London, 30.—A steamer thought to be the *Quebec* has been sighted at sea in a disabled condition.

A schooner rigged steamer of 1200 tons burden was wrecked off Tuscar light. It is feared the crew were lost.

London, 30.—The *Times* says the most uncertain element in the conditions affecting the value of money in '83, is the action of the American Congress in regard to the tariff bill and their currency legislation.

Vienna, 30.—The retail sale of the *Neue Wilner Tagblatt*, *Constitutionelle* and *Vorstadt Zeitung* is prohibited. The journals appeal.

THE MANDAMUS QUESTION.

THE CASE OF J N. KIMBALL VS. F. D. RICHARDS BEFORE THE SUPREME COURT, ON APPEAL.

The mandamus case in the matter of James N. Kimball *vs.* Franklin D. Richards on appeal from the First District Court, was called at 10 o'clock this morning, in the Supreme Court of the Territory, before Chief Justice Hunter and Associates P. H. Emerson and Stephen P. Twiss.

Messrs. Sheeks and Rawlins were added to the counsel for appellant.

Mr. Arthur Brown opened the argument in behalf of the appellant by reading a transcript of the record of the case heard in the First District Court, reports of which proceedings were published at the time of hearing.

Mr. Brown said the first question he would call the attention of the Justices to was the jurisdiction of the Court issuing the mandamus demanding the appellant to deliver up the books, records, etc., when not assembled in open court.

The writ in itself was not an alternative writ of mandamus but rather a summons *to show* cause, e c., as in a civil action, and was not a pleading in itself. The alternative writ does not state facts sufficient to constitute a cause of action, and therefore it was in the nature of a summons. He cited as authority the case of State of Wisconsin *vs.* Jennings. The statutes of the Territory determined the terms, etc., of the several district courts of the Territory. A statute of the compiled laws of the United States takes all authority to hear and decide mandamus cases from courts in chambers.

Mr. Brown then proceeded to show that the pleadings of James N. Kimball were for books, papers, etc., of the office of Probate Judge, and admitting that the said Kimball was not the Judge, though declaring that he had been appointed. He did not sue for the office, but only for the books and papers. It was not lawful for the Judge of Probate for Weber County to deliver over to a person who had not been elected, the books, papers, etc., before he had obtained lawful possession of the office. Mandamus may be brought to compel such delivery, but such could never obtain for the reason that it was an improper writ. The Court has no jurisdiction to try this case by mandamus. The case of the State of Minnesota *vs.* Williams was cited, in mandamusing Williams to vacate the office as member of the House of Representatives for that State. Until the State could show that the occupant of the office, was disentitled to such office he was lawfully acting in the duties thereof. This question must first be determined before the right to the office of the appointee of the Governor can be considered. The only means of ousting Mr. Richards was by a writ of *quo warranto*, otherwise if he delivered the office, he would be considered liable on his bonds to a criminal cause of action. Mr. Kimball had not the right to obtain the office by mandamus when he had not been lawfully appointed or elected to such office, *quo warranto* was the only proper writ.

On the subject of vacancy in the office in controversy Mr. Brown read the statute declaring that a probate judge, etc, shall be elected for a term of two years and until his successor is duly elected and qualified. Various authorities were cited showing that the hold-over clause in the laws of the several States made the time subsequent to the term for which the officer was elected a portion of the term of his election. The Hoar amendment did not contemplate the turning out of office any lawful occupants, but merely in case of any failure to elect to give the Governor power to appoint. It was to avoid any evil that might befall the public in case offices became vacant. Years ago it was a legally established and recognized fact in law, that no office can be said to be vacant while any person is authorized to act in it and does so act. Mr. Richards was, under the statutes, authorized to act in such office after the two years had elapsed, and further he did so act. The Hoar amendment contemplated that local officers should not be interfered with, but rather to obviate any evils in case of vacancy.

On the question of Mr. Richards' denial to being a polygamist under the meaning of any statutory law of the United States, Mr. Brown said that though Webster and other authorities define the term polygamist differently, the idea in the denial was that Mr. Richards was not a polygamist either in belief or practice, in any manner amenable to any law of Congress, and any other definition could not figure in this case.

Mr. Sutherland, in behalf of the respondent, said that all the apparent facts stated in the complaint are admitted in the answer. It was admitted that the appellant is the present occupant of the office. If Mr. Richards had ever been a polygamist he was ousted from office when the Edmunds bill passed. It was admitted that the bonds of Mr. Kimball were never filed with the Treasurer of Weber County. Like the treasurers of most of the other counties, about that time the Treasurer of Weber County could not be found in his office. But Mr. Kimball left the bonds, etc., at the office of the treasurer, and they apparently had not been recognized. In regard to the meaning of the term polygamist, the 8th section of the Edmunds bill defines the word as a person cohabiting with more than one woman, or a woman cohabiting with a man who cohabits with more than one woman. But philologically, a man or woman who believes or advocates a plurality of wives at the same time is a polygamist. If a man married two wives before the passage of the law of July, 1862, he was and is a polygamist; it is not necessary that he should have married more than one wife since that date. At the passage of the Edmunds bill the office of Probate Judge of Weber County immediately became vacant. If such definitions be accepted, then there certainly is a vacancy, which cannot be disputed. The Governor was authorized to appoint, and he did appoint, and in doing so demanded Mr. Richards to step down and out. The Hoar amendment was to fill the offices created by a failure to hold an election on the first Monday in August. If the Governor has found any offices having become vacant by such failure to elect then he has a right to fill them. If the hold-over clause be legal then the folly of the Hoar amendment must be imputed to the Congress of the United States, having passed a law which in itself was inoperative.

The Edmunds bill was aimed at polygamy, for its destruction; the ballot was taken from practisers of the same, and it was the intention of the government to give to the Territory a set of officers who were not polygamists. It does'nt matter whether the office of probate judges were "hold-over" offices or not, the Edmunds bill turned all polygamists out of them. The appointees are regular officers who have a right to hold the several offices to which they are appointed and until their successors are duly elected and qualified. If Mr. Kimball had been elected instead of appointed and had gone through the same ceremony to file bonds, etc., and then Mr. Richards would not vacate, would not that be a clear case for mandamus? Under the Hoar amendment the Governor's appointees are as much entitled to such offices as though they had been elected. Mandamus in many States is held to be a more specific because a more immediate remepy in these cases where the term of office is short, for before a case of *quo warranto* could be heard the term would expire. If Congress says that the Governor has a right to appoint in lieu of the August election then the titles of the various appointees to the offices are perfect. The matter is just the same as though Congress had couched the same idea in less ambiguous language.

Mr. Brown—Isn't the language of Congress in the Hoar amendment plain?

Mr. Sutherland—O, yes,

Mr. Brown — That's what I thought.

The Court will take judicial notice that in the complaint certain records are asked which the law provides shall be kept.

Adjourned till 1.45 p.m.

FRIDAY, 27, 1883, 1:45 p.m.

Judge R. K. Williams, in behalf of the appellant, Mr. F. D. Richards, opened his argument. In regard to the subject of polygamy he said that Greenleaf defined it as a plurality of wives at the same time, though in one sense a man who supported or advocated it was a polygamist. Polygamy or bigamy never was a common law offense before the Act of 1862; therefore it is essential that the facts should be set forth to show that the offense has been committed, proving that at least two marriages had been contracted by Mr. Richards. He first must have one wife and it must be proven also that since 1862 he has contracted another while he still had a legal wife, for the law of 1862 is evidently prospective and not retrospective in its operations. The constitutional guarantee protects the citizens of this republic from *expost facto* laws. The Edmunds law itself was in intent prospective but is argued in such a way as to make it appear retrospective. The Supreme Court of New York has decided that no law can be made retrospective unless so stated in most explicit, unambiguous language. Congress declared the election offices of Utah vacant, but they filled them, and with this provision before them, would they declare other offices vacant and not fill them? The appointing power was to be exercised only in case of the failure to elect. Therefore as there were no offices vacant the appointments of the Governor were null and void. Referred to the statute concerning the election of county and territorial officers containing the hold-over clause. The term of election is not for two years in reality; it is continuous until successors are duly elected and qualified. Under the amendment from which the Governor derives his power of appointment, the officers could hold only eight months for there is no hold-over clause in such law. This measure did not vacate any offices and intended to fill only such as would become vacant in consequence of a failure on the part of the people to elect. The fact of the matter was Congress didn't know what the territorial statutes were on the subject. If the appointees take the offices and that only for eight months then there will be several month's anarchy between the expiration of their term and the time of election in August, 1884. The object evidently of Congress was to avert and not to produce anarchy. If the offices were vacated under the Edmunds bill on March 22, 1882, then the offices were vacant on the first Monday in August, and if they did not become vacant through the failure in holding an election, then the power of the Governor under the Hoar amendment cannot be exercised, for there would be no necessity for the use thereof. If the appointments are legal, then from May 1873 to August, 1884, anarchy will reign, and who could suppose for one moment that the Congress of the United States would, with these facts staring them in the face, enact a measure directly producing inevitable anarchy.

Mandamus is not the proper method of redress in a case of this nature. *Quo warranto* is the means by which the right and title of any office must be tried. The abrogating of the office of Attorney General for this Territory left the prosecution for the usurpation of office upon the United States prosecuting attorney for the Territory. The foundation of Mr. Kimball's right to the office is based upon his appointment by the Governor which is void. Any person exercising the duties of the office of Judge of Probate without filing of his bonds, etc., is guilty of a misdemeanor. If the Treasurer had failed to accept or refused the bonds of Mr. Kimball then mandamus would have been the proper method of redress.

Mr. Richards has not, since the passage of the law of 1862, married any woman, therefore, he has offended against neither of the congressional enactments.

Mr. James N. Kimball, in his own behalf, referred to section 1817, Compiled Laws, under which power was conferred upon the Judge in chambers to hear and decide upon a case in mandamus. The right of the applicant for the writ of mandamus should first be shown to the court so as to give it jurisdiction in the matter of issuing the writ. This right was shown in the complaint, setting forth that attempts had been made to file the proper bonds and sureties, after having received the appointment. Mandamus in this case is the proper remedy. The dispute is not on the right to the office, but on the meaning of the statute of the United States.

In this Territory mandamus is the proper means of redress for the term is evidently too short for a case in *quo warranto*, and the right to the office and records has been shown. In common law mandamus is proper in obtaining the possession of an office, when there was no other immediate and legal remedy. If Judge Richards' term of office had expired, then it was a part of his official duty to deliver over to me the books, records, etc. I had received my appointment under the Hoar amendment, and I should not be required to proceed to obtain them by *quo warranto*. Prosecution for the usurpation of office does not devolve upon the United States District Attorney. The office of Attorney General having been abolished, whose duty it was to institute such actions. The case is properly brought in mandamus.

In regard to the allegation of polygamy made against Mr. Richards, he said that the use of the word polygamy in the Edmunds bill was intended to apply to the existing state of a marital relation in this Territory. The word was well understood. And anyone being in such relation was disqualified from acting in any office of public trust. Consequently all offices held by such persons, were declared vacant. But Judge Williams had argued that before a man could be declared a polygamist he must first be indicted and tried before a competent court and jury. However, the facts were known to exist. The law says a polygamist shall neither be eligible to nor shall he hold office. The office was vacant because there was no election and therefore I had a legal right to such office having received my appointment and complied with the law of qualification so far as practicable.

Mr. Kimball here quoted a number of authorities in support of the theory of mandamus being the proper remedy in this case.

Mr. J. L. Rawlins, in behalf of the appellant, F. D. Richards, said that the power of the several courts in the Territory was left to the Territorial Legislature, which authority should prescribe the jurisdiction of the several courts. The judges must conform to the exercise of the power prescribed by the Legislature. The district courts held by the judges in the manner prescribed by law are the exclusive depositories of jurisdiction in all original civil cases. In all cases where mandamus is held to be the proper remedy to secure the custody of books, papers, etc, the relator's right must be shown *prima facie* and legally, complete in everything but possession. The statute declares that the relator shall file a bond. He says he made a number of journeys to the house of the Treasurer but there was no evidence that the treasurer ever saw the papers Kimball left with his (the treasurer's) wife. In the answer to the complaint Mr. Richards denies that at any time the bond had been received and filed with the treasurer. If the bond had not been filed and Mr. Kimball entered upon the duties of the office, Mr. Richards, in delivering up the office would have been aiding Kimball on his road to the penitentiary, through being guilty of a misdemeanor under the statutes. The filing of the bond is, under our statutes, a condition precedent to the right of possession of the office.

The first position to maintain the remedy of mandamus is to show the Governor was substituted for the people, and also for that competent authority to determine who was elected or appointed. The vacancy, it is argued, occurred by virtue of the appointment.

It was said that Congress struck a blow at polygamy and that the Governor was given the right to appoint a set of officers that were not polygamists, and therefore all offices must have been vacated. If the offices became vacant on the first Monday in August, then how could they have been vacant by the act of appointment? Either one or the other position is false. But the Statutes of Utah were before Congress when the Hoar amendment was passed. The Governor's power was limited to as narrow a sphere as possible, and was granted only to be used in case of emergency, in case any irregularity might ensue in consequence of a failure to elect. Before the Governor's commission has the least validity the right to the office must be shown clearly and completely in everything but possession.

In regard to polygamy, Mr. Rawlins said that a charge of any criminal nature cannot be argued against an applicant for or possessor of an office. Such a person must be tried and convicted before such an allegation can be used against him. Certain things are defined as bigamy, and there is a manner defined for the prosecution of such crimes. The practice of cohabiting with more than one woman is polygamy. It was the intention of the statute of 1862 to reach the performance of the marriage ceremony. If Mr. Richards was charged with polygamy, before that could be used against him, he must first have a trial. The law of 1882 defines polygamy to mean not only the cohabiting in the marital relation, but it was general in meaning where a man cohabited with more than one woman. The relator is endeavoring to obtain the papers, books, etc., thinking at the same time that the office would naturally be incidental to such possession. But the possession of the office was the thing in controversy, and that of the books, etc., incidental.

The case was then submitted. Adjourned.

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NOTICE TO CREDITORS.

ESTATE OF ROBERT WATSON, DECEASED.

NOTICE IS HEREBY GIVEN BY THE undersigned, Administrators of the Estate of Robert Watson, deceased, to the creditors of, and all persons having claims against the said deceased, to exhibit them with the necessary vouchers, within ten months after the first publication of this notice, to the said Administrators at their residence in the 6th Ward of Salt Lake City, Territory of Utah in the County of Salt Lake.

Dated January 2nd, 1883.

JAMES C. WATSON,
HUGH WATSON,
Administrators of Estate of [redacted] deceased.