A QUESTION OF FEES.

In the Third district court this morning, Judge Bartch delivered his opinion in the case of the United States of America, plaintiff, vs Henry G. McMillan, John J. Daly and Worden P. Noble, defendants, argued and submitted recently.

It was an action brought against the defendant McMillan and his sureties on his bond as clerk of the Third district court, and it was alleged that he had failed to make returns of certain moneys received by him as emoluments of his office from June 8th to December 31st, 1889. The complaint stated that between those dates Mr. McMillan, as clerk, collected and received from different sources as fees and emoluments of his office the sum of $7458 70, of which $988.90 was received in United States business, $3776 for declarations of intention and naturalization, and $2693.80 from private persons in civil litigation, and from the Territory of Utah on account of territorial business.

The point that arose in the case was on a demurrer to the complaint, on the ground that neither of the counts stated facts sufficient to constitute a cause of action. The question, said his Honor, was as to whether the defendant clerk was compelled under the law of the United States to make returns of Territorial emoluments that are received from Territorial business and from naturalization. The plaintiff claimed that under the law he was required to make these returns, and the defendant denied that he was so required under the statute. This required a construction of the act relating to fees for these officers, and whether that act applied to Territorial business. The act to regulate fees and costs to be allowed clerks, marshals and attorneys of the circuit and district courts of the United States was passed February 26th, 1853, and provides "That in lieu of the compensation now allowed by law to attorneys, solicitors and proctors in the United States courts, to United States district attorneys, clerks of the district and circuit courts, marshals, witnesses, jurors, commissioners and printers, in the several states, the following and no other shall be taxed and allowed." And then followed a specification of fees to be allowed in the conduct of the business.

In this act, remarked the court, the territories were not included, and its provisions did not apply to clerks of territorial courts, but only to clerks of the circuit and district courts of the several states of the United States. There was no allusion whatever in any of its provisions to territorial, civil or criminal business, nor was there any reference to naturalization of aliens. The act was passed to regulate the fees for United States business in the several states, and there could be no question that no reference whatever having been made to the territories or officers of the territories—that at the time of its passage it was not intended to apply to these territories.

The law so continued without reference to the territories until March 3rd, 1855, when it was enacted "That the provisions of the act of February twenty-six, eighteen hundred and fifty-three, to regulate the fees and costs to be allowed clerks, marshals and attorneys of the circuit and district courts of the United States, and for other purposes, are hereby extended to the territories of Minnesota, New Mexico and Utah, as fully, in all particulars, as they would be had the word 'territories' been inserted in the sixth line after the word 'states' and the same had read 'in the several states and in the territories of the United States.' This clause to take effect from and after the date of said act, and the accounting officers will settle the accounts within its purview accordingly."

It seemed clear, then, his Honor went on to say, that up to this time the clerks of the territorial courts were not required to report the fees in question. The Supreme Court of the United States, in the case of the United States vs Hill, expressly held that the act did not apply to naturalization cases, and that the clerks need not make returns of their fees received in that class of cases. This was for the district of Massachusetts, but the same ruling would also apply to the territories of the United States.

The section upon which counsel for defendants relied, or that part which is in point here, provided that the clerk shall, "at the time of making his half-yearly return to the attorney general, pay into the treasury or deposit to the credit of the treasurer, as he may be directed by the attorney general, any surplus of the fees and emoluments of his office, which said return showed to exist over and above the compensation and allowances authorized by law to be retained by him." This section would be broad enough to include all fees of the clerk if the law just referred to applied to territorial business and naturalization.

Counsel for plaintiff claimed that there was a conflict between the case of the United States vs Hill and that of the United States vs Averill, which was found in 130 U.S., 335. His honor had examined the original papers in the latter case and found that that was an action brought against Clerk Averill for fees due to the United States. There was no reference whatever in the complaint to Territorial fees or to naturalization fees, and under the ruling in that case it was certainly very clear in view of the pleadings that the clerk must account for such fees. Comparing the two decisions (which were written by the same justice) he could see no conflict. In the former case the question was raised as to naturalization fees, which were not included in the fee bill of the United States, and the court therefore held that the law did not apply in that class of cases. In the latter case (the United States vs Averill) there was no mention made either of Territorial business or naturalization. Territorial business was not referred to in the statute providing the fees for United States business. He thought, therefore, the same ruling would apply; and there being no reference whatever in the fee bill either to Territorial criminal or Territorial civil business, nor to naturalization, he was of the opinion that the case of the United States vs Hill controlled in this particular case.

In the case of the United States vs. Averill the complaint made no allusion to these fees. In this case the reference was distinctly set out for Territorial business and naturalization, and he considered that he should be governed by the ruling of the United States vs Hill.

There was further reason for this. It would be impossible to conceive what interest the United States could have in business that was purely territorial. The United States was not affected thereby. If there was any equity it would be in favor of the parties who were compelled to pay these fees. If the clerk—but it was not so in this case—had charged illegal fees, or had charged fees that he was not entitled to under the law, then in equity the return should be made to the person from whom those fees were taken. Certainly the United States would have no interest in this, any more than it would in naturalization cases; and this held true to territorial criminal business as well as territorial civil business. The demurrer, he thought, should be sustained, and he so held.

Judge Judd—I desire to enter an exception to the action of the court. I do not know what course the attorney general at Washington may desire me to take, but I shall communicate with him, and if he desires it I shall take an appeal.

Attorney W. H. Dickson—If your honor please, I understand that it is not possible to make an amendment to the complaint, and therefore we ask judgment of dismissal, so that if they desire to appeal, the case will be in such shape that they can do so. I ask that the complaint be dismissed.

Judge Bartch—It may be so ordered.

Judge Judd—Then I desire to enter an exception to the action of the court in dismissing the complaint.

THE MAYOR'S MESSAGE.

The City Council met in regular session last night, Councilman Hardy in the chair. The members present were Lawson, Wantland, Beardsley, Evans, Bell, Horn, Folland, Rich and Simonds—10.

Absent—Loofbourow, Karrick, Kelly, Moran and Heiss—5.

THE PROCEEDINGS.

On motion of Councilman Folland, Henry W. Lawrence was allowed to address the Council.

Mr. Lawrence asked, in behalf of property owners, that the sidewalks on First and Second South streets between State and West Temple streets be allowed to remain another year before new ones were laid. The reason for the request, he said, was the hard times and inability of property owners to meet coming obligations.

Councilman Rich moved that Mr. Lawrence's petition be the first matter considered under the head of miscellaneous business. Carried.

A SEWER MATTER.

P. L. Williams, attorney for the board of education, sent in the following:

I have heretofore had some correspondence with the city relative to refund asked by the board of education on account of the advance of $2475 made for the construction of the lateral sewer on E street. I am instructed by the board