

JURISDICTION OF PROBATE COURTS, ETC.

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

(CONTINUED.)

The Governor must nominate, and, by and with the advice and consent of the Legislative Council, appoint this officer. Of this opinion were Governor Harding, Gov. Shaffer, and Gov. Woods. The other Governors, whatever may have been their opinion, have acquiesced in the election. I am ignorant of a single exception to this statement.

The case of the United States vs. McAllister arose in this Territory, March, 1870. The case was argued on two points—

"1. Was he the ministerial officer of the court in cases referred to in the act, or was that the duty of the U. S. Marshal?"

"2. Should he be elected or appointed?"

It was decided against the marshal. It speaks for itself.

I heard the opinion read, but I have never seen it since, so I can not furnish it.

I herewith file a certified copy of all the proceeding in it which I am able to find of record. There was, however, a demurrer filed, and after the judgment of May 16, 1870, it was appealed to the Supreme Court of the Territory. And the Supreme Court affirmed the judgment.

"THE TERRITORIAL MARSHALSHIP."

"In the District Court of the Third Judicial District of the Territory of Utah, County of Salt Lake.

"The United States of America, on the Relation of Joseph M. Orr, vs. J. D. T. McAllister.

"STATEMENT ON APPEAL."

"Be it remembered that on the 17th day of March, 1870, the Relator filed his complaint in said Court against said Respondent in words and figures following, to wit:

<p>"The United States of America on the relation of Joseph M. Orr, vs. J. D. T. McAllister.</p>	<p>In the Third District Court of Utah Territory. Regular March term, A. D. 1870, Hon. C. C. Wilson, Judge.</p>
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"I, Joseph M. Orr, the above relator, being first duly sworn upon oath, say that U. S. Grant, President of the United States, by virtue of the authority conferred upon him by law, on the 28th day of September, A. D. 1869, suspended Josiah Hosmer from the office of Marshal of the United States for the Territory of Utah until the end of the next session of the Senate of the United States, and on said day designated Joseph M. Orr to perform the duties of such suspended officer, in the meantime, and on the same day, a commission duly issued to the said relator, all of which is more fully shown by the exhibit hereunto attached, marked (A); that afterwards, but several months previous to the date hereof, said Relator duly qualified himself, according to law, to enter upon the duties aforesaid, by taking and subscribing the oath, a certified copy of which is hereto attached, marked exhibit (B), and filing the same with the Clerk of the Supreme Court of said Territory, and also forwarding a certified copy of the same to the Secretary of the Interior, and also by executing the bond, a certified copy of which is hereto attached and marked exhibit (C), which bond was duly recorded in the office of the Secretary of said Territory; that by reason of the premises it became and still is the duty and right of the said Relator, under and by virtue of the laws of the United States, to execute all processes issuing out of the District and Supreme Courts of said Territory of Utah, or directed by any judge thereof, to do and perform all and singular the executive business of said courts, and to have and enjoy all and singular the fees and emoluments of the same; that one J. D. T. McAllister, as Territorial Marshal of Utah Territory at the present time, assumes to have the right and authority to do and perform a portion of the aforesaid duties, devolved, by reason of the premises, upon the said Relator, and to have and receive the fees and emoluments of the same; and the said J. D. T. McAllister, so

assuming such right, has, for several months last past within the jurisdiction of this court, wrongfully, unlawfully and without any legal authority therefor, executed most of the process of this court, and has done and performed the executive business of the same in almost all cases in which the United States has not been a party, and has received to his own use almost all of the fees and emoluments pertaining to the same, in violation of the rights of the said Relator. And the said J. D. T. McAllister, still assuming said rights, still continues, within the jurisdiction of this Court, wrongfully and unlawfully and without any warrant or authority of law, to execute most of the processes of this Court, to do and perform almost all of the executive business of the same, and to receive to his own use the fees and emoluments pertaining to such service, in violation of the rights of the said Relator.

"Wherefore said Relator prays that an information may be filed against the said J. D. T. McAllister, according to law, and that he may by the Court here be required to appear and show by what authority he does the matters and things above specified.

"The Territory of Utah, } s.s.
Salt Lake County, }

"Joseph M. Orr, the aforesaid relator, being first duly sworn upon oath, says that the matters and things before stated, and to which he has subscribed his name, are true, as he verily believes.

"(Signed) J. M. ORR.

"Sworn to and subscribed before me, this 16th day of March, A. D. 1870.

"S. A. MANN, Clerk.

(ENDORSED.)

"Dist. Court 3rd Dist. Utah..]
"United States on relation of J. M. Orr ads. J. D. T. McAllister.

"Affidavit of Relator and Commission.

"Filed March 17th, 1870.

"S. A. MANN, Clerk.

"Afterwards, to wit, on the 24th day of March, A. D. 1870, defendant by his counsel appeared and filed, with the clerk of said court, his answer, which is in words and figures following, to wit—

<p>"The United States, by Chas. H. Hempstead, Attorney of the United States in the Territory of Utah, on the relation of Joseph M. Orr vs. John D. T. McAllister, Territorial Marshal for Utah Territory.</p>	<p>Territory of Utah, 3rd Judicial District Court, March term, 1870. Hon. C. C. Wilson, Judge.</p>
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"Now comes the above named John D. T. McAllister, in his own proper person, and says he admits that His Excellency U. S. Grant, at the time and in the manner mentioned in the relation herein filed, suspended Josiah Hosmer from the office of Marshal of the United States in the Territory of Utah, as alleged, and that he designated and commissioned the said Joseph M. Orr to discharge the duties of that office for the time and in the manner set forth in the relation, and that the said Joseph M. Orr took the oath and gave the bond required by law, and did and performed all other things necessary to be performed to enable him to discharge the duties enjoined on him by law as such United States Marshal. But as to the legal conclusions drawn by the United States attorney for the District of Utah he refers the same to this Honorable Court, without himself admitting or denying them or any of them. To enable this Honorable Court to understand and be informed as to such legal conclusions and rights and duties of the said Relator and of himself, he herein states and informs the Court that pursuant to the Act entitled an Act in relation to Marshals and Attorneys, approved March 3d, 1852, and of the acts amendatory thereto, he, on the 5th day of January, 1866, was duly elected by the joint vote of the Legislative Assembly of the Territory of Utah, then in session, to the office of Territorial Marshal, and that between that day and the twenty-sixth day of the same month he took the oath and gave the bond required by law, and that on the said 26th day of Jan. A. D. 1866, His Excellency Chas. Durkie, then Governor of Utah Territory, issued to him a Commission as such Territorial Marshal, which oath, bond, and commission are

now here to the Court shown. Afterwards on the same day he entered upon the duties of said office, and he has continued to discharge the duties and receive the fees and emoluments appertaining to the office of Territorial Marshal for Utah Territory.

"He further informs this honorable Court that on the 16th day of February, A. D. 1870, he was re-elected to said office by the joint vote of the Legislative Assembly of the Territory of Utah then in joint session. And that afterward, on the 17th day of February, A. D. 1870, he took the oath required by him before William Clayton, a notary public, and filed the bond also required by law with Wm. Clayton, Auditor of Public Accounts, and that afterwards on the 21st day of February, in the same year, His Excellency S. A. Mann, Acting-Governor of Utah Territory, issued a commission to him as such Territorial Marshal, which is still in full force and virtue; which oath, bond and commission are now here to the court shown. From that time until the filing of this relation, he has discharged the executive duties of this Honorable Court and served the process issued by it—as he lawfully may do—when this Honorable Court has been exercising its jurisdiction in cases not arising under the Constitution and laws of the United States, and when it has not been exercising its jurisdiction as a Circuit and District Court of the United States. And he further says he denies the allegations in relation that he, the defendant, herein assumes at this time, or at any other time he has assumed, to have the right or authority to do and perform any portion whatever of the duties devolved on the relator by reason of the premises set forth in the relation, or to receive any of the fees or emoluments of the office of the United States Marshal of the Territory of Utah. And he denies the allegation that he, the defendant, is now, or that he heretofore has been, in the exercise of any executive duty of this Honorable Court, or of the Supreme Court of this Territory, or served any process whatever which has been issued by either of said courts or any judge thereof, that could lawfully be served, or the duty could lawfully be discharged by the relator as United States Marshal for Utah Territory.

"And that he now herein disclaims, and at all times heretofore he has disclaimed, all right in himself as such Territorial Marshal to act as the executive officer of the Supreme or District Court when such Supreme or District Court is exercising its jurisdiction as District or Circuit Court of the United States, or when they are exercising the jurisdiction in cases arising under the Constitution and laws of the United States.

"But he claims, as it is his right and duty to claim, that by virtue of the laws of the United States and of the laws of Utah, and by virtue of the election, oath, bond and commission aforesaid, he has the right and it is his duty to act as Territorial Marshal of Utah Territory, and as such to be the executive officer both of the Supreme and District Courts when such Courts are not exercising their jurisdiction as Circuit or District Courts of the United States, nor in cases not arising under the Constitution and laws of the United States.

"He herein denies that he now executes or at any time heretofore he has executed any executive duty of either of said Courts, or served any process whatever, wrongfully, unlawfully or without legal authority. And, if, as alleged, he performs most all of the executive duties of said Courts and serves most all of the processes, it is for the reason that by law it is his duty so to do; and now, having fully answered and set forth his warrant, he prays to be adjudged to continue in said office.

"(Signed)

"JOHN D. T. McALLISTER.
"Z. SNOW, Attorney-General for Utah Territory."

"Territory of Utah.

"Third Judicial District Court sitting as a Circuit Court of the United States.

Hon. C. C. Wilson, Judge.

"The above named John D. T. McAllister makes oath and says that he has heard the foregoing answer read, knows the contents thereof, and that so much thereof as is set forth therein from his own knowledge is true and that which is therein set

forth from information of others he believes to be true.

"JOHN D. T. McALLISTER.
"Subscribed and sworn to before me, this 24th day of March, 1870.
"S. A. MANN, Clerk."

(Endorsed.)

"The United States on the relation of J. M. Orr vs. John D. T. McAllister.

"Answer.

"Filed March 24th, 1870.

"S. A. MANN, Clerk.

"Z. SNOW, Attorney-General.

"Afterwards, to wit, on the 11th day of May, A. D. 1870, during other proceedings of the court the following appears of record, which is in words following, to wit:

<p>"In the relation of J. M. Orr, against J. D. T. McAllister.</p>	<p>Demurrer of Plaintiff sustained.</p>
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"Afterwards, to wit, on May 12th, 1870, during proceedings of Court, the following appears of record, which in words following is, to wit:

<p>"In the relation of J. M. Orr, against J. D. T. McAllister.</p>	<p>Judgment of Ouster Entered.</p>
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"And ordered by the Court that said Respondent turn over within ten days to the relator all processes or other papers of this court now in his hands, as well as property now in his possession, by virtue of any process or order of this Court.

"Afterwards, to wit, on April 30, 1872, during proceedings of the Court, the following appeared of record, which is in words following, to wit:

Tuesday, April 30, 1872.

"Court met pursuant to adjournment.

"Present Hon. O. F. Strickland, Judge.

"J. L. High, Dept. U. S. Atty.

"A. S. Patrick, Dept. U. S. Marshal.

"J. D. T. McAllister, Territorial Marshal.

"R. W. McAllister as Deputy Territorial Marshal.

"Wm. S. Walker, Clerk.

"Z. Snow, Terr'l Atty General.

"Court opened by the Terr'l Marshal.

"Whereupon the Court announced that the Territorial Marshal and Territorial Attorney-General would be recognized as Executive Officers of this Court for all Territorial business.

"On motion of James L. High, Esq., Deputy U. S. Attorney, ordered that a *nolle prosequi* be and hereby is entered as to all indictments found by the grand jurors of this Court at and since the September term, 1870, thereof, and that all prisoners held under such indictments be discharged. And that all prisoners held under preliminary examination be transferred by the United States Marshal to the Territorial Marshal.

"Territory of Utah, } s.s.
County of Salt Lake, }

"I, Joseph F. Nounnan, Clerk of Third Judicial District Court of Utah Territory, do hereby certify that the foregoing is a full, true and correct copy of the original Complaint, Answer and Court proceedings in the above entitled action on file and of record in my office.

"Witness my hand and the seal of said Court, at Salt Lake City, this 23rd day of October, A. D. 1873.

"Jos. F. NOUNNAN, Clerk.

"By EDWD. B. MCKEAN,
Deputy Clerk.

By reference to the record in the McAllister case, it will be seen that Marshal McAllister was ousted May 11, 1870. The case was taken to the Supreme Court of the Territory, where, in the fall of that year, the judgment was affirmed.

Before the argument in the case, and in my case, in which the same principles were involved, it was agreed between the United States Attorney and myself, that both be argued together. Judgment in one to be given, and from that an appeal to be taken to the Supreme Court of the United States, the judgment in the other to abide the result of the appealed case. But when the Court here rendered judgment, it did so in both cases. I then sought the papers in the McAllister case, with intent to appeal it, but could not find the files. They have not yet been found. I thereupon went to the District Court, and obtained copies of all I could there find.

By a farther reference to this record, it will be seen that on

April 30th, 1872, Marshal McAllister and myself were again recognized as Territorial officers. But it was by the District Judge in the District Court. This was informal. The judgment in the Supreme Court of the Territory in that case was *unreversed*, though the principle governing it and upon which the court acted was *overruled* by the Supreme Court of the United States in the Clinton and Englebrecht case. That left the District Court without a ministerial officer, unless Marshal McAllister was recognized by virtue of this informal reinstatement. The Governor was not authorized to fill the vacancy. No method was found to fill it. It is this which is in the way of obtaining a jury.

From May 11th, 1870, to April 30th, 1872, the United States Marshal acted as the ministerial officer of the Court.

Since April 30th, 1872, there has not been any Legislative Assembly, so until now it has been impossible to correct this matter.

It is a necessity to fill that office, or legislate so as to remove the obstacle. It is a matter of no consequence where or how or what the action was that caused this state of affairs. We are in it, we must get out some way, and no branch of the government can help us out but the Governor and Legislative Assembly.

I sought to obtain a Grand Jury in the Third Judicial District, in September, 1872, in March and in September, 1873, but failed. I herewith file a printed statement of the matter at the September term, 1873, which I presume is correct:

"THIRD DISTRICT COURT, MCKEAN, C. J., PRESIDING.

"Tuesday, Oct. 20, 1873.

"Court met at 10 o'clock a.m.

"Some *ex parte* motions were disposed of, after which the clerk called the names of the grand jurors. Fourteen answered, and as fifteen are required to complete the panel, one of the petit jurors was drawn under the statutes—to fill the vacant place.

"Mr. William Cary, U.S. District Attorney for the Territory, submitted the following challenge to the array of the jury:

"United States of America, }
Territory of Utah, }

"In the District Court of the Third Judicial District of said Territory.

"Now comes William Cary, United States Attorney for said Territory, before the swearing of the persons in the jury box, and challenges the panel of the so-called grand jury summoned to appear at the present term of this court, and now moves to quash the same, and for grounds of motion assigns as follows:

"First—Because the laws of Utah have not been complied with in many respects in selecting said jurors, as will be seen by the court by reference to and examination of the venire, and the returns, certificates and documents accompanying the same.

"Second—Because they were not summoned by the United States Marshal, and therefore cannot lawfully take cognizance of offences against the United States.

"Third—The persons now in court were not summoned by any officer, but by John D. T. McAllister, a private citizen, the said McAllister having been ousted from the office of Territorial Marshal by the judgment of this court, rendered May 4th, 1870, the Honorable Chief Justice Wilson then presiding, which judgment was afterwards affirmed by the Superior Court of the Territory, and has never been reversed.

"WILLIAM CAREY, Atty of the U. S. for U. T.

"The challenge was argued briefly by Mr. Cary in support of his motion, and Territorial Attorney General Snow for the people.

"McKean announced that he would render a decision at four o'clock in the afternoon.

"After making some preliminary remarks concerning the challenge to the array of the grand jury, entered in the morning, McKean delivered his decision thereon verbally, which in substance was as follows:

"It had been admitted by the council on both sides that two of the persons summoned to serve as jurors were incompetent, for that they were not citizens, having only received their first papers, but before discharging them on that account the judge would examine the ques-