But that

DOES NOT REFER TO SPECIAL CONTRACTS

made by the Territorial Legislature under its power to exercise general legislation, in which they have vested in certain persons franchises to be used, and to acquire and hold real property; and also to make such regulations in the conduct of the Church incorporated as are consistent with the right to worship God according to the dictates of conscience.

It was never intended that, under such a contract, so made, by which property might be acquired from year to year and from day to day, the Congress of the United States, at the end of thirty years, after such a contract had been made by the Territorial Legislature of Utah, could, by an act of spoliation unequaled in the history of legislation in this country, undertake to take away from persons by whom that property had been acquired, every particle of it by a mere declaration that they disapproved the passage of that act. Would it be fair—and these things must enter into the consideration of the question of constitutional law as well as any other law—to do any such thing?

I say it was never intended by an such reservation on the part of the Congress of the United States, in granting to the Territorial Legislatures the power to legislate upon all rightful subjects of legislation, to take away this franchise, destroy this contract, and to distribute the property just as the Congress of the United States may direct—not as a court of equity may find, although there is such language as that in the act; but they undertake to constitute a tribunal, not to exercise its own powers as to whether there has been a dissolution of the corporation, but they declare there that there is a corporation dissolved. They say in effect to this court: "You must take charge of the property belonging to the corporation. You must set apart certain portions of it for cemeteries, buildings for religious worship, parsonage, etc., and then you must distribute the balance as you think best."

I do not wish to detain the court upon any of these questions. If I am prolix it is because I cannot avoid it. We claim that the Congress of the United States

HAD NO AUTHORITY

to pass the act of July 1st, 1862. They had, by stipulation between the Territorial Legislature of Utah, representing the government of the United States as their agents in this matter of legislation, and this corporation, made a contract by which the corporation might acquire any amount of property in the Territory, provided it be acquired within the provisions of the charter granted to it. By the Act of July 1st, 1862, Congress declared in effect that nevertheless this right should be limited and restricted as to the amount the corporation might acquire. I say that this act is a violation of the contract and in conflict with the Constitution of the United States.

But if your honors please, I take another step; I say that the Act of 1862 passed by the Congress of the United States, recognizes the existence and validity of that contract, and the charter of the corporation of the Church of Jesus Christ of Latter-day Saints. By the Act of 1862 the Congress of the United States not only did not disapprove but approved this charter, with certain exception in regard to the construction of the powers contained in one of the sections of that charter. This Act of 1862 can have no other meaning. I say that the Act of 1862 disapproved of no provision contained in the original charter of incorporation of the Church of Jesus Christ of Latter-day Saints except that. That is

A FAIR CONSTRUCTION

of this act, and I will read it to your honors for the purpose of showing exactly what it means:

SEC. 2. And be it further enacted, That the following ordinance of the provisional government of the State of Deseret, so called, namely: "An ordinance incorporating the Church of Jesus Christ of Latter-day Saints," passed February eight, in the year eighteen hundred and fifty-one, and adopted, re-enacted, and made valid by the governor and Legislative Assembly of the Territory of Utah by an act passed January nineteen, in the year eighteen hundred and fifty-five, entitled "An act in relation to the compilation and revision of the laws and resolutions in force in Utah Territory, their publication and distribution—

Your honors will see that the first part of that section refers solely to this corporation, but then it goes on to say:

And all other acts and parts of acts heretofore passed by the Legislative Assembly of the Territory of Utah, which establish, support, maintain, shield or countenance polygamy, be, and the same hereby are, disapproved and annulled. *Provided*—

Now we all know what the object of a proviso is—that it is to qualify or make more certain the declarations which have gone before; *Provided*—

That this act shall be so limited and construed as not to affect or interfere with the right of property legally acquired under the ordinance heretofore mentioned, nor with the right "to worship God according to the dictates of conscience," but only to annul all acts and laws which establish, maintain, protect, or countenance the practice of polygamy, evasively called spiritual marriage, however disguised by legal or ecclesiastical solemnities, sacraments, ceremonies, consecrations, or other contrivances.

Now recollect, if your honors please, that the title of this act is: "An Act to punish and prevent the practice of polygamy in the Territories of the United States and other places." This second section declares in effect that the ordinance creating this corporation of the Church of Jesus Christ of Latter-day Saints is disapproved in so far as it shall maintain or shield or countenance the practice of polygamy; that that part of the corporation be disapproved and annulled.

So that your honors will perceive that the proviso carries out the purpose declared in the preamble to the act, and declares that the act shall be so construed as not to interfere with the right of property acquired under the ordinance—nor with the right to "worship God according to the dictates of conscience"—which is the very language used in the third section of the ordinance or act of incorporation—but ONLY to annul all acts and laws which establish, maintain and protect polygamy, so that this proviso or qualification of the first part of the section, preserves the right to property acquired under the ordinance, preserves the right to "worship God according to the dictates of conscience" as declared in the ordinance, and only annuls all acts which countenance polygamy. This then is an affirmance, almost in terms, of all the other provisions of the ordinance—and an approval of its validity.

The fair construction of this act is that so much of the territorial law, with the ordinance, which created this corporation, as undertakes to countenance, protect and maintain the practice of polygamy is

DISAPPROVED AND ANNULLED,

and that is all. Now, the Congress of the United States, or any other legislative body, takes up an act which has been passed by a previous Congress and repeals a certain section of that act. Only one section of that act is repealed. What becomes of the balance? What becomes of the balance of the act? Is it approved or is it disapproved? What does it mean by disapproving one of the sections of the act, or one of the provisions of the act, and saying nothing about the balance? Does it not mean to say, in the language of common sense, and according to all rules of legal interpretation, that the balance of the act shall stand? Why, certainly. Most unquestionably it does.

But they go further than that. They provide that nothing contained in this act shall affect the rights of property acquired under that ordinance, nor the right to worship God according to the provisions of that third section, which really is the power granted to the corporation to make regulations for the management of the Church.

The corporation created by the Act of 1855 continued in existence until 1862. What else can be supposed than that by the provisions of the third section of this act limiting the amount of real property which might be held by this class of corporations — the Congress of the United States had in view that the corporation continued in existence, when it said that the property acquired, and the vested rights acquired, could not be disturbed? Vested in whom? Why, vested in this corporation. This living existing corporation. I say that no man can take this act and read it from beginning to end, and not come to the conclusion that this act is simply a disapproval of so much of the provisions of the charter as countenances polygamy and a declaration that no corporation of this kind should thereafter acquire or hold more than fifty thousand dollars' worth of real estate, leaving

IN ITS FULL FORCE

the balance of the act, untouched by the legislation of Congress, not disapproved by the Congress of the United States; leaving, according to the rules of construction the balance of the act creating this corporation to stand as a valid act. It is not only not a disapproval, but it is an averment, that the act creating this corporation, with these two single exceptions, should remain valid. If that be so then what right, under the power of disapproval has the Congress of the United States now to declare that this corporation is dissolved? I say they have no right. Irrespective of this approval on the part of the Congress of the United States, they had no such right; but with that approval, which I say was given by the Congress of the United States to this act in 1862—according to a fair construction of it, it remains a corporate franchise, vested with all the privileges that belonged to it when it was first created, with the power to acquire and hold real estate and personal property without limit; with the right to manage its church affairs—vested with all these franchises, and stripped only of the supposed power which it claimed to have been vested with, namely, to maintain and protect polygamy.

So far as the corporation is concerned, it remains as a valid corporation, vested with all the franchise given when this contract was first made in 1851, and confirmed in 1855. What right then has the Congress of the United States, by simple declaration, to declare that this corporation was dissolved? It is not satisfied with disapproving the passage of the act, but it goes on to declare that the corporation is dissolved. This is

A POWER NEVER BEFORE CLAIMED

by any legislative body in this or any other free country. It may be, for the purposes of this argument, admitted that Congress had the power to repeal that law. Does it follow that it had the power to dissolve the corporation? Have the parties who have acquired a franchise under that corporation no right to appear before a court of justice and have that court determine, according to well established rules of law, whether there has been any dissolution of that corporation—whether there has been any mis-user or non-user of its franchise? Or whether the act of repeal passed by the legislative department of the government does in fact dissolve that corporation? Are not these judicial questions upon which the parties have a right to be heard in a court of justice?

"But no," says the Congress of the United States, "we act as a court and will dissolve this corporation. Not only that, but we will direct, as a court of chancery, how it shall be wound up." They say: "You must take part of it and give it back to certain parties to be held for Church purposes; we will take the balance of it and let this court determine what is to be done with it." Now, what ought to be done? Where does it go? If it be property given for charitable purposes, I take it that the claim of the original donors is lost forever. They have no right to it because it was a gift. Is the government of the United States entitled to it? Why, do they propose to come in and take this property, and divide it amongst the people of the Territory of Utah; amongst those who have subscribed and those who have not subscribed, just as they may think proper? This is the question presented here.

Now, if your honors please, in the light of these facts, I wish to read some extracts bearing upon these questions, from the decisions rendered by the Supreme Court of the United States. I will first call your attention to the case of Terret v. Taylor, 9 Cranch, 53.

At the time of the Revolution, the

EPISCOPAL CHURCH OF VIRGINIA

was entitled to receive endowments of land for church purposes, and the minister of the parish held the title as a sole corporation with power of transmission to his successors, and the church wardens were a body corporate, with power of guardianship over the personal property. The church thus held a large amount of land at the time of the Revolution, which was confirmed to them by statute of the legislature, and the act of 1784 made the minister and vestry a corporation by the name of the Protestant Episcopal Church.

All those statutes down to 1788 were by statute in 1798 repealed as inconsistent with the principles of the state constitution and of religious freedom, and by statute of 1801 the legislature asserted the right to all the property of the Episcopal churches in all the parishes of the state, and directed the overseers of the poor in each parish to sell the same and appropriate the proceeds to the use of the poor of the parish.

Mr. Justice Story, in delivering the opinion of the court says:

The property was in fact and in law generally purchased by the parishioners or acquired by the benefactions of pious donors. The title thereto was indefeasibly vested in the churches or rather in their legal agents. It was not in the power of the crown to seize or assume it, nor of the Parliament itself to destroy the grants, unless by the exercise of a power the most arbitrary, oppressive and unjust. * * The state succeeded only to the rights of the crown, and we may add, with many a flower of prerogative struck from its hands. The division of an empire creates no forfeiture of previously existing rights. * * The statute of 1776 operated as a new grant and confirmation thereof to the church, and if the legislature possessed the authority to make such a grant and confirmation, it is very clear to our minds that it vested an indefeasible and irrevocable title.

We have no knowledge of any authority or principle that could support the doctrine that a legislative grant

IS REVOCABLE

in its own nature and held only *durante bene placito*.

Judge Storey goes on to say:

A private corporation created by the legislature may lose its franchises by misuse or a nonuse of them; and may be resumed by the government by a judicial judgment, upon a *quo warranto* to ascertain and enforce the forfeiture. * * But that the legislature can repeal statutes creating private corporations or confirming to them property already acquired under the faith of previous laws, and by such repeal can vest the property of such corporations exclusively in the state, or dispose of the same to such purposes as they may please without the consent or default of the corporators, we are not prepared to admit; and we think ourselves standing upon the principles of natural justice, upon the fundamental laws of every free government, upon the spirit and letter of the Constitution of the United States and upon the decisions of most respectable judicial tribunals in resisting such a doctrine.

The subsequent case of Wilkerson vs. Leland et al., 2 Peters 657, confirms the doctrine laid down in 9 Cranch supra. It was claimed that the Legislature of Rhode Island could by a legislative act confirm a sale by an execution in another state, under the exorbitant powers of legislation given by the charter of Charles II, which was its constitution. The court says:

"Even if such authority could be deemed to have been confided by the charter to the general assembly of Rhode Island, as an exercise of transcendental sovereignty before the Revolution, it can scarcely be imagined that that great event could have left the people of that state subjected to its uncontrolled and arbitrary exercise. That government can scarcely be deemed to be free, where the rights of property are left solely dependent upon the will of a legislative body without any restraint. * * * The rights of

PERSONAL LIBERTY

and private property should be held sacred. At least no court of justice in this country would be warranted in assuming that the power to violate and disregard them—a power so repugnant to the common principles of justice and civil liberty—lurked under any general grant of legislative authority, or ought to be implied from any general expressions of the will of the people. * * A grant or title to land once made by the legislature to any person or corporation is irrevocable. * * * We know of no case in which a legislative act to transfer the property of A to B without his consent, has ever been held a constitutional exercise of legislative power, in any state in the Union."

In the case of the West River Bridge Company v. Dix, 6 Howard 534, the court says:

A franchise is property and nothing more; it is incorporeal property, and is so defined by Justice Blackstone. * * It is its character of property which imparts to it its value, etc.

In the Pennsylvania College cases, 13 Wallace, 212, the court says:

Corporate franchises granted to private corporations, if duly accepted by the corporators, partake of the nature of legal estates, as the grant under such circumstances becomes a contract within the protection of that clause of the Constitution which ordains that no state shall pass any law impairing the obligation of contracts. Charters of private corporations are regarded as

EXECUTED CONTRACTS

between the government and the corporators, and the rule is well settled that the legislature cannot repeal, impair or alter such a charter, against the consent, or without the default of the corporation judicially ascertained and declared.

In the Sinking Fund cases, 99 U. S., 719, the court says:

The United States cannot any more than a state interfere with private rights, except for legitimate governmental purposes. They are not included within the constitutional prohibition, which prevents states from passing laws impairing the obligation of contracts, but equally with the states they are prohibited from depriving persons or corporations of property without due process of law.

You will perceive, your honors, that the expression, "without due process of law" is used. And let me say that there is a world of meaning in that declaration. According to our theory of government the legislature does not possess judicial powers. Our government is divided into three separate and distinct departments, no one of which trespasses upon the powers or rights, or exercises the powers or rights, belonging to either of the others. The judges cannot make laws; the legislatures cannot render judgments. They have each different spheres of action and of operation. After the law has been passed by the legislature, the judges have the right, after solemn deliberation, and after having heard the parties interested, to determine whether that be a valid law or not. But the legislative departments of the government cannot deprive a man or person of property without due process of law, nor can they undertake to dissolve the corporation and destroy rights which have been vested by a solemn contract in these parties. It has been well said that in this country we have two kinds of law—one which changes and one which does not change. One consists of the acts of the legislatures, which may be changed, amended or repealed from time to time, as the exigencies of the public or the needs of individuals require. Another law which does not change with the law of the land, is that no person shall be deprived of rights, liberty or property, without due process of law. "That means," says the Supreme Court of the United States, "the same thing as the expression 'the law of the land' as used in Magna Charta."

THAT LAW IS IMMUTABLE AND CHANGELESS.

It is necessary for the preservation of human rights and human property. It gives authority to legislatures and jurisdiction to courts. It stands sentinel at all times over the rights of individuals against the encroachments of arbitrary power. At every period in the history of every free people the "law of the land" can be invoked by any citizen in the community against all the citizens of the community—as well as against legislators. It says that when any one attempts to deprive you or me of our property, or of our liberty, or of our lives, we have a right to be heard; we have a right to be tried by due process of law. The meanest criminal that ever was arraigned before a bar of public justice has that right.

It is true that the mob, the populace if you please to bring it down to the most ultra point, may take a man out and hang him without any trial; in that they exercise the same power that is exercised by the grizzly bear of the mountains when he seizes upon his prey; no more, no less, no other nor greater authority. It is simply the exercise of arbitrary power. But when the Constitution of the United States, the Constitution of the several States, declare that no man, that no person shall be deprived of life, liberty or property without due process of law, it is a protest against the exercise of arbitrary power; it is a declaration in behalf of every individual in the community, whoever he may be, and whatever his condition. That is the doctrine of American liberty. It was brought across the ocean, but is laid down as the foundation of our republican system, and neither the Congress of the United States nor the legislatures of the states, nor the executive nor any officer of the law, nor the people themselves, have a right according to that declaration, to deny this privilege. Every man is entitled to it. Every man has a right to claim it, and the defendants here claim it now, and protest against this exercise of arbitrary power by

AN ACT OF SPOLIATION

unknown in the history of the legislations of this country. It undertakes to deprive a large class of citizens of their property. Are they American citizens? It is not denied. Every American citizen within the broad domain of these republican states stands upon the same footing. He is entitled to the same sacred principles of constitutional liberty which lie at the basis of our institutions. It is because he has that right; it is because of the existence of that doctrine, that so many men from the various countries of the earth are coming here to live, to breathe and to have their being as freemen.

I deem it unnecessary, if your honors please, to refer further to the various authorities which I have cited here. Feeble as I am, at least so far as my breath is concerned, I would still, if I thought it necessary, proceed further in the argument of this question. But I think I have presented the questions upon which we propose to stand in this case, upon which we propose to stand on the demurrer which has been filed, and to take the judgment of this tribunal, and if it be against us, then to invoke the judgment of the highest tribunal in the land.

SENATOR McDONALD:

If the Court please: The motion for the Receiver in this case is submitted on the record and on the agreement of facts submitted by the parties. These furnish all the law and all the facts that can be properly considered by this court on this motion. There is no room, if your honors please, for passing beyond this. There can be no appeal made to this court outside of that record. But the law arising upon the state of the record now before the court, in connection with the agreement of the parties as to the facts relating to the property, are what is under consideration. Therefore, your honors, there was no room for that appeal from my young and eloquent friend from Colorado, who has so ably sustained the District Attorney in the presentation of this case, and there can be no purpose in it except to incite some prejudice outside of the questions here involved; and it would be scarcely permissible in an argument before a jury. Your honors will therefore not expect me to follow him in that part of his argument, but to confine myself to the record which this court must pass upon. The first and most important question in the case is to determine what the law is that must govern the decision of this court.

It appears from the record in this case that some time prior to 1850 the provisional government of this Territory, called "Deseret," passed an ordinance of incorporation, which ordinance was recognized by the first Legislative Assembly that organized under the Territorial government, and was ratified and validated, in the language of the act of Congress of 1862, by the Territorial act of 1855. The bill filed in this case brings in view before the court the validity, and the force, and the effect of two

ACTS OF CONGRESS,

relating to that corporation, the first passed on the first day of July, 1862, and the last taking effect on the third day of March, 1887.

Now, the points so ably presented by my colleague in his argument upon the law question in this case, as to the power of Congress over this subject could not, perhaps, be strengthened by anything I might say, and yet in the course of my argument I find it necessary to some extent to review this proposition. And first, what power has Congress over the subject of making laws for a Territory of the United States? There is no section in the Constitution of the United States that directly confers that power; although section three, of article four, is frequently referred to, sometimes in the courts, more often in political discussions, as having something to do with this question. No court has ever grounded the authority to Congress upon that section. That section in substance is this: "That Congress shall have the power to dispose of and make all needful rules and regulations respecting the territory or other property of the United States." It was framed before there had been any special territorial legislation or in fact any necessity for it. The ordinance of 1787 governed the first territories of any consequence which belonged to the United States, and had already been adopted by the Congress of the United States acting under the articles of confederation, and that provided, so far as an instrument of that kind could, for the regulation and control of these territories. But without attempting to find any specific grant of power—for

THE SUPREME COURT

of the United States has not been able to do this—we are willing to say and accept the proposition that whatever legislative authority may be exercised in the Territories of the United States, lying outside of the limits of a State, is vested in Congress. That has been solemnly decided by the Supreme Court in more than one instance. Congress has seen proper in most instances to constitute agencies, if I may so term them, to exercise this

(Continued on Page 652.)