DESERET NEWS:

WEEKLY.

TRUTH AND LIBERTY.

WEDNESDAY, - - May 27, 1874.

ANOTHER UTAH BILL.

IT is said that Merrit & Co. have got up a new Utah bill, framed with a view to avoid the point of order raised against the McKee and Poland bills—that they would involve a congressional appropriation. This new bill proposes to give the selection of jurors to the Probate Judge and the Clerk of the District Court, by empowering them to choose names alternately; and to have the Governor appoint and the Assembly confirm the Territorial Marshal. The bill also proposes to legalize polygamous children until 1875.

The appointment of the Territorial Marshal by the Governor would be much the same thing as an appointed United States Marshal, so far as the wishes of the people are concerned. The proposed change as to the selection of jurors is also objectionable. The clerk of the District Court is the creature of the Judge of that court, and in some contingencies the judge of the Probate Court might be the creature of the Governor, and then in either case there is no guarantee that the people would be in the slightest degree represented.

These anti-Utah politicians work like beavers to carry out their nefarious purposes, and in order to do it they modify their measures from time to time, but in all their movements the cloven hoof is still there and readily detectable. "Can the Ethiopian change his skin, or the leopard his spots? Then may ye also do good, that are accustomed to do evil."

THE LIQUOR QUESTION.

THE liquor question is one of the most important of all that present themselves to any community. It is one that requires serious consideration, and should be dealt with in a sagacious and prudent spirit. It should certainly be kept, at least, strictly under restraint. Perhaps no other question involves such weighty consequences, nor more powerfully affects society, nor more thoroughly permeates the various interests of society. Upon it depend the majority of criminal offences. Yet the liquor interest in most communities is very powerful, because it has such a hold, such an iron grip, upon the weakness of poor human nature.

The petition of four thousand ladies of this city, presented to the City Council, on Tuesday evening, May 19, asks that body to refuse to license the sale of intoxicating drink. This is tantamount to asking the municipal authorities to prohibit the sale of intoxicating drinks, which include strong beer, strong porter, ale, all wines perhaps with the exception of mild home made wines, and all spirituous liquors.

There are many considerations which will suggest themselves to the Council in deliberating over this petition. One of the first things will be whether absolute prohibition would be desirable; and another, whether it would be practicable. As to the first, it may be urged that prohibitory laws generally have not worked very satisfactorily, as witness the experience of Maine and Massachusetts. But in former years, with a more sober and tractable population, prohibition, or what amounted to nearly the same thing, existed in this city with very salutary effect.

Before taking definitive action upon the question, the City Council will be likely to examine the whole subject carefully, in all its bearings. If after such deliberative examination, the Council should come to the conclusion that it would be desirable to grant the petition of the four thousand ladies and institute rigid prohibitory measures, the next thing to be considered would be, would it be practicable to carry those measures satisfactorily into effect? In deliberating upon this part of the subject the courts and their action would come into consideration. Even if this District Court, and the Supreme Court for the Territory, should not favor prohibitory measures, there would still be left an appeal to the Supreme Court at Washington.

In regard to this latter tribunal, there is reason to think that it would decide in favor of the right of the City to enact prohibitory measures, for in several of the late decisions of that high judicial body there has been a manifest leaning in favor of self-government for the Territories, notwithstanding the admission that the constitution was not made for the Territories and that Congress has plenary powers over them. It is true enough that the organic provisions of the federal constitution have no application to the Territories until they become States or are preparing to enter the Union. But the fundamental principles of the constitution must be held to apply to all citizens of the United States, whether residing in States or Territories. That, as to principles, is the fundamental rule of action for Congress in all legislation affecting the citizens of the Union, and a wilful departure therefrom, even by Congress itself, would be of the nature of treason to the principles upon which the republic of the United States was established and has been maintained in its dignity before all the world.

These and other relevant ideas affecting the question, taken into due consideration, should the City Council eventually conclude to institute prohibitory measures, we shall heartily wish it success, for it is very evident that if the whole liquor business were to be blotted out of existence to-day, to be known no more on this fair earth forever, the entire human race, morally, physically, financially, intellectually, and in every way, would be infinitely the gainers, though a few people might consider themselves immensely, unwarrantably and irreparably hurt.

SUSTAIN HOME INTERESTS.

ZION'S CO-OPERATIVE MERCANTILE INSTITUTION,

SALT LAKE CITY, May 3, 1874.

BRETHREN—We are led to call your attention to a few business items connected with this Institution, and our internal economy as a people, which we trust will receive at your hands careful consideration. A right understanding of our condition will undoubtedly be of service to us in reaching a just and correct solution of the problems that press upon us as a self-sustaining people.

The wool clipping season is now at hand, and, so far as we are aware, but little effort has been made to secure this valuable product for the use of our factories. It is estimated that the season's clip will aggregate upwards of half a million pounds, the whole of which can be manufactured into cloth and other woolen fabrics by our looms. But unless efforts are speedily made, too much of this important staple will be shipped out of the country in its raw state, to come back to us manufactured into clothing, flannels and other articles of wear. Our looms in the meantime will be idle, and remunerative employment, that our brethren are so much in need of, will have been furnished to others outside of this Territory.

Hides and pelts are another staple, of no less importance to the community than that of wool just referred to. But what is the condition of this branch of home manufacture to day? In reality we have ceased to manufacture leather. As with the wool, so with the hides, they have been shipped out of the country, and we have imported leather and shoes.

Now this Institution should be the factor, both home and foreign, for performing such functions as the manufacturing interest of the Territory demands, whether it be controlling the wool and hides produced or importing machinery and other necessary foreign products.

We would therefore earnestly call upon the brethren throughout the Territory to assist us, by paying what they owe the Institution with the least possible delay, and by subscribing for stock, or by making deposits.

Upon all sums deposited for three months and upwards the Institution is prepared to allow a fair and liberal interest.

In conclusion, we would impress upon you the importance of the subjects treated of in this letter, and solicit your cordial aid and support in placing this great institution in a position to bless and benefit the people in a still greater degree than it has yet done.

Your brother and friend,

BRIGHAM YOUNG,
President of Z. C. M. I.

LIST OF NAMES OF PASSENGERS

Booked through to Ogden, per Steamship "Nevada," May 6th, 1874.

John and Mary A Collins; Harriet Holbrow; Wm D, Mary A, and Jno W Salter; John and Mary Davis; Thomas and Emma Lewis; David Powell; John Lloyd; Henry, Mary and Hyrum Haynes; John, Catherine and John Jordan; Timothy, Jane, Janet and Jane Woozley; Benjmin Kelley; Geo Davis; Richard and Mary Batt; John, Jane and Wm Price; Wm, Martha and Thos Davis; Henry, Harriet, Mary, Henry, Sarah J and Eziah Thomas; Rachel Gibbs; Catherine Davis; David Rarie; John Hardy; John, Mary A, Sarah, John, Mary A, and Hannah Lake; James Williams; Wm H Hurst; Sarah Frebbel; G C Munns; Gideon Holmes; Eliza Wesson; Eliza, Mark and James Baker; Wm and Mary Thompson; John Harewood; Mary Bayne; John McPhie; Thomas Bowcutt; John, Emma, Isaac, and Edward Allcock; Benjamin, Mary, Walter, Jane, George and Sarah Scott; William Hodgkinson; Edward, Mary, Isabella, Annie, Edward, William, Joseph, John and Mary Green; Stephen, Esther, Eliza, Bertha, Stephen, John and Amelia Starley; Harry and Sarah Field; Thomas, Ann, James, Mary, Samuel, Annie, Robert and Sarah Liddiard; Ann Fraser and infant; Ebenezer Swainton; Ambrose Woolford; Ephraim and Mary Caffal; Wm H Myers; Kate Manning; Mary Williams; Wm Pickering; Hepzibah Gardiner; Samuel Dyson; Maria Small; Samuel, Jane, Lydia, Hannah, William and Maria Kydd; Sarah and Robt. Jefferson; Francis Dawkins; Gerret J and Georgiana E Kemmink; Fergus Coulter; James Brown; Mr. Williams; Maria Wesson.

Returning Missionaries—Lester J Herrick (in charge); Robert McQuarrie; John E Rees; James T Little.

List of names booked to New York only, who expected means in the hands of Brother Staines to continue their journey through:

P and Malnski Pantoch; Anton Karwinski; James, Margaret and Jane Davis; Elenor, Jno. and Thos. Allen; Daniel and Mary Richards; Sarah and Wm. Gibbs; Harriet Davis; Geo Kennett; Wm and Mary Farr; Sarah, Elizabeth and Jessie Buchanan.

UTAH DELEGATESHIP.—A Washington dispatch says that the House committee on elections will immediately take up the case of Cannon, Delegate from Utah, and press it to a conclusion. Maxwell, the contestant, has filed a paper with the committee, asking that Cannon may be forced to reply to his charges at once. A bill has been prepared by the committee to expel Cannon, as it is expected he will at once admit his polygamous relations, and prepare to defend them.—*Gold Hill News, May 19.*

SETTLES THE QUESTION.—Elder Cannon, the Mormon representative from Utah in Congress, has been declared entitled to his seat. This settles the question of the rights of the Mormons to elect one of their own number to represent them in Congress, and disposes of the absurd claim of Maxwell, the Gentile candidate, who laid claim to the seat on account of Cannon's ineligibility.—*Chicago Times.*

DIED.

In the 19th Ward, May 16th, of malignant scarlatina, EDNA CAROLINE, daughter of George and Rachael Hamlin, aged 17 months and 16 days.

At Bloomington, Oneida County, Idaho, May 10, after an illness of four days, MARY LAPSLEY, daughter of William and Phebe Huline, aged 1 year, 9 months and 19 days.

At West Jordan Ward, May 14th, ELZADA OPHELIA, twin daughter of Samuel and Marinda Allen Bateman, aged 2 months, lacking one day.

Continued from page 261.

England is the common law of this country," as we are told in the books. 1 Bishop, M. & D., par. 31. The common law is the groundwork of all jurisdiction; and the common law courts existed centuries before chancery courts or ecclesiastican courts were known, in England. Prior to the Norman conquest, the powers of what have since been known as common law courts, chancery courts, and ecclesiastical courts, were all united in one court and embraced in one jurisdiction. Chancery jurisdiction was almost unknown and ecclesiastical jurisdiction, as distinct from lay jurisdiction, had never been heard of. The courts then existing were presided over by laymen and ecclesiastics together, and belonged as much to the one as to the other. William, the Conqueror, ordered, by statute, a separation between the lay and the ecclesiastical powers of these courts and established separate tribunals, and "*forbade* tribunals of either classes from assuming cognizance of cases belonging to the other." Bouvier's Law Dict., title, "Ecclesiastical Courts." 1 Bishop on M. & D., par. 50.

The common law courts before the Conquest, before chancery courts had grown up, and before the ecclesiastical tribunals had been called into existence, exercised the same jurisdiction in divorce that the ecclesiastical courts afterwards did, and granted the same kind of divorce as was afterwards granted in the ecclesiastical courts. None of these tribunals, either those existing before or those coming into being after the Conquest, were empowered to grant any divorce, except "*a mensa et thoro.*" And at the date of the organization of the Territory of Utah, the ecclesiastical courts of England had no power beyond that and had no jurisdiction to grant divorce *a vinculo matrimonia.* Such as is prayed for in the case before us, could not have been granted in the ecclesiastical courts. It is a suit for divorce from the bonds of matrimony. 1 Bishop, M. and D., par. 30

In America a divorce is commonly taken to mean an absolute severing of the bonds of matrimony, and not merely a separation from bed and board. And this absolute divorce is the kind referred to in our Territorial statute. No ecclesiastical court ever took cognizance of such cases. Parliament alone, in England, could grant absolute divorces, (Story's Conflict of Laws, par. 202. 1 Bl. Com. 440-1: Story's Equity Juris., par. 1427, note.)

If we are to follow English, instead of American, models, in fashioning our jurisdiction in divorce cases, we cannot go to the Ecclesiastical Courts—but must go direct to Parliament—direct to our Legislature. But Congress has set its seal of condemnation upon this policy. The Territory of Florida took this view of the matter and accordingly assumed to grant divorces by its own enactments. Congress very promptly dissented from this view, and at once, in 1824, annulled all such territorial enactments. From that day to the present time no territorial legislature, so far as my knowledge goes, has presumed to take upon itself such power, recognizing fully that Congress disapproved of the exercise of such power, when no express authority therefor had been given. But Parliament itself never granted divorces *a vinculo*, except for adultery. (Bouv. Law Dic., title "Divorce.") Hence even our Legislature could have no pretence for assuming such power, even aside from the disapproval of Congress, save and except for the cause of adultery.

Hence, if we are to go to England for precedent and authority in divorce jurisdiction, we can find none except Parliament, and that for one cause only. No tribunal of justice there exercises such power. This, it would seem, is enough to show that the language, "chancery as well as common law jurisdiction," does not refer merely to matters and cases taken cognizance of in these English courts, but refers more especially to the "bed rock" principles which underlie all these courts, and to comprehend every right that needed enforcement and every wrong which required a remedy.

In most of the States of the Union, divorce is classed among suits at law and tried by jury, and in others it is considered a proceeding in chancery. And generally it has not been assumed by the courts except upon statutory authority or for causes arising prior to marriage when there was no statute. In Bacon's Abridgement (title, "Marriage") it is said that the ecclesiastical courts could not grant divorce *a vinculo* for any cause occurring *subsequent* to marriage. The inference might be drawn that they had jurisdiction when the causes arose prior to marriage. And suppose this to have been true. Then any causes of which a court of chancery should certainly not take cognizance, would be those which arose prior to marriage, for such were peculiarly under the care of the ecclesiastical courts and could not be assumed elsewhere, except upon statutory authority. Yet we find that, of all the causes for divorce, the chancery courts of this country are inclined to take these cases rather than any other. Chancellor Kent in speaking in a Court of Chancery, of divorce, says, "Whatever civil authority existed in the ecclesiastical courts, touching this point, exists in this court, or it exists nowhere and all direct judicial power over the case is extinguished, but that is hardly to be presumed." The case before him was one founded upon a cause existing at the marriage, and the Court without hesitation assumed the jurisdiction as part of the inherent powers of a court of chancery. Wightman *vs.* Wightman, 4 Johnson's Chy. R., 343.

And we understand it is admitted, in the case before us, that courts of chancery can take jurisdiction of divorce cases for causes arising anterior to marriage. Which of all others are the cases they should not take cognizance of, if we are to follow the rigid rule which it is proposed by the appellant that we should follow.

No American court could grant a divorce from the bonds of matrimony unless the statute give the causes for such divorce. And we think it will be found that, where such a divorce has been sought in an American court of chancery and refused, there was no statute in existence giving causes for divorce. In this Territory we have such statute, and it requires only the application of common law and equitable principles to carry them into effect. We have been referred to no decision where the grounds for divorce were given by statutes and where no court was specified to take the jurisdiction, and upon no reasoning have we a right to infer that a chancery court would in such a case allow the statute to lie dead and the wrong unremedied.

Chancellor Kent tells us that "all matrimonial and other causes of ecclesiastical cognizance belonged originally to the temporal courts, and after the spiritual courts cease, the cognizance of such causes would seem, as of course, to revert back to the *lay* tribunals. Wightman *vs.* Wightman, 4 Johnson. Ch. R., 347.

We have no ecclesiastical courts and if we had, they could have no jurisdiction in the case before us. We have only two sides to any court in this country—a law side and a chancery side, and whether divorce falls to the one side or the other, it belongs to the district court. The proceedings under the Territorial statute are more akin to the chancery than to the common law side of the court A suit under this statute is virtually a suit in chancery. The very gist of the action is an appeal to the conscience of the Chancellor and not to the verdict of a jury. The proceedings are not after the character of the ecclesiastical courts, the relief is not such as could be granted in those courts and the grounds of relief were wholly unknown in that court for such a divorce. Hence we can see no good reason for a court of chancery refusing to take jurisdiction in such cases, especially as chancery can give a more complete relief than a direct proceeding at law. Chancery is a superior court and chancery jurisdiction is a superior court jurisdiction, and everything is supposed to be done within the jurisdiction of said court, unless the contrary especially appears. (2 Bac. ab., p. 526.)

No analogy for a contrary view from what we have taken can be drawn, as to chancery powers, from the fact that in England a new divorce court has been created with the Probate judge as judge ordinary thereof; for the Lord Chancellor himself stands at the head of that court, and is authorized to take that position in such court whenever he may deem it proper.

The Supreme Court of the United States have, in the late case of ——, upon a totally different subject, given some dicta, which, by some, are supposed to bear upon the question involved in this case. Upon a fair and candid examination, however, of such dicta, we do not think that such will be found to be the case.

In respect to alimony, there seems to be no difference of opinion, if the granting of the divorce be proper.

Upon the whole case, therefore, we conclude that in divorce, as in all other civil cases, the Territorial statutes have conferred jurisdiction upon the District Courts; that the attempt to confer such power upon the Probate Courts was wholly nugatory as in conflict with the Organic Act, and that such grant of power to the District Courts by the Territorial statutes was wholly unnecessary, as under the Organic Act, such power was already vested in the District Courts as part of their general jurisdiction. Therefore the judgment of the Court below, both as to divorce and alimony, is affirmed.

MCKEAN, CHIEF JUSTICE, I concur in the conclusion, that the judgment of the Court below must be affirmed, and reserve the right hereafter to file my opinion in writing.

SUPREME COURT DECISION.

The Territorial Marshalship.

Opinion of Chief Justice J. B. McKean, Associate Justice J. S. Boreman concurring, and Associate Justice P. H. Emerson dissenting, delivered May 21, 1874.

TERRITORY OF UTAH, } October
Supreme Court. } Term, 1873.

Ex parte BENJAMIN L. DUNCAN.
Ex parte JOHN D. T. MCALLISTER.

The Court being in adjourned session in the month of May, 1874, Duncan appeared in court, and by his counsel claimed to be recognized by the Court as Territorial Marshal for the Territory. McAllister also appeared by his counsel and claimed to be recognized as such Territorial Marshal. The evidence presented, and the grounds relied upon by each, are stated and considered in the opinion of the Court.

J. R. McBride and R. N. Baskin for Duncan,

J. G. Sutherland and Z. Snow for McAllister.

MCKEAN, Ch. J., delivered the opinion of the Court; BOREMAN, J., concurring; EMERSON, J., dissenting.

On the argument on behalf of the respective claimants, the Journal of the Legislative Assembly of Utah was introduced, showing that on the 14th day of February, 1874, the Council was in session, and that among other proceedings,