THE EVENING NEWS.

Monday, . . . October 3, 1870.

LOCAL AND OTHER MATTERS.

SABBATH MEETINGS.—The congregation in the morning was addressed by several returned missionaries and President Geo. A. Smith. In the afternoon the time was occupied by Elder B. Young, Jr., President Geo. A. Smith and Elder Geo. Q. Cannon.

EXTRA PERFORMANCES.—Being Conference week there will be extra performances at the Theatre. To-morrow night the fine old comedy, "Sweethearts and Wives," followed by the screaming farce, "The Married Rake," will constitute the bill. Croxall's band will be in attendance.

EXTENSIVE AND DESTRUCTIVE FIRES.—We learn from parties just in from Bear Lake that the grass and timber on the mountains is on fire in numerous places between this city and that place—supposed to be the work of the Indians. The air is darkened with the smoke as far as the eye can see.

CO-OPERATIVE CHEESE FACTORY.—On Saturday we were shown, by Brother John A. Pack, some fine specimens of home-made cheese, produced at the *new* cheese factory, at Kansas Prairie, Summit County. This factory is purely a co-operative affair, being supplied with material from about one hundred cows belonging to the settlers of that place, and is under the superintendence of John A. Pack and sons. The article produced is much superior to that generally imported from the east, and is as cheap if not cheaper. It is being retailed in the stores of this city at thirty cents per pound. We believe the wholesale price is twenty-one cents.

We are pleased to note the substantial inauguration of this very important branch of home industry, and trust that, as quickly as possible, every other settlement in the Territory will emulate the example of Kamas, which, by the way, is but a small place. When cheese shall be extensively manufactured in Utah, it will not only be important as an article of home consumption and thus preclude the necessity of importing it, but there is no reason why it should not become a prominent article of export.

TERRITORIAL AND FEDERAL JURISDICTION.—In the District Court, for the past few days, another point in relation to Federal and Territorial jurisdiction, involving the right of the Territorial Attorney General to act as such, in the District Court, has been argued, and this morning was ruled upon by the Court, the latter holding and ruling that it is the duty of the U. S. Attorney to appear in the courts of this Territory in behalf of the Territory, and that the Legislative Assembly has not authority to create the office of Attorney General and to authorize such Attorney to appear in the courts in its behalf.

Attorney General Z. Snow gave notice of an appeal to the Supreme Court of the United States. We shall probably publish this ruling in full.

ESTATE LEFT.—J. W. Weist of South Bend, Indiania, writes that there is an estate left to his sister, who married a man by the name of Brown about fourteen years ago. He hopes to be able to hear of her where-abouts.

EXTENDING.—The wires of the Atlantic and Pacific Telegraph Co., are being extended to Virginia, Ma. and Gold Hill, Nev.

HUGE GRIZZLY.—A grizzly bear weighing 1,100 pounds was lately killed in Monterey County, California, by a hunter named Burch. One shot did the business.

A BIG BAR.—A special telegram to the Omaha *Herald*, from Denver, dated Sept. 28th, says:

"The First National bank of Denver, Colorado, has to day on exhibition the largest bar of gold ever run at one time, in the world. It measures twelve and a half inches in length, six and a half inches in width, and four and one-fourth inches high. It weighs twenty-three hundred and forty-eight and seventy-five one hundredths ounces. The fineness of the gold is seven hundred and ninety-two; silver one hundred and ninety and ninety-three. The value is fifty thousand dollars. It will be exhibited at the Colorado fair, afterwards exhibited at St. Louis, then sent to the fourth national bank of New York."

ARRESTED.—The Gold Hill *News* of Wednesday, states that two men named Wilson and Kessler had been arrested on suspicion of having committed the dastardly robbery on the persons and premises of Mr. and Mrs. Crane, on Salmon River. The evidence as to the indentity of the prisoners, was very strong.

The same paper contains the following account of a rather remarkable escape from injury.

"Last Sunday, Joseph Smith, foreman of the Nevada Boiler Works, Silver city, with two or three other men, were out on a sort of prospecting cruise, and coming to a shaft in a ravine about a mile south of Silver concluded to inspect it. Smith stepped upon a thin board platform or landing at the mouth of the shaft, and it broke, letting him drop quite suddenly some forty feet to the bottom. He lit in an old tub, filling it completely. His companions sprang forward just in time to prevent the old windlass and fixtures following him down the shaft, and after considerable trouble succeeded in extricating Smith from his disagreeable situation. Strange to say, he was but little injured. The tub was a total wreck."

"THE ST. LOUIS HOME JOURNAL." We have received the St. Louis *Home Journal*, for the 24 th instant, published weekly by Messrs Sheffield & Stone, of St Louis. This is an illustrated literary paper, and one of the very best of its kind, we think, published west of New York, and is putting forth such claims to public favor, that it bids fair to equal soon, any of its contemporaries in the country. It is published at two and a half dollars per year, lower to clubs, is of the same size as the New York *Ledger*, and contains well written editorials on subjects of popular interest. And has on its staff some of the most brilliant story writers of the country.

SUPREME COURT.

ASA L. KENYON vs. SUSAN KENYON. } In Supreme Court, Jan. Term, A. D. 1861, Utah Ter'y.

APPEAL FROM THE DISTRICT COURT FOR CARSON CITY.

Opinion of Hon. J. F. Kinney, Chief Justice.

Susan Kenyon filed her petition in the district court for divorce, charging adultery, and praying that the bonds of matrimony between her and her said husband be totally dissolved; also for the care and custody of the children, and for a separate estate out of the property of the defendant.

Kenyon answered, denying the facts charged, and alleged that the petitioner was herself guilty of the crime imputed to him.

A bill of exceptions was taken on the trial by which it seems, among other objections made to the jurisdiction of the court, and overruled, was one, that the district court had no jurisdiction of the action of divorce.

The court decreed a divorce from bed and board, the care and guardianship of the children, and two thousand and five hundred dollars as alimony to the plaintiff.

The defendant appeals, and contends under the statutes of Utah, the district court has no jurisdiction whatever over cases of divorce. Other questions are raised; but this is the only one necessary to consider. Sec. 1, page 162 Revised Laws, is relied upon in support of this position. It provides "That the Court of Probate in the county where the plaintiff resides, shall have jurisdiction in all cases of divorce and alimony, and of guardianship and distribution of property connected therewith."

If this statute is not in conflict with the Organic Act, it is supreme, and must be observed. It is not in conflict unless it either derogates from the powers exclusively conferred upon the district courts by the act, or confers unwarranted powers upon the probate courts. Part of sec. 9 reads as follows: "And be it further enacted that the judicial power of said Territory shall be vested in a supreme court, district courts, probate courts, and in justices of the peace."

After providing for a supreme court, it states that the Territory shall be divided into three judicial districts, and a district court shall be held in each of said districts by one of the justices of the supreme court, at such time and place as may be prescribed by law, and the judges shall, after their appointments, respectively reside in the districts which shall be assigned them. The jurisdiction of the several courts herein provided for, both appellate and original, and that of the probate courts, and justices of the peace, shall be as limited by law. Then follows an inhibition upon justices of the peace; and the section further provides that the supreme and district courts respectively, shall possess chancery as well as common law jurisdiction.

The judicial power of the Territory is vested in four separate and distinct courts.

The legislation as to one of those courts, that of justices of the peace, is restricted, and confined within certain well defined bounds; but with this exception, the jurisdiction of the several courts shall be as limited by law, except that the legislature cannot curtail the chancery and common law jurisdiction of the supreme, and district courts. No law of the Territory can deprive these courts of the power to exercise this jurisdiction, because it is conferred by a higher authority. The portion of the section under consideration, contains two radical provisions, two insuparable legislative barriers: first against conferring jurisdiction upon justices of the peace, in certain cases; second, against encroaching upon the common law and chancery jurisdiction of the supreme and district courts.

Is the statute conferring exclusive jurisdiction upon probate courts in actions of divorce, an interference with this jurisdiction of the district courts? To arrive at a proper solution of this question, we must inquire what is meant by chancery, and common law jurisdiction. Chancery jurisdiction may be defined to be a judicial power to hear and determine all cases wherein the law, for its universality cannot afford relief.

Early in the history of jurisprudence, the administration of justice in the ordinary courts was found to be incomplete, and hence arose the necessity of separate courts of equity, which were organized about the reign of King Edward III, for the purpose of correcting that, wherein the law was defective, and matters of fraud were among the objects to which the jurisdiction of chancery was originally confined.

Soon after these courts were established in England, a fierce struggle arose between the law and equity courts, in relation to the jurisdiction and powers of each; but as we trace the history of English jurisprudence, we find the prejudice which at first existed on the part of the common law courts, yielding to the necessity and utility of a distinctive equity jurisprudence. Arnold *vs.* Grimes, 2nd G. Greene, 77.

Follow this court from the reign of Edward III, at first feeble and affording relief in only a very few cases, until it branches out with enlarged powers and builds up a stately jurisprudence of its own, both in England and America, and with its extended jurisdiction we venture the assertion that as an equity court purely, without the aid of statute, it has never entertained a case of divorce so as to render a final decree between the parties.

The application for divorce from bed and board is not necessarily an equity proceeding. It may be either at law or chancery, as the legislature may prescribe. In England until very recently it was confined exclusively to the ecclesiastical or spiritual courts, and in the United States the petition is filed either in the chancery or law courts, according to the provisions of the statutes of the different states. The celebrated case of Burch *vs.* Burch, recently tried in Illinois, appears to have been at law and the entire case tried by a jury. In other states the chancellor hears and tries the issue, in some instances upon written evidence alone, and in others upon written and oral. We say then that the jurisdiction in divorce cases does not necessarily belong to chancery, and that clause of the Organic Act which confers upon the district courts chancery jurisdiction is not violated by the statute of Utah giving another court the right to try all cases of divorce. But the question arises, Is not the common law jurisdiction of the court trampled upon? Common law jurisdiction we understand to mean the power of the court to hear and determine cases according to the rules of the common law. Statutes are frequently invoked in aid of the common law, but common law courts, as such, are not dependent upon statutes, unless they have become incorporated into and form part of the common law, which is the case with some of the old English statutes. It is no part of the powers of common law courts, unaided by statute, to grant divorces from bed and board. Cases of this kind do not belong to their jurisdiction when sitting strictly as common law courts. Opposed to this view we are referred to the case of Wightman *vs.* Wightman, 4 John Ch. R. 343.

That was a case where the plaintiff married the defendant under a fit of insanity, had never lived with her husband, and had continued under aberration of mind, with occasional lucid intervals.

The question arose before the chancellor whether the court could take jurisdiction, as there was no statute in the state of New York for divorce *a vinculo matrimonii*, except in case of adultery, and the *cause* for divorce must arise after marriage. The learned chancellor declared the contract null and void *ab inito*, on the ground that the plaintiff had not the capability to contract no more than if she had been an idiot. But the court expressly says that the power resides somewhere to declare the contract void, and contends that it must reside in that court, as it has an exclusive jurisdiction, not only over cases of lunacy, but of matrimonial causes. This decision, when properly examined, will be found to sustain the position we have assumed, that proceedings for divorce do not necessarily belong to either the chancery or common law jurisdiction of the district courts.

Two questions only remain for our consideration. First, whether the legislature has granted to the probate court, by giving it jurisdiction in all cases of divorce, more judicial power than it is authorized to confer by the Organic Act. And second, whether the defendant below, after having answered, could raise the question of jurisdiction. The judicial power of the Territory is vested in certain courts. Among those named is the probate court. The jurisdiction of these courts shall be limited by law. We have seen that neither the common law or chancery jurisdiction of the district courts is infringed by providing for the probate court to grant divorces. This being the case it follows that under that clause, "limited by law," the legislature has the right to select another forum to try, and clothe another tribunal with the power to hear and determine actions for divorce.

The tribunal is the probate court, and we see nothing incompatible with the provisions of the Organic Act or the organization of the district courts to prevent the legislature from passing the law conferring exclusive jurisdiction in such cases upon this court. But it may be said that the defendant could not object to the jurisdiction after having answered. This would be true if the court had jurisdiction of the subject matter, and the judgment did not appear upon the face of the record *coram non judice*.

In the celebrated case of Voorhies *vs.* the United States, 10 Peters 161, the doctrine is well settled, that if the judgment is not warranted by the constitution or law of the land, the most solemn proceedings can confer no right which is denied to any judicial act under color of law, which can properly be deemed to have been done *coram non judice*, that is, by persons assuming the judicial function in the given case without lawful authority. Wright *vs.* Marsh, Lee and Develan, 2, G. Greene, 94. The line which separates error in judgment from the usurpation of power is very definite, and is precisely that which denotes the case when a judgment or decree is reversible only by an appellate court, or may be declared a nullity collaterally when offered in evidence in an action concerning the matter adjudicated or purporting to have been so. In the one case the record is absolute verity, in the other mere waste paper. If then the court below exercised a power not conferred by the Organic Act or the laws of this Territory, and not inherent in the court, the judgment is void and may be taken advantage of anywhere or before any court.

It is a principle as old as the law itself, that consent cannot confer jurisdiction, and if the court proceeded to try the case and render the decree in an action over which it had no control, the jurisdiction of which belonged to another court, the answer of the defendant could not confer such jurisdiction and the judgment is void.

That such is the case, we think we have abundantly shown by the fact that actions of divorce do not necessarily belong to courts of chancery or common law jurisdiction, that they may be provided for by statute, and the judicial power of the territory residing in part with the probate courts, the legislature had the right which they have exercised to give them the exclusive control over these actions.

The decree of the court below is reversed and set aside. — *Mountaineer*, Feb. 9, 1861.