

POLAND'S AMENDED UTAH BILL.

Be it enacted, &c.. That it shall be the duty of the United States marshal of the Territory of Utah, in person or by deputy, to attend all sessions of the supreme and district courts in said Territory, and to serve and execute all process and writs issued out of, and all orders, judgments, and decrees made by, said courts, or by any judge thereof, unless said court or judge shall otherwise order in any particular case. All process, writs, or other papers left with said marshal, or either of his deputies, shall be served without delay, and in the order in which they are received, upon payment or tender of his legal fees therefor; and it shall be unlawful for said marshal to demand or receive mileage for any greater distance than the actual distance by the usual routes from the county seat of the county in which the service is to be made or process executed to the place of service or execution of process, writ or other paper; except that when it shall be necessary to convey any person arrested by legal authority out of the county in which he is arrested, said marshal shall be entitled to mileage for the whole distance necessarily traveled in delivering the person so arrested before the court or officer ordering such arrest. Said marshal is hereby authorized to appoint as many deputies as may be necessary, each of whom shall have authority, in the name of said marshal, to perform any act with like effect and in like manner as said marshal. Such appointment shall not be complete until he shall give bond to said marshal, with sureties to be by him approved, in the penal sum of \$10,000, conditioned for the faithful discharge of his duties; and he shall also take and subscribe the same oath prescribed by law to be taken by said marshal; and said appointment, bond, and oath, shall be filed and remain in the office of the clerk of the supreme court of said Territory. In actions brought against said marshal for the misfeasance or non-feasance of any deputy, it shall be lawful for the plaintiff, at his option, to join the said deputy and the sureties on his bond with said marshal and his sureties.

SEC. 2. That it shall be the duty of the United States attorney in said Territory, in person or by an assistant, to attend all the courts of record having jurisdiction of offenses as well under the laws of said Territory as of the United States, and perform the duties of prosecuting officer in all criminal cases arising in said courts; and he is hereby authorized to appoint as many assistants as may be necessary, each of whom shall subscribe the same oath as is prescribed by law for said United States attorney; and the said appointment and oath shall be filed and remain in the office of the clerk of the supreme court of said Territory. The United States attorney shall be entitled to the same fees for services rendered by said assistants as he would be entitled to for the same services if rendered by himself.

SEC. 3. That there shall be held in each year two terms of the supreme court of said Territory, and four terms of each district court at such times as the governor of the Territory may by proclamation fix. The district courts shall have exclusive original jurisdiction in all suits or proceedings in chancery, and in all actions at law in which the sum or value of the thing in controversy shall be \$300 or upwards, and in all controversies where the title, possession, or boundaries of land, or mines or mining claims shall be in dispute, whatever their value, except in actions for forcible entry or forcible or unlawful detainer; and they shall have jurisdiction in suits for divorce. When a bill is filed by a woman to declare a marriage or a pretended marriage void, on account of a previous subsisting marriage of the defendant to another woman, the court or judge thereof may grant such reasonable sum for attorney and counsel fees as the circumstances of the case will justify, and may likewise, by final decree, make such allowance for the maintenance of the complainant and her children by the defendant as may be just and reasonable. And whenever, in any proceeding for divorce, or in any civil cause, or in any criminal prosecution, it is necessary to prove the existence of the marriage relation between two persons, it shall not be necessary to prove the same by the production of any record or certificate of the marriage, but evidence of cohabitation between the parties as husband and wife, and the acts, conduct, declarations, and admissions of the parties shall be admissible, and the marriage may be established like any question of fact. Probate courts, in their respective counties, shall have jurisdiction in the settlement of the estates of decedents, and in matters of guardianship and other like matters; but otherwise they shall have no civil, chancery, or criminal jurisdiction whatever; they shall have jurisdiction of suits of divorce for statutory causes concurrently with the district courts; but any defendant in a suit for divorce commenced in a probate court shall be entitled, after appearance and before plea or answer, to have said suit removed to the district court having jurisdiction, when said suit shall proceed in like manner as if originally commenced in said district court. All judgments and decrees heretofore rendered by the probate courts which have been executed, and the time to appeal from which has by the existing laws of said Territory expired, are hereby validated and confirmed. The jurisdiction heretofore conferred upon the justices of the peace by the organic act of said Territory is extended to all cases where the debt or sum claimed shall be less than \$300. From all final judgments of justices of the peace an appeal shall be allowed to the district courts of their respective districts, in the same manner as is now provided by the laws of said Territory for appeals to the probate court; and from the judgments of the probate courts an appeal shall lie to the district court of the district embracing the county

in which such probate court is held in such cases and in such manner as the supreme court of said Territory may, by general rules framed for that purpose, specify and designate, and such appeal shall vacate the judgment appealed from, and the case shall be tried *de novo* in the appellate court. Appeal may be taken from both justices' and probate courts to the district court of their respective districts in cases where judgments have been heretofore rendered and remain unexecuted; but this provision shall not enlarge the time for taking an appeal beyond the periods now allowed by the existing laws of said Territory for taking appeals. Whenever the condition of the business in the district court of any district is such that the judge of the district is unable to do the same, he may request the judge of either of the other districts to assist him, and upon such request made, the judge so requested may hold the whole or part of any term or any branch thereof, and his acts as such judge shall be of equal force as if he were duly assigned to hold the courts in such district.

SEC. 4. That within sixty days after the passage of this act and annually thereafter the governor of the Territory shall appoint in each county two male citizens of the United States, who shall have resided in such county for one year next preceding, who, with the sheriff of such county, shall constitute a board of jury commissioners for such county, and the commissioners appointed by the governor shall hold their offices for one year and until others shall be appointed in their stead. The governor shall by proclamation fix a time and place for the meeting of such commissioners in each county, and at the time and place so fixed each of such boards shall proceed to make a list, which shall contain the names and residences of all the male citizens of the United States who have resided within such county for six months next preceding, who are above twenty-one years of age and who can read and write in the English language; and when said list is completed, it shall be duly certified by such commissioners and returned to the clerk of the district court of the district in which such county is situated; and the lists thus furnished shall constitute a jury-list, from which shall be drawn all grand and petit jurors to serve in the district courts for the year next following. And the said commissioners shall be paid five dollars a day for each day's service as such commissioners and ten cents a mile for necessary travel, and their accounts shall be audited by the governor, and the governor shall draw orders on the treasurer of the Territory for the amount, which shall be paid by him out of any money in the territorial treasury. Whenever a grand or petit jury is to be drawn to serve at any term of a district court, the judge of such district shall give public notice of the time and place of the drawing of such jury, which shall be at least twelve days before the commencement of such term; and on the day and at the place thus fixed the judge of such district shall hold an open session of his court, and shall preside at the drawing of such jury; and the clerk of such court shall write the name of each person on the jury-list returned and filed in his office upon a separate slip of paper as nearly as practicable of the same size and form, and all such slips shall, by the clerk in open court, be placed in a covered box, and thoroughly mixed and mingled; and thereupon the United States marshal, or his deputy, shall proceed to fairly draw by lot from said box such number of names as may have previously been directed by said judge; and if both a grand and petit jury are to be drawn, the grand jury shall be drawn first; and when the drawing shall have been concluded, the clerk of the district court shall issue a venire to the marshal or his deputy, directing him to summon the persons so drawn, and the same shall be duly served on each of the persons so drawn at least seven days before the commencement of the term at which they are to serve; and the jurors so drawn and summoned shall constitute the regular grand and petit juries for the term for all cases. And the names thus drawn from the box by the clerk shall not be returned to or again placed in said box until a new jury-list shall be made. If during any term of the district court any additional grand or petit jurors shall be necessary, the same shall be drawn from said box by the United States marshal in open court; but if the attendance of those drawn cannot be obtained in a reasonable time other names may be drawn in the same manner. Each party, whether in civil or criminal cases, shall be allowed three peremptory challenges; and in the trial of any prosecution for adultery, bigamy, or polygamy it shall be a good cause of principal challenge to any juror that he practises polygamy or that he believes in the rightfulness of the same. In criminal cases, the court, and not the jury, shall pronounce the punishment, under the limitation prescribed by law. The grand jury must inquire into the case of every person imprisoned within the district on a criminal charge and not indicted; into the condition and management of the public prisons within the district; and into the wilful and corrupt misconduct in office of public officers of every description within the district; and they are also entitled to free access, at all reasonable times, to the public prisons, and to the examination, without charge, of all public records within the district.

SEC. 5. That there shall be appointed by the governor of said Territory one or more notaries public for each organized county, whose term of office shall be two years and until their successors shall be appointed and qualified. The act of the Legislative Assembly of the Territory of Utah entitled "An act concerning notaries public," approved January 17, 1866, is hereby approved, except the first section thereof, which is hereby disapproved. Provided, That wherever in said act the

words "probate judge" or "clerk of the probate court" are used, the words "secretary of the Territory" shall be substituted.

SEC. 6. That the supreme court of said Territory is hereby authorized to appoint commissioners of said court, who shall have and exercise all the duties of commissioners of the circuit courts of the United States, and to take acknowledgments of bail, &c.; and in addition they shall have the same authority as examining and committing magistrates in all cases arising under the laws of said Territory as is now possessed by justices of the peace in said Territory.

SEC. 7. That the common law of England, as the same is defined and modified by the courts of last resort in those States of the United States where the common law prevails, shall be the rule of decision in all the courts of said Territory so far as it is not repugnant to or inconsistent with the Constitution and laws of the United States and the existing statutes of said Territory.

SEC. 8. That the act of the territorial Legislature of the Territory of Utah entitled "An act in relation to marshals and attorneys," approved March 3, 1852, and all laws of said Territory inconsistent with the provisions of this act, are hereby disapproved. The act of the Congress of the United States entitled "An act 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," approved February 26, 1853, is extended over and shall apply to the fees of like officers in said Territory of Utah.

Correspondence.

UTAH AFFAIRS.

No. 7.

Jurisdiction of Probate Courts.

SALT LAKE CITY,
May 21, 1874.

Editor Deseret News.

The reasons why the Utah Legislature conferred civil and criminal jurisdiction on the Probate Courts, are thus stated in a memorial of lawyers and other influential citizens of Salt Lake City, to Congress, Feb. 17, 1873, as printed in the *Congressional Globe*.

"The Territory of Utah extends three hundred and sixty miles north and south, and two hundred and sixty-four miles east and west, and now contains a population equal to that of any other two Territories in the United States. Its inhabitants are settled mostly in towns and villages. For this Territory the population Congress has provided three courts; First District Court, held at Provo; Second District Court, held at Beaver; Third District Court, held at Salt Lake City. Of these courts, the first two mentioned hold one term a year, and the last mentioned two terms a year. The time during which the First and Second District Courts have been in session up to within the last two years will not average two days in each year; and there has been a year or more at times when no district court has been held outside of Salt Lake. The District Court of Salt Lake is in session but a small portion of the time. Of the judges appointed to the first and second districts, some have never seen the place appointed for holding their courts, and none of them have resided in their districts until very recently, unless an occasional visit can be called a residence. Consequently, any application for judicial interference, either criminal, common law or chancery jurisdiction, has been wholly impracticable.

"But suppose these courts had been in regular session. St. George, a city of two thousand inhabitants, possessing large agricultural and manufacturing interests, is situated in the southern portion of the Territory, in the second judicial district, and one hundred and twenty miles from Beaver, where the court is held. The facilities for traveling would require a citizen of St. George to arrive at Beaver in about three days. Would it not, under these circumstances, be highly inconvenient for him to transact any business in the district court? A citizen of Boston can travel to Chicago quicker and cheaper and more comfortably than a citizen of St. George can travel from his home to Beaver, yet we apprehend that the citizen of Boston would consider it something of a hardship should he be obliged to transact all his business at Chicago; and he would not be considered unreasonable should he ask for some local tribunal. Other towns in the Territory are similarly situated to that of St. George, and without local courts of some kind they are wholly without protection

by judicial authority in property or person.

"Under these circumstances, can it be said that the Legislature of Utah acted unwisely in conferring jurisdiction on the Probate Courts? Would they not have fallen far short of their duty had they neglected to throw around their infant settlements, so widely separated, such protection as the Probate Courts afforded?"

In my second letter it was clearly shown that it was only the intent of the Legislature to confer on the Probate Courts concurrent jurisdiction with the District Courts in civil and criminal matters of the Territory. This jurisdiction was conferred by the Legislature under section six of the Organic Act, which declares that "the Legislative power of said Territory shall extend to all rightful subjects of legislation, consistent with the constitution of the United States and with this act." The statute conferring this jurisdiction was approved Feb. 4, 1852, and, under the rule of the Supreme Court of the United States, until that act is disapproved by Congress, it must be held to be valid. As it has received the implied sanction of Congress for twenty-two years, it is reasonable to infer that it was approved by that body.

Since some time prior to Sept., 1871, when a grand jury was illegally summoned by the United States marshal on an open venire to attend the Third District Court of Utah, Judge McKean presiding, not a single criminal has been brought to justice in that court, if we except the case of Thomas Hawkins, already referred to, for committing adultery with his wife, on complaint of his wife, tried under a Territorial statute. And unless the Probate court had exercised the jurisdiction, legally conferred upon it, numbers of criminals must have gone unpunished and the peace of society been jeopardized. And even as it is, the right of appeal being granted in every case, it is the common practice for convicted criminals to appeal from the Justice's and Probate Courts to the District Courts, and obtain their release after having been convicted, as provided by law, by justices or a jury of their peers.

I find, by reference to an Exhibit, duly certified, that from June 29th, 1872, to November 14th, 1873, the Probate Court of Salt Lake County alone tried 56 cases, including the crimes of arson, larceny, robbery, house-stealing, forgery, assault, manslaughter, and four cases of murder. Similar exhibits show wherein federal judges have interfered with the administration of justice in hundreds of other cases in the lawfully constituted courts of the Territory, by liberating all manner of criminals, after lawful conviction, in defiance of the universal rule of law, that the acts of *de facto* officers cannot thus be collaterally attacked. In addition to those exhibits, the following abstract is submitted, taken from an affidavit of John Burt, sheriff of Box Elder County—

In the justice's court for Malad precinct, at the City of Corinne, before O. H. Elliott, justice of the peace, (Mr. Elliott is not a "Mormon") December 28, 1872, Richard Martin and Martha Martin made affidavits charging Othello S. Wright, Thomas Heller, William Schoonover, Alexander Toponce and Edmund P. Johnson (the two last named persons were U. S. deputy marshals) with stealing cattle and horses. After a lengthy examination and the hearing of a number of witnesses, all of the above named defendants and one George Butterbaugh were committed to answer to the charge of grand larceny in the Probate Court of Box Elder County, January 6, 1873. There the grand jury being duly impaneled found indictments against all of the above named defendants for stealing cattle and horses, 267 in number, and of the aggregate value of \$8,590. Associate Justice C. M. Hawley issued a writ of *habeas corpus*, January 28, 1873, which was served by M. T. Patrick, U. S. Marshal, and the prisoners were discharged from imprisonment and from the custody of the sheriff.

Judge Hawley's court met at Corinne, January 29, 1873, but the people had retired from the field in disgust. Judge Hawley, addressing himself to the prisoners in open court, used the following language—

"If any judge or sheriff of this county, or any other county in this Territory, shall at any time in the

future seek to interrupt you in the free exercise of your liberty as American citizens, you will please make the fact known to me and I shall see that they are punished to the utmost extent of the law. Gentlemen, you are now discharged and this court adjourned."

There is another exhibit, taken from the records of the Probate Court of Salt Lake County, of eighty-four civil cases therein adjudicated. Those cases clearly show the confidence reposed in the Probate Courts by non-"Mormons" and dissenters, sixty-two of whom were plaintiffs. Among those plaintiffs are several of the most prominent agitators for congressional legislation for Utah. One is a case of Walker Bros., dissenters (of whom Joseph R. Walker is the principal partner, and a chief agitator) plaintiffs, against James Robbins, a "Mormon," defendant, wherein the plaintiffs recovered judgment on the 11th June, 1866, for \$497.84.

The exhibit also shows three separate cases wherein Stephen De Wolfe, law partner of R. N. Baskin, recovered judgment against "Mormons" as follows—

Stephen De Wolfe vs. Thomas J. Franklin *et al.*, plaintiff recovered judgment, 12th May, 1860, for \$278.50 and costs.

De Wolfe and Standeford, assignees of C. A. Perry & Co., vs. A. Gardner (a "Mormon" bishop); plaintiff recovered judgment, 16th June, 1862, for

S. De Wolfe vs. Naisbitt and Hindley; plaintiff recovered judgment, 29th Nov., 1868, for \$650.80.

On the exhibit are two cases wherein John B. Kimball is plaintiff, a non-"Mormon," deceased, formerly a partner of H. W. Lawrence, a prominent agitator, which are decided in Mr. Kimball's favor and against "Mormons," viz: John B. Kimball vs. George Snow, plaintiff recovered judgment 13th June, 1859, for \$61 and costs; and also against Charles Crismon (a "Mormon") for \$476.40 and costs.

Another agitator is one of the plaintiffs in the case of Seigel Bros. vs. C. S. Cram (a "Mormon"); plaintiff recovered judgment, 16th July, 1868, for \$145.10; and still another, Samuel Kahn, is one of the plaintiffs in the case of Bodenburg and Kahn vs. Brigham H. Young (a "Mormon" and a nephew of Ex-Gov. Brigham Young); plaintiff recovered judgment, April 2nd, 1863, for \$3,255.76.

The exhibit also shows that Wells, Fargo & Co., Charles H. Hempstead, ex-U. S. prosecuting attorney, Gilbert & Gerrish, and Gilbert & Sons, merchants; Rogers, Shropshire & Co., The California State Telegraph Co. and other prominent parties proceeded against members of the "Mormon Church" in the Probate Court, thus clearly attesting the confidence reposed in the integrity of those courts while the parties were directly interested in the issue.

VERITAS.

No. 8.

The Territorial Marshalship and Attorneyship and the Jury Law.

SALT LAKE CITY,
May 29, 1874.

Editor Deseret News:

It was stated in my last that some time prior to September, 1871, no criminal had been brought to justice in the Third District Court—Judge McKean's district. There is but one reason for that fact, as alleged by his honor, and he gave it in court, October 20, 1873, substantially as follows—

"If in deciding the Englebrecht case the Supreme Court had gone further and said that McAllister (the Territorial Marshal, elected by the Legislative Assembly) was the proper person to serve processes in the District Court, then the difficulty would have been settled; but he did not understand that the decision said that McAllister was the proper officer. While he was now of the opinion that he had been wrong in holding that the legislature had not the right to create the office, he was also of the opinion that, had the case of Orr (U. S. Marshal) vs. McAllister been carried to the Supreme Court of the United States, that tribunal would have held that the office of Territorial Marshal must be filled by the nomination of the Governor."

Upon that point alone, he discharged the grand jury, duly summoned under the laws of the Territory. This was the third time since Sept.