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ARGUMENT

OF

HON. THOMAS · FITCH,

Addressed to the House Judiciary Committee in Reply to the Memorial of the Salt Lake Bar, and in Opposition to House Bill 3791, February 10, 1873.

Mr. Chairman and Gentlemen of the Committee on the Judiciary of the United States House of Representatives.

Twenty-six members of the Salt Lake City bar have memoralized Congress, asking for legislation with respect to Utah, and the memorial—with a bill based thereon—has been presented to the House of Representatives by the Hon. Samuel Merritt, who represents the Territory of Idaho there, but who has removed his residence and his law office to Salt Lake City.

By permission of your honorable committee, I propose to controvert the allegations and conclusions of the memorialists, and to offer an argument against the legislation proposed. I can find no word of censure for the members of the Salt Lake bar whose signatures are affixed to the memorial. They are lawyers in active practice, before a court which has assumed and exercises great powers, and which is presided over by a judge of a peculiar disposition. The judge of that court the Hon. James B. McKean, is not unknown to the members of your committee. He passed a large portion of the last session of Congress in Washington, urging upon you more than once his views of the situation in Utah, and soliciting the passage of a bill similar to the one now under consideration. Whatever else is disputed, I presume it will not be denied that Judge McKean is entirely in earnest in his purpose to bring about a social, political, and theological reconstruction of Utah. His motives I will not attack, his purpose I will not here condemn, his plan I will not now assault; but I wish to impress upon the committee the obvious fact that he is thoroughly possessed with his purpose and his plan, and I do not need—in the light of recent events I am sure that I do not need—to call attention to the equally obvious fact, that the entire business of his court, all his judicial functions, and all his personal and judicial influence are subordinated to his purpose to "solve the Mormon problem."

When this fact is once thoroughly understood, it will not be difficult to comprehend why the members of the Salt Lake bar have affixed their signatures to this memorial. It is true that some of them have practised for years—without inconvenience to their clients or themselves—under the system of laws they now visit with sweeping condemnation. It is also true that one of the laws denounced—the statute of limitations of February 16, 1872—was drafted and successfully urged upon the judiciary committee of the Territorial Council by one of the signers of the memorial. But the members of this committee can understand how very difficult and embarrassing it is for a lawyer to refuse the request, either express or implied, of a judge before whom he practices, upon whose favor he is more or less dependent, and the reputation of whose ill-will would be most damaging to his business success.

With these preliminary observations, I will pass at once to the consideration of this memorial. It is asserted—

"*First.* That from the very beginning the legislation of Utah has been inimical to and subversive of the Federal authority with the Territory.

"*Second.* That the Territorial legislature has resorted to every device short of open rebellion to deprive the governor and judges appointed by and representing the Federal Government of all power and authority within the Territory."

To sustain these propositions, reference is made to an act of the Territorial legislature, entitled "An act in relation to the Judiciary," passed January 19, 1855, page 29 of the General laws of Utah, and in describing this act and its alleged effect the memoralists say:

"This act by its first section gives to the district courts, presided over by Federal appointees, such jurisdiction in civil and criminal cases only as is not otherwise provided for.

"The same act (section twenty-nine) provides that the probate courts, which are presided over by persons elected by the vote of the Territorial legislature, shall '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.'

"The attempt, therefore, to abstract the rightful jurisdiction from the courts instituted and filled by the Federal authority, and to transfer it from the tribunal charged with it by the organic act to those of local character, is too plain for argument."

An all sufficient answer to this allegation of the memorialists will be found by referring to section 605 of an act of the Utah legislature, approved February 18th, 1870, entitled "An act to regulate proceedings in civil cases in the courts of justice of this territory, and to repeal certain acts and parts of acts," page 124 of Laws of Utah, 1870; for there the obnoxious section of the law of 1855 referred to by the memorialists is *repealed*.

But since the memorialists assert that—

"The proposition that the general system of legislation in Utah has been subversive of the authority of the Federal Government is not affected by the fact of the law being repealed"—

I purpose to examine the law of 1855 as if it were still in existence.

The memorialists say that—

"This act (the act of 1855, page 29, Laws of Utah) provides by its first section, 'that all the courts of this Territory shall have law and equity jurisdiction in civil cases, and the mode of proceedings shall be uniform in all of said courts.'

"By this act it will be seen that not only are the probate courts given powers which the supreme court of the Territory has again and again denied can be conferred, but even justices of the peace have unlimited jurisdiction in equity."

The reply to this is, that there is not now, and never was such a law. The quotation is a misquotation. The first section of the act of 1855, nor any other section of the act of 1855, nor any other section of any law ever passed in Utah, so far as I have been able to ascertain, contains any such language. I turn to the section cited or pretended to be cited by the memorialists, section one of the act in relation to the judiciary, passed January 19, 1855, page 29, General laws of Utah, and I find it reads as follows:

"Section 1. *Be it enacted by the Governor and Legislative Assembly of the Territory of Utah*, That the district courts shall exercise original jurisdiction both in civil and criminal cases, when not otherwise provided by law. They shall also have a general supervision over all inferior courts, to prevent and correct abuses where no other remedy is provided."

I must, Mr. Chairman, express my astonishment that twenty-six members of the Utah bar should, for any reason, have consented to affix their signatures to such a glaring, such an absurd, such an unkind inaccuracy. I can only suppose—I must out of respect to the profession suppose—that the signers did not carefully read the memorial, and that the gentleman who drafted it did not have access to the law he pretended to quote, and so relied upon his memory or his imagination.

"Justices of the peace have unlimited jurisdiction in equity!" There is not a line in all the laws of Utah to sustain this absurd assumption of the memorialists. And there is not, I am informed, in all the history of Utah a single instance of an attempt on the part of any justice of the peace to assume equity jurisdiction or common law jurisdiction in excess of that given him by act of Congress, as well as by the territorial laws, viz., one hundred dollars, except by consent and wish of litigants.

But not content with misquoting the Utah statutes, not content with their attempt to credit or discredit the Utah legislatures with laws which were never enacted, the memorialists go on to say:

"When it is explained that in addition to the different tribunals which are authorized by the organic act, (section nine, organic act,) the legislature has organized a 'county court,' (page 206 of the General Laws of Utah,) also a mayor's and aldermen's courts, (see charter of Great Salt Lake and other cities,) the enormity of this grant to these petty courts may be appreciated."

The "county court" organized by the Utah legislature is just such a county court as has been organized in a thousand counties all over the United States. It is a county legislature; nothing more nor less. In some places it is called a board of selectmen; in others, a board of supervisors; in others, county commissioners, and in others, again, a county court. It is a misapplication of the term to call it a court at all, for its functions are legislative or executive, but not judicial. To assume that it is vested with judicial powers for the trial and determination of cases at law or in equity, because it is *named* a court is about as reasonable as if we were to conclude that some of the New England State Legislatures are judicial bodies because they are called "general courts."

I know that in some localities the members of the county court do sit as associate justices, and look wise when the real judge of the circuit pretends to consult with them on questions of law. But even this privilege, if it be one, is not accorded to the members of county courts in Utah. The act of the legislature of Utah creating these county courts, pages 206, 207, General Laws of Utah, provides that—

"Sec. 3. The probate judge, in connection with the selectmen, shall be known as the county court, * * * and they are invested with such powers and jurisdiction as are or may be conferred by law."

Now, let us see what powers and jurisdiction are conferred by law:

"They are empowered and required to manage the county business, take care of the county property, audit claims, audit and settle the claims of other county officers, superintend the fiscal affairs of the county, district the county into road and school districts, locate sites for public buildings, oversee the poor, take care of the insane, and appoint all county and precinct officers not made elective by law." (Sections 4, 5, 6, 7, 8, 9, and 13 of the act prescribing duties of county courts, &c., page 206. General laws of Utah.)

That is all. They are not given any judicial duties or powers whatever, and they have never exercised or attempted to exercise such powers.

It is also asserted by the memorialists that "mayor's and aldermen's courts" have been organized, which, it is claimed, have been given an enormous grant of power, and reference is made to the charter of Great Salt Lake and other cities.

If we turn to the charter of Salt Lake City, pages 113 to 120, General Laws of Utah, and page 38, sixteenth session Utah Legislature, we will find that all the reference made to mayors' and aldermens' courts, and all the powers vested in mayors' and aldermans' courts, are enumerated in the following sections:

"The mayor and aldermen shall be conservators of the peace within the limits of the city, and shall give bonds and qualify as other justices of the peace, and when so qualified shall possess the same power and jurisdiction both in civil and criminal cases arising under the laws of the Territory and may be commissioned as justices of the peace in and for said city by the Governor." (Section 13, page 114, General Laws of Utah.)

"Appeals shall be allowed from the mayor's and aldermen's courts of said city to the probate court of Great Salt Lake county, under the same regulations and restrictions as are or may be provided for appeals from justices of the peace to the probate court." (Page 38, Laws Utah, 16th session.)

The charters of Provo and other cities in Utah contain similar provisions, and there is not a municipality in Utah wherein greater powers are conferred on mayor's and aldermen's courts than those of a justice of the peace.

And so it turns out, when we examine the denounced statutes of Utah, that the county courts are not courts or given the powers of courts at all; and that the mayors' and aldermen's courts are granted only the same powers as justices' courts. And what powers have been given to justices' courts? The act of February 4, 1852, section 4, page 33, General Laws of Utah, provides that—

"Justices of the peace have jurisdiction over all cases where the amount in controversy does not exceed one hundred dollars, * * * * and may try, hear, and determine public offences where the punishment imposed by law does not exceed one hundred dollars fine, or imprisonment does not exceed six months."

Section 13 of the same act provides for extending the jurisdiction of justices as arbitrators to any amount, *where both parties wish and consent to it;* but this is repealed by the act of 1870, section 507, page 105, Laws Utah, 1870.

I refer again to the counts of this associated lawyers' indictment of the legislature of Utah. They say:

"A reference to the record will establish these propositions:

"1. From the very beginning the legislation of Utah has been inimical to, and subversive of, the Federal authority within the Territory.

"2. The territorial legislature has resorted to every device short of open rebellion to deprive the Governor and judges appointed by and representing the Federal Government of all power and authority within the Territory."

And then they say:

"These are grave charges, and now for the proof."

And what is the proof?

A repealed statute is dragged from the tomb wherein it was inurned by the legislature of 1870; it is denuded of the garments in which it was clothed at its decease; it is given a suit of resurrection clothes, such as it never knew when alive, and then paraded as a horrid Mormon rebel.

There is an ancient motto, *Falsus in uno, falsus in omnibus.* What shall be said of a cause which resorts to such means to bolster itself in your esteem? What shall be said of memorialists who come up to the Congress of the United States with a pretentious petition, accusing the people of an entire Territory with being inimical to and desirous of subverting the Government of the United States, and who, in support of the allegations of their petition, refer to a law that is repealed, and make pretended quotations from a statute that never existed?

Should an adventurer obtain your money by means of a fraudulent check, I know what you would think of him. These memorialists ask your official representative action on the strength of a bogus law. What opinion must you entertain of them?

The memorialists further say:

"The last section of the act first referred to provides (pages 31 and 32, General Laws) 'that any matter involving litigation may be referred to the arbitrators or referees selected by the court or the parties,' and upon a hearing before such tribunal, it is required to decide the matter, and file its judgment which is to be entered and have the same effect as if given by the court.

"The right to a hearing by a judicial tribunal is thus denied, and the right of trial by jury abolished, unless the court see fit to grant it.

"The repugnance of this legislation, not only to the organic act, but to the principles of common right, we submit has no parallel in the legislative history of any other country."

What impression is sought to be conveyed by the foregoing language? What impression is conveyed? Clearly, that the court is given the power to refer a case for arbitration whether the litigants desire it or not, and that the court is given the power to select the arbitrators without consulting the wishes of litigants, for the memorialists go on to say, and I refer again to their language:

"The right to a hearing by a judicial tribunal is thus denied, and the right of trial by jury abolished, unless the court see fit to grant it."

Now let us refer to the law cited by the memorialists, and we will find that here as before, they have endeavored to make out their case by altering and misquoting the statute.

Section 35, page 31, General Laws of Utah, says:

"Any matter involving litigation may be referred to arbitrators or referees, who may be chosen by the parties or selected by the court, *as the parties shall elect*," &c., &c.

The words "as the parties shall elect" are omitted from the memorialists' quotation of the statutes. With those words in, there is nothing unusual in the law. It is the practice in every court in the country to refer a case where the litigants desire it referred, and in many localities, in New York city for instance, the parties are not allowed to select the referee of right, but the judge designates him.

In any event this section of the act of 1855 is repealed by chapter 6, sections 182 to 187, of the act of 1870. (Pages 49, 50, Utah Laws, 1870.)

I have referred here to the act of 1870. That act contains six hundred and five sections, and occupies one hundred and seven pages of the laws of 1870. It is a civil practice act copied bodily from the revised civil practice act of the State of Nevada, which was taken almost without alteration from the California practice act, which was framed upon the basis of the New York code. The passage of this act three years ago by the Utah Legislature is of itself a complete refutation of the allegation of the memorialists that the legislature of Utah—

"Has purposely neglected for twenty-one years to pass and establish a wholesome, general system of laws necessary to the welfare of a civilized community."

It evidences, on the contrary, that the legislature of Utah promptly recognized the change which the railroad and the development of mines had wrought in the social condition of that Territory; and so recognizing the fact that the people of Utah were passing from a pastoral, isolated community to one of mixed interest and of contact with surrounding and permeating civilization, they sought to shape and enlarge their laws to accommodate the new conditions.

I recur again, Mr. Chairman, to this memorial, and this brings with it necessarily the unpleasant duty of exposing another misstatement of the statute, another case of a garbled law, another attempt to make out a case by omitting the context. The memorialists say:

"Reference is also made to page 33, section 4, of an act in relation to justices of the peace. By this section such courts are permitted to 'decide cases without process' when the amount claimed is less than $100, and by section 13, same page, it is provided 'that when the amount exceeds $100, the justice shall have the same powers as other courts of arbitration, and shall have power to enforce his decision thereon, which decision shall be an end of the controversy.'

"Such monstrous provisions need no comment for their condemnation."

The law says, (section 4 of the act in relation to justices of the peace, page 33, General Laws Utah:)

"When the amount claimed exceeds that sum, (one hundred dollars,) but by fair credits, may be reduced to that amount, justices may decide cases without process; but if it shall become necessary to enforce such decisions, they shall enter such cases so decided upon their dockets, and proceed as in other cases."