THE RAID UPON THE LOCAL OFFICES.

THE AUDITOR'S AND SHERIFF'S CASES.

Answer and Demurrer.

In the Third District Court, this morning, Chief Justice Hunter on the bench, the case of the People of the Territory of Utah ex. rel. Arthur Pratt, vs. Theo. McKean, and the People of the Territory of Utah ex. rel. George C. Douglas vs. Nephi W. Clayton, involving respectively the title to and possession of the offices of Sheriff of this county and that of Territorial Auditor of Public Accounts, came up for argument.

Sutherland and McBride, Marshall and Royle and others appeared in behalf of the plaintiffs; Sheeks and Rawlins, Harkness and Kirkpatrick, Rosborough and Merritt, Arthur Brown and others appeared in behalf of the people.

Chief Justice Hunter, on receiving intimation that counsel were ready to proceed, stated that he proposed to limit the time to to-day and to-morrow for hearing the arguments in the cases—two arguments on each side—which he thought would be sufficient.

Mr. Rawlins, opened the case on the part of the respondents, and commenced by reading the pleadings therein, as *follows*:—We give the papers in the Clayton case, those, in the Sheriff's being similar with the exception of names:

District Court, Third Judicial District, County of Salt Lake, Utah Territory.

The people of the Territory of Utah, ex. el. Geo C. Douglas. Plaintiff.
vs.
Nephi W. Clayton, Defendant.

The defendant, Nephi W. Clayton, answers herein, and denies that the plaintiff, on the 16th day of September, 1882. or at any time. was duly appointed to the office of Auditor of Public Accounts of the Territory of Utah, and denies that the plaintiff on the 23d day of September, 1882, or at any time was commissioned Auditor of Public Accounts of said Territory, or that said plaintiff at any time has been, or is the duly appointed or commissioned Auditor of Public Accounts of said Territory, or entitled to said office, or any books, accounts or property belonging or pertaining to said office.

And on information and belief the defendant alleges that the said George C. Douglas has not at any time given or offered to give a bond, conditioned for the faithful performance of the duties of said office, to the Territory of Utah, in a sum not less than half of the revenue of the Territory of Utah for the year 1881, or with such sureties as the Probate Judge of Salt Lake County determined or would approve, or any bond with sureties, or approved as required by law, or that plaintiff has ever filed with the Probate Judge of said county his oath of office or official bond.

And the defendant denies that he has or makes no claim of right to said office, except by virtue of said election in August, 1880, but on the contrary he alleges that at said election he was duly elected to the office of Auditor of Public Accounts, and after said election he duly qualified for said office, and took an oath to support the Constitution of the United States and the laws of said Territory, and faithfully discharge the duties of said office; and also gave an official bond to the Territory of Utah, conditioned for the faithful performance of the duties of said office in the amount required by law, and with such sureties as the Probate Judge of Salt Lake County, Utah Territory, determined and approved, which bond and oath of office were filed with said Probate Judge, and afterward on the 27th day of November, 1880, the Governor of said Territory issued and delivered to the defendant a commission in the words and figures following, to-wit:

"United States of America,
Territory of Utah.

To all who shall see these presents, greeting:

Know ye, that whereas Nephi W. Clayton was on the second day of August, 1880, duly elected Auditor of Public Accounts in and for the Territory of Utah, and he having duly qualified as such, as appears by the proper evidence on file in the office of the Secretary of the Territory.

Therefore, I, Eli H. Murray, Governor of said Territory, do hereby commission him Auditor of Public Accounts, and authorize and empower him to discharge the duties of said office according to law, and to enjoy the rights and emoluments thereunto legally appertaining, for the term prescribed by law, and until his successor shall be elected and qualified to office.

In testimony whereof, I have here unto set my hand and caused the Great Seal of said Territory to be affixed. Done at Salt Lake City, this 27th day of November, A. D., 1880, and of the Independence of the United States the one hundred and fifth.

ELI H. MURRAY,
[SEAL.] Governor.

By the Governor:
ARTHUR L. THOMAS,
Sec'y of Utah Territory."

That after receiving said commission, and on or about the 28th day of November, 1880, the defendant entered into said office and upon the discharge of the duties thereof, and has not resigned, but has ever since held and now holds said office, with and under claim of right and title thereto, and as he is informed and believes his official term has not expired. And the defendant denies that there is no plain. speedy and adequate remedy in the ordinary course of law.

The defendant therefore prays *judgment* whether the court will take further cognizance of the proceedings herein, and asks that the action be dismissed with costs.

And the defendant further answers herein, and, admitting that on or about the 16th day of September, 1882, the plaintiff received from the Governor of Utah an instrument purporting to be an appointment, denies that on that day or at any time the plaintiff was duly, or in anyway appointed to the office of Auditor of Public Accounts of the Territory of Utah.

And the defendant admits that on the 23d of September, 1882, the plaintiff received from the said Governor an instrument of the terms set out in the affidavit of plaintiff, and the alternative writ herein, and therein called a commission, but the defendant denies that on that day or at any time the plaintiff was commissioned Auditor of Public Accounts of said Territory, or that, since the day last aforesaid, or at any time, he has been or is the duly appointed or commissioned Auditor of Public Accounts of said Territory or authorized or required to discharge the duties of said office, or entitled to the custody of any of the books, accounts or other property of said Territory, belonging or pertaining to said office. And the defendant, on information and belief, alleges that the plaintiff never gave or had filed in the office of the Probate Judge of Salt Lake County, Utah, a bond to the Territory of Utah, conditioned for the faithful performance of the duties of said office, in a sum not less than half the revenue of said Territory for the year 1881, or with such sureties as the Probate Judge of said county determined or would approve, or qualified for entering on said office, or ever gave any bond with sureties approved by said Judge, or filed an official oath with said Probate Judge.

And the defendant denies that he has or makes no claim of right to said office and the possession thereof, except that he was elected to said office in August, 1880; but on the contrary the defendant alleges that prior to August, 1880, he was a male citizen of the United States, over the age of twenty-one years, and for more than one year had been a constant resident in the Territory of Utah, and a taxpayer therein, and that after said election, he took an oath to support the Constitution of the United States and the laws of Utah Territory and faithfully discharge the duties of said office, and gave bonds to the people of the Territory of Utah as required by law, conditioned for the faithful performance of the duties of said office in a sum not less than half the revenue of said Territory for the year 1879, and with such sureties as were determined and approved by the Probate Judge of Salt Lake County, Utah, and filed the same and also his oath of office with said Probate Judge, and in all respects qualified as required by law to enter upon and discharge the duties of said office, and thereafter the Governor of the Territory of Utah issued and delivered to the defendant a commission in the words and figures following:

"United States of America,
Territory of Utah.

To all who shall see these presents, greeting:

"Know ye, that whereas, Nephi W. Clayton, was on the second day of August, A.D., 1880 duly elected Auditor of Public Accounts in and for the Territory of Utah, and he having duly qualified as such, as appears by the proper evidence on file in the office of the Secretary of the Territory;

"Therefore, I, Eli H. Murray, Governor of said Territory, do hereby commission him Auditor of Public Accounts, and authorize and empower him to discharge the duties of said office according to law, and to enjoy the rights and emoluments thereunto legally appertaining, for the term prescribed by law, and until his successor shall be elected and qualified to office.

In testimony whereof I have hereunto set my hand and caused the Great Seal of said Territory to be affixed.

Done at Salt Lake City this twenty seventh day of November A. D. 1880, and of the Independence of the United States the one hundred and fifth.

[SEAL.] ELI H, MURRAY,
Governor.

By the Governor:
ARTHUR L. THOMAS,
Sec'y of Utah Territory."

That after receiving said commission and on or about the 28th day of November 1880, and not in August 1880, the defendant entered into the said office, and upon the discharge of the duties thereof, and has not resigned said office, and holds the same under claim of right thereto. And the defendant alleges that the said office and the franchise thereof is worth more than one thousand dollars, and the salary thereof is more than one thousand dollars per annum. And the defendant denies there is not a plan, speedy and adequate remedy in the ordinary course of law.

Wherefore defendant prays judgment that he be hence dismissed with his costs.

TERRITORY OF UTAH, } ss.
County of Salt Lake. }

Nephi W. Clayton, being duly sworn says I am the defendant in the above entitled action, my foregoing answer is true of my own knowledge except as to matter therein stated on information and belief and as to those matters I believe it true.

Subscribed and sworn to before me this — day of October, 1882.

DEMURRER.

District Court, Third Judicial District, County of Salt Lake, Territory of Utah, The People of the Territory of Utah ex rel., George C. Douglas, plaintiff, vs. Nephi W. Clayton, defendant.

And now comes the defendant Nephi W. Clayton, and demurs to the the affidavit of the said George C. Douglas upon which the alternative writ herein is based, and demurs to, and also moves to quash, said alternative writ, on the following grounds:

1—The Court has no jurisdiction to hear or determine the subject matter in controversy, on proceedings for a writ of mandate.

2—Proceedings for a writ of mandate are not a lawful method of trying defendant's title to the office in question, neither the affidavit of relator, nor the alternative writ herein, states facts sufficient to constitute a cause of action against the defendant, for a writ of mandate or any judgment or relief.

Before Mr. Rawlins proceeded further in the case, Judge McBride moved for the peremptory writ of mandate to issue, and attacked the practice of demurring to the alternative writ. He claimed, on the part of the plaintiffs, that they had the right to open and close the case; defendants objected. This being a new point raised in the case, the court concluded to take it under advisement till 2 p.m., to which time the court adjourned.

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2 o'clock.

At this hour the Court again met, when a decision in reference to the point over which an adjournment was taken was given by Chief Justice Hunter. He denied the motion of Judge McBride to disregard demurrer.

Mr. Rawlins accordingly proceeded with his argument. He said the two cases in question involved the title to and the possession of the offices of Sheriff and Auditor of Public Accounts. Their general contention would be that the affidavit and the alternative writs, based upon the affidavit in these two cases respectively, did not state facts sufficient to entitle the party to any relief. The parties seeking relief of this sort in a proceeding of this kind must show a clear specific right and must be without any specified legal remedy in the ordinary course of law. The plaintiffs had attempted to show their right by an appointment made by the Governor of the Territory, which appointment is alleged to have been given on or about the 16th of September of the present year. The power of the Governor in respect to the making of appointments to office was special and restricted. He stood like an inferior court, or a court of limited jurisdiction. Such must be the case in the present instance, unless it could be shown that a vacancy has happened in an office in some particular manner. The conditions making the office vacant must appear in the pleadings. The plaintiffs, however, had not only failed to show the existence of a vacancy in the pleadings, but they had affirmatively shown the non-existence of the very contingency upon which the alleged authority of the Governor arose. They showed that the defendants respectively were duly elected to their offices at the regular August election of 1880; that they were regularly inaugurated in office pursuant to that election; that they have held said offices and the insignia thereof pursuant to said election, and that they claimed the right to the possession of these offices by such appointment, or election. They showed no vacancy happening in any manner in these offices; no resignation, and no death of an incumbent, they showed nothing as a matter of fact—unless the court might judicially know that a vacancy had happened under the conditions he had named, in which case the Governor might have the right to exercise his appointing power. His first proposition, therefore, was that the Auditor and Sheriff, elected in August, 1880 were entitled to hold their respective offices *until their successors were elected* and qualified, and he (Mr. Rawlins) used the word "successor" in its proper and accurate sense. He then proceeded to quote from the Statutes of Utah, on this point; in which it was clearly provided that incumbents should continue to hold office until their successors were elected and qualifid, and he also referred to general authorities where the same rule applied. The Utah statutes applied equally to Sheriff and auditor. They were both officers *de facto*; they exercised the functions of their offices, and they disputed the right of the plaintiffs to the right to or possession of the offices in question. Mr. Rawlins, in passing, remarked that, in the case of the auditor, it might be contended by the other side that the acts under which he received his appointment were nullities, as being in conflict with the Organic Act of the Territory. He reminded the Court, however, that it must remember, if such a point were raised, that this legislation had been upon the statute books since the year 1852—30 years—and that it had been continuously acted upon, it had never been disapproved, Congress had never declared it unconstitutional. But was this legislation in conflict with the Organic Act? An act of the Legislature was presumed to be constitutional, and while it was competent for the courts of superior jurisdiction to pass upon it and declare it void or not in harmony with the Constitution, yet it was a power they would very reluctantly exercise.

He did not question the right of the court to look into the constitutionality of these acts; but he certainly objected to a governor declaring them unconstitutional for the purpose of creating vacancies which he might fill. In harmony with the essential principles of Republican Government, in harmony with general policy, Mr. Rawlins maintained that the power of a governor making appointments to any office was very exceptional and always strictly guarded, cut down to the narrowest possible limits. Where could counsel find anything in the legislation of Congress that indicated a policy different from this? What statute could be found to give the Governor an unrestricted right to make appointments? The Revised Statutes of the United States—Section 1858—gave a governor the meagre power to fill vacancies which happened during the recess of the legislative council, or happened by resignation or death, and that was all Congress defined in respect to the governor making appointments until we come to some more recent legislation upon that subject. Thus they found how carefully Congress had restricted the power of a governor. This act to which he had made reference had some antecedents and likewise some consequences. He was informed that they were precluded from discussing this question until he read what had been referred to as suggestions of the justices of the Territory in respect to the condition of affairs in this Territory. He had read that letter carefully and found nothing in it which asked that the Governor should have uncontrolled power to make appointments to office. Alluding to the action of Congress and the suggestions contained in the letter of the judges, he remarked that they would bear the construction that there was to be some orderly and regular method by which there should be proper successors selected. Congress, for want of time or some other reason, did not provide a remedy by a regular election. What did it do? It provided "that the Governor of the Territory of Utah is hereby authorized to appoint officers in the said Territory to fill vacancies which may be caused by a failure to elect, etc. And that the term of said offices should not exceed eight months. But the suggestion of their honors was that a regular method be provided for electing successors. Congress, however, had said that the Governor should have power to fill *special, actual vacancies*, and that their term of office should not exceed eight months. Congress did not intend to create anarchy. It only intended that where there was a vacancy, where perhaps a vacancy arose through some contingency say in respect to some polygamist then the Governor should make the appointment, though the term of the person so appointed was not to be for two years, but only for eight months. The discussion which took place in the Senate before the *passage of* the amendment showed that that body did not consider that all the offices, because of a failure to elect, were vacant. Indeed, the whole discussion showed the contrary to be the case. At this stage of the proceedings, Mr. Rawlins with powerful oratorical effect, delivered the following on what is now known as "The Main Question:"

"At this juncture, I cannot leave this branch of the subject without calling your honor's attention to a celebrated article of recent publication. It will be unnecessary for me to mention the authorship of the article to which I refer; it will be necessary only to name the title of this article which has occasioned so much comment, and the force of which has already manifested itself. I refer to the article entitled "The Main Question." The parent of it is a member of a distinguished legal firm in this town. This eladorate and able production, in respect to the interpertation of this provision (the Hoar amendment), may be said to abound, not only in syllogisms but in exclamations. Among the syllogisms which I found was one in respect to the government reserving to itself the power to make all the principal appointments of officers in the Territory. This government like Parliament—to further elaborate this syllogism — possesses transcendant, uncontrolled power in the territory; or as Marshall has expressed it—I do not mean the parent of this production, but another Marshall, no more learned or distinguished, perhaps, than the gentleman engaged in this case—in referring to the powers of the federal government, has retained to itself the power to give a functionary known as the Governor of Utah, this great and transcendent authority — in other words to make the Governor the equal of this vast power. I have never supposed that any identity in the form of an individual, however superb, could be conceived as the one set down in the article in question. This is one of the syllogisms to which I have referred. Among the exclamations which are contained in this remarkable paper, I find this: Contemplate, if you please, grave and reverend senators, laying aside important business to pass the act