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State of Utah v. Richard Jessup : Brief of Respondent

Utah Supreme Court

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No. 6193

In
The Supreme Court
of the
State of Utah

STATE OF UTAH,
Plaintiff and Respondent,

vs.

RICHARD JESSUP,
Defendant and Appellant.

BRIEF OF RESPONDENT

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INDEX

Assignments of Error 1, 4, 5, 10.....	2-15
Subdivision A	2-5
Subdivision B-1 (a)	5-8
Subdivision B-1 (b)	8-11
Subdivision B-1 (c)	11
Subdivision B-1 (d)	11-12
Subdivision B-1 (e)	12
Subdivision C	13-15
Assignments of Error 2, 3	15
Assignments of Error 6, 7, 8, 9.....	21-22
Excerpts of Testimony	15-20
Statement	1

(Index Continued)

TABLE OF CITATIONS

(A Continuation)

26 Am. & Eng. Enc. Law (2d) 575.....	6
14 C.J.S., at page 1311,.....	22
59 C. J. 812, pages 811-814.....	8-9
Laws of Utah 1935, Sec. 103-51-2, page 220	2, 8, 10, 12, 14
Laws of Utah 1935, Sec. 105-21-9.....	4
Laws of Utah 1935, Chapter 112	5
Laws of Utah 1935, Sec. 105-21-39, Chapter 118	11
Laws of Utah 1935, Section 105-21-47.....	13
Laws of Utah 1935, Section 105-21-8.....	13
State v. Green, 68 Utah 251; 249 Pac. 1016	6, 7, 8, 9, 10
State v. Roy (1936), 40 N. M.; 60 Pac. (2d) 646; 110 A.L.R. 1.	5-15
State v. Springer, 40 Ut. 471; 121 Pac. 976.	3
United States v. Cannon, 4 Utah 122; Affirmed 116 U. S. 55	3-14-21
United States v. Musser, 4 Utah 153.	3
United States v. Musser, 4 Utah 156.....	3
Utah Constitution, Article I, Sec. 12.....	12
Utah Constitution, Article VI, Sec. 23.....	6-7

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BRIEF OF RESPONDENT

STATEMENT

Defendant, hereinafter called the appellant, is seeking to reverse the trial court on two general propositions of law: First, (App. Br. p. 2) that the trial court erred in overruling defendant's motion to quash the information, and Second, (App. Br. p. 11) that the trial court erred in overruling appellant's motion for a directed verdict.

The information charges the appellant in the language of the statute (Sec. 103-51-2, Laws of Utah, 1935, page 220), that he, on or about the 1st day of September, 1939, at Washington County,

State of Utah, "did cohabit with more than one person of the opposite sex."

ASSIGNMENTS OF ERROR NOS. 1, 4, 5, AND 10

Appellant's motion to quash is argued upon the grounds that: (A) the information fails to state a public offense; (B) that the criminal act under which it is drawn is (1) unconstitutional, (a) because it provides for more than one subject, (b) because the title does not cover its subjects, (c) because it combines a criminal and civil statute, (d) because it is inconsistent with other acts, and (e) because it provides that a wife must testify against her husband; and (2) the said section fails to set forth or describe a crime; (C) that the information fails to comply with the section stating the crime.

(A)

It seems as though appellant has exerted himself to list a volume of possible objections rather than to cite tenable objections and objections of merit. His argument is that the charging part of the information (which is also the words of the statute), to-wit: "did cohabit with more than one person" are merely "words of wind" and can mean to dwell with one's brothers, sisters, or even children; that said charging part should have adjectives such as "lewdly and lasciviously cohabit" in order to give criminal import to said charging part.

In order to follow appellant's argument, the legislative act would have to be distorted to include the crime of bigamy. One of the essential elements of bigamy is that of sexual intercourse. Said

element "is not a necessary ingredient in the crime of unlawful cohabitation."

State v. Springer, 40 Ut. 471; 121 Pac. 976.

United States v. Cannon, 4 Utah 122;

Affirmed 116 U. S. 55, and

United States v. Musser, 4 Utah 153.

The Cannon and Musser cases are based on the "Edmunds Act," which is designed to protect monogamous marriages. (See U. S. v. Cannon, 4 Ut. 141). The charging part of the Edmunds Act is similar to the Act under which appellant is charged, to wit: "If any male person . . . hereafter cohabits with more than one woman, he shall be deemed guilty of a misdemeanor." Mr. Justice Zane, through

United States v. Musser, 4 Utah, at page 156, says:

"We are of the opinion that the weight of authority is to the effect that the crime of unlawful cohabitation, as defined in the statute under consideration, is made without proof of sexual intercourse, and that proof of non-intercourse is not a defense. . . . We may assume that the authors of this law had in mind the institution of marriage, because they expressly declared that any man who having a wife, marries another, is guilty of a crime, and that any male person who cohabits with more than one woman is guilty of unlawful cohabitation. They had in view the evil effects of such practices. The end of the law was the protection of the monogamous marriage, and the suppression of polygamy and unlawful cohabitation was but a means to that end. It is proper also to take into consideration

the conditions as the national legislature anticipated and understood them in which the law was to be applied and enforced. They knew the time had elapsed within which a very large portion of those living in polygamy could be punished for that offense, and that many of these were among the most influential men in society, being the heads of the church, and that the example of their continuing to live with their plural wives under a claim of divine right, would be a scandal to society and a menace to the lawful marriage; that such examples would be a continuing invitation and apparent justification for their followers either secretly or openly to violate the law. Congress, therefore, forbade plural marriage in appearance only, as well as in form, and by the example of punishment it doubtless intended to eradicate the example of apparent plural marriages as well as the plural marriage in form. . . ."

The information is based on the new Code of Criminal Procedure, which prescribes a short form of information and further prescribes that an information is good if drawn in terms of the statute defining the offense and is sufficient to give the court and defendant notice of what offense is intended to be charged. (Section 105-21-9, Laws of Utah, 1935). The information being drawn in the words of the statute meets the statutory requirement of validity.

Appellant's complaint that the wording of the information was not sufficiently explanatory could have been well supplied by a Bill of Particulars. This was not requested by the appellant; neither did the court request the State to give the appel-

lant a Bill of Particulars. The appellant is not in a position to complain of the information not being specific and sufficiently explanatory when he sits idly by and does not avail himself of his statutory right to be particularly apprised of the crime of which he is charged.

One person may think that an information charging him in plain, short, and understandable language "that he cohabited with more than one person of the opposite sex," informs him better of the offense than an information drawn with great detail after the order of an old common law pleading. While the converse may be true with another accused person, the merits of the long and short form of indictments or informations are discussed in

State v. Roy (1936), 40 N. M.; 60 Pac.
(2d) 646; 110 A.L.R. 1.

B-1 (a)

(1) Appellant's next ground, advanced through his motion to quash, is that the statute under which the information is drawn is unconstitutional, because it contains more than one subject. Said act comprises

Chapter 112, Laws of Utah, 1935.

It reads as follows:

"If any person cohabits with more than one person of the opposite sex, such person is guilty of a felony.

"Any person, except the defendant, may be compelled to testify in a prosecution for unlawful cohabitation; provided, however, that the evidence given in such prosecution shall not be used against him in any proceeding, civil or criminal, except for

perjury in giving such testimony. A person so testifying shall not thereafter be liable to indictment, prosecution, or punishment for the offense concerning which such testimony was given."

It will be noted that the Act deals with the penal code and concerns only sexual offenses. Almost every Act of the Legislature can be divided so that it will contain two or more subjects from a strict grammatical point of view. That is to say, if an Act contains two sentences, it contains two subjects. It would be utterly ridiculous to say that the framers of the Constitution intended, through Article VI, Section 23, to prohibit all legislative Acts containing more than one sentence. Appellant's cited case of *State v. Green*, 68 Utah 251; 249 Pac. 1016, treats this point quite exhaustively. The opinion in the Utah report, at page 277, quoting another opinion, says:

"Manifestly the purpose of this provision of the Constitution is to prevent the Legislature from intermingling in one act two or more separate and distinct propositions — things which, in a legal sense, have no connection with, or proper relation to, each other. The reasons for, and the scope of, constitutional provisions of this character, are well illustrated in 26 Am. & Eng. Enc. Law (2d) 575, in the following language:

"This requirement of singleness is not intended to embarrass honest legislation, but only to prevent the vicious practice of joining, in one act, incongruous and unrelated matters; and, if all the parts of a statute have a natural connection and reasonably relate, directly or indirectly to

one general and legitimate subject of legislation, the act is not open to the objection of plurality, no matter how extensively or minutely it deals with the details looking to the accomplishment of the main legislative purpose'."

Said Green opinion at page 281 recites that on twelve different cases litigants have raised the question of statutes being unconstitutional because they contained more than one subject and only one has been successfully contested.

The Green case seems to be quite in point with the instant case. In the Green case, the horseracing act was contested as being unconstitutional because it contained more than one subject, towit: that of horseracing and that of betting or wagering by way of the pari-mutuel system. The Green case held that the act did not contain more than one subject within the purview of the framers of the Constitution.

The subjects in the instant case do not appear to be as distinct and separate as do the subjects in the Green case. Cohabitation, compelling a person to testify, using evidence in civil or criminal proceedings, and liability to prosecution for giving testimony, all relate to the criminal code and to sex offenses. Hence, we believe that within the contemplation of the framers of the constitutional provision (Article VI, Section 23), Chapter 112, Laws of Utah, 1935, does not contain two subjects. Even if said Chapter 112 was unconstitutional, this appellant could not avail himself of its unconstitutionality because his case dealt only with one subject — that of unlawful cohabitation. His wife was not compelled to testify against him; neither was his purported plural wife; hence no occasion arose

for such evidence to be used against him in civil or criminal cases, and therefore, no liability could arise out of the giving of such evidence.

Suppose the Legislature, to avoid any assailing of its Act upon appellant's contention, divided said Section 103-51-2, Laws of Utah, 1935, into four distinct and separate bills — (1) on unlawful cohabitation; (2) on compelling a witness to testify; (3) on using evidence in civil or criminal proceedings; and (4) on exempting one who testifies, from liability. Each bill would have to be interlocking and references tied to each other in order to give the full meaning of the intent of the Legislature. All constitutional or legislative Acts are supposed to be based on reason and public policy. Would it be more reasonable to draft the contents of said Section 103-51-2 in four separate bills than to draft it in one? Could said section be more clearly expressed through interlocking phraseology of four bills necessary to give the contents of said section? What public policy would favor expressing said Section 103-51-2 in four bills? These questions clearly answer themselves.

B-1 (b)

Appellant next complains of Chapter 112, Laws of Utah, 1935, being unconstitutional because its title does not express all its subjects. He quotes 59 C.J. 812 and *State Fair v. Green*, 68 Utah 251, as saying "all parts of an Act which are not within the title are unconstitutional and void." Said *Corpus Juris* citation more fully stated, reads as follows (Pages 811-814):

Sec. 393: "Since a constitutional requirement that the subject of a statute be ex-

pressed in its title is generally regarded as mandatory, the title is an essential part of an act, and the subject expressed in the title fixes the limit of the valid scope of the act. The provisions of an act must correspond with the subject expressed in its title; so nothing can validly be included in the body of a statute which is not expressed in or covered by the title, and all parts of an act which are not within its title are unconstitutional and void, even though such provisions might properly have been included in the act under a broader title. All matters, however, which are germane to, and naturally connected with, the subject announced by the title of an act and not excluded thereby are covered by it and may validly be included in the statute; and for the purpose of determining whether or not a provision is germane to the title a reasonable meaning should be given to the words and context of the provision.

Sec. 394: "Any means or provisions reasonably adapted to carry out and make effectual the principal object or purpose of a statute as disclosed by its title may be included in the body of the act, although not expressed or referred to in the title, without violating a constitutional provision requiring the subject of an act to be expressed in its title."

It will be noted that appellant has failed to descend this above quoted general principle of law down to the particulars of the instant case, as is announced in Section 394, *supra*, and also as is held by the above Green case. In the Green case, the horseracing statute was assailed as being un-

constitutional, because, among other reasons, parts of the act were not within the title, hence, such parts were void. The title of said horseracing act read: "An Act Relating to Horseracing and Providing for the Creation of a State Racing Commission and Defining its Powers and Duties and Repealing all Acts and Parts of Acts in Conflict Therewith." Section 6 of the act permits betting after the order of the pari-mutuel system. Appellant contended in said Green case that said Section 6 was not expressed in the title of the act. The Court held to the contrary on the theory that the pari-mutuel system of betting is associated and connected with horseracing. A note at page 814 of the above quoted Corpus Juris citation quotes the rule announced by Mr. Justice Straup in *State Fair v. Green*, supra, to be as follows:

"A provision in a bill to be germane to the subject expressed in the title is not required to be a necessary or even a usual or customary incident to the subject so expressed in the title. It is enough if it is directly or indirectly related to, and bears a natural connection with, such general subject, and such connection or relationship need not even be logical, but must be harmonious, and not discordant, with the expressed subject."

An examination of the above authorities readily shows that the body of Section 103-51-2, supra, is germane, related to and couched under the title of said section. To follow appellant's motion in the instant case, the title of the act would be about as large as the body of it and would express its substance about as much as it would be expressed in the body of the act. It seems clear that the constitutional convention did not intend the legislative bodies to go into great length and particular.

ity in the title of acts so that every particular part of the act is expressed in its title. The act in question we believe, would have been sufficiently expressed in its title if said title would have only referred to unlawful cohabitation; because compelling all but the defendant to testify and exempting them from criminal and civil liability is directly related to the act concerning unlawful cohabitation.

B-1 (c)

Appellant next complains because the act combines a criminal and a civil statute. He cites the case of *State v. Truman*, 32 Wash. 294; 73 Pac. 375. In the *Truman* case the act was entitled "An Act Relating to Crimes and Punishments, and Proceedings in Criminal Cases." The act then provided for bastardy proceedings. Held that bastardy proceedings were civil, hence, in derogation of the constitutional provision providing that every law shall contain but one subject, which shall be expressed in its title.

In the instant case the act only gives the witness who testifies a privilege to the effect that what she says cannot be used against her in any criminal or civil action except for perjury. Said act has nothing to do with combining a civil action with a criminal action or providing for a civil action under title of a criminal action as is announced in the *Truman* case. Then, too, the appellant cannot claim any prejudice to his substantial rights because his wife did not testify against him.

B-1 (d)

Appellant next complains about the unlawful cohabitation act, Chapter 112, as being inconsistent with Chapter 118, Section 105-21-39, Laws of Utah, 1935, in that the former act exempts the wife and

the plural wife from prosecution as accessories, while the latter section includes them as accessories. We need not bother ourselves with a construction or explanation of the mentioned inconsistency, as it does not concern us because the wife or plural wife did not testify in the instant case.

B-1 (e)

Appellant next complains that the act, Section 103-51-2, *supra*, violates Article I of Section 12 of the Utah Constitution, which provides that "a wife shall not be compelled to testify against her husband." This question is not at issue, because appellant's wife did not testify against him, hence, he is not an interested party to complain against the unconstitutionality of the act.

B-1 (d)

Appellant lists as another reason that the said act violates Article I of Section 12 of the Utah Constitution, that it disregards the provision that the "accused shall not be compelled to give evidence against himself." He raises this question out of a twisted reasoning that the complaint should have listed his purported wives as accomplices and then in this premise the statute provides that the purported wife is compelled to testify against herself. Appellant, through his contortions of reasoning, has apparently, by inadvertance, built the premise of a confession that his purported wives should have been listed along with him as accomplices. We submit also that this point is immaterial and not before the Court for consideration, for the reasons expressed in the preceding subdivision B-1 (e).

C.

Appellant complains of the information failing to comply with Chapter 118, Laws of Utah, 1935. He parallels the information with a hypothetical information charging a public offense as: "John Doe committed murder," and further says that such charge is meaningless, that it is like hanging a man because he is charged with committing murder when no one has been killed. He then cites "Forms for Certain Offenses," as is prescribed by Section 105-21-47, Laws of Utah, 1935, one of which is: "AB murdered CD."

Appellant's hypothetical information would be more parallel if the instant information alleged: "Richard Jessup committed unlawful cohabitation." The information follows the stock statutory rule of pleading (Section 105-21-8, Laws of Utah, 1935), which provides it is sufficient if it charges the offense by using the name given it by statute by stating so much of the definition of the offense in terms of the statute defining it. As heretofore stated, the information follows specifically the wording of the statute defining unlawful cohabitation. It seems appellant's complaint is that the information does not give the names of the persons of the opposite sex with whom appellant is alleged to have cohabited. Of course, through a Bill of Particulars, which he did not request, the names could have easily been supplied. Hence, appellant is in a poor position to now complain of the failure to supply the names. (*State v. Roy, supra*). Suppose that the court would not allow the names of the women he is alleged to have cohabited with (probably for reasons of public policy, such as to preserve the character and reputation of the women) to be announced. Query: Would the information and proof be essential to

warrant a conviction without an allegation and proof of the names of the persons of the opposite sex? Could it be said that the crime of unlawful cohabitation was not committed when the charge and proof clearly showed that John Doe "did cohabit with more than one person of the opposite sex," without alleging and proving the names of the persons of the opposite sex? No matter how overwhelming is the proof of the crime, should justice be defeated because the prosecution does not or cannot supply the names of the women the accused is alleged to have cohabited with? "What's in a name — a rose by any other name would smell as sweet." So, too, the crime of unlawful cohabitation would be as complete by showing the persons that appellant is alleged to have cohabited with were of the opposite sex. Yes, "opposite sex" more accurately defines them than to list their names, for their names might suggest they were of the male sex. The opposite of appellant's contention is the contention of the appellant in *United States v. Cannon*, 4 Ut. 134, that is to say, the indictment charged that Angus M. Cannon committed the crime of unlawful cohabitation, etc. The information was contested because it did not allege he was a male person. The Court held:

"An indictment for the offense created by Section 3 of the Act of Congress . . . (very similar to Section 103-51-2, *supra*) need not state that the defendant is a male person, even if the defendant's name be not a distinctively masculine name. It is presumed that the defendant is charged as a male person, when he is charged with an offense which could only be committed by such a person."

Appellant cites the above Cannon case as an authority for holding that the failure to recite the

names of the women the accused is alleged to have cohabited with as being "insufficient in not giving particulars." Said holding is not contra to the instant case, because it was appellant's fault in not asking for a Bill of Particulars enlarging the information to include the names of the members "of the opposite sex."

As authority for our contention that the information is sufficient, we cite *State v. Roy*, supra (40 N. M. 397; 60 P. (2d) 646; 110 A.L.R. 1). Said *Roy* case is quite recent (1936) and many of the jurisdictions uphold the short form of the indictment. It is too voluminous to attempt to set out herein. We believe it is a well selected case. We invite the Court to read it.

ASSIGNMENTS OF ERROR NOS. 2, 3.

Appellant next complains of the insufficiency of the evidence to warrant the case going to the jury. His complaint is centered on the failure of the State's evidence to show that the persons of the opposite sex had a fixed residence with the appellant.

The State's first witness called (Tr. p. 2) was Lola Jessup. She was not present. A doctor's certificate was produced showing she was physically unable to be at court (See Judgment Roll). The testimony of the State's witness, Deputy Sheriff Sam Fullerton, as pertinent reads as follows (Tr. p. 3):

"Q. On September 1st, as deputy sheriff, and with Antone B. Prince, county sheriff, you made a visit to New Harmony, is that right?

A. Yes.

Q. At that time did you visit the home of Richard Jessup up near New Harmony?

A. Yes.

Q. State just what you saw when you went in there, that is with reference to individuals or persons.

A. Well, when I went in there was one lady setting right to the right of the door, as I went in, and another lady back a little further, and she left. I never only just saw her as she went out the back door.

Q. Do you know who went out the back door?

A. Yes.

Q. Who was it you saw at the place as you first went in?

A. Ida Jessup, she told me her name was.

Q. The wife of Richard Jessup?

A. Yes.

Q. Did she tell you who went out the back door?

A. Yes.

Q. Who?

A. She said it was Lola.

Q. Do you know where Lola went?

A. No.

Q. Did you see Lola again that day?

A. No.

Q. Have you seen Lola since that time?

A. No.

Q. When she went out the back door did she run or did she just walk out?

A. Well, she went pretty fast."

The testimony of Sheriff Antone B. Prince, as pertinent, is as follows (Tr. p. 4):

"Q. Did you visit the Richard Jessup home that day? (Sept. 1).

A. Yes.

Q. Did you see Lola Jessup at that time?

A. No.

Q. Did you know where she was?

A. I didn't know where she was. We couldn't locate her.

Q. How is that?

A. I don't know where she was.

Q. You didn't see her at the home?

A. No.

Q. Did you have any conversation with Richard Jessup with reference to Lola?

A. Yes.

Q. Did he say anything about where she was?

A. He said that he didn't know where she had gone.

Q. Did you see Lola Jessup after that day?

A. Yes.

Q. When?

A. The following morning.

Q. Where did you see her then?

A. In her home.

Q. Where?

A. In the home of Richard Jessup.

Q. That is near New Harmony?

A. Yes.

Q. What was the purpose of your visit there at that time?

A. I went to serve a subpoena on both she and Ida Jessup.

Q. Did you serve a subpoena upon Lola Jessup or Johnson?

A. Yes.

Q. What name did you serve the subpoena in?

A. I think it was Lola Jessup Johnson.

Q. Lola Jessup Johnson?

A. If I remember correctly. I could be mistaken. I served Jessup, I know, I wouldn't say about Johnson. I believe it was Johnson.

Q. Did you ask her at that time if she was Lola Jessup, or do you remember?

A. I don't remember making — asking that question.

Q. You did see Lola Jessup, or Lola Johnson, at that time?

A. Yes.

Q. Where was she?

A. She was in the living room behind a door, sitting on a bed holding a baby in her arms.

Q. She was not in bed at that time?

A. No.

Q. Was she at that time apparently in good health, as nearly as you could tell?

A. As near as I could tell, yes.

Q. Will you state whether or not, if you observed, that she was in a pregnant condition?

A. Yes, sir."

Miss Mary Carling testified that she lived at New Harmony about two weeks prior to September 1st; that she is a cousin to Lola Johnson Jessup and to Ida Johnson Jessup; that she has known Lola Jessup ever since she was a little girl; that she was staying with her cousin, Lydia, wife of Fred Jessup, which was 30 or 40 yards from the Richard Jessup home; that she saw Lola Johnson at the Richard Jessup home about September 1st, and that she was on a visit at that time; that Lola Johnson was pregnant.

The record shows that the witness, Mary Carling, was a very unwilling witness and attempted to shield her cousins and appellant on facts surrounding the commission of the crime.

The foregoing facts and testimony, appellant contends, do not establish unlawful cohabitation within the meaning of the authorities he has cited, in that said facts do not establish a "fixed residence" of the "persons of the opposite sex."

If said facts were all the facts of this case bearing on the sufficiency of the evidence, we are of the opinion that the issue would be close as to whether or not the State made a prima facie case. We will not stop to show the above facts made a prima facie case, because we believe said facts, coupled with the confession of the appellant free and voluntarily

given on his own initiative as he was being taken to jail, clearly and convincingly establishes the State's case. The record, as pertinent, (Tr. p. 23), reads:

“Q. Now, will you state where that conversation took place, or that statement was made, rather?

A. Well, it was in my car on the road from New Harmony.

Q. Who was in the car at that time?

A. Richard Jessup and Fred Jessup, myself and Mr. Fullerton.

Q. Will you state what that was that Mr. Jessup said at that time?

A. Mr. Jessup said that they were being persecuted, he didn't say “prosecuted,” persecuted, for the same thing that their fathers had done.

Q. And did he say anything further at that time that you recall?

A. He said: ‘We believe in living the laws of God,’ as near as I can recall, he says: ‘The laws of man are man-made laws,’ he says: ‘We believe in living according to the laws of God.’

Q. Then what did you do after you arrived at St. George?

A. We put them in the county jail and went home.”

Such a confession, coupled with the facts, warrants the jury in bringing in their verdict of guilty after only five minutes of deliberation.

ASSIGNMENT NO. 6

Appellant objects to the State asking a witness if she was acquainted with "Lola Johnson, sometimes called Lola Jessup," on the grounds that no one had testified that Lola Johnson was also known as Lola Jessup. The record (Tr. p. 5) shows that the sheriff testified to serving a subpoena on Lola Jessup Johnson. Hence, even if appellant's objection was serious, it is cured by the record's prior showing Lola Johnson and Lola Jessup was one and the same person.

ASSIGNMENTS 7 AND 9

Appellant next objects to the court permitting testimony of the whereabouts of persons two days after the arrest of the appellant. We fail to find such testimony in the record. We do find testimony concerning the whereabouts of Lola and Ida the next day after the arrest. (Tr. p. 28).

We believe because of the close proximity to the time of the alleged crime, no error could arise that would reach to the substantial right of the appellant, especially in view of the appellant's confession.

ASSIGNMENT NO. 8

Appellant further complains of the State's testimony showing the pregnant condition of Lola Johnson. He cites U. S. v. Cannon, 4 Ut. 122, as an authority. Said Cannon case holds that it is not essential to prove sexual intercourse in order for the State to prove a prima facie case.

14 C.J.S., at page 1311, says:

“As defined in the dictionaries and cases the meaning of the word in its broad sense is to dwell or live with or together in the same place, house, or abode. More specifically, however, “cohabit” has been defined as meaning to live together as husband and wife, or man and wife, lawfully or unlawfully as the case may be, as implying sexual intercourse, or the possibility of sexual access.”

Although sexual intercourse is not an essential element to be proved in the crime of unlawful cohabitation, pregnancy of one of the opposite sex directly relates to the proof of dwelling together as man and wife. Especially is this true when the proof is that both of the persons of the opposite sex were pregnant (Tr. p. 25). We believe that the question of pregnancy of Lola Johnson is very material and pertinent to the proof of unlawful cohabitation of the appellant. Even if the fact of pregnancy was not material, an overruling of objection to the introduction of such evidence would not be error going to prejudice the substantial rights of the appellant.

We submit that appellant had a fair trial and no error was committed by the trial court infringing upon the substantial rights of this appellant.

Respectfully submitted,

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