to be such they have no assignable interest. This shifting right, dependent on matters of faith, belongs to that class of indefinite uses which in England pre-existed, but were established by the statute of 43d Elizabeth, under the name of charters. (Vidal v. Philadelphia, 2 Howard, 127.)

In some of the States gifts to these indefinite uses have been held void. (Att. Gen. v. Gallego (3 Leigh R. [Va.]. Hart v. Baptist Association (4 Wheaton R., 1) and cases referred to.)

(2) But there is another principle involved here. Though this law had chartered a church and created stock interest in its property, yet nothing can bar the right of this Government, with a proper saving of these property interests, from disincorporating it in so far as it has powers which are political in their nature, and create an institution which in other countries has been, and might become here, a powerful agency in its influence over the body-politic or over the functions of the Government itself.

It cannot be denied that a law looking to what the Constitution defines as "respecting the establishment of religion," though it vested the religious functions in a stock corporation, would be none the less void to that extent and repealable by Congress. This charter erects this church into an institution of the body politic, gives it perpetuity and indefinite power to acquire, generation by generation, property in the Territory, and thus, finally, as other churches have done in other countries, to gather such a force and influence as to govern the Commonwealth which gave it existence.

The duty of Congress to prevent such an institution to be established in the young State, as a means of preventing its growth to that structure at which admission to the Union will be desirable to the country, cannot be doubted.

Your committee, therefore, while proposing to disestablish the church and to dissolve both corporations, has provided for a judicial settlement of all rights of property according to law and equity.

The seventeenth section of the committee's bill (a new one) gives the right of review of any judgment of the court of the Territory in all criminal cases under this act and that of March 2, 1882, and of any judgment and decree under the sixteenth section of this act in dissolving and disposing of the property of these corporations. This conserves the rights of all under the decision of the highest court in the Union.

The eighteenth section of the committee's bill (a new section) gives equal rights to all religious sects to hold a limited amount of real property for religious houses of worship and for residences of religious teachers, etc.

The nineteenth and twentieth sections of the committee's bill, which amend twenty-second and twenty-third of the Senate bill, relate to the peace powers of commissioners of the supreme court of the Territory and of marshal of the United States in arrest, &c. The committee has proposed amendments to the Senate bill as to the powers of the marshal, in the interests of the liberty of the citizen and by limitation on the power of the marshal.

Section 20 of the committee's bill is a new one. It repeals the militia laws of Utah, creating the Nauvoo Legion, and brings the militia of the Territory under the laws of the United States.

Section 21 is also a new one, and repeals all special grants by the Territorial legislature and that of Deseret to private persons or corporations of rights in and to any part of the public domain.

Section 22 of the committee's bill amends in some respects section 25 of Senate bill. This re-establishes the dower right of the widow secured to her in England by Magna Charta. Dower, which is inconsistent with plural marriages, was abolished by the Territorial legislature of Utah, and is now to be restored, as continuing the claim of the lawful wife upon her living husband, against his estate when he dies.

The committee propose an amendment defining the term "lawful wife," as in plural marriages the first wife of the husband. This is right in itself, is according to the decisions of the courts of Utah, and is only opposed in appearance by one English case, Hyde v. Hyde, 1 Probate and Divorce Cases, and appears from the statement of members of the Mormon Church before the committee to be acceptable to them, at least as far as the preference is given to the first in legal rights over the other. It accords with the well known maxim, "*Qui prior est tempore, potior est jure.*"

Sections 23 and 24 of committee's bill correspond with one slight change to sections 17 and 18 of Senate bill. They refer to certain provisions as to reappointment of districts for legislative assembly, and to registration, etc. of voters.

Section 25 of committee's bill is a new one.

In aid of the third section, as to the record of marriages hereafter, this section requires every male person to register himself before the clerk of the probate court by his full name, and giving, if married, the name of his lawful wife. This will make a record of all marriages heretofore in the Territory, as section 3 provides for the record of those hereafter.

The section requires every male person to take and subscribe an oath at the same time to support the Constitution and laws of the United States, and especially those against polygamy, &c., and not to advise or counsel disobedience thereto. It then makes this registration or the taking of this oath a prerequisite to voting, jury service, and holding office.

Your committee recommend this as being right. None but those who will do the things prescribed in the oath should vote—for they are not good citizens; and none but those who will not do these things should esteem the oath a hardship as a prerequisite to taking part in the affairs of a government which must conform to the Constitution and laws of the United States.

Section 26 is a new one. It provides that the council, as a co-ordinate branch of the legislature, shall be appointed by the President, by and with the advice and consent of the Senate, from citizens resident in the several districts for members thereof laid out and defined by law.

In the present legislature the anti-Mormon people, though one-sixth or more of the population, have only one representative in either branch.

The United States and the people thereof are deeply and directly interested in the moulding of the policy of the new State. They are unrepresented. It is not only consistent with precedents and with judicial decisions as to the power of Congress over the Territories, but with reason and sound policy, as shown in the former report, that the interests of the people of the United States should be assured by fair representation in the legislature of the Territory. To give a monopoly of power to the Mormon majority in Utah would be injurious to the people of the United States not now there, but having a right to go there, but who may be prevented by legislation unfavorable to them, from all part in which at present they are wholly excluded.

Under this section the Mormon majority will have its full voice in one and the most numerous branch of the legislature. It can thus check all proposed legislation contrary to their rights and interests. The council appointed by the President and Senate will have like check on the local majority to protect the local minority and the whole of the people of the United States.

Such checks and balances are according to the genius of our whole political system.

Section 27 (a new one) gives all future appointments to offices in the Territory to the President and Senate or to the governor and council. At present the officers of the Territory are almost wholly in the hands of the Mormon population by reason of their being elected by popular suffrage.

The reasons already suggested make it important to give this power over the officers to other hands.

Section 28 makes the new office of commissioner of schools, and gives the appointment to the governor, and abolishes the office of superintendent. This will be in the interest of fair dealing and justice to the children of all classes of the population.

Your committee, in conclusion, recommend the bill herewith reported, amending the Senate bill No. 10, and as a substitute therefor, to the favorable consideration of the House. While the bill, thus amended, deals with the public questions involved with firmness and with a real purpose to cure existing evils, it does so in entire consistency with the constitutional liberties of the people, and with their free right to exercise their religious belief according to their own consciences, and only under the responsibility of each man to the Supreme Being.

All of which is respectfully submitted.

THE DECISION IN THE OFFICE CASES.

IT IS ADVERSE TO POPULAR CHOICE.

Following is the full text of the Territorial Supreme Court decision, delivered Saturday, June 19th, 1886, which declares that the People have not the right to fill the Territorial offices, but that it is the Governor's prerogative. The case on which the matter was tested was that of the Auditor of Public Accounts, Nephi W. Clayton, and similarly affects the office of Treasurer and others. After reviewing the complaint and answer in the case, the court says:

It will be seen that the defendant founds his right to hold the office upon the fact that at the regular election held on August 1st, 1880, he was elected to the position by the people of Utah, and afterwards commissioned by the Governor; that no one has since been elected to fill the office. He does not allege that he ever qualified as required by law, but insists "that by virtue of said election and the said commission of said Governor, and not otherwise," he is acting as Auditor of Public Accounts.

By the provisions of an act of this Territory entitled "An act to provide for the appointment of a Territorial Treasurer and Auditor of Public Accounts," it is provided in section 1: "That a Treasurer and Auditor of Public Accounts shall be elected by the joint vote of both houses of the Legislative Assembly, whose term of office shall be four years, and until their successors are elected and qualified, unless sooner superseded by legislative action.—*Comp. Laws, 1876, p. 90.*

In 1878 the Legislative Assembly passed an act which was duly approved, providing that "The Territorial Treasurer and Auditor of Public Accounts shall be hereafter elected by the qualified voters at the general election in August, 1878, and biennially thereafter, and the present incumbents shall hold their respective offices and perform the duties of the same until the next general election, and until their successors shall be elected and qualified. *Laws 1878, p. 27, sec. 4.*

It is contended by the plaintiff and respondent that the laws providing for the election of a Treasurer and Auditor of Public Accounts, are in conflict with section 7 of the Organic Act of Utah, and with section 1857 of the Revised Statues of the United States, and that therefore the defendant is not legally entitled to the office held by him. Section 7 of the Organic Act of the Territory provides: "That all township, district, and county officers, not herein otherwise provided for, shall be appointed or elected, as the case may be, in such manner as shall be provided by the Governor and Legislative Assembly of the Territory of Utah. The Governor shall nominate, and, by and with the advice and consent of the Legislative Council, appoint, all officers not herein otherwise provided for; and in the first instance the Governor alone may appoint all said officers, who shall hold their offices until the end of the first session of the Legislative Assembly."—*Comp. Laws 1876, p. 30.*

Section 1857 of the Revised Statutes of the United States is as follows: "All township, district and county officers, except justices of the peace and general officers of the militia, shall be appointed or elected in such manner as may be provided by the Governor and Legislative Assembly of every Territory, and all other officers not herein provided for, the Governor shall nominate, and by and with the advice and consent of the Legislative Council of each Territory, shall appoint.

Congress having the paramount right to legislate for the Territories, it must be conceded that if the act of the Legislature under consideration is open to the objection urged against, the same cannot be upheld or sustained.—*Taylor v. Stevenson, 9 Pac. Rep. 641.*

In the case just cited the court had under consideration section 1857 of the Revised Laws of the United States in connection with an act passed by the Legislature of Idaho, providing for the appointment of two commissioners, who, in conjunction with one other resident of the Territory, to be selected and appointed by the two named, should perform the functions of the office created, for the term specified by the law. The court in that case says: "This delegation of authority on the part of the Governor and Legislative Council to the two commissioners to select and appoint another, must be regarded with some degree of misgiving and doubt. All the powers intrusted to government in the Territories, as well as in the States, are divided into three departments, the executive, the legislative and judicial. It is wisely provided that the functions appropriate to each of these branches of the government shall be vested in a separate body of public servants, and it is apparent that the perfection of the system requires that the lines which separate and divide these departments shall be clearly defined and closely followed. It is also true as a general proposition, that the powers confided by the fundamental law to one of these departments cannot be exercised by another. And where, as in this case, the Organic Law provides that the Governor, by and with the consent of the Legislative Counsel, shall appoint the Territorial officers, we do not think that the authority can be delegated to another body, and the Governor thus divested of his prerogative. If this can be done and sanctioned in one instance, it may be in others, and by this method, or in the exercise of the two-thirds legislative rule, over the Governor's veto, the executive may be deprived of the appointing power which Congress has wisely confided to the Executive branch of the Territorial government."

We are clearly of the opinion that the act in question is in conflict with the Organic Law, and therefore void, and that the defendant has no title to the office of Auditor of Public Accounts of this Territory. It seems to us that no argument is needed to sustain this conclusion. The Organic Act has confided to the Governor the duty of appointing the person to fill the office, by and with the advice and consent of the Legislative Council. If the Legislature can take from him this power, and provide for the selection of the officer by any other mode, it can take from him every prerogative he possesses. Congress having pointed out the way by which the office in question should be filled, the Legislature has no power to provide another and different mode.—*Duncan vs. McAllister, 1 Utah, 81.*

The case just cited fully answers the argument of counsel for appellant, that the case of *Clinton vs, Engelbrecht, 13 Wall, 446*, and that of *Snow vs. U. S., 18 Wall, 317*, hold that another act passed under precisely the same conditions as the one in controversy was valid. See *Duncan vs. McAllister, 1 Utah, 85.*

But, it is argued, if the act prescribing the mode of filling the office in question is void by reason of its being in conflict with the Organic Act, then the offices do not exist. This Court held to the contrary, years ago, in *Duncan vs. McAllister, 1 Utah, 87*, and we see no reason for holding otherwise at this time. The act creating the office in question is entitled "An act to provide for the appointment of a Territorial Treasurer and Auditor of Public Accounts." The act creates the office, and it provides the mode of election. It is therefore two-fold. The first part is valid. The latter part is invalid. The act must be made to read in accord with the Organic Law, which vests the power of appointment in the Governor and Council.

The Legislature of the Territory has taken the same view that we now take of the question. For, in 1878, it changed the law so far as the manner of electing the office is concerned. By the act of 1852 the Auditor was elected by the Legislature. By the act of 1878 he is elected by the people. In changing the manner of election the Legislature had no idea that it was legislating the office out of existence. By its action it determined that the office remained, no matter how the officer should be chosen.

Moreover, if the whole act should be held void it would not help the defendant. He would be just as clearly a usurper. He has no more interest than any other citizen in the question whether Arthur Pratt, the Governor's appointee, has any title to the office; and we think the court below properly denied the defendant's claim to litigate Pratt's title. He is not interested in the question as to Pratt's right, but only in the determination of his own right to the office.—*People v. Abbott, 16 Cal. 359; People v. Miles, 2 Mich. 358.*

But, it is insisted that while this may all be true, the act of the Legislature which we hold to be invalid, has been ratified by long acquiescence by Congress and the people of this Territory, as well as by the action of the Territorial Legislature. If the Legislature had not the power to pass the act in the first instance, it had no authority to ratify it. A legislative body may ratify an act subsequently when it had the power to do the act in the first instance. It cannot by ratification make a void act valid. Congress did not pass the act in question, and the Territory can only exercise such powers as are given it expressly by Congress, or which are necessary in the exercise of the powers expressly granted. It is said that it is the duty of the Territorial Secretary to report the Laws passed by our Legislature to Congress, but the approval of Congress is not essential to the validity of the law, nor does its invalidity depend upon the disapproval of Congress. If the law is contrary to the Constitution of the United States, or to the Organic Act, or to any law of Congress, it is invalid without any disapproval of Congress. Neither can the acquiescence of the people of the Territory breathe the breath of life into an invalid law. The law in question was dead from the beginning.

We quite agree with counsel for the respondent that an officer's right to hold over until a successor is duly elected or otherwise chosen and qualified only follows where he has been legally in the exercise of the office, and in such cases he holds over as an officer *de jure*. But on the contrary, if the incumbent has never been legally invested with the office, he is nothing more than an officer *de facto*; there is, in legal contemplation in such a case, a vacancy in the office.—*People v. Stratton, 28 Cal. 382; State v. Howe, 25 Ohio St., 588; 18 Amn. Rep. 321; People v. Tilton, 37 Cal., 614; People v. Wells, Cal. 198.*

There being a vacancy in the office, we think there can be no doubt but what the Governor was authorized to fill the same by appointment, and that the court below was correct in adjudging that Arthur Pratt, by virtue of the Governor's appointment and his qualification under that appointment is the Auditor of Public Accounts for the Territory of Utah.

It is provided by section 8 of the act of 1852 that "vacancies may be filled by executive appointment in the foregoing, or any office when the mode of supplying vacancies is not prescribed by law."

Nothing can be plainer than the foregoing, and the act of the Governor in making the appointment, was clearly within his power, and strictly within his duties. If he had omitted to make the appointment he would have failed to have done his duty. He simply did that which the law required him to do. We hold that Arthur Pratt is the Auditor of Public Accounts for the Territory, and that he is entitled to be put in possession of said office, together with the books, safe and all and singular the insignia thereunto belonging.

It is also urged that the demurrer should have been sustained because the complaint does not set forth the facts as required by our code. The complaint is brought under chapter 5 of the laws of 1884. *See Laws 1884, 282.* Section 981 of that act is as follows:

"An action may be brought in the name of the People of this Territory against any person who usurps, intrudes into, holds or exercises any office or franchise, real or pretended, within the Territory, without authority of law."

The complaint alleges that the defendant "did usurp and intrude into the office of Auditor of Public Accounts in and for the Territory of Utah and ever since that time he has and does still hold and exercise the functions of said office, without authority of law therefor." In a criminal case, it is usually sufficient to describe a statutory offense in terms of the statute. It is insisted that this statement is a conclusion of law; that it does not conform to the code and state the facts constituting the cause of action. The complaint alleges that the respondent "holds and exercises the functions of the office without authority of law therefor." It would have been more precise to have stated "without appointment," that being the only way in which the defendant could lawfully enter into the office.

The object of the code is to make pleadings plain and simple. It does not require of the pleader more than was required at the common law. It usually requires less of them. If, then, this complaint had been sufficient in its allegations as tested by the rules of the common law, it is sufficient under the code. While our statute has changed the form of pleading with respect to rights and wrongs, of which *quo warranto* was formerly the remedy, the change is simply as to form, and not as to substance. The position of the parties, the rules of evidence, and the presumptions of the law remain the same as before. As we shall see, the burden is upon the defendant to show his right to the office when it is challenged by the people. It is not necessary to show or point out with great particularity the acts which constitute the wrongful usurpation, or wrongful holding of the office. If the defendant had an appointment, he had it in his possession and it is not necessary to allege it with the nicety required in other actions. It is sufficient to challenge the defendant's right, and he must disclaim or justify.

The ancient writ of *quo warranto* was a writ of right for the king against one who usurps any office, franchise or liberty, to inquire by what authority he supports his claim, in order to determine the right. *3 Bl. Com. 262.* In theory, the king was the fountain of honor, of office and of privilege and, whenever a subject undertook to exercise a public office, or franchise, he was, when called upon by the crown, through the writ of *quo warranto*, compelled to show his title, and if he failed to do so, judgment passed against him. The fountain of the rule may have been that, as all offices and franchises are the gift of the king, they were deemed to be possessed by him, and until his grant was shown, there could be no presumption that he had parted with them, or invested a subject with the right to exercise by delegation any part of the royal prerogative. But, whatever may have been the origin of the rule, it was well established, and was applied also in cases where probeedings by information, in the nature of a *quo warranto*, were resorted to as a substitute for the writ.—*Rex v. Leigh, 4, Burr, 2143.*

In this Territory a remedy by action is given in the place of the writ of *quo warranto*, and an information in the nature of a *quo warranto*. The people are in this country the ultimate source of the right to hold office; and now, under the code as at common law where the right of a person exercising an office is challenged in a direct proceeding by the district attorney, the defendant must establish his title, or judgment will be rendered against him. *People v. Thatcher, 55 N. Y. 529; People v. Woodbury, 14 Cal. 43; Flynn v. Abbott, 16 Cal. 358: State of Nevada v. Haskell, 14 Nev. 209; State v. Harris, 3 Ark. 570; 36 Amn. Decisions, 460; State v. Evans, 3 Ark. 585; 36 Amn. Decisions, 468; 30 Amn. Decistons, note, 51, 52.*

High, in his work on Extraordinary Remedies, sec. 713, lays down the rule as follows: "As regards the question of intrusion into or usurpation of the office, to test which an information is filed, it is regarded as sufficient to allege generally that the respondent is in possession of the office without lawful authority, and in case the pleadings are defective in this respect, the defect is one which should be taken advantage of by special demurrer."

And again. In section 716 he says that "when the proceedings are instituted for the purpose of testing a title to an office the proper course for the respondent is either to disclaim or justify. If he disclaims all right to the office, the people are of right entitled to a judgment as of course. If, upon the other hand, the respondent seeks to justify, he must set out his title specially and distinctly, and it will not suffice that he alleges generally that he was duly elected or appointed to the office, but he must state specifically how he was appointed, and if appointed to fill a vacancy caused by the removal of the former incumbent, the particulars of the dismissal as well as of the appointment must appear. The people are not bound to show anything, and the respondent must show in the face of his plea that he has a valid and sufficient title, and if he fails to exhibit sufficient authority for exercising the functions of the office, the people are entitled to judgment of ouster. Unless, therefore, the respondent disclaims all right to the office, and denies that he has assumed to exercise its functions, he should allege such facts as, if true, invest him fully with the legal title; otherwise he is considered a mere usurper."

The burden of proof and of allegation being upon the defendant, we think that the complaint was sufficient to challenge the right of defendant and to compel him to show his title, and not having shown a valid title, judgment was properly rendered against him, and in favor of the Governor's appointee, for under our code the District Attorney may, in addition to the cause of action in behalf of the people, set forth the name of the person entitled to the office in question, with a statement of his right thereto; and by the following section it is provided that "in every such case judgment may be rendered upon the right of the defendant and also upon the right of the party so alleged to be entitled, or only upon the right of the defendant, as the form of the action and justice may require."—*S. Laws 1884, 284.*

There is no error in the record and the judgment is affirmed, with costs.