

or tend to show, simply the existence of the marriage relation, or whether, when considered in connection with the immediately preceding questions and answers, it would show directly that the relation sustained was the criminal one charged in the indictment. The reviewing court, however, seemed to treat the question as an effort to establish by common repute the existence between the parties of the bigamous relation charged in the indictment; to prove by common repute the crime itself. If such was the object of the question, the conclusion of the court was unquestionably correct. If, on the contrary, the court meant to declare that such evidence of the existence of the marriage relation was incompetent in any case, its view cannot be followed here.

It being concluded in this cause that the evidence was sufficient to justify the verdict, and that there was no error in the admission of the testimony, or in the giving of the instructions complained of, it is therefore ordered that the judgment appealed from be affirmed.

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UNITED STATES v. DURANT.

(District Court, E. D. South Carolina. July 8, 1891.)

POST-OFFICE—MAILING OBSCENE MATTER.

A letter in which the person to whom it is addressed is called "a son of a bitch," inclosed in a sealed envelope, does not render the sender liable, under Rev. St. U. S. § 3893, as amended by Act Cong. Sept. 26, 1888, prohibiting the mailing of matter "upon the envelope or outside cover of which, or any postal-card upon which, are any delineation, epithets, terms, or language" of an indecent, libelous, or defamatory character, etc.

At Law. Indictment for mailing obscene matter.

*A. Lathrop*, Dist. Atty.

*Thomas E. Miller*, for defendant.

SIMONTON, J., (*charging jury*.) The defendant sent through the mail, sealed, a letter addressed to one E. H. Deas. In the letter he speaks of a prosecution set on foot against him by Deas for forgery, and of his acquittal, and, referring to Deas' testimony, calls it a lie, winding up by calling him "a lying son of a bitch." He is indicted under section 3893, Rev. St. U. S., as amended by act of congress approved September 26, 1888. This section punishes the sending through the mail, sealed or unsealed, "any obscene, lewd, or lascivious book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character." The district attorney rests on the fact that this letter is obscene, within the words of this section. It seems to me that this section is intended to forbid the dissemination through the mails of obscene literature, of the use of words or pictures, appealing to the animal passion, stimulating it, corrupting and debauching the mind and heart, (see *U. S. v. Clark*, 43 Fed. Rep. 574;) and that when congress seeks to prevent the use of the mail

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for the employment of language of an insulting character it confines itself to postal-cards and letters on the envelope of which this language appears. In the act containing the amendment to section 3893, on which this indictment is framed, is a section declaring unmailable "matter upon the envelope or outside cover of which, or any postal-card upon which, are any delineation, epithets, terms, or language of an indecent, lewd, lascivious, obscene, libelous, scurrilous, defamatory, or threatening character, or calculated, by the terms or manner or style of display, and obviously intended, to reflect injuriously upon the character or conduct of another." The letter of the defendant comes within this description, and, as he sealed the letter, he did not violate the law. The jury will find the defendant not guilty.

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BEACH *v.* UNITED STATES.

(*Circuit Court, N. D. California.* June 9, 1890.)

CRIMINAL LAW—REFUSAL OF WITNESS TO TESTIFY—MISCONDUCT OF COUNSEL.

Where a witness called by the government refuses to answer certain questions on the ground that the answers may tend to criminate him, it is reversible error for the court to charge the jury that such refusal is a circumstance from which it might be argued that the object of the witness was to shield the defendant rather than himself, and to allow the district attorney to argue that such refusal was a circumstance to be considered by the jury in making up their verdict.

On Writ of Error from District Court.

*S. M. Buck* and *A. P. Van Duzer*, for plaintiff in error.

*John T. Carey*, for the United States.

Before FIELD, Justice, and SAWYER, Circuit Judge.

FIELD, Justice. We are clear that the court below erred in allowing the district attorney to argue to the jury that the refusal of Marks to answer certain questions on the ground that his answers might criminate himself, was a circumstance to be considered by them in making up their verdict; that they had a right to consider whether it was not his real object to protect the defendant, and not himself; and that, "if he was thus particular to protect the defendant," it must have been from a knowledge that his answers might criminate, not himself, but the defendant. It was also error in the court, while stating generally to the jury that the refusal of Marks to answer could not be considered as evidence against the defendant, to accompany the statement with the charge that it was a fact in the case from which the district attorney had a right to argue that the refusal was not to save himself, but to save the defendant; that he had a right to argue from the character of the questions put, and the persistent refusals of the witness to answer any of them, and from the fact that it was not apparent to any one how the answers to the questions, or to some of them, could criminate him, "that his real object was