5 of the Edmunds Act, which provides "that in any prosecution for bigamy, polygamy or unfawful cohabitation, under any statute of the United States, it shall be sufficient cause of challenge to any person drawn or summoned as a juror or talesman * * * 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 preclude "Mormons" from the right to sit on a grand jury, where all kinds of indictments are to be found, its plain meaning being that in certain trial juries, after the indictment has been found, persons entertaining a certain belief may be excluded. The empanelling of a grand jury is not a prosecution for polygamy or bigamy any more than for murder or burglary; but if the "Mormons" could be asked certain questions and excused on making an affirmative answer to them, the non-"Mormons" should have been asked the same questions. The latter were not asked if they believed it right to cohabit with more than one woman, which was as much a disqualification as belief in polygamy, and there was manifest all the way through a disposition to create such a jury as was not provided for by law. Mr. Richards contended that a person suspected of crime had rights before the law which would shield him from baseless and vexatious indictments, where the latter were illegally found, as much as from conviction by a packed jury.

At the conclusion of his argument the court took a recess, and on re-assembling at two p.m. listened to the reply of C. S. Varian, Esq., Assistant Prosecuting Attorney, who argued that the provisions of the Edmunds bill in regard to the qualifications of jurors on polygamy cases, were applicable to grand jurors as well, and hence that this grand jury was a legal one. He declared that the point made by defendant's attorney that the "Mormon" members had been asked certain questions regarding cohabitation which had not been put to the non-"Mormons," had no weight, from the fact that this was a matter purely optional with the prosecuting attorney. He cited authorities to show that the only ground defendant could have for his motion would be in proving that the requisite number of ballots was not drawn from the jury box, and that the notice of the drawing was not given in the manner provided by law, and that the drawing was not had in the presence of officers designed by law ;but that these steps having been regular and fully complied with, there was no legal standing for the motion to quash the indictment by reason of the illegal nature of the empanelling of the jury.

Mr. Richards, in his closing argument, showed that the authorities quoted by Mr. Varian were not applicable to the state of affairs in this Territory, where there were two legislative bodies, the Congress of the United States and the Territorial Legislature, and referred at some length to the jury system which obtains here, and to its history from the beginning, making a strong and concise argument in support of his motion.

The matter was taken under advisement until 10 o'clock this morning, at which hour, in the presence of a full bar, the following was rendered by Chief Justice Zane as his

DECISION.

This is an indictment for polygamy and the objection to the indictment is that the grand jury was not a legally constituted grand jury and the reason, as I understand—the substantial reason is that certain grand jurors were excused illegally and certain others were placed on the grand jury in consequence, that ought not to have been there. It appears from the statement of facts pleaded to by the attorneys for the prosecution and for the defendant that the grand jury was first selected in pursuance of section 4 of the Act of Congress approved, I think, June 23d, 1874. In brief, there were at first thirty grand jurors selected in the mode prescribed by the statute. I do not understand that there is any objection to that; but twenty-five of them were illegal grand jurors, unless these challenges that were interposed were wrongful. The grand jurors excused, fifteen of them I believe, were asked these questions:

Do you believe in the doctrines and tenets of the Mormon Church?

Do you believe in the doctrine of plural marriage as taught by the Mormon Church?

Do you believe it is right for a man to have more than one undivorced wife living at the same time?

And each of these grand jurors answered these questions in the affirmative and was excused, and other jurors were selected in the following mode as provided in section four:

If during any term of the district court any additional grand or petit jurors may be necesary, the same shall be drawn from the said box by the United States marshal in open court; but if the attendance of those drawn cannot be obtained in a reasonable time, other names may be drawn in the same manner.

These were, after the fifteen were excused, the additional jurors selected in the mode prescribed. So it resolved at last into the question whether the act of Congress—so much of it as is applied in this case which is found in the Revised Statute book, section 1039, and this statute of the United States passed at the first session of the general Congress in 1882 shall hold. The statute describes first the crime of polygamy, and without reading a description of that crime, because it is well understood, it imposes a punishment on persons guilty of it by a fine of not more than $500 and imprisonment for a term of not more than five years, and further provides that:

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.

And then Section 5 provides:

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 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, 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 offense named in sections one or three of this act; but if he declines to answer on any ground, he shall be rejected as incompetent.

That is the whole of section five. Now the question is, whether this section applies to a grand jury or simply to a petit jury. The language is:

That in any prosecution for bigamy, polygamy, or unlawful cohabitation, etc.

The term prosecution, it is insisted, should be limited here to a trial jury, and not to a grand jury. It will be seen that the language expressed in this section is:

Any person appearing or offered as a juror or talesman.

The term juryman is used in its general sense without qualifying by reference to a grand jury or to a trial jury, except so far as the last term, which says, "or talesman;" it is not qualified —the term jury or juror—it is used in its general sense, and the term prosecution is not in it.

In any prosecution for bigamy, polygamy, or unlawful cohabitation, etc.

The prosecution of the defendant may be said to commence when the process of the court, according to methods provided by law, is commenced to be used against him. When is that? It is when the grand jury commences to investigate his case by subpœnaing witnesses and examining them against him. Without that proceeding there is no such thing as a prosecution of a crime under the laws of this Territory in this Court except as minor misdemeanors may be brought by appeal; but for a crime such as is described here, there can be no prosecution without the proceeding before the grand jury, it is a necessary part of the prosecution, and the term should be held here to mean the whole method from the beginning to the end, which results in the conviction of the defendant or of any defendant.

Now, if there is any question as to the meaning of a statute—if it is susceptible to two meanings—it is always proper to refer to the reason for the law—to the wrong which it is intended to remedy. What was it? The intention of Congress was to provide an impartial jury by which to try polygamy cases; there can be no question about that; and it is as important—quite as much probably to the defendant — well, not quite so much, though, to the defendant; but it is of the highest importance at least, that an impartial grand jury shall act upon each case, the case of each party that is charged with crime; it certainly is of the highest importance that an impartial jury shall act in each case. It is of great importance to the party indicted if he is innocent. A partial grand jury might indict an innocent man; because they will act upon their prejudices rather than the evidence; I do not say all men do, some men are able to lay aside their prejudices; but it is important to the State and to the people to have an impartial grand jury, because it would be a wrong to have an innocent man indicted, and it would be a wrong, also, against the public to permit a guilty man to go unpunished when there is evidence sufficient to convict him. That is the method which the people of the United States, through the government which they have provided, have adopted for the protection of society—the punishment of such conduct as they deem to be injurious to society; they have adopted this method of prohibiting and preventing what they have determined is injurious to society as a crime. And the reason for this law is, as I suppose, based on this presumption: that a man who believes it is right to commit the crime which he is called upon to try, cannot be an impartial juror in the trial of that man. He should not be influenced by such a motive as that. If a man believes, for instance—a man called as a juror to try a man for murder—if he believes the man was right in committing the murder, he is not a competent juror, because he will be influenced by that belief. Or if a man is charged with robbery—if a juror who tries him believes it was right for the man to commit the robbery, he is not a fit man to try that man; neither is he in a case of bigamy or polygamy. If a man believes that it is right to practice polygamy, in a polygamy case he cannot be an impartial juror according to all human experience, according to human nature as it exists; he cannot possibly be an impartial juror in a trial of that kind, because the conviction is with him that the man is right in practicing polygamy. Notwithstanding all human laws to the contrary, if he believes polygamy is a command, that it is a law proclaimed by the Almighty—it makes no difference how many human laws are passed, he will still believe that polygamy is right, because he thinks there is a higher law governing him.

Now, the Congress of the United States intended to exclude this class of men from participation in the duties of jurors, from acting either as grand jurors or petit jurors. And this is based upon the principle I have stated. That is the reason, I suppose, for this law—the reason it was passed.

Now, to construe this law simply to apply to the petit jury, and not to the grand jury would certainly defeat the purpose of the law, and, in my judgment, would be contrary to the letter as well. I am of the opinion that the letter and spirit of this law both agree.

I am therefore of the opinion that these jurors by their answers were properly excluded; could not have been otherwise under this law without disregarding it.

Other matters were discussed in the discussion of this question; but I think this view of the case will dispose of them. The motion to set aside the indictment, is, therefore, overruled.

Mr. F. S. Richards asked that the court note an exception to the ruling, which was done.

This decision was scarcely unexpected, after the late series of astonishing judgments and rulings which have emanated from the same high judicial source. No one who remembered his Honor's order in the open *venire* matter last week could indulge the hope for a moment that he would look upon the grand jury which found the Clawson indictment as in any way imperfect.

SUMMONS.

In the Probate Court, in and for Salt Lake County, Territory of Utah.

Sarah Andrews, Plaintiff,
vs.
Joseph Andrews, Defendant.

The People of the Territory of Utah send Greeting:

To Joseph Andrews, Defendant.

YOU ARE HEREBY REQUIRED TO appear in an action brought against you by the above-named plaintiff, in the Probate court, of the county of Salt Lake, Territory of Utah, and to answer the complaint filed therein within ten days (exclusive of the day of service) after the service on you of summons—if served within this county; or, if served out of this county, but in this district, within twenty days; otherwise within forty days.

The said action is brought to obtain a decree from this court dissolving the marriage contract existing between said plaintiff and you, on the ground of wilful desertion and failure to furnish the ordinary necessaries of life. And you are hereby notified that if you fail to appear and answer the said complaint as above required, the said plaintiff will apply to this court for the relief prayed for and cost of suit.

Witness, the Hon. Elias A. Smith, Judge, and the Seal of the Probate Court, of Salt Lake County, Territory of Utah, this 8th day of September, in the year of our Lord one thousand eight hundred and eighty-four.

[SEAL.]

w 6t JOHN C. CUTLER, Clerk.

SUMMONS.

In the Probate Court, in and for Salt Lake County, Utah Territory.

William L. Welsh, Plaintiff,
vs.
Mary V. Welsh, Defendant.

The People of the Territory of Utah send Greeting:

To Mary V. Welsh, Defendant.

YOU ARE HEREBY REQUIRED TO appear in an action brought against you by the above named plaintiff in the Probate Court, of the County of Salt Lake, Territory of Utah, and to answer the complaint filed therein within ten days (exclusive of the day of service) after the service on you of summons—if served within this County; or, if served out of this County, but in this district, within twenty days; otherwise within forty days.

The said action is brought to obtain a decree from this court dissolving the marriage contract existing between said plaintiff and you on the grounnd of willful desertion of the plaintiff by the defendant for more than one year last past and other causes set forth in said complaint. And you are hereby notified that if you fail to appear and answer the said complaint as above required, the said plaintiff will apply to this court for the relief prayed for and cost of suit.

Witness the Hon. Elias A. Smith, Judge, and the seal of the Probate Court, of Salt Lake County, Territory of Utah, this third day of September, in the year of our Lord one thousand eight hundred and eighty-four.

[SEAL.]

JOHN C. CUTLER, Clerk.

w4t C. F. Blandin, Attorney for Plaintiff.