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GEORGE Q. CANNON,
EDITOR AND PUBLISHER.

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Opinion of Judge Boreman.

UNITED STATES OF AMERICA, } ss.
Territory of Utah. }

In the matter of the application of John O'Neill for discharge, upon a writ of *habeas corpus*, from imprisonment in the Territorial Penitentiary:

W. W. Woods, Esq., for the petitioner, Judge Z. Snow, for the Territory.

The petitioner, John O'Neill, was, at the June term, 1872, of the Probate Court of Tooele county, in this Territory, convicted of the crime of "[illegible]t, assault and battery with intent to kill and rob;" and thereupon said Probate Court, at that term, sentenced him "to be imprisoned for a period of three years from June 29th, 1872." He has been confined in the Territorial Penitentiary from that date until the present time, and now he asks to be discharged, alleging that he is "confined and restrained of his liberty" illegally.

The first question which presents itself, and one which must be settled before a judge or court can proceed to examine the other points involved in such cases, is: Did the Probate Court possess criminal jurisdiction, to hear and determine such a case? The Territorial legislative enactments are broad and specific, recognizing in the Probate Courts original criminal jurisdiction. Did then the Legislature and Governor possess the legal authority to pass such an Act conferring upon the Probate Courts criminal jurisdiction? It is a well recognized truth, admitted in this case, and I presume in every case, that the Legislature is invested with only such authority as is granted by Congress. It is not contended that there is any other source of power.

The "Organic Act" of this Territory (approved Sept. 9th, 1850, in Section 6, declares "that the legislative power of said Territory shall extend to all rightful subjects of legislation, consistent with the Constitution of the United States and the provisions of this Act; but no law shall be passed interfering with the primary disposal of the soil; no tax shall be imposed upon the property of the United States, nor shall the lands or other property of non residents be taxed higher than the lands or other property of residents. All the laws passed by the Legislative Assembly and Governor shall be submitted to the Congress of the United States, and if disapproved shall be null and of no effect." The Legislative power shall extend to all ordinary, all "rightful subjects of legislation," but these "subjects" must be such as are "consistent with the constitution of the United States and *the provisions of this Act*"—the Organic Act. Not only so, but such law must not come within any of the exceptions specified in said sixth section, and it is not contended that the law in question is embraced in either of such exceptions. The last clause of said section (6) requires that all Territorial laws shall be submitted to Congress (which it is fair to presume has been done) "and, *if disapproved*, shall be null and of no effect." It is claimed on the part of the Territory that the clause last referred to neutralizes and destroys the prior provision that the "subjects" of legislation must be consistent with the Constitution of the United States and the provisions of this (Organic) Act." I cannot conceive it possible that Congress intended to say that the Legislature could pass any Act in violation of the United States Constitution and in violation of the provisions of the Organic Act, and that such Acts should be the law until disapproved by Congress. Yet such is the necessary and legitimate result of the reasoning on behalf of the Territory upon this point. No ingenuity can torture the language to mean that or anything like it. Congress only intended to reserve, in express terms, the right to disapprove the laws of the Territory, even though such laws might be consistent with the Constitution of the United States and the provisions of the Organic Act. It was unnecessary and superfluous for Congress to make such a reservation in regard to laws not consistent with the United States Constitution and the Organic Act. Such laws were and would be "null and of no effect" without such provision.

In section 9 of the "Organic Act," it is declared "that the judicial power of said Territory shall be vested in a Supreme Court, District Courts, Probate Courts, and in Justices of the Peace;" and "the jurisdiction of the several courts herein provided for, both appellate and original, and that of the Probate Courts, and of the Justices of the Peace, shall be as limited by law; provided that Justices of the Peace shall not have jurisdiction of any matter in controversy when the title or boundaries of land may be in dispute, or where the debt or sum claimed shall exceed one hundred dollars; and the said Supreme and District Courts, respectively, shall possess chancery as well as common law jurisdiction." Here, then, we find that no authority is given to Probate Courts except such as are embraced in the name. What is included under that head has for centuries been well understood, and is laid down in numerous decisions as well as the text books. In the language of Chief Justice Shaw in Peters vs. Peters, 8 Cushing, 535, "the peculiar and appropriate jurisdiction of the Probate Courts is fully laid down as embracing the probate of wills, granting administrations and their incidents."

It is contended, however, that the authority sought is given by that clause which says the jurisdiction "shall be as limited by law." Very true, but that law, if Territorial, must be "consistent with the Constitution of the United States and the provisions of the (Organic) Ac;" and to be consistent with the provisions of the Organic Act, it cannot confer upon the Probate Courts any chancery or common law jurisdiction, as these are expressly given to Supreme or District Courts. The Probate Courts are courts of "inferior" jurisdiction, and their power cannot be presumed—it must be expressly given. (Peacocke vs. Bell. 1 Sanders, 74.) The Supreme and District Courts, though of limited jurisdiction, are not "inferior" courts. Hurd on *habeas corpus*, p. 348-9—Territorial Laws, ch. 1., Sec. 1., p. 29. The power given by the Organic Act to the Supreme Court, of chancery and common law jurisdiction, excludes the idea of conferring like jurisdiction upon other and inferior courts. My attention has been called to Art. III, Sec. 2, of the Constitution of the United States, which says: "In all cases affecting embassadors, other public ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned," (giving general law and equity jurisdiction), "the Supreme Court shall have appellate jurisdiction, etc." Here are powers simply granted, without any words making such powers "exclusive" or "concurrent." It is contended on behalf of the Territory, because the word "exclusive" is not used, that therefore it is not exclusive. Congress perhaps in an early day thought the same way in regard to the U. S. Constitution, for they, by act of Congress, authorized the U. S. Supreme Court to issue writs of mandamus in certain cases therein specified. In Marbury vs. Madison, 1 Cranch, 127, Curtis' edition, an application was made to the Supreme Court under the act of Congress referred to. The Supreme Court did not recognize the power of Congress to pass such a law, and held that the court had no power to issue writs of mandamus, and Chief Justice Marshall, perhaps the ablest jurist who ever occupied the exalted position, in delivering the opinion of the court, said: "Affirmative words are often in their operation negative of other objects than those affirmed, and in this case *a negative or exclusive sense must be given to* them, or they have no operation at all."

But in addition to what has been said, the precise language of our Organic Act has been passed upon, in other States and Territories, and surely the law ought to mean the same in Utah as elsewhere, and the opinions of courts of competent jurisdiction in other Territories as well as States, are entitled to the highest consideration in arriving at a just and correct view of the law.

In Wisconsin, in the case of Smith vs. Odell (1 Wis, 455), it is held that "the Legislative Assembly (of the Territory) cannot pass an act in opposition to or in violation of its organic law. The courts cannot be required to enforce such an act. *It should be treated as a nullity.*"

In Kansas—whilst a Territory—this very question of the jurisdiction of Probate courts arose, under an organic act precisely like ours (so far as jurisdiction of courts were concerned). The Legislature had given Probate Courts civil and criminal jurisdiction concurrent with the District Courts. In the case of Locknane vs. Martin, McCahon's reports, p. 60—also Dewey vs. Dyer, p. 77) the Supreme Court of the Territory of Kansas declare unanimously that the act of the Legislature, conferring upon Probate Court "jurisdiction of cases at common law and chancery, *is inconsistent* with and in violation of the organic Act of this Territory (Kansas), and therefore, in so much of no legal validity." The same doctrine was re-affirmed after Kansas became a State, in the case of Graham et al vs. Kelly, 1 Kansas R. 116.

In Idaho the same question, of the jurisdiction of the Probate Courts, under an organic Act like that of this Territory, was passed upon by the Supreme Court of the Territory. There DuRell was prosecuted and fined by a Probate Court, for selling goods without license. In the learned opinion of the Chief Justice, McBride, in that case (The People vs. DuRell, 1 Idaho R., p. 30), it is declared that "the case stands in the same condition as if it had been originally begun and tried before a private individual. The laws of the Territory invest no man or court with authority over these offenses, except Justices of the Peace and the District Court, and the Probate Court was acting in neither capacity." (See also Moore vs. Koubly, 1 Idaho, p. 55.) I have understood that the Supreme Courts of Montana, Wyoming, and New Mexico have given similar decisions, but I have seen none of them. In the other Territories, so far as my information goes, the question has not been raised or the Legislatures have not presumed to give such powers to Probate Courts. In every tribunal outside of this Territory where the question has been raised, it has been decided adversely to such jurisdiction by the Probate Courts.

Congress also has recognized the fact that these Territorial Legislatures have no such power, from the fact that in the cases of Idaho and Colorado they have granted additional powers to Probate Courts.

It is contended that Congress did not so view the matter, from the fact that it has passed a law annulling the laws of certain sessions of the Montana Legislature. But this proves too much, and is in strict accordance with my views as above given. That Act of Congress annuls "all acts" of a "so-called Legislative Assembly." It is simply a repudiation of what Congress considers a bogus Legislature, even though its acts might be consistent with the United States Constitution and the Organic Act.

The attorney for the Territory in this case relied upon the case of the American Insurance Company *et al. vs.* Canter (1 Peters, 546), to show the power of a Territorial Legislature to give jurisdiction to a Territorial Court. This was a case arising under the Territorial laws of Florida, but a simple reference to the Organic Act of that Territory will show at once that the authority to create such a court as that described, and to confer upon it the jurisdiction allotted to it, were given in ample terms in the Organic Act.

I have carefully examined the celebrated Englebrecht case (13 Wal.), and can find nothing therein to sustain the view that the Probate Court can have criminal jurisdiction, or any jurisdiction as a court, except the same be conferred by Congress.

Now let us turn to the Supreme Court of our own Territory. Here we find that at one time (1861) the Supreme Court had other jurisdiction than of Probate matters. Chief Justice Kinney (Kenyon vs. Kenyon) says that "the Legislature can not curtail the chancery and common law jurisdiction of the Supreme and District Courts," *but he thinks that* divorce is not *necessarily embraced in either* chancery or common law jurisdiction. He does not decide—as it was not in the case—anything about the criminal jurisdiction of Probate Courts. It is possible as to this latter jurisdiction he might have held as is now commonly held elsewhere.

The decision referred, to of Kenyon vs Kenyon, has since, at least twice, been overruled by the Supreme Court of this Territory, in the case of Taylor vs. Taylor, and Higby *et al.* vs Cronin *et al.*, and we find the established doctrine in this Territories, that Probate Courts have no criminal jurisdiction. It is not necessary to refer to the other points raised, as this is decisive of the case. I am therefore required in justice to discharge the petitioner from the custody of the Warden of the Penitentiary, and allow him to go free. He is discharged.

LOCAL AND OTHER MATTERS.

FROM TUESDAY'S DAILY, MAY 13.

CAPE AND HOOD FOUND.—A little girl's cape and hood, found last Saturday up City Creek Canyon, were left at this office to-day. The owner can have them by calling for and describing them.

INFORMATION WANTED.—Information is wanted of the whereabouts of Sarah E. Subbs formerly of Fairview, Sanpete Co. If she will communicate with Bishop Tucker, of Fairview, she will learn something to her advantage.

CHARLESTON, WASATCH CO., May 9th.

Editor Deseret News:—

Brother John Eldridge, formerly of American Fork, while plowing on his farm, at Charleston, on the 6th inst., was taken suddenly ill, and suffered extremely during the night. Everything that could be done for him, was done; but he finally died about noon on the 7th. JOHN WATKINS.

CHANGES.—We have heard of some changes among the officers of the Salt Lake, Sevier Valley and Pioche Railroad. A meeting for the purpose of effecting the proposed or expected alterations was to be held this evening, and a general railroad meeting connected with the road was to be held at Tooele to-morrow. About a mile and a half of the grading at this end of the line has been completed under the supervision of Col H. P. Kimball. It is to be hoped the company will be enabled to push along the work.

AN IMPORTANT DISCOVERY.—We have seen some specimens of coal croppings found at the Point of the Mountain West, by a couple of gentlemen, last Sunday. In the locality where the specimens were picked up there were large quantities of an excellent quality of slate, besides other indications of coal deposits. The specimens shown us are genuine coal and, for croppings, are unusually good. It is to be hoped that this matter will be investigated, that it may be demonstrated whether or not there is a valuable coal deposit in that locality. Should the result be such as the discoverers anticipate, it will turn out to be of great benefit to this City and vicinity.

TO BE TESTED.—It appears that the question as to whether artesian wells can be obtained in this region of country will soon be efficiently and thoroughly tested. While Messrs. Curtis B. Hawley and Ezra Herrington are having the necessary well-boring machinery brought here a joint stock company is being formed in the Ely Mining district, Pioche, with the same object in view in that quarter. The insufficient supply of water at Pioche and its neighborhood has been a considerable drawback to progress there, and it is confidently expected that there will be but little difficulty in obtaining artesian wells, which will remove all obstructions to progress in that direction. So general is this opinion that the majority of citizens there, so says the *Record*, are taking stock in the affair.

A great many people hereabout have the same confidence that artesian wells can be obtained in this vicinity, and it is to be hoped that the matter will receive a thorough testing at the hands of those who undertake to enter upon this important enterprise.

SENT TO IDAHO FOR TRIAL.—Our readers will recollect that, a few weeks back, a man named Rufus King, formerly a postmaster in Idaho, and a defaulter to a large amount, was arrested at Ogden, by Marshal Fife, and brought to this city. A motion was made recently by the United States authorities, that King be remanded to Idaho, for trial; and yesterday the argument on the motion was heard before Associate Justice Emerson, Messrs. Bates and McBride appearing for King, and U. S. District Attorney Cary, and Col. Wickizer, U. S. Postal Agent, for the government. After hearing the argument on both sides, Judge Emerson granted the motion and ordered the prisoner back to Idaho for trial.

WASHINGTON CO.—Bro. A. R. Whitehead writes from Washington, Washington Co., May 9th, as follows—

"We have had a great deal of sickness in this place this Spring, and have had several deaths. Miss Emily D. Duncan died on the 13th of March, aged 22 years, after a long spell of sickness. Her funeral was largely attended by the people, both from St. George and this place. She had a large circle of friends throughout the Territory.

"Yesterday Bro. Washington L. Jolley lost a little boy, about one year old.

"Our Woollen and Cotton Factory is running, making some excellent cloths, but is operating at a great disadvantage in consequence of so much sickness, and the scarcity of hands.

"Our fruit and other crops look well, nothwithstanding the large amount of fruit killed by frost. The people feel well in the cause in which we are engaged."

SALT LAKE CITY, May 12th, 1872.

Editor Deseret News:

I have seen a couple of notices lately in your local columns, drawing attention to the dilapidated condition of a bridge over the water sect on Chesnut Street, near the old city wall. I had an idea that those hints would be sufficiently strong to induce the gentleman whose duty it is to see to its being repaired to have it attended to, but it remains in *statu quo*. Perhaps it would not be amiss to say now that in consequence of that bridge being in reality no bridge traffic by teams has nearly come to an end that way, which is a very great incovenience to the people living north of it, and also to strangers who frequently would go in that direction, in carriages that they might have the benefit of the fine commanding view of the city and valley from the bluff above the east bank of City Creek. The hackmen have generally become acquainted with the bridge, however, and go around some other way.

Some time ago a team with a load endeavored to cross that bridge, but got stuck fast, one of the horses falling off into the ditch. A gentleman from the same cause had his buggy smashed, and his life and the lives of some members of his family placed in jeopardy.

The old bridge could be repaired, or even a new one put there in its stead at but little cost, and the residents in that vicinity, being tax payers, will undoubtedly maintain the opinion that if the City does not see to this matter it will have neglected a very plain duty.

Respectfully, BRIDGER.

AN UNRELIABLE GUIDE.—Nearly every body who has a watch hereabouts whips it out when he or she happens to hear the City Hall clock strike. When this is done it very frequently occurs that the hands on the clock do not indicate the same time as those of the watch, which places the owner of the latter in a kind of quandary as to which of the two is right. The general conclusion, however, is that surely the city time-piece, which should be the general regulator of all other time-pieces, can scarcely be incorrect. The watch, or it may be the clock inside the house, is altered accordingly and the consequences of the alteration are sometimes very mischievous in their character, because of their having indicated the correct time before the change was made. Thus people are unconsciously made too late for railroad trains, meetings, appointments, &c., notwithstanding that they sometimes travel leisurely along firmly impressed with the delusion that they have plenty of time and to spare, according to the correct city time. Or, on the other hand, they may be made in this way to arrive at the railroad depot some time before it is necessary to be there, or at the doors of a public hall before they are open. These are not circumstances coined from the imagination, but are such as very frequently happen, so that what at first glance may appear to be a very small matter is in reality of considerable importance, because of the issues which very often depend upon it. On account of these considerations we believe it to be due to the public that the City Hall clock be always kept in first-class order and that it invariably, or so far as possible, indicate the correct time. The taxpayers, at least, would be glad to have an accurately timekeeping clock, inasmuch as they furnish the means to pay for it.