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Next term opens September 15th, 1884.

OVERRULED.

Judge Zane Disposes of the Motion.

THE CASE OF JOHN FOWLER.

A Stupendous Array of Words, With But Little Law and Less Logic—The Motion Denied.

The defendant in this case moved the Court to set aside the indictment for a number of reasons, that he should not be held to answer the indictment found by the grand jury in his case. And one objection is, "because the following-named persons, viz.—John Barton, O. D. Hendrickson and others were each and all illegally rejected from said panel of said grand jury, because they believed that polygamy was authorized by divine law; although they stated on their voir dire that they would, if on the grand jury, find indictments under the United States statute against polygamy or bigamy, if the evidence before them showed that any person had violated said statute, and was liable to prosecution under it."

I have been referred to the Second Utah Reports, U. S. versus J. H. Miles. In the trial of that case before the District Court, those who belonged to and were members of the Mormon Church were asked if they believed in the doctrine of polygamy, and they answered that they did, but that they would agree to enforce the law against it. The Court commenting on the point now under consideration said:

"A religious belief takes strong hold upon the individual. If a person believes it is his religious duty and privilege to do an act, he would not, as a consequence, look upon such act as criminal. Looking upon the act as innocent, he would naturally, but perhaps unconsciously, be averse to inflicting punishment therefor. We would not like to find a man guilty of a crime for doing that which he thought the Almighty authorized him to do. In such a case he would naturally lean towards an acquittal, and would possess that state of mind which would lead to a just inference that he would not act with entire impartiality in the case."

And the Court held, without reading further, that the objection to the questions asked the jurors mentioned was properly overruled, and held further that the jurors were properly excluded. Reference was also made to U. S. Reports, 13th Octo., page 394, Miles vs. U. S. I presume it was the same case, although I have not examined it. (Attorney Dickson—Yes, the same case your honor) which considers the point I have referred to, as decided in the Utah Reports. The Court says:

"It is evident from the examination of the jurors on their voir dire, that they believed that polygamy was obedience to the will of God. At common law, this would have been ground for principal challenge of jurors of the same faith. 3 Bla. Com. 303. It needs no argument to show that a jury composed of men entertaining such a belief could not have been free from bias or prejudice on the trial for polygamy, of a person who entertained the same belief, and whose offense consisted in the act of living in polygamy."

The Court in this case also held that the objection to this question was properly overruled. It seems, therefore, that this objection has been settled by the Supreme Court of this Territory and also by the Supreme Court of the United States, and that it is not now an open question in this court.

Another reason assigned by the defendant to set aside this indictment is: "The defendant also assigns as further and additional reasons why said indictment should be set aside, that Thompson Ritter, a member of the grand jury that found said indictment, was not at the time said jury was impaneled, nor when said indictment was found, an eligible juror as provided by law, because his name was not on the jury list prepared by the Probate Judge and the clerk of this court for the year 1879, nor on the jury list for any other year, and his name was not drawn from the jury box of this court."

It appears from the evidence in this case that the name of Thompson Ritter was in the list prepared by the Probate Judge and the Clerk. In that list Thompson Ritter's place of residence was given as Riverdale—a village, as I understand—and the name of Thompson Ritter was drawn out of the box. The Marshal served the summons on him, and he appeared in answer to the summons and stated—I suppose that he was sworn and accepted—that his name was Thompson Ritter. He also stated here yesterday that there were but two persons by the name of Ritter in the place where he resided, himself and his brother George. While the name of a person of course is given to describe the person, it is a very imperfect description, and unless you can couple something with it the description would not enable you to find a person always. The name of John Smith, without locating him, could be answered by several thousands of men. I presume, in the United States, and it would be as true of a description of one as another. When the Clerk of the Probate Court and the Probate Judge selected this name, they also connected with it the location, and from that and the evidence of the witness that no other person except George Ritter and Thompson Ritter lived there, it is quite clear who they intended, and it would hardly do to say that they intended George Ritter because that is so unlike Thompson; while Thompson is very much like Thompson in sound though not the same. The name of a person of course and the person himself are different things. The man whom the officers had in their mind when they placed the name upon the list was undoubtedly, from the evidence, Thompson Ritter. It has been made the reproach of the law, and while it is said to be the perfection of human reason, sometimes some technicalities defeat or are opposed to human reason. And it would seem to me that this objection can have no substantial reasoning upon which to stand, and it ought not to be sustained because the man is, as it appears, who was actually intended, did appear, and he was a competent juror, and nobody in the light of the evidence could have been injured because the Probate Judge and the Clerk of the court hap-

pened to make a mistake in his first name, calling him Thompkins instead of Thompson.

Another reason assigned is: "Because Alexander Majors, a member of said grand jury, was not at the time said jury was impaneled, nor when said indictment was found, an eligible juror as provided by law, because he had not resided in this Third Judicial District six months next preceding the time when he was selected by the Probate Judge or the Clerk of the District Court of said district, to serve as a juror, and because he was not then and has not since been, a taxpayer in this Territory; and because he had served in this court as a petit juror within two years next preceding the impaneling of said grand jury and the finding of said indictment, to-wit, at the April term, 1879, of said court, as appears from the record; and because he had illegally returned to the jury box and again drawn therefrom as a grand juror for the September term, 1879, of this court."

It appears from the evidence that the family of Majors—whatever family he had—resided in the State of California; that he was here on business for nearly about two years, going to Nevada to look after the evidence warrants the inference—occasionally, and the question is, was he a resident within the meaning of the law?

I have been referred in Wendell's Reports, (Vol. 19, page 11) to the case of Frost & Dickinson vs. Brisban. Chief Justice Nelson delivering the opinion, which appears to have been affirmed in the opinion of the Supreme Court of New York says:

"In the matter of Fitzgerald (2 Caines 317) it was decided that a person coming into this State and remaining for a special and temporary purpose, without any intent of settling here, was not a resident within the meaning of the act for relief against absent debtors. In the matter of Thompson (1 Wendell, 43) the court held under the same act, but in respect to an absent debtor, that residing abroad, engaged in business for a time, whether permanently or temporarily, was a resident residing out of the State, within the meaning of the statute; that the actual residence of the debtor was competent evidence to distinguish from the place of his domicile. In the matter of Wrigley (4 Wendell, 602, 8 id 134), it was held that a person remaining temporarily for a month in the City of New York and Brooklyn, intending to commence business in Canada, was not an inhabitant or resident, within the meaning of the insolvent act of 1812. In Rosvate vs. Kellogg (20 Johns. R. 210, 11) a resident of a place is said to be synonymous with an inhabitant, one that resides in a place. It may, I think, be doubted if this position is strictly accurate, as the latter term implies a more fixed and permanent abode than the former, and frequently imports many privileges and duties which a mere resident could not claim or be subject to. Approved lexicographers give a more fixed and definite character to the place of abode of the one than the other. Be this, however, as it may, the cases cited above, establish that the transient visit of a person for a time at a place, does not make him a resident while there; that something more is necessary to entitle him to that character. There must be a settled, fixed abode, an intention to remain permanent at least for a time, for business or other purposes, to constitute a residence within the legal meaning of that term."

Omitting a portion of this opinion the Court says further: "One of these cases expressly, and all of them virtually, decide that actual residence, without regard to the domicile of the defendant, was within the contemplation of the statutes. * * * The domicile of a citizen may be in one State or Territory, and his actual residence in another."

That seems to me to be sound reasoning. The duty of a juror is a burden imposed upon a citizen, and one which he owes to society, and of course if he is, for the purpose of business out of the State where his domicile is, in another State doing business, and actually living there, he cannot discharge the duty which he owes to society at the place of his domicile, and if he is otherwise unobjectionable, I see no reason why he should not perform that duty at the place where he actually lives and resides, among the people with whom he is doing business and associating, and who know him; I see no good reason for it; and it would seem to me that this opinion is based upon sound reasoning, and that on the principle there laid down I am disposed to hold that Mr. Majors, while his domicile was in California, his residence for the purpose of his doing his duty as a juror was in the Territory of Utah. It appears that Mr. Majors had served on a jury before in this court within two years or within the time that he had actually lived here.

Another objection that is made to Mr. Majors as a juror, is that he was not a taxpayer. It appears that he was not a taxpayer before he was taken on the jury, and that he was interrogated as to whether he was a taxpayer or not, and among other things he answered that he was not; but was asked by the State's Attorney if he didn't own a watch—and I think the inference is that reference was made to the watch and chain that he had on; it is reasonable to assume that the watch was with him, and he said that he had, and so far as the examination shows as to that particular point it ceased; the evidence did not show with any certainty or clearness that he may or may not have been a taxpayer in the Territory of Utah, according to his answer. I am inclined to think he was, according to the answers of other witnesses. The presumption is that those jurors were competent, and of course the burden is upon the defendant to show clearly that they were not—to overcome the presumption by the clear weight of evidence. It is pretty clearly shown that this man Majors didn't pay taxes here. It is shown that he was not assessed, and that he did not pay taxes; but the Supreme Court of this Territory—1st of Utah Reports, in the case of the United States vs. Reynolds, say upon this question: "It is likewise asserted that one of the jurors did not pay taxes. He had taxable property, however, and was ready to pay taxes. If he was not assessed, and not thus allowed to pay taxes, it was not his fault, and he cannot be excluded from the jury box for failing to pay taxes."

This opinion, therefore, holds that it was unnecessary that a juror should actually pay taxes if he has property that is taxable. The point was made that his (Majors') domicile was in San Francisco, and that, therefore, his watch should be assessed there. I am inclined to hold, under the laws of this Territory, that the fact that he was here, as shown, and had his property with him, authorized the revenue officer to assess it; it was taxable here. It was true that under the general law of the land, where not otherwise provided by statute, that assessable property is at a man's domi-

the place of his abode. But the statutes of this Territory, I am disposed to hold—without referring to them more particularly—have changed that rule, and made it all personal property, except such as was excepted by the statute, and this watch, as I understand, is not excepted. There is a question, however, that may be suggested by this one as respects the qualification that he should be a taxpayer, and as respects his having served on a jury within two years; there is some room, I think, for controversy here, which I simply call attention to.

It would seem that this act of Congress provided the method of the selection of jurors; it provided for the list being made up by the Probate Judge and the Clerk of the District Court.

(The Judge read Sec. 4 of the Poland Bill providing the manner in which jurors are to be drawn, etc.) The Territorial Statute says that notwithstanding they may answer the description of persons mentioned in the United States law, still they are not competent, and they must answer another qualification, which is, that they must be tax-payers, and that they must not have served on a jury within two years. These are additional qualifications to the ones mentioned in the United States law. It occurred to me as I was examining this statute—and I do not know whether there is any decision on it or not—I am confident that the question has not been passed upon; but it would seem to me that if the Territorial Legislature can impose other tests, they may cut down this 200 names very materially, so that there would be very few left. They are limited to 200, and it is found that they do not last half the year.

The other objection made to this indictment is, that the evidence shows that the juror Majors, and another juror had served on a jury in a trial of a case within two years next preceding the time they were selected by the Probate Judge and the clerk of this Court, and I infer within two years from the time they served on a grand jury.

[The Judge read the law on this point.] Proceeding he said: "You will observe that the language here is, that he has served as a grand or petit juror within two years next preceding the time they were selected. It does not state whether it is a juror that has served for a term, or whether his name has simply been drawn as a juror and examined and found incompetent, or whether he has actually served in the trial of a case. The description is general, that he has served as a grand or petit juror within two years next preceding the time of the selection. Now, there are different classes of jurors. One is what is known in common parlance as the regular panel; another class is termed talesmen, who serve in one case. These jurors (Majors and the other) it seems had, within a year, or within two years at least, their names drawn out of the jury box, and few fixed during the whole term; and in stating that their names should not be placed back in the box it refers to those who have served during the term. One reason for this probably was to equalize the burden upon eligible persons as near as possible. If that is so it would be unequal law to say that those who serve during the whole term, and whose names were placed upon the same footing as those whose names were simply drawn and did not serve. The reasons for the one case do not hold good, and the statute here says nothing about those who were drawn out to serve in one case, whether their name should be placed back into the box or not. It is true that if enough were not drawn out at first, the regular panel, I presume, could be filled up under this provision. But Congress seemed to have had in view the fact that the judge should order enough drawn out to constitute the regular panel jury, and these were drawn out for special duty. Nothing is said as to whether names should be placed back into the box or not. I am informed the District Judge and his brethren of the other districts have construed this law to mean the names drawn out in the regular method, and not to those drawn during the term for special service for one case. If that is the proper construction of this law, then to construe this statute of the Territory of Utah as applying to a juror whose name is drawn out to serve in one case, to hold it to apply to that, would be to hold that the Legislature intended, notwithstanding the intention of Congress, that where a juror's name was drawn out to serve in one case, and his name was put back into the box, that he was not a competent juror. I am disposed to hold that the construction which has been made of this section 4 of the Poland law is a proper construction, that where they are drawn for special duty to serve simply in one case that their names may again be put back into the box and be drawn to serve as regular jurors, notwithstanding they may have served in one case. That being so, I am disposed to construe this statute of the Territory with reference to the act of Congress and to hold that the intention of the Territorial Legislature was to conform to the act of Congress. And in speaking of grand and petit jurors, they intended jurors for the term, grand jurors certainly, but coupled with petit jurors. The grand jurors must be for the term; they could not serve on one special case; and the petit juror is coupled with it and that without qualification, and that must mean to be jurors for the term.

This view that I have taken on this motion disposes of all the questions that I deem it necessary now to direct attention to, particularly, the motion is therefore set aside.

An exception was taken to the ruling by counsel for the defendant.

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NOTICE.

THE ANNUAL MEETING OF THE STOCK HOLDERS of the Salt Lake Foundry and Machine Co., for the purpose of electing Directors, and transacting such other business as may come before the meeting, will be held on Thursday, October 16th, 1884, at 3 o'clock p.m. at the Company's Office, in Salt Lake City, Utah.

By order of the Board of Directors, ELIAS MORRIS, President.