person was offered as a witness by the plaintiff, to prove a contract against her former husband, Lord Alvany held her clearly incompetent; adding, with his characteristic energy, 'it never shall be endured that the confidence which the law has created while the parties remained in the most intimate of all relations, shall be broken whenever, by the misconduct of one party, the relation has been dissolved."

Counsel also cited the ruling of the Supreme Court of the United States in the case of Steen vs. Bowman, from which we make these extracts:

"It is admitted in all the cases that the wife is not competent, except in cases of violence upon her person, directly to criminate her husband, or to disclose that which she has learned from him in their confidential intercourse."

"And it is conceived that this principle does not merely afford protection to the husband and wife which they are at liberty to invoke or not, at their discretion, when the question is propounded; but it renders them incompetent to disclose facts in evidence in violation of the rule."

"Can the wife, under such circumstances, either voluntarily be permitted, or by force of authority be compelled to state facts in evidence which render infamous the character of her husband? We think, most clearly, that she cannot be. Public policy and established principles forbid it."

But it was contended by the Government that the statute changed this common law rule and made the wife a competent witness in cases of polygamy. It has been argued in the Utah courts that a provision in section 1156 of the code of Civil Procedure made the change in this wise:

"A husband cannot be examined for or against his wife without her consent, nor a wife for or against her husband without his consent; nor can either, during the marriage or afterwards, be without the consent of the other, examined as to any communication made by one to the other during the marriage; *but this exception does not apply* to a civil action or proceeding by one against the other, nor *to a criminal action or proceeding for a crime committed by one against the other.*"

The contention by public prosecutors has been that a sexual offense by the husband, for instance bigamy or polygamy, was a crime committed by the husband against the wife, and that thus the common law rule was set aside by this provision of the Utah statute.

The Code of Criminal Procedure, however, provides that,

Section 421—"*Except with the consent of both, or in cases of criminal violence upon one by the other, neither husband nor wife are competent witnesses for or against each other, in a criminal action or proceeding to which one or both are parties.*"

Mr. Richards argued that these two provisions of the statutes do not conflict with each other, and that both are in harmony with the common law. That the latter provision does not repeal the former. That all must be construed together. That they are *in pari materia*. That they evidently mean the same thing, and that is, an offence committed by one upon the person of the other, such as an assault, or any criminal violence, and were intended for mutual personal protection. And as in this case the appellant was not accused of such an offense, polygamy being not of that character, his wife was an incompetent witness. Numerous authorities were cited in support of this view. And to show that it is correct as to bigamy and polygamy, counsel quoted from The People vs. Houghton, a case of bigamy in which the wife was permitted to testify against her husband, but the appellate court held that the wife was incompetent, and said:

"By the rules of evidence prevalent at common law, neither husband nor wife is permitted to testify for or against each other in any action, civil or criminal. The rule has its foundation in the identity of their rights and concerns, the interest of civil society, and the sanctities of the marriage relation, and it is enforced by the courts with much strictness. Some exceptions there are where the wife would otherwise be exposed to personal injury without remedy."

In the case of the State vs. Armstrong, 4 Minn. 258, under a statute similar to ours, in a prosecution for adultery, Mr. Richards showed, the court held that the wife was not a competent witness and explained the rule as follows:

"The statutes only allow the wife to testify against the husband, or the husband against the wife, without the consent of the one against whom the testimony is offered, in 'a criminal action or proceeding for a crime committed by one against the other.' This exception is inserted simply to save those cases where, at common law, a wife could be a witness against her husband, or a husband against his wife, and not introduce any new rule, or extend the old one. Mr. Greenleaf, in his work on evidence, vol. 1, 343, says that these exceptions are allowed partly for the protection of the wife, in her life and liberty, and partly for the sake of public justice. But the necessity which calls for this exception for the wife's security, is described to mean, not a general necessity, as where no other witness can be had, but a particular necessity, as where, for instance, the wife would be exposed, without remedy, to *personal injury.*"

In support of the contention that even should it be held that under the Utah statute Mrs. Bassett was a competent witness because the offence of her husband was polygamy, yet it was error to permit her to disclose a confidential communication, Mr. Richards cited Wharton on Criminal Evidence:

"Section 398. Confidential communications between husband and wife are so far privileged that the law refuses to permit either to be interrogated as to what occurred in their confidential intercourse during their marital relations, covering, therefore, admissions by silence as well as admissions by words."

Also Greenleaf on Evidence:

"Section 254. Communications between husband and wife belong also to the class of privileged communications, and are therefore protected independently of the ground of interest and identity, which preclude the parties from testifying for or against each other."

"Therefore, after the parties are separated, whether it be by divorce or by death of the husband, the wife is still precluded from disclosing any conversation with him, though she may be admitted to testify to facts which came to her knowledge by means equally accessible to any person not standing in that relation."

Counsel closed this part of the argument by submitting that "The gravity of the charge against the plaintiff in error and the extreme penalty imposed upon him, the utter absence of all testimony tending to establish guilt, except the alleged confession testified to by his wife, and the strained construction of the statute which is claimed by the prosecution to abrogate a long established and well settled rule of law, all unite in appealing to the sound judgment of the Court for a strict adherence to its former decisions, which have ever preserved inviolate the sublime rule for which we now contend."

In regard to the juror Andrew Larson, who was challenged on the ground that he had been a polygamist, the objection being overruled, it was shown the Court was in error because the Edmunds Act provides in Section 5:

"That in any prosecution for bigamy, polygamy, or unlawful cohabitation, under a statute of the United States, *it shall be sufficient cause of challenge to any person drawn or summoned as a juryman or talesman, first that he is or has been living in the practice of bigamy, polygamy or unlawful cohabitation with more than one woman,* or that he is or has been guilty of an offense punishable by either of the foregoing sections, etc."

Mr. Richards showed that it was fair to presume that the intention and object of Congress in providing this cause of challenge was to secure fair and impartial jurors in this class of cases. The prosecution was not to be hampered by any person on the jury who, by reason of having once been a polygamist, might still retain a friendly bias for those in that relation, nor was the accused to be subjected to the disadvantage of being tried by a juror who had once been a polygamist but who, having renounced the doctrine,