Secs. 83, 92 and notes; Sedgwick on Statutory and Constitutional laws, 870—6; 2 Kent's Com. 295; 3 Blackstone's Com. 77.

McKean, C. J.—It was held by the Supreme Court of the United States in the case of Clinton *vs.* Engelbrecht, (13 Wallace) that the United States Marshal for this Territory was not the proper officer to summon a jury in a case like the one now at bar, a case arising under the laws of the Territory, or cognizable thereunder. It is now objected that John D. T. McAllister, who, acting as Territorial marshal, summoned the jury now drawn, had not lawful authority to do the same. It is shown that on the 12th day of May, 1870, the Hon. Chas. C. Wilson, then chief justice of the Supreme Court of this Territory, and judge of this district court, and while sitting in this court, in an action pending before him, and of which he had jurisdiction, rendered a judgment ousting the said McAllister from all authority in this court as such Territorial marshal, and that such judgment was afterward affirmed by the Supreme Court of this Territory, and has never been reversed.

The office of Territorial Marshal is not provided for in the Organic act of the Territory; and the seventh section of the act provides that "the governor shall nominate and by and with the advice and consent of the legislative council, appoint all officers not herein otherwise provided for." If it were not conceded that the assembly had a right to create such an office as that of Territorial Marshal, yet it is clear that it is neither a "township," "district" nor "county" office; and neither the assembly nor the council had any right to fill it without the nomination of the governor. And yet under the provisions of chapter IX, of the laws of Utah, p. 38, the two houses of the legislative assembly, in violation of the Organic act, ignored the governor and usurped authority to elect, and did elect McAllister the Territorial Marshal.

But if this office, created and improperly filled by the assembly, is vacant, can it now be filled? By "An act to provide for filling vacancies in certain offices in the several Territories," approved January 8, 1872, Congress provided, "that in any of the Territories, wherein a vacancy shall happen from resignation or death during the recess of the legislative council in any office which, under the Organic act of said Territory, is to be filled by appointment of the governor by and with the advice and consent of the council, the governor shall fill up such vacancy by granting a commission, which shall expire at the end of the next session of the said legislative council."

It is evident that the statute does not meet the question under consideration. It will not do to say that because the office was improperly filled by the assembly, therefore there is a vacancy caused by a resignation or death during the recess of the council. If a nomination had been made by the governor to the council and had been rejected by the council; or if that body had adjourned without acting on the nomination, whether the governor could then make an appointment to fill the vacancy, is a different question from that now presented. The jury now challenged was summoned by one who was elected Territorial marshal without authority of law; he was afterwards ousted from that office by a court of competent jurisdiction; there has been a session of the legislative council since such judgment of ouster, and no nomination for Territorial marshal is shown to have been submitted to the council; and the vacancy in the office was not so caused as to give the governor a right to fill it up during the recess of the council. The United States marshal it is held; cannot summon a jury to try this cause, we have no lawfully appointed Territorial marshal; and as this court is held for a district and not for a county, the sheriff cannot serve the venire, (See laws of Utah, 1870, p. 126.)

Other serious, nay, perhaps fatal points have been raised by the challenge to the array. But they need not be considered. One fatal objection is sufficient. Under existing law, or existing construction of law, it would seem to be impossible to obtain a legal jury in this Territory. But, if there are no jury trials here the responsibility shall not even seem to rest upon this court. Were this a criminal cause, the court might well hesitate to proceed and deprive a fellow man of his liberty or his life. Not so with civil matters. It is far better that litigants should have the opportunity to come here and try their cause even before illegal juries, than that they should appeal to rifles, pistols and vigilance committees; far better even though the verdicts rendered here should afterwards be all reversed. And the judge of this court when sitting in the supreme court of the Territory, will not hesitate to review the proceedings of this court the same as though he had never sat here.

It is useless to discharge this jury and order another; for, as the laws now stand, and are now construed, no jury can be obtained to which some fatal objection could not be urged. And experience renders it more than probable, that it will be far in the future when the much needed legislation will relieve us from the embarrassing dilemmas in which we find ourselves. What, in this long interim, shall be done? Shall the mining interests of Utah be liable to be suspended by injunction, and yet indefinitely denied even the semblance of trial in actions of ejectment? Shall litigants be informed by this court that they cannot have a jury trial here, even though they waive all technical objections? Shall the court adjourn *sine die*? Must society be thrown into chaos because some other departments of government neglect their duty? Extraordinary emergencies must be met by extraordinary measures. Influenced by considerations of public policy, and by such considerations alone, the court overrules the challenge to the array, and sustains the demurrer.

Address of Church Emigration Agent;—Mr. William C. Staines, Box 3957, P. O., New York City.

ADMINISTRATORS' NOTICE.

THE undersigned having been duly appointed by the Probate Court of Morgan county, U. T., administrators of the estate of Sanford Porter, Sen., deceased, do hereby give notice to all persons who have demands against said estate to present the same for settlement, and those indebted thereto are requested to make payment without delay.

J. P. PORTER,
N. T. PORTER,
Administrators of the estate of Sanford Porter, Sen., deceased.

Centerville, March 31, 1873. w10 1m
