EVENING NEWS.
Thursday - January 7, 1886

CASE OF ANGUS M. CANNON.

DECISION OF THE SUPREME COURT OF THE UNITED STATES.

[December 14th, 1885.]

Mr. Justice Blatchford delivered the opinion of the Court.

Angus M. Cannon was indicted by a grand jury in the District Court of the Third Judicial District in and for the Territory of Utah in February, 1885, for a violation of section 3 of the act of Congress approved March 22d, 1882, ch.47, entitled "An Act to amend section fifty-three hundred and fifty-two of the Revised Statutes of the United States, in reference to bigamy and for other purposes." (22 Stat., 31.) Section 1 of the Act amends section 5,352 of the Revised Statutes, which was a re-enactment of section 1 of the Act of July 1st, 1862, ch. 123. (12 Stat., 501.)

[Here follow the Act of 1862 and the Act of 1882.]

The indictment against Cannon was as follows: "The grand jury of the United States of America within and for the district aforesaid, in the Territory aforesaid, being duly empanelled and sworn, on their oaths do find and present, that Angus M. Cannon, late of said district, in the Territory aforesaid, to wit, on the first day of June, in the year of our Lord one thousand eight hundred and eighty-two, and on divers other days and continuously between the said first day of June, A.D. 1882, and the first day of February, A. D. 1885, at the county of Salt Lake and Territory of Utah, did unlawfully cohabit with more than one woman, to wit, one Amanda Cannon and one Clara C. Mason, sometimes known as Clara C. Cannon, against the form of the statute of the said United States in such case made and provided, and against the peace and dignity of the same."

The defendant pleaded not guilty, and the case was tried in April, 1885, resulting in a verdict of guilty, and a judgment imposing a fine of $300, imprisonment in the penitentiary for six months, and further imprisonment till the payment of the fine.

After the jury was empanelled and sworn, and the prosecution had called a witness, the defendant objected to the giving of any evidence under the indictment, on the ground that the indictment was defective and did not charge any criminal offense, nor any offense under the statutes of the United States, nor the offense described in the statute, either in the statutory words or equivalent words, and, especially, did not show that the person charged was a male person; and was insufficient to warrant a verdict or support a judgment of conviction. The court overruled the objection, and the defendant excepted. The following proceedings then took place, as shown by the bill of exceptions:

[Here is inserted the evidence in the case which has already been published in the DESERET NEWS.]

Defendant's counsel then made the following offer of proofs:

"We offer to prove by this and other witnesses to be called, that Amanda Cannon was married to the defendant before the marriage with this witness; that, prior to the passage of the Edmunds law, the latter alternately occupied the sleeping-room and board of each; that each, with her family, occupied, and still occupies, separate apartments, including separate dining-rooms and kitchens; that, after the Edmunds law had passed both Houses of Congress, and before its approval by the President, the defendant announced to witness, Amanda, and their families, that he did not intend to violate that law, but should live within it so long as it should remain a law, and at the same time assigned his reasons for so doing, and thereafter, and during the times alleged in the indictment, he did not occupy the rooms or bed of, or have any sexual intercourse with, the witness, and to this extent, by mutual agreement, separated from the witness; that, during all the time mentioned in the indictment, the two families have taken their meals in their respective dining-rooms; that defendant has taken his meals with the witness and her family, in her dining-room, two or three days each week, has provided for the support of the witness and her family distinct from other family expenses, and allowed them to occupy separate apartments in the same house occupied by him and Amanda, and this is the extent of his relations with the witness; and, also, that the defendant was financially unable to provide a separate house for witness and her family; also, that the witness and her family and Amanda and her family are dependent on the defendant for their support. To this offer and each paragraph thereof the prosecution objected, and the objection was sustained by the Court, and the defendant excepted to the ruling."

The foregoing was all the evidence given in the case. The Court instructed the jury as follows: "The indictment in this case charges that the defendant, on the first day of June, in the year of our Lord 1882, and on divers other days, continuously, between said first day of June, 1882, and the first day of February, 1885, did unlawfully cohabit with more than one woman, to wit, one Amanda Cannon and one Clara C. Mason, sometimes known as Clara C. Cannon. [If you believe from the evidence, gentlemen of the jury, 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.] [It is not necessary that the evidence should show that the defendant and these women, or either of them, occupied the same bed or slept in the same room; neither is it necessary that the evidence should show that, within the time mentioned, he had sexual intercourse with either of them.] I will state, the law presumes the defendant innocent until proven guilty beyond a reasonable doubt; that you are the judges of the credibility of the witnesses, the weight of the evidence and of the facts, and if you find the defendant guilty you will say in your verdict, 'We, the jury, find the defendant guilty in manner and form as charged in the indictment;' and, if you find him not guilty, you will say, 'We, the jury, find the defendant not guilty.'" No further or other instructions were given to the jury.

The defendant excepted to the parts of the instructions which are enclosed in brackets. He also submitted the following prayers for instructions, each of which was separately refused, followed by a separate exception:

[The requests of counsel for defendant 1 to to 24, which were refused by the Court, appeared in the NEWS' report of the trial.]

From the judgment the defendant appealed to the Supreme Court of the Territory, which affirmed it, and he has brought the case to this Court by a writ of error.

The principal question argued at the bar was the proper construction of section 3 of the Act of 1882. That question depends on the meaning of the word "cohabit," in that section. The meaning contended for by the defendant is indicated by his offer to show by Clara C. Cannon non-access, and facts to rebut the presumption of sexual intercourse with her, and the actual absence of such intercourse; and by the request for instructions to the jury, which are based on the view that the word "cohabit" necessarily includes the idea of having sexual intercourse. But we are of the opinion that this is not the proper interpretation of the statute; and that the Court properly charged the jury that the defendant was to be found guilty if he lived in the same house with the two women, and ate at their respective tables one-third of his time or thereabouts, and held them out to the world, by his language or conduct, or both, as his wives, and that it was not necessary it should be shown that he and the two women, or either of them, occupied the same bed or slept in the same room, or that he had sexual intercourse with either of them.

This interpretation is deducible from the language of the statute throughout. It refers wholly to the relations between men and women founded on the existence of actual marriages, or on the holding out of their existence. Section 1 makes it an offense for a man or a woman, with a living wife or husband, to marry another, and calls such offense polygamy. Section 3 singles out the man, and makes it a misdemeanor for him to cohabit with more than one woman. Section 4 provides that counts for any or all of the offenses named in sections 1 and 3 may be joined in the same information or indictment. This certainly has no tendency to show that the cohabitation referred to is any other side of a marital relation, actual or ostensible. So, in section 5, bigamy, polygamy, and unlawful cohabitation are classed together, and it is provided, that, in any prosecution for any one of such offenses, it shall be sufficient cause of challenge to a juror, that he has been living in the practice of bigamy, polygamy, or unlawful cohabitation with more than one woman, or has been guilty of an offense punishable by the preceding sections, or that he believes it to be 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. It is the practice of unlawful cohabitation with more than one woman that is aimed at—a cohabitation classed with polygamy and having its outward semblance. It is not on the one hand meretricious unmarital intercourse with more than one woman. General legislation as to lewd practices is left to the Territorial government. Nor on the other hand does the statute pry into the intimacies of the marriage relation. But it seeks not only to punish bigamy and polygamy when direct proof of the existence of those relations can be made, but to prevent a man from flaunting in the face of the world the ostentation and opportunities of a bigamous household, with all the outward appearances of the continuance of the same relations which existed before the Act was passed; and without reference to what may occur in the privacy of those relations. Compacts for sexual non-intercourse, easily made and as easily broken, when the prior marriage relations continue to exist, with the occupation of the same house and table and the keeping up of the same family unity, is not a lawful substitute for the monogamous family which alone the statute tolerates. In like manner, bigamy, polygamy, and unlawful cohabitation are classed together in section 6 and 8 of the Act. Section 6 authorizes the President to grant amnesty to persons guilty of bigamy, polygamy, or unlawful cohabitation before the passage of the Act. Any unlawful cohabitation, under the laws the United States, before that time, could only have been ostensibly marital cohabitation, for the only statute on the subject was section 5,352 of the Revised Statutes in regard to bigamy. Section 8 excludes from voting every polygamist, bigamist, or person cohabiting with more than one woman, and every woman cohabiting with any polygamist, bigamist, or person cohabiting with more than one woman. This section was considered by this Court in *Murphy v. Ramsey*, (*114 U. S., 15,*) where Mr. Justice Matthews, speaking for the Court, in construing the words "bigamist" and "polygamist" in that section, says, (*p. 41*): "In our opinion, any man is a polygamist or bigamist, in the sense of this section of the Act, who, having previously married one wife, still living, and having another at the time when he presents himself to claim registration as a voter, still maintains that relation to a plurality of wives, although, from the date of the passage of the Act of March 22, 1882, until the day he offers to register and vote, he may not in fact have cohabited with more than one woman. Without regard to the question whether, at the time he entered into such relation, it was a prohibited and punishable offense, or whether, by reason of lapse of time since its commission, a prosecution for it may not be barred, if he still maintains the relation, he is a bigamist or polygamist, because that is the status which the fixed habit and practice of his living has established. He has a plurality of wives, more than one woman whom he recognizes as a wife, of whose children he is the acknowledged father, and whom with their children he maintains as a family, of which he is the head. And this status as to several wives may well continue to exist, as a practical relation, although for a period he may not in fact cohabit with more than one; for that is quite consistent with the constant recognition of the same relation to many, accompanied with a possible intention to renew cohabitation with one or more of the others when it may be convenient. It is not, therefore, because the person has committed the offense of bigamy or polygamy, at some previous time, in violation of some existing statute, and as an additional punishment for its commission, that he is disfranchised by the Act of Congress of March 22, 1882; nor because he is guilty of the offense, as defined and punished by the terms of that act; but, because, having at some time entered into a bigamous or polygamous relation, by a marriage with a second or third wife, while the first was living, he still maintains it and has not dissolved it, although for the time being he restricts actual cohabitation to but one. He might in fact abstain from actual cohabitation with all, and be still as much as ever a bigamist or a polygamist. He can only cease to be such when he has finally and fully dissolved, in some effective manner, which we are not called on here to point out, the very relation of husband to several wives, which constitutes the forbidden status he has previously assumed. Cohabitation is but one of the many incidents to the marriage relation. It is not essential to it. One man, where such a system has been tolerated and practiced, may have several establishments, each of which may be the home of a separate family, none of which he himself may dwell in or even visit. The statute makes an express distinction between bigamists and polygamists on the one hand, and those who cohabit with more than one woman on the other; whereas, if cohabitation with several wives was essential to the description of those who are bigamists or polygamists, those words in the statute would be superfluous and unnecessary. It follows, therefore, that any person having several wives is a bigamist or polygamist in the sense of the Act of March 22, 1882, although since the date of its passage he may not have cohabited with more than one of them." In the spirit of this interpretation, a man cohabits with more than one woman, in the sense of sections 3, 5 and 8 of the Act, when, holding out to the world two women as his wives, by his language or conduct, or both, he lives in the house with them, and eats at the table of each a portion of his time, although he may not occupy the same bed or sleep in the same room with either of them, or actually have sexual intercourse with either of them. He holds two women out to the world as his wives, by his conduct, when, being the recognized and reputed husband of each, so understood to be by the two wives, and by the son of one of them, and by the son of a third reputed wife, he maintains the two wives, and the children of each, all in the same house with himself, and regularly eats at the table of each, and acts as the head of the two families.

This meaning of the phrase "cohabit with more than one woman," in the statute, is in consonance with a recognized definition of the word "cohabit." In Webster "cohabit" is defined thus: "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." In Worcester it is defined thus: "1. To dwell with another in the same place. 2. To live together as husband and wife." The word is never used in its first meaning, in a criminal statute; and its second meaning is that to which its use in this statute has relation. The context in which it is found, and the manifest evils which gave rise to the special enactments in regard to "cohabitation," require that the word should have the meaning which we have assigned to it. Bigamy and polygamy might fail of proof, for want of direct evidence of any marriage, but cohabitation with more than one woman, in the sense proved in this case was susceptible of the proof here given; and it was such offense as was here proved that section 3 of the Act was intended to reach—the exhibition of all the indicia of a marriage, a household, and a family, twice repeated. However, in some divorce cases, and in reference to a question of the condonation of adultery, the word "cohabit" may have been used in the limited sense of sexual intercourse, or however its meaning may have been so limited by its context in other statutes, it has no such meaning in the statute before us.

These views of the proper construction of section 3 show that the evidence which the Court rejected was properly excluded, and that there was no error in the instructions given to the jury, or in refusing to give those asked, aside from those which were proper to have been given, but were covered by the instructions given. Nor is the charge given open to the objection that the paragraphs in it which follow the first are not confined to the time laid in the indictment.

Objection is taken to the indictment because it does not allege that the defendant was a male person, section 3 making the offense it specifies punishable only when committed by a male person. By the Criminal Procedure Act of the Territory of Utah, passed February 22d, 1878, and which was in force from and after March 10th, 1878, (*Laws of 1878, p. 91,*) it is provided as follows:

"SEC. 148. All the forms of pleading in criminal actions, and the rules by which the sufficiency of pleadings are to be determined, are those prescribed by this Act.

SEC. 149. The first pleading on the part of the people is the indictment.

SEC. 150. The indictment must contain:

1. The title of the action, specifying the name of the Court to which the indictment is presented, and the names of the parties;

2. A clear and concise statement of the acts or omissions constituting the offense, with such particulars of the time, place, person and property as will enable the defendant to understand distinctly the character of the offense complained of and answer the indictment. It must be substantially in the following form:

Territory of Utah.
In the —— Judicial District Court.
The People of the Territory of Utah against A. B.

A. B. is accused by the Grand Jury of this Court, by this indictment, of the crime of (giving its legal appellation, such as murder, arson, or the like, or designating it as felony or misdemeanor), committed as follows: The said A. B., on the — day of ——, A. D. eighteen ——, at the county of —— (here set forth the act or omission charged as an offense).

SEC. 151. It must be direct and certain as it regards:

1. The party charged;
2. The offense charged;
3. The particular circumstances of the offense."

"SEC. 156. The words used in an indictment are construed in their usual acceptance in common language, except such words and phrases as are defined by law, which are construed according to their legal meaning.

SEC. 157. Words used in a statute to define a public offense need not be strictly pursued in the indictment; but other words conveying the same meaning may be used.

SEC. 158. The indictment is sufficient if it can be understood therefrom:

1. That it is entitled in a Court having authority to receive it, though the name of the Court be not stated;
2. That it was found by a Grand Jury of the district in which the Court was held;
3. That the defendant is named, or, if his name cannot be discovered, that he is described by a fictitious name, with a statement that his true name is to the jury unknown;
4. That the offense committed was within the jurisdiction of the Court, and is triable therein;
5. That the offense was committed at some time prior to the time of finding the indictment;
6. That the act or omission charged as the offense is clearly and distinctly set forth, without repetition, and in such a manner as to enable the Court to understand what is intended; and

To pronounce judgment upon a conviction, according to the right of the case."

"SEC. 190. The only pleading on the part of the defendant is either a demurrer or a plea."

Section 192 provides that the defendant may demur to the indictment when it appears upon the face thereof that it does not substantially conform to the requirements of section 150; or that the facts stated do not constitute a public offense.

Section 200 provides that when the objections mentioned in section 192 appear upon the face of the indictment, they can only be taken by demurrer, except that the objection that the facts stated do not constitute a public offense, may be taken at the trial, under the plea of not guilty, or, after the trial, in arrest of judgment.

"SEC. 479. Neither a departure from the form or mode prescribed by this Act in respect to any pleading or proceeding, nor an error or mistake therein, renders it invalid, unless it has actually prejudiced the defendant or tended to his prejudice, in respect to a substantial right."

Certainly, under these provisions, the defendant, having pleaded to the indictment and not demurred, must be held to have understood distinctly that the charge was against a male person, as guilty of the offense complained of, the offense being one which only a male person could commit; and the omission from the indictment of the allegation that he was a male person could not have prejudiced him, or tended to his prejudice, in respect to a substantial right.

The same statutory provisions apply to the objection that the indictment contains merely a charge of unlawful cohabitation with more than one woman, and does not allege a cohabitation with the women as wives, or as persons held out as wives. The defendant, having pleaded and not demurred, it must be held, under section 150, that the statement of the acts constituting the offense was such as to enable him to understand distinctly the character of the offense complained of, as that offense is now interpreted, and to answer the indictment. The objection now made cannot be regarded as an objection that the facts stated do not constitute a public offense, because the statement is in the words of the statute, and they, as is now held, have but one meaning; and there could not have been any prejudice to the defendant, or tendency to prejudice, in respect to a substantial right, in not alleging any more pointedly that he cohabited with the women as wives.

In connection with these statutory rules, section 3 of the Act of Congress makes the offense a misdemeanor. In *United States v. Mills, (7 Peters, 138, 142,)* it was said by this Court: "The general rule is, that in indictments for misdemeanors created by statute, it is sufficient to charge the offense in the words of the statute.

But in all cases the offense must be set forth with clearness, and all necessary certainty to apprise the accused of the crime with which he stands charged." These principles were applied to a case of misdemeanor, in *United States v. Britton*, (107 U. S., 655,) and an indictment was held sufficient because it embodied the language of the statute, and that language covered every element of the crime, and thus the offense created by the statute was set forth with sufficient certainty, so as to give the defendant clear notice of the charge he was called on to defend. That case was distinguished by the Court from *United States v. Carll*, (105 U. S. 611,) as this is distinguishable. In Carll's case, the statute made it an offense to pass a forged obligation of the United States with intent to defraud, and the punishment was a fine and imprisonment at hard labor. The question arose, on motion in arrest of judgment, whether the indictment was sufficient, it setting forth the offense in the language of the statute, without further alleging that the defendant knew the instrument to be forged. This Court held that the offense at which the statute was aimed was similar to the common-law offense of uttering a forged bill; that, therefore, knowledge that the instrument was forged was essential to make out the crime; and that the uttering, with intent to defraud, of an instrument in fact counterfeit, but supposed by the defendant to be genuine, though within the words of the statute, would not be within its meaning and object. The omitted allegation in that case—a knowledge of the forgery—was a separate, extrinsic fact, not forming part of the intent to defraud, or of the uttering, or of the fact of forgery; and, in the absence of that allegation, it was held that no crime was charged. In other words, the case was of the class provided for under the Utah statute, where the facts stated do not constitute a public offense. This, as has been shown, is not that case. The word "cohabit" has, in the statute, a definite meaning, including every element of the offense created, as before defined. The allegation of cohabiting with the two women as wives is not an extrinsic fact, but is covered by the allegation of cohabiting with them.

A strong appeal was made, in argument, to this Court, not to uphold the rulings of the trial Court, because that would require a polygamous husband not only to cease living with his plural wives, but also to abandon the women themselves; and this Court was asked to indicate what the conduct of the husband towards them must be in order to conform to the requirements of the law. It is sufficient to say, that, while what was done by the defendant in this case, after the passage of the Act of Congress, was not lawful, no Court can say, in advance, what particular state of things will be lawful, further than this, that he must not cohabit with more than one woman, in the sense of the word "cohabit" as hereinbefore defined. While Congress has legitimated the issue of polygamous marriages born before January 1st, 1883, and thus given to such issue claims upon their father which the law will recognize and enforce, it has made no enactment in respect to any rights or status of a bigamous or polygamous wife. It leaves the conduct of the man towards her to be regulated by considerations which, outside of section 3, are not covered by the statute, and which must be dealt with judicially, when properly presented.

Judgment affirmed.

MILLER, J.—I dissent from the judgment of the Court in this case.

I think that the Act of Congress, when prohibiting cohabitation with more than one woman, meant unlawful habitual sexual intercourse.

It is, in my opinion, a strained construction of a highly penal statute to hold that a man can be guilty, under that statute, without the accompaniment of actual sexual connection.

I know of no instance in which the word cohabitation has been used to describe a criminal offense where it did not imply sexual intercourse.

Mr. Justice FIELD concurs with me.

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