The Judiciary and the Common Law in Utah Territory, 1850–61

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IN AUGUST 1851, DAVID ADAMS, a physician residing in Wayne County, Illinois, wrote a letter to Brigham Young in which he expressed his dismay at the persecutions the Mormons had suffered in Missouri and Illinois and revealed his "serious thoughts of making Salt Lake City my future residence" to practice his profession. Prior to making a final decision, he asked Young a number of questions: how was title to property held in the territory, how fertile was the valley, how dangerous the Indians, how healthy the inhabitants, and were there other physicians in Utah? Among the most interesting questions, however, was whether the common law — that portion of unwritten English legal doctrine which had been received and modified in the United States before the American Revolution — had been adopted in the territory. Young responded to Adams, and both letters were published in the *Millennial Star* (14 [29 May 1852]: 212–16). He assured Adams that neither the "common law of England, nor any other general law of old countries" had been adopted, that those who attempted to "fasten their peculiar dogmas upon all succeeding generations," although "thought to be men of 'legal learning,' " were instead "profound ignoramuses," and that the United States would not "shine forth in her true colors" until they should "divest themselves of tradition and ignorance."

Although Mormons patterned their provisional government after the state governments with which they were acquainted, including executive, legislative, and judicial branches of government, Young's rejection of the common law was a radical departure from what had been done in other territorial governments. Most had adopted portions of the common law and laws of other states to fill initial gaps in their legal systems and assure continuity with American legal traditions (Bakken 1983, 22). However, many nineteenth-century Americans believed that the common-law power of judges needed to be checked

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through legislatures' codifying the laws (Horwitz 1977, 17–30). Without such a codification, they argued, reform-oriented judges could make decisions contrary to the public will, and lawyers, generally held in disrepute by the public, would be the only beneficiaries.

Like his contemporaries, Young saw the common law as a powerful foe in the Mormons' quest for self-government. Events in Missouri and Illinois had convinced him that the national legal system was corrupt and that they should maintain their own institutions of law and government. Despite abundant litigation before territorial status was achieved in 1850,[1] Brigham Young took the position that if "there [were] no traveler in our midst, we might soon forget the name of lawsuit" (*Millennial Star* 13 [15 Feb. 1851]: 50) and even claimed that "not a solitary case was reported for trial, before the regular sessions of either the county or supreme courts . . . during the past year" ("Territorial," 2 Dec. 1850). Clearly, Mormon opposition to judicial functioning in the territory was not an objection to the legal system as such but resulted from their fear that non-Mormons would control the courts and use the law as an instrument of persecution.

Thus, the Mormons were disappointed when they were given territorial status instead of statehood, which included the appointment of three men who served separately as trial judges and collectively as the Territorial Supreme Court to review their own decisions. Since Congress had endowed these judges with common-law jurisdiction, Mormons feared they would threaten LDS sovereignty and institutions by attempting to apply laws which had not been passed by the territorial legislature.

These fears were not groundless. The common law provided that marriage while having a living husband or wife was a felony, and the second marriage was void (Blackstone 1:423–24). Most states had reinforced common law with anti-bigamy statutes. Illinois, for instance, had enacted such measures in 1833 and 1845 (Illinois 1833, 198; 1839, 220; 1845, 173).

In February 1851, before the first judges arrived in August of that year and before the doctrine of plural marriage was officially announced in August 1852, Young had criticized "the gentile Christian nations & Legislatures" for their practice of making it almost "Death for a man to have two wives" while at the same time refusing to pass "any laws to do away with whoredoms" (Woodruff 4:11–12). It is therefore not surprising that the Mormons not only categorically rejected the common law, but also denounced, sometimes ruthlessly, the federal judges who tried to apply it in the territory.

Those first three federal appointees were two non-Mormons, Perry Brocchus and Lemuel Brandenberry, and one Mormon, Zerubbabel Snow. Within a month of their arrival, Brocchus and Brandenberry requested and received permission to address a gathering in the Tabernacle (Tullidge 1886, 86) where Brocchus enraged his audience by admonishing Mormon women to become virtuous and suggesting that the federal government could not redress the

[1] Brooks 2:364–97; Stansbury 1852, 130–31; Gunnison 1856, 56; CHC 3:451–52; Unruh 1979, 252–84.

wrongs committed by the gentiles in Illinois or Missouri (Woodruff 4:61–63). These remarks provoked Young, and he demanded that Brocchus return to the Tabernacle the following Sunday and apologize. Brocchus refused (Tullidge 1886, 86–87) and instead prepared to leave the territory with Brandenberry and the territorial secretary, Broughton D. Harris, who had in his possession $24,000 of territorial funds, as well as the seal and records of Utah. In order to prevent the removal of these funds, records, and seal, the legislature passed a resolution authorizing the United States Marshal to seize those items from Harris. Harris immediately petitioned the Supreme Court for an injunction to prevent the seizure. The court (comprised of Brocchus and Brandenberry — Snow refused to attend) granted the petition, and Harris retained custody of the items (CHC 3:533; Tullidge 1886, 92; *Congressional Globe* 25 [9 Jan. 1852]: 88–91). Within a week of this decision, the two judges, territorial secretary, and the Indian agent left Utah, taking with them the funds and records in dispute.

The experience with Brocchus and Brandenberry confirmed the Mormons' fears about the judiciary. On 4 October, the legislature attempted to neutralize future conflicts by enacting several measures that would assure Mormon control over the legal system. It divided the territory into three judicial districts and assigned Snow to preside over all three until President Fillmore appointed two more judges (Acts 1852, 37–38; Brooks 2:406). The following February and March, the legislature passed additional measures prohibiting lawyers from initiating legal process against clients for payment of fees, increasing the jurisdiction of the probate courts, allowing litigants to select any person to judge their case, or to refer the case to arbitrators or referees either chosen by the parties involved or selected by the court, allowing a person with no legal training or experience to prosecute or defend a case, requiring attorneys or other persons appearing before a court to present all of the facts of the case, and abolishing all technical forms of actions and pleadings (Acts 1852, 40, 43, 47, 55–56, 208–9).[2]

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[2] Mormons from Nauvoo who practiced law in Utah Territory included Orson Hyde, George A. Smith, Zerubbabel Snow, George Stiles, Hosea Stout, and William Hickman. When someone jokingly threatened to report Hyde to the authorities in Salt Lake after he was admitted to the bar in Iowa in 1850, during the Winter Quarters period, Hyde replied: "I thought I would join the profession knowing it to be under divine censure, and raise it, if possible, to an elevation above the woe, and contribute to its numbers that we might be strong and respectable enough to plead successfully our own cause" (*Frontier Guardian* 2 [3 April 1850]: 2). On 19 October 1856, however, Young stated that because of Hyde's association with the legal profession, he should be "cut off from the Quorum of the Twelve and the Church" and that he was "no more fit than a dog to stand at the Head of the Twelve" (Woodruff 4:476–47). Young had earlier cursed Zerubbabel Snow and all lawyers before a congregation in the Tabernacle on 24 February 1856 and urged his people to "keep away from court houses" (JD 3:236–41). Later that same day he warned that all Mormons "that have no other business only to go to those courts should come and give up their license and be dismissed from their calling" (Woodruff 4:404). Heber C. Kimball condemned the "evil practices" of the legal profession on 24 February 1856 (JD 3:242). In December 1856, George Stiles was excommunicated while serving as a federal judge (JD 4:519–20). That same month in England, the *Millennial Star* exhorted members to "build schoolhouses instead of jails, and make our religion effective in dispensing with the use of courts and jurors,

Interestingly, these sweeping measures failed to even mention common law. Perhaps the legislature was confident that Snow could be relied upon to keep the legal system from becoming contaminated. In October 1851, the same month it had given Snow responsibility for all three judicial districts, Howard Egan, a Mormon convert, was indicted for the murder of his wife's seducer (Brooks 2:404, 407). Although such premeditated killing was clearly a crime under the common law, George A. Smith, who had had no legal training but who defended Egan, argued in November at trial that Egan's action was justified under Utah's "mountain common law" and that common law's usual light penalty for adultery could not be accepted in Utah. He also asserted that Congress could not pass laws to punish criminals except when authorized to do so by the Constitution and that the district courts, when acting as territorial courts, had to apply the terriorial laws enacted by the legislature rather than laws enacted by Congress or other states (JD 1:96–103; *Deseret News*, 15 Nov. 1851; Brooks 2:407–8).

Although Smith did not specifically mention it, a case earlier that year established a precedent for his "mountain common law" argument. In February 1851, the Supreme Court of the State of Deseret (Heber C. Kimball was the judge) met as a "court of inquiry" concerning Madison D. Hambleton, who had killed a man accused of committing adultery with Mrs. Hambleton. Brigham Young spoke on behalf of Hambleton, and Hosea Stout, who believed Hambleton was justified, was prosecutor. Hambleton was acquitted by the court "and also by the Voice of the people present" (Brooks 2:396), while Mrs. Hambleton was excommunicated for adultery by the local congregation (Madsen 1981, 108–9).

Snow rejected Smith's argument that a wronged husband could justifiably kill under mountain common law but appeared to agree that common law did not apply in Utah. He noted in his charge to the jury that the court was sitting as a United States court (rather than a territorial court) and that "the United States have no right to pass a law to punish criminals . . . when there is an existing State or Territorial jurisdiction." Therefore, if the jury found that "the crime" had been committed in the territory, "the defendant, for that reason, is entitled to a verdict of, not guilty" (JD 1:103). Fifteen minutes later, the jury found Egan innocent (Cannon 1983).

Subsequent to Egan's trial the Mormons continued to advocate their right to enforce their own laws even when they were contrary to the common law. In December, Judge Snow organized what was probably the first law school of the territory, where he instructed his scholars that they had "a right to make such laws as suited [their] own Convenience Notions and circumstances" and that such laws could be enacted "without any regard to the Common Law

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prisoners and prisons; have no lawyers, because there is no litigation . . ." (20 [10 Dec. 1858]: 232).

Yet, in the last years of his life, Young permitted and even encouraged the study of law, not because it was a noble profession, but to counteract those who distorted the truth through law (JD 14:82–86; 11:215).

of England or the laws which any of the states had adopted" (Woodruff 4:85–86; Brooks 2:410).

Later in March 1852, the Legislature passed a law defining homicide to punish actual or would-be rape by a male relative as "justifiable homicide" (Acts 1855, 203–5). This statute was part of the anti-attorney legislation already described.

Shortly after their departure from Utah, Brocchus and Brandenberry issued a report in Washington revealing that the Mormons practiced polygamy and challenging Mormons to argue the legality of plural marriage from a national forum (Stenhouse 1873, 280). A series of letters to the *New York Herald* in April 1852, signed by Jedediah M. Grant but possibly written by Thomas L. Kane, responded with many of the same arguments used by George A. Smith in the Egan trial (Stenhouse 1873, 278; Arrington 1974, 140, 149; Sessions 1982, 100, 264–65; CHC 3:528, n18). For example, these letters challenged Congress to either approve or rescind the "Act of our Territorial Legislature making Death the punishment of Adultery," warning that if "our Laws do not offer an *honorable* redress to the American citizen, he'll have it outside the law" (Sessions 1982, 351–68).

Because polygamy was practiced underground, the letters did not admit its presence in the territory but instead outlined its legal and religious justifications, then argued that the laws of foreign jurisdictions (including those of other states) could not be used to prohibit its practice unless the local population specifically adopted such laws (Sessions 1982, 319–68). On 1 August 1852, however, Brigham Young spoke of the violation of female virtue as a "vile" practice of heathen nations and stated "for argument's sake" that plural marriage was not illegal under the constitution of any state or the United States (JD 1:361; Waite 1866, 21). Orson Pratt, only twenty-eight days later, admitted and defended the Mormon system of plural marriage, mirroring Young's remarks by contrasting the corrupt and debased outside world, which recognized the common law and merely winked at adultery, to the territory of Utah, which was governed by the laws of God and meted out Old Testament punishment for moral transgressions (*Deseret News* 14 Sept. 1852; CHC 4:56). Nevertheless, the legislature never legalized plural marriage by statute, as it had "legalized" the killing of seducers, since such an act would only invite Congress to exercise its power to strike down territorial enactments with which it disagreed.

Into this hostile and defiant environment, which was solidified by Mormon control of all three branches of government, came the next federal judge, Leonidas Shaver, in October 1852, followed by Chief Justice Lazarus Reed in June 1853 — nearly two years after Brocchus and Brandenberry had left the territory. During this period, Mormon litigants took their disputes to the ecclesiastical courts, the probate courts, or to Judge Snow.

The arrival of additional non-Mormon officials touched off more uncertainties about the judicial system. In his annual message to the legislature on 2 December 1853, Brigham Young urged the legislature to prohibit all judges from using common law precedent: "String a Judge, or Justice, of the legal

mists and fogs which surround him in this day and age, leave him no nook, or corner of precedent, or common law ambiguous enactments . . . and it is my opinion, that unrighteous decisions would seldom be given" ("Annual Messages," 2 Dec. 1853, 38–39).

On 14 January 1854, the legislature obediently passed a measure, unprecedented elsewhere in the United States, which provided that "no laws nor parts of laws shall be read, argued, cited, or adopted in any court . . . except those enacted by the Governor and Legislative Assembly" (Acts 1855, 260–61). Thus the Mormons hoped to finally establish by statute their long-argued position that the common law, both criminal and civil, did not apply in Utah and that the judiciary could not apply common-law precepts. In so doing, they arguably overrode the provision of the Organic Act, by which Congress created Utah Territory, providing that the Supreme Court and district courts of the territory "shall posses[s] chancery as well as common law jurisdiction" (*Statutes* 9:453). The First Presidency urged the Saints to carry on all of their activities "without any contaminating influence of Gentile Amalgamation, laws and traditions," and argued that the only laws applicable in the territory were the laws of the United States, which did not prohibit the practice of plural marriage, and the laws enacted by the territorial legislature — not the common law or laws enacted in any of the thirty-one states. They also stated that "law is, or should be neither more nor less than rule of action founded in justice for the proper regulation of the human family in their social intercourse, and written with the utmost plainness." They contrasted this "law" with the common law, which was characterized as a "labyrinth of abominations" which "should be struck out of existence" (*Deseret News*, 21 Sept. 1854, 4).

Given this type of rhetoric and the legislature's stance, it was obvious that the Mormon hierarchy would resist all attempts by gentile judges to use common law. Thus, Mormons were furious when a new chief justice, John Fitch Kinney, held in February 1855 that the legislature had violated the Organic Act when it forbade the use of the common law (Brooks 2:550).[3] In so doing, Kinney was simply demonstrating that he could recognize a legal contradiction when he saw one, but there is no reason to suppose that he had malicious motives. On the contrary, Kinney had enjoyed good relations with the Mor-

[3] When the supreme court convened in Salt Lake City on January 1855, it was its first regular session, even though the territory had been organized for more than four years. Previously, the court's high rate of turnover had prevented its meeting. Although the Organic Act provided for annual court sessions, the judges evidently had only met once in September 1851 when Justices Brocchus and Brandenberry upheld the territorial secretary's refusal to deliver records and funds to the legislature. After their departure, a full bench did not return to Utah until June 1853, and the court did not meet in 1852 or 1853 (although the legislature provided for Justices Shaver and Snow to hold district court together (Acts, 1853, 92). Even after the arrival of Chief Justice Reed and Justice Shaver, the supreme court was not convened in 1854, perhaps due to a lack of court business (see Brooks 2:531). In January and February 1855, after Reed and Snow were replaced by Kinney and Stiles, the court met for two weeks and adopted rules, admitted lawyers to practice (including Hosea Stout and Orson Pratt [Brooks 2:550]), heard three cases on appeal (Brooks 2:551), and held that the common law was in force in the territory.

mons as a lawyer in Lee County, Iowa, and later as an Iowa Supreme Court Justice. He attempted to build on this relationship after his arrival in Utah (Homer 1986–87). In December 1854, he had been among federal appointees who had petitioned President Pierce to reappoint Brigham Young as governor (JH, 30 Dec. 1854). The following month, Kinney congratulated the territorial legislature for its desire to rule by love rather than law and its "wise policy of few and simple laws" (*Millennial Star* 17 [19 May 1855]: 307). The legislature had reciprocated by assigning him to the Salt Lake judicial district in January 1855, following the expiration of Judge Shaver's term (Acts 1855, 398).

Aware that Kinney's decision had implications for Mormon sovereignty and perhaps even the doctrine of plural marriage, Brigham Young argued in a speech at the Tabernacle that Congress had given the legislature the "privilege of excluding the common law at pleasure" (Bullock, 18 Feb. 1855). A few weeks later at an afternoon council meeting he stated that Kinney had no legal basis for deciding that the common law was the law of the territory and would have "to take that back" (Bullock, 11 March 1855). Heber C. Kimball was even more strident when he said that the only reason the federal judges wanted to apply the common law in the territory was because "they want all hell here" (Bullock, 25 Feb. 1855).

Kinney claimed in a letter to United States Attorney General Caleb Cushing that his decision had "brought back all the Vengeance of Brigham Young and his deluded followers" only because "the avowed doctrine of the 'great apostle' is that the authority of the priesthood is and shall be the law of the land" (Records, Kinney to Cushing, 1 March 1855). It is clear that the disagreement over the proper application of the common law was part of the already escalating power struggle between the three branches of government.

Shortly before Kinney's decision, President Franklin Pierce told the Mormons he intended to replace Governor Young with Colonel Edward J. Steptoe, who had arrived in Utah in the fall of 1854 with 175 troops under his command. When Steptoe declined the appointment, the Mormons suspected that Kinney coveted the position.[4]

A number of decisions subsequent to Kinney's reinforced the legitimacy of the common law in the territory. In November 1855, W. W. Drummond, who was Judge Shaver's replacement and had arrived in Utah in the summer of 1855, decided that the legislature's expanded jurisdiction for the probate

[4] On 1 April 1855, Kinney wrote to Cushing that he supported Steptoe but that if Steptoe declined "and the President is of the opinion that I can be useful in that capacity, I will accept if appointed" (Records, under date). Thus, when Kinney informed Young in May that he intended to travel to Washington to attend to official duties, Young reported the rumor to Amasa Lyman and Charles C. Rich that Kinney would "try if possible to obtain the Governorship" (Letterbook 2:181). Heber C. Kimball was blunter in a letter to his son William. He wrote, "As Colonel Steptoe would not accept of the governorship, he [Kinney] is going for it. He has not told us so, but we smell rum. He, Kinney, is a damned hypocrite and a damned rascal, all he brought with him" (JH, 29 May 1855). Hosea Stout also speculated that Kinney's "business evidently is to try to have Governor Young removed and Judge appointed in his place" (Brooks 2:556). Kinney was not appointed governor but neither was anyone else. Young continued in that position by default.

courts was illegal (Brooks 2:565). That same month Kinney ruled that district courts could inquire into whether there were violations of territorial criminal law (*People v. Green*, 1 Utah 11, 1856). In January 1856, Drummond wrote an opinion for the Supreme Court which held that federal grand juries had to be constituted as required under the common law and that "no act of the Utah Legislature can take away that law or that power. It is fixed by the Organic Law of the territory and is as binding . . . as the constitution of any of the States of this Union" (*People v. Green*, 1 Utah 11, 1856).

A test of probate court authority occurred in January 1856 when Drummond was placed under house arrest by order of a probate judge and released by Kinney's order (Brooks 2:583–84; Woodruff 4:383). Within a few weeks, the legislature removed Kinney from the Salt Lake judicial district and assigned him to remote Carson Valley, later part of Nevada (Brooks 2:589). Young simultaneously reasserted the appropriateness of legislation to control the Supreme Court, reminded the judges that they were appointed not "as kings or monarchs but as servants of the people" and claimed to know "the meaning the marrow and the pith of the laws and the very principle upon which they are built much better than the Judges do," while judges who said "our laws are not right & we should not be governed by them" were like foxes sent to guard the chicken coop (Woodruff 4:392–93).

Kinney complained to the attorney general that this new assignment was "an insult to me and my family personally" — retaliation for his decision that the common law was applicable in the territory (Records, Kinney to Black, n.d.). Both Kinney and Drummond left the territory in April and May 1856 complaining to the president that Mormons refused to submit to civil authority. These complaints helped convince President James Buchanan to replace Young and send an army to Utah in the fall of 1857. (Kinney had not published his complaints and, in 1860, was welcomed back to Utah as chief justice [*Deseret News*, 28 Nov. 1860, p. 305]).

The climate in Utah remained hostile. In December 1856, unidentified individuals broke into the library of George P. Stiles, the only judge remaining on the federal bench, and dumped his law books into a privy (Brooks 2:611, 613–14).

In April of the following year Stiles left the territory, leaving the federal bench vacant. On 21 June 1857, Brigham Young reaffirmed the right of the Mormons to "govern their own institutions" (Woodruff 5:60–61). In July, when the Mormons learned that Buchanan's army was en route to install new judges and a new governor, Brigham Young denounced the Organic Act as unconstitutional because "officers are . . . forced upon a free people, contrary to their known and expressed wishes," and contrary to "the principle that the governed shall enjoy the right to elect their own officers, and be guided by the laws of their own consent" (Tullidge 1877, 271–74). The legislature, in response, passed a resolution of resistance to attempts to undermine territorial laws "or to impose upon us those which are inapplicable, and of right not in force in this territory" (Tullidge 1877, 280).

Prior to the arrival of the new officials — Governor Alfred Cumming and Judges Delana R. Eccles, C. E. Sinclair and John Cradlebaugh — in June

1858, the Mormons had effectively neutralized the power of the judiciary because they controlled the legislature, had one position on the territorial Supreme Court, and the governorship. Johnston's army returned control of the executive and judicial branches to gentiles. Furthermore, the 2,500 non-Mormon soldiers provided the gentile officials with a consistency they had not enjoyed since the 1855 departure of Steptoe's soldiers. The *Valley Tan*, published at Camp Floyd as the first gentile newspaper in the territory, criticized the Mormon stranglehold on territorial politics and discussed the propriety of congressional intervention in the territories.

While the Utah Expedition was still at Camp Scott, during the winter of 1857–58, Judge Eccles formally convened a district court, empaneled a grand jury to indict Mormons for treason, and suggested, for the first time, that the jury could also return indictments against the Mormons for polygamy under the Mexican common law and standards of Christianity (Furniss 1960, 167; CHC 4:357–9; "Utah Expedition," 481–2). Eccles was unsuccessful in obtaining indictments. Soon thereafter, the army entered Salt Lake valley and President Buchanan issued a proclamation which pardoned the Mormons for treason.

In August 1858, two months after his arrival, Eccles asked Hosea Stout, perhaps in his capacity as a pro tem United States attorney, to investigate a rumor that a Mormon had been castrated for committing adultery. Such punishment would have been consistent with the Old Testament punishment and inconsistent with the common law (Brooks 2:663). Stout makes no mention of either initiating or completing such an investigation. Eccles also supported the publication of the *Valley Tan*, which featured, in its first issue, an argument for applying the common law to prosecute polygamy (reprinted from the *National Intelligencer*) which claimed that plural marriage could not "be legalized in the common domain, because [it was] repugnant to the common law of the States" (*Valley Tan*, 6 Nov. 1858, pp. 1–2).

Sinclair, taking his lead from Eccles and the *Valley Tan*, also attempted to challenge the legality of polygamy in his district court by relying on the common law. On 22 November 1858, Sinclair asked a grand jury to determine whether "polygamy does prevail in this Territory" and to report to him its finding. He termed the practice "an offence against the laws of every State and Territory in the Union, Utah only excepted" and that regardless of "whether the civil or the common law furnishes the basis upon which the status of this Territory have been erected" he could, as a judge, "call the attention of grand juries to, and direct the investigation of matters of general public import which, from the nature and observation in the entire community, justify such intervention," and on such occasions, the object of such inquiry was "the suppression of general and public evils . . ." (*Valley Tan*, 26 Nov. 1858, pp. 2–3; Brooks 2:668–69; Bancroft 1889, 539–40; Tullidge 1886, 226–27). Sinclair also expressed his intention to subpoena Brigham Young to appear on charges of treason and to testify concerning polygamy (Woodruff 5:240, 244–49).

Even the non-Mormon federal officials recognized the impropriety of Sinclair's attempt to undermine Mormon influence. The United States attorney

in Utah, a non-Mormon, told the grand jury that "Sinclair was entirely out of order in this charge to the Jury" (Woodruff 5:243–44) and that "they had to observe and respect the Presidents pardon as well as the proclamation of the Gov Cummings" (Brooks 2:670). The governor also criticized the judges and refused to sign a writ for the apprehension of Brigham Young for charges already pardoned by the president (Tullidge 1886, 228). Woodruff expressed the Mormon position: It was "a Historical fact that treason did exhist in this Territory," but "it is equally a Historical fact that all treason which existed in this Territory was pardoned by James Buchanan" (5:247).

Brigham Young's apparent ability to influence the legal system, even out of office, by virtue of his ecclesiastical authority and the territorial legislature's subsequent refusal to pay Sinclair's court expenses, fortified the judges' belief that the Mormons were trying to "throw obloquy upon the character of law courts and drive people into their ecclesiastical courts for the adjustment of all grievances" (*Valley Tan*, 24 Dec. 1858, p. 3). Sinclair accused the Mormon legislature of "tramiling the District Court for the purpose of preventing the punishment of crimes . . . and declared that he was now ready to do anything he could against both the church and people" (Brooks 2:688–89). Thus, when Judge Cradlebaugh held the first session of his court in Provo in March 1859, he arrived from Camp Floyd with a military escort and promptly empaneled a grand jury to file indictments against participants in the Mountain Meadows massacre (Bancroft 1889, 559). The Mormons complained that the soldiers were intended to intimidate the grand jurors. Cradlebaugh claimed they were necessary for his personal protection. The jurors refused to indict anyone, and Cradlebaugh bitterly attacked the Mormon probate courts and accused the territory's attorney general of usurping the authority of the U.S. Attorney (Brooks 2:689, 691–92; Woodruff 5:306, 312–13).

Later in March, Cradlebaugh arrested the mayor of Provo on the charge of murder and planned with the other judges how to arrest Brigham Young for treason and polygamy (Woodruff 5:311; Tullidge 1886, 228; Bancroft 1889, 573). He also threatened to arrest Cumming for refusing to authorize military escorts to court proceedings (Woodruff 5:311).

In May 1859 the U.S. attorney general rebuked Cradlebaugh and other judges for intimidating the Mormons with troops (Tullidge 1886, 228; Bancroft 1889, 573). Even more significant was Cumming's refusal to support their request to arrest or charge Brigham Young because of Buchanan's general amnesty. This fourth batch of justices was replaced after three years in office when Abraham Lincoln replaced Buchanan in 1861. By then, it was apparent that judicial attempts to apply common law and force compliance with "gentile standards" of morality had basically failed. It was still virtually impossible to convict Mormons for committing acts contrary to the common law. As long as Congress failed to prohibit polygamy and the Mormons remained the fact finders at trial, the balance of power in the territory remained in favor of the Mormons even though they had been excluded from two of the three branches of government and the judges had stripped the probate courts of criminal jurisdiction (Woodruff 5:345–46; Brooks 2:699).

The popular explanation for the well-documented rift between the Mormon hierarchy and gentile judiciary in Utah Territory during the 1850s is that the officials were unsavory, immoral, incompetent, and incapable of performing their judicial functions with dignity. This explanation ignores both the power struggle between the judges and the Mormon leadership over the right to govern the territory and the applicability of the common law, and the national debate on common law in the federal courts and the federal right to regulate domestic institutions in the territories. If, on occasion, it was easier for the Mormons to accuse the judges of promiscuity, drinking, and incompetence and for the judges to accuse the Mormons of treason and lechery, both parties recognized that their underlying quarrel was the deadly serious struggle over who should govern the territory and whether the Mormons could practice plural marriage.

Eventually, the contest would be decided in favor of the federal government. Congress specifically prohibited bigamy in 1862 and polygamy with other bills in the 1880s, enforcing the decrees with the courts and federal marshals and attacking directly the Church's political, financial, and social authority. Monuments in the battle over the common law strewed the battlefield. *Murphy v. Carter*, 1 Utah 17 in 1868, *In the Matter Catherine Wiseman*, the next year, and *Godebe v. Salt Lake City*, 1 Utah 68 in 1870 were a series of territorial Supreme Court decisions affirming the common law. In 1873, the court held, despite Mormon pronouncements to the contrary, that the common law had been "tacitly agreed upon" by the people of the territory (*First National Bank of Utah v. Kinner*, 1 Utah 100) and confirmed that it was "to be resorted to as furnishing . . . the measure of personal rights and the rule of judicial opinion" in 1875 (*Thomas v. Union Pacific Railroad Co.*, 1 Utah 232).

Only after Mormons were barred from juries in the 1870s and the federal government bestowed unprecedented powers on its officials in the 1880s did convictions come for plural marriage. After polygamy was abandoned, for all practical purposes, in 1890, the Mormons were finally granted their forty-year dream of self-government and statehood and the legislature agreed that the common law "shall be the rule of decision in all courts of this state." [5]

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[5] *Utah Code Ann.* Sect. 68–3–1 (1978). The common law has since remained the law of Utah, except for the common law of crimes, abolished by the Utah Legislature in 1973 (*Utah Code Ann.* Sect. 76–1–105, 1978).

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