# CHAPTER V

## UTAH: THE TERRITORIAL AND DISTRICT COURTS

*CLIFFORD L. ASHTON**

### *INTRODUCTION*

An understanding of the bitter relationship that developed between the early Utah territorial judges and the Mormon pioneers requires some understanding of the early Mormon society and its attitude toward the federal government and lawyers in general. The conflict developed because of a unique political history which commenced in Kirtland, Ohio. There it readily became apparent that the early Mormon society was much more than a religious sect. Because of the teaching of its leader Joseph Smith, it aspired to become a political, social, economic, and religious "kingdom." It quickly became a political force, becoming so strong that conflict arose; bitter frontier resistance and eventual mob violence caused the early Mormons to flee westward where they settled first in Missouri and then in Nauvoo, Illinois, on the Mississippi River. There the movement became even more political. Soon Nauvoo was larger than Chicago. Joseph Smith obtained from the Illinois legislature, where both Abraham Lincoln and Stephen Douglas were representatives, a home rule charter which gave the city plenary power subject only to state constitutional limitations. The city rapidly became a strong political entity with its own courts (which recognized no right of review) and even its own army, the Nauvoo Legion. Joseph Smith became the first commanding officer with first the rank of lieutenant general, and finally major general. By now his political power rivaled that of the governor. As the spiritual and political leader of a vigorous group of young people on the unsettled frontier of the United States, he convinced his followers that their destiny was to establish the "Kingdom of God" on earth. This kingdom was to be temporal and political as well as spiritual.

The very success of the movement caused conflict with the people of Illinois, resulting in renewed mob violence and the assassination of Joseph Smith. After Joseph Smith's death, the Mormons fled across the Mississippi River west to the Missouri River where they regrouped for their subsequent migration farther west to the Great Basin in the Rocky Mountains.

When they reached the Great Basin in 1847, the area was largely uninhabited. It, like California, almost a thousand miles away, was part of Mexico. Only a very few of the people in California were citizens of the United States; in fact, the only Americans in quantity there in 1847 were former members of the Mormon Battalion and passengers aboard the Mormon ship, Brooklyn. The Battalion members were mustered out in San Diego in 1846. At that same time some of the Brooklyn passengers, under the leadership of Mormon Sam Brannan, began to settle northern California.

The pioneer Mormons in the Great Basin in 1847 found themselves cut off not only from their members in California, but from the rest of the world as well. Communication was so slow and tedious that they lived in isolation in an all-Mormon world removed from non-Mormon influence. In this environment these early pioneers, emerging from the fire of persecution, endured the hardship and faced the challenge of settling a new frontier. They did so without federal help and, in fact, in spite of the federal government. Once they had established a new community, they felt free to govern themselves as they had done at

Nauvoo. By now they were of necessity a self-sufficient political and economic entity. Their leaders were men of strong will and fixed purpose. They did not intend to be driven further and held bitter memories of the treatment they had received in Ohio, Illinois, and Missouri. While they held the Constitution of the United States to be "divinely inspired," they were not fond of the federal government which they felt had failed to protect them at Missouri and Nauvoo, Illinois. Their leaders subscribed to the enunciations of John C. Calhoun of South Carolina and Thomas Jefferson that Amendments IX and X of the Constitution of the United States reserved to the states and the people the inherent right to govern themselves subject only to constitutional limitations.

Only six months after the Mormons had established themselves in the valley of the Great Salt Lake, the war with Mexico ended. By the terms of the ensuing treaty of Guadalupe-Hidalgo, and the so-called Gadsden Purchase, the Mexican government conveyed to the United States two-thirds of what had been Old Mexico, including what is now Utah and California. Thus, less than two years after the exodus from Illinois, the Mormon pioneers were once again within the territorial jurisdiction of the United States.

Even before the treaty of Guadalupe-Hidalgo, the Utah pioneers had set up their own machinery of government. This had been a relatively easy task. In Nauvoo the Mormons had a de jure government. In Missouri and on the frontier they governed themselves effectively, though on a de facto basis. Prior to the treaty of Guadalupe-Hidalgo the government was almost theocratic. A group of fifty men, mostly ecclesiastical leaders, three of whom were non-Mormons, functioned primarily in economic and military affairs. This group acted sub rosa and was called the Ytfif (fifty spelled backward) or the Council of Fifty. Their names were well-known.[1] They were the true leaders of their people and performed a necessary function to a people governing themselves without sovereignty. But the philosophy of the early Mormon leaders went far beyond necessity. The leaders believed that they had the constitutional right to set up their own government and that the federal government was not authorized to interfere. Several years later, during the Civil War, Brigham Young expressed the Mormon belief in the right to self-government as follows:

> In "Amendments to the Constitution of the United States", articles nine and ten, it is definitely stated that "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people. The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or the people."[2]

From this he concluded:

> We have a right to settle in any unoccupied and unclaimed part of the public domain owned by our Government, where the machinery of the Government has not extended, and there govern and control ourselves according to republican principles; and the Congress of the United States is not authorized in the least, by the Constitution that governs it, to make laws for the new settlement, and appoint adjudicators [judges] and administrators [primarily governors] of the law for it, any more than we have a right to make laws and appoint administrators of the law for California, Ohio, Illinois, or Missouri.[3]

In 1849 the Mormons organized a provisional government called the "State of Deseret." All its original officers were members of the Council of Fifty. It was patterned, in part at least, after other territorial governments operating under organic acts of the United States Congress. The general assembly of the new State of Deseret provided by ordinance for a judiciary. Heber C. Kimball was appointed chief justice, and John Taylor and

N.K. Whitney were appointed associate judges. The three were not lawyers, and all were high in the Mormon ecclesiastical hierarchy.

The early organizers of the proposed State of Deseret had no intention of becoming a territory of the United States. Their purpose, frustrated repeatedly over the years, was to join the Union as an independent state. They received their first disappointment in 1850. On September 9, an act to establish a territorial government for Utah was enacted. This act provided for the appointment by the President, with congressional approval, of key territorial officers, including a chief justice and two associate judges. While President Fillmore appointed Brigham Young governor of the new territory, he appointed two non-Mormons to the judgeships. The appointment of Brigham Young avoided serious conflict. The judgeships, however, were doomed to cause conflict and dissatisfaction. Later, when Brigham Young was replaced in 1857, open rebellion resulted.

### A. *THE FIRST JUDGES: 1850 TO 1854*

The first federally appointed chief justice of the territory of Utah was Joseph Buffington, appointed September 28, 1850. He had been a member of the 28th and 29th Congresses (1843-1847) representing Pennsylvania, and had been a judge of the 8th Judicial District in that state. He was well-qualified, but when notified of his appointment he declined to accept and chose to remain at home where he served honorably from 1855 to 1871 as judge of the 10th Circuit in Pennsylvania. One reason for his refusal to accept was the salary, $1,800 a year with no expenses allowed.[4]

President Fillmore then appointed Lemuel G. Brandenbury (sometimes referred to as Bradenbury or Brandenberg) of Pennsylvania on March 12, 1851, to fill the position Buffington had declined. Little is reported about Brandenbury, who was later described by Brigham Young as an "inconspicuous lawyer."[5] As one modern historian noted: "Aside from the fact that he made a speech on the courthouse steps of Carlisle, Pennsylvania in 1845 and that he was appointed chief justice of the first court to assemble in the territory, we do not know anything about him."[6]

On September 28, 1850, prior to Brandenbury's appointment, President Fillmore appointed Zerubbabel Snow of Ohio and Perry E. Brocchus of Alabama as associate judges. Zerubbabel Snow was a Mormon, destined to be the only Mormon judicial appointee for more than thirty-five years. He was born in Vermont on March 29, 1809, met the Mormons in Ohio and believed them and joined the Mormon church before coming to Utah. He resided in Ohio at the time of his appointment.

Zerubbabel Snow was also a merchant and farmer. In 1854 he was listed as one of the most prominent merchants in Salt Lake. After his replacement as associate judge he continued his legal career and in 1859 was elected probate judge for what was then known as Cedar County where he served until he was elected probate judge for Utah County in 1862. In 1865 he became prosecuting attorney for Salt Lake City, which office he held until 1876. He was appointed to this office by Judge Elias Smith, a probate judge. The dual sovereignty which existed in the early Utah Territory is clearly demonstrated by the fact that Judge Snow was elected associate judge of the de facto State of Deseret the same year he was elected de jure probate judge of Utah County. He also served as attorney general for the territory.

Judge Brocchus, a controversial figure in early Utah history, was born in Virginia. He moved to Alabama and was residing there when he was appointed. His traveling companion on the trip west was Albert Carring-

ton, a prominent Dartmouth College graduate in high standing in the Mormon heirarchy. Carrington reported that Brocchus was a man of mediocre capacity whose real purpose in coming to Utah was to secure the appointment as delegate at Washington, and it was said that he threatened to use his influence at the capitol to crush the Mormons in the event they refused to gratify his political ambition.[7]

When Brocchus arrived in Salt Lake City he was disappointed to learn that Almon W. Babbit, a Mormon, had been elected as Utah's delegate to Congress. Disgruntled because of the appointment, he threw discretion to the winds when he was invited by Brigham Young to occupy the platform with leaders of the Mormon church at their September conference. The Washington Monument was being constructed at this time and the territory had arranged to send a block of marble as its contribution. Brocchus was invited to address a large Mormon congregation regarding this matter. Reports of what happened there are confusing and in conflict. It is clear, however, that Brocchus exercised atrocious taste and for over two hours used the occasion to lecture the audience, reproving Mormon leaders for alleged disrespectful utterances about federal officials and particularly for Brigham Young's consignment, in a moment of temper, of President Zachary Taylor to hell because President Taylor had been instrumental in denying statehood to the proposed State of Deseret. Brocchus skated dangerously close to the issue of polygamy, suggesting that the lives of the donors "should correspond with the purity of the marble, otherwise it would not be acceptable."[8] The audience was incensed. Brigham Young reported: "If I had but crooked my little finger, he would have been used up; but I did not bend it. If I had, the sisters alone felt indignant enough to have chopped him to pieces."[9]

The unfortunate episode got the federal judges off to a bad start. They were now aware that they were not welcome. Brigham Young had the full support of the people. He was in command, through Daniel Wells, of a well-armed, all Mormon Militia, the Nauvoo Legions, now called the Utah Militia. The federal judges had as their only military support U.S. Marshal Joseph L. Heywood, a Mormon. They did, however, have a position of power in Broughton D. Harris of Vermont, federally appointed secretary of the territory. Harris held $24,000 of federal funds to be used to pay federal expenses, including Brigham Young's salary. Harris refused to disburse the money and threatened to return it, the seal, the records, and other documents to Washington. The Utah territorial legislature thereupon authorized the U.S. marshal to become the custodian of the funds. The three judges, in their only known judicial act, issued a restraining order. The political pot was now on the burner; it was destined to come to a boil in a little more than five years, resulting in the open rebellion of the so-called Utah War of 1857. It should be noted that at the time of this dispute Brigham Young was acting not only as governor of the Utah Territory, but also as the elected governor of the State of Deseret. The State of Deseret also had a chief justice and two associate judges. Prominent Mormons considered the federal judges intruding usurpers. So did Brigham Young, but as he had accepted the federal appointment as territorial governor, he was in an inconsistent position and could not say much. He realized this, and in later years during the Civil War, tried to justify his position stating that while he had been appointed governor of the territory by the President of the United States he considered that his priesthood should govern and control that office, and stated:

> I am of the same mind today. We have not yet received our elected returns; but should I be elected Governor of the State of Deseret, that office shall be sustained and controlled by the power of the eternal Priesthood of the Son of God, or I will walk the office under my feet.[10]

Some idea of how the federal judges were received in Utah is indicated by Brigham Young's treatment of Judge Snow— one of his own—the only Mormon. When Snow, a new arrival, asked Brigham Young for a place to stay, Young offered him the same quarters he had when he first came to the territory—the mountains for walls, the sky for a ceiling, and the ground for a bed, and said he had no time to go about hunting a house for a judge.[11] Even with this inauspicious start, Snow elected to remain. When the federal judges returned to Washington, Snow remained and functioned in his office until he was replaced some years later.

On September 28, 1851, less than sixty days after the arrival of the federal judges, the non-Mormon members of the territorial government, including the judges, traveled to Washington to present their case to the administration. They took with them the $24,000, the seal, and the records. During the judges' first sixty days on the bench, no cases came before them. Therefore, it can be concluded that the disfavor they incurred was not caused by their judicial conduct, but rather by the political, social, and religious differences, which could only have been reconciled by more tolerant men—on both sides.

The federal group, headed by Brocchus, denounced the Mormons at every stop along the return trail, and upon their return to Washington the judges reported:

> . . .We have been compelled to withdraw from the Territory, and our official duties, in consequence of an extraordinary state of affairs existing there, which rendered the performance of those duties not only dangerous, but impracticable. . . . We found upon our arrival that almost the entire population consisted of people called Mormons; and the Mormon church overshadowing and controlling the opinions, the actions, the property, and even the lives of its members; usurping and exercising the functions of legislation and the judicial business of the Territory; organizing and commanding the Military . . .[12]

Brandenbury and Brocchus, while anxious to leave the territory, were not willing to abandon the emoluments of office. They succeeded in persuading Congress to compensate them during the long period which they did not serve, and during which time not a single case was heard. Brandenbury even considered returning to Utah when his compensation was threatened. Brigham Young, five years later in a tabernacle address in Salt Lake City, commenting on Brandenbury, noted:

> The last we heard of him he was in Washington, doing a little writing for this, that, and the other lawyer, when he could get any to do, and attending to cases as a lawyer, where he could get a few dollars for transacting a little business of that kind, for this or that man; running from office to office, and from pillar to post, to obtain a living. He is a tolerably good man, after all; and, if he had done as I counseled him, he would have stayed here, and let that other judge [Brocchus] go.[13]

Brocchus subsequently secured an appointment to the bench in the territory of New Mexico where he gained almost as much notoriety as he did in Utah.[14]

The account of affairs in the territory of Utah by the fleeing judges was believed and spread quickly. Dr. John M. Bernhisel, Utah's delegate to Congress, wrote: "The excitement here . . . is intense and it is with deep regret that I inform you that it is considered a settled matter that Governor Young be removed . . . and a military force . . . be stationed in the territory to enforce the laws."[15]

The conflict culminated in the Utah War five years later. Before that event was to occur,

however, Dr. Bernhisel and others succeeded in convincing President Fillmore that the "runaway judges," as they were called, misrepresented the facts. Bernhisel was so successful that the "runaways" were soon in disrepute. The President then sent to the Senate the names of Heber C. Kimball for the position of chief justice and Orson Hyde and Willard Richards for the positions of associate judges. All were prominent Mormons. Heber C. Kimball was, at the time his name was submitted to the Senate, chief justice of the State of Deseret. The Senate rejected the proposals on the ground that the men were not sufficiently versed in the law; in fact, none of the three were lawyers.

President Fillmore then recommended Lazarus H. Reed of New York as chief justice and Samuel Stokeley, originally of Pennsylvania and later of Ohio, and Leonidas Shaver of Missouri as associate judges. They were approved in the summer of 1852. At about this same time the President sent to the Senate the name of George Edmunds, Jr., of Illinois. He was appointed August 4, 1853, but declined to serve. Most historians do not include him as one of the territorial judges. Although Stokeley was approved by the Senate, he too failed to serve. He is not listed by most historians as one of Utah's territorial judges. Because of the failure of Edmunds and Stokeley to accept office, Judge Snow continued to serve for several more years. It is interesting to note that he was appointed by the territorial legislature to assume the duties of the "runaway judges."[16]

Judge Shaver came to Utah late in 1852 and Chief Justice Reed arrived in June of the following year. Both died in office—Reed at the age of forty while on a visit to New York in 1853, and Shaver on June 29, 1855, in Salt Lake City, presumably "from some infection of the head."[17] This ambiguous reference to the cause of death foreshadowed future trouble. Shaver had developed "inflammation of the middle ear" which according to Doctor Garland Hurt, an outspoken opponent of Brigham Young, was the cause of death. Apparently Shaver used opium (perhaps to relieve his pain).[18] In later years enemies of the Mormon people, looking for atrocities, began to assert without any evidence that Shaver had been killed by Mormon assassins. Unfortunately for the Mormons, President Pierce appointed William Wormer Drummond to fill Shaver's vacancy.

The Mormon pioneers got along very well with Chief Justice Reed and Judge Shaver. This is demonstrated by the attitudes of both the people and the judges. Brigham Young, reporting to Utah's delegate in Washington, Dr. Bernhisel, on October 31, 1853, wrote:

> Judges Reed and Shaver conduct themselves very gentlemanly thus far, appear frank and friendly in their Department [sic] and are universally liked and respected in their offices by the people and I would prefer to have them remain if possible.[19]

Judges Reed and Shaver were likewise frank in their admiration of the pioneers and of their leader Brigham Young. Judge Reed was quoted as observing:

> I have made up my mind that no man has been more grossly misrepresented than Governor Young, and that he is a man who will reciprocate kindness and good intentions as heartily and freely as anyone, but if abused or crowded hard, I think he may be found exceedingly hard to handle.[20]

When Reed died in New York in 1853, President Pierce appointed John F. Kinney as chief justice to succeed Reed. Kinney was born in New York, admitted to the bar in 1837, and moved to Iowa where he held several offices. He resigned in 1847 as prosecuting attorney of Lee County to become a judge of the Iowa Supreme Court. He left that position to become chief justice in Utah in 1854. He, like his

predecessor, was generally friendly with the Mormons who, according to a Mormon historian, accepted him as "dignified," "impartial," and "courteous."[21] He was not very important during his first appointment period as he was absent from the territory most of the time. He received a second appointment in 1860.[22]

During this period, John W.D. Underwood of Georgia was offered a judgeship. Unfortunately for Utah he refused the honor. Underwood was a great lawyer, humorist, and public servant. He also turned down President Buchanan's later offer of a federal judgeship in the territory of Nebraska. The Utah Territory could have used a man of his abilities and humor in the grim and troublesome years ahead.

### B. *THE DRUMMOND PERIOD: 1854 TO 1856*

Before considering the Drummond period and in order to better understand its bitterness and resulting tragedy, it is necessary to consider some of the early territorial legislation which helped create the coming conflict.

The act establishing the territory of Utah provided that "judicial power . . . be vested in a Supreme Court, District Courts, Probate Courts, and in Justices of the Peace."[23] It further provided that the district courts in the three districts each be presided over by one of the supreme court justices, and that the jurisdiction of all the courts be limited as provided by law.[24]

On February 4, 1852, during the period when Brocchus and the other judges were in bitter controversy with the Mormon pioneers, the legislative assembly of the territory of Utah enacted provisions which redefined the jurisdiction of the probate courts. Whereas traditionally these courts were only given express jurisdiction to probate wills and administer estates, in the 1852 act they were given the additional power to exercise "original jurisdiction, both civil and criminal, and as well in Chancery as at Common Law, when not prohibited by legislative enactment; and they shall be governed in all respects by the same general rules and regulations as regards practice as the District Courts."[25] This meant that the federal district judges and the local probate judges exercised concurrent jurisdiction—with supervisory and appellate power in the federal court.

Another interesting provision provided that:

> Any matter involving litigation may be referred to arbitrators or referees, who may be chosen by the parties, or selected by the court, as the parties shall elect; all such arbitrators have authority to subpoena witnesses, administer oaths or affirmations, and issue process as the court. And when they shall have made their decision, shall report the case, if necessary to enforce the same, to the clerk of the county in which the case has arisen, or when the case has not arisen in any court, to the clerk of the Probate Court; and it shall be the duty of the clerk in whose office any such decision has been filed, to make a record thereof, and proceed in the same manner as if the case had been prosecuted and decided in the usual manner.[26]

No distinction was made between criminal and civil jurisdiction.

The same early judiciary act provided justices of the peace for each precinct with limited jurisdiction. Appeal was to the probate court. A precinct was often geographically the same as a ward, which was an ecclesiastical parish. The ward was presided over by a bishop who was appointed by higher ecclesiastical authority. In early Utah history, the bishop and the justice of the peace were often the same person. It should be understood that a bishop in this early period was much more than a spiritual leader of his ward. He also acted as a counselor and a judge in all local disputes. Inasmuch as he was chosen by

higher ecclesiastical authority, his decision had a finality not altered by any ordinary appellate judicial process. In this period, those whose affairs and disputes could not be settled on an amicable basis went to the bishop. They were urged to do so, and his decision was usually treated as final by the parties. Before the creation of the Utah Territory, he acted in a de facto capacity. After the act of 1852, if he acted as an arbitrator appointed by the probate judge (who was appointed by the all-Mormon legislature) or as a justice of the peace, he acted in a de jure capacity. Consequently, most Mormon litigation continued to be settled in the old way, and most of the non-Mormon litigation wound up in the federal courts. During this early period, Brigham Young also performed judicial functions. For long periods of time the Mormon pioneers lived under primitive conditions, without courts or schools. Their leaders were, therefore, called upon to perform functions that in a more settled community would be performed more formally. Thus, Brigham Young often performed the judicial function of granting bills of divorce. This was done without legislative or judicial authority.

It is also important to understand that the early Mormon leaders, particularly Brigham Young, disliked courts and lawyers in general. This distaste is reflected in early territorial laws. One provided that lawyers could not sue to collect a fee.[27] Another provided that legal precedent should not be considered.[28]

An early territorial case which ignored common law precedent was the sensational murder trial of Howard Egan, tried before Judge Zerubbabel Snow in 1851. On returning from California, Egan learned that his wife had been seduced by James Monroe, a former Mormon. Egan found his wife's paramour and killed him. He was charged with murder. George A. Smith, an apostle in the Mormon church, acted as one of the defense lawyers. In summing up the case to the jury, he said:

> I am not prepared to refer to authorities on legal points, as I would have been had not the trial been so hasty; but as it is, I shall present my arguments upon a plain, simple principle of reasoning. Not being acquainted with the dead languages, I shall simply talk the common mountain English, without references to anything that may be technical. All I want is simply truth and justice. This defendant asks not for his life, if he deserves to die; but if he has done nothing but an act of justice, he wishes that justice awarded to him. . . .
>
> In England, when a man seduces the wife or relative of another, the injured enters a civil suit for damages, which may perhaps cost him five hundred pounds, to get his case through; and, as a matter of course, if he unfortunately belongs to the toiling million, he may get twenty pounds as damages. In this case, character is not estimated, neither reputation, but the number of pounds, shillings, and pence alone bear the sway which is common in courts of all old and rotten governments.
>
> In taking this point into consideration, I argue that in this Territory, it is a principle of mountain common law, that no man can seduce the wife of another without endangering his own life. . . . What is natural justice with this people? Does a civil suit for damages answer the purpose, not with an isolated individual, but with this whole community? No! It does not! The principle, the only one that beats and throbs through the hearts of the entire inhabitants of this Territory, is simply this: The man who seduces his neighbor's wife must die, and her nearest relative must kill him!
>
> If Howard Egan did kill James Monroe, it was in accordance with the established principles of justice known in these mountains. That the people of this Territory would have regarded him as accessory to the crime of that creature, had he not done it, is also a plain case. Every man knew the style of old Israel, that the nearest relation would be at his heels to fulfill the requirements of justice.

> I come before you, not for the pence of that gentleman, the defendant in particular; and, gentlemen of the jury, with the limited knowledge I have of the law, were I a juryman, I would lie in the jury-room until the worms should draw me through the key-hole, before I would give in my verdict to hang a man for doing an act of justice, for the neglect of which he would have been damned in the eyes of this whole community.[29]

The defendant was released.[30]

Brigham Young frequently criticized the courts and lawyers in general. His goal was to avoid both, and until the advent of the federal judges he succeeded very well. In his message to the State of Deseret in 1850, he stated:

> Unparalleled in the history of the times, not a solitary case was reported for trial, before the regular sessions of either the county or supreme courts, during the past year; and no offense beyond the control of a justice of the peace seems to have been committed. This argues favorably in behalf of justice's courts having extended jurisdiction, and probably, is partly owing to the requirements of the law, making it the duty of all officers to seek to allay and compromise differences instead of promoting litigation.[31]

This was to change after the first federal appointees arrived. Brigham Young complained to delegate Bernhisel: "Judge Z. Snow is officiating in his office and I am sorry to say has considerable business." On January 1, 1852, a day of praise and thanksgiving, Brigham Young urged the people to "starve the lawyers" by ceasing to quarrel.

It was in this environment that the next coterie of federal judges was appointed. Chief Justice John F. Kinney was appointed by President Pierce on August 24, 1853. He did not have a big impact during this period, but did later.[32] During his first appointment, he objected to what he considered an obvious conflict between the federal and local system. Because he remained out of the jurisdiction during most of the period, his duties were unfortunately taken over by the two associate judges. The first of these judges was George P. Stiles, appointed August 1, 1854. The second was William Wormer Drummond of Illinois, appointed September 12, 1854. Both appointments were destined to be disastrous. Stiles was a former Mormon who had been excommunicated. Excommunication in this early religious society carried serious social and even economic sanctions. Selection of such a person to be a judge of the people who had ousted him from good standing was asking for trouble. To make matters worse, Stiles, along with the president of the stake at Kirtland, Ohio, Almon W. Babbit, had been a member of the city council of Nauvoo. The early Mormons considered him a traitor to their revered martyr.

But the appointee that outraged the Mormons most was William Wormer Drummond of Illinois. President Pierce appointed him to replace Edmunds who had declined to serve. Inasmuch as Chief Justice Kinney was outside the territory during 1855, Judges Stiles and Drummond were left alone to administer the courts and cope with the confusion that existed because of the duplicative judicial system created by the act of 1852. They both immediately took exception to the duality that existed. Writing ten years later, the wife of a later federal judge, Judge Waite, observed: "When Drummond was about to hold court, he intimated he would set aside all judgments rendered by probate Judges, and annul all their proceedings, except such as pertained to the usual and legitimate business of the probate courts. Here was a direct issue, and a conflict was inevitable."[33]

The first clash occurred in a dispute over the jurisdiction of the U.S. marshal and the territorial marshal. In 1856 the U.S. marshal was a non-Mormon. His Mormon predecessor had acted in full cooperation with the early

settlers. Now it was claimed that only the U.S. marshal could officiate in court business conducted in the United States courts without regard to whether that court was acting in a federal or local capacity. According to Mrs. Waite, when Judge Stiles issued certain writs, the U.S. marshal "found [them] impossible to serve."[34] When the question of jurisdiction of the marshals came officially before the court, three Mormon lawyers, James Ferguson, Hosea Stout, and J.C. Little, appeared and demanded that Judge Stiles decide in their favor. They were so bold, particularly Ferguson, that Judge Stiles was intimidated and adjourned court.[35]

Then the incident largely instrumental in causing the "Utah War" occurred. The court records of Judge Stiles disappeared. There was circumstantial evidence indicating they had been burned, and the judge filed an affidavit to this effect. It was later discovered the records had not been destroyed, but were, according to Mormon explanation, in the fireproof vaults of Governor Brigham Young. The damage, however, had already been done. Mormon enemies capitalized on the opportunity. Judge Stiles soon became aware that he had made a mistake and let the matter drop. Judge Drummond, however, exploited the rumored burning into a raging fire of anti-Mormon protest.

The appointment of Judge Drummond is acknowledged to have been a serious mistake. He is referred to by one historian as a "gambler and a bully."[36] Remy, the French traveler, described him as "not a very estimable character, being notorious for the immorality of his private life."[37] Stenhouse, an anti-Mormon writer, observed:

> Plurality of wives was to the Mormons a part of their religion, openly acknowledged to all the world. Drummond's plurality was the outrage of a respectable wife of excellent reputation for the indulgence of a common prostitute and the whole of his conduct was a gross insult to the government which he represented and the people among whom he was sent to administer the law. For any contempt the Mormons exhibited to such a man, there is not need of apology.[38]

The Drummond period represents a bitter interlude in Utah history which culminated in 1857 when President Buchanan sent an expeditionary force to Utah to subdue the Mormons and their leader, Brigham Young.

### C. *THE MORMON WAR: 1857 TO 1858*

While the Mormon pioneers were celebrating the tenth anniversary of their settlement in the Great Basin in the high mountains east of the city, they learned that a United States Army was moving west to subdue them and to replace Brigham Young as governor of the territory. This military expedition was the direct result of the stories circulated by the so- called federal "runaway judges," and Judge W.W. Drummond.

Accompanying the new governor Alfred Cumming, was Delana R. Eckels, the newly appointed chief justice. He was appointed by President Buchanan in 1857. The two new associate judges were Charles E. Sinclair and John Cradlebaugh. Sinclair was born in Prince William County, Virginia, in 1828, and was appointed associate judge August 25, 1857. Cradlebaugh was born February 22, 1819, in Circleville, Pickaway County, Ohio.

The expeditionary force en route to the Great Salt Lake was originally under the command of Colonel Edmund Alexander. When his faltering command was confronted in the Bear River area by the Mormon Militia, he withdrew into what is now Wyoming. When General Albert Sidney Johnston learned this, he left Fort Leavenworth, Kansas, with reinforcements. They reached Alexander's despairing army near Green River, (Wyoming) just as winter was grimly setting in. That

winter of 1857-58 was one of the most bitter in the history of the west. The inclement weather, together with the belligerent opposition of the Utah Militia, forced the expedition to spend the winter in frozen Black's Fork on the Green River. Meanwhile a Mormon army of 3,000 partially armed men waited expectantly in the city and in the canyon portals to the valley.

Justice Eckels, who was the only one of the newly appointed judges accompanying the army, became very disgruntled and bitter during this hard and frozen winter. Most of the army officers were well housed in a new type of tent which followed the conical style of the Indian lodge. The judge, however, being a mere civilian, was forced to live in the temporary settlement of Eckelsville (named after him) which was about one hundred yards west of the military encampment of Camp Scott. The only person who lived in grand style in this civilian community was the newly appointed governor and his wife. They had several tents "attached together—with a combination parlor and bed chamber, dining room, store room, kitchen and a room for his [Cumming's] young servant girl."[39]

Justice Eckels, on the other hand, first lived in a hole in the ground and later in a small hut built of frozen sod. In this rigorous setting and while in a forbidding mood he called a grand jury, which proceeded to return indictments against the Mormon leaders for treason and an assortment of alleged crimes against the sovereignty of the United States. Not only was he concerned with the alleged crimes of the Mormons, he also was faced with the disorders and offenses which accompany an idle, restless, and irritable army of men forced to live in isolated and adverse conditions. Many engaged in drunken brawls, stole government property, and twice broke up parties given by Eckels for his friends.[40] The judge responded by issuing an order in March 1857 closing all gambling dens along the frozen banks of Black's Fork. This did not endear him to his isolated winter companions.

During that fall and winter, Brigham Young boldly intimated a secession from the United States. On August 2, 1857, speaking in the old Bowery (a makeshift gathering place for the Mormon leaders to conduct meetings, etc.) located on what is now Temple Square, he said:

> The time must come when there will be a separation between this kingdom and the kingdoms of this world, even in every point of view. The time must come when this kingdom must be free and independent of all kingdoms. Are you prepared to have the thread cut today?
>
> * * *
>
> I shall take it as a witness that God designs to cut the thread between us and the world, when an army undertakes to make their appearance in this Territory to chastise me or to destroy my life from the earth. . . . As for the rest, we will wait a little while to see; but I shall take a hostile movement by our enemies as an evidence that it is time for the thread be cut.[41]

Brigham Young, as an appointee of the federal government, unwillingly tolerated the appointment of federal judges, but when it became clear that an army was on the way to replace him, he declared martial law and directed his people to resist what he and they considered to be a mob invasion. This clearly revealed what had always been in Brigham Young's mind concerning the federal government. He and the other leaders, without dissent, believed self-government was their exclusive constitutional right, and that any attempt to interfere was itself unconstitutional. The same thinking was already growing in South Carolina, where South Carolina had already, in 1832, under the leadership of John C. Calhoun, nullified federal law by refusing to abide by a federal tax. Mormon people were anxious to follow Brigham Young's lead. They were wary of armies. In both Missouri

and Illinois legally constituted armies had, under the guise of state authority, killed the people and driven them from their homes so that the people saw such armies as a mob threat.

The Utah War was an ominous prelude to the Civil War. Both had similar issues. First, the issue of self-determination; second, the moral issues of polygamy and slavery. The issue of polygamy was not as important on the frontier in 1857 as it later became in the Victorian Period. By then the practice was considered an abomination by most of the Christian world. The Mormon leaders, with large polygamous families, stubbornly resisted all efforts to stamp out the practice until many years later. The federal judges, in the performance of their judicial duty in enforcing later anti-polygamy laws, were doomed to incur the further enmity of the Mormon people. This enmity did not become acute until after the Civil War.

After lengthy negotiations, Johnston's army of approximately 2,500 men left Camp Scott and entered the Salt Lake Valley in June, 1858. A few militia men remained in the city under orders to fire the houses if the army camped in the city. The rest of the Mormons had moved south. These men, concealed in "lucerne ditches," watched the weary soldiers with their equipment and animals move through the city until they crossed the Jordan River to the southwest where they set up a temporary camp. Justice Eckels, who accompanied the soldiers, remained in the city. Governor Cumming, who had already arrived earlier in the spring, was established in commodious quarters supplied by the Mormon leaders. Eckels was not so fortunate. He complained to his friends in the east that he was forced to sleep on the ground and live under primitive conditions.

That summer Justice Eckels returned east on a leave of absence. After the bitter winter at Camp Scott, he needed a rest. His account of his visit in the west did not help the Mormon image. He was back the next year. The grand jury indictments returned at Camp Scott were never acted on because Brigham Young negotiated a grant of complete amnesty for all alleged crimes by the Mormon people and their leaders against the federal government in return for the peaceable acceptance of Governor Cumming and the army.

While the Mormons generally accepted the appointment of Governor Cumming, they did not accord the judges the same acceptance. Justice Eckels, in a wearisome reiteration of the same type of criticism heaped on Judges Brocchus and Drummond, was described as a corrupt judge, an undemocratic federal official, and "the meanest man the Administration could find."[42] He deserved better. His background was very respectable. After studying law on his own, he was admitted to the Indiana bar in 1827. He became the first mayor of Greencastle, Indiana, served in the Indiana legislature in 1836-37, and was a circuit court judge for sixteen years, at both state and federal levels. From 1837 to 1840 he was a professor of law at Indiana State University. At home he was "highly respected"[43] and fondly remembered with many anecdotes. In one, a witness was cited before him for contempt for failing to appear and for giving evasive answers. The most satisfactory reason the witness could give was that he was about half sick. The judge with great gravity said, "the court is disposed to excuse the half of you that was sick, but the well half will be fined one dollar and costs and both halves will be committed until this is paid."[44]

In November of 1858, Associate Judge Cradlebaugh arrived. He stopped outside the city at the home of a prominent Mormon, Ephraim Hanks, for directions. To Hanks he looked like an ox driver, was coarsely dressed

and possessed only one eye.[45] From the Hanks' residence, Cradlebaugh hitched a ride into the city on a load of wood. When he arrived he was wearing a black patch over one eye. At first the pioneers were very pleased with him because he appeared to be not overly impressed with his own importance. He immediately endeared himself to Brigham Young when he commented critically on Chief Justice Eckels' "prejudices."[46] Yet, as noted by historians, "no Gentile [a non-Mormon] caused Brigham Young more trouble than this tall, lean, middle-aged lawyer from Ohio . . . "[47] Cradlebaugh, who later played such a critical and decisive role in Utah's efforts to achieve statehood, was not as judicially qualified as Eckels. His only judicial experience was in Utah. His later career was political and was at Utah's expense.

Associate Judge Sinclair apparently arrived in the territory about the same time as Cradlebaugh. He was qualified for his office and tried to perform his duties, but so far as the Mormons were concerned, Sinclair was just another bad appointment. Again they made the tedious accusations that he was seen "frequently reeling through the streets of Salt Lake City drunk and sometimes helpless."[48] At least he was not accused of being a panderer, gambler, and corrupt. Perhaps the Mormons regarded Sinclair as an honest drunk, and Eckels as a corrupt teetotaler. On other occasions, the Mormon leaders expressed appreciation that Sinclair had not brought the full weight of his office to bear against them and shortly after his departure, it was even observed that he was probably the best of the three judges on the bench in 1858, for he occasionally tried to do something according to law.

Sinclair, after leaving Utah in 1860, took the stump in his native state to oppose secession. Before Virginia seceded he edited a newspaper in Memphis, Tennessee. He later returned to Virginia where he was engaged by the confederacy in the secret service department at Richmond. After the war he returned to practice in Prince William County. He also served in the Virginia state senate where he was known as a fine linguist. He died in March, 1887. Sinclair was far from a drunk. Besides, a federal judge in the Utah Territory in 1858 probably needed an occasional drink.

Why did Cumming get along so well with the Mormon people while the judges did not? Governor Cumming, as an administrative officer, had to work closely with Brigham Young and the leaders. He soon wisely became a participant in their social and administrative affairs. They liked him and he liked them. This role was not available to a conscientious judge. He was obliged to keep aloof so that he could impartially perform his duties. Also he had a judicial duty to interpret and enforce the law. This left little room for social and administrative manipulation, and helps to explain the bitter history of most early territorial judges in Utah.

### D. *THE ECKELS, SINCLAIR, CRADLEBAUGH PERIOD: 1858 TO 1860*

During the difficult period of adjustment from a state of threatened war to a state of uncomfortable peace, there were two armies in the territory ready to engage each other on a moment's notice. The federal force of 2,500 to 3,000 men was at Camp Floyd, twenty-five miles southwest of Salt Lake City. The Mormons had a larger number of fully armed militia subject to instant mobilization. Both armies, remembering the prior bitter winter and threats, were spoiling for a fight. Each considered the other its enemy. The militia was subject to the call of the new non-Mormon governor, who was friendly to the pioneers. The army under orders of General Johnston, at first was at the services of the judges.

General Johnston and Governor Cumming, since the bitter forced encampment at Fort Scott, had developed an intense dislike for each other. It was soon to become manifest in what almost precipitated another open conflict. The conduct of the new judges created the situation that threatened to erupt in conflict.

Justice Eckels, who had been assigned by Governor Cumming to Nephi in the southern area, was especially bitter against the Mormons. He was a personal friend of Lewis Cass, United States secretary of state. In letters to Cass he reported: "The Mormon people resident here are in secret, if not open rebellion—and they are firm in their determination to resist even to a bloody issue the due execution of the laws."[49]

Judges Sinclair and Cradlebaugh apparently shared Justice Eckels' opinion. Cradlebaugh had been assigned to Provo and Sinclair to Salt Lake City. Sinclair immediately called grand juries and attempted to get indictments involving several unsolved crimes, including the Mountain Meadows Massacre, the Potter Murders, and the acts of treason allegedly committed by some of the Mormon leaders during the Utah War. The Mormons were outraged. They felt they had been given amnesty from most of these charges. Judge Sinclair, however, indicated in his charge to the grand jury that he would not take notice of the President's pardon.[50]

About this same time, David A. Burr, a bitter anti-Mormon, son of U.S. Surveyor General David H. Burr, filed disbarment and slander proceedings against James Ferguson because of his intimidation of Judge Stiles.[51] For some reason Judge Sinclair, hearing the matter, desired the testimony of Brigham Young. The Mormons, fearing another Carthage (murder of Joseph Smith), escorted Brigham Young with an armed guard, "their pistols and knives ready for service."[52] In due time the jury found Ferguson not guilty of slander and the disbarment proceedings were dismissed.

In the meantime, Judge Cradlebaugh in Provo attempted to get indictments against some of the prominent Mormons of that city, including Mayor B.K. Bullock and Bishop Aaron Johnson. In his charge to the grand jury Cradlebaugh said:

> You are the tools, the dupes, the instruments of a tyrannical church despotism. The heads of your church order and direct you. You are taught to obey their orders and commit these horrid murders. Deprived of your liberty you have lost your manhood and become the willing instruments of bad men.[53]

Any jury so instructed did what should have been expected. Whether they were dupes, proud men, or both, the jury refused to indict. Cradlebaugh was not through, however. He launched a crusade in which he acted as accuser, prosecutor, witness and juror. Marshal Dotson, on Cradlebaugh's order, arrested several men, including Mayor Bullock. The city became an armed camp; the citizens were literally "up in arms." The judge called for assistance from nearby Camp Floyd, and General Johnston sent over a military detachment to support the jailers. The chief of police in turn called up 200 temporary special policemen—actually members of the Utah Militia. Johnston then sent eight companies of infantry, one company of cavalry, and one company of artillery with orders to camp just outside the town and attack no one except in self-defense.

Governor Cumming, who had not been notified, was furious. When he urged the general to remove his troops, Johnston replied:

> I am under no obligation whatever to conform to your suggestions with regard to the military disposition of the troops in this department, except only when it may be expedient to employ them in their civil capacity as a posse.[54]

When this occurred, Governor Cumming did an amazing thing. He had General Daniel Wells, commander of the Utah Militia, call a general mobilization to confront Johnston and his threatening troops. The administration in Washington decided to support Governor Cumming rather than General Johnston and the judges. Secretary of War Floyd wrote to Johnston:

> Peace now being restored to the Territory, the judicial administration of the laws will require no help from the army under your command—You will therefore only order the troops under your command to assist as a *posse comitatus* in the execution of the laws, upon the written application of the Governor of the Territory, and not otherwise.[55]

Attorney General Black at the same time advised the judges that only the district attorney could act as a public prosecutor and only the marshal was entrusted with the keeping of prisoners. He also advised that "it did not seem either right or necessary to instruct you that these were to be the limits of your interference with the public affairs of the territory."[56] The judges were also reminded that "many willing candidates" sought the positions they held. The frustrated judges attempted to vindicate themselves in several letters sent to President Buchanan.[57]

Judge Cradlebaugh, finding himself thwarted in Provo, elected to go south in an effort to investigate the Mountain Meadows Massacre and discover and punish the penetrators of that "most atrocious" crime. He was unsuccessful. His investigation convinced him, however, of the implication of several Mormon leaders in the southern part of the Utah Territory. Marshal Dotson, who accompanied him, was never able to apprehend them. They were apparently hiding in the wild mountains and canyons of the Colorado River or in the Kolob Mountain area east of Mountain Meadows. The frustrated Cradlebaugh moved to Carson City, then a part of the Utah Territory, and attempted to perform his duties. Whatever judicial success he had is relatively unimportant because his political activity became much more significant. Using the Mountain Meadows Massacre as ammunition, with a poor assist from polygamy, he inflamed the citizens of Carson City, who were mostly miners (Carson City was originally a Mormon settlement), against the Mormon people.

When Lincoln became President, Cradlebaugh and others were able to convince the administration that the territory of Nevada should be carved out of the Utah Territory. This was done in 1861 and Cradlebaugh that year became the Nevada Territory's representative in the Congress. He served two terms. There he vilified and attacked the Mormon people so effectively that he, more than any other person, prevented Utah from becoming a state until many years later. Cradlebaugh had his day, but at least one Mormon historian took comfort in noting that in the end he "became relegated to the lowly calling of a bullwacker."[58]

Judge Eckels, who had been in the east during the conflict between Governor Cumming and General Johnston, did not attempt to function in his office in Nephi until the summer of 1859. By then Cradlebaugh was in Carson City. Eckels' attempt to get indictments at Nephi failed for the same reasons that had confronted Cradlebaugh. In addition, it was now apparent to the Mormon leaders that the Buchanan administration would support Governor Cumming against the judges. Therefore, the territorial legislature failed to provide the funds necessary to operate the federal courts, so that in less than two weeks the judge was forced to adjourn his court. He had obtained only one conviction.

When Eckels left the territory late in 1859, he was very bitter. In letters written to Secre-

tary of State Lewis Cass he complained about Mormon conduct and unpunished crimes, writing that there had been "106 murders as well as innumerable lesser unsolved crimes, in most of which ecclesiastical personages had been involved."[59] These unsupported charges were believed by many in Washington, including some members of the House and Senate, who continued to believe that the population in the Utah Territory was in open rebellion.

### *E. PRE-MCKEAN PERIOD APPOINTMENTS: 1860 TO 1870*

Before Lincoln became President in 1861, three new judges were appointed. The chief justice was John Fitch Kinney, appointed for the second time on June 27, 1860. The associate judges were R.P. Flenniken and H.R. Crosbie, appointed May 11, 1860, and August 1, 1860, respectively. Edward Randolph Hardin was also offered a judgeship. He refused the appointment in favor of a judgeship in the territory of Alaska. When President Lincoln took office, Cradlebaugh still claimed the judgeship in the Second District (Carson City). Flenniken begged Lincoln to let him hold that office, claiming: "Here in Carson with my family I could have done well. In any other place, unless I became a Mormon, I could have neither peace nor prosperity."[60] That request became moot when Cradlebaugh was elected a representative of the new territory of Nevada. Flenniken served a short time at Carson City until he was replaced by Charles D. Waite, appointed by Lincoln February 3, 1862. There is little recorded about Judge Flenniken. He was born in Pennsylvania and resided there at the time of his appointment. It has been observed that Flenniken was a political huckster who rarely appeared in a courtroom as an advocate. He was a speechmaker and a loyal party worker. Appointed charge d'affaires in Denmark in 1847 and then removed with a change in administration, Flenniken besieged his party leaders with pleading letters. Born in 1802, he went to Utah (Nevada) in 1860, resigned after a few years, and died in San Francisco in 1879.

Judge Crosbie was born in Pennsylvania and resided in Oregon at the time he was appointed. He was replaced by Judge Thomas J. Drake who was appointed on February 3, 1862.

Chief Justice Kinney, who had been appointed by President Pierce years earlier, served in his second appointment for a very short time. On May 6, 1863, he was replaced by John Titus from Pennsylvania. When Justice Kinney served his first term, he vigorously opposed the jurisdiction of the probate courts. Justice Eckels was even more opposed and denied their jurisdiction.[61] The second time around Kinney had a change of heart, became a pro-Mormon and ruled in favor of probate court jurisdiction.[62] The Mormon people and their leaders appreciated Justice Kinney's turnaround and returned his favors by unanimously electing him as their delegate to Congress on August 3, 1862, when Lincoln removed him in favor of Justice Titus. Titus, along with his two associate judges, Waite and Drake, continued to serve during a large part of the Civil War.

In 1860 the Buchanan administration began decreasing the number of federal troops in the territory. In March 1860, General Johnston left Camp Scott. He was replaced by Colonel James F. Smith. Within a few months the number of troops was cut to 700. These soldiers were so split on the issue of secession that they ceased to be a viable force. Harassed by internal strife, they held on until midsummer of 1861 when the last soldiers left.[63] Thus, during the first two years of the Lincoln administration, the Mormon leaders were not

threatened by a federal military force; their own Utah Militia was fully armed and in complete military control. Now secure, Brigham Young and other Mormon leaders again boldly claimed a constitutional right to govern themselves without federal interference.

Conflict had been avoided while Governor Cumming was in office because he and the Mormon leaders were in general agreement. When he left in May of 1861, the Lincoln administration made a blunder. It appointed a political hack, John W. Dawson, as governor. Dawson immediately antagonized the Mormons by vetoing another petition for statehood. When he was caught making allegedly improper advances to his housekeeper, he knew he was in trouble and fled the territory in fear of his life. While waiting for the stage at Mountain Dell, he was waylaid and severely beaten. Some said he was almost emasculated. The deed allegedly was done by several young Mormons. Some of their names were: Lot Huntington (son of Dimick B. Huntington, an Indian interpreter), Moroni Clawson (related by marriage to Brigham Young), John M. Jason (a reputed Danite and a friend of Bill Hickman), John P. Smith (a relative of Hyrum Smith, brother of Joseph Smith), and at least two others. The event is important because of the furor it created in the states. It gave Cradlebaugh more ammunition and helped delay statehood for many more years.

The interim governor between Dawson and Harding was Frank Fuller. During this interesting period, Brigham Young had a free hand. Fuller was a Mormon. The only law enforcement agencies were under the direction of General Daniel Wells (Utah Militia), Colonel Robert T. Burton (bishop of Fifteenth Ward, colonel in the Utah Militia and Salt Lake County Sheriff), and Colonel Andrew Cunningham (also Fifteenth Ward Bishop, a ranking officer in the militia, and chief of police). Justice Kinney, now friendly to Brigham Young, was chief justice.

On July 17, 1862, Governor Harding and the new federal judges arrived in the territory. Harding had known Joseph Smith personally in his early years and been a guest in later years at the Smith home at Palmyra, New York.[64] His memories of that acquaintance and experience were favorable, so at first he was very friendly. Soon a breach occurred and antagonism developed.

The judges and even Harding were treated as intruders. This is not difficult to understand. As late as March 1862, Brigham Young had told his people that they had an absolute right to govern themselves. The Civil War was in full bloom and news in the territory was that Lee's army was winning. That army was fighting for the same self-determination Brigham Young was preaching. The intensity of Brigham Young's feelings is demonstrated by the following bold outburst he made while delivering a speech in March, 1862: "If any among this community want to sustain the Government of the Devil [the federal government] in preference to the kingdom of God [State of Deseret] I wish them to go where they belong."[65] In the same speech he asserted great devotion to the Constitution and the Declaration of Independence, stating: "Let us unfurl the stars and stripes—the flag of our country; let us sustain the Constitution that our fathers have bequeathed to us in letters of blood . . ."[66] Some of the early Mormon leaders, like many in the South, loved God and country, but hated the federal government.

In this hostile environment, the Lincoln judges were generally ignored. With very little to do, they agitated for reform. Judge Waite, in such a mood, proposed that the Organic Act of 1850, establishing the territory, be amended to provide that "the United States Marshal [not county authorities, that is, select-

men] should choose proposed jurors under the direction of the federal judges [the practice elsewhere] and that probate courts should be restricted to customary probate business [also the practice elsewhere]."[67]

When the proposal was sent to Washington, the incensed Mormon people held a mass meeting in the old tabernacle calling for the resignation of federal officials and petitioning President Lincoln for their immediate removal. Their voice was heard and Governor Harding was transferred to the Colorado Territory as chief justice. Judge Drake continued in office for some time. According to Bancroft, "Judge Drake remained at his post, though merely going through the form of holding court. All attempts to administer justice proving futile among a community that had never willingly submitted and had not yet been compelled to submit, to gentile domination."[68] After attending a session of the supreme court where not one case was heard, Judge Waite resigned. Following his resignation Waite established himself in the practice of law in the Idaho Territory. In 1867 his wife published a highly prejudiced account of his stay in the Utah Territory entitled *The Mormon Prophet and His Harem.*[69] It became a best seller, spreading a defamatory picture of the Mormon people and contributing to the later anti-polygamy laws.

When the Mormons petitioned for the removal of Governor Harding and Judges Waite and Drake, they did not seek removal of Justice Kinney; however, the non-Mormons did. Apparently, in an attempt to accommodate both factions, President Lincoln removed Kinney, as well as Harding. He named John Titus of Pennsylvania to be Kinney's successor. Kinney was thereupon unanimously elected by the Mormon people as the territorial representative to Congress.

The complaints of Governor Harding, Judge Waite, and many non-Mormons soon reached the administration. In the fall of 1863 a second army was sent to the Utah Territory. It was commanded by Colonel Patrick E. Connor and was ostensibly sent to guard the mail routes even though the Mormons had protected the mail very well. Actually, the army was sent to keep an eye on the Mormon leaders and to prevent them from intimidating federal appointees. After locating his army in a commanding position east of the city, in what became known as Fort Douglas, Connor wrote:

> It would be impossible for me to describe what I saw and heard in Salt Lake, so as to make you realize the enormity of Mormonism; suffice it, that I found them a community of traitors, murderers, fanatics, and whores. The people publicly rejoice at reverses to our arms, they thank God that the American Government is gone, as they term it, while their prophet and bishops preach treason from the pulpit. The federal officers are entirely powerless, and talk in whispers, for fear of being overheard by Brigham's spies. Brigham Young rules with despotic sway and death by assassination is the penalty of disobedience to his commands.[70]

Clearly Connor was not thinking of the light assignment of protecting the overland mail from the Indians in concluding: "I have a difficult and dangerous task before me, and I will endeavor to act with prudence and firmness."[71]

Connor's perceptions were poisoned by the anti-Mormon faction that was beginning to have a voice in affairs. In 1862 this voice was little more than a whisper. It was to grow into a roar of protest in the years ahead. Connor's bitter view mellowed with the years. He learned to admire and respect the Mormon people. However, he continued to distrust Brigham Young. The two men never became friendly.

Connor's army of approximately three hundred men prevented, or at least deterred, the Mormon leaders from intimidation of the

judges. At the same time, the Civil War kept the federal government busy so that the Lincoln administration maintained a hands-off policy. Brigham Young's policy was simply to steer clear of courts and lawyers. During this period he was generally successful. In urging his people to stay away from lawyers and courts, he said on August 12, 1866:

> I think that a community is civilized so far as it is free from contentions, lawsuits, and litigations of every kind—The law is made for the lawless and disobedient, not for the good, wise, just and virtuous. Law is made for the maintenance of peace, not for the introduction of litigation and disorder. . . . We have been broken up, as has been anticipated by military force, and now it is expected that a course of law suits will accomplish what the military failed to do. . . . But we are here, and wish to enjoy peace, we earnestly desire it, and we calculate to have it. . . . Now I ask every man and woman who wishes an honorable name in the Church and Kingdom of God . . . if they have entertained any idea of going to law, to banish it from their minds at once. We have our Bishop's Court, they can tell us what is right. We have our High Councils, and we have our Selectmen here who are sustained by the sufferage of the people. If you are not satisfied with the decision of the Bishop's Court and the High Council, call upon the Selectmen and let them decide your case. And if you men and women who think of going to Gentile law [federal law] to have your difficulties adjusted, I would advise you to stop it and let the lawyers go into other business.[72]

Most of his people followed his advice so that Judge Titus and Judge Drake had very little to do.

When Waite resigned, he was succeeded by Solomon P.S. McCurdy of Missouri. Born in Kentucky, he was appointed April 21, 1864. Notwithstanding the fact that the Senate failed to confirm him, he served in some judicial capacity for a short time while awaiting confirmation. In May 1866 George A. Smith, high in the Mormon ecclesiastical order, wrote:

> Judge McCurdy has been in his district once, being the only time a Federal Judge has been in the second judicial district since its organization six years ago; no court having been held there. McCurdy resides in this city [Salt Lake City] with his family, and is taking part against the lawful authorities here, by protecting with the sanctity of the ermine, gambling, dram, and other disreputable shops, that are kept in motion for the purpose of rendering modern Christian life endurable in this isolated locality.[73]

Judge McCurdy incurred the further ill will of the Mormon people when he performed a marriage between a man named S. N. Brassfield to a plural wife of a Mormon. This caused so much concern to McCurdy that he wrote the following letter dated April 8, 1866, to Brigadier General P. E. Connor, who was at that time in New York:

> I married S.N. Brassfield to a Mormon woman on the 28th [Sept.] Brassfield was assassinated on the night of the 6th instant. I have been denounced and threatened publicly. Government officials here have telegraphed the Secretary of War to retain troops here until others are sent to relieve them. Call on Secretary of War, learn his conclusions and answer; I feel unsafe in person and property without protection.[74]

Titus served until 1867. Like the others, he had very little to do. Eli B. Kelsey, a disaffected Mormon, wrote to Franklin D. Richards on December 28, 1866:

> You are aware that a certain junta, made up of fire-eating Gentiles and apostates . . . sent a couple of delegates to Washington, loaded down with changes of disloyalty, & c., against the 'Mormons.' One of them our chief justice [Titus], -a man well skilled in the letter of the law, but entirely innocent of its spirit, richly endowed with a stubborness and intractability that effectually precluded all possibility of political or judicial preference elsewhere, than in those political old clothes shops—the Territories. This man is a tall, lean, and angular specimen of humanity, facetiously styled by the boys as "slub-side-a-bus-over-six-feet-a-bus."[73]

Elsewhere, Justice Titus was described as fair and able.[76] He was, however, very anti-Mormon and that gave him a bad press in Utah. After leaving Utah, he became chief judge of the territory of Arizona, where he died.

Judge McCurdy was succeeded by Enos D. Hoge, a Johnson-appointed Democrat. Originally from Illinois, Hoge was practicing law in Salt Lake City at the time of his appointment in 1868. He served a very short time and was replaced by Charles C. Wilson, a Republican of Illinois who served as chief justice from September 11, 1868, until he was succeeded by James B. McKean in 1870. Hoge unsuccessfully attempted to prevent the appointment of his Republican successor on the ground that President Grant could not remove a territorial judge except for malfeasance and that, therefore, he was entitled to serve his full four-year term.[77] Hoge returned to the practice of law in Salt Lake City where he died July 27, 1912.

The other judges who served in the pre-McKean period were Obed Franklin Strickland and Cyrus Madison Hawley. Both were Republicans from New York and both served well into the McKean period. Some insight into the nature of the judgeship during this interim period is revealed by the deal between the aging Judge Drake and Judge Strickland. Strickland apparently bought the judgeship from Drake. How that could have been managed is not clear. Strickland gave as consideration his promissory note. Some years later, when Drake tried to collect on the note, Strickland successfully defended on the ground that it was against public policy to sell a public office.[78]

### F. *THE MCKEAN PERIOD: 1870 TO 1875*

Prior to the McKean period, there were two significant developments. First, Connor's soldiers, having little to do, were encouraged by their commander to prospect for minerals in the nearby mountains. They were successful and mining soon became a major endeavor. Brigham Young restrained his people from engaging in this new enterprise, preferring to keep them in their shops and on their farms. Second, in 1869, the two strings of rail moving east and west across the continent finally converged at Promontory north of the Great Salt Lake. The significance of these two events is obvious. The Mormon people in the Utah Territory were now no longer isolated from the rest of the world and large numbers of non-Mormons from east and west were soon to converge on the territory. Many of these were adventurers, but some were well-trained mining engineers. They were not adherents of Mormonism. Soon they established a vigorous, vocal enclave within the Mormon society.

Shortly before McKean's appointment, President Grant selected his old friend General J. Wilson "Wils" Shaffer as governor of the territory. Shaffer was suffering from consumption but was determined in the few months he had remaining to "suppress and conquer" Brigham Young. Shaffer is reported to have said: "Never after me, by God, shall it be said that Brigham Young is governor of Utah."[79] As it turned out he was about right. He knew he could not replace Daniel Wells as commanding officer of the Utah Militia, so he decided to destroy that which he could not control. By executive order he prohibited all musters and drills, except on his express order, and appointed General Connor commander of the militia.[80] This, of course, meant the end of the militia as a strong arm supporting the Mormon people, and in fact, for all practical purposes, ended the militia altogether. Shaffer died about six months later, but he had accomplished his purpose.

The year 1870 was a bad one for Brigham Young and his followers. That same year the House of the United States Congress passed

the anti-polygamy Cullom Bill. The protest which followed, from both Mormons and a respectable group of non-Mormons, caused the bill to die in the House. Nevertheless, it was ominous and the Mormons were to hear much more on this subject later.

James Bedell McKean was appointed chief justice by President Grant on June 17, 1870. When McKean arrived in Utah, he had Connor's army and a large number of miners and non-Mormons who were soon to form a coterie of supporters urging vigorous action. He also had House approval of a strong anti-polygamy bill. This he believed placed him in a strong position, and in fact it did; but the strength of his position was not to last.

McKean was from New York. His father was a Methodist minister who had raised his son strictly. Some Mormons even claimed, improbably, that McKean's appointment was part of a Methodist conspiracy to overthrow Mormonism. His religious upbringing, however, undoubtedly influenced him strongly, as reflected in his own perception of his divine role in Utah:

> The Mission which God has called upon me to perform in Utah, is as much above the duties of the other courts and judges as the heavens are above the earth, and whenever or wherever I may find the Local or Federal laws are obstructing or interfering therewith, by God's blessing I shall trample them under my feet.[81]

McKean had served honorably as a northern officer in the Civil War. He reportedly used to say, after his appointment, that he had not asked for the job, but that since President Grant needed a faithful servant to enforce the laws, he accepted the assignment to Utah.[82] Records in the archives show the contrary. The modern historian Knecht reports the judge "flooded the chief executive with pleas over a period of years for appointment. It could be to the Banana Republics, to anywhere-but somewhere, because the faithful ex-soldier could not earn his living at 'lawing.'"[83]

Prior to the proposed Cullom Bill the Congress had taken steps to curtail polygamy, which was being practiced by some of the Mormons, particularly the leaders including Brigham Young. This anti-polygamy act of July 1, 1862, was announced about the same time as the Emancipation Proclamation (January 1, 1863). Thus the Republican administration implemented its platform of 1860 by classifying polygamy and slavery as "twin relics of barbarism." The Civil War kept the administration too busy to enforce the 1862 anti-polygamy act. Furthermore, there was a strong feeling that the act was unconstitutional. Among other things, it prohibited the Mormon church from owning over $50,000 of property not exclusively used for religious purposes. This provision was to become very important in 1887.[84]

The proposed Cullom law had teeth. When McKean arrived, he mistakenly expected it would be enacted into law and conducted himself accordingly. The bill placed all responsibility for selecting jurors in the hands of the U.S. attorney and the U.S. marshal. Prior to, or contemporaneous with, the proposed bill, Judges Strickland and Hawley had moved in the direction of the bill.

It was in this atmosphere that Justice McKean heard the *Englebrecht* case.[85] This case arose out of the destruction of about $30,000 worth of liquor by the city marshal and his officers. Suit was commenced by R.N. Baskin on behalf of his clients for treble damages. When Justice McKean opened the term for the Third Judicial District, an open venire of grand jurors, which previously had been summoned by the U.S. marshal on Judge Strickland's orders, was selected to try the

case. The jurors chosen from this venire returned an indictment against the officers who destroyed the liquor.

Attorneys for the defendants challenged the jury array. The challenge was overruled. The panel chosen contained mostly non-Mormons, all jurors who believed in polygamy having been disqualified. When the civil trial was held, the petit jury was picked in the same manner and the same challenge was made and overruled. The all non-Mormon jury awarded the plaintiff over $50,000, thereby enabling the case to go to the Supreme Court of the United States. The Court overruled McKean's decision upholding the manner of selecting jurors. It was a crushing blow for Judge McKean, who steadfastly maintained that the unanimous decision written by Justice Chase was wrong.

While the appeal was pending, Judge McKean conducted his court and selected juries on the same basis as he had before. Brigham Young and the Mormon leaders became his principal targets. During a short period of time he caused indictments to be issued against Brigham Young, Daniel Wells, and other prominent Mormons for everything from unlawful cohabitation to murder and adultery. In all, over seventy criminal cases were filed before him and his associate judges. When the *Englebrecht* case was reversed, all these indictments had to be dismissed because the jurors who indicted were improperly selected.[86] But McKean was not to be thwarted. He soon had Brigham Young before him in a civil suit. This occurred when one of Brigham Young's wives brought suit for divorce. She prevailed and McKean ordered Brigham Young to pay attorney's fees. On advice of counsel he refused pending appeal and was thereupon ordered to show cause why he should not be punished for contempt. The judge found him guilty and ordered him to one day in jail without bond. This outraged all but a few of even the most bitter anti-Mormons, and was McKean's undoing.

Prior to the divorce suit, Brigham Young appeared before Judge McKean on the question of whether he should be admitted to bail on one of the pending indictments for murder. U.S. District Attorney Bates recommended that the defendant be released but the judge refused. However, because jail accommodations were not available, he did remand Brigham Young to the custody of the U.S. marshal who confined the defendant to one of his own houses. Even at this stage, Judge McKean was beginning to lose support in the administration. Senator Oliver Perry Morton, one of the most powerful senators in the United States Senate, visited the territory during the McKean period. He was a cripple and viewed from his wheelchair some of the proceedings against Brigham Young which were conducted by Judge McKean in Faust's Hall. On one occasion the judge kept everyone waiting for over half an hour before making his appearance. Mr. Morton's feelings were reflected by a Mr. Fishbach, an editor of the *Indianapolis Journal* who was with Senator Morton at Faust's. Fishbach, according to the *Salt Lake Herald*, was the "Boswell of Senator Morton." He wrote while on the train with Senator Morton:

> It is unfortunate for the nation that it is in the power of such men as Judge McKean. . .to precipitate a collision between the Federal authorities and the Mormons, in a contest in which the Government occupies a false and untenable position. If an issue is to be made and settled in the courts between the U.S. authority on the one hand and polygamy on the other . . . it is of the utmost importance that it be fairly made and impartially tried. . . . We are convinced that the pending prosecutions are conceived in folly, conducted in violation of law, and with an utter recklessness as to the grave results that must necessarily ensue.[87]

When McKean sent Brigham Young to jail on the civil contempt charge, the following telegram was sent. It was hailed by Mormons as the "Hallelujah Telegram":

> Washington [March] 16—The President has nominated Isaac C. Parker of Missouri, chief justice of Utah, vice [to replace] McKean. . . . The nomination of ex-Congressman Parker . . . involves the removal of Judge McKean, but does not indicate any change in the policy of the administration regarding the question of polygamy. The removal and that of the present register of the land office in Salt Lake, are caused by what the President deems the fanatical and extreme conduct on the part of these officers . . . and by several acts of McKean which are considered ill advised, tyrannical, and in excess of his powers as judge.[88]

One act which added to the flood of criticism leveled against McKean was his writing of editorials for the Salt Lake City *Tribune* applauding his own judicial decisions in the Brigham Young-Daniel Wells proceedings. This cost the acting editor of that paper his job.[89]

A colorful description of Judge McKean and his courtroom was made by a special correspondent for the *Cincinnati Commercial*. He wrote:

> The judge on the bench, J.E. McKean, at once cleared his throat and looked over the bar and the audience. The judge wore a blue coat and was as trim as a bank president. He sat upon a wooden chair behind a deal table, raised half a foot above the floor; the Marshal stood behind a remnant of dry goods box in one corner, and the jury sat upon two broken setees [sic] under a hot stove pipe and behind a stove. They were intelligent as usual with juries, and resembled a parcel of baggage smashers warming themselves in a railroad depot between trains.
>
> The bar consisted of what appeared to be a large keno party keeping tally on a long pine table. When some law books were brought in after a while the bar wore that unrecognizable look of religious services about to be performed before the opening of the game. . . .
>
> The room itself was the second story of a livery stable, and a polygamous jackass and several unregenerate Lamanite mules in the stall beneath occasionally interrupted the judge with a bray of delight.[90]

The same correspondent also paid his respects to Judge McKean's associates:

> As for McKean's two Associate Judges, they are holding District Court at Provo and Beaver, Hawley harassing some rural Justice of the Peace with his last printed opinion, and Strickland playing billiards for drinks between sessions with Bill Nye.[91]

Another journalist, S.A. Kenner, appraising Judge McKean, wrote:

> Regarding Judge McKean, the writer cheerfully bears witness that personally he was many removes from a bad man. A thorough gentleman in his instincts and demeanor, moral and upright in his habits, and as fair minded as any ordinary man who ever sat in judgment when presiding over cases in which his "policy" regarding the Mormons, plainly outlined from the beginning, was not involved in any manner.[92]

Judge McKean remained in Salt Lake City after his removal from office. Most of his friends deserted him and he died of typhoid fever in January of 1879, a lonely man. Brigham Young died earlier, in 1877.

### G. *THE END OF CONFLICTING JURISDICTION; THE BEGINNING OF PROSECUTION OF POLYGAMISTS: 1874 TO 1884*

Two important events occurred at the beginning of this period which ended the conflicting jurisdiction between the probate and federal courts. R.N. Baskin, a rabid anti-Mormon who had vigorously and ably urged and supported Judge McKean, filed a case to test the validity of the jurisdiction of probate courts.[93] This had been a "bone of contention" since 1852. Since 1852 the probate

courts had exercised concurrent jurisdiction with the federal courts in all matters, criminal as well as civil. They were the "people's courts" (i.e., the Mormon people).

The probate judge who was most prominent during this conflicting jurisdictional period was Judge Elias Smith. He served various terms from 1851 until 1882. He was kept busier than most because the Mormon pioneers accepted him more than the federal judges. The historian Tullidge described him as follows:

> Judge Smith has eminently filled the most important judicial sphere in Utah, the probate courts being, until the McKean period, practically the Courts of Justice for the people. Indeed, he is known in all the acts of his life, and in his essential character and quality of mind, to be conscientious in the highest degree. It is not his nature to administer unrighteously; and in the peculiar case of Utah, with Gentile and Mormons in chronic conflict, that quality of mind and judgment has had ample opportunity to manifest itself. In this quality of justice his peer was Daniel Spencer, who occupied an office in the Church analagous to that of Chief Justice of the State, and to whose ecclesiastical court—the High Council—Gentiles have in the early days repeatedly taken their cases for arbitration in preference to "going to law" either in the federal or probate courts. Elias Smith and Daniel Spencer may therefore be offered to the Gentile reader as the proper types of the judges of the Mormon Israel.[94]

The foregoing shows the prominence and general acceptance of the probate judges. It was following the Poland Act that Judge Smith resigned. His picture is included herein.

In early 1874 the Supreme Court of the United States ruled that the act of the territorial legislature conferring on the probate courts' general jurisdiction was inconsistent with the Organic Act creating the territory and therefore void. The probate courts were thus deprived of all jurisdiction concurrent with the federal courts, leaving the latter supreme at not only the appellate but lower level as well. Also in 1874 Congress concluded the matter by enacting the Poland Act.[95] This act limited the territorial probate courts to ordinary probate proceedings. The act also wisely validated all void judgments that the probate courts had handed down over the twenty-year period. These, as noted, were criminal as well as civil and included executions. Most importantly, the act gave the U.S. marshal authority, under the direction of the federal judges, to draw prospective jurors, and provided for a procedure that prevented the jury packing that had been evident in the *Englebrecht* case and no doubt in the probate courts. By now there were growing numbers of non-Mormons in the territory, and juries became a fair cross-section of the population.

All this boded ill for the Mormon practice of polygamy—a practice that the Grant administration had vowed to eliminate. Even during the McKean regime, no cases had been filed under the 1862 Anti-Polygamy Act. One reason was the strong prevailing opinion that the 1862 act was unconstitutional. A second reason was that if such cases had been filed, Mormon juries probably would have acquitted. Both these obstacles to prosecution were now eliminated. According to one Mormon historian,[96] in the summer of 1874 Mormon leaders opened negotiations with United States Attorney Carey to file a test case. The defendant was named George Reynolds, a clerk in the endowment house where marriages were performed. He was tried the first time in the third district under the 1862 act and convicted. Irregularities in the selection of the grand jury which had brought the indictment caused the conviction to be set aside by an appellate court consisting of Boreman, Lowe, and Emerson.[97] He was tried a second time and was again convicted. The case was appealed to the

United States Supreme Court which affirmed the conviction and held the anti-polygamy act to be constitutional.[98]

When Brigham Young died in 1877, the political climate changed. The idea of self-determination died with him. Polygamy was doomed. Mormon leaders, however, with large polygamous families, felt they could not concede and they did not. The federal judges, with a Supreme Court mandate and an administrative policy, were bound to proceed. The result was tragic for the Mormon leaders and their people. The bitterness which resulted among the Mormons lasted for many years. It was, of course, directed primarily against the judiciary—the arm of the government which adjudicated the cases.

The *Reynolds* case paved the way for many more. Most Mormon leaders were practicing polygamy. Brigham Young escaped trial because of his death. John Taylor, his successor, did not officially become president of the church until 1880. He spent almost his entire term in office in hiding. But other leaders were arrested and imprisoned. At this time most of the Mormon leaders who were practicing polygamy were fugitives from justice living in what was called the "underground." Those who were apprehended were charged, tried, and on refusing to recant their beliefs and practices, convicted and confined to the Utah State Penitentiary. They were considered by most of the early Mormon pioneers to be honored martyrs to the cause.

In 1886 the large number of Mormon leaders in jail was beginning to embarrass the Arthur administration. On May 13, 1886, the territorial governor, Caleb W. West, visited the penitentiary and offered the Mormon inmates amnesty conditioned upon them recanting on the issue of polygamy. In a letter written to the governor on May 24, 1886, all forty-nine of these "Who's Who in Mormondom" refused to do so. Among other things, they wrote:

> The proposition you made, though prompted doubtless by a kind feeling, was not entirely new, for we could all have avoided imprisonment by making the same promise to the courts; in fact, the penalties we are now enduring are for declining to so promise rather than for acts committed in the past. Had you offered us unconditional amnnesty, dearly as we prize the great boon of liberty, it would have been gladly accepted; but we cannot afford to obtain it by proving untrue to our conscience, our religion and our God.[99]

The leader of this select group was Lorenzo Snow. In later years he became the fifth president of the Mormon church, succeeding Wilford Woodruff.

The unfriendly feeling that existed prior to this period increased in bitterness. Holding judicial office in an environment where a federal judge was considered an enemy of the majority of the people must have been unpleasant. The office obviously was anything but attractive. Most able lawyers who were considered did not want the job. Most of those who did accept did not stay long. From 1875 to 1884 there were five chief justices. The first was Isaac C. Parker. He was appointed March of 1875. Utah was lucky; Parker's appointment was withdrawn. In Kansas he earned the notorious reputation "Hanging Judge Parker." He later was appointed by President Grant as a chief justice in Arkansas and later Missouri where his reputation continued to grow until he became a notorious legend.[100]

On March 19, 1875, President Grant appointed David P. Lowe to take the position that Parker declined. The new chief justice was reported by a contemporary historian as "an honest, straightforward man, a good lawyer, and an upright judge."[101] One of his first acts was to undo the judicial decision of Judge McKean in the case of Brigham Young's

wife Ann Eliza, ruling that the order granting alimony should be expunged from the record. Lowe was a Republican; he was born August 22, 1823, in Oneida County, New York. He graduated from Cincinnati Law College in Ohio in 1851. From 1863 to 1864, he was in the Ohio State Senate and served from 1871 through 1875 in the United States Congress. Prior to that he was a judge in the Sixth Judicial District of Kansas.

Six months after Lowe resigned, Alexander White of Tennessee was appointed, September 11, 1875. White tried to serve but not for long. George Prescott sent a telegram to Senators Edmunds and Frelinghaysen complaining about the new judge: "White is worse possible judge for Utah. Deaf, conceited, obstinate. Knows no mining law. Thinks he Knows it all. Tramples on all precedents. Lawyers and Litigants panic stricken. Business and Mining interests Demand rejection."[102] For whatever reason, White resigned and on April 20, 1876, President Grant appointed Michael Shaeffer of Illinois. There is little to report about Shaeffer. He served about two years, but neither faction could stand him and petitions for his removal were endorsed by both sides. When he was removed an attempt was made to confirm the appointment of David Corbin as his successor. Corbin was a "carpetbagger from South Carolina . . . [who] could not get confirmed because of irregularities connected with an election down there."[103] Shaeffer was finally replaced by John A. Hunter of Lancaster County, Ohio, who was appointed by President Hayes, July 1, 1879. He served until September 1, 1884. His successor, Charles S. Zane, was appointed by President Arthur, July 5, 1884.

The associate judges who served during this period seemed more content with their lot than the chief justices or most of their predecessors, and played a more important part in Utah history. Phillip H. Emerson and Jacob S. Boreman were both appointed in 1873 by President Grant. In 1880 President Hayes replaced Boreman by appointing Stephen P. Twiss, who served until 1884-85 when President Arthur reappointed Boreman.

Emerson served from 1873 until 1889. During this period he was appointed by three different Presidents—Grant in 1873, Hayes in 1877, and Garfield in 1881. Emerson was born in Vermont in 1834, admitted to that bar in 1862, and that year settled at Battle Creek, Michigan. He soon became active in Republican politics. He served as city attorney, as a member of the school board, and in 1872 was elected to the state senate. He resigned that position to become an associate judge in Utah on March 10, 1873.

Stephen P. Twiss was born May 2, 1827, in Charlton, Massachusetts. He attended Leicester Academy at Worchester, Massachusetts, and Dane Law School, Harvard University. He practiced alone from 1853 to 1857 at Worchester, and went to Boston in 1857 where he practiced until 1858 when he returned to Worchester until 1863. In 1856 he was a member of the Massachusetts legislature. He later became a city councilman and city solicitor. In 1863 he went to Missouri and practiced in Jefferson City until he was appointed territorial judge of Utah in 1880. When he was replaced by Boreman in 1884, he returned to Missouri where he remained until his death.

Jacob S. Boreman deserves special attention because he served over eleven years as a territorial judge. Leonard J. Arrington, a very knowledgeable Utah historian, reported:

> Far more influential than Judge McKean in shaping Utah's Judicial practice was Jacob Smith Boreman. Boreman was a colleague of McKean, served with the latter on Utah's supreme court at the same time that he (Boreman) presided over the second district court, which met at Beaver,

> and in many ways resembled the redoubtable McKean. Yet he served much longer, spread his influence over a wider number of cases, was wiser in his counsels, and remained to exert a powerful influence on the Utah bar until his death in 1913.[104]

Boreman was born in Tyler County, Virginia, August 4, 1831. He received his law degree from the University of Virginia in 1855. In 1858 he moved west and in 1861 he became city attorney for Kansas City. During the Civil War he raised a company of militia. Apparently the militia was not actively engaged because from 1862 until 1868 Boreman was judge of the common pleas court in Jackson County, Missouri, a place in which the early Mormons suffered from mob violence. Twice he was elected to the Missouri state legislature. This background indicated considerable credentials; but because he was from Jackson County, Missouri, Boreman was viewed with suspicion by the Mormon leaders.

While Boreman was in the Second Judicial Court in Beaver, he presided over the two trials of John D. Lee who was accused of murder arising out of the notorious and tragic Mountain Meadows Massacre. This event plagued the conscience of the Mormon people for many years, not because Mormons generally were responsible, but because Mormons of the period abhorred the atrocity as much as anyone. Unfortunately, their enemies wanted a whole people tarred with the brush of a few misled zealots. While the massacre involved many people, John D. Lee was the only one brought to trial. The first trial commenced in July 1875. It lasted for some days. The government lawyer, William Carey, was assisted by R.N. Baskin, an outspoken anti-Mormon and friend of Judge McKean who was still sulking because of his removal in 1875. The defendant was represented by Sutherland and Bates.[105] The jury in the first case was part gentile and part Mormon. Judge Boreman, in his *Reminiscenses*, observed:

> The evidence was clear and abundant that he (Lee) was guilty, but the jury failed to agree and although urged by the Court [Boreman] to try to reach a conclusion, it became quite evident that it need not be effected. Hence I discharged the jury.[106]

Commenting on the second Lee trial on September 14, 1886, Boreman wrote:

> At the beginning of this (2d) trial I noticed that Daniel H. Wells, first counselor of Brigham Young, had come all [the] way from Salt Lake City, to Beaver [250 miles], and located himself in a place facing the jury so that the jury could see him. I did not know whether he was there on behalf of the defendant or of the prosecution. As the forming of the jury proceeded, I observed that Howard (Government lawyer) made no objections to the exclusion of Gentile jurors from the jury on motion of the defendants' [sic] attorneys and seemed to be himself anxious to get gentiles off of the panel. . . .
>
> When the jury was completed it was composed wholly of Mormons, and to my surprise the first witness of the prosecution called to the witness stand was Daniel H. Wells, one of the First Presidency of the Mormon church. . . . No question of any importance was asked Wells, and when asked, their irrelevancy being apparent & manifest, I ruled them out on objections by the attorneys for the defendant. No doubt, however, that the placing of Wells on the witness stand, as I afterwards concluded, served Howard's (U.S. Attorney) purpose, in his efforts to let the jury see that the Church was on the side of the prosecution.[107]

One of the witnesses who testified at both trials was Jacob Hamblin, a neighbor of Lee and a friend of the Indians. In commenting on his testimony, Boreman wrote:

> Jacob Hamblin—did not at that [first] trial know anything—he had hardly heard of the Mountain Meadow Massacre although it was close to his home in Washington County. He was called as a witness at the second trial and gave considerable

testimony-his lips had been opened. Mr. Hoge, one of the [defendant's] attorneys asked him if he had been a witness on the former trial & he answered that he had been. Then you did not know any of these facts you have been detailing—yes—well said Mr. Hoge [former Utah territorial judge], why did you not give the same testimony then as now? "The time had not come." That was the substance of his answer. . . . He was a rough—uncouth backwoodsman & was believed to be ready to do anything the church desired him to do.[108]

The all-Mormon jury quickly convicted the defendant. The complete stenographic record of the two Lee trials is at the Huntington Library, placed there by Judge Boreman's son Gilbert in 1934.[109]

These trials did not resolve finally or dissolve the effect of the massacre. Many non-Mormons and some Mormons called it a "whitewash," with John D. Lee as the sacrificial goat. It remained a subject of historical controversy for many years until Juanita Brooks in 1950 published her scholarly and honest history, *The Mountain Meadows Massacre*.[110]

## H. *THE FIRST ZANE PERIOD: 1884 TO 1887*

This period is named after Charles S. Zane, who was first appointed chief justice of the territory by President Arthur, July 5, 1884. The following excerpt from *History of The Bench and Bar of Utah* is an interesting resume of the background of the chief justice :

> Charles Shuster Zane, son of Andrew and Mary Franklin Zane, was born in Marsh River Township, Cumberland County, New Jersey, March 2, 1831. His mother was a distant relative of the great Franklin, the "philosopher of the thunder bolt." At the age of nineteen he left the paternal roof and journeyed to Illinois, which State had witnessed four years previously, the exodus from its borders of the expatriated community that were the pioneers and founders of Utah. Little thought young Zane that his fate and that of the exiled Mormons were destined to meet in any way, much less in the manner that gave him so much notoriety, and added so many stirring pages to their history.
>
> His elder brother, John, had migrated to the West as early as 1838; the year whose close witnessed the Mormon troubles in Caldwell and Davies counties, Missouri, and the beginning of the exodus of the Saints from that state. Charles joined his brother in Illinois, and settled first at Richland, Sangamon County, where he engaged in farming and brickmaking. In the fall of 1852 he entered McKendry College, which he left three years later to teach school. In his leisure hours he read law. Subsequently he entered the office of James C. Conkling, a prominent lawyer of Springfield.
>
> Among the chief lights in the legal firmament of the Illinois capital at that period was Abraham Lincoln, the future President of the United States. Young Zane had previously applied to Mr. Lincoln for a situation, but he, having already a student in his office, advised him to go to Mr. Conkling. In the spring of 1857 he was admitted to the bar, and opened an office over that of Mr. Lincoln and his partner, Mr. Herndon. The following year he was elected city attorney of Springfield, and was re- elected in 1861 and 1865.
>
> The momentous year that witnessed Lincoln's inauguration as President and the outbreak of the Civil War, saw the installation of Charles S. Zane as the great man's successor in the law firm of Lincoln & Herndon. Though he did not himself enlist, he helped to raise troops for the war, assisting Captain George R. Webber of the Commissary Department. He afterwards held the office of County Attorney of Sangamon County.[111]

Zane probably was the right man to act as chief justice during this difficult period. He was not a zealot and not anti-Mormon; in fact he was very judicial, a good lawyer, and respected the Mormon people. These qualities were needed during this difficult period when the Mormon society, and especially its leaders, were agonizing over the doomed practice of

polygamy. He and his associates had the grim task of enforcing two new strict anti-polygamy laws which were designed to crush polygamy and which threatened the existence of the Mormon church itself.

In March of 1882, the Congress enacted the first of these acts which became known as the "Edmunds Law."[112] In this enactment, anyone practicing bigamy or unlawful cohabitation was disqualified from holding office. In March of 1887, Congress became even tougher and amended the Edmunds Act by enacting into law the "Edmunds-Tucker Act" which provided that in any prosecution for bigamy or unlawful cohabitation the lawful husband or wife of the accused could be a competent witness. It also provided that all marriages in the territory had to be certified with full names of parties and the person performing the ceremony. Such certificate was admissible in court as prima facie evidence of the facts stated. A lethal provision of the act provided that the attorney general of the United States had the duty to prosecute proceedings to forfeit and escheat to the United States property of the church corporation in violation of an earlier enactment in 1862, prohibiting the Mormon church from owning property not used for church purposes in excess of $50,000. It also dissolved the corporate existence of the Mormon church as provided by the provisional State of Deseret in 1851 and the territorial government in 1855.[113]

What had been ominous now became reality. Not only was polygamy doomed, the very existence of the church that espoused it was in jeopardy. Pursuant to the provisions of the Edmunds-Tucker Act, the U.S. district attorney brought a bill in chancery before the Utah Territorial Supreme Court for the purpose of disenfranchising the Mormon church and escheating church properties to the United States government for the benefit of the common schools in the territory, as provided by the act. On November 5, 1887, Chief Justice Zane, speaking for a unanimous court consisting of Boreman and Henderson, entered judgment which in effect announced that properties identified in the act were subject to forfeiture and that the charter which incorporated the Church of Jesus Christ of Latter-day Saints was dissolved. This disastrous decision almost destroyed the Mormon church, and created bitter feelings against the three judges, especially Chief Justice Zane.

Zane incurred even further ill feelings in a proceeding involving George Q. Cannon. George Q. Cannon, who was Brigham Young's secretary and destined to be counselor to three successive church presidents, John Taylor, Wilford Woodruff and Lorenzo Snow, was elected in 1872 as Utah's non-voting delegate to the United States Congress. There he functioned so effectively that he was sometimes referred to as the Mormon Richelieu. He, like almost all the Mormon leaders, was a well-known polygamist. During the early prosecutions following the Reynolds case he was relatively immune because of his congressional status. However, when the Edmunds Act of 1882 made polygamists and "co-habs" ineligible to hold public office, he lost his seat in Congress and became "fair game" for the federal prosecutors and marshals. He escaped arrest for a time because President Taylor sent him to Mexico to acquire property for the church. On his return, however, he was arrested while on the train near Promontory, Utah. He made a bizarre escape from the railroad platform and was almost immediately rearrested and returned to Salt Lake where he was confronted by a very annoyed chief justice. The charge was unlawful cohabitation. The judge fixed what appeared to be a grossly excessive bail of $45,000. It soon became apparent, however, that even this bail was not large enough as George Q. Cannon, as soon as

bail was posted, again went to the "underground" as a fugitive from justice. The irate Judge Zane immediately declared the bail forfeited and the marshal once again took up the hunt. Although Cannon was now a fugitive, he was not without friends, both at home and in Washington. Soon these friends stirred up national interest and sympathy for his cause. To them the $45,000 bail seemed exorbitant for a misdemeanor. It did not occur to them that it was not high enough to insure George Q. Cannon's appearance.

A favorable press and influential friends in Washington soon convinced President Grover Cleveland that the activities of Chief Justice Zane were unnecessarily punitive, and, according to the Cannon family history,[114] caused the President to replace Zane with Elliot Sandford and to appoint a new fourth justice, John W. Judd. This occurred in 1887-88. But Zane was not through. He was to reappear in a short two years presiding again as chief justice during the final demise of polygamy in Utah.

Judges Boreman, Emerson, Powers (who succeeded Emerson in 1885), and Henderson (who succeeded Powers in 1886), were also active during this period. Powers, however, became much more important as a practitioner than as a judge. They incurred the enmity of the Mormon leaders when they sentenced to jail many of the Mormon leaders.

Henry Parry Henderson was appointed by President Cleveland in 1886. He was born September 22, 1843, in Tully, New York. His parents moved to Michigan where his early years were spent on the family farm. After graduating from the Michigan Agricultural College he attended for a short time law school in Ann Arbor, Michigan. For two years he was clerk of the Michigan Supreme Court. While acting as county clerk of Ingham County, Michigan, he again studied law and was admitted to the practice in 1867. In 1874 he was elected prosecuting attorney of Ingham county. In 1879 he was elected on the Democratic ticket to the Michigan state legislature. Later he was elected mayor of Mason, Michigan, where he was serving when appointed to the Utah Territorial Court to serve in the first district at Ogden. At the expiration of his term he was replaced by James Alvin Miner. In 1892 Henderson moved to Salt Lake City where he formed a partnership in a firm known as Henderson, Pierce, Critchlow and Barrett. He was a member of this firm at the time of his death, June 3, 1909.[115]

## I. *THE INTERIM SANDFORD PERIOD: 1888 TO 1890*

Elliot Sandford, who was appointed chief justice by President Cleveland in 1888, was born in 1840 at Raynham, Massachusetts. In 1861 he graduated from Amherst College and in 1864 received his law degree from Columbia University in New York. After practicing law for a short time in New York City, he returned to Amherst. In 1867 he was back in New York City where he continued in the practice of law until his appointment as chief justice of the Utah Territory. During this period matters quieted down. One reason was the Mormon leaders and the judges were awaiting the appellate decision of the United States Supreme Court in *Church of Jesus Christ of Latter-day Saints v. United States.*[116] Orson F. Whitney, a pro-Mormon historian and high church leader, reported: "From the hour of Judge Sandford's installation, it was evident that judicial proceedings in Utah would be divested of all undue severity."[117]

Judges Judd and Henderson followed the policy of the chief justice; in fact, the policy of the Cleveland administration during this period softened and not one prosecution under

the anti-polygamy acts was initiated. When defendants did plead guilty, the penalties imposed were not severe. Not only did George Q. Cannon submit to the court's jurisdiction with two pleas of guilty, so too did other Mormon leaders, including Francis M. Lyman, one of the twelve apostles of the church. After a little plea bargaining, Lyman pled guilty to one of five indictments for unlawful cohabitation. The other four were dismissed. Judge Sandford fined him $200 and sentenced him to eighty-five days in jail.

The Cleveland administration, and particularly Chief Justice Sandford, were severely criticized during this period for the leniency shown in both lack of prosecution and punishment of offenses under the anti-polygamy laws. "In the eyes of the 'Ultras,' he (Sandford) was an enemy of progress."[118] President Cleveland incurred further ill will of the "ultras" by pardoning some offenders who had been convicted.

When President Harrison replaced Cleveland in 1889, renewed pressure was applied and Justice Sandford expected to be replaced. He had written out his resignation soon after Harrison was inaugurated. Yielding to the solicitation of prominent members of the Utah Bar, he refrained from sending it to Washington. Two months later he was requested to resign by the attorney general for the reason that "the President has become satisfied that your administration of the office is not in harmony with the policy he deems proper to be pursued with reference to Utah affairs."[119]

Justice Sandford replied:

> My earnest purpose while on the Bench, as Chief Justice of this Territory, has been to administer justice and the laws honestly and impartially to all men, under the obligations of my oath of office. If the President of the United States has any policy which he desires a Judge of the Supreme Court to carry out in reference to Utah affairs other than the one I have pursued you may say to him that he has done well to remove me.[120]

When Sandford's resignation was accepted, he returned to New York where he again engaged in private practice. He died in New York in 1897.

The President forthwith reappointed as chief justice Charles S. Zane, who Sandford had replaced. This, of course, meant that prosecutions and punishments for violations of the polygamy acts soon would be renewed and that punishment would become more severe.

During the interim period Justice Zane was very actively practicing law in the territory. One of the cases he appeared in was *United States v. The Church of Jesus Christ of Latter-day Saints*.[121] In that case a receiver had been appointed to take possession of the property of the church. This receiver, Frank H. Dyer, was U.S. marshal. He had two lawyers representing him, P.L. Williams and George S. Peters. Zane & Zane, father and son, represented certain school trustees who were authorized to receive funds. They objected to the fees charged by the receiver and his lawyers on the grounds they were excessive. They wanted to save the funds from pillage. Sandford and a court consisting of Henderson and Boreman referred the matter back to the examiner for reconsideration, and in a subsequent continuation of the case, the same court cut the fees more than in half. Zane was also very active in this period in the general practice of law in the southern settlements as well as in the Third Judicial District. In his practice he established a reputation as an excellent lawyer, with a quick wit and great courtroom presence.

Judge John Walters Judd, who was appointed during this period (July 1888) by President Cleveland, was born September 6, 1839, in Gallatin, Sumner County, Tennessee.

He read law at the office of Judge Joseph C. Stark at Springfield, Tennessee. During the Civil War he volunteered and served as a cavalryman. He was at the battle of Missionary Ridge and was with Morgan in his raid into Ohio. During the war he was severely wounded, captured, and imprisoned in Ohio. After the war he developed an extensive and lucrative private practice at Springfield, Tennessee, where he was active when he was appointed to the Utah Territorial Court. In 1893 after his term expired as federal judge, he was appointed U.S. district attorney for the territory of Utah, which position he held until Utah became a state on January 6, 1896. Judd then returned to Tennessee in the fall of 1898 and made his home in Nashville where he again returned to the practice of law. In 1903 he was elected to a professorship by the board of trustees of the law department of Vanderbilt University. He remained at Vanderbilt until his death on January 27, 1919. His religious affiliation was Methodist and he was also a Master Mason, Royal Arch Mason, and Knight Templar.[122]

Judge Judd handled two cases which were especially interesting and significant. One of these was appealed to the United States Supreme Court. It involved Hans Nielsen who was charged in the Second District with two indictments, one for unlawful cohabitation and the other for adultery. Hans pleaded guilty to the unlawful cohabitation and was sentenced by Judd to a term of imprisonment. He pleaded not guilty to the other indictment for adultery and was convicted. At the second trial he defended on the ground that he could not be tried twice for what amounted to the same offense, pointing out that the same time period and the same woman were involved in both indictments. On a petition for habeas corpus which reached the United States Supreme Court, it was held in an interesting unanimous opinion written by Mr. Justice Bradley that he was in fact sentenced twice for the same offense and, therefore, habeas corpus should have been granted and the defendant discharged on the conviction for adultery.[123]

The other case attracted more attention and demonstrated the division which existed between the Mormon people and the judiciary. During the time that Johnston's army was encamped in Utah, one of the soldiers, a Sergeant Ralph Pike, had abused and beaten a young Mormon named Howard Spencer. The beating was so severe that young Spencer, who was from a prominent family, suffered severe brain damage as a result. Sometime later Spencer accosted Pike and killed him in cold blood. Many Mormons thought the sergeant deserved what he received. The United States government did not. Years later, in August of 1889, Howard Spencer was tried at Salt Lake City before Judge Judd who was assisting in the Third Judicial District. The jury returned a verdict of not guilty. Many Mormons openly applauded the verdict. The judge, however, was not pleased and expressed his dissatisfaction from the bench. One of the lawyers representing the defendant was Arthur Brown from Nevada. Partly because of the popularity he achieved by reason of his defense of Spencer, he later became one of Utah's first United States senators. He and Judge Powers crossed paths later in the most sensational murder trial of the period. This time Brown was not the lawyer; Powers had that role. Brown was the victim.

Judge Thomas J. Anderson, a Utah territorial judge, had been appointed by President Cleveland in 1889. He was a descendant of an early Virginia family composed of French Hugenots and English, and served in the War of 1812 as a private, after which he moved to Marion County, Iowa. He joined the northern army as a first lieutenant in the Civil War and was promoted to captain and resigned in December of 1864. He later became a major. While in the

army he served as a judge advocate. He was considered a self-made man.[124]

In November of 1889, Judge Anderson held special sessions of court in Salt Lake City to pass upon the petitions of certain residents for citizenship. Utah in 1889 had many European converts to Mormonism who were not citizens. Judge Anderson, in an opinion handed down the last day of November, denied the applications of two of these people on the ground that they had been through the Endowment House and had taken an oath against the government. Nine others were rejected, not because of any oath, but simply because they were members of the Mormon church. When Judge Zane, who was about to embark on his last term, heard of the decision, he announced from the bench that Judge Anderson's opinion would be respected "for the present." Whitney, a Mormon historian, noted that "it was evidently a bitter dose for this naturally upright magistrate to swallow."[125] From Whitney's attitude, it was becoming clear that the anti-Mormon attitude of the judges was beginning to change. It also appeared that Zane was conducting himself, as he always did, in a judicial and proper manner. This would become more apparent in what is identified here as the Second Zane Period.

### J. *THE SECOND ZANE PERIOD: 1890 TO 1893*

Chief Justice Zane, who had been reappointed to replace Sandford in 1889, was destined to preside as judge during the period when polygamy in Utah was enduring its final death struggle. Fortunately, his past experience in the territory as a judge and practitioner, together with his growing understanding of the Mormon people and their unique problems, tempered his judgment so that the second time around he was a more sympathetic judge than he had been earlier.

In May of 1890 the Supreme Court of the United States handed down its long awaited decision in *United States v. Church of Jesus Christ of Latter-day Saints*. The United States Supreme Court now entitled the case *The Late Corporation of The Church of Jesus Christ of Latter-day Saints v. United States*.[126] The Court reviewed at great length the entire legal and judicial history of polygamy in the territory and affirmed the territorial decision written by Zane and concurred in by Boreman and Emerson. Three of the United States Supreme Court Justices dissented, relying on a strict constitutional construction similar to that used by Calhoun and Brigham Young. They believed that the United States Constitution had not delegated to Congress the power to confiscate property of individuals or corporations on the ground that they have been guilty of criminal practices as was done under the 1862 and 1887 acts.

Because of this decision, the die was now cast. The ax was about to fall. Before it fell, Utah's "Richelieu," George Q. Cannon, got busy. He and his people were not only confronted with the 1890 Supreme Court decision authorizing and directing confiscation of property, they were also confronted by a new proposed law known as the Cullom Struble Bill. This bill proposed to completely disenfranchise anyone in the territory who taught, practiced, or belonged to an organization that taught polygamy. The proposed legislation was inspired by Mormondom's great enemy, R.N. Baskin. It meant, if it became law, that the Mormon people, who by their thrift and industry had settled and developed the Great Basin, were now to turn over the governing process to those whom they considered their enemies. This was too much. The bill passed the House, but George Q. Cannon and others convinced the Senate to do nothing until the Mormons had made an effort to voluntarily eliminate polygamy at home. This was done

and in the fall of 1890 the Mormon people, under the leadership of President Wilford Woodruff and the skillful guidance of George Q. Cannon, voted to accept a "Manifesto" which declared that while polygamy was still a correct religious principle and practice, it no longer was to be permitted or authorized by the church as long as the law of the land prohibited it. Some who could not or would not repudiate the practice went to Canada, Mexico, and Arizona. Some of their descendants later returned and are among the present leaders of the Mormon church. The ordeal was over for all practical and political purposes.

Most of the federal judges had taken no personal satisfaction in sending decent men to jail to enforce a law which they were sworn to uphold and which their victims honestly felt was unconstitutional. Judge Zane, writing some years later, commented on the magnitude of the problems which had been endured. He wrote:

> [O]ur national law-makers in 1862 enacted a law defining plural marriage as a crime. . . . In 1882 they made another law, more stringent and comprehensive, defining and punishing unlawful cohabitation also as a crime. And in 1887 still another law was passed designed to be yet more stringent and effectual. The courts of the Territory of Utah began the enforcement of the two acts. in September 1884 (when he took office), and of the last law as soon as it took effect. After more than thirteen hundred men had been sent to prison for their violation, Wilford Woodruff, the president of the Mormon church made and published an official declaration termed the "Manifesto" [which declared polygamy no longer a practice in the Church].[127]

While polygamy ceased to be a bone of contention, there still remained the question of confiscation and escheat of properties owned by the church, as mandated by the United States Supreme Court.

Subsequent implementing decisions were to be resolved for the most part by the judges appointed by President Harrison. Judge Anderson, appointed by President Cleveland to replace Boreman, was still a holdover. In 1889, Harrison had appointed Zane to replace Sandford; John W. Blackburn to replace Judd; James W. Miner to replace Henderson; and in 1893 George Washington Bartch to replace Anderson. These judges were to preside over the remaining difficult question involving confiscation of church property as mandated by the United States Supreme Court.

Miner was born at Marshall, Michigan, September 9, 1842. He was admitted to the bar at an early age, practiced for a while in Michigan, and then came to Ogden, Utah, where his chief activity was promoting real estate. The post-railroad activity in Ogden soon made him rich. On August 2, 1890, President Harrison commissioned him as an associate judge of the Utah Territory where he was assigned to the First Judicial District in Ogden. The judge reportedly drew criticism for his decisions involving the interests of his close relatives.[128] As one modern historian suggests, his decisions involving "water rights of certain real property owned by his wife, his daughter, or his son-in-law did nothing to hurt the family's finances."[129] Later, in 1896, he became one of the first supreme court justices of the state of Utah. He died May 22, 1907.

John W. Blackburn was from Illinois. He was residing in Utah at the time of his appointment to the Utah territorial federal court in 1889. Prior to coming to Utah, he had practiced law in Colorado. After he left the bench in 1893 he practiced in Salt Lake City under the firm name of Blackburn, Bartch and Benson. Later he practiced by himself in Provo, Utah, where he died January 5, 1894.

George Washington Bartch was from Pennsylvania. After practicing for a short time in

his home state, he moved to Colorado and finally to Utah where he was residing at the time of his appointment in 1893.

Judge Zane, who was to be replaced by Judge Merritt in 1894, remained in the territory and with polygamy no longer a judicial problem, he quickly gained the respect of the Mormon people. On January 1, 1896, he was elected by them to be the first chief justice of the Utah State Supreme Court.

### K. *THE SECOND CLEVELAND PERIOD JUDGES: 1893 TO 1896*

When President Cleveland was elected for a second time, he replaced the Harrison judges with his own. Zane was replaced by Samuel A. Merritt; Blackburn by Harvey Walker Smith; Miner by William Henry King; and Bartch by Henry Herman Rolapp. Two of these were Mormons so that for the first time in forty-three years Mormons were appointed to the federal bench. The first of these was William H. King. He was born in Fillmore, Utah, June 3, 1863. His early education was at Brigham Young University and at the University of Utah. After going on a mission to Europe for the Mormon church he attended Michigan Law School, graduating from there with an LL.B. in 1888. The following year he married Ann Lyman from a prominent Utah pioneer family. After practicing for some time in Provo, Utah, with the firm of Thurman, Sutherland and King, he went to Salt Lake City where he founded a partnership with Arthur Brown and Judge H. P. Henderson, a former territorial judge.

Judge King's political career began as a member of the Utah legislature where he served three terms. He finally became president of the Utah Territorial Senate. On August 2, 1894, President Cleveland appointed him as an associate judge of the Utah Territorial Supreme Court. He remained in that office until statehood (1896) when he was elected to the United States Congress from the state of Utah. After his career as a congressman, he was elected to the United States Senate where he served from March 4, 1911, to January 2, 1941. He died November 27, 1949.

Henry H. Rolapp, the next Mormon appointee, was born March 22, 1860, in Germany. When he was twenty years old his family, as Mormon converts, moved to Utah. His elementary education had been in Germany. In 1884 he graduated from Michigan Law School. He first practiced in Montpelier, Idaho. Later he moved to Ogden, Utah, where he practiced until November 30, 1895, when he was appointed a territorial judge of the Utah Territory. After Utah became a state he was elected as the first state court judge of the Second Judicial District.

Judge Rolapp's greatest distinction in the years to come was in civic and business affairs. He became president of The Amalgamated Sugar Company; an officer and director of a bank, railroads, transit companies; a regent at the University of Utah; and a delegate of the American Bar Association. During all of this time he was a devout and active member of the Mormon church. He died in Salt Lake City, Utah, January 8, 1936.

The third Cleveland judge was Harvey Walker Smith. He was appointed May 8, 1893, a year earlier than King. He was the only non-Mormon of the second group of Cleveland appointees. He was born August 18, 1857, in Hickman County, Kentucky, and studied law on his own. Prior to his appointment, he moved to Ogden, Utah, where he practiced for several years. Smith served until his death, November 22, 1895.

During this period and until long after statehood, former judges, such as Henderson and

Powers, achieved great prominence as successful lawyers. Powers, especially, became important throughout the western United States. He, too, was a graduate of Michigan Law School. At one time he was a member of the bars of California, Nevada, Idaho, Montana, Oregon, Washington, Nebraska, Illinois, and the District of Columbia. He handled many famous cases, the most notorious of which was the defense of Ann Bradley of Salt Lake City who shot and killed former United States Senator Arthur Brown on the steps of the Willard Hotel in Washington, D.C., in 1906. She was acquitted on the "unwritten law." He and Arthur Brown had been bitter enemies (mostly political) for a long time.

During this pre-statehood period the political and social structure of the old pioneer society changed rapidly. There were now large numbers of non-Mormons and Mormons who realized they really were not very different from each other. They gradually began a social and political integration. The old People's Party (Mormon) and the Liberal (non-Mormon) converted to the more traditional Republican and Democrat ranks. Future federal judicial appointments would follow this pattern more than Mormon or non-Mormon.

Several reported territorial cases dealt with the remaining problems involving the United States Supreme Court mandate. The first was in *United States v. The Late Corporation of The Church of Jesus Christ of Latter-day Saints,*[130] in which Chief Justice Zane, and Justices Blackburn and Miner concurred in a decision which, among other things, determined the method to be used in disposing of personal property (in this case, cattle, sheep, etc.) for the benefit of the poor and needy members of the Mormon church. The master had recommended that a commission be appointed to administer these funds. Chief Justice Zane, showing his changing attitude towards the Mormons, thought the church leaders should administer the funds. His associates, not so familiar with the Mormons, thought otherwise. Zane reluctantly agreed without writing a dissenting opinion.

Other cases followed. These involved four pieces of real property: the tithing yard, the Gardo House (a mansion built by Brigham Young), coal lands, and what was known as the Church Farm. Whether these lands escheated depended on whether the church acquired a vested interest prior to the Act of 1862, which by its terms excluded such lands. The argument was made that inasmuch as the federal government had not surveyed these lands prior to 1862, and therefore had not deeded them away, that the possessory rights of the church did not constitute a vested interest. In the basic case decided by Zane, the court followed this reasoning. However, on appeal, the court consisting of Smith, Miner, and Bartch reversed on that theory, holding that possessory rights constituted a vested interest and therefore the tithing yard and Church Office property remained in the church while the Gardo House, Church Farm, and coal lands escheated. Harvey Walker Smith, the first of the second group of Cleveland appointees, wrote the opinion for the court.[131]

With polygamy abandoned and the Mormon people looking toward statehood, the Harrison administration, realizing that the reason for escheating property to the federal government under the Supreme Court decision no longer existed, took steps to resolve the problem. On October 25, 1893, President Harrison signed the Rawlins Resolution enacted by Congress restoring to the Mormon church its personal property and money, not arising from the rents of real estate since March 3, 1887, ". . .

to be applied under the direction and control of the First Presidency of said Church to the charitable uses and purposes thereof."[132]

The relationship between the judiciary and the Mormon people quickly achieved a normal status, proving that the real animosity which had existed for almost fifty years had been caused primarily by two things. First, Brigham Young's insistence that the Mormon people had the constitutional right to govern themselves without the interference of federal appointees, and second, the federal government's insistence on stamping out polygamy in Utah. This was resisted just as forcibly by the leaders of the church until the "Manifesto" eliminated the problem. A possible contributing third cause was the appointment of non-Mormon judges. It is probable, however, that the existence of the first two causes made such appointments practically inevitable.

On March 28, 1896, President Cleveland approved a joint resolution of the House and Senate which removed the last vestiges of the debris and ruin resulting from the anti-polygamy acts and the confiscation of church property. The resolution, like the earlier resolution involving personal property, restored to the Mormon church all escheated real property which had been turned over to the government.

Approximately sixty federal judges played a critical role in this political struggle and the resulting geographical change. But for the action and the early attitude of Mormon leadership, the geographic boundaries of most of the western United States would have been quite different from what they are now. It is doubtful there would have been a Nevada or even a Wyoming and Arizona. There perhaps would have been a State of Deseret or Utah larger than the state of Texas. In 1850 when the struggle began, the proposed State of Deseret embraced all of what is now the states of Utah, Nevada, the western part of Arizona, southern California, including Los Angeles and San Diego, and even parts of Idaho and Oregon. The territory of Utah organized in 1850, while not as large as the proposed State of Deseret, was larger than Texas. It was bounded on the east by the Rocky Mountains and on the west by the Sierra Nevada, on the north and south by the 42nd and 37th parallels. It contained 187,923 square miles. In retrospect it was largely because of Brigham Young's insistence on the right to self-rule and the reluctance of the leaders to abandon polygamy that the pioneer society found itself in almost fifty years of struggle with the federal government. It ended with statehood, but in that quarrel the territory was worn away by political erosion until, by the time of statehood, the area had been reduced to 84,916 square miles.

### L. *STATEHOOD: 1896 TO 1978*

Brigham Young's criticism of lawyers was so well-known that by the time Utah finally was admitted to statehood in 1896, there were few Mormons who had sufficient interest or legal training to qualify as federal or state supreme court judges. The only Mormons who could have qualified were Henry H. Rolapp, William H. King, Aurelius Miner, LeGrande Young, Richard W. Young, and James H. Moyle. Even in 1887, James Moyle had difficulty getting church leadership approval to attend law school. As a devout and bright young Mormon, he went to his bishop and requested approval of his law school intentions. The bishop said to him, "Jimmy, you are a good boy, but these educated men (lawyers) are damned rascals."[133] James Moyle then appealed to his stake president, Angus M. Cannon, who in an outburst of emotion said, "You will go to Hell." James Moyle persisted

and took his case to his former bishop, Robert T. Burton, who advised him to talk to George Q. Cannon, who was a counselor to President John Taylor, and who James Moyle considered to be "the leading intellectual of the Church."[134] President Taylor, who was at the time a polygamous fugitive from justice, advised him "that being a lawyer was a dangerous calling" and related that "[h]is experience and that of the Church was that lawyers had been a source of great wrongs and injustice, as well as an advantage to the right and justice, and therefore the profession was dangerous."[135] After some discussion President Taylor acquiesced with young Moyle's request and with President Cannon gave him their blessing which, in effect, "set him apart to study law."[136]

Rolapp, King, Miner, Moyle, and the two Youngs, who were professionally qualified, were otherwise disqualified for other reasons, or unavailable. Miner, not to be confused with James A. Miner, was a polygamist and therefore, as a practical matter, was not eligible to hold any public office because of the old Edmunds Law. Col. Richard W. Young, Brigham Young's grandson, was available, but his army status as a West Point graduate interfered. He later went to the Philippine Islands as an officer in the Spanish American War, following which he became the first American to sit on the Philippine Supreme Court. LeGrande Young, a graduate of Michigan Law School and a son of Joseph Young, Brigham Young's brother, was too old and not political. (He became the ancestor of Steve Young, the 1983 All-American Quarterback from Brigham Young University). The other three, Rolapp, King, and Moyle, were Democrats. If they had aspired to the judgeship, this would have been to their advantage because Grover S. Cleveland was President. Utah's first senators, Arthur Brown and Frank J. Cannon, did not have sufficient status to have much political influence, especially since they were Republicans. Furthermore, being a federal district judge in 1896 was not an exciting adventure for most bright young lawyers. The pay was low and the cases limited. Its main attraction was that it was a lifetime appointment. King and Moyle, both very able and ambitious, had other political aspirations. Moyle became an unsuccessful Democratic candidate for governor in 1900, and William King a successful candidate for Congress in 1896. In 1916 William King became U.S. senator from Utah, defeating George Sutherland who later became a United States Supreme Court justice. Sutherland had been James Moyle's roommate at Ann Arbor, Michigan. Henry Rolapp served a short time as a state district court judge. His real interest, however, was in business.

### M. *UNITED STATES DISTRICT JUDGES*

The appointments of Judge Marshall and later his successor, Judge Johnson did not entirely resolve the conflict which had existed in the early non-Mormon and Mormon society. However, fortunately, they did put it on ice. Later in the Judge Ritter period it briefly reemerged.

John Augustus Marshall from Virginia had sufficient influence in Washington and at home to become the first United States district court judge for Utah. He may have received strong support from his uncle, Thomas Marshall, and his father, John, who were both nephews of the famous Chief Justice John Marshall. He was appointed on January 13, 1896, to the Eighth Circuit Court for the District of Utah. He served until August 6, 1915, when he was replaced by Tillman D. Johnson.

Thomas Marshall, John's uncle, was from Kentucky via Montana and had practiced

successfully in the Utah Territory since 1866, being especially expert in mining law, which became very important at that time. The new judge was born near Warrenton, Fauquier County, Virginia, September 5, 1854, and was educated at Shenandoah Valley Academy and at the University of Virginia Law School. When twenty-four years of age and while still unmarried, he came to Salt Lake City where he first practiced law. It is probable that one reason he came west was because his uncle, Thomas, had a successful practice in Salt Lake City and had been the first "gentile" to be elected to the Utah Territorial Council. Ten years later young Marshall married Jesse Kirkpatrick. That same year he became a probate court judge in Salt Lake County (1888-89). In 1892 he became a member of the legislative assembly of Utah.

John Marshall's wife, Jesse Kirkpatrick, was a daughter of Moses Kirkpatrick who had been a partner in the law firm of Bennett, Harkness and Kirkpatrick. Kirkpatrick later became a well-known state court judge in Butte, Montana. The firm of Bennett, Harkness and Kirkpatrick was an early predecessor of the Van Cott firm in Salt Lake City. So, too, was the later firm of Bennett, Marshall and Bradley. Judge Marshall was a named partner in that firm.

The judge resigned in 1915. It is reported by S.N. Cornwall in his history of the Van Cott firm that the judge terminated his judgeship "when he became enmeshed in a scandal involving the cleaning woman of his courtroom. Mr. Van Cott and Will Ray, who was then U.S. district attorney, both thought the accusation was a frame-up and urged the judge to meet the thing head on with a fight to the finish. But the judge resigned from the bench rather than go through the ordeal of the scandal."[137]

After his resignation he resumed his private practice, but in later years he became something of a recluse, residing alone or with one of his daughters at the Hotel Utah in Salt Lake City. By 1938 his health had become so bad that he made few social or public appearances. He died a relatively wealthy but lonely man at his place of residence on April 4, 1941. He was survived by two daughters, Mary Marshall Fitch of Auburn, California, and Cary Marshall Lee of the Hotel Utah, Salt Lake City. He was eighty-seven years of age at the time and had been a resident of Utah for sixty-three years. At the time of his death it was reported in the Salt Lake *Tribune* that he was a great-nephew of John Marshall and a great-grandson of Robert Morris, "Revolutionary War hero and financial savior of the American Cause." The same paper editorialized Marshall and referred to him as a "brilliant member of a family famed for legal ability" and a nephew of Thomas Marshall of Utah pre-statehood fame.[138] His eulogy by the Utah State and Salt Lake County Bar Associations referred to him as "a brilliant mining lawyer and a great judge."[139]

Judge Marshall's successor, Tillman Davis Johnson, was appointed by Woodrow Wilson on August 16, 1915. He was born in a log cabin January 8, 1858, in Tennessee. He received his early legal education at Cumberland University. He taught school and studied and practiced law in the office of Avent & Avent in Murfreesboro, Tennessee. This apparently did not satisfy him, so he, his wife, young son Wade M. Johnson, and two other children came to Ogden, Utah, in 1890, where he engaged in the general practice of law. In 1913 he formed a partnership with his son, Wade M., as Johnson & Johnson. He was very active politically. When in Tennessee, he was placed in charge of the Indian Schools at Fort Bennett, South Dakota. In 1889 he became principal of the Indian School at Fort Hall, Idaho. In Utah he became a member of the 1899 legislature. In 1912 he was an unsuccessful Demo-

cratic candidate for Congress. His social affiliations were with the Woodmen of the World and he was a prominent Mason and Southern Baptist.

Certainly there were many men at the bar, Democrat as well as Republican, whose professional accomplishments were much more impressive. The real reason Judge Johnson was appointed was because he was the only one who met President Woodrow Wilson's specifications for the position, which required that the new appointee be a southern Democrat, a non-Mormon and a lawyer. It is doubtful that anyone else in Utah could fit those specifications.

In 1915 being a federal district judge still was not too attractive. The growth of the federal government since that time, and particularly since 1932, with new laws and regulations, has changed the picture completely so that now a federal judgeship is a sought-after position. While Judge Johnson was in charge of the government Indian School in South Dakota, he became a good friend of Sitting Bull, the medicine man who watched Custer's downfall in 1876 from a nearby hill at the Battle of Little Big Horn. Judge Johnson liked to tell young lawyers about Sitting Bull's account of Crazy Horse's victory. According to Sitting Bull, the first soldier killed was Custer whose scalp was taken. This is a bit contrary to the gory scene of Budweiser beer posters, which show Custer as the heroic lone survivor, pistol in hand, fighting wild Indians to the last.

Judge Johnson was an honest, well respected judge. There was no pretense in his manner. He appeared to be almost spartan in his conduct and very abstemious in his habits. His social life was private, and good lawyers had confidence in him. The old anti-Mormon and pro-Mormon groups were losing their competitive edge. They found little comfort in his court. He was nonpartisan and neither "pro nor anti" anything. He was a good judge for the state of Utah during these early years.

While Judge Johnson gave the appearance of being inscrutable and imperturbable, he occasionally broke through this shell and demonstrated a delicious ability to be amused and to amuse. During World War II the government brought black troops into the Salt Lake City area. An enterprising entrepreneur imported several black prostitutes to entertain these troops. The government in due course brought the matter before Judge Johnson under the Mann Act (White Slave Act). When the case started the judge asked the principals to identify themselves. The prostitute to be called as a witness was a very attractive, young black woman. When she was asked to identify herself, she rolled her eyes and said, "I is de white slave." The filled courtroom broke up and Judge Johnson, without cracking a smile, stepped down from the bench and staggered into his chambers, where he remained for about fifteen minutes. When he returned, even he was grinning, but ever so slightly. On other occasions he amused himself by having attorneys and defendants identify themselves. If the attorney was young, well dressed and immaculately groomed, representing a defendant who was a disreputable mess, the judge would slyly ask which one was the defendant. The spectators would laugh, the attorney would squirm, and the judge would unconcernedly continue to twirl the sharp end of his pencil in his ear.

For many years Judge Johnson walked from his home near the Eagle Gate in Salt Lake City to his courtroom four blocks away. His last walk was taken when he was over ninety years of age. He died at Salt Lake City, Utah, October 2, 1953.

Judge Johnson's successor was Willis William Ritter. He was born January 24, 1899 in Salt

Lake City, Utah. When nine years of age, Judge Ritter moved with his family to Park City, Utah. It was there he graduated from high school in 1918. After one year at the University of Utah, he entered the University of Chicago Law School, receiving an L.L.B. degree in 1924, cum laude. He obtained a degree in political science from the University of Utah in 1927 and an S.J.D. degree from Harvard University Law School in 1940. He received the highly coveted academic honors of the Order of Coif in law school, and Phi Beta Kappa as an undergraduate. In 1926 he joined the faculty of the University of Utah, teaching there for over twenty-four years. With the advent of World War II, the law school faculty was reduced and the judge took a supervisory legal job with O.P.A. He received an interim appointment to the federal district court in October of 1949.

He was the first native born Utahn to be appointed to the federal bench of the state of Utah. His appointment and senate approval were vigorously opposed and resulted in bitter accusations and storms hearings. Utah's Senator Elbert Thomas, Chairman of the Military Affairs Committee, however, had great influence, so that after serving an interim period, the new judge was again appointed by Harry S. Truman in June of 1950. By this time Senator Arthur Watkins, a Republican, had replaced Senator Thomas. Even though Watkins was not in favor of the second appointment, he did not oppose it on the floor of the Senate, so that this time the Senate approved.

The bitter opposition and hearings were ominous and did not end when the new judge finally was sworn in in 1950. He was understandably bitter, and did not forget those who he felt unjustly accused him. Being a man of strong and intense feelings, his bitterness lasted for many years and had much to do with his later conduct on the bench. Because of this, and for whatever other reasons, Judge Ritter became a very controversial judge. His enemies, while admitting his honesty and intelligence, accused him of bias and prejudices which they felt made him a bad judge. His friends respected his ability and honesty. Lawyers who appeared before him knew that going into his court unprepared was disastrous. As a former law professor, he quickly detected the unprepared. They were treated like students and soon found themselves in trouble. A professional, well-prepared lawyer usually received a fair hearing.

In his later years, he and the U.S. District Attorney's office got into a bitter dispute about the handling of the judge's calendar. This resulted in the filing in 1977 of a Petition for a Writ of Mandamus or Prohibition to the Judicial Council of the Tenth Circuit Court of Appeals entitled, *United States of America, Petitioner, v. Honorable Willis W. Ritter, Chief Judge, Respondent.*[140] It was signed by Wade H. McCree, Jr., Solicitor General, Department of Justice in Washington, and by Raymond M. Child, U.S. attorney in Salt Lake City. Attached to the Petition was an appendix of 860 pages containing grievances, transcripts, and newspaper clippings for which the judge was severely criticized. The judge retaliated with complaints of his own to the United States Supreme Court against the Tenth Circuit and the U.S. attorney. These accusations reveal a very bitter relationship between the U.S. District Attorney's office and the judge. The judge's death in March of 1978 terminated this unfortunate episode.

Thus, the judge, from even before his appointment in June of 1950 until almost thirty years later, remained very controversial. This controversy sometimes made his courtroom more of an arena than a court.

Judged on the record of what he did rather than what his critics had to say of him, he accomplished many useful things. He was

especially adept at detecting legal issues and effective at getting to the heart of a problem. This made him an excellent law and motion judge. He regularly disposed of lengthy law and motion calendars, ruling on most of the matters the same day they were argued. He also had a special talent for cutting through red tape resulting from ponderous modern discovery procedure which too often clutters the legal process. This judge did not tolerate confusion or delay which often occurs in modern practice. Like law and motion matters, his decisions were usually made at the conclusion of the trial.

His quick ability to get to the heart of the problem cut both ways. His detractors thought it sometimes caused him to jump to conclusions before he had examined all the facts carefully, and then to become an advocate rather than a judge. One lawyer was known to say: "He always knew where the ball was but was inclined to run with it-sometimes in the wrong direction."

He was perhaps overly tolerant of young criminals. They often received little more than a slap on the wrist. He later ascribed this to his own hard youth when he worked in the mines in Park City. The so-called white-collar criminal, particularly if wealthy, found himself facing a very unsympathetic judge.

Judge Ritter was one of the most interesting men to ever sit on a Utah bench. His biography should be, and probably will be, written. Appearing before him was a challenge. One lawyer, on being asked how he got along so well with the judge, was heard to say, "Well, you don't practice law before Judge Ritter—you practice psychiatry!"

The judge spent his last few years as chief judge, even though a movement was afoot to deprive him of that position, surrounded by his rare books, objects of art, Indian rugs and paintings which adorned his court chambers. He remained a controversial figure until his death on March 5, 1978. It is possible that part of the controversy was because of the dying but still existing Mormon—non-Mormon conflict. History will have to ripen before a fair appraisal of this brilliant yet controversial man is finally cast.

The busy Utah federal court is now presided over by four active and two retired federal judges. All are well accepted and respected in the community.

## NOTES

*A.B., 1934, L.L.B., J.D., 1937, University of Michigan.

[1]Minutes of the Council of Fifty, located at J. Reuben Clark Law Library, Brigham Young University, Provo, Utah. *See also* K. Hansen, *Quest for Empire* 227-28 (1967).

[2]Remarks by President Brigham Young (Mar. 9, 1862), reprinted in 10 *Journal of Discourses* 39-40 (1967) [hereinafter *Young Remarks*].

[3]*Id.*

[4]Salaries for Utah territorial judges were initially set at $1,800. By 1870 the amount was $3,000. E.S. Pomeroy, *The Territories and the United States* 35 (1947).

[5]A.L. Neff, *History of Utah, 1847 to 1869*, 176 (1940); *see* text accompanying note 13, *infra*.

[6]Knecht, "Federal Judges of the Utah Territory from a Lawyer's Point of View," in *American Territorial System* 115 n.9 (J.P. Bloom ed., 1969).

[7]Neff, *supra* note 5 at 170-71.

[8]*Id.* at 172.

[9]*Id.*

[10]*Young Remarks, supra* note 2 at 42.

[11]*Deseret News*, June 27, 1858, taken from the *Journal History* in the Church Historian's Office, of the Church of Jesus Christ of Latter-day Saints in Salt Lake City, Utah. (Neff described it as follows: "*The Journal History* is a compilation of transcripts from original documents. It is capable of indefinite expansion by reason of the loose leaf character of the backing and the fact that the entries are by date and without page number. Documentary materials are thus brought together in convenient form from widely different sources. These ponderous volumes are being added to constantly. They supplement the History of Brigham Young, containing as they do, letters, minutes of meetings, and extracts from private diaries. The set is second in importance only to the Young manuscript history." Neff, *supra* note 5 at 911).

[12]Neff, *supra* note 5 at 174.

[13]*Id.* at 176.

[14]Minutes of the New Mexico Bar Association 19-23 (Santa Fe, 1895).

[15]Letter from Dr. John M. Bernhisel, *Journal History, supra* note 11 (Dec. 24, 1851), taken from Neff, *supra* note 5 at 911 (explanation of primary sources).

[16]E.W. Tullidge, *History of Salt Lake City* 160-61 (1868), (biography of Judge Z. Snow).

[17]Neff, *supra* note 5 at 177-78.

[18]N.F. Furniss, *The Mormon Conflict 1850-1859*, 38 (1960).

[19]Neff, *supra* note 5 at 178-79.

[20]Tullidge, *supra* note 16 at 95.

[21]B.H. Roberts, 4 *A Comprehensive History of the Church of Jesus Christ of Latter-day Saints, Century I*, 195 n.19 (1930), (quoting O.F. Whitney).

[22]For further discussion, *see* subsection E., *infra*.

[23]Act to Establish a Territorial Government, Act of Sept. 9, 1850, § 9, 9 Stat. 453.

[24]*Id.*

[25]Terr. Laws of Utah, ch. I, An Act in relation to the Judiciary, Feb. 4, 1852, § 29, *Revised Laws of Utah* 124 (1855).

[26]*Id.* §44 at 128.

[27]Terr. Laws of Utah, ch. VI, An Act for the Regulation of Attorneys, Feb. 18, 1852, § 2, *Revised Laws of Utah* 139 (1855), (providing: "No person. . .employing counsel in any of the Courts of this Territory, shall be compelled by any process of law to pay the counsel so employed in the case for any services rendered as counsel before or after, or during the process of trial.").

[28]Terr. Laws of Utah, ch. LXIV, An Act containing provisions applicable to the laws of the Territory of Utah, Jan. 14, 1854, § 1 *Revised Laws of Utah* 260 (1855), (providing in pertinent part: ". . . no report, decision, or doings of any court should be read, argued, cited or adopted as precedent in any other trial."). This seems to indicate some respect for precedent even though George A. Smith confesses ignorance of such procedure.

[29]Neff, *supra* note 5 at 193.

[30]*Id.* at 194.

[31]Message to Deseret, Dec. 2, 1850, quoted in Neff, *supra* note 5 at 188.

[32]For further discussion, *see* subsection E., *infra*.

[33]C.V. Waite, *The Mormon Prophet and His Harem* 49 (1868).

[34]*Id.* at 46-47.

[35]Neff, *supra* note 5 at 446-47.

[36]H.H. Bancroft, *History of Utah 1540-1887*, 490 (1890).

[37]J. Remy & J. Brenchley, *A Journey to Great Salt Lake City* 468-69 (1861).

[38]Neff, *supra* note 5 at 447-48.

[39]Letter from Porter to Sibley, 1858 Records of the Army Department of Utah, Phelps Diary 17, entry dated Nov. 12, 1857; and *Mississippi Republican*, Feb. 12, 1858.

[40]*Id.*

[41]*Young Remarks, supra* note 2 at 98-99.

[42]*Journal History, supra* note 11 (May 20, 1858).

[43]Taken from hand-written material in Indiana Historical Society, not indexed. *See also* Utah Hist. Q., (Apr. 1955).

[44]*Id.*

[45]*Journal History, supra* note 11 (May 20, 1858).

[46]*Id.*

[47]Furniss, *supra* note 18 at 208.

[48]Roberts, *supra* note 21 at 456.

[49]Letters from Eckles to Cass (June 4 & July 9, 1858; Jan. 14, 1859). *See also* affidavit of James Lynch, July 27, 1859, Office of the Indian Affairs, National Archives.

[50]Neff, *supra* note 5 at 694.

[51]For further discussion, *see* subsection B., *supra.*

[52]Furniss, *supra* note 18 at 213.

[53]Neff, *supra* note 5 at 694.

[54]Letter from Johnston to Cumming (Mar. 22, 1859), Records of the War Department, RG 94, National Archives.

[55]Letter from Floyd to Johnston (May 6, 1859), 2 Sen. Exec. Doc. 2, 36th Cong. 1st Sess.

[56]Letter from Black to Cradlebaugh and Sinclair (May 17, 1859), letters to Dept. of Justice, National Archives.

[57]Letter from Cradlebaugh and Sinclair to Buchanan (July 16, 1859), appointment papers, Dept. of Justice, National Archives.

[58]Neff, *supra* note 5 at 698.

[59]Letter from Eckles to Cass (Sept. 27, 1858), Territorial Papers, National Archives.

[60]Letter from Flenniken to Black (Dec. 12, 1860), RG 670, M 680, roll 1, National Archives.

[61]D. Miller, petition for habeas corpus.

[62]Letter from Kinney to C. Cushing (Mar. 1, 1855), RG 60, M 680, roll 1, National Archives (against); Petition of James Graham for habeas corpus noted in *Deseret News*, Mar. 20, 1861 (in favor).

[63]Records of the War Department, RG 98, National Archives.

[64]P. Tucker, *Origin, Rise and Progress of Mormonism* 280-87 (1867). (Letter from Hon. Stephen S. Harding to Pomeroy Tucker, (June 1, 1867) describing Harding's experiences with the Smith family as early as 1827).

[65]*Young Remarks, supra* note 2 at 41.

[66]*Id.*

[67]This proposal failed but was rekindled years later into the Poland Act. *See* subsection G., *infra.*

[68]Bancroft, *supra* note 36 at 621.

[69]Waite, *supra* note 33.

[70]Letter to Major R.C. Dunn, Assistant General, San Francisco, California (Sept. 24, 1862), National Archives.

[71]*Id.*

[72]Neff, *supra* note 5 at 700-701.

[73]Letter from George A. Smith to Brigham Young, Jr., *Journal History, supra* note 11 (May 21, 1866).

[74]J.H. Beadle, *Life in Utah* 205 (1870).

[75]Neff, *supra* note 5 at 701.

[76]*Id.*

[77]*Id.*

[78]This transaction is described by Drake to his attorney George Bates in a letter dated April 26, 1873, cited by the *Salt Lake Herald*, May 31, 1873.

[79]Tullidge, *supra* note 16 at 480.

[80]Proclamation, Sept. 15, 1879, quoted in *id.* at 483.

[81]E.W. Tullidge, *Life of Brigham Young; Or, Utah and Her Founders* 420-21 (1876).

[82]Knecht, *supra* note 6 at 117.

[83]*Id.* at 117-18.

[84]For further discussion, *see* subsection H., *infra.*

[85]*Clinton v. Englebrecht*, 80 U.S. (13 Wall.) 434 (1872).

[86]Tullidge, *supra* note 16 at 166. Judge Zerubbabel Snow, one of the earliest federal judicial appointees, managed the appeal for the Mormon people in the *Englebrecht* case. At the time of these proceedings, Judge Snow had a private law practice in the territory and acted as one of the attorneys for Brigham Young. During this same period, he also served as attorney general for the Territory, and in such capacity advised the territorial legislature to withhold funding of the federal courts pending a decision in the *Englebrecht* case, which he correctly felt the Supreme Court would reverse.

[87]*Id.* at 549.

[88]*Id.* at 616.

[89]*Id.* at 588-90.

[90]C.C. Goodwin, *History of the Bench and Bar of Utah* 37-38 (1913), (quoting the *Cincinnati Commercial*).

[91]*Id.* at 39.

[92]*Id.* at 45.

[93]*Ferris v. Higley*, 87 U.S. (20 Wall.) 375 (1874).

[94]Tullidge, *supra* note 16 at 160.

[95]18 Stat. 253 (1874).

[96]O.F. Whitney, 3 *History of Utah* 46-47 (1892).

[97]*Id.* The record of the proceedings (the case was tried twice) reveals anything but a friendly suit. It was vigorously contested.

[98]*Reynolds v. United States*, 98 U.S. 145 (1878).

[99]Quoted from a letter in Tullidge, *supra* note 16 at 106.

[100]S.W. Harmon, *Hell on the Border* 30-45 (1898).

[101]Tullidge, *supra* note 16 at 619.

[102]Senate 44, BA 4, Papers Relating to the Nomination of Alexander White, Committee on Judiciary, Papers Relating to Presidential Nominations, 44 Cong., RG 46, National Archives.

[103]Knecht, *supra* note 6 at 118-19, citing at n. 51, *New York Tribune*, Dec. 28, 1877, Apr. 3, 1879, & May 7, 1879.

[104]Arrington, *Crusade Against Theocracy: the Reminiscenses of Judge Jacob Smith Boreman of Utah, 1872-1877*, 24 Huntington Libr. Q. 1-2 (1960).

[105]Just prior to the death of Brigham Young on August 29, 1877, Bates, on behalf of himself and Sutherland, brought suit in Bates' name against the Mormon church for an attorney fee of $5,000 for representing John D. Lee at the first trial. Bates' lawyer was R. N. Baskin. Brigham Young, as trustee of the church, was served with summons on August 28, 1877, the day before his death. Lawyers who were then representing the church, LeGrande Young, and Williams, demurred to the complaint, stating that it did not state a cause of action. On December 11, 1877, Judge Shaeffer agreed with defense counsel and dismissed the complaint (professional tradition is that it was on the grounds of *ultra vires*, meaning that Brigham Young had no authority to bind the church). Utah Archives Case No. 3137, 1877.

[106]Arrington, *supra* note 104 at 36.

[107]*Id.* at 42-43.

[108]*Id.* at 44.

[109]*Id.* at 4.

[110]J. Brooks, *The Mountain Meadows Massacre* (2d ed., 1962).

[111]Goodwin, *supra* note 90 at 54-55.

[112]22 Stat. 30 (1882).

[113]24 Stat. 735 (1887).

[114]*Cannon Family Historical Treasury* 109 (Evans & Cannon ed., 1967).

[115]Goodwin, *supra* note 90 at 94-95.

[116]*United States v. The Church of Latter-day Saints*, 5 Utah 361, 15 P. 473 (1887).

[117]O.F. Whitney, *Popular History of Utah*, 463-64 (1916).

[118]*Id.* at 465.

[119]*Id.* at 470.

[120]*Id.* at 472.

[121]6 Utah 9, 21 P. 503 (1889).

[122]*Nashville Banner*, Jan. 29, 1919, at 9.

[123]*Hans Nielsen, Petitioner*, 131 U.S. 176 (1888).

[124]*Portrait Gallery of Eminent and Self-Made Men*, Iowa vol. at 523-24 (1878).

[125]Whitney, *supra* note 117 at 479.

[126]136 U.S. 1, *modified*, 140 U.S. 665 (1889).

[127]Zane, *The Death of Polygamy in Utah*, 3 The Forum 368 (1891).

[128]Knecht, *supra* note 6 at 117, n. 26.

[129]*Id.* at 117.

[130]8 Utah 310, 31 P. 436 (1892).

[131]*United States v. Tithing Yard and Offices*, 9 Utah 273, 34 P. 55, (1893); *United States v. Gardo House*, 9 Utah 285, 34 P. 59 (1893); *United States v. Church Coal Lands*, 9 Utah 338, 34 P. 60 (1893); *United States v. Church Farm*, 9 Utah 389, 34 P. 60 (1893).

[132]Whitney, *supra* note 117 at 502.

[133]*Mormon Democrat: The Religious and Political memoirs of James Henry Moyle* 130 (G. Sessions ed., 1975).

[134]*Id.* at 130-31.

[135]*Id.* at 131-32.

[136]*Id.* at 132-33.

[137]S.N. Cornwall, *The Van Cott Firm, First Century* 37-38 (1974).

[138]*Salt Lake Tribune*, Apr. 5, 1941, at 21.

[139]*Salt Lake Tribune*, Apr. 6, 1941, at 20.

[140]*United States v. Ritter*, Nos. 77-1212, 77-1545.