THE EVENING NEWS.

GEORGE Q. CANNON, EDITOR AND PUBLISHER.

Monday, - - - October 30, 1871.

ARREST OF MAYOR WELLS.

On Saturday afternoon Hon. Daniel H. Wells, Mayor of this City, and Hosea Stout, Esq., were arrested by the United States Marshal, under an indictment found several weeks since by the Grand Jury, charging them with murder. The parties were taken to the Third District Court room, the Court being then in session, and by their counsel made application to be liberated on bail. As it was then late, about four or half past four o'clock, the Court said it would be impossible to entertain the question then. Counsel asked that a time be fixed for the hearing of the application, and 10 o'clock this morning was fixed for that purpose. The arrested parties were taken by the Marshal to Camp Douglas, and there held in confinement.

This morning there was a large attendance at the Court room, to hear the discussion on the above question, the accused parties being also present, having been brought from their military prison for that purpose. Major Hempstead and Hon. Thomas Fitch appeared on behalf of the defendants, the district attorney and his assistant on behalf of the people.

Before the arrival of the accused in the court room, the prosecuting attorney said "While conversing with Mr. Fitch, I understood that he is about taking steps for a writ of habeas corpus to admit the prisoner to bail. (To Mr. Fitch) Do I understand that you have the application in form?

Mr. F. No, not yet.

Prosecuting Attorney. That would present the legal question of whether or not this court has the right in cases of murder in the first degree to issue a writ, but if Mr Fitch is ready to argue that question we are ready to take it up. We take the position that this court has not the power to do so.

Mr. Fitch. We can proceed with that argument without the presence of the prisoners.

Prosecuting Attorney. The question is whether this Court has power on any showing, to admit to bail in this case.

Major Hempstead opened the discussion, and in a lengthy and able manner contended that, though the custom was to refuse bail in capital cases, yet the highest court in England—the Court of King's Bench, has held that it had that right, and in capital cases in this country the same rule was admissable and has been sometimes followed in the discretion of the courts, except in cases where the evidence of guilt was conclusive and the presumption strong. High common law authorities were cited, and statutory enactments quoted by Mr. Hempstead in favor of his position.

The prosecuting attorney and his assistant replied to the argument of the defendants' counsel, and seemed to depend chiefly on the Territorial statutes for its rebuttal.

Mr. Fitch was about to commence the closing argument in favor of granting the bail when the Court said:

"Without intending to have it regarded as a precedent in any other case, I will hold that I have power to issue a habeas corpus and bring these prisoners before me, and as they have come in, being brought here by an officer during the progress of the argument, I will regard them as being here on the return of a writ of habeas corpus. I will therefore say further, that although I was well aware, before this argument, that in Great Britain and in the United States a prisoner charged by indictment with a capital offence is almost never admitted to bail, still I was willing to be convinced that in this case it would be right to depart from the almost universal rule. Not only willing but anxious to be so convinced; nay, more, I have tried to convince myself by arguments in addition to those of counsel that it would be right and expedient to do so in this case.

"In the case of the people against Daniel H. Wells, his counsel properly say that the defendant is the Mayor of the city, and is at the head of the police force. Camp Douglas, the place where prisoners awaiting trial in this Court are usually detained, is some miles distant from the City Hall, and from the residence of the Mayor. In that camp it would be practically impossible for the Mayor to attend to any of the duties of his office, and therefore he could not be held responsible for the quietude and good order of the city. I will therefore admit him to bail. (Applause in the Court.) In the case of the people against Stout I will further consider the application and the arguments, and will reach and announce my conclusions hereafter."

Defendants' counsel asked the Court to fix the amount of the bail. The Court in reply said:

"The defendant Wells may give bail ——"

Ass. Pros. Att. "I think, if the Court please, we ought to be consulted as to the amount of bail."

Court. "I will hear what you have to say."

Ass. Pros. Att. "We ask that the bail be fixed at five hundred thousand dollars."

Court. "No, the defendant may give bail, with two sureties, of fifty thousand dollars, his counsel to draw up the bond and submit it to the Prosecuting attorney."

Pros. Att. "If it should turn out, may it please your honor, that your honor has not the authority to let this party to bail, it seems to me that the form of giving bail would be worthless, because it would not bind the prisoner, unless the Court has authority to grant it."

Court. "Well, as the prisoner asks it through his counsel, and is in Court when it is done, there will be other considerations if the binding nature of the bond is disputed. I have expressly said that my ruling in this case shall not be a precedent. I will allow no counsel to say to me that I am bound by it in any other case."

On Saturday, as the public is well aware, Chief Justice McKean sentenced Thomas Hawkins to pay a fine of five hundred dollars and be imprisoned at hard labor for three years. The defendant was charged with adultery, "with his own wives," on the complaint of his first wife," and convicted and sentenced on a malinterpretation of a Territorial statute, passed by a polygamous legislature, for a polygamous community, for the purpose of punishing carnal abuse. In our humble opinion, neither the verdict of the "law abiding jury" nor the sentence of the sorrowful Judge is justly entitled to one tittle of respectful regard from the public. Indeed, we are not sure that impeachment would not be in order, and it is presumable that ere long either that or something equivalent to it will occur with the happiest effect. Thomas doubtless felt very grateful for the distinguished consideration of the "law-abiding jury" and for the affecting ebullition of judicial sorrow and mercy, the $500 and the three years and the hard labor and the contingent recommendation of pardon included.

The sentence was an exceedingly curious one, and may yet be honored with a niche among the unique curiosities of American judicial literature. For us, we have always considered the Hawkins difficulty a mere family squabble, unworthy of the dignity of public notice, and but for the side issues forced from it and the adventitious importance with which it has been designedly invested for ulterior purposes of political intrigue, we should never have commented on the difficulty in these columns.

The judicial reasons for the infliction of both fine and imprisonment were stupendous in their ponderosity. The fine was needed to "run the machine," so the fine could not be dispensed with, for money not only makes the mare to go, but makes the courts to go also. It is an excellent thing to keep an eye upon the main chance, even in so grave a matter as passing sentence. Then sympathizing friends might club and pay the fine for Thomas, and he escape lightly, and that wouldn't satisfy judicial vindictiveness. Thomas so escaping, the hand of the Lord might have been acknowleged in the matter, and that would have displeased the sorrowful Judge, for how could he afford for the Almighty to have any hand or credit in anything judicial in Utah? So to prevent Thomas's friends from dividing his punishment amongst them, and the Lord from delivering him, Thomas must needs be both fined and imprisoned, a very neat bit of judicial diplomatic strategy, and quite worthy of the sorrowful Judge. Now, having ruled God out of the Hawkins' case, wouldn't the sorrowful Judge like to rule Him out of Court altogether, forbidding Him to raise any money to pay fines, forbidding Him to deliver prisoners by any sort of procedure, however innocent they might be, forbidding Him to work any kind of miracle in regard to court matters, forbidding Him to interpose the tip of his little finger to hinder in any way, shape, or manner, the operations of "the authorities of the United States," and in an especial degree of the Federal Judiciary in Utah? For had not "this community ought to begin to learn that God does not interpose to rescue criminals," and therefore that it is the height of presumption to suppose or remotely hope that He would think of rescuing anybody whom the sorrowful Judge might condemn? It must be remembered that God did not interpose to rescue Abel, nor John the Baptist, nor Jesus Christ, nor the martyr Stephen, nor the Jewish apostles, nor hundreds of the early Christians. Why, therefore, should He be expected to rescue any poor "Mormon" from the clutches of the sorrowful Judge? The Judge never could demean his ermine by extending a particle of aid or comfort to any person who could be so fanatical as to expect, believe, or hope that God did, might, should, would or could attempt to do any such ridiculous thing. In the cases where He did interpose and rescue the condemned, such as those of Daniel, the three Hebrew children, and many others, it was all a mistake on His part, and would have been promptly and effectually prevented by fine or imprisonment or both if the sorrowful Judge had been there. Because it was not according to "law," you know.

A short time ago the crusade was announced in a new shape—"Federal Authority *versus* Polygamic Theocracy," but, if "coming events cast their shadows before," it really seems as if the next announced shape of the non-descript movement will be—The Sorrowful Judge *versus* the Lord of Hosts.

THE CASE OF CLAYTON vs. CLAYTON.

A suit for divorce and alimony, entitled Clayton vs. Clayton, was instituted a few days since in the Third Judicial District Court in this city, the preliminary proceedings in which were commenced on the morning of Friday last. Messrs. Gilcrist and Handry appeared for the plaintiff, and Messrs. Hempstead and Kirkpatrick for the defendant. The complainant in the case was Emilie, wife of Mr. William Clayton, of this city, and as the parties are very old residents here, and well known, far more than ordinary interest is manifested in the proceedings.

In answer to the complaint, defendant's counsel entered a demurrer to the jurisdiction of the District Courts in this Territory in suits for divorce and alimony, claiming that by the act of the Territorial Legislature, original and exclusive jurisdiction was conferred upon the Probate Courts. The point was ably argued by Mr. Kirkpatrick last Friday; Mr. Gilcrist replying, taking the negative of the proposition, assumed by defendant's counsel, each of the gentlemen quoting largely from the highest authorities to support his position.

On Saturday afternoon, Major Hempstead closed the argument, and it has rarely been our good fortune to listen to a more masterly, lucid and logical exposition of law, and as the point at issue is one of vast importance to the people of this Territory, seeming to involve all the decisions of all the probate Courts in the Territory, from the time they were organized until now, in all cases of divorce and alimony, we append a brief outline of Mr. Hempstead's argument:

He read from and commented at length upon the decision in the case of Taylor vs. Taylor, June term of Supreme Court of Utah, 1870, and contended that the only point therein decided was the power of a court of equity, to decree a divorce on the ground of fraud in the making of the original marriage contract, for which there was some authority in the New York courts; but claimed that the opinion in other points, viz: as to the jurisdiction of the District Courts and the want of jurisdiction in the Probate Courts, was not binding in authority, as not being involved in the facts of the case then decided.

He then discussed the question of marriage and divorce, claiming that marriage is not merely a civil contract, but, as laid down by Bishop and other writers, was something more. It is a *status*, a *condition*. By reason of this latter the legislative or political power claimed and exercised a right to declare, determine and define the status of the citizens or subjects of the State, the right and the province to say by whom, under what circumstances and through what forms the contract should be entered upon and consummated, and equally for what causes, upon what terms and by what tribunals it might be dissolved. While two persons might enter into the contract of their own free will, it was a rule of universal acceptation, that they cannot, of their own volition, rescind the contract, or annul it, hence, differing from other actions in contract, a divorce cannot be decreed by default, and will not be by consent alone. The basis of which rule is that the State itself as well as the parties has an interest in the relation, or status, or condition of husband and wife. At an early day in our history, most of the legislatures, and at this day not a few, of them, grant divorces. And it has long been a question whether the dissolution of the marriage contract, be a strictly legislative or judicial function. The fact is, it may be either, but experience has proved that it is unwise and inexpedient for legislatures to grant divorces, and the better tribunal is the judicial arm of the government. So that generally at this day, the legislature defines the causes of divorce, and directs the particular tribunal named by it to determine the case. But the counsel claimed there was no authority holding that equity courts ever assumed jurisdiction over divorce matters for statutory causes, by reason of their chancery powers in the absence of direct legislative authority. That divorce never was a source of equity jurisdiction, either in England or America, and in some of the text-books it is laid down as a subject matter of equity jurisdiction. He quoted at length from Bishop on marriage and divorce on this point

He then traced the history of the Ecclesiastical Courts of England, and their jurisdiction over divorce matters, from the earliest times, quoting from Blackstone and other autuorities. From time immemorial down to the recent statute of Victoria, creating the divorce courts in Great Britain, the matter of divorce was one of the subjects of jurisdiction of ecclesiastical courts, neither the common law nor the equity courts ever assumed jurisdiction over the subject matter.

We find scattered through the text writers such expressions as that the ecclesiastical law of England was a part of the common law, but wherever such expressions occur they refer to "common law" not in its technical and usual sense, but as meaning the whole body of laws in force in England at the time of the migration of our ancestors, viz: the common law are statutory laws, equity law, admiralty and ecclesiastical.

Our ancestors when they came to America brought this great body of laws, but did not bring with them the tribunals to administer it. But from time to time by legislative act erected the proper tribunals to exercise these several jurisdictions as their circumstances required. First they created common law courts, then equity courts, then admiralty courts.

Our condition did not require or our institutions allow of ecclesiastical courts; but matters which were in England the subjects of the ecclesiastical jurisdiction have been from time to time committed to our tribunals. The subjects of jurisdiction of the ecclesiastical courts were three, viz: 1 *Pecuniary* relation to subtraction of tithes, non payment of church dues, fees etc., spoliation and dilapidation of church property. 2 Matrimonial causes, an undisturbed and unquestioned subject of jurisdiction in the ecclesiastical courts. And 3, Testamentory causes, to wit, matters of probate of wills, &c.

For the first of these subjects, of course, in America we never had any need of courts, as here there has never been any union of church and state. The second has been variously administered, sometimes by the legislature itself, and sometimes vested by it in the common law courts, and more frequently in the equity courts. For the Third, and here we find the only tribunals in this land, bearing any analogy to the ecclesiastical courts of Great Britain, we have our courts for the determination of testamentory affairs, the probate of wills, the administration of estates of decedents, etc., variously in the several States denominated surrogater courts, orphens courts, probate courts, etc. These several courts approach nearer to the jurisdiction of, and in analogy to, the ecclesiastical courts of England than any other, and take the place in one system occupied by the latter in Great Britain, and are seemingly the successors of the ecclesiastical courts, so far as they are applicable to our condition and constitutions. So that when the Utah Legislature, as it was competent to do, desired to fix the tribunal to take jurisdiction of divorce matters, it properly and almost necessarily vested that jurisdiction in the tribunals most nearly assimilating to the ecclesiastical courts, and which *ex vi termini* "Probate courts" had jurisdiction already of one branch of the ecclesiastical law, to wit, testamentary causes. A court too erected and named by Congress itself in the organic act. And yet it is claimed that the legislature has no power to confer this jurisdiction upon Probate Courts, but that the District Courts have exclusive jurisdiction because the Organic Act confers on them "chancery as well as common law jurisdiction." The whole history of English jurisprudence, text writers and reports, contradicts the suggestion and overthrows the argument. The legislature, the quasi political sovereignty of the Territory, whose power extends "to all rightful subjects of legislation consistent with the Constitution of the United States, and the provisions of the Organic Act," had the right to determine which of the courts created by Congress should exercise divorce jurisdiction, and correctly and logically if not wisely named the Probate Courts for that purpose.

The counsel also cited as conclusions of the propositions that this court as a court of equity being a court of the United States has thereby jurisdiction of divorce cause, the decision of the Supreme Court of the United States Barber vs. Barber 21 Howard 582, therein Justice Wayne says; "We disclaim altogether any jurisdiction in the courts of the United States upon the subject of divorce, or for the allowance of alimony, either at an original proceeding in chancery, or as an incident to divorce *a' vinculo* or to one from bed and board."

And read from the opinion in same case of Justice Daniell concurred in as it was by C. J. Chase and J. Campbell as follows—"From the above views it would seem to follow, inevitably, that as the jurisdiction of the chancery in England does not extend to or embrace the subjects of divorce and alimony, and as the jurisdiction of the courts of the United States in chancery is bounded by that of the chancery in England, all power or cognisance, with respect to those subjects, by the courts of the United States in *chancery* is equally excluded."

Major Hempstead then referred to the cases of Norman vs. Lee 2 Black 499, and Orchard vs. Hughes 1 Wallace 73, and the repeated decisions of this court thereunder that it is a U. S. court and in chancery derives all its powers from English chancery laws are the rules of the Supreme Court of the United States.

The decision of the Court was deferred until a future day.

[SPECIAL TO THE DESERET NEWS]

By Telegraph.

Per WESTERN UNION Telegraph Line

Afternoon Dispatches.

WASHINGTON.

WASHINGTON.—The President has issued a proclamation recommending Thursday, Nov. 30th, as a day of thanksgiving.

NEW YORK.

Various.

NEW YORK, 29.—Judge Ledwith, a member of the committee of Seventy, accepts the nomination from Tammany.

In view of the sailing of the Russian fleet from Madeira on the 9th of Oct., the arrival of the Grand Duke is not looked for till about the 9th of Nov.

Tweed Compromises.

NEW YORK, 30.—The *Times* states that Tweed has concluded to pay 420,000 dollars to Jackson and Dehultz, as the assignee of Keyser, for work and material furnished to Tweed's houses. Tweed's original defense was that Keyser agreed to do his work in consideration of receiving certain contracts. This action of Tweed will stop one suit against him.

KENTUCKY.

City Officials Arrested.

LEXINGTON, 29.—The mayor and many of the officials of this city have been arrested on indictments from the federal court, charged with felony, growing out of the disturbances at the August election. General indignation exists at what is considered a gross outrage. The matter is being investigated by the leading radicals of this place.

PENNSYLVANIA.

Small Pox.

PHILADELPHIA, 30.—The health report for last week shows eighty-five deaths from small-pox, being a slight increase. The number of cases is largely increasing, but the disease is still confined to the Twentieth Ward

ILLINOIS.

Shot Dead.

CHICAGO, 30.—Harry Williams, colored, was last evening shot dead by Charles Groger, also colored. The quarrel was about women.

PACIFIC COAST DISPATCHES

SAN FRANCISCO, 29.—The Republican county committee have given certificates of election to Lewis and Franklin, the old committee members from the First Ward, in spite of the protest, on the ground of fraud and illegality. The impression is very general that the old ring will be reconstructed.

LOS ANGELES.—Eight arrests were made to-day of men charged with taking part in the riots on Thursday night, one for stealing a diamond ring from a Chinaman after he was hanged. The coroner's jury have adjourned till Monday. The city police are implicated for neglect of duty. At a meeting of the common council last night, Osborne stated that he was informed that the policemen, including the marshal, conducted themselves disgracefully at the riot, that policemen offered bribes to men to induce them to join in the riot. A special committee has been appointed to investigate. It is proposed and warmly advocated to raise a military company for protection against like scenes.

STOCKTON, Cal.—The injuries received by Mayor Holden, of Stockton, at the railroad accident, are much more serious than was reported.

VIRGINIA CITY, Nev.—Jos. Langdon, foreman of the old Belcher mine, was at the 800 feet level when a large lump of clay fell from the side shaft, 400 feet, striking him upon the shoulder, and badly injuring him.

SAN FRANCISCO.—It is conceded that the election of Swift and Byington as president and vice-president of the new Republican county committee is a full defeat of the old ring and triumph of the position of the tax payers element.

E Hirtell, portrait painter, a German of 48, shot and killed himself at his lodgings in Tyson place, off Washington street, to-day. Cause, domestic trouble.

The San Francisco savings union has recovered judgment in $3,066 and costs, to-day against Geo. Dalton, collector of internal revenue, for tax paid under protest.

FOREIGN NEWS.

GREAT BRITAIN.

LONDON, 28.—The Mansion House fund for Chicago amounts to £42,250. Belfast subscription, £5,000. Liberal contributions have been received from other towns.

Gladstone, in a speech to-day, eulogized the Queen, complimented his colleagues, pointed with pride to the vitality of the Liberal party, declared that Ireland was now more contented and promised a reduction of troops in the colonies and other reforms.

SPAIN.

Wants Twenty Millions.

MADRID.—The cost of the war in Cuba during the past year was sixty-two milion dollars, and the colonial deficit was eleven millions. Government wanted a credit of twenty million dollars for military purposes.

ITALY.

ROME, 28.—An allocution of the Pope has been published in which, while he recognizes the bishops appointed by the Italian government as possessing the requisite qualifications, he solemnly repudiates the Italian guarantee, and protests against the invasion of the Holy See. He also condens the course of Dollinger and such as are following his example in warring against the decisions of the Ecumenical Council.