JURISDICTION OF PROBATE COURTS, ETC.

Opinion of Hon. Z. Snow, Territorial Attorney-General.

[CONCLUDED.]

"The second cause for the challenge was because the jurors had not been summoned by the U. S. Marshal. The judge said that in the early days of the Territory, when Brigham Young was Governor, and Judge Snow was on the bench, the U. S. Marshal served all processes from the District Courts; and for one and a half years he (McKean), ordered the clerk of his court to issue venires for juries to the United States Marshal. His associates did the same in their districts, and in doing so they followed the example of their predecessors. Under the acts of Congress the clerk was forbidden to issue a venire until ordered by the judge. He formerly acted under the laws of Congress. In the Englebrecht case the Supreme Court of the United States had decided that the United States Marshal was not the proper officer to summon a jury to try cases arising under the laws of the Territory, and he, McKean, humbly bowed to the decision; but the Supreme Court had not overruled the decision ousting McAllister from the office of Territorial Marshal. While the Englebrecht decision said it was not lawful for the United States Marshal to summon juries, it did not say that McAllister was the proper person to do so. The Supreme Court had held that the acts of Congress did not govern the courts of the Territories, but that the laws of the Territories governed the courts. Since that decision he had obeyed it strictly. Had not ordered the clerk to issue a venire, for the law compels him to do that. The judge had apportioned juries to six counties, because the Territorial law gave him that power, but further than that he had not interfered in the matter. Efforts had been made to induce him to again act under the laws of Congress, but he had always refused. The law said that the clerk should issue the venire to the Territorial Marshal, and if McAllister was that officer the clerk had done his duty; anyhow the clerk could not issue it to the U. S. Marshal. It looked to the judge very much as if the legislature had done all it could to oust the U. S. Marshal. Members of the bar might say affairs were in a vexing dilemma, but they could not be helped, the courts were not the legislatures.

"He next went to the third point of the challenge, that the jurors were not summoned by any officer but by a private citizen. If in deciding the Englebrecht case the Supreme Court had gone further and said that McAllister was the proper person to serve processes in the District Court, then the difficulty would have been settled; but the judge did not understand that the decision said that McAllister was the proper officer. Many were of the opinion that McAllister was not a legal officer for two reasons, first, that the legislature had no right to create the office; and second, after creating it, it could not be filled except on the nomination of the governor. 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 *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.

"He would be glad if he could hold one term of court without having such vexed questions to pass upon; but he supposed it could not be so. He sometimes erred in his judgments, but he was consoled by the fact that in States, where the judges were learned in the law and where almost everything was done by precedent, errors were sometimes committed. A grand jury in a Territory had a two-fold duty to perform — to investigate crimes against the laws of the Territory, and also those against the United States. He could conceive of a case where the jury would be illegal for the United States and legal for the Territory. Mr. Cary had challenged on behalf of the United States, and not for the Territory. The jury might be held to investigate crimes against the Territory, but no sooner would an indictment be presented than the attorney for the indicted party, if he did his duty, would challenge the array of the jury and raise the same questions raised by Mr. Cary. He felt differently when it came to the question of the life or liberty of a person than he did on the trial of a civil case. If the gentlemen were willing to raise no objections to a petit jury, and were willing to have their suits tried by twelve men, he would not object; but in regard to the grand jury he felt he would not be doing his duty if he did not discharge it. He would therefore sustain the challenge, and say to the jurors, 'You are discharged.'

"Judge Snow informed the jurors that the Territorial Marshal would pay them for expenses in coming from and returning to their homes. Time was given him to examine into the subject and to conclude whether he would appeal from the decision of the court in discharging the jurors or not.

"Court adjourned till Wednesday morning at ten o'clock."

A grand jury was called in the Second Judicial District in June, 1873, and in the First Judicial District in the fall and winter of the same year. In each, indictments were found. One man is in the Penitentiary and sentenced for thirty years, sentenced on the indictment so found. Others are yet pending. I therefore think I ought to be excused from expressing a more definite opinion.

In my judgment it is a rightful subject of legislation in this Territory to limit, fix, and set reasonable bounds to judicial authority in this Territory, and regulate the mode of procedure, both at law and in equity, including the mode and manner of appeals from one court to another, and to provide officers either by election or appointment. If the Supreme Court of the United States shall rule against the civil and criminal jurisdiction of the Probate Courts, then our code will need modifying so as to permit appeals from Justices of the Peace to the District Courts.

As to the act of Congress referred to, I have only to add that no act of any State or Territory is necessary in aid of an act of Congress.

Every statute of a State or of a Territory in aid of an act of Congress, or to hinder or delay its operation, is unconstitutional and void. But this remark is not designed to apply to a statute that only incidentally effects it.

As to crimes that go unpunished, I have to say if the Probate courts have not criminal jurisdiction, and if the Territorial government can not confer it, and if the District Courts set aside the juries, the officers of the law may be excused if crimes goes unpunished.

As there is a difference of opinion about the *election* and *appointment* of certain officers, and as I have formed an opinion for myself, I will proceed to present it.

The seventh section of the Organic Act, as above quoted, is ambiguous in its terms, and for that reason admits of construction or interpretation.

The act as a whole was designed to prepare for a State to be admitted into the Union, and therefore should at all times be construed with reference to that object. It gave full powers of legislation, subject to only a few inhibitions, and subject to the supremacy of the United States to be exercised by a disapproval of the laws enacted.

It provided for a Governor, a secretary, three judges, an attorney and a marshal of the United States, for a legislative department, and for a delegate in Congress. With such an act for such an object it is easily to be perceived that many officers were to be provided for, not therein named; hence the seventh section of the act was introduced.

The first clause of this section includes in terms all *township, district*, and *county officers*, and these by the express language used may be *elected* or *appointed* as may be provided by law. The next clause includes *all officers* not provided for, and these shall be nominated and, by and with the advice and consent of the council, appointed. Here it will be seen by the words *all officers* is included the township, county, and district officers which are in the first clause. Therefore there must be some implied exceptions to the last clause.

Those who maintain that the Governor *must* nominate are forced to introduce in this clause the words —"with the exception of township, district, and county officers," so as to make the language of the last clause read thus, "And, *with the exception* of *township, district* and *county officers*, the Governor shall nominate and, by and with the advice and consent of the legislative council, appoint *all officers* not herein otherwise provided for," or they must introduce other equivalent words in the same or some other part of the section. This exception, however, is not in the statute in terms; if there at all, it is implied. Still, if these words were in the *terms* of the section, it would not render the statute unambiguous. As there is not any legal unambiguous *definition* of the word *district*, which is included in the *first* clause, with their construction, it would have to be introduced in the exception of the last clause. I have before said the section requires a construction or interpretation.

So those who maintain that the officers may be *appointed* or *elected*, are necessarily forced to find a solution of the question.

They claim that as the questions arising out of it are of a political nature, involving the police power of the Territory it is one properly submitted to the political branch of the government, which is the *Governor* and *Legislative Assembly*; and that as some exceptions or words are implied, and must be so implied, it is their right to supply this omission.

The section may be read with equal plausibility as follows—

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.

The governor shall nominate and, by and with the advice and consent of the Legislative Council, appoint all officers not herein otherwise provided for, *which, by law are required to be thus appointed*, or equivalent words in some other part of the section.

One of these implied clauses will restrict legislative power. The other does not enlarge it; but if it did it harmonizes with the rules of construction.

In construing the powers of Congress, under the Constitution of the United States, the rule is—as these powers are all delegated—none is given except what is expressed, and what is necessarily implied in what is expressed. In construing State legislative powers under their constitutions, every power is held to be given, except those expressly prohibited, or necessarily implied prohibition in what is expressed.

If I am correct in holding to the same rule in a Territory as in a State, the legislative power is over this subject, because not prohibited.

This view harmonizes with the language of section 6, latter clause —"All laws passed by the Legislative Assembly and the Governor shall be submitted to the Congress of the United States, and if disapproved shall be null and of no effect."

This clause is equal to saying shall be effectual if not disapproved. It also harmonizes with the opinion of the Supreme Court of the United States in the Clinton and Engelbrecht case and in my case.

Again, I have said it is ambiguous in that the section contains the word *district* in connection with the words township and County officers.

Township and county are words well understood, embracing subdivisions of a State or of a Territory, but the word district, as the law now stands, has no definite signification, so I will examine its meaning.

Wharton defines "district" to be "a circuit within which a person may be compelled to appear." Wharton's L. D. p. 239.

This, then, may be the whole Territory, or a certain part less than the whole.

Bouvier says, "It is a certain portion of the country, separated from the rest for some special purpose." I Bouvier L. D. p. 438. This makes it less than the whole, with an extent to be defined by law. It may be a county, a city, a township, a school or an election district.

Burrill is more lengthy. He says, "It is derived from the Latin word *districtus, districtoi;* from *destringer*, signifying to distrain, Law French, *distresse*, from *distreindre* to distrain. In old law a circuit or Territory within which the power of distraining or other coercive authority might be exercised." I Burrill's L. D. 384. Burrill proceeds and says, "In modern law, a portion of territory (as of a State, county, city, or town) defined by law, within which a certain jurisdiction or authority may be exercised, a civil division of a State or county for judicial or other purposes; any limited extent of territory. By successive extensions of meaning this word has gradually lost its original and peculiar signification and is now constantly used in ordinary language to denote *any* extent of territory for *any* purpose."

Webster (see this word in Webster's Unabridged Dictionary), after giving its derviation as Burrill, says, "All that space within which the lord has the power of coercing and punishing.

"A defined portion of a State or city for legislative, judicial, fiscal or elective purposes.

"Any portion of territory of undefined extent, a region, a country".

With these definitions, then, it may be and for some purposes it is the whole Territory, as for instance the election of a delegate to Congress, the exercise of Gubernatorial or Legislative power, the exercise of judicial power by the Supreme Court. For other purposes it is a subdivision of the Territory, as for instance the election of members to the Legislative Assembly, the exercise of judicial power by the District Courts and the Probate Courts. Then follow the County Courts, in their sphere of action, and so on. But none are districts until defined by law. When therefore any law is passed by the Governor and Legislative Assembly defining a *district*, whether that be the whole Territory or a sub-division of it, it becomes a *district* within the meaning of that word, and by the express language used the officers may be elected or appointed as the law may provide.

How then stands this question?

In 1852 the Governor and Legislative Assembly passed a law providing for an Attorney-General and a Marshal to be elected by the joint vote of both Houses. Under this law these officers have been elected from that time till the present, and until about 1862 or 1863 no governor raised an objection. Then one raised the objection, but the Legislative Assembly stood firm. From that time till 1870 it was acquiesced in by the Governors, each of whom had the same but no more legal authority than those who have since presided. In 1870 the courts here ruled against this law.

In 1873 the Supreme Court of the United States, having the law under consideration, held it valid, saying, "The Organic Act is susceptible of a construction that will avoid such a conflict. And that construction is supported by long usage in this and other territories. Under these circumstances it is the duty of the court to adopt it and declare the Territorial Act valid." If I am correct in saying the judgment of a court of last resort is conclusive, has not this act been declared valid.

In concluding, allow me to suggest that the judicial department is all important. It is that branch in which chiefly lies the sanction or vindication of the law and nothing can compensate for its loss, or the impairment of its efficiency.

The fact that it sometimes commits an error only shows that the judges are men.

Legislative acts are constantly coming under their scrutiny and are being held void because they conflict with the Constitutions of their States or with the Constitution of the United States, and the supremacy of the General Government.

The importance of this subject, with the long continuance of its agitation and the interest excited, is my excuse for the length of this communication.

Your most Obedient Servant,

Z. SNOW.

CORRESPONDENCE.

Genuine Germans and Bogus Moabites, a Scientific Swindle.

Editor Deseret News:

Under the above head, I find in the 19*th Siecle*, a republican paper of Paris, an account of the most ludicrous trick ever palmed on a scientific body of men. It is a well known fact that the Germans are extremely proud of their philosophy. They claim to stand at the head of the scientific world, and they despise what they term the futility and ignorance of the French nation. The following facts will fully demonstrate the falsity of their high pretensions:

M. Charles Ganneau, a well known French savant, writes from Jerusalem, under date of the 25th of December, 1873, that the discovery of ancient ruins at Mesa, near the Jordan, had led to the manufacture of "Moabite pottery" on a large scale. Two years ago this gentleman learned from the German newspapers that a certain Prussian bookseller, a renegade Jew, had collected a large number of earthern vases and small statues, covered with Moabite inscriptions found on the other side of the Jordan. On seeing these objects, M. Ganneau at once pronounced them the work of a maker of bogus antiquities. His suspicions fell immediately on a foreign resident of Jerusalem, with whom he was slightly acquainted, whose hand in copying the characters of Mesa's antiquities he easily distinguished. He stated this singular roguery to several English and French savants, recommending them to be on the watch.

In the meantime the greatest and most famed German savants, declared absolutely the authenticity of these bogus productions, and even translated a portion of the inscriptions contained thereon, which caused much talk in the scientific circles of Germany, and became even a national question, and they were anxious to secure at any price those marvellous specimens of "ancient pottery." The Emperor William bought the collection for 18,000 thalers, and it was triumphantly brought to Berlin, where it now constitutes the most splendid ornament of the royal museum.

Having thus secured a ready and lucrative market, the forger went to work with increased zest, and he now exports these objects by hundreds, which are greedily collected by the impeccable Germans as soon as they are placed in the market.

M. Ganneau has seen these vases and statues at Jerusalem. "One must be truly blind," says he, "to be deceived by such an imposture." These small earthen statues are so very ugly that the fancy gingerbread dolls at the fairs of Paris are master-pieces of art in comparison with them. They are covered with inscriptions from head to foot, and with phallic attributions of a phenomenal size. The German mythologists were no doubt delighted on beholding these juvenile indecencies, which were by them considered as religious symbols! Moreover, a number of vases like flowerpots, were there, every one covered with "Moabite inscriptions."

Upon being convinced that the supposed specimens of Moabite pottery were forgeries, the French savant immediately commenced investigations, and after a few days' diligent search he caught the forger at work, and also *found the very potter in whose shop he bakes his specimens!* M. Ganneau was tempted to keep still, and to let the Germans invest more money in this tremendous hoax; but, on second thought, he concluded that it was time to unmask the forger, to stop this archæological scandal, and to interrupt this colossal swindle, which was so well calculated to injure science.

But what have the good people of Berlin said on the matter? Frenchmen have hugely enjoyed the joke. They feel merry at the facility with which these *infallible* German scientists have been duped by a miserable forger. And the Emperor William, although he is in possession oi a large amount in thalers which were easily obtained, is no doubt extremely vexed to think that he has paid so high a price for forged antiquities.

This is certainly the most complete imposition ever palmed upon the credulity of archæologists. The English and French Scientific Academies have been officially informed of it.

LOUIS A. BERTRAND.