Opinion of Chief Justice J. B. McKean.

DELIVERED NOV. 13, 1871.

Territory of Utah, Supreme Court. Paul Englebrecht et al, Appelles, vs. Jeter Clinton, J. D. T. McAllister et al, Appellants.

On the 27th of Aug., A.D. 1870, the defendant Clinton, an Alderman of Salt Lake City, issued to the defendant, McAllister, the Marshal of said city the following warrant—

To John D. T. McAllister, city Marshal of Salt Lake City, or any of his deputies, to whom these presents shall come, greeting—

Whereas, on this 27th day of August, 1870, before me, Jeter Clinton, one of the Aldermen of the city of Salt Lake, personally appeared one William G. Phillips, who was by me sworn in due form of law and on his oath did say, among other things, that one Paul Englebrecht is "the owner and keeper of a building situate on second South Street, between East Temple and First East Streets, in said city, known as the Merchants' Exchange, and therein he, the said Paul Englebrecht, has a large quantity of spirituous and vinous liquors, as he firmly believed, and which said liquor, as the aforesaid firmly believed, is established and kept therein by the said Paul Englebrecht for the purpose, among other things, of unlawfully selling and disposing of the same without first obtaining a license from the City Council for so doing;"

And I having investigated the said charge and satisfied the same is true in fact,—

You are, therefore, hereby commanded forthwith, after these presents shall come to your possession, to enter said building and seize and demolish all things by you found therein, which is made use of for the purpose of unlawfully selling or otherwise disposing of spirituous or vinous liquors, and that you arrest the said Paul Englebrecht, and forthwith bring him before me, to be dealt with as the law provides.

Given under my hand this 27th day of August, 1870.

JETER CLINTON,
Alderman of said city.

With this warrant as his authority, the defendant, McAllister, and seventeen other defendants who accompanied him as a *posse commitatus*, entered the designated building, and in the absence of the plaintiff, Englebrecht, destroyed a large quantity of spirituous and vinous liquors, and the castors, bottles and vessels containing them, the property of Englebrecht and his partners, the other two plaintiffs Pehweke and Lutz.

The plaintiffs brought an action against the defendants and claimed judgment in a sum equal to three times the value of the property so destroyed, under the following statute—

"If any person * * * wilfully and maliciously injure, destroy, or secrete any goods, chattels or valuable papers of another, * * * he shall be imprisoned, not more than one year, or fined not exceeding five hundred dollars, or both fined and imprisoned at the discretion of the court, and is liable to the party injured in a sum equal to three times the value of the property so destroyed, or injured or damaged, sustained in a civil action. (Laws of Utah, p. 57, sec. 102.)

The defendants sought to justify, under the foregoing warrant, and an ordinance of the City Council of the said city, section 7, of which is as follows:

"Sec. 7. Any person having reasonable cause to believe that any house or place mentioned in the foregoing action of this ordinance, is established and kept for the purpose of manufacturing, selling or otherwise disposing of spirituous, vinous, or fermented liquors, without first obtaining license from the City Council, and will make oath of the same, describing the place; and if upon investigation it shall so appear, the mayor or alderman before whom such complaint has been made, may issue his warrant, directed to the city marshal, or any of his deputies, commanding him to enter said house or place and demolish all things found therein, made use of for the purpose of manufacturing, selling or otherwise disposing of spirituous, vinous or fermented liquors, and to arrest the person or persons owning, keeping or conducting said house or place, and bring him or them before the court, and such person or persons on conviction shall be liable to a fine not to exceed one hundred dollars, and imprisonment not to exceed six months, or both fine and imprisonment, at the discretion of the court."

The case was tried in the Third District Court, at the September term, 1870, and the jury returned a verdict in favor of the plaintiffs for the sum of $59,063.25, the same being, in the language of the jury, "three times the value agreed upon by us of the goods of the plaintiffs destroyed by the defendants." Judgment was entered upon this verdict. We, the defendants, appeal to this court. Other facts will be stated in the opinion of the Court. Snow and Hoge and A. Miner for the appellants; Baskin and Maxwell for the appellees."

MCKEAN, C. J.

Passing by all questions touching the regularity of the papers on appeal to this court, let us go at once to the merits of the case, first premising that the questions necessary to the decision of the case are neither numerous nor difficult. 1. Is section 7 of the ordinance cited, lawful and valid? 2. Is the warrant valid, or was it void on its face? 3. Were any errors committed on the trial? 4. Did the evidence justify the verdict of the jury?

It appeared on the trial that the plaintiff, Englebrecht, had no notice of the proceedings against him and his property, until after the property in question had been destroyed. The other plaintiffs were not even named in the warrant. Whether an ordinance that authorizes the destruction of property, on an exparte affidavit, is valid or void, is not even a debatable question. It is in violation of the most sacred constitutional guarantees. No court has a right to exercise such arbitrary powers as the 7th section of the ordinance in question was intended to confer. This being so, it is not necessary to inquire whether the Alderman, Clinton, was lawfully vested with judicial authority or not.

The warrant on its face recited the fact that Phillips had made oath that he "firmly believed" so; it commanded that forthwith property used for certain purposes be demolished, leaving the marshal to judge what property; and that Engelbrecht be arrested and brought before the alderman to be dealt with as the law provides. It clearly appeared from the face of the warrant that it was issued under the void provision of the ordinance in question, that Engelbrecht had not yet been dealt with as the law provides, and that the property too was ordered to be demolished before he could have been thus dealt with. The warrant was therefore void on its face, and that too without any reference to the question whether the alderman could or could not exercise judicial power. The warrant being void, it is no protection to those acting under it.

The questions raised by the challenge to the array of jurors, have been several times passed upon by this Court in other cases, and overruled.

Section 172 of the Utah Code reads as follows:—"Either party may challenge the jurors; but when there are several parties on either side, they shall join in the challenge before it can be made, unless the Court otherwise order or direct. The challenge shall be to individual jurors, and shall be peremptory or for cause. Each party shall be entitled to six peremptory challenges." Each of the defendants claimed the right to interfere six peremptory challenges, which would have made considerably over one hundred challenges for all of the defendants. Any other construction of the statute than that all the plaintiffs were entitled to six and all the defendants were entitled to six peremptory challenges would be manifestly absurd.

The defendants exercised to the utmost their right to challenge jurors both peremptorily and for cause. Having done so, they cannot now dispute the lawfulness of the jury.

On the cross-examination of one of the plaintiffs, who was called as a witness on the part of the plaintiffs, it appeared that the items stated in the complaint were made out from invoices and accounts of sales. The defendants counsel then moved for an order to compel the plaintiffs to produce such invoices and accounts of sales. The court refused to make such order. The defendants' counsel should previously have given the plaintiffs notice to produce those books or writings, or should, on the trial, have moved to strike out some designated portion of the plaintiffs' testimony, unless they were produced or their absence accounted for. The motion that was actually made was unreasonable. Had the jury rendered a verdict against the defendants for the actual value of the property destroyed, and not for three times such value, it would now be a pertinant question whether such verdict was proper under the pleadings in this case. The charge of the court touching that question now cuts no figure in the case.

The exceptions taken by the defendants' counsel to the charge of the court, and to the refusal of the Court to charge certain things, were general. No one thing in particular was pointed, even those portions of the charge that were favorable to the defendants were covered by the general exceptions. This Court will, therefore, not cast about for possible errors which the learned counsel were unable to indicate.

There was evidence that the property of the defendants was destroyed by the act or procurement of the nineteen defendants against whom the verdict was rendered; there was also some evidence leaning upon the charge of malice; upon all the evidence the jury found that the property was wilfully and maliciously destroyed, and assessed the damages at three times the value of the property. There being some evidence, the verdict must stand. The judgment of the Court below is affirmed.

J. Hawley delivered his opinion in the case of Wm. Jennings appellant, and James P. Pruner appellee, reversing the judgment of the Court below and awarding a new trial.

Correspondence.

SALT LAKE CITY, Nov. 13, 1871.

Editor of the News:—Sir: Having been a member of the Church of Jesus Christ of Latter-day Saints since May, 1832, and having had a fair and reasonable opportunity of understanding their doctrines, religious and civil, and as one of their doctrines is now being put on trial, I deem it a duty I owe to myself, to my brethren, and to my country to write a few lines on the subject of this doctrine, and the means which are being used to suppress it. And, first, I will say that it is now, and it always has been, one of their ruling principles, *that of two evils accept the least;* another is, *that God has a right to rule in the affairs of men and of nations;* a third is, *that God has given revelations to man, in which many commands have been given, and these it is his and the nation's duty to obey;* and another is, *that God is immutable.* From this last it follows as a logical deduction that He, being unchangeable, may yet give more revelations, which, if he do, man *must* obey, or take the consequence of disobedience, whatever that consequence may be. In these sentiments many may now be found who concur with us in the abstract but not in the concrete.

A very able English writer has said, when speaking of the duty of philosophers, it is the duty of philosophers to *doubt, inquire* and *discover*; and when discovery of a principle is made; to hold fast to that principle through evil report as well as through good report; that a new principle not worth *dying* for is not worth the *discovery*. Apply this to a revelation given of God which is only a reiteration of the apostles' doctrine, and it follows not only as a logical deduction, but as a philosophical argument, that a revelation is not worth giving, nor yet of believing when given, that is not worth practicing and holding fast to through evil report as well as through good report. The same able writer said men are often brought into circumstances in which they are forced to accept or make a choice of evils; and when speaking of revolutions, gives as a few instances, the condition of the Protestants when seceding from the Catholic church, the Protestant dissenters when seceding from the Episcopal church, and the Americans when they threw off the English yoke and declared themselves independent. In all these he says, a few men, good men, first *doubted*, then *enquired*, and afterwards *discovered*; and, on discovery, had the moral courage to speak; but, he adds, all these had *two evils* set before them. One was to reject the principles, and thus injure themselves, their posterity and their country, or to speak out, let the principle be known, enter into its practice, and take the risk of opposition, which is sure to come, and in many instances—not all—resist by force of arms, and thus, perhaps, lose their own lives and many of the lives of their countrymen, and, it might be, cause a great evil to come upon themselves, their posterity and their country.

Such has been our condition, Mr. Editor, in many instances of past life, and such it seems, taking external signs as a guide, is our approaching condition. One of two great and serious evils we now have laid before us, or, at least, such seems to be the case. We are told in substance:

"You Mormons are industrious, honest and upright in deal; but you are ignorant and fanatical. You have been deceived. You must now renounce one part of your real though misjudged religious belief, or your leaders must be arraigned by Federal authority, be brought before a Federal Judge, be indicted by a Federal Grand Jury for adultery or for lewd and lascivious association and cohabitation with women not lawfully married to them, be tried by a Federal Traverse Jury, all summoned by a Federal Marshal; and on the trial the testimony against them shall come, in part at least, from their lawful wives, in part from those adultresses and those lewd and lascivious women, and in part from the sons and daughters of those women, whom we will compel to come to court, and tell what they may know, or be, at the discretion of the judge, incarcerated in a prison ruled over by a Federal officer. If they resist, Federal troops are to be sent into your country to aid in the due observance of the law as expounded by these judges. One thing more shall befall your leaders, if any persons happen to be summoned on the grand or petit jury, who in all respects may be good men, if they believe as you do on religious subjects, and therefore not as we do, they are incompetent to serve on the jury and must be rejected; and if any Mormons shall be called as witnesses on their behalf, we will permit them to be sworn, but you must remember such witnesses stand disgraced before the law and before the bar of civilized men, and their testimony will be weak indeed, in fact not worth one bit."

Such now, Mr. Editor, is our condition as is supposed. To deny and reject the doctrine of plural marriage is to deny what we believe the God of Gods has commanded us to receive and practice, and, by so denying, bring upon us and upon our posterity and our country, not only ruin in this life, but in the life to come, and so far as respects ourselves, banishment from the presence of God and the glory of his power. To reject and resist these Federal officers, and thus bring on collision between us and the United States, whose government, when kept within its constitutional limits, is beyond all doubt the best human government the sun ever shone upon, is in like manner to injure if not destroy ourselves and our families, and to be aiders and abettors in destroying that government which, of all others, we wish most to preserve!

Such now, as I have before said, seems by the external signs to be our condition; such evidently some, perhaps many, firmly believe is at this time our actual condition; and those some, or many as the case may be, apparently rejoice over it. But I, as an individual, do not concur with these. I do not fear being brought to the point of seeing many, if any, of our leaders tried in the manner I have indicated, though I have seen one member of the church—Hawkins—so tried. Nor do I fear being compelled resist the government of the United States, not in the least, though many an external sign indicates what I have before said.

Having said so much on this subject of accepting evils, I now proceed to show some of the reasons of the other abstract sentiments mentioned. In so doing I shall endeavor to show by a few examples that these abstract sentiments stand on firm belief, resting on evidence on the one side, and unbelief, denying the accuracy of that evidence, on the other, so that to contend about or war over it is simply to contend or war about that which the contention or war cannot possibly settle. Discussion, eliciting light, is often convincing; but controversy, angry controversy and war settle nothing on such a subject. While war may subdue yet it does not settle scientific rules, nor establish or over throw a revelation.

The time was when men thought it a duty to propagate their creeds by the sword, without considering if they had the right so to act. Those upon whom the sword was destined to fall had the same natural right to put down by the sword that which they were trying to sustain; the only effect of which would be, to kill off each other. I unhesitatingly say neither right exists.

More another time.

Yours &c.,
Z. SNOW.

The burned Chicago buildings, if placed side by side, would reach 100 miles.