THE MILES CASE.

JUDGMENT OF THE LOWER COURT AFFIRMED.

In the Supreme Court of Utah Territory, June Term, 1879. United States respondent, vs. John Miles, appellant. Appeal from Third District Court.

Boreman, Justice, delivered the opinion of the Court:

The appellant was indicted and convicted of the crime of bigamy, and from the judgment in this respect, he has appealed to this court.

The first assignment of error was that "the Court erred in allowing the attorney for the United States to ask the jurors or any of them if they believed in polygamy or that he or they belonged to the Mormon Church, or allowing any questions as to the religious belief of any juror."

The Criminal Procedure act says that a particular cause of challenge is "*for* the existence of a state of mind on the part of the juror which leads to a just inference in reference to the case that he will not act *with entire impartiality*, which is known in this act as actual bias.'" —(Sec. 241, second clause, Laws of Utah, p., 178.)

A religious belief takes strong hold upon the individual. If a person believes it is his religious duty or privilege to do an act, he would not as a consequence, look upon said act as criminal. Looking upon the act as innocent, he would naturally, but perhaps unconsciously, be averse to inflicting punishment therefor. He would not like to find a man guilty of a crime for doing that which he thought the Almighty authorized him to do. In such a case he would naturally lean toward an acquittal, and would possess that state of mind which would *lead to a just inference* that he would not act with entire impartiality in the case.

The inquiry as to whether the person offered as juror was a member of the Mormon Church was of the same character as that respecting his belief. Both questions go to the belief. It is one of the leading doctrines of the Mormon Church that polygamy is divinely appointed and that it is ordained of God, and to be reverenced as such. It is likewise one of the cardinal teachings of that Church that as it is God's law, it is above man's law, and that when the practice comes in *conflict with the laws* of the land, the laws of the Church must be obeyed and the laws of the land disobeyed.

One belonging to a church holding the offense charged to be of divine sanction, and above the civil law, might also be influenced by the probable action of his church toward him if he failed in the jury box as well as elsewhere to uphold its doctrine.

But all of the jurors to whom these questions were asked and who were excluded, were in the first place challenged for actual bias and the challenge submitted to triers appointed by the Court. These triers in each instance found the challenge true and their decision was final. These questions, therefore, were not material nor important. The Court and the parties were bound by the decision of the triers, for the statute says that if the triers find the challenge true, "the juror must be excluded." (*Crim. Procedure*, Sec. 253. Laws of Utah, 1878, p. 113.)

It is claimed, however, that the court had no authority for appointing triers. In the selection of jurors, the Territorial Statutes are to control the courts, when there is no conflict with the United States Statutes. U. S. vs. Reynolds—U. S. Supreme Court, but not yet reported. Clinton vs. Englebrecht, 13 Wall. 434.

Our Territorial Statute, the Criminal Procedure act of 1878, requires the Court to appoint triers when the challenge is for actual bias and the challenge is denied. (Laws of Utah, 1878, pp. 112-3.) We do not, therefore, see that there was any error committed by the Court in appointing the triers.

The indictment charges the second marriage to have taken place between appellant and Caroline Owens, but it is alleged that her name is Caroline Owen Maile or Caroline Owen. The name of this party after adoption by her uncle was that of Caroline Owen, and such was the name that she was known by, and she was not known afterwards by the name of Maile. The offense is sufficiently described. There is no evidence or claim that the appellant was misled as to the person intended, especially when in the appellant's brief it is stated that "the alleged second marriage" is admitted. This is not the case of a mistake in the defendant's name, but if it were, the description would have been sufficient and the variance immaterial. The names of Owen and Owens have the same sound. State vs. Havely, 21st Mo.

It is claimed that Caroline Owen being a party to the second marriage was an accomplice, and that the Court should have instructed the jury not to convict on her testimony unless corroborated by other witnesses. Under the United States Statute against bigamy or polygamy, there is no such thing as an accomplice. It is unknown to the law.

Phillips says that an accomplice "in all cases expects to earn a pardon," and hence such testimony needs to be corroborated, "the temptation to commit perjury being so great, where the witness by accusing another may escape himself." (Phill. Ev., pp. 37-41.)

The reason of the rule failing, the rule itself falls. In the instance before us, no such temptation could influence the witness, nor could any hope of pardon. She had committed no offense, and could not commit the offense charged against the defendant.

The allowing of questions to be put to witness D. H. Wells respecting the dress or robes of the persons visiting the Endowment House is assigned for error.

All marriages in the Endowment House, as shown by the testimony, are clandestine and performed under cover of sworn secrecy. Direct testimony is therefore extremely difficult of access; and hence every fact going to show the object of the party's visit becomes material. If it were necessary that a peculiar style of dress were worn in case of marriage, it was proper to show what that style was. If the party were dressed according to the requirements in case of marriage, the presumption would be that she was there for that purpose. If she were not dressed in the mode required, the presumption would be that she was not there for the purpose of marriage. With this view the question was certainly proper.

It is said that the first marriage was the *corpus delicti* and must be clearly proven before confessions or admissions of the defendant can be admitted in evidence. Such a rule cannot apply to bigamy or polygamy cases, but only to those where the deed—the *corpus delicti*, is one thing and the fact as to who did the deed is another. In bigamy or polygamy cases these two facts are not separate and distinct, but one and the same. The crime is not committed at all if the defendant did not commit it. It requires his participation to constitute and complete the offense.

It is, however, strenuously contended that the declarations, confessions or admissions of the prisoner are not alone sufficient proof of the first marriage. If the surroundings of such admissions show them to have been deliberate, they would be sufficient to support a verdict of guilty. Greenleaf says, that "marriage may be proved by the deliberate admissions of the prisoner." (3 Gr. Ev. sec. 204.) We are entirely without statute upon the subject of marriage, and the manner of its celebration and the proof thereof are left as at common law. As no special ceremony is required at common law no proof is required to show whether any was performed or not. The only questions to be determined in this respect were whether defendant and Emily Spencer were ever married, and if so was such marriage prior to that between defendant and Carrie Owen. The existence of such prior marriage may be shown "by evidence of facts from which it may be inferred." (1 Bou. Just. 263, Bishop St. Crimes, sec. 609. 1 Bishop M. & D. secs. 260,266.)

That the prisoner's deliberate admissions are facts from which the marriage may be inferred, is as we believe well established and supported by the later English as well as American authorities, and the rule does not seem either unreasonable or unjust, but eminently proper and right. (1 Bishop M. & D. sec. 497, 500. Wharton's Am. Cr. Law sec. 2631. 1 Phile on evidence (side page) 452, 542; 2, Gr. Ev. § 461 note (1); 2, Starkie's Ev. (6 Am. ed.) 251 2 "C"; 1, Russell on Crimes 218, notes; Murtagh's case 1, Ashmead, 272; Forney vs. Hallanhen, 8 S. and R., 159; Warner's case 2, Va. Cases, 95; Com. vs. O'Neal, 17 Grattan, 582; Britten's case 4 McCord (S. Carolina, 256; Hillem's case, 3 Rich, 434; Regina vs. Sommonsto, 47 E. C. L. 164; Wolverton vs. State, 10 Ohio 173; Cayford's case 7, Greenleaf (Me.) 57; Ham's case, 11 Maine 391; State vs. Hodgskins, 19 Maine, 155; Jackson vs. People, 2 Scam., 231; Quin vs. State, 46 Ind., 725; State vs. Seals, 16 Ind., 352; Arnold vs. State, 53 Ga., 574; Brown vs. State, 52 Ala., 338; Laugthy vs. State, 30 Ala., 536; Com. vs. Jackson, 11 Bush (Ky.,) 679; Williams vs. State, 54 Ala., 131

The defendant on numerous occasions deliberately admitted and declared that Emily Spencer was his wife. He introduced her (Emily) to various persons as "his wife," He said of her "she is my wife," and also, "you are my wife." On the same evening at Angus Cannon's he spoke of her again as his "first wife," saying that "he was not going to put his first wife out of the house the first night they were married," &c. He also said that "if he could not dance with his wife Emily, he would not dance with any one." Going back a little, we find that immediately after coming out of the Endowment House on the occasion of the marriage of himself and Carrie Owen, the defendant declared to Carrie Owen that the marriage between himself and Emily had already taken place. When he came to the room of Carrie late at night, evidently from the room of Emily, his language indicated the same thing He afterwards said to Carrie Owen, "I have never admitted to you before that Emily Spencer is my first wife, you are only my second, * * * but there is no witness about to hear what I am telling you." He repeatedly spoke to her of Emily as his first wife.

These samples of defendant's admissions of the first marriage, taken with the surroundings show that they were not idle remarks, but deliberate statements of a fact. In the case at bar, the verdict of the jury, however, does not depend alone upon the admissions, confessions or declarations made by the defendant, but said admissions and declarations are corroborated by a variety of circumstances. For example: Prior to the marriage with Emily Spencer, the defendant's conduct showed that such marriage was long contemplated, and that, too, as a first marriage. The defendant, and Emily Spencer, Carrie Owen, and Julia Spencer, called upon John Taylor, the head of the so-called "Church of Jesus Christ of Latter-day Saints," to take the counsel of the head of their Church as to the precedence of these three girls if they should marry the defendant. Taylor was the highest authority in the Church and his decision was final and conclusive, as the parties believed. He told them that the order was that the oldest must be the first wife; that the precedence was controlled by the relative ages of the girls, and that Emily Spencer being the oldest, must be the first wife if they married, and Carrie Owen should be the second wife. Defendant said that he must obey counsel and marry Emily Spencer as his first wife. This was in accordance with the desires of the defendant throughout, although he feigned otherwise to Carrie Owen in respect thereto.

The priority or precedence of Emily Spencer over Carrie Owen was talked of in the presence of the defendant, as appears by Katie Conley's testimony. It was settled and well understood between the parties before they went to the Endowment House, that Emily Spencer was to be the first wife and Carrie Owen was to be the second.

The day that Emily was seen in the Endowment House was the day agreed upon for her marriage as well as that of Carrie Owen.

The defendant persisted in taking Emily Spencer to the reception party at Angus Cannon's, notwithstanding the protests of Carrie Owen. He claimed that she (Emily) was his wife and he would take her there. Whilst at the reception he treated Emily as his wife, recognizing her as such, taking her part as against Carrie Owen and reproving Carrie Owen for her course toward Emily, when Carrie's whole conduct was prompted wholly by the very fact of his claiming Emily, instead of herself, to be his first wife.

He led Emily and Carrie to the marriage supper that evening, and otherwise acted towards Emily as his wife.

The place of marriage—of all marriages according to the requirement of the Mormon Church, is the Endowment House. Persons go there for two purposes, to-wit: to take their endowments and to be married. It was necessary that the endowments be taken before marriage. In taking their endowments and in being married a peculiar set of garments or dresses was necessary.

Emily Spencer had taken her endowments prior to that time in a similar house at St. George. She would, therefore, not go to the Endowment House in Salt Lake City to take her endowments. She was, however, seen there dressed in this peculiar manner required of parties taking endowments or getting married, and as she could not have been there for the purpose of taking her endowments, the conclusion in connection with other circumstances, would seem to be inevitable that she was there for the purpose of marriage. She could have been there for no other purpose.

Emily Spencer and defendant were not married on that day after his marriage with Miss Carrie Owen, for he remained with Miss Owen whilst there, and went from the Endowment House with her.

Whilst defendant and Carrie Owen were in the Endowment House and about to be married, D. H. Wells, the party officiating, called defendant's attention to the fact that it was the first wife's privilege to give this woman (Miss Owen) to him, and that he, defendant knew it. Wells' knowledge of the defendant's prior marriage thus made manifest, did not call from defendant any denial of that marriage, but in effect he admitted it. As Carrie Owen arose to retire, thus showing a disposition to revolt, the defendant simply remarked to Wells, "never mind," and the first wife was not called, although in the building, and the ceremony of marriage between defendant and Carrie Owen proceeded.

After defendant's arrest—but before indictment—he promised to give up the other woman and make Miss Owen his first and only wife, if she would come back to him.

These are some of the facts which corroborate the testimony as to defendant's admission of the first *marriage, and they, together with the circumstances immediately* surrounding each admission, seem fully to sustain the truthfulness of such admissions.

The point raised, that the second *wife cannot be* admitted to testify until the first marriage is clearly proven, cannot possibly have any effect in this case; for here the admissions and corroborating circumstances showed clearly the first marriage before the second wife was offered as a witness, the subsequent testimony of Miss Owen, however, confirming them.

The admissions of the first marriage with corroborating circumstances ought to be sufficient in Utah if anywhere, for here there is no statute upon marriage; and to cover up this crime of polygamy every possible precaution is taken to prevent any proof of said marriages, and direct proof is nearly, if not entirely, impossible. Whatever of ceremony there is, takes place in secret, and such secrecy is enjoined by oaths of great affected solemnity. Such oaths, although illegal and void, are generally, by those taking them, treated as binding, either from a mistaken notion of their validity or from a fear of the consequences to themselves of a violation thereof. The public demonstrations and the general condition of society here, show the praise that is awarded to such as shrink from their duty to uphold and obey the law and divulge these secrets, and such things point unerringly to the ignominy and ostracism which the friends of this crime of polygamy seek to visit upon those who are honorable enough and brave enough to expose these hidden criminalities.

Concealment of the marriage contract is contrary to public policy and injurious to the best interests of society. Publicity affords protection. (Cunningham vs. Burdel, 4 Bradt. 343, 454-5; 1 Bishop's M. and D., §§ 488, 539.) The object of such secresy, no doubt, is to render the law against polygamous marriages a virtual nullity, by making its execution an impossibility. It is the duty of courts not to uphold any such shield for crime, but to render it wholly unavailing. Polygamy is is no more sacred than any other crime, and other crimes are daily in courts of justice established by circumstantial evidence and admissions.

We see no error in the instructions granted, nor do we see that the court below erred in refusing those of the defendant which were refused, as the law was laid correctly in the instructions given.

We, therefore, see no error in the verdict and judgment of the court below, and the judgment is therefore affirmed.

BY TELEGRAPH

AMERICAN

WASHINGTON, 5.—A few days ago special dispatches were sent to several prominent Western newspapers from this city attributing Henry Watterson's personal attack upon Senator Conkling in the Louisville *Courier-Journal* to resentment for the alleged slights inflicted upon *him by* the Senator in declining repeated invitations to dinner when Watterson was here in the interest of Tilden's claims to the presidency, during the progress of the electoral count controversy. Watterson having traced this report to Mr. Painter, Washington correspondent of the Philadelphia *Enquirer*, forthwith published an editorial paragraph saying in substance that the assertion was untrue and that he would leave the question of responsibility for the falsehood to be settled by Watterson, Conkling and Painter, meanwhile remarking that if the Senator had told Painter any such thing, the responsibility for a lie would be with (Conkling's), and if he was not the author of the story, Painter would be the scoundrel.

Painter to-day furnishes the press a copy of a letter addressed by him to Watterson, in which he uses the following language:

"I see by your paper, just received by me, that you seek to deny and fail to deny the only charge made by me, which I repeat, viz., that you sought Mr. Conkling's acquaintance in the winter of 1877 and pursued him with invitations to dinner, which were all promptly declined. From that time to the present you have pursued him through your paper with slander and vituperation, such as only the champion blackguard of the South could revel. You have seen fit to publish part of a correspondence with me and to suppress part, and in the same paper you print a letter from a gentleman which shows on the face of it that you received it *in confidence* and had no right to give it publicity. From the time you were first brought to the notice of the public by your antics in the rear of the rebel army as a performing monkey and grinder of a smut machine, your reputation has been such that you should not be surprised that your society is not considered desirable by gentlemen.

(Signed) U. H. PAINTER.

The *Star* gives this the appropriate heading of "More sulphur in the air," for Watterson is not the man to allow such language to pass without serious notice.

BOSTON, 5. — The professional scullers race, three miles with turn, by Evan Morris, of Pittsburg, and Teneyck. For an eighth of a mile nothing like the race was seen on the river. Morris and Teneyck passing each other three times. Both rowed about the same number of strokes to the mile. Finally Morris secured the lead and kept it all the way home coming about half a mile in front of Teneyck—time 26.36½. On the way back about half a mile from the finish the Boatflick's boat filled with water and he was dumped over as he was for some time paddling about when fortunately the police boat pulled up to him and rescued him from his perilous position. Teneyck's boat also filled and swamped and was rescued. After bailing out his boat he again started for the second money. By this time Delano, who was far in the rear, had come up to him and both started for home. Teneyck rowed comfortably this time, but without filling his boat again nearly filled and he came very near receiving a cold bath. However he kept on row, crossing the line 18½ seconds before Delano. The latter claimed the second money on the ground that Teneyck received outside assistance, and the Judges thought the claim was correct and awarded the second prize to Delano.

The row for the city of Boston cup, distance two miles, for the first mile was one of the prettiest races that has taken place on the