CHALLENGE TO THE GRAND JURY SUSTAINED—RULING OF THE COURT.

By yesterday's NEWS our readers perceived that the U. S. Attorney for the Territory, Hon. W. Cary, challenged the Grand Jury and moved that it be quashed, assigning certain reasons therefor. The decision of his honor, Chief Justice McKean, was given yesterday afternoon. The challenge of the U. S. attorney was sustained and the grand jury discharged. We present our readers the substance of the decision.

Among the objections to the panel it was incidentally mentioned that two of its members had only received their first papers, and consequently, not being citizens, they were not legally qualified to act as grand jurors. On that point the court said that before rejecting two aliens from the jury he would inquire if they were entitled to citizenship, and if there were he might admit them there before swearing, and so cure that defect.

The first ground of objection to the array presented by Mr. Cary was that in its selection the laws of Utah had not been complied with in many respects. One of the points included under this head was that the clerk of the court had not issued the venire thirty days before the commencement of the term of the court. The Chief Justice said that while the statute required the clerk to issue the venire thirty days before the term began, he had been under the impression that that provision was directory—that it was intended mainly if not entirely for the accommodation and advantage of the juror himself, so that, thirty days before being called upon to serve, he might have notice to make other preparations; and if this point of the statute was not observed the juror himself might urge that he had not received the notice required by law; but if the juror waived that point he, the court, did not see how others would be endangered by it. He, therefore, did not feel disposed to sustain the challenge on that ground any more than in reference to the matter of the non-citizenship of two of its members.

There was perhaps more force in the fact that in the certificates of the election of the jurors their places of residence and occupations were not designated, thus failing to furnish the data required and contemplated by the statute. One or two of the certificates seemed to be defective in other particulars, still he was not disposed to decide the challenge upon any point included in the first objection of the U. S. Attorney; though there seemed to be some force in some of them, he was disposed to overrule them.

The second ground of challenge was—they were not summoned by the United States Marshal, and therefore could not lawfully take cognizance of offences against the United States.

The question might be put—"Why were they not summoned by the United States Marshal? Why was the venire issued only to the so-called Territorial Marshal? In olden times in this Territory—for many years after its organization, the United States Marshal served all the process of the district court. When Brigham Young was Governor, and his learned friend Judge Snow sat on the bench here, such was the practice in that court. The United States Marshal was the only officer known to the Court for the service of process. For one and a half years he—the Court—used to issue his order to the clerk to issue his venire to the United States Marshal. His associates, Strickland and Hawley, did the same. They followed in the footsteps of his predecessor in office, Chief Justice Wilson, and after examination reached the same conclusion as he did—that the United States Marshal was the officer to serve the process of that court, and they acted accordingly. The National Congress, as far back as the 4th United States Statutes at Large, enacted that no grand jury should hereafter be summoned to attend any circuit or district court of the United States, unless the judge of said district court, or one of the judges of said circuit court should, in his own discretion, or upon notification by the district attorney, that such jury would be needed, order a venire to be issued. Therefore they acted under that Act of Congress, and, if they were right, a clerk had no right to issue a venire until he was ordered.

But in the celebrated Engelbrecht case—arising under the laws of the Territory and not under the act of Congress—which went up from this Territory to the Supreme Court of the United States, one point contested was—was it lawful for the United States Marshal to summon the petit jury which tried the case? The Supreme Court of the United States held that it was not lawful, and over-ruled the judgment. That court was the court of last resort and of the highest authority, and to its decision he bowed.

But in over-ruling the judgment of the court in that civil case, the question was, Did they over-rule the decision of his predecessor, afterwards affirmed by the Supreme Court of the Territory, in the ouster of Mr. McAllister? It should be remembered that that cause—The United States, under the relation of Orr, United States Marshal, against John D. T. McAllister—had never been appealed to the Supreme Court of the United States, and that court had not said whether his predecessor was right or wrong in holding that Mr. McAllister was not the proper Territorial marshal.

The question might be asked—Why was not the venire issued to the United States Marshal as well as to the Territorial Marshal, or to him who is so-called? The Supreme Court of the United States, in the decision to which he had referred, held that acts of Congress do not apply to the Territories unless specially made; that that act forbidding the clerk to issue a venire without being ordered by the district judge, was intended to apply to the circuit and district courts within the States, and not to the courts of the Territories; hence, ince that decision was rendered he had not issued an order to the clerk to issue a venire. He had done but one thing in reference to the jury. There was a statute which said that a judge in his diseretion might make an order apportioning juries among two or more counties in his district. In the exercise of that discretion he, one or two years ago, made an order, which was still in force, apportioning the jurors among six counties in this district. Further than that, he had not interfered by way of order with the venire, for the reason that the Supreme Court held that the legislation under which they had previously acted applied to the Federal Courts in the States, and not in the Territories. And they expressly held that the making up of the lists and all matters connected with the designation of juries were subject to the regulation of Territorial law. To that decision ever since it was delivered he had bowed. Since that decision numerous efforts had been made to induce him to act under the Congressional law to which he had referred, but he had refused to do so and he should continue to refuse. He bowed to the Supreme Court of the United States, which held that the local legislature had control of the jury system in a Territory. And what had the Legislature of this Territory done? As the law now stood he could hold a district court for United States business only here in Salt Lake City or in Salt Lake County; but he might hold a court in any other county in his district to try causes arising under the laws of the Territory only, provided the Territorial Legislature or the county authorities had made provisions for paying the expenses. Neither the Legislature nor the county authorities had made such provisions, consequently all the terms of his court were, from necessity, confined to this county. But however ample might be the provisions they might make, so far as paying expenses were concerned, he could hold court for United States business in this county only.

The statute said that when a district court was to be held, whether for a district or for a county, the clerk of said court should, at least thirty days previous to the time of holding said court, issue a writ to the Territorial Marshal, if said court was to be holden for a district, or to the Sheriff of a county, if said court was to be held for a county, specifying the time and place of holding said court, requiring him to summon eighteen eligible men to serve as grand jurors, and eighteen eligible men to serve as petit jurors. There was another provision saying that fifteen men should constitute a grand jury, twelve of whom must agree on an indictment.

In the present instance, save in regard to the thirty days, which he, the Court, could not regard as vitiating the venire, the clerk had acted under that section. He had issued his venire to the gentleman who claimed to be, and who was called, Territorial Marshal; and hence came up the question raised by this second ground of challenge. It was only district and circuit judges in the States who could act under the Act of Congress in reference to ordering a venire, for the Engelbrecht decision had remanded Territorial judges back to Territorial law; and the law of this Territory said the venire should be issued to the Territorial Marshal; and as that Court was not to be held for a county, but for a district, the venire was issued to the gentleman who claimed to be Territorial Marshal.

It looked to him, the Court, very much as if the Legislature had done all that within it lay to oust the United States Marshal from his office. He did not say they had ousted him, but that they had done all they could to that end; and if Mr. McAllister was Territorial Marshal the clerk had simply done his duty under that statute. There was no statute ordering him to issue the venire to the United States Marshal, *unless* they could go back to some other statute showing that the judge should still order him to do so. The statute now under consideration ignored the judge and went right by him. The Legislature issued its command, and when the clerk issued his venire to the Territorial Marshal or to the county Sheriff, he obeyed that statute.

They might say this was a vexatious dilemma, an embarrassing situation in which to be placed. True. But they were not there to legislate, but to take the law as it was, and find out what it was if they could. As the local statute did not command the clerk to issue the venire to the United States Marshal, of course he did not do it. Then the question was, Did he issue it to the right man? That brought the Court to the consideration of the third point of objection—

The jurors now in court were not summoned by any officer, but by John D. T. McAllister, a private citizen, the said McAllister having been ousted from the office of Territorial Marshal by the Judge of this court, May 4th, 1870, Hon. Chief Justice Wilson then presiding, which judgment had been afterward affirmed by the Supreme Court of the Territory, and had never been reversed. If that cause had gone to the Supreme Court of the United States, and that Court had decided that the Territorial Marshal was the proper officer to serve the process of this court in cases arising under Territorial laws, that would have been an end of the matter, it would have been as binding as a statute of Congress or of the Legislature. But that cause was not appealed to the Supreme Court, and he did not understand the Engelbrecht decision as going to the extent of saying, by any means, either expressly, inferentially, or logically, that Mr. McAllister was the proper Territorial officer. There were some sentences in that opinion which looked as if the Court had some question in their minds as to that, but that question was not before them and they did not pass upon it.

Prior to the Engelbrecht decision many members of the bar regarded Mr. McAllister as not the lawful Territorial Marshal, and for two reasons, one of which was that the local legislature had no power to create the office, and that the United States Marshal was empowered to serve all the processes of the court. That doctrine had, however, been over-ruled. Another reason why his right to the office was disputed was that the Legislature, after creating the office, filled it without the intervention of the Governor; the marshal was not nominated by the Governor, the two houses of the Legislature controlled it absolutely; and even conceding the right of the Legislature to create the office, they had no right to fill it without a nomination being put in by the Governor to the council. While the Court was of the opinion that they were wrong in holding that the Legislature had no right to create an officer to serve process under Territorial laws—the Supreme Court of the United States had held that they were wrong, and to that decision he bowed—yet he was of opinion that if the case of the United States, under the relation of Orr *vs.* McAllister, had gone to the Supreme Court of the United States, they would have held that that office could only have been filled on a nomination by the Governor and confirmation by the council; and he, therefore, was not of the opinion, by any means, that, logically or necessarily, the Engelbrecht decision re-instated Mr. McAllister in the office which he held.

He would be glad to hold one term of court without having some of these great questions to pass upon every week during the term, yet that seemed not to be the fortune of a judge in Utah. In one shape or another these questions arose at every term of court. He supposed it would continue to be so. They must do the best they could. Embarrassments would grow out of any decisions they might make in these matters, and a judge must reach the best conclusions he was capable of; even then he might make some mistakes. He derived some consolation from the fact that in the oldest States, where the jurisprudence all ran in a groove, and where a new question was a very rare thing, but where almost every case that came up was controlled by precedent, it was one of the commonest things for a judge to be over-ruled. It was some consolation to him to remember that fact, when he found himself almost every day, either in term time or in chambers, confronted with the most perplexing questions, questions over which learned lawyers, after elaborate arguments, frankly confessed they were far from confident they were right, and the law of which never could be positively known until settled by the Supreme Court of the United States, their decision was final, and binding upon everybody.

It seemed to him that he must sustain the challenge. He might say, however, that a grand jury in a district court in a Territory had a two-fold duty to perform—to investigate charges of offences under the laws of Congress, and also under the laws of the Territory.

A grand jury sitting for Federal business might be called upon to indict a man for counterfeiting the currency of the republic, for violation of the revenue laws, for trespasses upon the public lands, and if they found indictments they would be in the name of the United States. The same jury migtht be called upon to inquire into offences against the laws of the Territory, such as murder, manslaughter, arson, rape, bribery, &c.; and he could conceive of a case where a grand jury might through some miscarriage in the machinery by which they were brought into court, be illegal for United States business, and yet be legal for Territorial business, and some of the considerations addressed to the court in this challenge would not apply to a jury acting simply under the laws of the Territory. But this last point—raising the question of the right of Mr. McAllister to serve the venire as Territorial marshal, would apply equally to a grand jury under the Territorial laws as under Federal laws. Mr. Cary did not challenge for the Territory, he had no interest in that. He was there as an officer of the United States, and he challenged only in the name of the United States. He therefore might sustain his challenge, and discharge this jury from all duties growing out of Federal law, and he might hold them to do duty simply under Territorial law. Suppose no one were to challenge them under the Territorial law, and he were to say to them You are discharged so far as Federal duties are concerned, but held to inquire into offences against the laws of the Territory, and they were sworn and charged for that purpose. No sooner would an indictment come in, no matter for what, than it would be the duty of any member of that bar defending the prisoner, to raise these questions, and make a motion in abatement or to quash the indictment. He would have to do it if he did his duty. And if a poor prisoner were brought there, unable to employ counsel, and the Court should assign him counsel, as it would be his duty to do, and that counsel neglected to raise every reasonable point in his client's behalf, he would not do his duty, and he, the Court, would set him aside and appoint somebody else; for if he appointed counsel to defend a prisoner he must do all he could honorably, not dishonorably, to set that prisoner free. It would be his duty to raise the question as to the tenure of the office of the gentleman who summoned the jury. Therefore he did not see what could be gained by simply discharging the jury from Federal business, and holding them to find indictments under Teritorial law.

He felt very differently about a jury when it came to a trial involving life and liberty, than on a trial on a promissary note. If the members of the bar chose to waive all these questions in a trial on a promissory note, book account, farm or mine, that was for them and their clients to arrange, he had no interest in that. In attending to civil business there were great difficulties in the way, but the technicalities involved in such matters were of more interest to counsel and their clients than to the Court; he was disposed to give them every opportunity he could to get their civil business tried. When the life or liberty of a man was involved, he was not disposed to waive anything, no let them. He was therefore forced to the conclusion that he must not only sustain this challenge on the part of the United States, but that he ought to look forward to the logical consequences of this position and condition of legal affairs, and anticipate that if men were indicted under Territorial law, he would have to squash the indictments. That was his view of the law, he therefore sustained this challenge, and said to the Grand Jury—"You are discharged. The clerk will give you a certificate of two days' service."

OUR COUNTRY CONTEMPORARIES.

According to the *Reporter* of Oct. 20, the Corinnites had a blue Monday time on the 19th, with the new Sunday ordinance. The day was generally observed, "at the front door" at least.

From the Ogden *Junction* of Oct. 21—

A pleasant party at Riverdale school-house on the 20th, a number of visitors from Ogden attending, and Browning's band furnishing the music.

"A passenger from the west purchased a ticket this morning for the east, and in returning to his pocket a roll of greenbacks, dropped on the platform a twenty-dollar bill, which was picked up by a man standing by. The finder was crossing the road to indulge in a "square meal," when he was "nabbed" by a sharp individual who claimed the bill, which was at once given up. The real owner was in the meantime regaling himself with hot rolls and coffee at the hotel, in ignorant bliss of his loss."

The Provo *Times* of Oct. 18 has the following description of Harrison Carter, the murderer of officer Bowen—

"Carter's age is about 25 years; height, 5 feet 9 inches; weight, 162 pounds; light hair; light blue eyes; light complexion, high forehead, sunk on the left side from the blow of a pistol; short, stiff, heavy beard; which was usually shaved clean; is rather heavy in build; has a devil-may-care, swaggering style of walk, had on dark pants and woolen overshirt, the collar of the latter usually open."

FOREIGN NOTES.

Salmon have been introduced into the New Zealand rivers with great success.

The olive harvest in the south of Europe is reported to have been very plentiful.

The horse-chestnut is now used in France for the manufacture of starch. The nut yields about 17 per cent of pure starch.

The possessors of the Tichborne estate are already out of pocket about $800,000 by their fight with "the claimant." But the lawyers don't feel particularly mournful over it.

The steamers of the American Steamship Company (Philadelphia and Liverpool) have attracted much attention in Liverpool, and questions relative to their construction, cost, etc., have been innumerable.

A machine has been invented in England for cutting coal in the mine, which it is claimed can be run by a man and two boys, and will do the work of twelve men with picks and the ordinary implements used by the miners. The saving in the cost of mining the coal is estimated at thirty-nine cents per ton.