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from all passion, to discriminate between those outward acts which the law may punish because they are injurious to society, and that conduct which is in itself innocent, is dictated by a sense of religious duty, is harmless and praiseworthy, and therefore incapable of being made criminal, because it is under the shield of the Constitution. There is no difficulty in making this discrimination. Every day we analyze here the processes of the human mind. Every day we determine here the difference between one thing, the product of one man's ingenuity, and another thing made by another man; and in that severe analysis we lay bare the anatomy of the human intellect. Are we so dull that we cannot discriminate between that conduct which the law may prohibit and that which it may not, when the religious constitutional rights of our fellow citizens are involved?

Now, to bring this down to the technical shape of this record, which is what your honors must regard. On page 22 of Case No. 1278, your honors will find the fifth prayer for instruction. Having more than one wife, it says, and claiming and introducing more than one woman as a wife, does not constitute the offense charged. You must find to justify a conviction that he has lived with more than one within the time stated in the indictment. Here is the whole defect of the entire evidence plainly pointed out. Can any lawyer deny that this was a necessary instruction?

1. Having more than one wife.

2. Introducing more than one woman as a wife.

These facts do not constitute the offense charged. To justify a conviction the jury must find that he cohabited with more than one.

Will any lawyer tell me that that was not a necessary instruction in this case, and that it was not a gross error to have refused it? It was refused, and no equivalent instruction was given.

And here I pass away from the Constitution. I leave it with reluctance, for I never know where my footsteps will stray when I undertake to explore the field of recent legislation, without the guide of the fundamental law. But before I leave that gracious presence, which is to me second only to that which looks down on us from the heavens, I think I hear her say to this statute, with all the majesty of her supreme authority: "Take, then, thy bond; take thou thy pound of flesh; take thy cohabitation; but in the taking and in the proof of it, if thou encroach by the estimation of a hair on the religious liberty of my subjects, thou diest!"

The second proposition, on which I have to argue, is stated in the 35th page of the brief. I will read:

"The terms 'cohabit' with more than one woman,' in the 3d section of the Act, aside from any constitutional or other objection to the evidence given by the prosecution on these trials, do not apply to the state of facts proved in either of them, there being no evidence of cohabitation with any of the women, excepting Minnie, during the periods covered by the respective indictments.

1. Cohabitation of a man with a woman, in a penal statute, I should have said, meant dwelling together in a sexual relation. But we have passed beyond that, and it has been held by this Court that it means something else. What it ought to be held to mean, in its application to these Mormons, depends upon a great deal of antecedent public history. A penal statute, breaking in suddenly upon domestic relations that have existed for a long period of time, cannot be construed without some reference to what has gone before. The elements that have a legitimate bearing upon its construction are these:

First.—The time of the passage of the law.

Second.—The antecedent public history of the sect called Mormons, of their settlement in Utah, and the organization of the Territory.

Third.—The public equities growing out of public facts.

Fourth.—The numbers and situation of the persons to be affected by the construction given to the law.

Of all these things, excepting perhaps the fourth, the Court can judicially take notice; and if I mention a few facts which I cannot prove from public sources I presume the Court will permit me to suggest them:

The law was enacted March 22, 1882. Polygamy had then existed in Utah, openly and to a large extent, for 35 years.

I must detain your honors for a few minutes upon the subject of the great exodus of the Mormons from Nauvoo, in 1846-7. It is a matter of public history. I want you to understand why I advert to it. It was a public act transpiring for a whole year in full view of the people of the United States. The polygamy that accompanied it all along was well known to the people and Government of the United States. It was the most remarkable expedition that has occurred, save in the difference of magnitude, since Moses led the Israelites out of Egypt. It began from a State of the Union. Two Senators of the United States, men very eminent in the public life of the country at that time, Col. Benton, of Missouri, and Mr. Douglas, of Illinois, intervened between the popular violence of the surrounding population and the government of Illinois, to negotiate protection for these people until they could depart, they agreeing on their part to go and seek a home out of the United States. They sold out their property at an enormous sacrifice, and prepared for the great expedition. That expedition crossed the domain of the United States from the Mississippi to the Missouri, and there the head of the column wintered at Council Bluffs. While they were there during that winter, the government of the United States made a requisition on Brigham Young, who was then the head of the Mormon Church and the leader of these people, to form a Mormon battalion to go into the Mexican war. He responded and gave the flower of his young men, five hundred stalwart fellows. The United States government sent military officers from this city to take the command; and the Mormon battalion went into the Mexican war and served until its close.

The expedition of which I have been speaking continued on in the spring of 1847 across the Rocky Mountains, and on the 24th of July, 1847, it halted at the Great Salt Lake in Mexican territory, and when all were gathered in, the settlers amounted to 20,000 souls, all holding one faith, and many of the older men having plural wives, which they carried along with them in the view of the whole country. But they were not all gathered in until after the country became the property of the United States. Public opinion throughout the United States was at that time of one unanimous tenor. Their polygamy was well known. Every one said let them go. They are beyond the mountains, they are in a foreign land, let them have their religion and their polygamy, we are rid of them.

The press at that period was not what it is now. If it had been, this expedition would have been attended by a hundred reporters, and every incident of every day would have been described in newspapers, laid on the breakfast tables of the whole country, on the following morning. But the expedition was not unnoticed by the press. By reference to the columns of the *National Intelligencer* and the *Union*, published here, you will find that this expedition was noticed from time to time. But this was not all. Not only was this emigration conducted in full view of the people and government of the United States, but it was attended by a great exhibition of heroism, and of many of the most remarkable qualities of human character. These Mormons passed through tribes of Indians, who were at that very time fighting the troops of the United States. There were comparatively but few persons of foreign birth in the expedition. They were chiefly from New-England, New York, Pennsylvania and Ohio; people educated in the public and private schools of those States, intelligent, many of them of the classes styled ladies and gentlemen. There was a good deal of the New England blood among them at that time. Among those who emigrated from Nauvoo was an educated Connecticut lady who bore my family name. She died on the way, and was buried in a grave, now unknown, in the deep black soil of the prairie. Although the Mormons passed through bands of Indians of the most hostile description, no scalp of a Mormon, man, woman, or child, was hung up in an Indian wigwam. No Mormon took the life of an Indian, or fired a gun except to bring down a buffalo, or some other game. They have always had more success, more Christian tact, in dealing with the Indians than any other white men on this continent of North America, excepting William Penn's Quakers. This is true of them now. All the great salient facts about this emigration were known to the people and Government of the United States through a whole year. It is of very little consequence to the purpose of my argument whether the law of Mexico, when they settled in Mexican territory, did or did not prohibit polygamy; and it is also of no consequence, in my judgment, whether the treaty undertook to secure to them religious freedom after the country became the property of the United States, because when they passed under the Constitution of the United States they received a guarantee of religious liberty that was far more effectual than any treaty could bestow.

Now allow me to follow down their history from 1848. The Territory was organized by act of Congress in 1850. Brigham Young was appointed governor of the Territory and so continued down to 1857. He was a man known by the whole country to be a polygamist. He died years afterward, leaving seventeen wives and fifty or sixty children.

There was no interference and no legislation until 1862. The act then passed was believed by every Mormon in Utah to be unconstitutional. There was no prosecutions under it for a long time. At length, a test case was made, which reached this Court, and was decided at the October term 1878, and at some time in the winter of 1879.

The polut decided was, as your honors well know, that their religion was no bar to the act of the sovereign power in declaring polygamous marriages to be bigamy. That was the point under consideration.

There the matter rested until the passage of the act of 1882. From the passage of the act of 1862 to 1882 is 20 years. From 1847 to 1862 is 15 years. From 1862 to 1879 (decision) is 17 years. From 1879 to 1882 is 3 years. From 1847 to 1882 is 35 years. Break up this whole period of 35 years, as we may by any of these subdivisions, there is no one of the minor periods in which the people of the United States did not know that polygamy was extensively practised in that Territory, and was increasing. If it can be said that by the act of 1862 the Mormons had notice that the institution was to be broken up, what shall we say about the period of 15 years before '62, or about the 20 years that followed 1862 until 1882?

These considerations, of course, are no bar to legislation. But the legislative power was bound to regard them, and, in a court, these public equities must have some influence in the construction and application of the legislation to particular cases arising among so great a number of persons.

For example: When the act of 1882 went into operation there were about 2,000 heads of polygamous families in Utah, each one having an average of three wives. There were, therefore, about 6,000 women in polygamous relations. If we allow an average of five children to each wife, there were 15 children to each male parent, or an aggregate of 30,000 children in the Territory born of polygamous marriages. The whole population of the Territory was, in 1882, 150,000, about 120,000 being Mormons and the other 30,000 non-Mormons.

Chief-Justice. Does the census of 1880 give the number of polygamous families?

Mr. Curtis. No, sir; that is a calculation I have made from the most reliable data I could obtain. The census does not make any distinction in the population in that regard. In 1882 there were about 25,000 heads of Mormon families. If we deduct 2,000 heads of polygamous families, we have 23,000 heads of families who are not polygamists, but who hold the Mormon religious faith. I will now make the direct application of the public equities growing out of the facts, antecedent to 1882 to the proper judicial construction and application of this law to the cases before the Court. Mr. Snow's case being, in all its important main features, the case of 2,000 other men in the Territory of Utah. I asked my young colleague and friend to have this diagram prepared in order to present clearly to the eye of the Court according to the evidence, the situation of the premises. On a superficial view it might seem that this was an establishment arranged to meet a certain state of things, or to meet a change in the law or a change in the condition of things in the Territory. (Referring to a diagram showing the location of the dwellings occupied by the several wives.)

The Chief Justice. Does the record show when these houses were erected?

Mr. Curtis. It does; that house, called by these people the old homestead, with its separate divisions deeded to each of three women long before the Edmunds act, was built and occupied by Mr. Snow thirty-five years ago. That house, within an enclosure and in a surrounding yard, in which Minnie dwells, was built more recently.

Chief-Justice. That was not occupied until about the time the act of 1882 went into effect, was it?

Mr Curtis. The act found her living there. That is the evidence Mr. Snow had been living there with her before the act of 1882. It is now over four years since he moved into that house.

The Chief-Justice. These houses at the extreme right and left, how long have they been standing?

Mr. Curtis. The evidence shows this is Mary's house (indicating on diagram.) This is the Tabernacle on the street, (indicating,) and that is the court house (indicating.) This is the house of Adeline and Phœbe; so that the whole seven are accounted for and located.

The Chief-Justice. Were those distinct houses erected before the law of 1882.

Mr. Curtis. Oh yes, sir.

The Chief-Justice. Does not that show that the practice of polygamy did not exclude such separate arrangements before any law against cohabitation was passed?

Mr. Curtis. Of course it did not.

The Chief-Justice. And your contention is against the idea that it is cohabitation, not that it is not polygamy.

Mr. Curtis. You have got to do one of two things, and here is the choice. You have got to say cohabitation is a dwelling together, with or without sexual intercourse, either in one or two houses, under such circumstances as constitute a household, a "cohabiting" household; or else, on the other hand, you have got to say that while you find there is the relation of marriage which began forty years ago, or thirty-five years ago, or seventeen years ago, and which for certain purposes must continue, yet there need be no personal association whatever between the parties to constitute cohabitation. I submit that this cannot be and that the whole question is as to the conduct and declarations of the parties and what that amounted to; and when it is said that the relationship must be broken up, you have got to define what relationship, and to say whether these men must turn their wives and children adrift upon the world.

Sarah Snow was married to the defendant in 1846, Harriet in 1846, Mary in 1857, Eleanor about 35 years ago, and Minnie in 1871.

Adeline, who was held in the second and third cases tried to have been the lawful wife, must have been married before any of the others named in the indictments. The date of Phœbe's marriage is not given, but in fact she was married about the same time as Mary.

So that of the whole seven, six—Adeline, Sarah, Harriet, Eleanor, Mary and Phœbe—were married long before the act of 1882, and one—Minnie—11 years before the act of 1882.

Now then let us pause for a moment. Will it be contended that a law that breaks in suddenly upon relations that were contracted in the full view of the people and Government of the United States without any interference, and punishes as "cohabitation" relations that have so long existed, is not to have its meaning interpreted by any reference to these facts?

For 15 years, from 1847 to 1862, six of these marriages had been subsisting—subsisting with the full tolerance of the people of the United States.

The seventh marriage took place in 1871, eleven years before the act that is to be construed.

During all this period this man has contracted duties towards these women which I need not explain again.

Now let us see. It is simply impossible for the Court, in the cases before it, with the persons who assumed these relations under such circumstances, not to give any consideration to the public equities. If I am asked what the bearing of these facts and public equities should be in a court, I answer that they call for a construction of this one word, "cohabitation," that will confine its meaning and operation so as not to require these men to renounce every possible duty to those women and force them to turn them and their children adrift upon the world. It is impossible for this Court not to give any consideration to the public equities, in construing and applying this statute to the cases before it, of persons who assumed their relations to each other under at least a tacit permission of the people and Government of the United States.

While you leave it to the legislative power to enact anything to be a law that is within its constitutional authority, it is for you to determine the construction of whatever laws are made. You are the supreme, the undoubted, and indubitable fountain of justice, in the construction and application of laws.

Give these people then, I beseech you, as successive cases arise, a rule by which they can walk without being lost in the pitfalls of uncertainty and doubt. Tell them what you require of them, or rather what the law requires of them.

I do not ask you to go forward and give constructions and make provisions for future cases. I ask you to take this case, and upon its plain facts to give a ruling and decision that will shut out these constructive "cohabitations."

These people are a loyal and law-abiding people. They have a code of political ethics, accepted as part of their religious creed. I have studied it. There is no better code of political morals for the ground that it covers, ever formulated by a human pen, that has fallen under my observation, and I have been somewhat of a student in that kind of literature. If your honors care to read it, you will find it in their book of Doctrine and Covenants.

I here leave this case in your hands. But I cannot leave it without saying that the zealots who push the criminal law beyond the barriers of the Constitution are not the first, and perhaps they will not be the last, to seek to extend the kingdom of Christ by persecution, and to propagate a religion of love by the gospel of hate.

Nor can I leave it without taking shame to myself that I have for so many years lived in ignorance of the condition of things in that devoted Territory. I have spent, on mere pecuniary interests, on lower politics, in the delight of letters and the pleasures of life, precious time that ought to have been given to the oppressed. If now my example, tardy as it is and feeble as it is, shall do something to arouse younger and more important men to a sense of their duty on this great problem, I shall have the consolation that I have done something to atone for my share in whatever blame rests upon this nation.

BY TELEGRAPH.

PER WESTERN UNION TELEGRAPH LINE.

AMERICAN.

PITTSBURG, 17.—A special from Washington, Pennsylvania, to the *Dispatch* says: After months of search Professor Jonathan Emery, of William and Mary College, has discovered the aerolite which fell in Washington County on September 14, 1885. It was found imbeded deep in the soil on Frederick Miller's farm, two miles north of Claysville. Professor Emery says it is the largest aerolite on record and weighs fully two hundred tons. Its composition is chromium, nickel, aluminum, copper, magnesium and tin.

KANSAS CITY, 17.—The *Times* Tombstone, Arizonia, special says: A courier who arrived at General Mile's headquarters brings information that six of Hatfield's men were killed in the ambuscade by the Indians. The report comes from Deming that watch fires have been seen in the vicinity, supposed to be calling out the Mescalero Apaches. It is feared that a raid of the country is contemplated by Geronimo's band and couriers are being sent out to warn the settlers.

NEW YORK, 17.—At the directors meeting of the Pacific Mail Company, it was decided to close the books for the annual election May 20th, the election to be held May 26th, and the books to be re-opened on the 27th. One of the directors says that they pledged themselves to vote for the present Board, President Houston does not wish to be re-elected, but they hope to prevail on him to remain.

Edward Lauterbach, one of the directors said the transcontinental situation is unchanged. In making their agreement, there are three elements to be considered—the overland companies, the Pacific Mail and the Panama Railway Company. The attitude of the Panama Railroad is an important factor. They have been getting the same rate from us right along, no matter what we received. Some efforts have been made to get a concession from them, but no action has yet been taken

CHICAGO, 17.—Information reached Chicago that the two men who the detectives believe are the miscreants who boarded the night express on the Rock Island Railroad and murdered Express Messenger Kellogg and then robbed the safe of $20,000 in cash, have been run down. On the Sunday morning succeeding the robbery the strangers took breakfast at the farm house of Orrin Austin, in Kendall County, some miles north of Morris, where the robbery is supposed to have been committed. They insisted on sitting with their faces toward the door and Mrs. Austin accidentally discovered they were armed. After breakfast they hastily took to a neighboring clump of woods. Many other suspicions circumstances led to the belief that the pair were no other than the train robbers. With the breakfast incident as a clue the detectives have finally traced them, meanwhile accumulating evidence that they are the right persons. The men have been located in a small town, where they are engaged in the cattle business, and have been identified by Farmer Austin. It is talked to-night that the arrest, if not already made, will be made to-morrow.

CINCINNATI, 17.—To-night Joseph Keegan, a Baltimore & Ohio telegraph operator, while walking towards his home, was shot and instantly killed by Geo W. Taylor. Taylor had been drunk and shot at another man, and Keegan was struck by the bullet. The murderer was arrested.

NORTH SYDNEY, N. B., 17.—The American fishing schooner *Ellen M. Doughty*, Captain Warren Doughty, anchored outside the entrance of St. Ann's harbor on the 11th inst., and purchased a number of barrels of bait. She left on the 13th, but owing to the ice had to put back on Friday the 14th. This morning she was seized by Customs Officer McAuly for purchasing bait and neglecting to enter or clear at the Custom House. Captain Doughty admitted purchasing the bait and seems very little concerned about the seizure, saying he will look to the American government for protection. No instruction has yet been received from Ottawa. The collector of customs at Baddock, N. B., has inquired into the facts regarding the seizure, and expresses himself as satisfied that it was legally made.

Ottawa, Ont., 17.—The following named vessels are setting with points named, for protection of the fisheries: *Middleton*, at St. John; *Comrade* and *Howlett*, at Halifax; *Critic*, at Georgetown, P. E. I.: *Terror* at Shulburne, N. S., and *Lizzie Lindsay*, at Gaspe. Two of these vessels will be put in commission this week. The remaining four, will soon be ready, are schooners of light draught and specially designed for speed. The vessels will be armed and the crews limited to twenty-five men each.

WASHINGTON, D. C., 18.—The President will leave Washington on the 30th inst. for Brooklyn, where he will review the Decoration Day parade on the following morning, and will review the parade in New York City in the afternoon, if possible. He will return to Washington on Tuesday morning.

WASHINGTON, 18.—One of the topics considered at the cabinet meeting today was the seizure of the American fishing vessel by Canadian authorities, for alleged violation of custom laws.

CINCINNATI, 18.—The remaining troops ordered here by the governor, as a means of protection against violence in connection with the recent strikes, were ordered away to-day. The strike situation is vacillating. While some classes of men are returning to work, others hold out and others are coming out. Among the last named are the planing mill hands, who have organized and demand eight hours a day with ten hours' pay. The Grocers' Association has granted the request of the clerks to close at 7 p.m. except on Saturdays.

ORANGEVILLE, Ontario, 18.—Two dynamite explosions occurred here last night, one at the office, and another at the residence of Police Magistrate Monroe. The office was completely wrecked and the adjoining property somewhat damaged. The house was badly damaged, but no lives lost. The indignation of the citizens is very great, as this is the third and most destructive explosion since the initiation of the Scott Act. The cause of the outrage is the action of Magistrate Monroe in strictly enforcing the temperance law. Although large rewards have been offered for information regarding the perpetration of the first two explosions, no one has been arrested in connection with the crimes.

OTTAWA, 18.—The Canada Pacific Railway is making active preparations for the opening of the line for traffic to British Columbia. The telegraph staff have started from Winnipeg to prepare their lines, and a large gang of navvies left that city yesterday to put the track in readiness.

NEW YORK, 18.—The Brooklyn sugar workers strike has been declared at an end and the union dissolved.

Frederick Wainwratt, one of the strikers, assaulted John D. Earle,