AD CHLOEN, M. A.

Fresh from Her Cambridge Examination.

Lady, very fair are you,
And your eyes are very blue,
And your hose;
And your brow is like the snow;
And the various things you know;
Goodness knows.

And the rose flush on your cheek,
And your algebra and Greek,
Perfect are;
And that loving, lustrous eye
Recognizes in the sky
Every Star.

You have pouting, piquant lips,
You can doubtless an eclipse
Calculate;
But for your cerulean hue,
I had certainly from you
Met my fate.

If by an arrangement dual
I were Adams mixed with Whewell,
Then, some day,
As a wooer might come
To so sweet an Artium
Magistra.

MORTIMER COLLINS.

JURISDICTION OF PROBATE COURTS, ETC.

Opinion of Hon. Z. Snow, Territorial Attorney-General.

ATTORNEY GENERAL'S OFFICE,
SALT LAKE CITY,
February 5th, 1874.

Honorable Orson Pratt, Speaker of the House of Representatives.

Sir—Your communication of the 4th inst. came duly to hand. You say the House, on the 4th inst., passed the following motion—

"I move that the Hon. Judge Snow, Attorney-General for this Territory, be requested to furnish this House with his written opinion on the jurisdiction of the Probate Courts of this Territory, and such other matters of legal jurisdiction and alleged malfeasance of certain officers, charged by his Excellency the Governor, in his special message vetoing the memorial to Congress, against the Legislative Body, as encouraged by them and practised by the various officers of the Territory."

By this motion it is at once perceived that, to understand what is desired, the message must be examined.

His Excellency the Governor, in his message, uses the following language—

"And in view of the fact that I, as Governor, required as I am by the Organic Act, and by my official oath, to see 'that the laws shall be faithfully executed, have been continuously confronted with open violations of the laws of Congress, without the ability to enforce obedience thereto because of defective and inimical legislation, and have, as duty required, represented the facts to Federal authorities and to the Legislative Assembly of the Territory, to ask or expect me to join you in condemning my own official acts, by pronouncing them 'absolutely untrue,' and made 'with malicious intent,' is a sad commentary upon the judgment and good taste of those who ask it. That I cannot do so is certain.

"The charge that there exists, 'insubordination and other violations of the Constitution and laws of the United States,' in this Territory, is true or false. Let the facts be submitted. All will agree that the final object of the government is the protection of the citizen in his rights.

"That the laws of this Territory, as they now stand, are inadequate to accomplish that end, cannot be denied.

"There has not been a jury impanelled in this Territory for more than three years, whose verdict would have been valid, nor can there be under the laws now in force. Such are the decisions of the District and Supreme Courts of the Territory, and such, therefore, is the law. Life, liberty and property are at the mercy of the lawless and dishonest, without the possibility of protection. You have been called upon to furnish the remedy. The power to do so is in our hands. If we do not give the needed legislation, Congress must, or anarchy will ensue.

"Again; In the 7th section of the Act organizing the Territory, Congress gave to the Governor the power, by and with the advice and consent of the Legislative Council, to appoint all officers above the grade of county officers. In disregard of the rights thus conferred upon the Governor, the Legislative Assembly, by enactment, have usurped that power, by making all such officers elective by the joint vote of the two houses of that body, independent of the Governor. That this usurpation has caused much of the existing difficulty and confusion, cannot be questioned. In my message to the Legislative Assembly, at its last session, I called special attention to these obnoxious statutes, asking their repeal, and the enactment of laws upon that subject which would be in conformity with the Organic Act. But my recommendations went for naught; and the persons thus illegally elected, including all of the Territorial officers, were continued and are now in office, in effect obstructing the administration of justice, and preventing the correction of existing evils.

"Again: It has been repeatedly held by the District Courts, and affirmed by the Supreme Court of the Territory, that the Probate Courts, under the Organic Act, have no equity or criminal jurisdiction, and yet, in contempt of such decision, the Probate Courts throughout the Territory exercise a jurisdiction concurrent with the District Courts; determining questions in equity, issuing writs of *habeas corpus;* in some instances discharging persons held by the District Courts for felonies not bailable, and impanelling Grand Juries, and putting persons upon trial for liberty and life.

"Again: In 1862 the Congress of the United States enacted a law making plural marriage a crime. And yet it cannot be denied that plural marriage is now practiced to a great extent in this Territory, in direct violation of that law. It is not sufficient to say that the law is unconstitutional. The Supreme Court of the United States has not so decided. Until that is done, it is the law of the land, and should be obeyed.

"In my message to the Legislative Assembly at its session in 1872, I called attention to the violations of this act, and urged the enactment of a law prohibiting it in the future. But, I regret to say, nothing was done. Can we, in truth, state that no law of the United States is violated in Utah, or ask Congress to investigate, and inquire into the truth of that which no one denies? I can not.

"Again; It is well known that a large number of homicides have been committed in this Territory; and, in many instances, no attempt to bring the persons charged with such crimes to trial has been made. Indeed such are the defects of the laws that no legal conviction can be had."

From this and from the motion, I am to give a written opinion, or fail to comply with the request.

It appears to me that any opinion I have or may give is only extra official, as neither his Excellency nor the Courts nor the Legislature are bound by it, and much less is Congress.

Notwithstanding this, I deem it a duty to say that during my short official career as Attorney General, I have, as often as required, expressed opinions on legislative, judicial and executive power, the harmonious working of all which is essential to good order in any government.

But before entering on the subject of my views as to the jurisdiction of the Probate Courts, in civil and criminal cases, and the subject of the *election* and *appointment* of officers for the Territory, I will lay down a few rules which commend themselves to me.

FIRST—An Act of the Legislative Department, within its legislative powers, is absolute. It is the law, and all within its provisions are bound by it. But it may be ambiguous, uncertain, and difficult to understand, by reason of accident or omission. It then has to be construed or interpreted. If it is not within their legislative powers, the act is void.

SECOND—The judgment of a court of original jurisdiction, in a case when it has jurisdiction of the subject matter of the suit and of the person, is the law of that case, however erroneous, unless on appeal or writ of error it be reversed, but it does not establish a principle.

THIRD—The Judgment of a Supreme Court, that being a court of last resort, is conclusive, it is binding on all. It is equally as binding on the Governor and President and the Legislature as on individuals and other courts. It settles that case, and it also settles the principles upon which future analogous cases are to be governed, until the law be changed or the case overruled.

FOURTH—The act of the President or the Governor in his gubernatorial authority, and within his lawful powers, is also binding on all.

By a little reflection it will be perceived that it may sometimes happen that powers conflict, particularly among legislative departments like Congress and the States and Territories, and their statutes seemingly conflict. These involve very intricate questions. Whenever they are met, they must be solved, and a conflict of views will always arise, denoting, as I think, healthy action.

On a correct understanding of these three powers depends the solution of this entire matter.

Whenever either of these three branches of government, whether through error of judgment, or by accident, or by design, paralyzes any other branch, a jar in the machinery ensues.

The opinions I entertain on these subjects, being the right of electing or appointing officers, and the right to confer on the Probate Courts civil and criminal jurisdiction, have long since been expressed and given to the public, which remain unchanged. No recent argument has thrown any light on the subject.

His Excellency the Governor, in his message on this point, has not even indicated an opinion, much less expressed it. His language is, "It has been repeatedly held by the District Courts and affirmed by the Supreme Court of the Territory that the Probate Courts, under the Organic Act, have no equity or criminal jurisdiction, and yet," etc. Whoever examines the 9th section of that act will find that the Organic Act does not attempt to create or give jurisdiction of any kind to the Probate Courts, but only authorizes their creation by the Territorial government, and authorizes their jurisdiction to be conferred.

The language of the Act in section 6, is, "The Legislative power of said Territory shall extend to *all rightful subjects of legislation* consistent with the Constitution of the United States and with this Act." Then follow a few inhibitions, but none on the subject of the jurisdiction of the court. In section 9, before referred to, the language is, "The jurisdiction of the several courts herein provided for," meaning the Supreme, District and Probate Courts, and Justices of the Peace, "both appellate and original, and that of the Probate Courts and Justices of the Peace, shall be as limited by law."

At that time there was no provision in any law of Congress, nor is there yet any provision, applicable to the jurisdiction of the Probate Courts in this Territory. The inference therefore is irresistible that the words "limited by law," meant a law of the Territory.

The Act of Utah, creating the Probate Courts, and prescribing their jurisdiction, was approved February 4th, 1852, and is as follows.

"SEC. 23.—There shall be a Judge of Probate in each county within the Territory, whose jurisdiction within his court, in all cases, arises within their respective counties under the laws of the Territory; said Judge shall be elected by the joint vote of the Legislative Assembly, and commissioned by the Governor, they shall hold their offices for the term of one year, and until their successors are elected and qualified. They shall be qualified and sworn by any person authorized to administer oaths, and give bonds and security in the sum of not less than ten thousand dollars, to be approved by the Auditor of Public Accounts; and the Auditor shall give the person filing bonds a certificate that such bond has been approved by him and filed in his office."

The jurisdiction is thus defined—

"SEC. 27.—The Judge of Probate has jurisdiction of the Probate of Wills, the administration of the estates of deceased persons, and of the guardianship of minors, idiots, and insane persons.

"SEC. 28.—The Probate records shall be kept in books separate from those of the other business of the court.

"SEC. 29.—The several Probate courts in their respective counties, have power to exercise original jurisdiction, both civil and criminal, and as well in Chancery as at Common law, when not prohibited by legislative enactment; and they shall be governed in all respects by the same general rules and regulations as regards practice as the District courts."

The act also provides for a sheriff, a clerk, a seal of court, and the keeping of a record, also for grand and petit juries, giving them all the Common law requisites of a *Court of Record*, with appeals to the District Courts.

By this your honors will see that the jurisdiction of the Probate Courts depends not on the Organic Act, but in the laws of Utah, passed pursuant to the authority therein given. And the only questions are—did the legislature of Utah, in 1852, exceed its legislative power in conferring law and equity jurisdiction on these courts, or has Congress given this jurisdiction by authorizing the Legislature to confer it under the maxim of law that what one does by another, he does by himself, or has Congress, by not disapproving the act, affirmed it?

These all are principles entering into the solution of the proposition. In relation to them the Hon. John Titus, in the case of Tiernan against Salt Lake City, in 1865, said, "The power reserved in Congress by itself to disapprove devolves upon that body the duty of revising the legislative acts of Utah, and the presumption as cited is, that this duty is performed. Congress, therefore, not having disapproved, must be presumed to have approved the act." This was decided concerning an act which had been passed only about six years. The act on the subject of the Probate Court jurisdiction was passed twenty-two years ago, and Congress has not yet disapproved it.

The Supreme Court of the United States, in the case of the Miners' Bank *vs.* Iowa, 12 Howe, pp. 4—8, expressly sanctioned the doctrine that a Territorial law was valid until or unless disapproved by Congress. The court was unanimous in the decision. The Supreme Court of the United States, in the case of Clinton *vs.* Englebrecht, from this Territory, 13 Wall, pp. 445-6, unanimously said, the Chief Justice speaking for the whole court—

"It is insisted, however, that the jury law of Utah is defective in two particulars. First, that it requires the jury list to be selected by the County Court, upon which the *Organic law* did not *permit* authority for that purpose to be conferred. Second, that it requires the jury to be summoned by the Territorial marshal, who was *elected* by the legislature and not appointed by the Governor. We do not see how these facts, if truly alleged, would make the mode actually adopted for summoning the jury in this case legal. But we will examine the objections.

"In the first place, we observe that the law has received the *implied sanction* of Congress. It was adopted in 1859." [This Probate law, you remember, was adopted in 1852.] "It has been upon the statute book for more than twelve years." [The Probate jurisdiction law has been on the Statute for more than twenty-years.] "It must have been transmitted to Congress soon after it was enacted, for it was the duty of the Secretary of the Territory to transmit to that body copies of all laws on or before the 1st of December in each year. The simple disapproval by Congress at any time would have annulled it. It is no unreasonable inference, therefore, that it was approved by Congress."

True, this language was used concerning the jury law, but it is equally applicable to the law creating the Probate Courts, and fixing and setting bounds to their jurisdiction.

The Supreme Court in that case examined the jury law of Utah and held it valid.

How then stands so much of this matter as relates to the validity of the jury law in the Courts?

First, the Governor and Legislative Assembly of Utah, in 1859, in construing their legislative powers, passed the act, which was acted upon from that time till 1870 by every legislature, and every governor, and every judge on the bench. In 1870 the courts here ruled against it. In 1872, on appeal, the Supreme Court of the United States in the very case where the decision had been made in our courts unanimously sustained our jury law, and said in its decision, when speaking concerning the court here, "We are of the opinion the court erred both in its theory and in its action."

But before this decision, there were and still are conflicting views on the subject of the civil and criminal jurisdiction of the Probate Courts. The legislatures of the following Territories have so construed their legislative powers, as to give civil and criminal jurisdiction to their Probate Courts to a limited extent, *viz.*, Kansas, Montana, Idaho, Oregon and Utah. The judges of Kansas, Montana and Idaho have held that the Legislature exceeded their powers when they conferred it.

In a few instances Congress, after the decisions above alluded to, conferred on the Probate Courts in those Territories a limited civil jurisdiction.

In Utah the course has been in the Legislative department one uniform sentiment, so far as the members of the two houses are concerned.

But the governors and judges have not had a uniform sentiment on this question.

From 1852 to 1856 the jurisdiction of the Probate Courts was not called in question in such a form as to require the Court to decide it.

In 1856, at Carson valley, then a part of Utah, Judge Drummond held that Probate Courts had not civil jurisdiction.

From 1856 to 1859 or 1860, the question was not decided, so far as I know or have the means of learning.

In 1859 or 1860, Judges Eccles, Cradlebaugh and Sinclair held each, informally in some cases, that these courts had not either civil or criminal jurisdiction.

From 1860 or 1861 to 1869 or 1870, these courts, without ever testing it in any district except the Third, exercised both civil and criminal jurisdiction, as provided by our law.

In 1861 the Supreme Court of this Territory held that the Probate Courts of the Territory had jurisdiction under our law in divorce cases.

In 1870 the Supreme Court of this Territory held that our Probate Courts had not jurisdiction in divorce cases.

In 1865 the District Court of the Third Judicial District held that the Probate Courts of the Territory had, under our law, civil and criminal jurisdiction, and that they had authority to grant naturalization papers to foreigners.

From 1852 to 1870 no case was taken to the Supreme Court of the Territory, that has fallen under my notice, in which it was necessary to decide whether or not the Probate Courts of the Territory had either civil or criminal jurisdiction.

In 1870 a civil case was removed from the Probate Court of the County of Salt Lake to the District Court of the Third Judicial District in this Territory, in which the point of its civil jurisdiction was raised. The District Court decided against it. The case was taken to the Supreme Court of the Territory, and by that court the judgment was affirmed. This being the only case ever decided in the Supreme Court of the Territory involving that question, it was removed by writ of error to the Supreme Court of the United States, and in March last it was argued in that court. It has not yet been decided.

No case or class of cases can be considered as settling a principle until the case or cases have been considered on argument in the court of last resort, which, on this Probate Court jurisdiction question, is the Supreme Court of the United States.

But when there is such a conflict of opinion, the case, until settled, ought to be treated modestly.

If the decision of the Supreme Court of the United States shall be in favor of the civil and criminal jurisdiction of the Probate Courts, as given by our law, it will not settle any thing concerning it except that it was a rightful subject of Territorial legislation. Its wisdom or its folly will not enter into the consideration, but it will bind the President, our Governor and Judges, and Congress and your Honors. It will leave Congress to disapprove the law, and the Legislature of this Territory to amend it, or not.

If it be unwise to give them so extensive powers as they now have, and I think it is, their jurisdiction can be modified by your Honors. But with the view of his Excellency on the subject, if I understand his views, he could not approve of anything on the subject, but an unconditional repeal of the law, and the Legislative Assembly, without renouncing its doctrine of twenty-two years' standing, could not repeal it.