TERRITORY OF UTAH,
SUPREME COURT,
Before the Hon. J. B. McKean, C. J.,
C. M. Hawley, and O. F. Strickland, } A. J.
Cronyn & Perris, vs. W. G. Higley, *et al.* } Appeal from the Third District Court.

The transcript in this case shows that the plaintiffs commenced an original suit against the defendants in the Probate Court, in Salt Lake County, upon a promissory note given by the defendants to the plaintiffs. To this suit the defendants appeared and without objection to the jurisdiction of the Probate Court filed an answer; afterward the case was tried before a jury, which resulted in a verdict and judgment for the plaintiff. From this they took an appeal, but failed to perfect it in time. After the appeal was dismissed the District Court of the Third Judicial District, on the application of the defendants, issued a writ of certiorari, which brought the case to the District Court. On the hearing, the District Court held that the Probate Court had not jurisdiction. The judgment was, therefore, reversed and the suit dismissed. An appeal brings the case to this Court. The only question involved is, have the Probate Courts in this Territory jurisdiction in civil cases at common law?

This question is to be settled by determining the true meaning of

1. The Acts of Utah;
2. The Organic Act.

These questions also involve the legislative power of the Governor and Legislative Assembly of this Territory. I shall examine first the Act of Utah: Sec. 23, p. 30 of the Acts of Utah provides that there shall be a Judge of Probate in each County within this Territory, whose jurisdiction within his Court in all cases arises within their respective counties under the laws of the Territory. Sec. 29, p. 31 of the same Act says, 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 by the same general rules and regulations, as to practice, as the District Courts. Other parts of the the same Act provide for a seal of Court, the keeping of a clerk and a record by these courts, with a sheriff to execute their process. They are also authorized to summon grand and petit jurors, thus providing for them all the common law requisites of a Court of Record. Sec. 1, p. 34 of the Utah Laws, provides that "all the Courts of this Territory shall have law and equity jurisdiction in civil cases, and the mode of procedure shall be uniform in said Courts." Not perceiving any ambiguity or uncertainty in the meaning of these statutes, I must conclude that if the Legislature had power to confer this jurisdiction on these Courts, it has been done. I therefore pass to inquire whether there is the requisite Legislative power in the Governor and Legislative Assembly of Utah to confer this jurisdiction. To determine this, I shall look to the Organic Act and examine it in connection with the Constitution and Laws of the United States, and with the decisions of the Supreme Court.

It is the right and the duty of the Legislative departments of all governments, when not restrained by a constitution, to provide Courts and to limit, fix, or set bounds to their judicial powers. The Constitution of the United States, Art. 3, Sec. 1, says, "the judicial power of the United States shall be vested in one Supreme Court and in such inferior Courts as the Congress may from time to time ordain and establish." By this it appears that Congress is charged with the duty of providing by law, (it is, therefore, within its legislative power,) for limiting or fixing the number of judges of the Supreme Court and of prescribing, by law, the number of inferior Courts with the number of their judges, and for the original and appellate jurisdiction of each, as well as their exclusive, or concurrent judicial powers, and the appellate jurisdiction of the Supreme Court.

The same Article, Sec 2, after stating the classes of cases to which the judicial power of the United States shall extend, of which there are eleven, and after stating the classes in which the Supreme Court shall have original jurisdiction, adds that in all other cases it shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make. Here we find it is not only the right, but the duty of Congress to limit, by law, the appellate jurisdiction of the Supreme Court, to create inferior Courts and to confer upon them original jurisdiction, which may be exclusive or concurrent, at the discretion of Congress.

By the Act of Congress Sept. 24, 1789, Congress exercised its unquestionable right to create inferior Courts, to limit their jurisdiction and to regulate the appellate jurisdiction of the Supreme Court. These are referred to, not because they settle the question now before us, but because they establish, what every one must concede, that it is a rightful subject of legislation to limit, to give, to fix, and to set bounds to judicial power, and, if need require, to create new Courts and abolish old ones, when not restrained by a constitution or a paramount law. It has been claimed that the Organic Act is a constitution for Utah, a claim which by no course of reasoning can be sustained; yet, if it were so it would not settle this question of Legislative power. It may be observed that there is a plain and necessary distinction to be drawn between the Constitution of the United States and the Constitution of a State, or an Organic Act of a Territory, in relation to the constitution of the Legislative powers contained in them. The Constitution of the United States, having been given by the States for a national, supreme law, is understood to be construed strictly; that is, to authorize the Congress to legislate on such subjects and on only such subjects as are expressly, or by necessary implication, therein contained. The Constitution of a State and an Organic Act are both to be construed liberally; that is, to authorize legislation on all rightful subjects of legislation, unless it be on subjects by it prohibited. This is in harmony with the theory, if not with the practice, of the American States: that all just powers of the governors are derived from the consent of the governed. Before proceeding to the Organic Act, I will remark: that neither the Constitution or a law of the United States limits, or attempts to limit, except in a very few cases, the power either of the Executive, Judicial, or Legislative in the Territories. And: that no law of Congress exists which *defines, limits, fixes or sets bounds to* the judicial power of the Probate Courts in this Territory. Organic Act, Sec. 4, says, "the legislative power and authority of said Territory shall be vested in the Governor and Legislative Assembly." Sec. 6 says, "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." Then follow certain inhibitions among which the jurisdiction of the Probate Courts is not mentioned directly or indirectly. We in this language find this Legislative power expressly given "if it be consistent with the Constitution of the United States," and "if it be a rightful subject of legislation" which I trust I have before shown conclusively that it is. An act is consistent that is not inconsistent. When the Constitution says nothing upon a subject of the judical power of a court not therein named, a statute naming the court and limiting its jurisdiction must be consistent with the Constitution. One statute naming a court without setting bounds to its jurisdiction is not inconsistent with another statute naming the same court and setting bounds to its jurisdiction. When authority is expressly given in a constitution, or in an Organic Act, to a legislative department, to legislate on all right ful subjects of legislation, such a power ought not to be neutralized, by other words therein, unless these other words clearly showed such an intent, or at least, an intent to make the case an exception to a general power. It is not necessary to enumerate the various subjects upon which the Legislative Assembly may exercise its lawful powers nor to enumerate exceptions to this right. It is quite enough for our purpose to show what has before been shown: that the legislative power of fixing, giving, limiting or setting bounds to judicial powers, is a rightful subject of legislation, unless clearly restrained by a higher power and, that in the case at bar, no higher power has restrained it. Passing over several matters contained in the Constitution and the Organic Act, relating to inhibitions on Congressional and Territorial legislative powers, not necessary to be named because not affecting the case at bar, I proceed to the ninth section of the Organic Act, which says "The judicial power of said Territory shall be vested in a Supreme Court, District Courts, Probate Courts, and in Justices of the Peace. The jurisdiction of the several courts herein provided for, both the appellate and original, shall be as limited by law." By what law? A law of Congress or a law of the Territory? A law then in existence or a law thereafter to be passed? None others are possible. Certainly not a law of Congress; nor a law of the Territory then in existence for there was none, nor can it be a law of Congress for none has been passed. Is it not then evident that it means a law of the Territory thereafter to be passed? If in this I am corrrct, and it is impossible for me to perceive my error, then here I find the legislative power expressly given as if the power mentioned in Sec. 6 was again thought of and again affirmed or re-enacted. It has been again suggested and it may again be suggested that the words "as limited by law" implies a law then in force as the word limited is in the past tense which, I concede is not without some force. It would have great force if there had been any law of the United States or of the Territory then in force on this subject, but as there was none and as Congress has not since passed any for this or any other Territory,—Montana excepted—See Act of Congress of March, 1867, p, 426—and as the Organic Act of the Territory of Wisconsin, passed 1836, contained the same word in this respect as our own; and as Congress never passed any law for that Territory the conclusion is irresistable, that Congress used the word limited with reference to future Territorial Legislation. It was held by the Supreme Court in the case of the Ins. Co. *vs* Canter, 1 Peters 511; and in the Dred Scott case, 19 Howard pp. 393, 442, 443, that Congress in the Territories had the combined powers of the general government and of a state government. If so then does it not follow as a logical deduction that by Sec. 4 of the Organic Act Congress conferred on the Governor and Legislative Assembly that part of its power which as a State it could exercise? Is it reasonable to suppose that Congress, by declaring that the Legislative power shall be vested etc., and shall extend to all rightful subjects of legislation" intended to restrain them within any narrower limits than the fair and reasonable import of their words would imply, any more than it intended to extend those powers so as to include legislation on subjects properly national?

Ought these *words to be* restrained so as to limit this power to *subjects less* than would exist if Utah were a State. I will look a little further to Sec. 9, in which I find, when speaking concerning jurisdiction, a proviso that Justices of the Peace shall not have jurisdiction of any matter in controversy where the title to or boundaries of land may be in dispute, or where the debt or sum claimed shall exceed one hundred dollars, which is the only limitation, when speaking concerning jurisdiction, we find in this section, and that is confined to Justices of the Peace, and therefore has no referenc to any of the other courts. If to this we apply the maxim of expression *unius est exclusio alterus* it will include in the Territorial legislative discretion the jurisdiction of all the courts except Justices of the Peace and it will also include them with the exception of the cases expressly named.

The proviso proceeds and says: "And the said Supreme and District Courts, respectively, shall possess chancery as well as common-law jurisdiction." Without this clause it would have been left entirely to have conferred the whole Territorial judicial power on the other two courts, viz., the Justices of the Peace and Probate Courts, but with it there is a further limitation of discretion which is, the Supreme and District Courts must possess common law and chancery jurisdiction. This cannot be taken from them. But notwithstanding this and notwithstanding it is to be both appellate and original it is to be exercised as it shall be limited by law. It has been claimed that the maxim above mentioned "the expression of one thing is the exclusion of all others" applies in this phrase to the jurisdiction of the courts inasmuch as it expressly names the Supreme and District Courts and does not name the Probate Courts and Justices of the Peace. But this proves too much as it entirely excludes Justices of the Peace. Besides, before the proviso in the same section the power to limit or prescribe the jurisdiction of all the courts is expressly given.

The naming of the Supreme and District Courts in this proviso, saying: "They shall possess chancery as well as common law jurisdiction is to be understood, as I have before said, as excluding the power of the Legislative Assembly to take from these two courts common law jurisdiction and as giving them chancery powers. This view of the subject is made manifest by the consideration that Congress as a national legislature has not power to legislate relating to the internal police of a State, in a State capacity, and that it was then authorizing the Legislative Assembly to regulate the internal affairs of the Territory, and that in a State a common law court could not, in the absence of a constitution or statutory provision, authorizing it to be done, exercise chancery jurisdiction.

I am safe in saying that in every State in the Union where the same courts have both chancery and common law jurisdiction, the chancery jurisdiction has been given either in the Constitution or by statute.

Chancery jurisdiction must be given in one of these ways. (Sec. 4 Kent, 11 ed., p. 163, note d.) These two jurisdictions are separate and distinct, and when chancery jurisdiction is given to a common law court it is only another power added.

This combination of jurisdictions in the same court is of American origin. These words in the proviso can have a full and just meaning and leave it within the power to confer original jurisdiction on the Probate Courts.

We further remark that jurisdiction is of several kinds.

1. It is original.
2. It is appellate.

Both of these may be exercised in the same case, that is in one court original, and in the other appellate, jurisdiction, and that whether the case be one of chancery or common-law cognizance.

3. It is exclusive.
4. It is concurrent.

A jurisdiction is exclusive when a particular court and no other has power to adjudicate on the subject matter of the suit.

A jurisdiction is concurrent when two or more than two courts have power to adjudicate upon the subject matter of the suit. Both of which are familiar to us all. Sec. 1. Bonviers L. D. 683. If it were conceded, which however is not conceded, that Congress conferred on the District Courts, original jurisdiction, in Territorial criminal cases, would it follow that an act of the Legislature conferring jurisdiction on another court would be inconsistent with the Organic Act, so long as the jurisdiction was not taken from the District Court?

If an Act create a court and prescribe its jurisdiction, would another Act creating another court and giving it the same jurisdiction as the first, be inconsistent *with the* first Act?

Could not the *two* laws be executed at the same time? and would not these two Courts have concurrent jurisdiction? Is not this common legislation?

An alien may sue a citizen of the United States in a State Court or in the United States Courts, in certain cases: That is, both Courts have jurisdiction. Is the law of a State, giving jurisdiction to its courts in such cases, inconsistent with the Constitution of the United States, or the law of Congress? see act of Congress, Sept. 24th, 1889, Sec. 9, 11. In this Section 9, the words in connection with the jurisdiction of the Courts, exclusive and concurrent, are not used. There are, therefore, no words used, giving them the very largest and most extensive import of meaning, which confers exclusive, or ginal jurisdiction on the District Courts, or that confines the whole appellate jurisdiction, to the Supreme Courts.

It may not be uninteresting to look into the term limited. On examination of the law dictionaries I do not find the word limit, but I do find the words limits and limitations. Limitation is the end of time, appointed by law, within which a party may sue for and recover a right. Limits is applied to boundaries such as States, Territories, counties, towns, and jail limits. Limits says Webster is bounds, bounds set, bounds fixed; to limit is to bound, to set bounds, to fix bounds. Which, when applied to judicial power must mean to define, to fix, to set bounds to. Limited it is conceded is in the past time but, as I have before shown, in this section it is used with reference to a future signification and with reference to the original and appellate jurisdiction of all the courts. The Supreme Court has held, though I think erroneously, that it has original jurisdiction in chancery. All concur that the district courts have original jurisdiction in such cases. If then the Supreme Court is right and I am wrong these two courts have concurrent jurisdiction even though the word concurrent, when applied to jurisdiction, is not used in the Organic Act.

If it be *not* inconsistent for these two courts to *have* concurrent jurisdiction, can it be inconsistent, with the Organic Act, *to* confer the like original jurisdiction on another court?

Z. SNOW, for Pltffs.