THE RAID UPON THE OFFICES.

CONTINUATION OF THE ARGUMENTS.

October 13, 1882.

The Court met this morning at 10 o'clock, Chief Justice Hunter on the bench.

Mr. Marshall rose to make the closing speech on behalf of the plaintiffs, and said he deemed it useless, and, in fact, a vain work to endeavor to cover any of the points of law referred to by his colleague, Mr. Dickson. They were willing, on behalf of the appointees of the Governor, to submit the authorities and the reasoning that had been made by Mr. Dickson. In the argument that he proposed to make he desired to confine himself solely and absolutely to the question of the construction of statutes, and to read only such law as bore upon that subject. He desired, in reading that law and defining it, that his honor would take the Edmunds bill and the statutes of Utah providing for a term of office, and the Hoar Amendment, together; that as they all bore on the same subject, they should be read and construed together in the light of the law which he would read, and from that he would ask his nonor to form a conclusion as to what the intention of the legislation in question (the Edmunds bill, etc.,) was.

Before proceeding with his argument, counsel referred to some further authorities not covered by his colleague, yesterday. He regarded this reference merely as supplemental to Mr. Dickson's argument. The references went to show, as claimed by counsel, that exceptions to the general rule of mandamus proceedings were admissable in the present case.

Counsel then called attention to the rules of construction of statutes, going to show how far the court may go to give force and effect to the intention of the law-making power. The late decision of Judge Field, in the Chinaman case, was specially referred to in this connection, and counsel proposed to quote authority in support of the same. The court was requested to take the statutes of Utah and consider them, with the Hoar amendment, treating on the Territory of Utah, and the Congress of the United States as [one legislative body; and attach at the end the act of the Territory creating the office, and providing for the appointments covered by the Hoar amendment, and construe them together. The court was also requested to take the Edmunds bill and the Utah statutes, providing for the offices, and place them side by side, before arriving at his decision.

After reading a number of authorities upon the rules of construction, counsel said that the object of the conrts had been to give force and effect to legislation, and at all hazards and at all times to avoid a construction which in its results would render that legislation nugatory and absurd, for which in force and effect would declare it null and void for all and every purpose or object, But in this case no such thing was requisite; his honor was not forced to that atternative. There was not one single word in the Hoar amendment that could be construed other than by giving its reasonable and appropriate meaning, and by giving such a construction his honor would give to it vitality, his decision would carry with it—the true meaning and intent of the legislators; in doing this, he would not pronounce the action of the Senate of the United States absurd, vain, void and of no purpose. Mr. Marshall was at this stage asked by Mr. Rawlins if he had any objection to his asking a question. Mr. Marshall answered, "No sir, I don't wish to be interrupted, my collegue will answer." This reminded Mr. Marshall of a personal compliment that had been paid him, (in connection with the "main question") by Mr. Rawlins in his lengthy argument; and the gentleman in this particular, had reminded him of a colloquy in Bulwer's celebrated play of Richelieu, in which that wise Cardinal, in his superior knowledge of human nature, and the philosophy of the human mind, is talking with his brother, Joseph, and after appealing to his ambition and selfishness, he makes this remark: "O, Joseph, you may yet become a Bishop!" "I thought," said Mr. Marshall, "that my friend's aptitude in displaying his knowledge of the Jesuitism and sophisms of religion earned him the application of the remark—"O, Joseph, you may yet become a Bishop." This retort, on the part of counsel, was enjoyed apparently by all, but its effect was really marred by the rather inelegant style of the gentleman's delivery.

Mr. Rawlins—May I ask you the question now Mr. Marshall?

Ans.—No, sir, I refer you again to my colleague. [Laughter, on the other side.]

After quoting authorities on the construction of statutes, counsel said he desired to review certain current history. He did not wish to refer to it, so he said, for the purpose of creating effect, but merely to address himself to the law pertinent to the case; it was part and parcel of the argument, and therefore should be entered into. He then said: The Organic Act was passed in 1850; and as early as '58-9 the laws of the United States were violated and resistance was offered—so it was reported—to the laws. The result was, an army, a rebellion, a force marched from the Eastern States to Utah, to enforce the rights of your honor's predecessors. Time rolled on; the discord was settled. In 1862 the anti-polygamy law was passed, striking at once at the fundamental principles of the Mormon Church, the people that ruled throughout this Territory, proclaiming and defining that as a crime, which was one of the essentials and fundamental principles of their Church. The law was passed, and the Reynold's case was the only conviction that could be obtained; in fact, it was scarcely possible for the law to be enforced in Utah. Public opinion with the masses, taught by its leaders, was that that law was unconstitutional. Unconstitutional! How? It was in violation of a higher law; it struck the Supreme Being himself and violated His ordinances—His revelations as given to Joe Smith and Brigham Young. The people conscientiously in their faith believed—I give them credit for that; I know them well. Earnest in their faith, earnest in their belief, believing that their future salvation depended upon their violation, in fact, of the law; believing that their hopes of the future rested solely in the complete subserviency to the revelations of the Church, to its creeds and its doctrines and covenants; disregarding and setting at nought the law of 1862, which, upon the statute books of the United States was a dead letter for 18 years nearly. Finally, a case was brought against Reynolds. He was tried and convicted under and by aid of the Poland bill. The general impression through Utah was that this was a test case. "We'll try this case; let it be brought before the Supreme Court of the United States, and there settle the question, whether this law is against a higher law, and whether it is an innovation of the rights of conscience. And we'll obey that law [decision]. Such were the hopes of all well-wishers of the people, that when the Supreme Court decided, that then the masses of the people of Utah, those constituting the bone and sinew, would bow to the decision of that court and recognize its force and effect, and henceforth go and sin no more. Yes, the well-wishes of this Territory, of its greatness and wealth, hoped and trusted that the leaders in high places in this church would, when the decision was telegraphed from Washington, take it upon themselves to teach their subordinates, their people, their admirers, "Let your conscience be what it may, let your belief be what it may, let your faith be what it may, you must obey the laws of the land, and one of the laws of the land was that polygamy was a crime and must not be practised here." But, may it please your honor, the decision was rendered, and what was the result? From the northern extremity of the Territory to its southern limit, and from its eastern to its western borders, the pulpits of the Church still thundered out this belief and its falth, proclaiming its fundamental doctrine of polygamy. They threw to one side the decision of the Supreme Court, and rested themselves still upon revelation. How did the country at large regard it? Does not your honor recall now the attempts raised in every pulpit of every religious denomination throughout the Union. [And here Mr. Marshall, in about two or three long strides, cleared the wide open space between himself and the Judge, looking his honor squarely in the eye, as if he really and truly meant it] and of every press of every political shade and color, hurl forth its resolution that this faith shall be stopped, tha this crime shall be abandoned and put down by law if possible, and if not by law, that it shall be destroyed.

After the grandiloquent, or rather vehement, effort on the part of Mr. Marshall, he referred to the circumstances of the passage of the Edmunds bill, and read said bill to his honor. This bill he contended caused vacancies in all the offices filled by polygamists; but owing to circumstances that arose, the Edmunds bill was not put in force; that in consequence of the non-arrival of the commissioners the usual election on the first Monday in August could not be held. This contingency brought forth the letter from the Judges of the Territory to the Senate of the United States, asking that some further legislation should be provided to legally fill vacancies caused by failure to hold an election in August. It was true that the Judge did not suggest any mode by which the difficulty could be overcome; they simply asked Congress to supply a remedy. And what was that remedy? The Hoar amendment, which amendment, counsel contended, taken in conjunction with the Edmunds law implied that the offices in question, by failure to elect, were all vacant, and that, therefore, the Governor in making the appointments to the offices of sheriff and auditor was only carrying out the power given to him by the legislation in question.

Recess till 2 o'clock.

COL. MERRITT'S CLOSING ARGUMENT.

Col. Merritt, at the outset, said he should attempt, consistent with what he conceived to be his duty to his clients, to make his argument as brief as possible, and his labors, in fact, had been much lightened by the very exhaustive argument made by his learned colleague [Mr. Rawlins] in this case. They had hoped—or at least he for one had hoped—that in the trial of this case, which involved a purely legal argument in a court of justice—they had hoped and expected that they would be met with purely legal arguments. But that morning, and during a portion of the time the previous day, there had been injected in this case a stump speech. The learned counsel upon the other side seemed to have forgotten the forum, and thought that doubtless he was upon the hustings taking a part—as he could, ably and eloquently, as he always did—in a contest between two parties for the seat of delegate for this Territory. What the argument was made for, he could not, for the life of him, tell. Certainly the gentleman (Mr. Marshal) did not intend to confess the weakness of their side of the case upon the question as to the right of a governor to fill vacancies where there were no vacancies, nor could he intend to excite, if possible, passion and prejudice against the defendants in this case. It would scarcely be consistent with his well known character as a lawyer to think that he would do so knowingly. Therefore he could only conceive that his learned friend in this case had forgotten the forum. Perhaps he imagined that he ought to have been nominated as delegate to Congress from the Territory, or perhaps he, in his dreams, looked to himself as the future and coming senator whenever Utah should be admitted as a State. Now, in his argument of this case he (Mr. Merritt) would attempt to argue upon purely legal questions, so far as his ability would permit, and in order to do so they would have first to consider what the powers of the Territory of Utah were. In article four of the constitution of the United States, it is provided that the Congress of the United States shall have power to make such rules and regulations as it might see proper for the control and disposition of the territories and other properties of the United States. Under this provision Congress had assumed the power—and it had long been decided by the highest courts that it had the power—to prescribe a form of government for the territories, until such time as they shall have acquired the proper population and the other requirements for admission as sovereign States of the nation. Now, under that provision of the Constitution, and following the legislation of Congress in regard to other territories of the United States, there was passed for the Territory of Utah, on the 9th of September, 1850, and Organic Act. Being a part of the United States it became necessary to provide some kind of government; and Mr. Merritt briefly outlined the government which had been provided for the Territory of Utah, and the powers belonging to Congress and the Territorial Legislative respectively. Such being the case, the question arose as to what were rightful subjects of legislation. One was that the Territory had a right to elect officers for local government, had a right to say how they should be elected, and whom elected by, the time, place and manner of their election, and the terms of their election, Congress reserving to itself the power to elect superior officers, such as Marshal, District Attorney, Judges, etc. One of the rights of the Territory, also was to elect Territorial Auditor of Public Accounts, Sheriffs, Probate Judges, Justices of the Peace, District Constables, etc. This right would not be denied. It followed, then, as a logical sequence, that if the legislature had the power to pass laws creating these offices, the manner of election, etc., it had at the same time the right to prescribe as to the term of office,—whether it should be two, four, six, or ten years, or for life, if it saw proper. Ever since the Territory had been organized the term of the offices in question had been prescribed, indeed so far as the Auditor is concerned, his term was to continue for two years, and until his succersor was elected and qualified. The defandants held their offices by virtue of Territorial statute. It was a well settled rule, that where power was given or conveyed by a superior to an inferior, that that power might be exercised by the latter with the same force and effect, as if used by the former himself. And in this light counsel regarded tha Territorial law providing for the office of Auditor of Public Accounts. The power to create the office had been delegated to the Territory by the Congress of the United States in the Organic Act; and it was therefore, just as valid and binding as a direct act of Congress to the same end, would be. And this delegated power not only authorized the Legislature to create the office of Territoriel Auditor, but to prescribe the term of office, and the time thereafter that the officers should continue in office, namely, until his successor should be elected and qualified. It had been clearly shown by Mr. Rawline, whose argument, in his opinian, was unanswerable, that Mr. Clayton held his office for two years by showing, in the first place, that the Legislature provided for this office in a general act, in which also were prescribed its duties and powers, also its liabilities and qualifications. After this the Legislature passed another act by which they did, what? Repeal the first? No; but recognizing the first by extending the term of office two years, and until the successor should be elected and qualified. These two acts being *pera materia*, the statutes must be construed together; and counsel would lay it down beyond a matter of dispute that the amendment of the act of '78 must be read in conjunction with the act of which it was made amendatory, as to the constituency and term.

Referring to the office of sheriff, counsel said that the law provided that that office should be elected for two years and until his successor should be elected and qualified, and he understood that it had been conceded that Mr. Dickson's argument was based on that assumption; for which counsel complimented the gentleman on his good judgment in not attempting to attack something that was unanswerable. It could not but be conceded in the case of the auditor and that of sheriff, whose cases were at issue, that they held for two years and until their successors were elected and qualified. Counsel on the other side cited decisions from Ohio, Missouri Illinois, California, and one from New Jersey, by which they would show that the provision providing for a specified term of office, and until the successor was elected and qualified, that the officer held over only in the event of there being no election; and by way of answering this point Defendant's Counsel read from 35th New Jersey, page 196; and then stated, that if there was any provision in the Organic Act preventing the Legislature from electing the officers in question for a term of 2 or 4 years and until their successors were elected and qualified, there might be some ground for argument in the case. But where the law specifically provided 2 years or 4 years, as the case might be, and until the successor was elected and qualified, there was no question of law as to his right to hold over. This was maintained in the case of Goodwick against Guthrie, and other California cases referred to by counsel. It was not a question of successorship, but a question of vacancy. The Hoar Amendment, not to the Edmunds bill but to the civil appropriation bill, provided that the Governor of the Territory might fill any vacancy that may exist by failure to elect at the then ensuing August election. Now it was contended by the gentlemen that because Congress passed an act that the Governor might fill vacancies, that the construction should follow that the vacancy must be created. You might as well say, Sir, that if A. gave B. authority to sell his real estate in San Francisco, and A. had no real estate in that place, that because B. went there and made a deed to C. by which he undertook to convey the title, that that created and invested the realty in A. as a constituent.

It was argued further by counsel that an evil existed in Utah—and in this argument, if indeed it were worthy the name, the gentleman, his friend Marshall, figured more as a stump than a forum orator—and to meet which the Edmunds law was made; and he referred to what he was pleased to term the "rebellion" of '59, and to the framing of the law of '62 against polygamy. It was well known, and no one would deny, that a portion of the people did practice polygamy, and that they did believe in doing so that they were obeying a command from God. But it was argued that to meet this evil the Edmunds law was enacted, and, following the same line of argument in order to carry out its terms, the old officers would have to be turned out. That in effect, was Mr. Marshall's argument. This was not true, Congress, under the Edmunds law, never contemplated any such thing. Mr. Clayton, for instance, who was present, neither was living and never had lived in polygamy, he was not a violater under the law on the subject, so far as the Court could ascertain from the pleadings in the case; neither had Congress undertaken to interfere with the religious sentiments of any man; it made no difference whether he believed in Joe Smith's gold plates, or in Moses' tables of stone, or in any other absurdity; but should it be said, the law was made to deal with the gold plates, but not the tables of stone; that it was made to affect the modern but not the ancient prophets? No court could for a moment hold that Congress had any such intention. And then, the law was not made applicable to Utah alone; it was no more so to Utah than to any other place over which the United States have exclusive jurisdiction. It would not do for gentlemen to come into court and argue seriously that the object of the law was to put down Mormons, as Mormons. Nothing of the sort. This speech was evidently made for one of two purposes; either ', to make the groundlings stare," or an attempt to overawe this honorable Court. He knew, however, his Honor was made of better metal that he could not be induced to sacrifice his honor, as a judge, at the shrine of popular clamor, but that he would poise the scale of justice and deal impartially, popular opinion to the contrary notwithstanding; that in this American court, this temple of justice, we should, to use a sporting term, have a "square deal." And that was all we asked.

Referring again to argument of Mr. Marshall, the Colonel said it should never have been heard beyond the pale of the hustings; that in listening to it he was pained for his personal friend, for whose legal ability he had so much respect, and at whose feet, it might be said, he had sat, as did Paul at the feet of Gamaliel, to learn the law—for him to so far forget the dignity of the forum as to descend to the stump, appealing to passion, swayed by the current of popular clamor was, to say the least of it out of place. Counsel was almost ready to exclaim, *stat magni nominis umbra!*

Counsel would have it understood that the offices of the Territory could not be declared vacant simply because certain imperialists would have them vacant; the law could not be twisted to accommodate or exalt the horn of Ephraim, much less that of Eli. (Laughter.) Counsel then referred to the letter of the judges to a certain Senator which figured in the making of the Hoar amendment, and upon which Mr. Marshall placed so much stress; all that could possibly be said of it was