

of any former marriage which shall have been dissolved by a valid decree of a competent court, nor to any person by reason of any former marriage which shall have been pronounced void by a valid decree of a competent court, on the ground of nullity of the marriage contract.

"SEC. 2. That the foregoing provisions shall not affect the prosecution or punishment of any offence already committed against the section amended by the first section of this act.

"SEC. 3. 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.

"SEC. 4. That counts for any or all of the offenses named in sections one and three of this act may be joined in the same information or indictment.

"SEC. 5. That in any prosecution for bigamy, polygamy, or unlawful cohabitation, under any statute of the United States, it shall be sufficient cause of challenge to any person drawn or summoned as a jurymen 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 offence punishable by either of the foregoing sections, or by section fifty-three hundred and fifty-two of the Revised Statutes of the United States, or the act of July first, eighteen hundred and sixty-two, entitled 'An act to punish and prevent the practice of polygamy in the Territories of the United States and other places, and disapproving and annulling certain acts of the Legislative Assembly of the Territory of Utah;' or, second, that he believes it right for a man to have more than one living and undivorced wife at the same time, or to live in the practice of cohabiting with more than one woman; and any person appearing or offered as a juror or talesman, and challenged on either of the foregoing grounds, may be questioned on his oath as to the existence of any such cause of challenge, and other evidence may be introduced bearing upon the question raised by such challenge; and this question shall be tried by the court. But as to the first ground of challenge before mentioned, the person challenged shall not be bound to answer if he shall say upon his oath that he declines on the ground that his answer may tend to criminate himself; and if he shall answer as to said first ground, his answer shall not be given in evidence in any criminal prosecution against him for any offence named in sections one or three of this act, but if he declines to answer on any ground, he shall be rejected as incompetent.

"SEC. 6. That the President is hereby authorized to grant amnesty to such classes of offenders guilty of bigamy, polygamy, or unlawful cohabitation, before the passage of this act, on such conditions and under such limitations as he shall think proper; but no such amnesty shall have effect unless the conditions thereof shall be complied with.

"SEC. 7. That the issue of bigamous or polygamous marriages, known as Mormon marriages, in cases in which such marriages have been solemnized according to the ceremonies of the Mormon sect, in any Territory of the United States, and such issue shall have been born before the first day of January, Anno Domini eighteen hundred and eighty-three, are hereby legitimated.

"SEC. 8. That no polygamist, bigamist, or any person cohabiting with more than one woman, and no woman cohabiting with any of the persons described as aforesaid in this section, in any Territory or other place over which the United States have exclusive jurisdiction, shall be entitled to vote at any election held in any such Territory or other place, or be eligible for election or appointment to or to be entitled to hold any office or place of public trust, honor or emolument, in, under, or for any such Territory or place, or under the United States.

"SEC. 9. That all the registration and election officers of every description in the Territory of Utah are hereby declared vacant, and each and every duty relating to the registration of voters, the conduct of elections, the receiving or rejection of votes, and the canvassing and returning of the same, and the issuing of certificates or other evidence of election in said Territory, shall, until other provisions be made by the Legislative Assembly of said Territory as is hereinafter by this section provided, be performed under the existing laws of the United States and of said Territory by proper persons, who shall be appointed to execute such offices and perform such duties by a board of five persons, to be appointed by the President, by and with the advice and consent of the Senate, not more than three of whom shall be members of one political party; and a majority of whom shall be a quorum. The members of said board so appointed by the President shall each receive a salary at the rate of three thousand dollars per annum, and shall continue in office until the Legislative Assembly of said Territory shall make provision for filling said offices as hereinafter authorized. The secretary of the Territory shall be the secretary of said board, and keep a journal of its proceedings, and attest the action of said board under this section. The canvass and return of all the votes at elections in said Territory for members of the

Legislative Assembly thereof shall also be returned to said board, which shall canvass all such returns and issue certificates of election to those persons who, being eligible for such election, shall appear to have been lawfully elected, which certificates shall be the only evidence of the right of such persons to sit in such Assembly: Provided, That said board of five persons shall not exclude any person otherwise eligible to vote from the polls on account of any opinion such person may entertain on the subject of bigamy or polygamy, nor shall they refuse to count any such vote on account of the opinion of the person casting it on the subject of bigamy or polygamy; but each House of such Assembly, after its organization, shall have power to decide upon the elections and qualifications of its members; and at or after the first meeting of said Legislative Assembly, whose members shall have been elected and returned according to the provisions of this act, said Legislative Assembly may make such laws, conformable to the organic act of said Territory and not inconsistent with other laws of the United States, as it shall deem proper, concerning the filling of the offices in said Territory declared vacant by this act."

Section 5352 of the Revised Statutes, which the foregoing act amends, reads as follows: "Every person having a husband or wife living who marries another, whether married or single, in a Territory, or other place over which the United States have exclusive jurisdiction, is guilty of bigamy, and shall be punished by a fine of not more than five hundred dollars, and by imprisonment for a term not more than five years; but this section shall not extend to any person by reason of any former marriage whose husband or wife by such marriage is absent for five successive years and is not known to such person to be living, nor to any person by reason of any former marriage which has been dissolved by decree of a competent court, nor to any person by reason of any former marriage which has been pronounced void by decree of a competent court on the ground of nullity of the marriage contract."

At the time of the passage of the act of March 22, 1882, the qualifications of voters prescribed by the Territorial Legislature, whose right to do so was conferred by the organic act of Utah, were as follows: If males, they were required to be citizens of the United States, over twenty-one years of age, and constant residents in the Territory during the six months next preceding the election, and no person was to be deemed a resident unless he was a taxpayer in the Territory; if females, they were required to be of the age of twenty-one years, resident in the Territory six months next preceding the election, and born or naturalized in the United States, or the wife, widow or daughter of a native born or naturalized citizen of the United States. (Act to establish a territorial government for Utah, approved September 9, 1850, 9 Stats. 453; Comp. Laws of Utah, 1876, p. 88.)

At the same time there was also in force chap. 12 of the laws of Utah, 1878, providing for the registration of voters and to further regulate the manner of conducting elections in that Territory.

That act contains the following provisions:

"That the assessors in their respective counties are hereby constituted the registration officers, and they are required to appoint a resident deputy in each precinct to assist in carrying out the provisions of this act, and before the first Monday in June, 1878, in person or by deputy, they shall visit every dwelling in each precinct, and make careful inquiry as to any or all persons entitled to vote, and each assessor or deputy, in all cases, shall ascertain upon what ground such person claims to be a voter, and he shall require each person entitled to vote and desiring to be registered to take and subscribe in substance the following oath or affirmation:

"TERRITORY OF UTAH, } ss:
County _____, }

"I, _____, being first duly sworn, depose and say that I am over twenty-one years of age and have resided in the Territory of Utah for six months, and in the precinct of _____ one month next preceding the date hereof, and (if a male) am a ('native-born,' or 'naturalized,' as the case may be) citizen of the United States, and a tax-payer in this Territory; (or, if a female,) I am 'native-born' or 'naturalized,' or the 'wife,' 'widow,' or 'daughter,' (as the case may be,) of a native-born or naturalized citizen of the United States.

"Subscribed and sworn to before me this _____ day _____, A. D. 18____, Assessor."

"Upon the receipt of such affidavit, the assessor as aforesaid shall place the name of such voter upon the registry list of the voters of the county.

"SEC. 2. It shall also be the duty of the assessor of each county, in person or by deputy, at the time of making the annual assessment for taxes in each year, beginning in 1879, to take up the transcript of the next preceding registration list and proceed to the revision of the same, and for this purpose he shall visit every dwelling-house in each precinct, and make careful inquiry if any person whose name is on his list has died, or removed from the precinct, or his otherwise disqualified as a voter of such precinct, and if so, to erase the same therefrom, or whether any qualified voter resides therein whose name is not on his list, and if so, to add the same thereto, in the manner as provided in the preceding section.

"SEC. 3. It shall also be the duty of each assessor, in person or by deputy, during the week commencing the first Monday in June of each year, at his

office, to enter on his registry list the name of any voter that may have been omitted, on such voter appearing and complying with the provision of the first section of this act required of voters for registration purposes.

"SEC. 4. Upon the completion of the list, it shall be the duty of each assessor as aforesaid to proceed to make out a list in alphabetical order, for each precinct, containing the names of all the registered voters of such precinct, and shall, on or before the first day of July in each year, deliver all of said lists and affidavits to the clerk of the county court.

"SEC. 5. The clerk of the county court shall deliver to the assessor the registry lists whenever necessary for the revision thereof, or adding names thereto, and the assessor in person or by deputy shall, during the week commencing the second Monday in September in the year 1878, and every second year thereafter, enter names of voters in the registry list in the manner provided in section three of this act, and upon the list being completed, proceed as required by section four of this act: Provided, That in such case he shall deliver the lists and affidavits on or before the 10th day of October in each year.

"SEC. 6. Voters removing from one election precinct to another in the same county may appear before the assessor at any time previous to the delivery of the registry list to the clerk of the county court, and have their names erased therefrom, and they may thereupon have their names registered in the precinct to which they may remove.

"SEC. 7. The clerk of the county court shall file and carefully preserve all said affidavits and registry lists, and shall make a copy of each precinct registry list, and cause the same to be posted up at least fifteen days before any election, at or near the place of election, and shall make and transmit another copy to the judges of election.

"SEC. 8. The clerk of the county court shall cause to be printed or written a notice, which shall designate the offices to be filled, and stating that the election will commence at _____, [designating the place for holding the polls,] one hour after sunrise, and continue until sunset on the _____ day of _____, 18____, [naming the day of election.] Dated at _____, A. D. 18____, Clerk of the County Court.

"A copy of which shall be posted up at least fifteen days before the election, in three public places in said precinct best calculated to give notice to all the voters. It shall also be the duty of the clerk of the county court to give notice on the lists so posted that the senior justices of the peace for said precinct will hear objections to the right to vote of any person registered until sunset of the fifth day preceding the day of election. Said objections shall be made by a qualified voter, in writing, and delivered to said justice, who shall issue a written notice to the person objected to, stating the place, day, and hour when the objection will be heard. The person making the objection shall serve, or cause to be served, said notice upon the person objected to, and shall also make returns of such service to the justice before whom the objection shall be heard. Upon the hearing of the case, if said justice shall find that the person objected to is not a qualified voter, he shall, within three days prior to the election, transmit a certified list of the names of all such unqualified persons to the judges of election, and said judges shall strike such names from the registry list before the opening of the polls.

"SEC. 9. The county court shall, at its first session in June of each year, appoint three capable and discreet persons in each precinct in the county, one at least of whom shall be of the political party that was in the minority at the last previous election, if any such party there be in such precinct, to act as judges of general and special elections; and they shall designate one of the persons appointed to preside, and the other two to act as clerks of said elections. And the clerk of said court shall make out certificates of said appointments, and transmit the same by mail or other safe conveyance to the persons so appointed, who, previous to entering upon said office, shall take and subscribe an oath to the effect that they will well and faithfully perform all the duties thereof to the best of their ability, and that they will studiously endeavor to prevent any fraud, deceit, or abuse at any election over which they may preside. If, in any precinct, any of such judges decline to serve or fail to appear, the voters of said precinct, first assembled on the day of election, to the number of six, at or immediately after the time designated for opening the polls, may elect a judge or judges to fill the vacancy, and the persons so elected shall qualify as hereinbefore provided."

Sections 10 and 11 prescribe how ballot-boxes, keys, etc., shall be procured, and provide for envelopes and ballots, and for keeping the boxes during the voting and until the canvass; and section 12 provides how the judges shall keep the lists, etc.

"SEC. 13. Every voter shall designate on a single ballot, written or printed, the name of the person or persons voted for, with a pertinent designation of the office to be filled, and when any question is to be decided in the affirmative or negative, he shall state the proposition at the bottom of the ballot, and write thereunder yes or no, as he may desire to vote thereon, which ballot shall be neatly folded and placed in one of the envelopes hereinbefore provided for, and delivered to the presiding judge of election, who shall, in the presence of the voter, on the name of

the proposed voter being found on the registry list, and on all challenges to such vote being decided in favor of such voter, deposit it in the ballot-box, without any mark whatever being placed on such envelope; otherwise the ballot shall be rejected."

The remainder of the act relates to the canvass, returns, and certificates of election.

[March 23d, 1885.]

Mr. Justice MATTHEWS, after making the foregoing statement, delivered the opinion of the Court.

These cases, although actions at law, were not tried by jury; and, therefore, are rightly brought here by appeal, according to the provision of the act of Congress of April 7, 1874, 18 Stat. pt. 3, p. 27; Supplement Rev. Stats. 12. *Stringfellow v. Cain*, 99 U. S. 610; *Hecht v. Boughton*, 105 U. S. 235; *Woolf v. Hamilton*, 108 U. S. 15.

The wrong complained of in each case by the respective plaintiffs is, that the defendants, and each of them, intended to wrongfully deprive the plaintiff of the elective franchise in said Territory, wilfully and maliciously, by the acts and in the manner aforesaid, refused the plaintiff registration, as a voter, at the said registration commenced on the second Monday of September, 1882, and deprived the plaintiff of the right to vote at the election held in said Territory on the 7th day of November, 1882, and at all elections under said registration."

The acts which, it is alleged, were done by the five defendants, as a Board of Commissioners or Canvassers, under the law of March 22, 1882, and which contributed to the wrong, and constituted part of it, are that they prescribed as a condition of registration an unauthorized oath, set out in the complaint, in a rule promulgated by them for the government of the registration officers; and that the deputy registration officer having, in obedience to such rule, "acting under the directions of the other defendants," wilfully and maliciously refused to receive the affidavit tendered by the plaintiff, in lieu of that prescribed by the rule of the board, and to register the plaintiff; and that the county registration officer, on appeal, having refused to order otherwise, the Board of Commissioners also refused to reverse and correct these rulings and to direct the registration of the plaintiffs respectively, but affirmed and approved the same.

But an examination of the ninth section of the act of March 22, 1882, providing for the appointment and prescribing the duties and powers of that board, shows that they have no functions whatever in respect to the registration of voters, except the appointment of officers, in place of those previously authorized, whose offices are by that section of the law declared to be vacant; and the persons appointed to succeed them are not subject to the direction and control of the board, but are required, until other provision be made by the legislative assembly of the Territory, to perform all the duties relating to the registration of voters, "under the existing laws of the United States and of said Territory." The board are not authorized to prescribe rules for governing them in the performance of these duties, much less to prescribe any qualifications for voters as a condition of registration. The statutory powers of the board are limited to the appointment of the registration and election officers, authorized to act in the first instance under the law until provision is made by the Territorial Legislature for the appointment of their successors, and to the canvass of the returns and the issue of certificates of election "to those persons who, being eligible for such election shall appear to have been lawfully elected."

The proviso in the section does indeed declare "that said board of five persons shall not exclude any person otherwise eligible to vote from the polls on account of any opinion such person may entertain on the subject of bigamy or polygamy," but, in the absence of any general and express power over the subject of declaring the qualification of voters, it is not a just inference, from the words of this proviso, that it was intended to admit by implication the existence of any authority in the board to exclude from registration or the right to vote, any person whatever, or in any manner to define and declare what the qualifications of a voter shall be. The prohibition against excluding any person from the polls, for the reason assigned, must be construed, with the additional injunction, "nor shall they refuse to count any such vote on account of the opinion of the person casting it on the subject of bigamy or polygamy," to apply to the action of the board in canvassing the returns of elections, made to them by the officers holding such elections; or, if it includes more, it is to be taken as the announcement of a general principle to govern all officers concerned in the registration of voters or the conduct of elections.

It follows that the rules promulgated by the board, prescribing the form of oath to be exacted of persons offering to register as voters, and which constitute the directions under which it is alleged the registration officers acted, were without force, and no effect can be given to them. It cannot be alleged that they had the effect in law of preventing the registration of the plaintiffs, for the registration officers were not bound to obey them; and if they did so, they did it in their own wrong. There was no relation between the board and the officers appointed by them of principal and agent, so as to make the members of the former liable for what the latter may have illegally

done under their instructions, and, therefore, no connection in law between the acts of the board as charged and the wrongs complained of.

The judgment in favor of the defendants, composing the Board of Commissioners, upon their demurrer, therefore, was rightly rendered.

The cases, as to the other defendants, the registration officers, stand on different principles. If they were merely ministerial officers, and if they have deprived the respective plaintiffs of their right to be registered as voters, in violation of law, they may be responsible in an action for damages. Whether they are so must depend, in the first instance, not upon what they have done or omitted, but upon the question whether the plaintiffs have severally shown themselves entitled to the right of which, it is alleged, they were illegally deprived.

And in entering upon the consideration of this point it is to be observed, in the first place, that the pleader has not in any of the complaints, alleged, as matter of fact, that the plaintiff was a legally qualified voter, entitled to be registered as such. He has preferred, in each case, with variations to suit the circumstances, to aver the existence of specific enumerated qualifications, and the absence of specific and enumerated disqualifications, leaving it to be inferred, as a matter of law, that the plaintiff was a legally qualified voter and entitled to be registered as such. That legal inference is necessary to complete the case as stated; and the sufficiency of the statement must depend on whether all the positive qualifications required by law are alleged to have existed, and all the disqualifications affixed by law have been negated.

To ascertain this we have to compare the allegations of the complaint in each case with the requisitions of the law, and, by construction, to determine whether they conform.

So far as the requirements of the law existing at the time of the passage of the act of March 22d, 1882, and which continued in force concurrently with that, are concerned, there is no difficulty. Each of the plaintiffs is shown to have been a qualified voter, unless disqualified by the latter act. The only question is, whether they have brought themselves within the meaning of that act. The language on which the questions arise occurs in the 8th section, and is: "That no polygamist, bigamist, or any person cohabiting with more than one woman, and no woman cohabiting with any of the persons described as aforesaid in this section," etc., that is, with any polygamist, bigamist, or person cohabiting with more than one woman, shall be entitled to vote at any election held in the Territory.

In the case in which Mary Ann M. Pratt is plaintiff, she clearly excludes herself from the disqualifications of the act. She alleges in her complaint "that she is not and never has been a bigamist or a polygamist; that she is the widow of Orson Pratt, Sen., who died prior to the 22nd day of March, 1882, after a continuous residence in said Territory of more than thirty years, and that since the death of her said husband she has not cohabited with any man."

The same is true in reference to the allegations of the complaint in the case in which Mildred E. Randall and her husband are plaintiffs. They are, "that the plaintiff, Mildred E. Randall, for more than three years last past has been and is the wife of the plaintiff, Alfred Randall, who is and prior to March 22d, 1882, was a native-born citizen of the United States of America; that she has not on or since March 22d, 1882, cohabited with any bigamist, polygamist, or with any man cohabiting with more than one woman; that she is not a bigamist or polygamist, and never has been a bigamist or polygamist, and has not in any way violated the act of Congress entitled 'An act to amend section 5352 of the Revised Statutes of the United States in reference to bigamy, and for other purposes,' approved March 22d, 1882."

The requirements of the eighth section of the act, in reference to a woman claiming the right to vote, are that she does not, at the time she offers to register, cohabit with a polygamist, bigamist, or person cohabiting with more than one woman; and it is sufficient, if the complaint denies the disqualification in the language of the act. These requirements are fully met in the two cases just referred to.

The case of Eilen C. Clawson is different. In the complaint, filed by herself and her husband, it is alleged that she "is not and never has been a bigamist or polygamist, and is not cohabiting and never has cohabited with any man except her husband, the co-plaintiff herein, to whom she was lawfully married more than fifteen years ago, and of whom she is the first and lawful wife; that the plaintiff, Hiram B. Clawson, has not married or entered into any marriage contract or relation with any woman within the last six years, and has continuously and openly resided in the city of Salt Lake, in said Territory of Utah, for more than twenty years last past."

It is quite consistent with these statements, that the husband of the female plaintiff was at the time she claimed registration, a bigamist, or a polygamist, or that he was then cohabiting with more than one woman; and that she was cohabiting with him at the same time. She would be, on either supposition, expressly disqualified from voting by the eighth section of the act of March 22d, 1882, and she does not negative the fact.

It cannot, therefore, be inferred that she was a lawfully qualified voter.

(Concluded on page 227.)