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FOUR WIVES.

FEDERAL AUTHORITY VERSUS POLYGAMIC THEOCRACY

JAMES B. McKEAN AND THE MORMONS 1870-1875

by Thomas G. Alexander

During the late 1860's and early 1870's, Utah was no place for a Gentile. What one historian has called a "full-blown boycott" had developed against non-Mormon businesses by the end of 1868. The local and territorial government was, by any measure, a theocracy, and only because Utah was a territory did anyone other than representatives of the Mormon People's Party have any part in the government.[1] Nevertheless, Gentiles, especially miners, merchants, and lawyers, came to Utah; and, principally owing to the economic opportunities in the territory, many stayed to make permanent homes. Of those jurists who came to Zion, none has been more criticized than Chief Justice James B. McKean.

McKean was born in Bennington, Vermont, on August 5, 1821.[2] His father, a Methodist clergyman, took the family to Half Moon, Saratoga County, New York, where McKean attended elementary school and worked on the family farm. The young man attended Jonesville Academy, where he was later appointed to the faculty. At the age of twenty-five he left the teaching profession to read law. After his admission to the bar, he moved to Ballston Spa, then to Saratoga where he married Kate Hay. McKean rose in the ranks of the bar in Saratoga and in 1856 he was elected county judge. A leader in the local Republican organization after its formation, he was elected to Congress in 1858. He remained until November, 1861, when he resigned to accept a commission as Colonel in the Seventy-seventh New York Volunteers. He served for twenty months, distinguishing himself in the Peninsular Campaign, until typhoid

forced him to resign. For six years thereafter he remained in Saratoga; then in 1869 he moved to New York City where he formed a successful law partnership. In 1870, President Ulysses S. Grant, without McKean's solicitation, allegedly on the recommendation of Reverend John P. Newman of Washington, appointed the jurist to the post of Chief Justice of Utah. Grant wanted to enforce the federal laws, particularly the Morrill Anti-bigamy Act of 1862 which had heretofore been a dead letter.

INITIAL CONFLICT

Almost as soon as Judge McKean arrived in Salt Lake City, the seat of the Third District Court and traditional bailiwick of the chief justice, he found himself involved in a conflict between the federal government and territorial officials over the relative areas of their jurisdiction. Such issues as the jurisdiction of the territorial marshal and attorney, the extent of the power of the locally controlled probate courts, and the right of the governor to nominate territorial officials formed the crux of the Mormon-Gentile conflict.[8]

In the fall of 1870, shortly after he took the bench, McKean and his fellow judges ruled that the territorial courts were United States district courts. Consequently, from then until April, 1872, the United States marshal empaneled juries by open venire. In a decision which was possibly the biggest blot on McKean's career, the United States Supreme Court overruled him by decreeing that the courts were merely legislative courts of the territory created by federal statute and thus subject to territorial law. The case involved a

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[1] Leonard J. Arrington, *Great Basin Kingdom: An Economic History of the Latter-day Saints, 1830-1900* (Cambridge, 1958), p. 294; *The Latter-day Saints' Millennial Star,* XXVI (1876), 744-46 and *Journal of Discourses,* ed. George D. Watt (26 vols., Liverpool, 1854-86), VI, 342, both cited in Klaus J. Hansen, "The Theory and Practice of the Political Kingdom of God in Mormon History, 1829-1890" (Unpublished Master's Thesis, Brigham Young University, 1959), pp. 49 and 52; Shaffer to Cullom, April 27, 1870, cited in Nels Anderson, *Desert Saints: The Mormon Frontier in Utah* (Chicago, 1942), p. 266.

[2] The sketch of McKean's early life is based upon *Salt Lake Daily Tribune* (hereafter cited as *Tribune*), January 7, 1879; Orson F. Whitney, *History of Utah* (4 vols., Salt Lake City, 1892-1904), II, 541-43; and Robert J. Dwyer, *The Gentile Comes to Utah: A Study in Religious and Social Conflict* (1862-1890) (Washington, 1941), p. 74.

[3] For a discussion of the problems see Earl S. Pomeroy, *The Territories and the United States,* 1861-1890 (Philadelphia, 1947), pp. 56-57; B. H. Roberts, *A Comprehensive History of the Church of Jesus Christ of Latter-day Saints: Century One* (6 vols., Salt Lake City, 1930), V; Whitney, II; Clair T. Kilts, "A History of the Federal and Territorial Court Conflicts in Utah, 1851-1874" (Unpublished Master's Thesis, Brigham Young University, 1959); and Thomas G. Alexander, "The Utah Federal Courts and the Areas of Conflict, 1850-1896" (Unpublished Master's Thesis, Utah State University, 1961).

judgment of $59,063.25 against Alderman and Justice of the Peace Jeter Clinton for the abatement of a saloon in Salt Lake City which refused to pay a city liquor license tax that it considered exorbitant. The federal decision in *Clinton* v. *Englebrecht* provided the legal basis for throwing out 130 indictments found by grand juries drawn in accordance with the practice in United States courts rather than the territorial statutes. This solved nothing, however, because the disputes over the appointment of the territorial marshall tied the hands of the court; the courts became little more than boards of arbitration, and by June, 1874, a backlog of ninety-five cases had built up in Third District Court.[4]

McKean and other Gentiles believed that the Mormons were afraid to allow trials of their brethren accused of murder and other crimes before impartial juries. The judge wrote to U. S. Attorney General George H. Williams in the fall of 1873 complaining that he could neither convict the guilty nor protect the innocent and that Utah had become a "theocratic state, under the vice regency of Brigham Young." President Grant called for legislation in his December, 1873, message, and twenty-six members of the Salt Lake City bar petitioned Congress in March, 1874. It is clear that the majority of Congressmen agreed that new legislation was needed. The Poland Act, which passed in June, 1874, abolished the offices of territorial marshal and attorney, vested the power to draw jury rolls in the clerk of the district court and judge of the probate court, and eliminated civil and criminal jurisdiction from the probate courts.[5]

VARIOUS MINOR DIFFICULTIES

Though the Poland Act cleared up the major issue of the relative jurisdiction of federal courts, a number of minor issues of conflict between the Mormons and Gentiles had so muddied the waters of Utah federal-territorial relationships that they were not very clear for many years.

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[4] *Clinton* v. *Englebrecht*, 80 U. S. 434, 1872; Hawley to Williams, November 9, 1872, and McKean to Williams, November 12, 1873, "Department of Justice Selected Documents from the Appointment Clerk Files Relating to Utah Judges," Vol. I (Microcopy of documents in the National Archives, Washington, D. C., in the Utah State Archives, Salt Lake City, hereafter cited as Mf.1); *Tribune*, September 2 and October 5, 1870, October 5, 1871, April 25 and 26, 1872, April 3 and 7, October 22, 23, and 29, and December 10, 1873, and January 3 and 8, February 1, 6, 7, and 12, May 8, June 30, July 23 and 24, and December 19, 1874.

[5] Jacob S. Boreman, "Crusade Against Theocracy: the Reminiscences of Judge Jacob Smith Boreman of Utah, 1872-1877," ed. Leonard J. Arrington, reprinted from *The Huntington Library Quarterly*, XXIV (November, 1960), 30; *Tribune*, April 16, 1872, December 3, 1873, and March 8, 1874; McKean to Williams, November 12, 1873, Mf. 1; Whitney, II, 737; *Congressional Record*, 43rd Cong., 1st Sess., 4466-75; 18 *Statutes at Large*, 253.

One source of conflict between McKean and the Mormons was the judge's ruling on naturalization of aliens. On October 6, 1870, two Mormons applied for citizenship. McKean questioned them on their belief in plural marriage and asked whether they considered the Anti-bigamy Act of 1862 binding on them. One told the chief justice that he believed he should obey the laws of God rather than the laws of man. McKean denied their petitions on the ground that they were not of good moral character. The Mormons considered this an infringement of their religious liberty.[6] Some Gentiles took the position that it was McKean's right to assure himself of the good moral character of the applicants and their willingness to obey the law.

To McKean this was not a matter of religion:

> In this country a man may adopt any religion that he pleases, or reject all religion if he pleases. But no man must violate our laws and plead religion as an excuse; and no alien should be made a citizen who will not promise to obey the laws. Let natives and aliens distinctly understand that in this country, license is not liberty, and crime is not religion.[7]

Mormon historians have since alleged that McKean meant to imply in this and subsequent decisions that "No Mormon need apply" for naturalization. He did, however, naturalize former polygamists and practicing Mormons who promised to obey the law.[8]

Another area of contention was the political control which the Mormons exercised over the counties of Utah. By the August, 1874, elections the Gentile population of the mining districts of Tooele County had grown sufficiently that non-Mormons were ready to challenge Mormon supremacy. On the face of the returns, the Gentiles won by an average of 200 votes in 2,200 cast. The county clerk, a Mormon, certified the results of the territorial secretary, and Governor Woods issued commissions to the Gentiles. After considerable legal battling over control of the records, the Gentiles retained the offices.[9]

The Mormons claimed that great numbers of Gentile votes were fraudulent. The *Tribune* challenged them to prove the allegations in court. A number of Mormon aliens who had voted on first papers

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[6] Whitney, II, 558; *Deseret News* (Salt Lake City weekly hereafter cited as DN), October 19 and 26, 1870.

[7] *Tribune,* October 15, 1870.

[8] Roberts, V, 388; *Tribune,* July 11, 1871, October 24, 1872, December 18 and 24, 1873, September 10, August 2, 17, and 18, October 8, and November 21, 1874.

[9] Whitney, II, 749-751; *Tribune,* August 23, 25, and 29, September 4, 9, 12, 13, and 15, 1874; *Brown v. Atkin,* 1 Hagan (Utah), 267, 1874.

or on naturalizations performed by probate courts and a Tooele election judge were convicted and given token fines. The county court tally showed that both Gentiles and Mormons had voted illegally, but apparently no Gentiles were convicted despite the fact that both Mormons and Gentiles then sat on both the grand and petit juries.[10]

THE COURT AND POLYGAMY

If political controversy was important in Utah, social conflict was equally significant and a major issue was the practice of polygamy. Though the Anti-bigamy Act of 1862 had made the practice illegal, U. S. Attorneys were generally unwilling to bring such cases to trial. They feared they could not obtain convictions because, as one argued, "It was necessary to prove both the first and plural marriages." It was virtually impossible to prove the latter because the territory had no legislation on marriage and they were secret ceremonies performed in the Endowment House.[11]

In October, 1871, under McKean's rulings, Mormons who said that they did not believe a man who lived with more than one wife guilty of adultery were excluded from a grand jury empaneled on open venire. The jury found indictments under territorial statutes against Church leaders Brigham Young, George Q. Cannon, and Daniel H. Wells, and also apostate Henry W. Lawrence, for lewd and lascivious cohabitation and adultery.[12]

The Mormons decried Lawrence's arrest as a blind designed for effect. It seems probable, however, that McKean and the other officials simply wanted to show that their actions did not involve the religion of the Latter-day Saints but were designed to secure obedience to the laws of the land.[13]

After admitting Brigham Young to $5,000 bail, McKean denied a motion to quash the indictment with these words:

> The supreme court of California has well said: "Courts are bound to take notice of the political and social conditions of the country which they judicially rule." It is therefore proper to say, that while

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[10] *Tribune,* September 2, November 10, 11, 14, 19, and 24, and December 8 and 24, 1874; Whitney does not mention Mormons who voted on first papers. Whitney, II, 753; Territory of Utah, *Journals of the Legislative Assembly of the Territory of Utah,* 1876, p. 104. It is possible that the oath was laxly administered by Mormon officials because the counties had begun the practice of either rebating taxes or not assessing them against citizens who were impoverished in the depressed conditions of 1874. *Tribune,* February 7 and August 11, 1874.

[11] R. N. Baskin, *Reminiscences of Early Utah* (Salt Lake City, 1914) p. 38; Boreman, p. 18; *Legislative Journal,* 1872, p. 33.

[12] Whitney, II, 592; *Tribune,* September 19 and 23, and October 9, 1871.

[13] *Tribune,* October 9, 1871.

> the case at bar is called, *"The People versus Brigham Young,"* its other and real title is, *"Federal Authority versus Polygamic Theocracy."* The Government of the United States founded upon a written constitution, finds within its jurisidiction another government claiming to come from God — *imperium in imperio* — whose policy and practices are, in grave particulars, at variance with its own. The one government arrests the other, in the person of its chief, and arraigns it at this bar. A system is on trial in the person of Brigham Young. Let all concerned keep this fact steadily in view; and let that government rule without a rival which shall prove to be in the right. If the learned counsel for the defendant will adduce authorities or principles from the whole range of jurisprudence, or from mental, moral or social science, proving that the polygamous practices charged in the indictment are not crimes, this court will at once quash the indictment and charge the grand jury to find no more of the kind.

The Phophet's lawyer, Thomas Fitch, filed a bill of exceptions to the statement.[14] It has been argued by Orma Linford that the use of these territorial laws was unwarranted because "the Mormons had not intended the adultery and lewd and lascivious cohabitation laws to apply to ther plural marriage system." One must, however, take the intent of Congress in passing the Morrill Act into consideration. It repealed any laws which were designed to establish, support, or maintain polygamy. If the local laws had been intended to countenance plural marriage then those features of the law were repealed. If they were not so intended or bore no relation to plural marriage, the Morrill Act made at least those contracted after its passage illegal, and those contracted before may have been illegal under the common law. If they were illegal, McKean's argument that "polygamous sexual intercourse is adultery" is valid. McKean refused even to agree with his colleagues that plural wives enjoyed the same immunity from testimony against their alleged husbands that legal wives did.[15]

A considerable portion of the Gentile as well as Mormon opinion was against McKean on this issue. Non-Mormons ranging from Patrick Edward Connor to the Walker Brothers deplored his action. U.S. Attorney George C. Bates could not understand why the Mormon leaders were indicted under local laws rather than the federal statute.[16] It is significant, however, that Bates secured no indictments under the federal statute either. The cases, of course, never came to

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[14] *Tribune*, October 10, 1871; Whitney, II, 592 and 599-602.

[15] Orma Linford, "The Mormons and the Law: The Polygamy Cases," *Utah Law Review*, IX (Winter, 1964), 331; 12 *Statutes at Large*, 501; *Tribune*, October 8, 1874; *Friel* v. *Wood*, 1 Hagan (Utah), 160, 1874

[16] Whitney, II, 603-605, 620, and 678.

trial because the Englebrecht decision overruled McKean's method of empaneling the grand jury.

Not until after the passage of the Poland Act were George Q. Cannon and George Reynolds indicted under the Morrill Act. Cannon did not come to trial at this time, and Reynolds was convicted only because the courts accepted the testimony of his plural wife that the marriage had taken place. Not until after the definition of unlawful cohabitation in the Edmunds Act could the government successfully prosecute polygamists.[17]

THE COURT AND BRIGHAM YOUNG

Several civil cases involving Brigham Young came before McKean's court, but undoubtedly the most celebrated was the attempt of Ann Eliza Webb Dee Young, the Prophet's twenty-seventh wife, to sue for divorce. The facts of the case are well known and need not be reiterated here. Judge Emerson at first referred the case to the probate courts. After the passage of the Poland Act, it was again returned to the Third District Court where McKean heard it. Brigham Young filed a counter petition stating that, though it was unknown to him previously, Ann Eliza was not divorced at the time of the marriage, which was at any rate a "plural or celestial marriage" and thus not legal. The defendant was, in addition, legally married to Mary Ann Angell.[18]

McKean placed the burden of proof on Young and ordered him to pay $500 per month alimony pending the outcome. He rightly pointed out that no matter what sort of marriage his union with Ann Eliza had been, it was a legal marriage, provided both parties were competent to marry, because Utah had no laws governing marriage. In Utah, it was incumbent upon Young to prove, either that Ann Eliza was not divorced from James L. Dee at the time of the plural marriage, or that he was legally married to Mary Ann Angell. If he could do so, McKean said that he would sustain Young's position.[19]

This ruling, of course, placed Brigham Young on the horns of a dilemma. It would be impossible to prove that Dee and Ann Eliza were not legally divorced because the Poland Act had legalized all action of probate courts where their divorce had taken place. On the other hand, if he were actually to prove he was legally married

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[17] *Tribune,* October 16 and 27 and November 13, 1874, February 26, 1875, and January 7, 1879; Baskin, pp. 61-68.

[18] Whitney, II, 757-58; *Tribune,* July 31, and August 1 and 29, 1873, and July 25 and August 26, 1874.

[19] *Tribune,* February 26, 1875.

to Mary Ann Angell, he would be bringing evidence which might have led to his conviction under the Morrill Act because of his prior admission under oath that he had also married Ann Eliza. Young chose simply to appeal to the territorial supreme court. He failed, however, to follow the proper procedure and on March 11, 1875, McKean sentenced the Prophet to a fine of $25 and one day imprisonment for contempt of court. Later, the divorce suit was thrown out after the intervention of the United States Attorney General on the ground that Ann Eliza could not have been Brigham Young's legal wife.[20]

In addition to demonstrating McKean's poor judgment in some matters, the Ann Eliza case served to show that the Mormons never bothered to define any legal status for plural wives. The only sanctions which the Church imposed were moral and religious, and anyone who chose to disregard them could do so with legal, and sometimes even religious, impunity. Brigham Young argued that the marriage could have no validity at law — that it was only an ecclesiastical affair. Yet on other occasions, Mormons argued that plural wives should have the same rights as did legal wives and they complained at the prosecution for adultery with plural wives. On occasion, as when George Q. Cannon was indicted for polygamy, they took the position that each polygamous wife was also a legal wife.[21]

In at least two cases which came before McKean's court, the husband had failed to follow the religious form before entering into plural marriage. The revelation to Joseph Smith required husbands to secure permission of their first wife before taking a second one, but this was not always done. Harriet Hawkins, wife of Thomas Hawkins of Lehi, came to Robert N. Baskin complaining that her husband had taken a second wife and later a third without her consent and had slept with the new wife in the same room as she did with only a flimsy drape hanging between the couple and her. Hawkins was convicted, but his conviction was overruled by the Englebrecht decision because the jury had been improperly empaneled. In a similar case, Catherine Reese sued for divorce from her husband John Reese, the Carson Valley pioneer, who had taken plural wives without her consent.[22]

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[20] Whitney, II, 761; *Tribune,* March 12, 1875; Boreman to Carey, November 10, 1875, Mf. 1; Boreman, p. 44n.

[21] *Friel v. Wood,* 1 Hogan (Utah), 160, 1874; Tribune, August 8, 1873, and August 28 and October 23, 1874.

[22] Doctrine and Covenants 132:61; Baskin, pp. 39-46; Whitney, II, 611 ff.; *Tribune,* August 8, 10, and 21, and October 20, 23, and 26, 1871, September 15, 1874, and February 28, 1875.

If McKean demonstrated poor judgment in the Ann Eliza case, he showed equally faulty discrimination in accepting the word of Bill Hickman, a confessed murderer, that Brigham Young, Daniel H. Wells, and Hosea Stout were implicated in the murder of Richard Yates and several others, which took place during the Utah War. McKean said that evidence other than Hickman's testimony was available, but the prosecuting attorney showed none. Some ground for McKean's belief was apparently found in the doctrine of blood atonement which Church leaders preached at the time. The Englebrecht decision also made it necessary to dismiss these cases together with cases against several members of the Salt Lake City police force for the murder of Dr. J. King Robinson in October, 1866.[23]

In the latter instance, two alleged eye witnesses, Charles W. Baker and Thomas Butterwood, presented testimony which Baker allegedly swore he had been paid to give. In a letter to the *Tribune* in April, 1874, Butterwood denied that he had perjured himself, but he said that one of the policemen had hired a lawyer named William Kirby to pay Baker to swear that he had lied. In addition, Butterwood apparently became the object of a vendetta by the police of Salt Lake City, where he was, according to court testimony, badgered with nuisance charges.[24]

THE COURT AND CITY GOVERNMENT

Many of the problems in which McKean became involved concerned the government of Salt Lake City. By 1873, Gentiles made up about one-quarter of the city's population. The Mormons looked upon them as interlopers, but many came with the idea of making homes and establishing businesses in the Mormon capitol. An 1874 study showed that Gentiles contributed $46,456.33 in taxes and license fees in a total city revenue of $110,000. The city was legally obliged to publish quarterly statements of receipts and disbursements, but it seemed to operate as a closed corporation; until 1874 very little was known about the uses of public funds. Gentiles charged that corruption existed and instituted unsuccessful proceedings to open the books.[25]

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[23] Baskin, p. 37; Whitney, II, 629-33, 638-41, 660-61, 663-64, 666-71, and 674; *Journal of Discourses*, IV (1857), 49-51, cited in Hansen, p. 147; McKean to Williams, November 12, 1873, Mf. 1.

[24] *Tribune*, January 18 and April 11, 1874; McKean to Williams, November 12, 1873, Mf. 1.

[25] *Tribune*, July 24, August 30, September 1, and October 27, 1871, March 8 and August 3, 1872, September 12, 1873, and January 15 and February 4, 1874, and February 10 and 26, April 2, 7, and 22, May 9, June 7, 10, 11, 16, and 30, July 1, 3, and 15, September 26, October 31, and November 26, 1874.

If a major problem of Mormon-Gentile relationships involved the use of money by the city, subordinate questions included the methods used to obtain the money and the regulation of business. An ordinance which caused considerable inconvenience to merchants was the requirement that all grocers and meat markets do business in a block in the center of the city of 20,000 people. McKean ruled that the ordinance was an unreasonable restraint on legitimate business and an inconvenience to the inhabitants of the city.[26]

The most serious conflicts came over the amounts charged to establishments for liquor licenses. In Salt Lake City in 1871, a retail license cost $750 per month, whereas, at the same time, Chicago dealers paid $56 per year. The territorial supreme court overruled an attempt to force William S. Godbe's drugstore to purchase a liquor license because he sold spirits on prescription for medicinal purposes.[27]

The Mormons averred that the issue was one of morality and that the Gentiles had brought the liquor problem with them to Utah. It was difficult, however, for the Gentiles to accept the Mormons' sincerity in the issue because the City of Salt Lake was in the liquor business and in effect used the Gentiles' license fees to furnish capital to compete with them. After several complaints, in July, 1872, Judge McKean restrained the city from arresting any liquor dealers until the courts could settle the issue.[28]

After some legal dealings, the city reduced the license fees to $1,200 per year for retail and $600 for wholesale. The *Tribune* commented favorably on the rates, but raised some question as to the principle of prohibiting sale between the hours of 10 p.m. and 6 a.m. This license fee was not entirely satisfactory to all dealers, but McKean sustained the right of the city to set it even though he was "not aware that any other city in the United States demands so much as $1,000 for a liquor license."[29]

Other issues between Mormons and Gentiles which McKean was called upon to adjudicate involved billiard playing and gambling. Police Judge Jeter Clinton fined C. W. Kitchen, proprietor of the Clift House Hotel, $100 for refusing to pay a license tax of $1,400 per year levied on all billiard tables. The tax was nearly twenty times that of New York City, and Kitchen charged no money for playing and

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[26] *DN*, October 19, 1870, *Tribune*, March 4, 1871, and November 10, August 8, and November 14, 1872.

[27] *Godbe* v. *Salt Lake City*, 1 Hagan (Utah), 68, 1871; *Tribune*, April 21 and October 27, 1871.

[28] *Tribune*, May 3 and 4, July 10 and 30, and August 10, 12, and 17, 1872.

[29] *Tribune*, March 7, 8, 10, 12, and 13, 1873, and March 19, June 6, 7, 9, 10, 13, and 18, July 9, 10, 12, 1873, and April 8, 1874.

allowed no gambling. During the trial, City Attorney E. D. Hoge placed a pool player named Wilkins on the stand in an apparent attempt to show that gambling was involved in the game. Hoge asked the man what he did after the game was over, but Wilkins refused to answer. Hoge badgered him for some time, but Wilkins still refused to reveal what he had done. Finally, with some reluctance, Wilkins announced to the Court that after the game he had simply gone to the lavatory.[30]

In this case, gambling was not involved, and McKean ruled that though the city had an undoubted right to license gambling, it had no right to restrict innocent amusement. If billiards, played as they were at the Clift House, were to be licensed, the city would have the same right to license children's baseball games. In cases where actual gambling was involved, however, McKean and his fellow judges sustained the right of the city to pass and enforce fines against gamblers.[31]

Another issue which came before McKean was the problem of conduct of soldiers in Salt Lake City. The cases involved the apparent breaking of local ordinances by soldiers on the one hand and the alleged abuse of the soldiers by city policemen on the other. Eventually, after a severe altercation, the Secretary of War intervened and the territorial supreme court ruled that soldiers might be removed from the jurisdiction of the city in cases involving purely local police ordinances.[32]

As the conflict evolved, a considerable degree of violence took place between Mormons and Gentiles in which McKean or his court was directly involved. In October, 1870, one Major Offley attempted to kill E. L. Sloan, editor of the *Herald*. McKean's court convicted Offley of assault with intent to kill, but because of Sloan's appeal for leniency, Offley was fined only $100. A body of what McKean thought were either Danites or members of the Nauvoo Legion tried to intimidate the judge in court. In October, 1874, a group of armed men knocked Marshal George R. Maxwell down and hurt him while he was trying to serve a writ on Brigham Young to secure his testimony before a grand jury.[33]

McKean worked under what appear to have been extremely adverse conditions. When he first came to Utah, he held court in a hay loft over a livery stable called Faust's Hall. Under such conditions,

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[30] *Tribune*, September 11 and 16, 1873.

[31] *Tribune*, September 18, 1873; *Ex Parte Douglas*, 1 Hagan (Utah), 108, 1873.

[32] Whitney, II, 719-21; *Tribune*, January 28, February 4, 7, 15, 17, and 26, May 10, June 12 and 17, 1874; *Ex Parte Bright*, 1 Hagan (Utah), 145, 1874.

[33] Whitney, II, 519-20; McKean to Williams, November 12, 1873, Mf. 1; *Tribune*, October 13, 1874.

mules "occasionally interrupted the judge with a bray of delight." In July, 1872, he moved to the Liberal Institute. But it was too small, and in March, 1873, after a sojourn in the suburbs near the Jordan River, he moved to the Salt Lake City Hall. The city government, however, evicted the court after John D. T. McAllister could no longer serve as Territorial Marshal. In 1874 the court moved to commodious rooms in the Clift House.[84]

REMOVAL FROM THE BENCH

McKean became a prominent figure in Utah Territory. Colonel Henry A. Morrow, commander of Fort Douglas, named his infant son after the judge. He was a founding father of the Utah chapter of the Grand Army of the Republic and supporter of the efforts of the Salt Lake City Library Association to provide a public library for the city. Unlike some who came to Utah, McKean planned to stay permanently, and in October, 1874, he purchased a lot in Salt Lake City to build a house. After his removal from the bench in March, 1875, he was admitted to the bar where he practiced until several months before his death of typhoid fever in Salt Lake City on January 5, 1879, the day before the United States Supreme Court handed down the Reynolds decision.[85]

It has been alleged that the legal fraternity did not respect McKean's judicial talent. In an attempt to secure McKean's reappointment, however, thirty-five of the most prominent members of the legal community of Salt Lake City, including J. G. Sutherland, one of the Church's attorneys, petitioned President Grant. McKean was, in fact, the first judge to be reappointed to a second term on the Utah bench.[86]

Why, then, was McKean removed less than a year after his reappointment? His removal can best be ascribed to a quirk of fate and possibly to his lack of judgment. He had the poor fortune to censure George E. Whitney, a Salt Lake City lawyer who happened also to be brother-in-law of both United States Supreme Court Justice Stephen J. Field and Senator Timothy O. Howe of Wisconsin, both of whom were friends of President Grant. In addition, the Ann Eliza case and the imprisonment of the aged Brigham Young for contempt of court, which many considered ill-advised, may have had something to do with the removal.[87]

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[84] Whitney, II, 622; *Tribune,* July 13, 1872, and March 14 and 20, June 3 and 5, and August 11, 1874; Journal History of the Church of Jesus Christ of Latter-day Saints, Church Historian's Office, Salt Lake City (hereafter cited as J. H.), June 3, 1874.

[85] *Tribune,* April 20 and September 9, 1872, July 8, 1871, December 21, 1873, October 16, 1874, March 25, 1875, and January 7, 1879.

[86] Whitney, II, 646; *Tribune,* May 16 and June 4, 1874; Pomeroy, pp. 117-18.

[87] *Tribune,* March 17, 19, and 20, 1875; Whitney, II, 761.

It seems probable, however, that the trouble with Whitney, rather than the difficulty with the Mormons, was the central reason for his dismissal. He had been reappointed in June, 1874, at a time immediately before the passage of the Poland Act. At that time the storm over his relationship with the Mormons raged at a much higher pitch than in March, 1875, when the only major unresolved conflict was the prosecution of George Rynolds, which President Grant supported, and the Ann Eliza case, which had not yet gone to trial.

Charges have been made that McKean overruled the Englebrecht decision with his interference in territorial and municipal affairs. The charge is without foundation. The ruling established the nature of his court, not territorial sovereignty. As the United State Supreme Court made clear,

> The government of the Territories of the United States belongs, primarily to Congress; and secondarily, to such agencies as Congress may establish for that purpose. During the term of their pupilage as Territories, they are mere dependencies of the United States. Their people do not constitute a sovereign power. All political authority exercised therein is derived from the General Government.[38]

More serious were the charges of judicial corruption lodged earlier by George Caesar Bates and the *Salt Lake Herald.* In June, 1873, Baskin placed Bates on the stand in a civil suit to testify concerning certain charges he had made in the pages of the *Herald* about the federal officials. Bates said that he had "no reference to him [Baskin] or any of the parties engaged in the proceedings before the court, nor to the United States attorney [William Carey], and certainly not to the court [Judge McKean]." Bates later reversed his position and said that he would publish full details in the *Herald,* which he did.[39]

The charge which affected McKean personally involved mining litigation in his court in which he was allegedly interested. The *Herald* again dredged up the charge in October, 1874. McKean denied the charge the first time, but this time he called the grand jury together, told them to look into the charges and indict him if they were true. If they were not, the jury was invited to indict the proprietors of the *Herald.* In the interim, affidavits were published sustaining McKean's position, but the *Herald* cried out that McKean was infringing on freedom of the press. When the grand jury issued its report, it vindicated McKean but refused also to indict the editors because of the freedom issue.[40]

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[38] Whitney, II, 546-49; *Snow* v. *United States,* 84 U.S., 317, 1873.

[39] *Tribune,* June 20 and 23, July 21, August 3 and 30, September 9, 1873; *Herald,* July 20, 1873.

[40] *Tribune,* October 20, 27, 30, and 31, 1874.

After this charge had been cleared up, another allegation was made that McKean was writing anonymous or pseudonymous articles in his behalf. The *Herald* charged McKean with publishing an article sustaining his position on the indictments for lascivious cohabitation. McKean himself appeared before United States Commissioner Dennis J. Toohey with evidence to refute the allegation, producing J. H. Beadle, the actual writer, but he withdrew the complaint which might have led to a slander indictment against the *Herald*.[41]

It has been charged that McKean gained control of the *Tribune* and either published articles himself or gave exclusive advance stories about pending court decisions. The charge that he wrote some editorials was probably true during a time in the fall of 1871. One can search the *Tribune* between the time of McKean's appointment and his removal in vain for evidence that decisions were known in advance or that other articles sustaining McKean were necessarily written by him.[42] The fact is that competent lawyers, including Robert N. Baskin, who was later to become Chief Justice of the Utah State Supreme Court, believed that McKean's views were legally sound.

Attacks also came from Bates, on McKean's appointment of Baskin as *ad interim* United States attorney after Charles H. Hempstead resigned. Federal statutes, despite a contrary assertion by Bates, who became Baskin's successor, authorized the judge to make such an appointment.[43]

JUDGMENT AND MOTIVATION

In retrospect it must be admitted that McKean used extremely poor judgment in some matters. Foremost among these was the indictment of Brigham Young and other prominent Church leaders for murder on the word of a man with the admitted background of Bill Hickman. Secondly, given the political climate, McKean's judgment that the jury composed of Gentiles would be fair and impartial in its treatment of these men is questionable. In the imprisonment of

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[41] *Tribune*, November 13, 1874.

[42] Anderson, p. 288. Tullidge says that Oscar G. Sawyer permitted McKean to write editorials for the paper sustaining his decisions and that McKean gave him advance information on the indictment of Brigham Young for lewd and lascivious cohabitation. Sawyer was shortly dismissed because he took a rabid anti-Mormon position whereas the Godbeites who owned the paper wanted to be moderate. There is no concrete evidence, however, that McKean gave any advance information. The *New York Herald* of Sunday, October 1, 1871, contained a telegraphic dispatch saying that Brigham Young had been indicted and that the Mormons were arming. The dispatch did not say for what offense, and both the *Salt Lake Herald* and the *Deseret Evening News* had already printed articles and continued to print them saying that both rumors had been current for some time. Surely no one would allege that McKean gave advance information to them also. *DEN*, September 28, 1871; *Herald*, September 29, October 1 and 3, 1871; Edward Tullidge, *History of Salt Lake City* (Salt Lake City, 1885), pp. 528-29 and 588-90.

[43] Whitney, II, 567; 12 *Statutes at Large*, 768; Baskin, p. 38.

Brigham Young, the error was not that the Prophet was not guilty — he was technically guilty — but that McKean, together with so many other Gentiles in the territory, misjudged the feelings of the people of Utah. Many of them believed, quite erroneously, that the Mormons would gladly throw off the leadership of Church officials if given the chance.

On the other hand, in as far as the legality of McKean's actions is concerned, even though the Supreme Court overruled him in the Englebrecht and Snow cases, he had ample precedent for the positions which he took.[44] The idea that they had no basis because the federal supreme court overruled them is obviously wrong in view of the controversy among recognized lawyers over recent court decisions. In his ruling on the jurisdiction of probate courts the Supreme Court sustained him. His position that polygamous cohabitation was also adultery was sustained by other lawyers and by the fact that polygamous marriage was illegal. His rulings on the laws of Salt Lake City were based on the legal right of courts to inquire into the reasonability of local ordinances and are filled with citations of precedent to support the position.

The most thorny question in McKean's judgeship deals with his motivation. Orson F. Whitney and other historians have claimed that McKean and other federal officials made up a "Ring," which came to Utah for personal profit and for religious reasons to undermine local authority. The Mormons seemed to be unwilling to accept the view that McKean could have been motivated by any force except religion or personal gain. Mayor Wells said that to McKean " . . . there is but one crime in the world and that is polygamy. There is but one set of criminals and they are Mormons." In this, both Wells and Whitney, who cites Wells with approval, were apparently blinded by their close connection with the situation. The Gentiles affirmed that they were not asking the Mormons to give up their religion, unless by religion was meant polygamy and religious control of the secular life of the territory.[45]

Contrary to what Mayor Wells said, McKean made it clear to the grand jury in October, 1874, that they had a duty to investigate violations of all laws. He was convinced that "Utah is a Theocracy, a spurious Theocracy in the heart of the Republic!" There is no concrete evidence, however, that he conceived of his duty as even partly

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[44] See the brief filed in *Clinton* v. *Englebrecht,* 80 U.S., 434, 1872, and Baskin, pp. 33-35. For an opposing view see Whitney, II, 544-45.

[45] Whitney, II, 487-89, 546, 551-54, and 628; Anderson, p. 265; *Tribune,* September 10, 1870, November 19, 1873, February 5 and September 21, 1874; McKean to Williams, November 12, 1873, Mf. 1.

religious.[46] He saw his mission as essentially two fold: first, to halt crime and punish criminals, and second, to undermine the foundations of the theocracy which he viewed as a power in conflict with basic American principles and the paramount authority of the federal government in the territories.

The problem for McKean and the other judges was that the Mormons viewed both of these issues as religious. To them, polygamy, which he saw as a crime, was a God-given principle. The operation of government through the auspices of the Church was also, to them, in harmony with their religious beliefs. It has long been known that the Church officials considered themselves responsible for political and economic, as well as what others might consider religious affairs.[47]

By the mid-twentieth century, historians should recognize that the judges and other Gentiles and the Mormons misunderstood each other. McKean was not part of a sordid conspiracy to destroy the Mormon Church. Though balanced judgment failed him at times, he was primarily interested in sustaining federal authority in Utah Territory and punishing crimes. On the other hand, polygamy and adultery were not synonymous. The system of Church domination of politics and economics was not the personal despotism of Brigham Young. If anything, it was tyranny of the majority because members of the Church supported their leader. The main problem was the absence of any voluntary attempt on the part of the Mormons to take into consideration the needs of the Gentile minority.

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[46] *Tribune*, October 8, 1874. Tullidge says that: "In January, 1872, in the Ebbett House, in Washington, Judge McKean avowed his principles to Judge Louis Dent, brother-in-law of the President, in these precise words:

> "Judge Dent, the mission which God has called upon me to perform in Utah, is as much above the duties of other courts and judges as the heavens are above the earth, and whenever or wherever I may find the Local or Federal laws obstructing or interfering therewith, by God's blessing, I shall trample them under my feet." Edward W. Tullidge, *Life of Brigham Young; or, Utah and Her Founders* (New York, 1876), pp. 420-21. Tullidge does not say where he obtained the information. It contradicts the position which McKean took in his rulings in court and it seems probable that it was merely hearsay.

[47] On the problem of the political kingdom see Klaus J. Hansen, "The Kingdom of God in Mormon Thought and Practice, 1830-1896," (Unpublished Ph.D. Dissertation, Wayne State University, 1963).