CANNON vs. UNITED STATES.

ARGUMENT OF F. S. RICHARDS, ESQ.

AN UNANSWERABLE PLEA FOR THE APPELLANT.

IN THE U. S. SUPREME COURT.

Mr. Richards premised his argument, by a detail of the facts involved in the trial and conviction of his client, including the assignments of error. He then stated the first essential point in the case to be: was the indictment sufficient? In answer to this question he presented and emphasized the objections which were offered in the lower courts, and quoted in support of his position numerous authorities. Following a pertinent but exhaustive argument upon this issue, he proceeded to the vital point of the cause—the construction of Section Three of the Edmunds law:

That if any male person, in a Territory or other place over which the United States have exclusive jurisdiction, hereafter cohabits with more than one woman, he shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not more than three hundred dollars, or by imprisonment for not more than six months, or by both said punishments, in the discretion of the Court.

The following gives a somewhat thorough synopsis, but far from complete report of Mr. Richards' remarks upon that question:

IMPORTANCE OF THE ISSUE.

May it please the Court—It is beyond my power and certainly not within my desire, to exaggerate the grave necessity which exists for your careful and authoritative construction of this portion of the Edmunds law. It is vitally requisite to the welfare of a great section of the Republic that this august tribunal shall define the term "cohabit" as used in the section under consideration; and that this Court shall determine, in no ambiguous words, what constitutes the offense of "unlawful cohabitation." I am not here for the sole purpose of saving Angus M. Cannon, the plaintiff in error, from serving his few remaining days of imprisonment, nor from the payment of the fine which stands against his name upon the Marshal's register. My client, as an individual, could better afford to serve the remainder of his term and pay the sum of three hundred dollars, than to spend infinitely more time and money in this effort to obtain, what would at best be a tardy and ineffectual redress. But I am here to ask that this Conrt will exercise its exalted power and shed light upon a path which hundreds of citizens must tread. At present that way is dark. This statute has been so variously, so equivocally and so shiftingly construed by the lower courts, that it has become a veritable catacomb of fatal turnings. To-day, in some of the Territories of these United States, a large portion of the population is directly or indirectly affected by this act. It involves property and personal liberty. With some citizens life itself is at stake, for the imprisonment of aged, toil-worn men may mean death; and yet I venture to say that if any man who is under proscription by this law were asked to tell its exact meaning, he could not answer even to save himself from a fate tenfold worse than that which now impends. No lawyer can give a definite reply with confidence, and when the lower courts construe, they fail to lessen the confusion and mystery. There are many cases in the Territories now in course of adjudication, involving this point, and there are scores, if not hundreds of similar prosecutions imminent. While this startling condition remains, no man, even with the best legal advice in the land, can tell, under this act, how to conform his life to the law. It is therefore plain that whatever disposition may be made of the technical and intrinsic points of this particular case, justice and humanity unite in demanding that the full power, scope and meaning of the Edmunds act shall be made plain.

The law says "that if any male person * * * shall hereafter cohabit with more than one woman he shall be deemed guilty of a misdemeanor," etc. The words of the statute are very general and require construction. This is evident from the first reading. The word "cohabit" seems to be used in a concrete sense like the words larceny, burglary, and other words that imply special defining facts, but the statute has not given the facts which shall constitute the prohibited cohabitation, and it is the first instance of its use in a criminal statute without any qualifying word to aid in defining it. It therefore needs construction—a restrictive construction.

DEFINITION OF "COHABIT."

Webster and other lexicographers substantially agree in two definitions of the word cohabit: 1. "To dwell with, to inhabit or reside in company, or in the same place or country. 2. To dwell or live together as husband and wife." If the Court were to adopt the first as evincing the intention of Congress it would lead to the most absurd consequences. That definition must be rejected as having no application to the word as used in this statute. It implies no intimacy—no relation requiring legal regulation—certainly no restriction on account of difference of sex. The other definition implies intimacy—sexual intimacy—and a degree of it illustrated by the dwelling together of husband and wife. This statute is intended to prevent the living together of an adult male person with more than one woman in the same intimacy as is usual between husband and wife. The statute means an habitual living intimacy requiring marriage to justify it. In other words, it forbids a man and two women to so live together as to amount to cohabitation, because both women can not be his lawful wives.

All cohabitation which the law deals with is sexual cohabitation. The law regulates and draws inference from it because it imports living together in the habitual practice of sexual intercourse. No intimacy of the sexes is offensive to the public, nor criminal under this statute, unless it includes in fact or by necessary presumption sexual intercourse.

The word "cohabit" has never been used in any criminal law to mean anything less than actual sexual intercourse. This is an incontrovertible statement. In all the discussion of this question, up to this moment, not a single case has been found where the doctrine is held that, without intercourse a criminal cohabitation exists. I challenge the prosecution to a contradiction. You may scan the exhaustive brief of the Government; you may note the long list of authorities presented by the industrious and eminent counsel on the other side of this case; but you will not find a single precedent to controvert the claim which we make—that "cohabitation" in a criminal law means nothing less than actual sexual intercourse. Further, I maintain that the authorities quoted by counsel for the government to establish a difference between matrimonial cohabitation and matrimonial intercourse, refer entirely to actions in divorce or for the determination of conjugal rights, and have no relation to the construction of criminal law. It is true that in the English ecclesiastical courts in some instances, a distinction has been drawn between matrimonial intercourse and matrimonial cohabitation. For instance the case of Orme against Orme, was an action brought by the wife against her spouse to enforce a restitution of her conjugal rights. The court held that the wife was in the habitation of the husband and was therefore cohabiting with him, and that the court could not enforce sexual intercourse between the parties. The reason for drawing this distinction is manifest. By what extraordinary process could the court have enforced a decree commanding sexual intercourse? But this has no relevancy to the present case nor to any criminal cause. Criminal cohabitation and matrimonal cohabitation are widely different; the law governing the former seeks to regulate the intercourse between the sexes; the law governing the latter merely regulates the domestic relation. I call your attention to the significant fact that the quotation from Bishop cited by opposing counsel was from the great jurist's work on marriage and divorce and not from his work on criminal law. I reiterate the assertion that you would look in vain in the latter work for any such construction. When in a civil case the question has arisen as to consummation of a marriage, the term "cohabitation" has been used as the equivalent of sexual relations, and could have no other meaning. So if the question is whether a marital offense has been condoned, the cohabitation after knowledge of the offense means sexual intercourse only. It is not necessary that the wife shall withdraw from the house. She may be unable to do so, and it is enough that she ceases cohabiting with the husband by withdrawing from his bed.

The popular use of the word, especially when applied to the relation of the sexes, conforms to this meaning; and whether we look to judicial proceedings, lexicographers, or common speech the same signification is found. Had Congress intended to use the word in a new signification, a definition would have been given to carry out the intent. The omission of the word lascivious is of no significance. The word unlawful used in other sections of the act as describing cohabitation, takes the place of the words "lewd and lascivious" as used in similar laws, and means the same thing. Statutes against lascivious cohabitation do not refer to a cohabitation with more than one woman, but are directed against one who *lasciviously cohabits with any woman*, and the word "lascivious" only means wanton and unlawful, and that the woman is not the wife of the man. This statute against cohabiting with more than one woman retains the full meaning of the term lascivious, and perhaps more, for both women cannot lawfully be the wives of the man, and the cohabitation with at least one of them must be unlawful.

WHAT WAS SHOWN AT THE TRIAL.

Mr. Justice Miller—Did the court construe it to mean one act of sexual intercourse?

Mr. Richards—No, your Honor. We offered to prove that there had been no act of sexual intercourse, but the court rejected the evidence as immaterial and irrelevant. It was proven on the trial, by the witnesses for the prosecution, that my client had married Amanda and Clara, the two women named in the indictment and with whom the cohabitation was charged, several years before the passage of the Edmunds law, which first made such cohabitation a crime—the marriage with Clara having taken place about ten years ago. The evidence was that before and since the passage of the law, he and the two women had lived in the same house and that he had eaten with each of them about one-third of the time. We offered to show by the same witnesses that Amanda was married to him before Clara; that with their respective families they occupied separate apartments, including separate dining rooms and kitchens, and had taken their meals in their respective rooms; that after the Edmunds law had passed both houses of Congress, and before its approval by the President, the defendant announced to Clara, Amanda, and their families, that he did not intend to violate that law, but should live within it so long as it remained a law; and after that time, and during the times alleged in the indictment, he did not occupy Clara's room or bed or have sexual intercourse with her; that Clara and her family were dependent upon the defendant for support, and that he was financially unable to provide a separate house for her and her family. Yet all this evidence was excluded from the jury—which we think was gross error in the court below. For we affirm this proposition, that with such facts admitted in evidence, no judge or jury could find against my client either the substance or the shadow of unlawful cohabitation. The court bade the witnesses to speak until all the circumstances tending to guilt were brought out in evidence, and then their mouths were closed by judicial order. Upon an adroit segregation of half of the facts a conviction was had; a fair statement of all the facts would have established innocence—a cruel illustration of the classical paradox that "the half is better [for the prosecution] than the whole." There was no evidence whatever that the plaintiff in error at any time after the passage the Edmunds law, said or claimed that Clara C. Cannon was his wife. On the contrary we offered, and insisted upon our right to prove, by the witnesses for the prosecution, that an actual separation had occurred between Angus M. Cannon and Clara C. Cannon; and that the separation, or parting, or mutual earthly divorcement—whatever may be the proper term—was absolute except as to those matters of ordinary courtesy, in life and conduct, perfectly innocent of themselves, and such as are of daily occurrence between hosts and guests dwelling under the same roof with friends of the other sex. And yet the jury was instructed by the trial judge as follows:

"If you believe from the evidence, beyond a reasonable doubt, that the defendant lived in the same house with Amanda Cannon and Clara C. Cannon, the women named in the indictment, and ate at their respective tables one third of his time or thereabouts, and that he held them out to the world by his language or his conduct, or by both, as his wives, you should find him guilty."

The issue here submitted was whether the plaintiff in error had held out these women as his wives by his language or conduct, because it was undisputed that they lived in the same house and ate at their respective tables substantially as stated, yet the Court excluded from the jury evidence offered by him to prove that he had, when the Edmunds Act was passed by Congress, and before its approval by the President, given up his marital relations with Clara C. Cannon.

In other words he was not permitted to show, upon the issue made by the Court itself, as to whether he held these women out as his wives by words or conduct; that he had surrendered the highest and dearest right of a husband. Let it be admitted, for the sake of the argument, that sexual intercourse is not necessary to constitute the offense of unlawful cohabitation denounced by the Edmunds Act, and that the trial judge properly charged the jury to that effect, my client still had the right to show, upon the question of whether he held out Clara C. Cannon as his wife, that by mutual consent he had left her bed, and had done so in consequence of the passage of the Act, and he had the right to show how they had since lived. The proof excluded was of the greatest importance upon the identical question submitted to the jury, for it showed both words and acts by the defendant indicating his intention to change his relations with the woman he had claimed as his wife. It was competent evidence on two legal grounds. As being a part of the *res gestae* and also as showing an intention not to violate the law.

HOW CAN THE LAW BE KEPT?

If this evidence was properly excluded, it is difficult to see by what means any man, living with plural wives at the time of the enactment of the Edmunds law, can escape the punishment it prescribes for "cohabiting with more than one woman;" no matter how anxious he may be to obey the law. By what process or machinery of the law can he terminate his marital relations with a plural wife? If he applies to a court to dissolve the marriage, he will be told that the plural marriage was void and having no existence cannot be dissolved. If he appears in open court and asks that an entry be made of record that this woman is no longer his wife, he will be told that the court has nothing to do with any such transaction, and he will be silenced or held for contempt. If he announces to his household, to his friends and neighbors, that he proposes to change his marital relations, observe the act of Congress, and thereafter cohabit with but one woman, and if he proceeds to act upon this declaration, this avails him nothing.

He is indicted for unlawful cohabitation, arrested, brought to trial, and the prosecution shows him to have been a polygamist prior to the passage of the Edmunds law; that he still lives in his dwelling house with two women, whom he had previously married, and with their families, supporting, however, separate tables and establishments; and the Court instructs the jury that if they find these facts to exist, and that he has held out these women as his wives, by words or conduct, they must convict. In vain he asks to be heard in order that he may show that by both words and conduct he has abandoned all marital relations with one of these women, and has obeyed the law. He is sternly told that he cannot be heard, but that his doom is sealed. Over the door of a court like this should be inscribed:

"Who enters here leaves hope behind."

It will be seen from an examination of the bill of exceptions, that the prosecution was permitted to show that the plaintiff in error and Clara C. Cannon occupied adjoining bed-rooms, with no intervening room. The unquestionable object of this proof was to show sexual intercourse, or such facilities as made the conclusion of its existence irresistible. Yet the plaintiff in error on cross-examination was not permitted to show that the room of Clara C. Cannon was also occupied during the time charged in the indictment, by her two daughters and two nieces. Indeed no evidence of any kind was admitted for him showing or tending to show that he had not shared the bed of Clara, or had sexual intercourse with her.

I submit that if evidence showing sexual intercourse, or facilities for it, was admissible against the defendant, evidence disproving or tending to disprove the same fact should have been admitted for him.

It seems to me beyond question that gross injustice was done to my client in not permitting his counsel to cross-examine the witnesses introduced by the prosecution as to the manner in which he had lived with the two women named in the indictment, both before and after the enactment of the Edmunds Law. It was for the jury to pass upon the good faith of his declarations and conduct, and he was entitled to have all the facts before them in order to show whether he had held these women out as his wives after the passage of the act. The arbitrary and unprecedented refusal to permit the exercise of this proper right of cross-examination was resented even by one of the judges of the lower court.

But, your Honors, if sexual intercourse is to be declared no essential element of unlawful cohabitation, still in the case at bar there could not possibly be a legal conviction. This court has already ruled, in substance, that if a man were a polygamist prior to the passage of the Edmunds Act, his status continued to be polygamous thereafter, and the continuance of that status was in itself no offense. It appears clear, therefore, that after the enactment of this law, a man's polygamous wife remained still such a wife, without his being under any legal liability, unless he should transgress the law by some definite act. Can the acknowledgment by a man of this innocent polygamous relation with any woman be sufficient, in and of itself, to constitute that definite act of transgression? Certainly not. If his polygamous wife were to emigrate to China, or elsewhere, his status would still be that of a polygamist. Could he commit a crime by merely mentioning that the immigrant was his polygamous wife, a simple fact judicially pronounced to be inoffensive? Common sense answers the question. Then if a man who has none of this intangible intimacy with his polygamous wife, which we are seeking to analyze and define, were to proclaim frequently and publicly that he was a polygamist, he would not offend against the law. It could not be adjudged to be an act of murder simply for an acquitted homicide to say, "I slew my assailant." Your honors would scarcely entertain a charge of treason against a person for acknowledging an act which this court had previously declared was not seditious nor traitorous.

INTANGIBLE INTIMACY.

Now we come to the intangible intimacy, which was held to constitute this offense of unlawful cohabitation. It is true that Angus M. Cannon dwelt under the same roof which furnished the only possible shelter for Clara C. Cannon. But other men have been convicted under this same unfathomable law of this same mysterious offense, whose polygamous wives lived at a distance from the homes of their legal wives. These convictions have been reached in cases where the defendants were never proven to have been in the houses of the polygamous wives, except to offer humane help for sick children or as neighbors of ordinary acquaintance. What is this intangible intimacy? And how far must a man live from the home of his polygamous wife in order to escape from its undefined entanglements? May he dwell within a furlong, a mile, a township, or a county?

This impalpable evanescence has never been thoroughly and permanently materialized by the lower courts. But, as all roads lead to Rome, so have all the devious rulings upon this act led to conviction—plain, uncompromising, universal conviction. Under your Honors' ruling in the Commissioners cases, a man is not an offender for merely affirming his polygamous status. And yet, if you were to ask any person of truth and competent judgment in Utah, what circumstance would have to be coupled with that acknowledgment of polygamous relation, in order to secure conviction, he would be likely to answer you; "Judging from results, nothing."

ERRORS IN CHARGE TO THE JURY.

Manifest error was committed by the trial Court in not charging the jury that the prosecution was under the provisions of the Edmunds Act, and when that act took effect, and that prior to that time cohabitation was not an offense. The jury should also have been told the meaning of the term "cohabitation," as used in the Edmunds law, and that unless the plaintiff in error had been proved guilty beyond a reasonable doubt, of such cohabitation with the women named in the indictment, since the passage of the act and within the time charged in the indictment, they must acquit. It is claimed that every other defect in the charge to the jury was cured by that portion of it telling them that the law presumed the defendant innocent until proven guilty beyond a reasonable doubt. But this was not enough. The defendant was entitled to the instructions asked for by him, and the court erred in refusing them, and in not giving any equivalent instructions on the subjects to which most of the requests relate.

My client asked for instructions numbered 15 and 16 as follows:

"15. The law presumes innocence, and therefore that all persons who were cohabiting when the Edmunds Law took effect contrary to the provisions of that Act then ceased to do so.

"16. No fact in the conduct of the defendant subsequent to the passage of the Edmunds Act can be made more significant of guilt in violating the section against cohabitation, by reason of the existence of the polygamous relation between him and the women mentioned in the indictment prior to the passage of that statute."

These the Court erroneously refused to give.

The latter part of the 13th request should also have been given, as follows:

"That all the defendant's social familiarity with the mothers of such families, established prior to the passage of said act, not shown to include all the particulars of cohabitation as the Court has defined it, should be considered by the jury with the legal presumption of innocence, and the failure to establish such cohabitation entitles the defendant to acquittal."

The Court refused to instruct the jury that there was no proof of holding out and that they should acquit the defendant if they found that he had not held out Clara C. Cannon as his wife since the passage of the Edmunds law, as asked in the 19th and 20th requests. This seems to indicate that the Court intended that this ingredient of the offense might be committed before the offense was created or else it indicated that the defendant was not to be acquitted even though the jury should find that the facts upon which the instructions made conviction depend, did not actually exist.

But the most extraordinary defect in this remarkable judicial production is found in that portion of the charge which tells the jury that the defendant is charged with having on the first day of June, in the year of our Lord 188[illegible] and on divers other days continuous between said first day of June, 188[illegible] and the first day of February, 188[illegible] unlawfully cohabited, etc., and then without confining the inquiry of the jury to these dates, tells them that if they believe from the evidence that the defendant lived in the same house with the women named in the indictment and ate at their respective tables one third of his time or thereabouts, and held them out to the world as his wives, they must find him guilty. Whether or not the court intended to charge the jury to convict the plaintiff in error for acts antecedent to the passage of the Edmunds law, the jury was certainly so instructed. And the peculiar manner in which this part of the charge is drawn is made more significant by the prosecution having been permitted to introduce evidence as to facts anterior to the passage of the Edmunds law. I submit that in a trial involving the liberty of a defendant this charge was gross error.

EX POST FACTO CONSTRUCTION.

Three things were proven upon the trial: That the defendant had lived in the same house with Clara C. Cannon; that he had eaten at a table with his own children in her seperate apartments; that he was married to her seven years prior to the passage of the Edmunds Act — from which marriage a holding out was inferred. The three facts with their one attendant inference are taken to constitute the unlawful cohabitation, and upon this and the instructions the jury found a verdict of guilty. But it is no crime or offense in and of itself, even in Utah, for a man to dwell under the same roof which shelters another woman than his legal wife; nor to eat at the table with that other woman in the presence of his own legitimate children. It is only when those acts are coupled with a holding out of the woman as a wife that they can be made to contain the criminal element. In this case, the prosecution proved the marriage of Angus M. Cannon and Clara C. Cannon and their living together as husband and wife prior to the passage of the Edmunds law; and at this point the prosecution stopped, declaring that the inference of holding out continuously after March 22nd, 1882, was deducible from these facts. That presumption of guilt was raised against the defendant on trial; and when he sought to rebut that presumption by the most positive and competent evidence that he had conformed to the law, he was stopped by the court and the presumption was made conclusive against him. There was not a scintilla of proof of a holding out