8 Reaper, which have given such universal satisfaction, are improved and again to the front.

Thanking our patrons for past favors and soliciting a continuation of the same, we invite them to call and examine the above Machines at our Warehouse in the Skating Rink, on West Temple Street, and at our Agencies throughout the Territories.

WE ALSO SELL THE CELEBRATED
COATE'S LOCK-LEVER HAY RAKE!
A Combined Hand and Self Dump.
A Child can operate it. The SIMPLEST and BEST RAKE IN THE WORLD.

D. M. OSBORNE & CO.

R. K. THOMAS.

EAGLE EMPORIUM.

JUNE 1887.

$25,000 Surplus Stock
MUST BE CLOSED OUT AT ONCE!

All Seasonable Goods!

EVERY DAYS' SALES DIFFERENT.

Country people will, however, be accommodated ANY DAY they happen to be in town, providing the lines are not all sold out.

COME EARLY IN THE MORNING FOR FIRST CHOICE.

R. K. THOMAS.

EXCELSIOR MANUFACTURING CO.,

CHARTER OAK

STOVES,
TIN PLATE, SHEET IRON, STAMPED WARE & TINNERS' TOOLS,
612-18 N. Main Street, St. Louis, Missouri.

FOR SALE BY Z. C. M. I.,
Sole Agents in Salt Lake City.

ROCKY MOUNTAIN CHURN!
Patented March 2nd, 1886.
MANUFACTURED BY
C. M. DONELSON.
147 East, Second South Street,
SALT LAKE CITY.

BEST CHURN IN THE WORLD!

Admitted by the Best Butter Makers to be
THE MOST PERFECT CHURN MADE.

Will make the best butter in the shortest time and with the least amount of labor of any Churn ever before invented.

AS EASILY CLEANED AS A MILK PAIL.

Will Churn in from 5 to 15 Minutes.

WE GIVE A DAIRY THERMOMETER WITH EACH CHURN.
For Sale at All the Leading Stores.

TESTIMONIALS:
SALT LAKE CITY, March 26, 1886.

Rocky Mountain Churn Company,

GENTLEMEN:—We have carefully examined your Patent Churn, and take pleasure in stating that we believe it is one of the best inventions in the line ever brought before the public, and we have no doubt but that this churn will commend itself to every practical farmer and dairyman as being a great invention and labor-saving machine. In fact we cannot speak too highly of it.

H. S. Eldredge, Supt. Z. C. M. I.; S. P. Teasdel, Merchant, Salt Lake City; Foremost Little, ex-mayor Salt Lake City; G. E. Bourne, manager grocery department, Z. C. M. I.; Joseph E. Walker, president, Union National Bank, Salt Lake City; R. G. Raybould, Cashier, Union National Bank, Salt Lake City; Pavey, Walden & Co.; H. W. Lawrence, and many others. sdw 1mo