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THE DECISION OF THE SUPREME COURT.

Our readers will pardon the rather late issue of our paper this evening, when it is understood that we have delayed for the purpose of giving in full the decision of the Supreme Court in the *mandamus* case. The demurrer is sustained and the proceedings against the Assessor are at an end. The validity of the woman suffrage Act is not involved in the decision. The ruling, as we anticipated, only affects the writ and the right of the Court to issue it. The opinion is well worth careful reading and study.

Of course Judge Boreman had to give a dissenting opinion. It was his last chance. It contains nothing new, but is merely an echo of the views of the "Liberal" attorneys. We question very much if he has any of his own.

It is too late to take up the main subject this evening. We shall have something to say on it at a future time. We congratulate the Assessor and the people on the result of the case.

NOT A JUST JUDGMENT.

WICKED men generally judge other people from their own standard. They know how they would act under given circumstances, and jump to the conclusion that others would do the same. That is how licentious people judge "Mormon" polygamists, and on the same principle the Republicans are now anticipating — or pretending to anticipate—certain contingencies as the consequence of Democratic accession to the control of national affairs.

One of the chief and most frequently repeated predictions of the Republican campaign orators and papers is, that if the Democrats succeed in November, they will proceed to reconstruct the Supreme Court for the purpose of overthrowing the war amendments to the Constitution. Why should any fears be entertained on this head? There is nothing in the platform of the Democratic party, nor in the principles or utterances of its chiefs and candidates, to warrant any such conclusion. On the contrary, the party and its nominee for President have plainly stated their acceptance of the issues of the war, at least as far as those Constitutional Amendments are concerned.

But these accusers by anticipation have themselves been guilty of the things which they foretel as the inevitable acts of others. During the period from 1863 to 1869 inclusive, while the Republicans were in full power, the Supreme Court was three times reconstructed, for the purpose of introducing new elements and accomplishing party designs. By Act of March 3d, 1863, the Supreme Court was increased by the addition of a member, to ten. By Act of July 23d, 1866, it was provided that vacancies should not be filled until the Court be reduced to the Chief Justice and six Associates. By Act of April 10th, 1869, the Court was to consist of the Chief and eight, rendering it necessary to appoint one (eight Judges already sitting), the Act to take effect the first Monday in December, 1869.

The first charge was not of any very great importance. The second was made with the object of preventing the appointment of a Justice by Andrew Johnson. The third was for the purpose of effecting the reversal of a decision, certain to be given, and which was rendered shortly after the law increasing the court was made, against the constitutionality of the legal tender act. By the addition of Justices Bradley and Strong, who were well known to hold views opposite to those of the decision, the ruling was reversed on a rehearing.

With such a record, predictions of evil on a probable reconstruction of the Supreme Court, as a consequence of Democratic success, comes with very bad grace from the Republican party.

We do not anticipate any such attempt to attack the constitutional amendments referred to, for the simple reason that the Democratic campaign is conducted on an avowed acceptance of the principles contained in these Amendments, and General Hancock has, in the most positive terms, announced that he considers them inviolable. The Republicans have been measuring their opponents by their own half bushel, and there is therefore no wonder that they indulge in anticipations of evil. That kind of guage is no true guide to a just judgment.

The largest cotton seed oil mill in the world is building at Little Rock, Ark., and is to employ 650 men, using 300 tons of cotton seed daily.

Elders Finlayson and McAllister have opened the gospel to the people of the Orkney Islands, which have a population of about 31,200. They have preached and distributed tracts in several of the principal towns and villages.

Two Americans, Messrs. Prescott, profess to have discovered that underground currents of electricity, flowing in all directions, form the true "earths" of lightning discharges. They assert that all houses, trees, etc., struck by lightning are underflowed by these currents, and that no houses, etc., standing on spots where there are no currents, are ever struck. In protecting a house from lightning-stroke, therefore, their method is to test the ground underneath, and, if there are no earth-currents below, to take no further trouble, but, if these currents are present, to earth the rod which they egress in that part of the ground below where they are strongest.

THE MANDAMUS CASE.

DECISION OF THE SUPREME COURT.

THE DEMURRER SUSTAINED.

In the matter of the petition and affidavit of George R. Maxwell for writ of mandamus, directed to Robert T. Burton, Assessor and Register of Salt Lake County, Territory of Utah.

SUPREME COURT OF THE TERRITORY OF UTAH.

Sutherland & McBride for Relator.

Zera Snow, Zerrubbabel Snow, J. L. Rawlins, Richards & Williams, Bennett & Harkness, A. Miner, For Respondent.

A petition was presented to this Court at its present session by the relater for a writ of mandamus, to compel Robert T. Burton, Assessor and Register of voters for Salt Lake County, Utah Territory, to erase and strike from the list of voters of Salt Lake County, made by him, the name of the following persons, viz.: Emeline B. Wells, Maria M. Blythe and Mrs. A. G. Paddock, and also the names of all women whose names thereon appear on the aforesaid list, or that he show cause before this court on the 29th day of September, why he has not done so. Also that in the meantime the said officer be ordered not to return said list or any copy thereof to any election officer until the further order of this court.

An alternative writ was ordered at the time of filing the petition and the cause came up for hearing on the day mentioned in the alternative writ, to wit: Sept. 29, 1880.

The respondent on the day fixed for the hearing appeared by counsel who interposed a demurrer to the petition and writ, assigning as grounds therefor,

1. That this court has no jurisdiction of the subject of this action.

2. Neither the petition nor writ herein state facts sufficient to constitute a cause of action, thus raising two questions for the determination of this court.

It has been heretofore held by the Supreme Court of this Territory, in the case of Shepperd *vs* the 2nd District Court, that this court has no original jurisdiction to issue mandamus except to enable it to exercise its appellate jurisdiction. And the Court in that case cites sections 1,907, 1,836 and 1,869 of the Revised Statutes of the United States, and the 3d section of an act entitled, "An Act in Relation to Courts and judicial officers in the Territory of Utah, (Poland law) which are as follows:

Sec. 1,907. "The judicial power in Utah shall be vested in a Supreme Court, District Court, Probate Court and the Justice of the Peace."

Sec. 1,863. "The jurisdiction both appellate and original of the courts provided for by section 1,907 shall be limited by law."

Sec. 1,860. "Writs of error, bills of exceptions and appeals shall be allowed in all cases from the final decisions of the District Court to the Supreme Court of all the Territories, respectively, under such regulations as may be provided by law, but in no case removed to the Supreme Court shall trial by jury be allowed in that court."

Third section Judicial act.

"The District Court shall have exclusive original jurisdiction in all suits and proceedings in chancery, and in all actions at law in which the sum or value of the thing in controversy shall be $300 or upwards.

The Supreme Court in passing upon these laws, in the decision cited, says:

"Regarding the acts of Congress as the Supreme law of the Territory having a controlling power similar to, if not co-extensive with the constitution of any particular State over their respective Legislatures and Judicial departments, we are forced to the conclusion that, in so far as section 445 of our Practice act, which provides that the writ of mandamus may be issued by *any* Court of this Territory, except a Justice of the Peace, is in conflict with the acts of Congress above referred to, it is wholly inoperative and void.

The decision of the Court is based upon the theory that the Acts of Congress in reference to the courts referred to, are paramount to all territorial legislation. In this theory we now concur, and if there is any Congressional enactment which has the effect of making inoperative and void, Section 445 of the Practice Act, then of course the Act is void. So far as it confers upon this court power to issue mandamus except in the exercise of its appellate jurisdiction. It is insisted that the third section of the Act in relation to courts and judicial officers in the Territory of Utah as above quoted, resolves that question. To a certain extent said third section has the effect of limiting the jurisdiction of this court, but only to that certain extent. It confers upon the District Court, *exclusive*, original jurisdiction in all suits or proceedings in chancery, and in all actions at law in which the sum or value of the thing in controversy shall be three hundred dollars or upwards.

To determine therefore whether the Congressional enactment destroys the Legislative enactment, we must look into the character of the proceeding wherein the rule is sought to be applied. Clearly if the case is a suit or proceeding in chancery, then the exclusive original jurisdiction over it is in the District Court; and if the case be an action at law to which the sum or value of the thing in controversy shall be three hundred dollars or upwards, then the exclusive original jurisdiction over it is in the District Court.

But if it is not a suit or proceeding in chancery, or it is not a suit at law wherein the sum or value of the thing in controversy is three hundred dollars or upwards, then the District Court does not by virtue of the third section obtain the exclusive original jurisdiction. The Poland Bill confers upon Justices of Peace jurisdiction in all cases where the debt or sum claimed shall be less than three hundred dollars, thus giving to Justices' Courts concurrent jurisdiction with the District Courts in such cases where the amount in controversy is less than three hundred dollars.

Sec. 445 of the practice act provides that the writ of mandamus may be issued by *any* court in this Territory, except a justice's to any inferior tribunal, corporation, board or person to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust or station." Under this provision the relator has applied to this court for the writ, and the demurrer interposed to his complaint and affidavit raises the jurisdictional question, and in resolving that question it becomes our duty to apply the rule of construction heretofore referred to. The case is not a suit or proceeding in chancery, and therefore the District Court has not exclusive original jurisdiction over it, nor is the amount involved in it $300 or upwards, nor is it less than $300.

It has no monied value whatever, and has no element calling for the chancery powers of the court, but it is of that class of cases in which the practice act confers upon this Court, under the broad term *any court*, jurisdiction to issue writs of mandamus.

To my mind there is a wide difference in the office of the two writs, viz., mandamus and certiorari.

The former is termed in our statute a *writ of mandate* and the latter is termed a *writ of review*.

Clearly in the one case looking to the enforcement of some act or duty refused to be done by an officer in the execution of a trust which by law he is required to do or perform.

In the other looking to certain proceedings had by some inferior tribunal, wherein there is alleged error or other informality in the proceeding which the superior court issues the writ, desires to review, to ascertain if or not error or informality exists.

In the case of the writ of certiorari, I have no doubt of the power of this court to issue it for the purposes prescribed by the statute.

In the case of the writ of mandamus, I hold it can only be issued in the particular cases provided by the statute, and that the statute limits the power to issue it to such cases wherein it is sought to compel the performance of any act which the law specially enjoins as a duty resulting from an office, trust or station.

This case is not of the kind here spoken of. The officer against whom this writ is directed has performed his duty. We are not called upon to command him to do any duty he has failed or refused to perform, but we are asked to compel him to undo an act which the law compelled him to do and he has done. This we cannot do.

The validity of the law which imposed the duty upon the respondent to enter the names of the persons named in the register, cannot be brought into question in a proceeding of this kind. We find that there is a law on our statute books in reference to registration, compelling the respondent to do what we are now asked to compel him to undo. We cannot, for the purposes of this proceeding inquire into its validity. Having satisfied ourselves that the duty required by the statute to be performed, has been performed, nothing is left for us to do. The office of the writ is not to require the respondent to do something not within the scope of his official authority. Beyond that he cannot go, and this court could not compel him to exceed the functions of his office. In this case it was the duty of the respondent to enter the names upon the register, and having so entered them he could not afterwards legally erase them, and if he could not, then this Court cannot through the agency of the writ of mandamus compel him to.

Section 2 of the act of Feb. 22, 1878, provides that it shall be the duty of the Assessor of each county in person, or by deputy, at the time of making the annual assessment for taxes in each year, beginning in 1879, to take up the transcript of the next preceding Registration List and proceed to the revision of the same, and for this purpose he shall visit every dwelling house in each precinct, and make careful inquiry if any person, whose name is on his list, has died or removed from the precinct, *or is otherwise disqualified* as a voter of such precinct, and if so, to erase the same therefrom, or whether any qualified voter resides therein, whose name is not on his list, and if so to add the same thereto in the manner provided in the preceding section.

The preceding section imposes upon the Registration Officers the duty of visiting every dwelling house in each precinct and of making careful inquiry as to any or all persons entitled to vote, and to ascertain upon what ground such person claims to be a voter, and shall require each person entitled to vote, and desiring to be registered, to take and subscribe an oath, in form or substance as therein prescribed.

Section 3 provides that it shall be the duty of each Assessor in person or by deputy, during the week commencing the first Monday in June of each year at his office to enter on his Registry List the name of any voter that may have been omitted, on such voter appearing and complying with the provision of the first section of this act required for voters for registration purposes.

By Section four he is required, on the completion of this list, to make out a list, in alphabetical order, for each Precinct, and to deliver the same on or before July first in each year, with all the affidavits, to the Clerk of the County Court.

Having performed the duties thus prescribed, the functions of the Assessor cease, and he has no further duty to perform in regard to that Registration List, until the beginning of the year 1880, and having for that year pursued the same course, he has no further duty to perform with the Registration List for 1880, until the beginning of the year 1881, and the List for 1880 is the one from which it is now sought to have the erasure made. This same act of Feb'y 22, 1878, provides how the name of any person in said Registration List may be stricken therefrom, and by whom it shall be done.

"Sec. 7. The Clerk of the County Court, shall file, and carefully preserve all said affidavits and Registry Lists and shall make a copy of each Precinct Registry List, and cause the same to be posted up at least 15 days before any election, at or near the place of election, and shall make and transmit another copy to the Judges of Election.

Sec. 8.—The Clerk of the County Court, shall cause to be printed or written a notice which shall designate the offices to be filled, and stating that the election will commence at ——(designating the place for holding the polls,) one hour after sunrise, and continue until sunset on the ——day of——, 18—. (Naming the day of election,) Dated at——A. D. 18—.

Clerk of County Court.

A copy of which shall be posted up, at least 15 days before the election, in three public places in said Precinct, best calculated to give notice to all voters. It shall also be the duty of the Clerk of the County Court to give notice on the lists so posted, that the senior Justices of the Peace for said Precinct will hear objections to the right to vote, of any person registered, until sunset of the fifth day preceding the day of election. Said objections shall be made by a qualified voter in writing and delivered to the said Justice who shall issue a written notice to the person objected to, stating the place, day and hour when the objection will be heard. The person making the objection shall serve, or cause to be served, said notice upon the person objected to, and shall also make returns of such service to the Justice before whom the objection shall be heard. Upon the hearing of the case, if said Justice shall find that the person objected to is not a qualified voter, he shall, within three days prior to the election, transmit a certified list of the names of all such unqualified persons, to the Judges of Election, and said Judges shall strike such names from the Registry List before the opening of the polls.

Granting that the issuance of this writ is within the jurisdictional powers of this court, it is the law that it can be directed to an officer to compel him to do a mere ministerial act which the relator has a right to have done by him, and as to which the officer has no discretion. But it must be to compel him to do a *mere* ministerial act, and this act must be one which by law he is required to perform and which he has refused to do.

Chief Justice Taney in the case of *The State of Mississippi vs. Johnson* 4. Wall 475 has given a clear definition of a ministerial duty. He says: "A ministerial duty, the performance of which may, in proper cases, be required, is one in which nothing is left to discretion. It is a simple, definite duty, arising under circumstances admitted or proved to exist and imposed by law."

Are the duties required of the Assessor in relation to registering persons and preparing the Registration Lists, *mere* ministerial duties? If they are, and he has refused or neglected to perform them, he undoubtedly could be compelled by mandamus to perform them. Following the definition given to "a ministerial duty" as above quoted, these acts do not fall within it. To be ministerial, nothing is to be left to the discretion of the Assessor. In the case at bar, one of the duties imposed upon the Assessor is to ascertain upon what grounds any and all persons claim to be voters, and he is furthermore required to make careful inquiry if any person whose name is on the list has died or removed from the precinct, *or is otherwise* disqualified as a voter. These are all duties which require investigation, research and opinion, discretion and consideration. He must form a judgment and act upon that judgment and it is incumbent upon him to exercise discretion in arriving at that judgment. He has the discretion upon the judgment formed by him from the inquiries he is required to make, to erase from the Registration List of the *preceding year* any name that may be thereon. All these acts are not therefore mere ministerial duties, but are duties as to which the officer has a discretion, and are therefore not such duties which he can be compelled to do through the agency of the writ of mandamus.

It was insisted in argument by counsel for the relator, that the court has the power by mandamus to compel the respondent to perform an act not within the scope of his authority, if his refusal to do the act would work an injury.

This court cannot impose a duty on an officer which is not within the power imposed on him by law. A mandamus will not be granted to command any person to exercise a jurisdiction which that person is not most clearly and certainly appointed to and bound by law to exercise; for the court will not grant such writ except it clearly see that there is a power lodged in the person against whom the mandamus is prayed."

In announcing this opinion on the question of the right of this Court to issue the writ, His Honor Judge Boreman concurs with Judge Hunter, though upon other grounds, as would appear from his opinion on file. Judge Emerson does not agree with the majority of the Court in this right, and hence dissents as to that branch of the opinion. Judge Boreman dissents from the majority of the Court in its opinion refusing the writ, for the reasons stated in his opinion on file.

Judges Hunter and Emerson concur in refusing the writ on the grounds stated in the majority opinion.

The demurrer is sustained.

DISSENTING OPINION.

In the Supreme Court of Utah Territory, June Term, 1880, *adjourned to 25th September,* 1880.

George R. Maxwell, Plaintiff, vs. Robert T. Burton, Defendant.

AN APPLICATION FOR MANDAMUS.

Boreman, Justice, delivered the following opinion:

An an original question, I have uniformly been of the opinion that the Supreme Court had no jurisdiction in such cases as this, except in aid of its appellate powers. I have considered that the Supreme Court had no distinctively original jurisdiction, except in cases of *habeas corpus*. The issuing of the mandamus as prayed is an exercise of original jurisdiction. In the late case of Emmeline Young and others vs. George Q. Cannon *et al.*, this Court, after exhaustive argument, declared that it had jurisdiction to issue the writ of *certiorari*, which is an original writ of the same class as that of mandamus, and coming to us from the same source, the King's Bench. I assumed that that decision was to settle the practice, and that in this class of cases, to which both *certiorari* and *mandamus* belong, the Supreme Court would take jurisdiction. I think it our duty now to stand by that decision and not again unsettle the practice, as I deem would be done if the writ were now denied.

Upon the merits of the case I cannot agree with a majority of the Court. I deem this to be a proper case in which to issue the writ. The Legislature had no authority to allow anybody to vote who were not citizens or who had not declared their intentions to become such. It has never enacted that parties who had declared their intentions to become citizens might vote. Therefore the registering officer is not authorized to allow anybody to vote who are not citizens. The statute granting suffrage to women allows them to vote without being citizens if they are "the wife, widow or the daughter of a native-born or naturalized citizen." Such a provision is utterly void, in my opinion, and it is the duty of the registering officer to obey the law of Congress and not that of the Territory, when they conflict.

The act conferring the elective franchise upon women is unjust, as granting the franchise to women upon easier terms than to males. Men are required to be tax-payers by the statute, but not so with women; the men are all required to be residents, but not so the women, if they be the "wife, widow, or daughter," and all men who ask to vote must be citizens, or they will be rejected, but not so with all women. This matter of citizenship is important, when we consider that the bulk of the population of this Territory is of foreign birth, or children born in this Territory of foreign parents. The statute granting the elective franchise to women destroys the uniformity and impartiality which should exist in regard to the qualifications of voters, and the act which will do this is unjust and ought not to be upheld. I do not think that it will do to say that the requirement as to male voters, which is not found amongst the requirements of the female voters, will be nugatory. We have no right to conclude that this is so. The Legislature has expressed itself to the contrary. It first passed the statute allowing males to vote, requiring them to be citizens, etc. It afterwards passed the statute granting the elective franchise to women, and subsequently it enacts the registration law wherein it retains all the qualifications originally required as to male voters. It certainly, therefore, had no *intention* of repealing any part thereof. The two laws in regard to suffrage show great unfairness and lack of uniformity between the requirements of male voters and those of female voters, but as the Legislature so intended, what authority have we to say that the one repeals the other. This certainly does not exist by implication as they are statutes regarding different classes. The two laws are not inconsistent further than that one is unconstitutional, unjust and unfair to the body of voters mentioned in the first, and being so should not be upheld. If the Legislature had power to make one set of qualifications for one class of voters and another set for another class of voters, then the two laws can stand, but if the Legislature has not such power, its attempt to do so is nugatory and void.

For these reasons thus hastily stated I am unable to agree with my associates in denying the writ in this case.