THE EVENING NEWS.

PUBLISHED DAILY, SUNDAYS EXCEPTED AT FOUR O'CLOCK.

Friday, - - May 22, 1874.

DAVID O. CALDER,
EDITOR AND PUBLISHER.

NEWS OF THE DAY.

In the U. S. House of Representatives, a bill was passed yesterday, for the admission of New Mexico as a state into the Union.

The citizens of Lowell, Mass., have sent two thousand dollars to aid the Lousiana sufferers, and six hundred dollars to help the sufferers by the Mill River disaster.

Mr. and Mrs. Sartoris, daughter and son-in-law of President Grant, reached New York, last night.

Forty temperance crusaders were arrested in Pittsburg, Pa., yesterday, charged with obstructing the side walks; they were dismissed and informed that for a second offence they would be punished.

Professor Swing, recently tried in Chicago on a charge of heresy, and acquitted, announces his withdrawal from the Presbyterian church.

A noted herd of short horns, numbering seventy-nine animals, was sold at Minneapolis yesterday, for $126,990; one bull was bought by Mr. G Robbins, of London, England, for $14,000.

Governor Kellog, of Louisiana, announces that forty thousand rations are issued daily to the sufferers by the Mississippi floods.

A resolution has been introduced into the Arkansas legislature, requesting the resignation of the Senators in Congress from that State.

The Czar of Russia has left England.

The Prussian Diet has prorogued.

Prince Metternich and the Count of Montebello fought a duel yesterday, in which the former was disabled by being wounded in the arm.

Louis, son of the Duke de Monpensier, is dead.

Just So.—The Washington *Star* says—

"Delegate Cannon, of Utah, is to be investigated by Congress for immoral—that is to say, polygamous—practices, and all the members who are without sin are arming themselves with rocks to shy at him."

And the concrete voice of Congress and the country should be to the Delegate from Utah's peaceful vales—"Keep thy seat, thou hast not sinned in this particular."

The Case of Geo. Q. Cannon.—Washington, May 19th. — The House Election Committee yesterday had before it Geo. Q. Cannon, Mormon Delegate, to answer the charges presented by Hazelton of Wisconsin, that he was living in open polygamy, with four women as his wives, in violation of law. He declined to plead to the charges, and admitted his guilt by stating that he would submit the matter on evidence presented by General Maxwell, on the contested election case, which is conclusive against him. If the committee can be induced to report, the expulsion of the polygamist apostle is considered certain. The only obstacle is the mysterious one always raised by Brigham Young and the Mormons, in preventing hostile action in Congress against their peculiar interest.—*Sacramento Union.*

Correspondence.

The Bear Lake Monster Described by an Eye-witness—Its Existence Authenticated.

By courtesy of President Brigham Young we are enabled to print the following letter, which, from the known veracity of its writer, is sufficient to extinguish all doubts as to the existence of the monster, which has so long been supposed to inhabit the waters of Bear Lake, Rich Co.

PARIS, Oneida County, Idaho,
May 18th, 1874.

President Brigham Young:

Dear Brother: — Last Friday morning (May 15th), on our return from Conference, William Broomhead, Milando Pratt and myself were in a light wagon traveling northward by the Lake shore, when our attention was attracted to an object in the water about a hundred yards ahead of us and about twenty-five yards from the shore. At first sight we thought it might be a very large duck, as we distinctly saw ducks nearer the shore, but as we got near, we saw that it was an animal, the head and a portion of the back about a foot from the head being visible, leaving also about the space of a foot between the back part of the head, and the beginning of the back where the animal was not visible, the invisible part no doubt being the neck. When we were within about 70 yards the animal dived under the water, and from its action we judged it was not more than five or six feet long, still we did not see its length. When it went down we stopped our wagon and waited, hoping it would come up again, which it did in perhaps about a minute, a little behind us and probably 25 yards from shore, and not more than 35 yards from us. Its face and part of its head were distinctly seen, covered with fur, or short hair of a light snuff color. The face of the animal was apparently flat, very wide between the eyes, and tapering to the nose, with very full large eyes and prominent ears, resembling those of a horse, but scarcely as long. The whole face, in shape, was like that of a fox, but so large that the space between the eyes equalled that of the distance between the eyes of a common cow. It did not look ferocious, and was in no hurry to go, but kept moving slowly, then diving again, came up and moved off into the Lake as fast as a man could walk. We had an excellent opportunity to see what was above water, and the Lake was perfectly still.

As there has been considerable interest excited in regard to the "Bear Lake Monster," I submit a description of what we have seen, thinking it might be acceptable to you. Very respectfully,

WM. BUDGE.

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, Supreme Court.	October 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, "communications were received from His Excellency, the Governor, nominating * * * * * Benjamin L. Duncan to the office of Territorial Marshal."

A commission, of which the following is a copy, was also introduced:

"The United States of America, Territory of Utah.

"*To all who shall see these Presents, Greeting:*

"Know ye, that whereas Benjamin L. Duncan was, on the third day of March, A.D., 1874, duly appointed Territorial Marshal in and for the Territory of Utah, and he having duly qualified as such, as appears by proper evidence on file in the office of the Secretary of the Territory: Therefore I, George L. Woods, Governor of said Territory, do hereby commission him Territorial Marshal, as above indicated, and authorize, and empower him to discharge the duties of said office according to law, and to enjoy the rights and emoluments thereunto legally appertaining, until the next session of the Legislative Assembly, and until his successor shall be elected and qualified to office.

[L. S.] "In testimony whereof I have hereunto set my hand and caused the Great Seal of said Territory to be affixed.

"Done at Salt Lake City, this third day of March, A. D., 1874, and of the Independence of the United States, the ninety-eighth.
"GEO. L. WOODS,
Governor."

"GEORGE A. BLACK,
Secretary of Utah Territory."

On the part of McAllister the Journal of the Legislative Assembly was introduced, showing that on the 16th day of February, A. D. 1874, the committee on elections of the House of Representatives reported to the House "the number and kind of officers to be elected by the joint vote of the Legislative Assembly," among others, "One Territorial Marshal;" and added, "Your committee would also recommend that the Assembly hold a joint session as soon as possible, consistent with other legislative business, for the purpose of making said elections." Also showing that in the House of Representatives on the 19th of the same month, Mr. S. A. Mann moved that the Council be requested to meet the House in joint session to-morrow at 2 p.m., for the purpose of electing the officers to be made elective by law by the joint vote of the Legislative Assembly. Seconded and carried." Also showing that in the Council on the same day, "A communication was received from the House, asking the Council to meet in joint session to-morrow at 2 p.m. On motion of Councilor Harrington, the Council agreed thereto." Also showing the following record:

"Joint Session. Representatives' Hall, Salt Lake City, February 20, 1874.

"According to previous agreement, the Assembly went into joint session.

"The President of the Council presiding.

"The roll of the Council was called by the chief clerk of the Council. Quorum present.

"The roll of the House was called by the chief clerk of the House. Quorum present.

"The President declared the joint session open and ready to proceed to business. * * *

"On motion of Councilor Harrington, John D. T. McAllister was elected Territorial Marshal."

Documents of which the following are copies, were read on the argument:

"REPRESENTATIVES' HALL,
Salt Lake City, Feb. 21, 1874.

"*Hon J. D. T. McAllister:*

"Dear Sir—We have the honor to inform you that at a joint session of the Legislative Assembly, held at the Representatives' Hall, on the twentieth instant, you were elected Territorial Marshal for the Territory of Utah for the term prescribed by law.

"Respectfully yours,
L. JOHN NUTTALL,
Chief Clerk of the Council.

"ROBT. L. CAMPBELL,
Chief Clerk of the House of Representatives."

"TERRITORIAL AUDITOR'S OFFICE, Salt Lake City,
Feb. 28th, 1874.

"I hereby certify that John D. T. McAllister, who was on the twentieth day of February, A. D. 1874, elected by joint vote of the Legislative Assembly of the Territory of Utah to the office of Territorial Marshal for the Territory of Utah, hath this day presented his bonds, with security, and taken and subscribed the oath of office. Which bond has been approved and filed in my office, as required by law.

"In Testimony Whereof, I have hereunto subscribed my name and affixed my official seal, at my office in Salt Lake City, the day and year aforesaid.

[L. S.] "WILLIAM CLAYTON,
Auditor of Public Accounts for U. T."

The contest between Duncan and McAllister for the Territorial Marshalship does not come before us on appeal, nor is it in the nature of a writ of *quo warranto*. Each petitioner asks only to be recognized as the Marshal *de facto*, leaving the question as to who is Marshal *de jure* to be contested in another way. But the manner in which the question is presented to us, will compel us in some regards to consider the legal rights of the petitioners, though we intend now to decide only which of them shall be treated as the *de facto* officer of the court.

Has the Supreme Court of the United States decided the questions involved in this contest? If it has, then its decision must put a speedy end to this controversy.

The cases of *Clinton vs. Engelbrecht* and *Snow vs. the United States ex rel. Hempstead*, have been cited as controlling; and it must be conceded on all hands that if the questions now before us have been decided in that court, it was in the one or the other or in both of those cases. What were the questions involved in those cases? In *Clinton vs. Engelbrecht* the United States Marshal summoned the jury which tried the case — a case arising under the local laws of the Territory. The court decided that the jury should have been summoned by the Territorial Marshal, and not by the United States Marshal. In *Snow* v. *the U. S. ex rel. Hempstead*, the United States Attorney claimed that it was his right and duty, and not the right and duty of the Territorial Attorney General, to prosecute in the Federal courts, all offenders against the local criminal laws of the Territory. The court decided that such offenders should be prosecuted by the Territorial Attorney General and not by the United States Attorney.

Those questions being decided are set at rest. But the Supreme Court of the United States would be the last court to claim that it could decide, in those cases, or in any case, a question not involved in the record. No court has more clearly than that court laid down the doctrine, that an opinion expressed upon a question not before the court is neither binding upon inferior courts, nor upon the court which expressed it.

The question, how must the Territorial Marshal of Utah be appointed, or elected, or chosen? has never been presented to the Supreme Court of the United States, and therefore that court has not had it in its power to decide it. It has never been decided, neither in that court nor in this. If either court has ever employed language which even remotely seems to decide this question, it has been in some case not involving the question, and therefore the language was clearly *obiter*.

The learned counsel for the respective petitioners referred to many text books and reported cases; but in some respects the case at bar is unlike any in the books. It is a case of new impression. Let us inquire, then, not in the light of authority, for there is none, but in the light of reason brought to bear upon the statute, how must the Territorial Marshal be appointed, or elected, or chosen?

The Organic Act of this Territory provides for the election, by the people, of the members of the Legislative Assembly; and that the Governor, Secretary, Chief Justice and Associate Justices, U. S. Attorney and U. S. Marshal, shall be nominated, and by and with the advice and consent of the Senate, appointed by the President of the United States. And section 7 of the Organic Act provides thus: "And be it further enacted: That all township, district and county officers, not herein otherwise provided for, shall be appointed or elected, as the case may be, in such manner as shall be provided by the Governor and Legislative Assembly of the Territory." These provisions, it will be borne in mind, apply to Federal officers, members of the Legislative Assembly, and township, district and county officers. It is most manifest that none of these provisions control the question under consideration. A Territorial Marshal is not a Federal officer; he is not a member of the Legislative Assembly; he is not a township, district, or county officer. These provisions of the Organic Act throw no direct light upon the inquiry, how must the Territorial Marshal be appointed, elected or chosen? But section 7 of that Act contains this further provision: "The Governor shall nominate, and, by and with the advice and consent of the Legislative Council, appoint all officers not herein otherwise provided for."

Can there be any question that if there is anything in the Organic Act, authorizing the creation of and designating the manner of filling the office of Territorial Marshal, it is the provision last quoted? If such an officer can exist at all, must he not of necessity be created like "all officers not herein otherwise provided for?" The Supreme Court of the United States has recognized the right of the Governor and Legislative Assembly to create the office, but it has not decided how that office must be filled.

But what legislation has there been creating or touching this officer? When Brigham Young was governor of this Territory an act was passed and approved containing this provision, to wit: "Be it enacted by the governor and legislative assembly of the Territory of Utah: That a Marshal shall be elected by a joint vote of both Houses of the Legislative Assembly, whose term of office shall be one year" (afterwards extended to four years), "unless sooner removed by the Legislative Assembly, or until his successor is elected and qualified." (See sec. 1, chap. ix., p. 38, Laws of Utah.)

It is thought by some whose opinions are entitled to a high respect, that the office sought to be created by this act, and the manner of filling it, are inseparable; that neither can stand without the other; that if the one is overthrown it must drag down the other with it. Let us consider this view of the case.

What must be presumed to have been the intention of the Legislative Assembly in enacting this law? Was it to accommodate and benefit the public? Or was it to create a place for the benefit of some favorite? We must judicially presume that the legislators intended to serve their constituents rather than some one man; that the office and not the officer was the thing considered. If the office and the incumbent are inseparable, then the office did not exist till the incumbent was chosen, and were the incumbent to die the office would die with him. There would be no vacancy to fill for the reason that there would be no office; and there could be no Territorial Marshal until the office were recreated by legislation, and filled by proper designation. And what would be the consequences of such a state of affairs? The United States Marshal could not act in local cases, either civil or criminal; the rights of parties could not be enforced, and criminals could not be brought to justice. Unless we are irresistibly impelled to it, we ought not to reach a conclusion that might lead to such consequences.

It seems to have been the intention of the Legislative Assembly to do two things—

1. To create the office of Territorial Marshal.
2. To fill that office by a joint vote of both houses.

The Supreme Court of the United States recognizes the right of the Assembly to create the office, and the Organic Act provides how it shall be filled. If any part of the Utah Statute conflicts with the Organic Act, of course the former must, in such part, be null and void. The doctrine that a statute may be valid in part and void in part is elementary.

If the Territorial Marshal is a "township," "district," or "county" officer, then the manner of electing him provided by the Utah Statute may be valid. (Organic Act, Sec. 7.) A constable chosen for a town, or precinct, or small political division or district, is a township or district officer. An officer chosen or appointed for a limited division of a county, or of the Territory, such as a representative district, or council district, or judicial district, is a district officer. The Utah Statute provides — "Sec. 2. Said Marshal shall have power to appoint one or more deputy marshals in each judicial district of the Territory." A sheriff is a county officer. The Territorial Marshal is not a Federal officer; he is therefore not to be nominated, and, by and with the advice and consent of the Senate, appointed by the President of the United States. The bailiwick of the Marshal is co-extensive with the Territory; he is therefore not a township, district, or county officer, and therefore he cannot be appointed or elected in such manner as shall be provided by the Governor and Legislative Assembly, unless they shall provide the same manner that has been provided by Congress. The Territorial Marshal, not belonging to any one of the classes specifically named, must be included amongst "all officers not herein otherwise provided for," and therefore he must be nominated, and by and with the advice and consent of the Legislative Council, appointed by the Governor. (Organic Act, Sec. 7.) The Utah statute, in so far as it conflicts with this provision of the Organic Act, is null and void. What may have been the motive of the Legislative Assembly in passing, or of Governor Young in approving, this provision; whether the Governor desired to be relieved of the responsibility of nominating the officer, or whether it was intended to take the power to nominate away from his successors in office, it is unnecessary to inquire. It is sufficient to say, that they could neither repeal nor override an important provision of the Organic Act.

Whether the joint session of the two houses of the Legislative Assembly was called and conducted, and the election of McAllister effected, according to parliamentary law or not, is a matter of no moment. According to the Supreme Court of the United States, the Assembly had a right to create the office of Territorial Marshal; according to the Organic Act the Governor of the Territory had a right, nay, it was his duty, to nominate, and, by and with the advice and consent of the Legislative Council, to appoint the incumbent of that office. The Governor did so nominate Duncan; the Council did not reject the nominee; the Governor did not withdraw his name, and, after the adjournment of the Council, the Governor appointed him by issuing to him a commission. "The Governor shall commission all officers who shall be appointed to office under the laws of the said Territory, and shall take care that the laws be faithfully executed." (Organic Act, Sec. 2.)

Many questions are left for consideration when this controversy shall come before us in a proceeding on *quo warranto*, if such a case shall arise.

We intend now to go no further than to inquire and decide which of these petitioners has the better *prima facie* case, and which ought therefore to be recognized as the Territorial Marshal *de facto*.

It is the opinion of the court that Benjamin L. Duncan ought to be, and he is hereby recognized as *de facto* the Territorial Marshal of this Territory.

BOREMAN, J., concurs.
EMERSON, J., dissents.

SUPREME COURT DECISION.

Jurisdiction of Probate Courts in Cases of Divorce.

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

Alice Cast, Appellee, *vs.* Eric M. Cast, Appellant.	October adjourned Term, May, 1874.

Boreman, Justice, delivered the opinion of the court.

This is a suit for divorce from the bonds of matrimony and for alimony, which was instituted by the appellee against her husband, in the Third District Court of the Territory, wherein a decree for divorce and alimony was entered, and thereupon the defendant appealed to this court.

The only question raised and involved is as to the jurisdiction of the District Court to hear and determine the case. The objection to its taking cognizance thereof is based solely upon the ground that divorce is "neither the subject of common law nor equity jurisdiction," but is a "special proceeding and purely statutory." It is further claimed that the only statute which controls this matter is Territorial, and embraced in one enactment, entitled, "An Act in relation to Bills of Divorce," approved March 6th, 1852. By the terms of this law, divorce is committed to Probate Courts, and no allusion is made to the District Courts. These facts, it is claimed, exclude the subject for consideration in the District Courts.

If it be true that this jurisdiction depends entirely upon Territorial statute, it does not follow that it depends entirely upon the one particular statute referred to. Other statutes may cover the same subject matter, and in order to reach correct conclusion as to the powers granted and the intention of the Legislature, the examination should extend to all Territorial enactments bearing upon the point in issue.

The Legislature, nearly ten months after the divorce act, created the law entitled, "An Act regulating the mode of civil procedure in civil cases in the courts of the Territory of Utah," approved December 30th, 1852, which provides, "Section 1, That all the courts of this Territory shall have law and equity jurisdiction in civil cases," and the last section thereof repeals all conflicting statutes. These terms seem to confer a general jurisdiction and make no exceptions. The natural deduction is that no exceptions were intended, or had in view, but that the purpose was to embrace all civil suits in this general grant of jurisdiction. Mr. Justice Story conveys the same idea in the following broad language: "The remedies for the redress of wrongs and for the enforcement of rights, are distinguished into two classes; first, those which are administered in courts of common law, and, secondly, those which are administered in courts of equity." (1 Story's Eq. Juris, par. 25.)

If divorce be a "remedy for the redress of wrong" or for the enforcement of a right, it belongs to one of these two classes—either to the class administered in courts of common law or to the class administered in courts of equity. And if to either class, then this statute confers the jurisdiction upon the District Courts, and so much of the divorce act as seems to confine such cases to the Probate Courts, is by the repealing clause referred, expressly negatived. This Civil Procedure act was, subsequently, "so far as in conflict" with the code of 1870, repealed; but as there is no conflict so far as this question of jurisdiction is concerned, it remains unimpaired. In addition to this, the code of 1870 bears out the same general idea that the District Courts have jurisdiction in all civil cases.

Over two years after the above mentioned enactments of 1852, the Legislature manifested this same intention in still broader terms in "an act in relation to the judiciary," approved Jan. 19, 1855, in the first section of which we read that "the District Courts shall exercise original jurisdiction, both in civil and criminal cases, when not otherwise provided by law." The words "law and equity" are left out, and the jurisdiction is made to embrace all civil cases as well as criminal cases, when it is not "otherwise provided by law." The reverse of this general grant of power must be provided in some law. The granting of a particular jurisdiction to the Probate Courts is not sufficient to negative this, nor does this enactment affect the jurisdiction of the Probate Courts, but the District Courts shall have the jurisdiction also, in that as in all other civil cases, unless some other law says they shall not have it. The divorce act itself does not so provide, and it has not been claimed that such a provision anywhere exists. By inference alone can the conclusion be drawn from the divorce act that the District Courts are to be excluded from jurisdiction in divorce. It will not do to say that inference is what is intended, or allowed, by the words "otherwise provided." These words require an express negative of the power. Divorce is a "civil" or a "criminal" suit, and of course no one claims it to be the latter. It is a civil suit, whether we call it a suit at law or in equity, or whether we call it a special proceeding and *sui generis*.

Let us now advert to the question of the power of the Legislature to pass the divorce act. This act specifies the causes for which divorce can be granted, and it likewise gives directions as to the manner of proceeding in such cases, and purports to confer the jurisdiction thereof upon the Probate Courts. The authority of the legislature to specify the causes of divorce and to direct the manner of proceeding, is not questioned. But it is claimed that that act, so far as it confers the jurisdiction upon Probate Courts, is in conflict with the Organic Act, and therefore null and void.

The authority of the Legislature to confer such power upon the Probate Courts, is based upon that portion of the "Organic Act" which reads as follows: (Sec. 6.) "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." The "subject" must not only be "rightful," but also "consistent" with the Organic Act.

The latter clause of this sixth section, respecting the admission of the laws to Congress and its disapproval, cannot be relied upon in this case. If an act of the Legislature be already void, the disapproval of Congress is not necessary. Such disapproval is only necessary to make void that which is otherwise valid. When the matter considered is a rightful subject of legislation, and consistent with the Constitution of the United States, and with the Organic Act, but yet is inexpedient and unwise, it would be necessary to invoke the disapproval of Congress to invalidate it. But any act of the Legislature which is not consistent with the Constitution of the United States, or which is not consistent with the provisions of the Organic Act, is null and void, and it seems impossible that Congress should have intended to require its disapproval of such acts, that it should have intended to require its disapproval to make void that which is already void. The case of Clinton *vs.* Engelbrecht, "slightly understood," lays down no such doctrine.

By the Organic Act the "judicial power" of the Territory is divided into four distinct branches, and vested respectively in a Supreme Court, District Courts, Probate Courts and Justices of the Peace. The necessary deductions are that four kinds or qualities of jurisdiction were intended, and that these kinds or qualities were to be distributed in a manner usual to like courts in the States. If a jumbling of jurisdictions was to be allowed, the division of the judicial power was wholly unnecessary, and this commingling of jurisdictions is comparatively unknown under like Organic acts, except in Utah.

But our Organic act does not stop with this simple division of the "judicial power" into four heads—it goes farther, and provides that the District Courts shall be vested with the same jurisdiction as is vested in the Circuit and District Courts of the United States, and in addition thereto provides that "the jurisdiction of the several courts herein provided for, both appellate and original, and that of the Probate Courts and of 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 when the debt or sum claimed shall exceed one hundred dollars; and the said Superior and District Courts respectively shall possess chancery as well as common law jurisdiction." (Sec. 9). The jurisdiction here vested, refers especially to cases arising under Territorial laws. If the Territorial law should give the right, and that was such as was recognized as common law or in chancery or such as required common law principles or equitable principles to be invoked to grant the relief, the jurisdiction belonged to the District Court as original and the Supreme Court as appelate, unless the prior words, "be as limited by law," were intended to give the Legislature the power to otherwise provide. Let us look at this matter. This fundamental act says that the jurisdiction of the courts—all Territorial courts—shall "be as limited by law," provided "the said Supreme and District Courts shall possess chancery as well as common law jurisdiction." The jurisdiction of the various courts may "be as limited by law," with the proviso, and so far as any attempt of the Legislature conflicts with the proviso it is null and void. The proviso is as much a part of the statute and as binding upon the Legislature, as the express grant to which the proviso is attached. The Legislature may limit the jurisdiction but in doing so must not come in conflict with the provisos mentioned, or other parts of the Organic Act. The Legislature may limit the jurisdictions of these courts, fix the respective boundaries of each court, and detail the general powers of the respective courts – this must all be done according to the authorities as given in the Organic Act. The Legislature cannot deprive any court of the jurisdiction granted to such court in the Organic Act. That jurisdiction is above the reach of legislative enactment. Dunphey *vs.* Kleinsmith, 11 Wallace, 610. It is a rule which we conceive to be well settled in the United States, that no court can have any jurisdiction except such as is conferred by the power which created the court, or by a legislature endowed with express authority to confer such jurisdiction. Kent Com. p. 334, 336. United States *vs.* Hudson 7 Cranch, 32. Wharton's Crim. Law, par. 163.

It is claimed that jurisdiction in divorce can only be taken by express enactment of the legislature. Equally express must be the authority bestowed upon the legislature. If the legislature can claim such a power by irresistable implication of the fundamental law, then also, with like irresistable implication can the District Courts claim such jurisdiction under Territorial statutes, aside from the Organic Act.

The constitution of the United States created the Supreme Court of the United States and gave a general outline of its jurisdiction. In like manner our Organic Act created the District Courts and gave a general outline of their jurisdiction. It nowhere, except as is embraced in the name, gives any jurisdiction, in express language, to the Probate Courts. The delineation of power contained in the Constitution of the United States, as belonging to the Supreme Court, and the inferior courts to be thereafter created "is now regarded as nothing more, in this respect, than a power vested in Congress to confer jurisdiction, in its discretion, within those limits." Abbott's U. S. Court Practice, p. 185.

Mr. Justice Baldwin, in delivering the opinion of the Supreme Court of the United States, in the case of Rhode Island *vs.* Massachusetts (12 Peters, 657, 721), says: "It was necessarily left to the legislative power to organize the Supreme Court, to define its powers consistently with the constitution, that constitution having delineated only the great outlines of the judicial power, leaving the details to Congress." To use a later legal term, of the United States Supreme Court, the constitution only "chalked out" the boundaries of the jurisdiction.

It is just so in regard to our Territorial courts. The Organic act gave only the outlines of jurisdiction, leaving to the Legislature the organization of the courts and the details of jurisdiction, all, however, to be consistent with the outlines given, just as those of Congress were to be consistent with the constitution. And this and nothing more is the plain meaning of those words, "as limited by law."

The outlines of the jurisdiction given to the District Courts are in the name and in the words, "chancery as well as common law jurisdiction." The outlines of jurisdiction given to the Probate Court are nothing save and except such as is embraced in the name itself. In filling up the details of jurisdiction to the District Courts, the Legislature is guided by the name and the words, "chancery as well as common law jurisdiction." In filling out the duties of jurisdiction to the Probate Courts, the Legislature can alone be guided by the name; and to do so, the Legislature can confer no jurisdiction upon the Probate Courts except such as is usual to such courts. Had Congress intended more, it would have been as easy to say so in this connection as it was in connection with the District and Supreme Courts. Probate Courts are inferior Courts and no jurisdiction can be inferred—it must be given by positive law. (Peacock *vs.* Bell, 1 Sanders, 74.)

The District Courts are not inferior courts, within the meaning of the language as used in the books. Hurd on *habeas corpus*, p. 348-9: Territorial laws, ch. I., sec. 1, p. 29. Much can be inferred in their favor.

If the Legislature could infer authority to empower the Probate Courts to grant divorces, it could in like manner and with equal reason, bestow such power upon Justices of the Peace. The Organic act does not say, in direct language, that it shall not do so. But the very idea shows at once how unsound is the assumption of the Legislature to bestow such power upon the Probate Courts.

Whether as a fact it be true or not, it is presumed that the legislature is willing to act in harmony with national law and American ideas and principles, and to do so it must notice the general character of the courts throughout the nation and can not, without well grounded authority, attempt to commingle and mix up the jurisdictions of the Territorial tribunals created by the Organic Act, contrary to the well known and recognized powers of such courts in the States of the Union and contrary to the intention manifested in the Organic Act. As therefore the Legislature is not vested with any power to confer jurisdiction, in divorce, upon Probate Courts, it follows that the attempt to do so is nugatory and that the Divorce act, in so far as it grants such jurisdiction to Probate Courts, is void.

We now, at this stage of our examination, find that we have a statute which authorizes divorce and specifies the causes for which it may be granted. But no tribunal is designated in specific terms, to take such jurisdiction.

What course should be pursued? We have no Ecclesiastical Court, and none were ever known on American soil, even in colonial times. In the absence of such tribunals, it becomes the duty of the District Courts, they being courts of general jurisdiction, superior and not inferior courts, to step in and take such jurisdiction, that the law may not fall or fail for want of a proper tribunal.

"If the Legislature," says Mr. Bishop, "should establish a system of laws, not mentioning any court in which they are to be enforced, the tribunal best adapted to enforce them ought to take the jurisdiction." 1 Bishop on Marriage and Divorce, par. 49 n (1); Perry *vs.* Perry, 2 Paige, 501. And such a court is generally a court of equity. Rose *vs.* Rose, 4 Eng. (Ark.) 507, 512; 1 Story's Eq. Juris., par. 53.

The District Courts, by the language of the Organic Act, were made courts of general common law and chancery jurisdiction. But these broad terms do not, as it is claimed, embrace divorce, because that is "neither the subject of common law nor chancery jurisdiction." We cannot believe that Congress intended to form these courts upon such a cramped model. The very name is wholly American, not English, and imports something that is American. And the very language of the law, "chancery as well as common law jurisdiction," presupposes the idea of an already existing common law jurisdiction, conferred in the name itself.

If we are to discard the broad and liberal sense in which the words chancery and common law jurisdiction are supposed to be used, we render these almost lifeless words, and district courts must depend upon Territorial statutes for their jurisdiction. If we are to confine such jurisdiction to the narrow list of the cases usually cognizable in the common law courts and chancery courts, technically so called in England, then rights exist in this Territory that can be asserted in no existing court and wrongs exist that no known tribunal among us can remedy. A mechanic's lien law is found upon our statute book and no court designated in which such lien can be enforced, and such a lien was unknown to the English common lein courts and courts of chancery. What tribunal can take the jurisdiction?

At the present term of this court two cases have been submitted to us in regard to adverse mining claims, the cases arising under the 7th section of the United States mining law of 1872. The law says that the matter in dispute shall be submitted to a tribunal competent to take the jurisdiction, and no court is specified. What tribunal shall assume to dispose of the matter? The matter was wholly unknown to the common law and chancery courts of England, technically so-called. Are parties to be remediless? We cannot consent to such a view of the matter.

Mr. Justice Story in speaking of equity, says, "It has an expansive power, to meet new emergencies; and the sole question, applicable to the point of jurisdiction, must from time to time be, whether such rights and wrongs do exist, and whether the remedies therefor in other courts, and especially in courts of common law, are full and adequate to redress." This is the true character of a court of chancery. 1 Story's Eq. Juris., par. 53. New subjects and new rights are continually arising, and even in England the expansive nature of the chancery jurisdiction is such that "the jurisdiction may be deemed in some sort a resulting jurisdiction in *cases not submitted to the decision of other courts* by the crown or parliament as the great fountain of justice." 1 Story's Eq. Juris., par. 43. On the other hand we turn to the common law, and common law includes everything of jurisdiction that is not equitable, and in its broadest sense includes even equity itself and also admiralty. (United States *vs.* Coolidge, 1 Gall., 489. 1 Abbott's U. S. Practice, par. 196. Story's Eq. Juris. par. 41, note 11), and likewise the common law (1 Bl. com., par. 79). In the United States courts, common law embraces "all those proceedings in which legal rights are to be ascertained and determined, whether they be the old, long settled proceedings of the common law or *new legal remedies*, different, it may be, from the old common law forms, but proceeding according to the general course of common law principles and contradistinguished to those where equitable rights alone were recognized and equitable remedies administered, as well as in contradistinction to those where, as in admiralty, a mixture of public law, maritime law and equity is often found in one proceeding." 1 Abbott's U. S. Ct. Pr., p. 193. Parsons *vs.* Bedford, 3 Peters, 433, 446. Parish *vs.* Ellis, 16 Peters, 451.

The common law which our fathers brought to this country from England, includes, not only the principles administered in what are technically termed the courts of common law, but in all other tribunals. 1 Bishop on M. & D., par. 39.

The ecclesiastical law is a part of the common law (1 Bishop on M. & D., pars. 56, 57, 68, 71, 75), and ecclesiastical jurisdiction is derived from the common law. Bac. Ab., title "Ecclesiastical Courts," letter "E." And "the matrimonial law of 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. (Bow. 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 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 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 device. 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. 223.)

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, is 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 already 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.

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.

LIST OF LETTERS

REMAINING in the Post Office at Salt Lake City, May 22, 1874, which, if not called for within one month, will be sent to the Dead Letter Office.

LADIES' LIST.

A
Admire Mrs
Anderson J C
Armstrong M
A
Ahlquist U
B
Brome F
Brooks R
Bartell C
Blork L
Boultoon A
Bocker M 2
Barnes S 2
Biggs T
Binder W
Bone W
C
Christensen A
M
Curtis S A
Christensen B
Carlson C L
Clark E
Carssen B
Collett M
Clotworthy M
Call M
Caull M
Clark M
Crouch W
Collins M
Curlson T J
D
Davis E
E
Elmer A
Eldridge L 2
F
Faust R
Faust C A

G
Gunn H
H
Harvey A
Hammer C J
Hull F 2
Hutchings E
Hansen K
Hurton M
Harley M
Hooper M A
Hanks S
Hunter S
J
Johanson
Johnson H
Johnson M
L
Lynch R
Lambson M
M
Marsh A
Molner C A
Maud E M
Mauris E C
Mayne H
Miller L M
May M A
Mortensen M
Miller R B
N
Nelson J
Nudham M A
Neilson P
P
Pratt A A
Peterson L
Panter S J
Parker S A
Park R
Prestley W

R
Ribelin A
Ronnow M B
Ridgers J J
Read N S
Redfield P
Rudy S
Riddle M
S
Stockdale A
Sawyer A
Sherman C L
Snow E
Simmons R
Stevens J
Sundell J
Stewart M
Simmons M
Shaw M
Sanders N
Swarthout M
Speed S
Spears S M
Sansom M A
Sanson T
Squire W
Smith A T
T
Taylor E
Thirkill M
Termen R
V
Valentine M
W
Wright E
Wheatley E
Wanless E
Wallis L 2
Wallace M
Wright M
Williams V

GENTLEMEN'S LIST.

A
Allen D
Austin F C
Arlxie L
Anderson R
Andrus M
B
Borgquist
Boardmon
Busby A
Blambelle A
Bergomin F D
Bowers F P
Burnett G P
Bridge J M
Briggs J
Beon J
Baird J
Boker L A
Badger R C
Beall R T
Brieghurst S
Butterwood T
Biggs T
Bonker T N
Bassett W
Benedict W L
Butterworth W J
Bowen W W 2
C
Contractor
Churchbill A
Cook D S
Cluchin F
Campbell H
Crane J
Chamberlain J
Crissmen J
Currow J
Clayton J C
Canfield J
Cohn M
Connors M
Conway E
Christian R V 2
Campbell W
Cotton W
Clark W H
D
Davis J G
Drummond A
Duncanson D
M
Day D
Delamore F
Demerest H V
E
Dunn L 2
Dockrett R H
Dodge W H
Dodd W R
E
Evans E M
Embody J
Entwisel J 2
Eldridge G W
Emons J J E
F
Florida M
Ferguson F
Farnsworth J W
Fitzgerald J
Ferrel S
Frisbie T P
Ford W L
G
Gardner A
Giles B
Gooch C C
George H V
Gray H H
Gratton G W
Green G
Gould L
Galbraith J H
Gendrin J
Glenson W
H
Hale Bros
Hamlin
Hewyett A A
Hopton A M
Henry A
Hunter A

Helmer E P
Horn J
Harris J
Hexlon J P
Harrison J E
Hagmon J
Hart J
Haynes J M
Harris J H
Henry M
Hill N
Hafer P
Hall O B
Hellstrott S
Hopkins R W
Hall T C 2
Hilton W
J
Jones D S
Jones S S
Jones J
Jeffries A 2
Jensen C O A
Jackson H H
Johnson G
Jolliet J
Johnson R
K
Kendrick A S
Killstrem
Kirghaum A W 2
Kimball A B
Kipp R 2
Kenney J G 3
Kerr J C
Ketchum S
L
Lord S & Co
Lewis A L
Loeber C J
Larsen E M
Lienhard G
Lewis A A
Longmaid J
Lloyd J
Loring W
Legg W
Lowell A
Lawson S
M
Mitchell B T
Marsden
Masson C
Morrin J B
Morris J H
Muldoon J
Milligan J
Martin J
Matthews J E
Matilor J 2
Myers J
Milquist J T
Morris L
Margnette E
Morton M E
Moffet M
Mortensen F
Motter P H
Miller R
Morris Wm
Morris W C
McGewen C
McDonald P
Muns J E
N
Norton C H
Niles E D
Newman G W
Nilsen M
Newbaner S
Newell W
Newson W A
O
O'Niel M
O'Brien J
Olsen J A
Orleans S M & T Co
Olney F A
P
Paton A 2
Pratt C
Postlethwait 2
Pierce E
Phillips E
Page J
Petterson J R

Pederson J
Parker J B
Phelps S
Pigott W S
R
Rickits
Robinson H
Raught G H
Riddle J 2
Reese M E
Ross H
Rudy O W
Rudy F
Rositer W A
Reese W
Russell H W 4
"Reporter"
S
Stringham B
Stringham B 2
Shonfel C
Sanderson B
Schofield C
Snelgrove B
Snider B N
Stringham G
Sherman H
Sorenson G
Sutton J
Sawyer J
Schoonmaker J W 2
Simpson J
Steele J W
Simmons J M
Shafer J
Simmons L W
Stockdale M
Spencer M W
Season V
Shelton T J
Sorenson W
Sanders W
Smith J E
Smith W 2
T
"Telegraph"
Tenait D
Taylor B F & Co
Tighe J
Thomson J
Thomson Dr J
L
Thomson N
Thomson N
Turage P W
Taylor S
Tehoun
W
White A
White A
Wikisell B
Warner C 2
Worden C L
Willard F J
Wanliss H 2
Wilson E
Webb G
Whiting E L
Wyatt J 2
Walker J T 2
Wood J V
Whiting J
Wilson T F
Wear J
Walsh J
Walker J
Weston J
White J B
Wells L
Weller M
Watts R
Wright R
Warren W J 2
Wilmurtte W
H
Woolsey W
Williams C F
Williams P
Williams W G
Y
Young A S
Young D
Young P H

HELD FOR POSTAGE.

J Y Smith, Alta City, U
D W Stanton, Stockton, U
Miss L Snow, Provo City U
M Kronberg, Chicago, Ill
N Hulesen, Glenwood, U
Mr A Moffatt, Alta City, U
M D wiand, Whitisland, Iowa
Miss Ida Lemon, Santa Cruz, Cal
P C Jensen, Brigham City, U
Capt E F Smith, Buel, Nev
Mr J Turman, Minersville, U
Mrs Barnard, Corinne, U
E Bisney, Bingham, U
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Mrs A J Black, Glendale, U
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J. M. MOORE, Postmaster.