EVENING NEWS.

Tuesday - June 16, 1885

ARGUMENT OF J. R. McBRIDE

BEFORE THE SUPREME COURT OF UTAH IN THE CASE OF A. M. CANNON.

These cases, aside from any consequences to the defendants, are important, as they bear upon the meaning and application of the Act of Congress creating the offense of cohabitation. It is of the utmost importance that a law which may affect so many people, should not only be construed, but so correctly construed, that the legal mind shall be satisfied and all reasonable controversy set at rest. This consideration induces me, after the already elaborate argument, to add a few suggestions on one feature of these cases.

For this purpose I have carefully gone over the act itself, have undertaken to examine it from the point of view which it will be conceded its makers occupied, and, giving legal effect to all that it contains, tried to ascertain what it is, and apply it to the facts of the case in hand. I have sought to reach the legal result, so that, not only for this case, but for all others, we may have a plain guide, so far as the law may be involved.

First—I will state the facts of this case from the record. The defendant, Cannon, assuming for this argument that he is charged with being a "male person," is alleged by the indictment to have committed the offense of cohabiting with more than one woman, between the first day of June, 1882, and the first day of February, 1885, viz.; that he did cohabit unlawfully with Amanda Cannon and Clara C. Mason, at the County of Salt Lake, Territory of Utah.

The prosecution showed by proof that the defendant resided at 246 First South Street, Salt Lake City; that before July, 1882, he married Amanda Cannon, named in the indictment, and that he had lived and cohabited with her even since; that she is the mother of nine children, born since the same marriage, eight of them being now resident at his said house. That by the same ceremony and at the same time, he, defendant, married Sarah Cannon, who is not named in the indictment. About 1874, Clara C. Mason, named in the indictment—then a widow with two children—was married to defendant, and ever since has resided in said house of defendant.

In this house Clara Mason occupied during the last three years, two rooms on the east of a hall which passes through the house from north to south, with one child, born of this marriage, two orphan children which she was rearing and one child by a former marriage Amanda Cannon with her children occupying the rooms on the west side of the hall. The bedroom of Clara C. Mason was in the northeast corner of the building, on the second floor. Amanda Cannon's bedroom was in the southwest corner of the same building, second floor. Defendant's bedroom was in the southeast corner on the same floor. There is a hall running north and south through the centre of the house on the second floor, Amanda's bedroom being separated from defendant's by this hallway, and there is no room between defendant's and Clara's. Clara Cannon's child of her marriage with defendant was born January 11th, 1882, she having had two born prior, but both were dead. The families live separate, with distinct households throughout—kitchens, dining and sleeping rooms.

The testimony showed that defendant took his meals about every third day with these women and their families in their apartments and onemeal with each on Sunday. The orphan children had lived with Clara for the last five years. In Clara's bed room were two beds, occupied by herself and the four children who were with her all the time. The defendant had been heard to speak of Amanda Cannon as his wife, but no *time* was given as to when this statement was made. It was shown that Amanda Cannon and Clara are both members of the Mormon Church. On this statement of facts the prosecution rested their case.

The defendant then offered to prove (and for the purpose of this case will be taken to have proved): That Amanda Cannon was married to defendant before Clara; that before the passage of the law of March, 1882 punishing cohabitation, he had alternately occupied the sleeping room and bed of each; that each with her family occupied and still occupies separate apartments as already proved; that on the passage of the Edmunds law, the defendant announced to both these women and their families, that he did not intend to violate that law, but should live within it, giving his reasons, and that he has not since occupied the bed or sleeping room, or had any sexual intimacy with Clara, and to that extent, they by mutual agreement, separated; that these women and their families, are dependent on him for support, and that he was not financially able to provide a separate house for Clara.

The offer of this evidence was objected to as immaterial, irrelevant and incompetent, and the objection was sustained.

We have, then, before us a case showing this state of facts. A defendant who had married one of the women 25 years ago, the other about ten years ago, followed in each by the usual cohabitation as of marriage, and the birth of children, under the roof of defendant. On the passage of the law of 1882 the defendant separated himself from the *sexual relations* that had before been maintained between him and Clara, but still supported and sustained her and her children in his house.

Will these facts show the defendant guilty of a violation of the law of 1882? The statute is remarkable for its brevity. It reads:

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."

It is manifest that the first thing to do is to ascertain what the word "cohabits" in this statute means. What constitutes "cohabitation" is matter of law—that I premise at the outset. Webster defines "cohabit" "to dwell with," "as to live in the same country"—in its first or primary sense. It is too obvious for dispute that the word in this statute does not mean cohabitation in this sense; living in the same house or in the same country was not prohibited. If that were so, any male person living in the same country, with the woman would be guilty, or any such person who kept a female servant, above a child's age would be guilty. The next definition by Webster is "The state of living together *as man and wife.*" And if it should appear that a man lived with two women *as wives*, though neither of them in fact were such, or one was, and the other not, he would be guilty. But what does living with a woman as a wife imply? It is admitted that sexual intercourse with a woman is not cohabitation, and that any number of criminal interviews of this kind would not constitute an offense under this statute; and is it not equally true that any amount of innocent living without such intercourse under the same roof does not constitute the offense? Does not cohabitation mean a living together in the enjoyment of the rights that *attach to marriage*, if marriage has taken place, or the same privileges, if no marriage has been celebrated? Must not this interpretation of the statute be applied especially when the circumstances surrounding the passage of this statute are considered?

Polygamy had been prohibited by law, but the proof of marriage had been so difficult, and the time of the statute by reason of the elapse of time was so short, that this law against cohabitation purposed among other reasons, to supplement and make effective the legislation which had been so fruitless in prosecuting polygamy. The actual proof of the marriage was dispensed with, that the *acts which followed it* might be washed by the law.

The cohabitation which *resulted* from the polygamous marriage, which had not heretofore been punishable, was made an offense with a view to suppress the consequences of that marriage, to wit, the birth of illegitimate children, and the thrusting of innocent offspring into life, with the brand of crime upon them.

Is not the idea of sexual relations inevitably connected with the thing forbidden? What sense could there be in inserting the term "*male person*" into the statute unless it was intended to give that fact significance and effect? The very idea of forbidding the association of persons of opposite sex is based on the fact that such association was the impropriety that was forbidden; but if the association as man and as woman is immaterial, as the decision of this case in the court below implies, then this element in the statute is practically eliminated.

It is idle to say that it is necessary that a defendant be *a man*, in order to be guilty, and that he can be guilty by simply doing acts which any woman could do as well as he could. A woman can reside in the house, eat with the family three times a week, control and govern the children, and furnish support for all, as well as a man, and if a man *does only* these things, and exercises no privilege of his sex, is he any more guilty than if he were a woman?

Suppose that Angus M. Cannon were in fact a eunuch, could he be guilty of cohabiting in the sense of this law? And if he lived in the same relations to these two women that a eunuch would, could he be guilty? Go further. A male child above the age of infancy is a "male person;" would the fact that such a child lived under the same roof, or even occupied the same bed with two women make him an offender? Certainly not, and the reason is, that because no *sexual relations* existed or could exist between them.

If a brother lived in the same house with his two grown-up sisters, both of whom were supported and maintained by him openly, would the facts alone show him guilty of the crime denounced in this act? Certainly not, and why? Because no sexual relations would be shown; but to show that the *sexual relation* is the *gist* of the offense, suppose it could be proved that he shared their bed, his guilt would be admitted. I am not insisting that actual or positive proof of sexual intimacy between a defendant and two women shall be shown in order to make out guilt under this statute. I only insist that the jury shall have sufficient evidence to satisfy them, that sexual relations *do exist*, and that no conviction can be had, when it is shown that they do not exist.

What I maintain is: that as matter of law, the jury must find that a defendant shall have sustained, not innocent, but forbidden sexual relations with the two women, or no verdict of guilt can be supported. What evidence will satisfy them is another thing. What I contest is, the doctrine, that a man may be as innocent of improper conduct with these women as a brother should be with his sisters, and yet be condemned to the penitentiary for acts that are not only not wrong, but in truth commendable and praiseworthy, and the refusal to do which would condemn him in the eyes of any just person.

Take this case as an example. The defendant does nothing except to provide for his children and their mothers, and aid by his presence in their training for future duties, for which they are all dependent on him. The prosecution proved no impropriety on his part, and they objected to positive proof of *actual innocence* in his defense, and yet he is convicted on appearances which are not only innocent, but it is admitted that he is innocent of any actual wrong or impropriety.

It is said, that the law is aimed at the scandal of a man living with two women, but there is no scandal where there is no criminality. Scandal results from criminal or conduct which implies it. But it is inverting proof to say that "scandal" proves the crime. The vice of the construction contended for, is in assuming that evil may be proven by appearances, in defiance of the truth. Appearances may be evidence of facts, but they are not the facts themselves—nor can they overcome facts. The reason why the lawmaker in this statute discarded the usual adjectives, "lewd," "lascivious," "adulterous," etc., as a prefix to the word "cohabit," is an obvious one. They did not intend to permit an issue to be raised on the *character* of the cohabitation. It was intended to meet a peculiar state of things where the parties indulging in the practice might claim it as a religious rite. They said it was not lewd, or lascivious, or adulterous, because the gratification of the passions was not the object of it. Hence, to avoid this issue, instead of using any of these qualifying words, it made the offense to consist in the *actual connection* without reference to the motive or purport. But this does not prove that the actual connection between the parties was also intended to be dispensed with.

We admit that actual sexual intercourse alone will not make the offense—that constitutes the well-known crime of adultery—neither does dwelling in the same place constitute the offense, for that would convict every other man in the Territory. But we contend that taken with the dwelling together, there *must be evidence* that satisfies the jury, that sexual relations exist between the parties. In other words, the sexual relation is an indispensible element of the offense—*not all of it*—but a necessary constituent, and on its absence the offense cannot exist.

There is another point in this case which deserves notice. The Court below added to the facts which it specified was necessary to constitute the offense, "that if the defendant, besides living in the same house and eating at the tables of these two women every third day, "held them out" as his wives, by either language or conduct, the jury should find him guilty."

Did the Court mean that the "conduct" already specified, living in the same house and eating at the tables of these two women was to be considered as proof of the offense? If that be so, the charge gives this conduct a double meaning. If the "conduct" is first to be maintained as evidence of a fact to be proved, and then as the ultimate fact, conclusion of guilt, then the "conduct" considered *as evidence* amounted to nothing, and it may well be said that the word "fail" was "not on the slate of the prosecution." If the court meant that if the defendant "held out" those women in such manner as that the public and the jury would understand he was *living with them as wives*, which would imply sexual relations, then the charge misled the jury, for the Court distinctly held that sexual relations need not be proved or found by the jury, and if the court meant that if he once said that these women were his wives since the passage of the law against cohabitation, it gave an instruction on which there was not one word of testimony in the whole case. Nor was there any "conduct" except that first specified in the charge to which such an instruction could apply. So that this part of the charge, unless it was held to be construed by those facts already specified, had not one word of testimony for its basis.

So, take any view of this part of the charge that we may, it was erroneous. I regard the questions thus briefly presented as the vital ones in this case and the Musser case, and I submit that both judgments must be reversed for the errors which I thus have indicated.

LEGAL NOTICE.

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

In the matter of the Estate of Charles Button, deceased.

NOTICE IS HEREBY GIVEN, THAT Amelia Button, Administratrix of the Estate of Charles Button, deceased, has rendered for settlement, and filed in said Court, her final account of her administration of said estate and petition for distribution of the estate of said deceased and that the 7th day of July, A. D., 1885, at ten o'clock a. m., at the Court Room of said Court, in the City of Salt Lake, County of Salt Lake and Territory of Utah, has been duly appointed by said Court for the settlement of said account and distribution of said estate, at which time and place any person interested in said estate may appear and show cause, if any there be, why said account should not be settled and approved and distribution made as prayed for.

Dated June 13th, 1885.

JOHN C. CUTLER,
Clerk Probate Court.
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