to vacate the office of deputy clerk, held by the relator, is not tenable. The language of the section is prospective. A law may not operate upon existing rights and liabilities without it in terms expresses such intention. 2 Hill, 238, Johnson *vs.* Bursell. Though there is no valid right to an office which may not be disturbed by legislation. Yet the incumbent has, in a sense, a right to his office. If that right is taken away by statute, the terms should be clear in which the purpose is stated."

But again, how it is to be ascertained whether a party has committed the offense denounced by those statutes? Is it to be by due process of law, or without such? Is a citizen to be put under disabilities and debarred of civil rights and degrading penalties attached to him without a hearing? without a trial by his compeers? without indictment or information? without a verdict of his countrymen? and without a judgment of a competent Court on legal proceedings? These grave questions demand serious attention.

III.

There was no vacancy to fill—none that the Governor could appoint to; therefore, his attempt to fill a vacancy was a mere *brutum fulmen*, and his commission a wholly worthless document.

By the Territorial statute of Feb. 20, 1874, Compiled Laws, p. 122, sec. 173, it is provided: "That on the first Monday in August, 1874, and every two years thereafter there shall be elected by the qualified voters of the several counties of Utah Territory, one Probate Judge for each county, whose term of office shall be for two years *and until his successor is duly elected and qualified*"

By this statute the term is not only for two years, but *until his successor is duly elected and qualfied*; hence, the pretermitting the election could not of itself work a vacancy, because the term did not expire at the biennial election, nor until a successor was *duly elected and qualified*, so that a duly elected and qualified successor was essential to terminate the term. And this provision in the statute, so far as counsel is informed, has universally been held in the American States as preventing a vacancy until such successor was duly elected or appointed and qualified, and the reasons given are of the most potent character, being based on public policy and private rights.

Without stating the many phases under which the question has been presented, and the many reasons given for such a rule, the following authorities are referred to as among the prominent ones by the Supreme Court of the United States and of the States:

6 Wallace, 293, United States *vs.* Addison.

25 Ohio Stat., 588, State *vs.* How.

37 California, 614, People *vs.* Tilton.

6 Penn. Stat., 513, Commonwealth *vs.* Hanly.

IV.

If the pretermitting an election *could not* work a vacancy, did the Hoar amendment to the Civil Service Bill adopted just at the close of the session of Congress in July, 1882, have that effect? Its language is: "The Governor of the Territory of Utah is hereby authorized to appoint officers in said Territory, to fill vacancies which may be caused by a failure to elect on the first Monday in August, Eighteen Hundred and Eighty-two, in consequence of the provisions of an act entitled: An act to amend section fifty-three hundred and fifty two, of the Revised Statutes of the United States in reference to bigamy and for other purposes, approved March 22nd, 1882, to hold their offices until their successors are elected and qualified under the provisions of said act: *Provided*, That the term of office of any of said offiers, shall not exceed eight months."

What is the Governor authorized to do by the terms of this act? To appoint officers *to fill vacancies which may be caused* by a failure *to elect on first Monday in August*, 1882. It did not profess to declare vacancies, nor did it authorize the Governor, nor the Courts to declare vacancies. But such vacancies as might, under the Territorial statutes, occur because of the failure to hold said election, were authorized to be filled by the Governor, and if the Governor has found any such vacancies he, no doubt, had the right to fill them. The power to fill vacancies was, however, confined to such as occurred for the one cause only; to wit: because of the non-holding of such election. It did not authorize him to fill vacancies which might have, or should occur, for any but the one cause. And this hold-over clause is found in the Territorial statute, there was no vacancy because of the non-holding of the election. The statute provides what the term should be, and it was not for two years simply, but for two years and and until a successor should be elected and qualified. Congress could have shortened this term, perhaps, by an explicit repeal of the statute and conferring on the Governor the appointing power; it did not, however, see proper to do that, but only to provide for the filling of such offices as should become vacant by the failure to hold such election. The object of Congress was to prevent, and not produce anarchy, as would manifestly occur should the statute be construed as contended for by the appellee and his counsel.

1st.—If the vacancy occurred by reason of the 8th section of the Edmunds bill, it took place March 22, 1882, on the approval of said bill, and did not occur by reason of the non-holding of the August election; the vacancy existed on first Monday in August, 1882, and was not filled by the election, but as that did not make the vacancy, the Governor had no right to fill it under the Hoar amendment, and if the vacancy existed on the approval of the Edmunds bill, all the acts of the incumbent were were null and void from that date, unless by the holding of the office under claim of right, he became an officer *de facto*, in which case there was no vacancy, for so long as there is an incumbent who has legal authority to discharge the duties, as so well said by the Supreme Court of , such a thing as a vacancy is a legal impossibility.

2nd.—If there be vacancies because of the not-holding said election, those vacancies occurred immediately after the first Monday in August, 1882, and should have been at once filled by the Governor, so that his appointments would expire eight months thereafter, or in May, 1883, leaving a hiatus, or vacancies, in all such offices from May to August, withott legal power in anyone to fill such vacancies and thus most signally producing the very mischief Congress was trying to avert, and this mischief is sufficient of itself to condemn this attempted construction and to relieve the Congress of the United States and the President from the implied censure of producing anarchy throughout this Territory, and indeed, all the other Territories, for the eighth section of the Edmunds bill applies to them all. Whereas, if the same construction of statutes be meted out for Utah as for other Territories and States, then, indeed will there be no anarchy with all the offices, with the hold-over clause, will be discharged by the present incumbents and such as have no hold over-clause will be filled by the Governor's appointees.

V.

But mandamus is not the proper proceeding to try this question. It is true that the Territorial statute, Compiled Laws, p. 523, sec. 1670, authorizes it: "To compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust or station; or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled and from which he is unlawfully precluded."

But the next section provides that: "This writ shall be issued in all cases where there is not a plain, speedy, and adequate remedy in the ordinary course of lay."

These two sections taken together, are simply declaratory of the common law, and so held by the Supreme Court of California on an identical statute; see 44 Cal., 173, Kimball *vs.* U. W. & Co., and High on Extraordinary Remedies, section 30, quotes this case appovingly, and says: "The Court will construe the latter section as a limitation upon the powers conferred by the former and not as an enlargement of those powers. * * * * The Courts will, therefore, in administering relief by mandamus under such a statute, be governed by the same conditions and limitations which prevailed at common law, and will not issue the writ in cases where another adequate remedy is provided by law.

Is there an adequate remedy at law? In section 591, High on Extraordinary Remedies, says: "The modern information in the nature of *quo warranto*, may be defined as an information, criminal in form, presented to a Court of competent jurisdiction by the public prosecutor, for the purpose of correcting usurpations, misuses, non-uses of a public office or corporate franchise,"

And in section 603, High says: "It is yet a strictly civil proceeding, resorted to for the purpose of testing a civil right, *by trying the title to an office* or franchise, and ousting the wrongful possessor."

Is there a public prosecutor authorized to file such information on the relation of a private person? By second section of the United States statute of June 23rd, 1874, known as the Poland Bill, it is made the duty of the States attorney for this Territory to attend all the courts of record having jurisdiction of offenses under the Territorial and United States laws, and *"perform the duties of prosecuting officer in all criminal cases."*

By the Territorial statute of February 17th, 1876, Compiled Laws, p. 129, sections 204 and 206, each county was required to elect a "county prosecuting attorney, and his duties are to commence and take charge of prosecutions for offences arising under the laws of the Teoritories," and when carried to the District Court, "may aid in conducting the prosecution."

The United States and county attorneys each have the right to appoint assistants, so there was no lack of a public prosecutor.

Wells, on Jurisdiction of Courts, p. 497, sec. 501, says: "A *mandamus* is not the proper proceeding to try the right to a public office." and refers to:—

18 Mich., 338, People *vs.* Detroit.

3 Oregon, 220, Warner *vs.* Myers

And this doctrine is fully sustained by the Appellate Court of New York:—

76 N. Y., 328, People, *ex rel vs.* Ferris, *et. al.*

In High, section 49, it is said: "In determining the extent to which the Courts may properly interfere by mandamus with questions relating to the title to and possession of public offices, it is necessary to recur to an important principle * * * and which may be properly termed the controlling principle governing the entire jurisdiction by mandamus. It is that in all cases where other adequate and specific remedy exist at law for the grievance complained of, the writ of mandamus is never granted. Applying this principle to cases where relief has been sought to determine disputed questions of title and possession of public offices, the courts have almost uniformly refused to lend their aid by mandamus, since the remedy by information in the nature of a *quo warranto*, is justly regarded as the most appropriate and efficacious remedy for testing the title to an office, as well as the right to the possession and exercise of the franchise.

"And the rule may now be regarded as established by an overwhelming current of authority, that where an office is already filled by an actual incumbent, exercising the functions of the office *de facto*, and under color of right, *mandamus will not lie to compel the admission of another claimant, nor to determine the disputed title."*

In note I, he refers to cases from New York, Nebraska, Georgia, Missouri, Michigan, Arkansas, Illinois, Minnesota, Pennsylvania, and several English authorities, and *contra*, Massachusetts and Maryland, leaving but the two States as recognizing the proceedings by mandamus, and possibly those two governed by their own peculiar statutes. That *quo warranto* is the proper remedy to try the title to an office has been recognized by the United States Supreme Court, both in the cases referred to in 6 Wallace of U.S. *vs.* Addison, and in 3 Wallace, 328, Territory *vs.* Lockwood.

So far only the demurrer to plaintiff's complaint has been considered, and if counsel is right in supposing there was an adequate remedy by which the title to the office could be tried, the demurrer should have been sustained and the proceedings dismissed, this leaves entirely out of view the criminal proceedings authorized against an usurper of an office.

VI.

But defendant also filed his answer at the same time of filing his demurrer, and in which he sets up these denials and facts:

1st.—Denies that plaintiff had been duly and legally appointed, or that he had qualified as required by law. The facts as shown by the plaintiff, are that the county treasurer, McQuarrie, was absent, and that plaintiff could not learn whereat or when he would return, and that having called several times at the treasurer's residence and office, he left the bond, with the justification of the sureties and oath of office, with his wife, on September 23rd, and the Governor commissioned him on the 28th, and plaintiff says he is informed the treasurer returned that day, but the answer denies that he returned until the 29th of September, 1882,—one day after the commission issued.

But whether the treasurer returned the one day or the other, it shows, as averred by the defendant, that his absence was temporary.

Plaintiff shows that the Governor appointed him to the office on the 16th September, 1882; that he executed the bond on the 18th. So, as by the statute, the plaintiff had twenty days from his appointment to present his bond and have it approved by the county treasurer, there could be no necessity for this haste when only about one-half the time had expired, and as matter of fact, the treasurer did return six or seven days previous to the expiration of the twenty days. As the 3d section of the Territorial statute of February 20th, 1874, Compiled Laws, p. 122, requires that the "*bond shall be approved by and filed with the county treasurer.*" And the Penal Code of February 18th, 1876, Compiled Laws, p. 571, sec. 1858, provides that: "Every person who exercises any of the functions of a public office without having taken and filed the oath of office, or *without having* executed *and filed the required bond, is guilty of a misdemeanor.*"

If this county treasurer had remained absent the twenty days, the plaintiff might then have been excused, as he could not comply with the requirements of the statute to file and have his bond approved within the required time on account of the default of the proper public functionary. But both parties show that the treasurer was back and in his office in ample time to have his bond filed and approved, and had the treasurer rejected the bond for any insufficient cause, the law gave him ample remedy to compel him to accept the bond. So, even after the treasurer's return, the plaintiff had still until October 6th to present his bond and demand its approval by the treasurer, and this he wholly failed to do, and as matter of fact, said bond still remains without presentation to, or approval and filing by the proper officer. And plaintiff's complaint shows he had five days to present the bond to the treasurer after his return and before the filing of his complaint, as it was not filed until October 4th.

The Governor's commission, under no circumstance, can alone authorize the party to exercise the functions of this office, and if he attempts to do so, without having filed and had his bonds properly approved, he falls under the denunciations of the Penal Code.

The law is emphatic both as to how he shall qualify for the office and that any attempt to enter upon the discharge of the duties without this prerequisite, shall be a public offence. Yet in the face of these two emphatic statutes and in direct conravention of both, without any necessity whatever, or the jeopardizing any right he brings this suit asking the Court to place him in office and to put him in possession of the records.

VII.

The defendant, though not called on by the allegation of any fact on the part of plaintiff showing that he is a polygamist, has still by allegation denied that since June, 1862, he has married any woman or that he falls under the denunciation of any statute, United States or Territorial, as a polygamist. This is an explicit avowal that the essential fact to constitute polygamy under either the Congressional statute of 1862, or the Edmunds bill does not exist. He denies that since June 30th, 1862, he has married any woman. If that be true he has offended against no United States statute; nor is there any statute of Utah Territory on the subject, hence he need have gone no further but stood on this denial that such essential fact existed; but he does go on to deny on information and belief, the deduction or conclusion of law set up by the plaintiff, and that he is right and plaintiff is wrong as to the conclusion of law, for if he has not married any woman since the enactment of the statute of July 1st, 1882, it is legally impossible for him to be a polygamist within the provisions of that or the statute of March 22nd, 1882,—known as the Edmunds bill.

VIII.

For the several reasons herein given, or for either of them, much less for all combined, the Court erred in overruling the demurrer, also in adjudging and awarding a peremptory mandamus on the motion of the plaintiff on the pleadings, and we, most respectfully ask a reversal of the judgment and a direction of the Court below to dismiss the proceedings.

R. K. WILLIAMS,
F. S. RICHARDS,
Attorneys for Appellant.

Kelley's Island, Ohio, March 28th, 1880.—I have used Kendal's Spavin Cure on a bone spavin, and am pleased to report that it has taken the enlargement completely off. It took only one bottle to perform the cure. I am confident if it is properly used it will do all you claim for it. Yours truly, C. M. Lincoln.

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NOTICE.

In the Probate Court, in and for Salt Lake County, Territory of Utah.

NELS JONSSON, *Plaintiff.*
vs.
ELNA GORANS JONSSON, *Defendant.* } SUMMONS.

The People of the Territory of Utah send Greeting: to Elna Gorance, Jonsson, Defendant,

YOU ARE HEREBY REQUIRED TO appear in an action brought against you by the above named plaintiff, in the Probate Court, of the County of Salt Lake, Territory of Utah, and to answer the complaint filed therein, within ten days (exclusive of the day of service) after the service on you of Summons—if served within this County; or, if served out of this County, but in this district, within twenty days; otherwise within forty days.

The said action is brought to obtain a decree from this Court dissolving the marriage contract existing between said plaintiff and you. And you are hereby notified that if you fail to appear and answer the said complaint as above required, the said plaintiff will apply to this court for the relief prayed for and cost of suit.

Witness, the Hon. F. Smith, Judge, and the seal of the Probate Court, of Salt Lake County, Territory of Utah, this Eighth day of January, in the year of our Lord one thousand eight hundred and eighty-three.

[SEAL]

w5 D. BOCKHOLT, Clerk.

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