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ARGUMENT OF HON. THOMAS FITCH,

Addressed to the House Judiciary Committee in Reply to the Memorial of the Salt Lake Bar, and in Opposition to House Bill 3791, February 10, 1873.

Mr. Chairman and Gentlemen of the Committee on the Judiciary of the United States House of Representatives.

Twenty-six members of the Salt Lake City bar have memorialized Congress, asking for legislation with respect to Utah, and the memorial—with a bill based thereon—has been presented to the House of Representatives by the Hon. Samuel Merritt, who represents the Territory of Idaho there, but who has removed his residence and his law office to Salt Lake City.

By permission of your honorable committee, I propose to controvert the allegations and conclusions of the memorialists, and to offer an argument against the legislation proposed. I can find no word of censure for the members of the Salt Lake bar whose signatures are affixed to the memorial. They are lawyers in active practice, before a court which has assumed and exercises great powers, and which is presided over by a judge of a peculiar disposition. The judge of that court the Hon. James B. McKean, is not unknown to the members of your committee. He passed a large portion of the last session of Congress in Washington, urging upon you more than once his views of the situation in Utah, and soliciting the passage of a bill similar to the one now under consideration. Whatever else is disputed, I presume it will not be denied that Judge McKean is entirely in earnest in his purpose to bring about a social, political, and theological reconstruction of Utah. His motives I will not attack, his purpose I will not here condemn, his plan I will not now assault; but I wish to impress upon the committee the obvious fact that he is thoroughly possessed with his purpose and his plan, and I do not need—in the light of recent events I am sure that I do not need—to call attention to the equally obvious fact, that the entire business of his court, all his judicial functions, and all his personal and judicial influence are subordinated to his purpose to "solve the Mormon problem."

When this fact is once thoroughly understood, it will not be difficult to comprehend why the members of the Salt Lake bar have affixed their signatures to this memorial. It is true that some of them have practised for years—without inconvenience to their clients or themselves—under the system of laws they now visit with sweeping condemnation. It is also true that one of the laws denounced—the statute of limitations of February 16, 1872—was drafted and successfully urged upon the judiciary committee of the Territorial Council by one of the signers of the memorial. But the members of this committee can understand how very difficult and embarrassing it is for a lawyer to refuse the request, either express or implied, of a judge before whom he practices, upon whose favor he is more or less dependent, and the reputation of whose ill-will would be most damaging to his business success.

With these preliminary observations, I will pass at once to the consideration of this memorial. It is asserted—

"*First.* That from the very beginning the legislation of Utah has been inimical to and subversive of the Federal authority with the Territory.

"*Second.* That the Territorial legislature has resorted to every device short of open rebellion to deprive the governor and judges appointed by and representing the Federal Government of all power and authority within the Territory."

To sustain these propositions, reference is made to an act of the Territorial legislature, entitled "An act in relation to the Judiciary," passed January 19, 1855, page 29 of the General laws of Utah, and in describing this act and its alleged effect the memorialists say:

"This act by its first section gives to the district courts, presided over by Federal appointees, such jurisdiction in civil and criminal cases only as is not otherwise provided for.

"The same act (section twenty-nine) provides that the probate courts, which are presided over by persons elected by the vote of the Territorial legislature, shall '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.'

"The attempt, therefore, to abstract the rightful jurisdiction from the courts instituted and filled by the Federal authority, and to transfer it from the tribunal charged with it by the organic act to those of local character, is too plain for argument."

An all sufficient answer to this allegation of the memorialists will be found by referring to section 605 of an act of the Utah legislature, approved February 18th, 1870, entitled "An act to regulate proceedings in civil cases in the courts of justice of this territory, and to repeal certain acts and parts of acts," page 124 of Laws of Utah, 1870; for there the obnoxious section of the law of 1855 referred to by the memorialists is *repealed*.

But since the memorialists assert that—

"The proposition that the general system of legislation in Utah has been subversive of the authority of the Federal Government is not affected by the fact of the law being repealed"—

I purpose to examine the law of 1855 as if it were still in existence.

The memorialists say that—

"This act (the act of 1855, page 29, Laws of Utah) provides by its first section, 'that all the courts of this Territory shall have law and equity jurisdiction in civil cases, and the mode of proceedings shall be uniform in all of said courts.'

"By this act it will be seen that not only are the probate courts given powers which the supreme court of the Territory has again and again denied can be conferred, but even justices of the peace have unlimited jurisdiction in equity."

The reply to this is, that there is not now, and never was such a law. The quotation is a misquotation. The first section of the act of 1855, nor any other section of the act of 1855, nor any other section of any law ever passed in Utah, so far as I have been able to ascertain, contains any such language. I turn to the section cited or pretended to be cited by the memorialists, section one of the act in relation to the judiciary, passed January 19, 1855, page 29, General laws of Utah, and I find it reads as follows:

"Section 1. *Be it enacted by the Governor and Legislative Assembly of the Territory of Utah*, That the district courts shall exercise original jurisdiction both in civil and criminal cases, when not otherwise provided by law. They shall also have a general supervision over all inferior courts, to prevent and correct abuses where no other remedy is provided."

I must, Mr. Chairman, express my astonishment that twenty-six members of the Utah bar should, for any reason, have consented to affix their signatures to such a glaring, such an absurd, such an unkind inaccuracy. I can only suppose—I must out of respect to the profession suppose—that the signers did not carefully read the memorial, and that the gentleman who drafted it did not have access to the law he pretended to quote, and so relied upon his memory or his imagination.

"Justices of the peace have unlimited jurisdiction in equity!" There is not a line in all the laws of Utah to sustain this absurd assumption of the memorialists. And there is not, I am informed, in all the history of Utah a single instance of an attempt on the part of any justice of the peace to assume equity jurisdiction or common law jurisdiction in excess of that given him by act of Congress, as well as by the territorial laws, viz., one hundred dollars, except by consent and wish of litigants.

But not content with misquoting the Utah statutes, not content with their attempt to credit or discredit the Utah legislatures with laws which were never enacted, the memorialists go on to say:

"When it is explained that in addition to the different tribunals which are authorized by the organic act, (section nine, organic act,) the legislature has organized a 'county court,' (page 206 of the General Laws of Utah,) also a mayor's and aldermen's courts, (see charter of Great Salt Lake and other cities,) the enormity of this grant to these petty courts may be appreciated."

The "county court" organized by the Utah legislature is just such a county court as has been organized in a thousand counties all over the United States. It is a county legislature; nothing more nor less. In some places it is called a board of selectmen; in others, a board of supervisors; in others, county commissioners, and in others, again, a county court. It is a misapplication of the term to call it a court at all, for its functions are legislative or executive, but not judicial. To assume that it is vested with judicial powers for the trial and determination of cases at law or in equity, because it is *named* a court is about as reasonable as if we were to conclude that some of the New England State Legislatures are judicial bodies because they are called "general courts."

I know that in some localities the members of the county court do sit as associate justices, and look wise when the real judge of the circuit pretends to consult with them on questions of law. But even this privilege, if it be one, is not accorded to the members of county courts in Utah. The act of the legislature of Utah creating these county courts, pages 206, 207, General Laws of Utah, provides that—

"Sec. 3. The probate judge, in connection with the selectmen, shall be known as the county court, * * * and they are invested with such powers and jurisdiction as are or may be conferred by law."

Now, let us see what powers and jurisdiction are conferred by law:

"They are empowered and required to manage the county business, take care of the county property, audit claims, audit and settle the claims of other county officers, superintend the fiscal affairs of the county, district the county into road and school districts, locate sites for public buildings, oversee the poor, take care of the insane, and appoint all county and precinct officers not made elective by law." (Sections 4, 5, 6, 7, 8, 9, and 13 of the act prescribing duties of county courts, &c., page 206. General laws of Utah.)

That is all. They are not given any judicial duties or powers whatever, and they have never exercised or attempted to exercise such powers.

It is also asserted by the memorialists that "mayor's and aldermen's courts" have been organized, which, it is claimed, have been given an enormous grant of power, and reference is made to the charter of Great Salt Lake and other cities.

If we turn to the charter of Salt Lake City, pages 113 to 120, General Laws of Utah, and page 38, sixteenth session Utah Legislature, we will find that all the reference made to mayors' and aldermens' courts, and all the powers vested in mayors' and aldermans' courts, are enumerated in the following sections:

"The mayor and aldermen shall be conservators of the peace within the limits of the city, and shall give bonds and qualify as other justices of the peace, and when so qualified shall possess the same power and jurisdiction both in civil and criminal cases arising under the laws of the Territory and may be commissioned as justices of the peace in and for said city by the Governor." (Section 13, page 114, General Laws of Utah.)

"Appeals shall be allowed from the mayor's and aldermen's courts of said city to the probate court of Great Salt Lake county, under the same regulations and restrictions as are or may be provided for appeals from justices of the peace to the probate court." (Page 38, Laws Utah, 16th session.)

The charters of Provo and other cities in Utah contain similar provisions, and there is not a municipality in Utah wherein greater powers are conferred on mayor's and aldermen's courts than those of a justice of the peace.

And so it turns out, when we examine the denounced statutes of Utah, that the county courts are not courts or given the powers of courts at all; and that the mayors' and aldermen's courts are granted only the same powers as justices' courts. And what powers have been given to justices' courts? The act of February 4, 1852, section 4, page 33, General Laws of Utah, provides that—

"Justices of the peace have jurisdiction over all cases where the amount in controversy does not exceed one hundred dollars, * * * * and may try, hear, and determine public offences where the punishment imposed by law does not exceed one hundred dollars fine, or imprisonment does not exceed six months."

Section 13 of the same act provides for extending the jurisdiction of justices as arbitrators to any amount, *where both parties wish and consent to it*; but this is repealed by the act of 1870, section 507, page 105, Laws Utah, 1870.

I refer again to the counts of this associated lawyers' indictment of the legislature of Utah. They say:

"A reference to the record will establish these propositions:

"1. From the very beginning the legislation of Utah has been inimical to, and subversive of, the Federal authority within the Territory.

"2. The territorial legislature has resorted to every device short of open rebellion to deprive the Governor and judges appointed by and representing the Federal Government of all power and authority within the Territory."

And then they say:

"These are grave charges, and now for the proof."

And what is the proof?

A repealed statute is dragged from the tomb wherein it was inurned by the legislature of 1870; it is denuded of the garments in which it was clothed at its decease; it is given a suit of resurrection clothes, such as it never knew when alive, and then paraded as a horrid Mormon rebel.

There is an ancient motto, *Falsus in uno, falsus in omnibus*. What shall be said of a cause which resorts to such means to bolster itself in your esteem? What shall be said of memorialists who come up to the Congress of the United States with a pretentious petition, accusing the people of an entire Territory with being inimical to and desirous of subverting the Government of the United States, and who, in support of the allegations of their petition, refer to a law that is repealed, and make pretended quotations from a statute that never existed?

Should an adventurer obtain your money by means of a fraudulent check, I know what you would think of him. These memorialists ask your official representative action on the strength of a bogus law. What opinion must you entertain of them?

The memorialists further say:

"The last section of the act first referred to provides (pages 31 and 32, General Laws) 'that any matter involving litigation may be referred to the arbitrators or referees selected by the court or the parties,' and upon a hearing before such tribunal, it is required to decide the matter, and file its judgment which is to be entered and have the same effect as if given by the court.

"The right to a hearing by a judicial tribunal is thus denied, and the right of trial by jury abolished, unless the court see fit to grant it.

"The repugnance of this legislation, not only to the organic act, but to the principles of common right, we submit has no parallel in the legislative history of any other country."

What impression is sought to be conveyed by the foregoing language? What impression is conveyed? Clearly, that the court is given the power to refer a case for arbitration whether the litigants desire it or not, and that the court is given the power to select the arbitrators without consulting the wishes of litigants, for the memorialists go on to say, and I refer again to their language:

"The right to a hearing by a judicial tribunal is thus denied, and the right of trial by jury abolished, unless the court see fit to grant it."

Now let us refer to the law cited by the memorialists, and we will find that here as before, they have endeavored to make out their case by altering and misquoting the statute.

Section 35, page 31, General Laws of Utah, says:

"Any matter involving litigation may be referred to arbitrators or referees, who may be chosen by the parties or selected by the court, *as the parties shall elect*," &c., &c.

The words "as the parties shall elect" are omitted from the memorialists' quotation of the statutes. With those words in, there is nothing unusual in the law. It is the practice in every court in the country to refer a case where the litigants desire it referred, and in many localities, in New York city for instance, the parties are not allowed to select the referee of right, but the judge designates him.

In any event this section of the act of 1855 is repealed by chapter 6, sections 182 to 187, of the act of 1870. (Pages 49, 50, Utah Laws, 1870.)

I have referred here to the act of 1870. That act contains six hundred and five sections, and occupies one hundred and seven pages of the laws of 1870. It is a civil practice act copied bodily from the revised civil practice act of the State of Nevada, which was taken almost without alteration from the California practice act, which was framed upon the basis of the New York code. The passage of this act three years ago by the Utah Legislature is of itself a complete refutation of the allegation of the memorialists that the legislature of Utah—

"Has purposely neglected for twenty-one years to pass and establish a wholesome, general system of laws necessary to the welfare of a civilized community."

It evidences, on the contrary, that the legislature of Utah promptly recognized the change which the railroad and the development of mines had wrought in the social condition of that Territory; and so recognizing the fact that the people of Utah were passing from a pastoral, isolated community to one of mixed interest and of contact with surrounding and permeating civilization, they sought to shape and enlarge their laws to accommodate the new conditions.

I recur again, Mr. Chairman, to this memorial, and this brings with it necessarily the unpleasant duty of exposing another misstatement of the statute, another case of a garbled law, another attempt to make out a case by omitting the context. The memorialists say:

"Reference is also made to page 33, section 4, of an act in relation to justices of the peace. By this section such courts are permitted to 'decide cases without process' when the amount claimed is less than $100, and by section 13, same page, it is provided 'that when the amount exceeds $100, the justice shall have the same powers as other courts of arbitration, and shall have power to enforce his decision thereon, which decision shall be an end of the controversy.'

"Such monstrous provisions need no comment for their condemnation."

The law says, (section 4 of the act in relation to justices of the peace, page 33, General Laws Utah:)

"When the amount claimed exceeds that sum, (one hundred dollars,) but by fair credits, may be reduced to that amount, justices may decide cases without process; but if it shall become necessary to enforce such decisions, they shall enter such cases so decided upon their dockets, and proceed as in other cases."

That is to say, that the justice will hear the case without the expense to litigants of process, but if the losing party is dissatisfied, and declines to voluntarily comply with the decision of the justice, then the case must proceed as if no hearing had been previously had.

The memorialists' quotation from section 13, viz.—

"That when the amount exceeds $100 the justice shall have the same powers as other courts of arbitration, and shall have power to enforce his decision thereon, which decision shall be the end of the controversy"—

is complete.

In the statute, section 13, page 33, General Laws Utah, the language quoted above is prefaced with the following sentence:

"The jurisdiction of justices extends to the limits of their respective counties, and within that limit it extends to all civil cases (except when the question of title to and boundaries of land may arise) when the amount in controversy does not exceed one hundred dollars, *and by the wish and consent of parties* may be extended to any amount: *Provided*"—

And then the language quoted by the memorialists follows.

The difference between the law and the memorialists' statement of the law is, briefly stated, thus:

By the law, justices can act as arbitrators to any amount, and enforce their decisions, only by the wish and consent of the parties.

By the memorialists' statement of the law, justices can act as arbitrators to any amount, and enforce their decisions, *without* the consent of the parties.

Which makes all the difference.

I must again recall the attention of the committee to the fact that this law, as well as all the other laws thus far referred to in the memorial, is repealed by the act of 1870.

I refer again to the memorial, and find that the next point of attack is the jury system of the Territory. The memorialists say:

"The Supreme Court of the United States having recently, in the case of Clinton *vs.* Englebrecht, affirmed the binding force and validity of the present jury law of this Territory, especial attention is called to the complications and burdensome provisions of this law. Without entering into an elaborate detail of its objectionable features, we will simply state that the Mormon element have the exclusive control of the selection of jurors in our courts of general jurisdiction, and that for the improper exercise of this control, for the prejudices and partialities of the element aforesaid against other portions of the people of said Territory, there is no remedy or redress whatever.

"Furthermore, it is our conviction that under the present system, carried out with the purest motives and best intentions, the machinery (so to speak) of the system is so complicated, and in different parts has to be worked by so many different persons, that to obtain a jury panel in any case not justly subject to challenge will be very difficult; that in a great majority of cases such challenge could be properly interposed for defects occurring in simply carrying out or attempting to carry out the provisions of the law.

"And this being so, the right of trial by jury in this Territory is in effect denied, and criminals go unpunished and the rights of the people unprotected."

The mode of obtaining grand and petit jurors in Utah is the same as that pursued in many parts of the country. The county court of each county, at its first session in each year, selects fifty names from the assessment roll, of persons eligible as jurors. These names are written on slips of paper and deposited in a box, the boxes shaken up, and the jury panel drawn therefrom promiscuously. What there is in this plan that is either unusual, unfair, or complicated does not appear. The memorialists do not enlighten us on these points. On the contrary, they "decline to enter into elaborate details."

It is doubtless true that "the Mormon element have the exclusive control of the selection of jurors in our courts of general jurisdiction." But inasmuch as nine-tenths of the persons eligible to jury duty are Mormons, it is difficult to comprehend how this evil, if it be an evil, can be remedied, without either converting or disfranchising the Mormons. It is scarcely within the scope of Congressional power to accomplish the first, and it certainly does not seem right to perpetrate the second. To select the jurors exclusively from non-Mormons, to confine the jury duty of the country to less than one-tenth of its citizens, would be as onerous on those included as it would be unjust to those disfranchised. I venture the assertion that no jury list has ever been made out in Utah on which the non-Mormon element has not been accorded a larger representation than its numbers entitled it to expect. Even the memorialists do not assert, except by inuendo, that this "Mormon control" has ever been improperly exercised. There is no complaint among litigants that it never has been so exercised, and one of the signers to the memorial, Mr. R. N. Baskin, himself the right arm if not the brains of the anti-Mormon party of Utah, testified before the House Territorial Committee of the Forty-first Congress, "that in cases where their religion was not in issue he never met fairer juries than the Mormon juries."

It follows as a correlative proposition that in cases where their religion was at issue—for instance, in a trial of an indictment for polygamy—Mormon jurors would not be "fair;" that is to say, their peculiar views and prejudices would prevent a verdict of guilty. Admitting frankly that this may be so, I ask if the remedy proposed is not worse than the disease. Here you have a condition where nine-tenths of a community entertain views that preclude them from doing their duty as jurors in a special class of cases. Was not this the case in most of the Northern States with respect to the fugitive-slave law? Was not this the case in the Southern States with respect to the crime of treason? If Congress declined to enact a law that would have enabled Chief Justice Chase to pick out a jury that should convict Jefferson Davis, of treason, ought it now to enact a law to enable Chief Justice McKean to pick out a jury to convict Brigham Young of polygamy? It seems to me that the law would be a greater offence against the spirit of democratic republican institutions than is the existence of the evil thus sought to be reached. It were better to leave the traitor to the judgment of history, and the polygamist to the encircling and assailing influences of monogamic civilization.

And even if it should be decided to permit juries to be packed in order that polygamists may be convicted, I submit that such an extraordinary statute should not be permitted to extend its operations one inch beyond the limits of its necessary domain. I submit that such a law should be made to apply only to trials for polygamy, and that all the wealth, the accumulations, the growing industries of 140,000 people should not be thus placed within the grasp of a few men, who might use their power for the basest and most sordid purposes.

The memorialists further say:

"We submit further that in providing for the filling of offices of territorial marshal, (Laws of Utah, page 38,) territorial attorney-general, (page 38,) territorial auditor, (page 75,) territorial treasurer, (page 77,) territorial school superintendent, (page 221,) territorial surveyor-general, (page 77,) territorial wardens of penitentiary, (page 96,) territorial directors of penitentiary, (page 96,) territorial notaries public, (page 214,) by the joint vote of the legislative assembly, is deliberate violation of the seventh section of the organic act, which provides that all such officers should be appointed by the Governor, by and with the advice and consent of the territorial council."

The seventh section of the organic act above referred to reads as follows:

"Sec. 7. *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 of Utah. The Governor shall nominate, and, by and with the advice and consent of the legislative council, appoint all officers not herein otherwise provided for; and in the first instance the Governor alone may appoint all said officers, who shall hold their offices until the first end of the first session of the legislative assembly, and shall lay off the necessary districts for members of the council and house of representatives, and all other offices."

The language of the organic act is not especially lucid; but taken together and interpreted fairly, I submit that it means that pending the action of the legislature the Governor shall appoint all public officers in Utah, but that the legislature might provide by law for filling their offices—after the first appointment—either by election or appointment. The first legislative assembly did provide by law for filling those offices "by election," viz., by the election of the legislative assembly. The first Governor of Utah, who might have vetoed the law, approved it. It has never been annulled or disapproved by Congress. These offices have been thus filled for twenty years under this law, and never by dishonest or incompetent officers, and it is rather late in the day now to cite this law as an evidence that the Utah legislature is "inimical to the Federal Government."

The next count of the indictment of the memorialists is in the following language:

"We also submit that the act of February 12, 1870, prostitutes the right of suffrage by conferring it on an alien woman, without even qualification of time of residence, but on the sole condition that she become what is termed the 'wife' of a 'citizen,' without any limit to the capacity of such 'citizen' for this new process of naturalization. When it is remembered that most of these women, by assuming domestic relations which are in violation of the laws of Congress, could not become citizens by naturalization in the courts, the purpose of this summary process of making legal voters of them is apparent."

I am not here to defend either the doctrine of female suffrage generally or the Utah female-suffrage law specifically, but in answer to this section of the memorial I beg leave to quote from a speech of the Utah Delegate, Hon. W. H. Hooper, delivered in the United States House of Representatives on the 29th of January last. Mr. Hooper says:

"The legislative assembly of Utah adopted female suffrage. The gentleman from Montana sees in this another monstrous instance of Mormon craft. The Mormons feared the loss of power, he says, by the gradual change of population, and increased their voting power by this method. If they had adopted it for the purpose stated by him, it would not be discreditable to them. But though the legislature of Utah are far-sighted men, in this instance he gives them credit which they do not deserve. For the purpose of increasing voters, that plan had not occurred to them.

"What are the facts, sir, connected with this movement? When the legislative assembly which passed the female-suffrage bill met, no less than two bills were before Congress having for their object the enfranchisement of the women of the Territory of Utah. Their friends argued that the enactment of such a law would practically solve the 'Mormon problem.' 'Give woman the ballot,' said they, 'and you bestow upon her the power to regulate the marriage relation and to emancipate herself from the thraldom imposed upon her in Utah.'

"[illegible] without foundation the popular assertions were concerning the women of the Territory, some members of the legislative assembly were in favor of passing the law referred to; others favored it, convinced of its propriety by the arguments of the friends of that great political reform. The bill became a law. The gentleman will not consent that the legislative assembly in this action shall be credited with correct motives for what even he does not deny is a correct thing. Sir, what is the real objection to this measure? Is it because the women vote, or because they do not vote as the gentleman would have them?

"The gentleman from Montana makes an assertion concerning the ages of those who vote. I might contradict it, and say that he is misinformed; that in this, as in other instances, he has believed the tales of slanderers. But let us examine this statement, and see how much foundation of truth it has. At the election held last August in the Territory for Delegate to Congress and members of the legislative assembly and other officers, the total vote polled was 22,912. Without any doubt Utah at that time had a population of at least 120,000. But suppose we throw off five thousand and call her population 115,000, what proportion does her vote bear to this? Not one-fifth. Her adult citizens of the United States of both sexes, all having the right to vote, and yet the vote only reaching 22,912. I ask, sir, where is the evidence in these figures of such an abuse of the ballot by women as the gentleman would have you believe exists there?"

I return to the memorial. It says:

"In support of the third, fourth, and eighth propositions we advert to the absence of any statute of frauds, of registration, of inheritance, or marriage. Such an omission cannot simply be an oversight, but must have been intentional and deliberate. We submit that the ordinary exigencies of a civilized community demand legislation upon these subjects."

The absence of a law for the registration of voters is not remarkable. This political reform has not yet been extended to all the States in the Union. The absence of a statute of frauds, of inheritance, or marriage, has as yet worked no injury, and no serious inconvenience to any of the people of Utah. It would have been better certainly if the Utah legislature had found time in their limited forty-day sessions to consider and enact such statutes, but the common law is ample enough to supply their absence; and although no Utah legislature has ever formally adopted the common law, it has been ruled by the supreme court of Utah Territory that it exists there, and is in full force and effect.

It is further asserted by the memorialists that the Territorial legislature—

"Has, in terms and practice, cantoned out the legislative authority to municipal corporations—and so spread and extended are these corporations that they include almost all the settled lands in the Territory—and invested them, by elaborate charters, with the most absolute and monstrous powers for oppression and tyranny. The municipal governments established by it, and spread over the habitable parts of the Territory, have established and put in force elaborate codes of laws, mostly uniform, but most oppressive, vexatious, and arbitrary in their nature, and far more so in their execution by means of tribunals unauthorized by law."

The charters of all the municipalities of Utah are similar in letter and spirit. An examination of one will be sufficient to test the accuracy of this last statement of the memorialists. I have examined the charter of Provo city, to be found on pages 120, 121, 122, 123, 124, and 125 of the General Laws of Utah, and I submit as the result of my labors the following:

The inhabitants of Provo are constituted a body corporate and politic, with perpetual succession, with power to sue and be sued, and purchase, hold, and sell property for the benefit of the city.

The municipal government is vested in a mayor, aldermen and council, who are to be elected by popular vote, and hold office for two years.

The city council is to have stated, and special called meetings, and may appoint the necessary city officers.

The mayor and aldermen are to be conservators of the peace, with the same powers and jurisdiction as other justices of the peace.

The city council have power to levy and collect taxes, annually, not to exceed five mills on the dollar for contingent expenses, and five mills on the dollar to open, improve, and keep in repair the streets.

They are empowered to make proper sanitary regulations, license merchants, regulate slaughter-houses, breweries, etc., pass such ordinances, not contrary to the Constitution and laws of the United States and laws of the Territory, as may be necessary to provide for the health and peace of the city, and to inflict punishments for violating such ordinances, not exceeding one hundred dollars fine or six months' imprisonment, etc., etc.

I submit, that there is not an incorporated city in the United States with less power than these Utah municipalities, or where local government is more economically and democratically administered, or where taxation is less onerous, or rights of person and property more secure.

Against the sweeping assertion that "these municipal governments have established and put in force elaborate codes of laws, most oppressive, vexatious, and arbitrary in their nature," I interpose a sweeping denial, and I call your attention to the fact that the memorialists have not attempted to substantiate this section of their indictment with a single citation from any of the municipal codes so earnestly denounced. Why there is such an omission, such a grievous hiatus, such a failure of evidence to sustain the allegations of the bill, I cannot conjecture. Surely the imagination and the industry of the writer of that memorial must have suddenly failed him. The man who could invent laws, and garble and amend the statues of a Territory to fit the exigencies of his statements, should have been equal to the emergency of supposing a city ordinance.

I come now, Mr. Chairman, to the accusation of the memorialists that the—

"Probate courts are invested with appellate as well as general original jurisdiction, criminal as well as civil, in chancery as well as at law, to the exclusion of the district courts. By these means there have been established and vigorously maintained in Utah an independent system of laws and an independent judiciary, to which all the local authorities and local ministerial officers are wholly subservient; among whom are those invested with the power to select and summon all jurors, grand as well petit, for the administration of territorial laws in the district courts. Hence the administration of justice has fallen into utter disorder and confusion.

"Persons accused of crime and committed to custody by the district courts or judges are discharged on *habeas corpus* by the probate judges. The probate courts, assuming as law that all acts purporting to confer jurisdiction upon them not disapproved by Congress are approved by Congress, are exercising all over the Territory unlimited jurisdiction, original and appellate, criminal as well as civil, in chancery as well as at law, which these various acts assume to confer. In them equity is blended with remedies at law in one and the same case; grand juries are empannelled, indictments found and tried for every grade of crime. In some cases prisoners under accusation or trial upon such indictments have been discharged or held to answer, as the showing required, before district courts by district judges on *habeas corpus*. And in all this confusion, though often decided, no question is determined, but everything is moving on in the full tide of disorder, toward a violent collision which must result if Congress fails to interpose by appropriate legislation."

And to all this I reply that the probate courts of Utah are indeed made courts of record, and given original civil and criminal jurisdiction, with chancery powers as well, by the act of the Territorial legislature. If this be a crime, the Territorial legislature of Utah has perpetrated it. If it be treason against the United States, they are guilty of it. If it has tended to bring the administration of justice into utter disorder and confusion, the Utah legislators are responsible. But, before we condemn them utterly, let us examine both the cause and the effect of this 'hostile' and subversive legislation."

The tendency of the American mind is toward self-government. This tendency is aggravated rather than reduced by a residence in any of the Territories. Officers and judges, who are elected at home, have a greater degree of direct responsibility to the people whom they rule than officers and judges who are appointed from abroad, and there never was a Territory where the people were so well contented with their imported officials that they did not seek to enlarge and aggrandize the powers of those whom they were permitted to choose for themselves. If Utah has exceeded all other Territories in her efforts in this behalf, the reason has doubtless been that Utah has had less cause for delight in her imported officials than have the other Territories.

But if Utah is to be denounced as disloyal, because she has attempted to make chancellors out of her probate judges, then let the denunciation be visited upon her neighbors, for they are also offenders. I beg permission, in this connection, to quote again largely from the speech of the Utah Delegate to which I have already referred.

Mr. Hooper says:

"The organic acts of Utah, Nevada, Idaho, and Montana are in respect to the organization of courts and the definition of jurisdiction, precisely similar, not only in spirit but in text. All use the same language.

"'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 appellate and original, and that of the probate courts and of justices of the peace, shall be as limited by law,' &c."

"And with respect to the power of the Territorial legislative assemblies, the organic acts of these four Territories are again precisely the same, for in each it is said—

"'That the legislative power of the Territory shall extend to all rightful subjects of legislation consistent with the Constitution of the United States and the provisions of this act.'

"Starting with similar organic acts, we will examine the laws of the different Territories, and see if Utah is alone in the monstrous usurpation, the unheard-of iniquity charged against her, of clothing probate courts with original common law and chancery jurisdiction. I refer to the laws of Nevada Territory for 1861, section six hundred and eight, page 418, and to sections one and two, page 82 and 83, of the laws of 1862, and I find that the probate courts were given—

"'Original civil jurisdiction of actions to enforce mechanics' liens, of proceedings in cases of insolvency, of proceedings in divorce cases, of all civil cases in which the amount in controversy does not exceed $500, or which involves the title and possession of real property situated in the county, not exceeding $500' * * * * 'And their jurisdiction shall be co-extensive with the jurisdiction of the district court,' etc.

"Section six hundred and twenty-three, page 194, of the laws of Idaho Territory for 1864, provides that—

"'The probate court shall have concurrent civil jurisdiction with the district court of this Territory of an action to enforce the lien of mechanics and others, and in all civil actions when the amount in controversy shall not exceed $800' * * * * 'The probate court and the judge thereof shall have power at chambers to try and determine suits of *mandamus*, *certiorari*, and *quo warranto*, and to issue all writs necessary or proper to the complete exercise of the powers conferred upon it by this and other statutes, and, in the absence of the district judge from the county, to issue writs of *habeas corpus* and injunction.'

"Section six hundred and twenty-nine of the same act provides that—

"'In all civil cases within their jurisdiction, the probate courts and the judges thereof shall have the same power to grant all orders, writs, and processes which the district courts or the judges thereof have power to grant within their jurisdiction, and to hear and determine all questions arising within their jurisdiction as fully and completely as the district courts or the judges thereof have power to do under the laws of this Territory.'

"Sections four hundred and eighty-two and eighty-three, page 139, of the laws of Montana Territory, 1864-'65, provide that—

"'The probate court shall have concurrent jurisdiction with the district court in all civil actions where the amount in controversy shall not exceed $2,500. The probate court and the judge thereof shall have power at chambers to try and determine suits of *mandamus*, *certiorari*, and *quo warranto*, and to issue all writs necessary or proper to the complete exercise of the powers conferred upon it by this and other statutes; and in the absence of the district judge from the county, to issue writs of *habeas corpus* and injunctions.'

"Thus it will be observed that the probate courts of three Territories, Nevada, Idaho and Montana, were given common law and chancery jurisdiction, limited in some extent it is true, but none the less complete within its limits. The common-law jurisdiction was limited in Nevada to $500, in Idaho to $800, in Montana to $2,500; but if the territorial legislative assemblies of these Territories had the power under the organic act to grant concurrent or coextensive jurisdiction to the probate court at all, they might have enlarged that jurisdiction to $10,000,000, or made it unlimited, as readily as to place limits to its exercise.

"The power once ceded to pass the law, and the remainder is but a matter of legislative discretion. So with respect to chancery jurisdiction. Nevada limited the chancery jurisdiction of her probate judges to divorce cases, proceedings in cases of insolvency, and the enforcement of mechanics' liens. Idaho and Montana go further, and permit their probate judges to grant writs of injunction when the district judge is absent from the county. Montana has three district judges and nine counties. Unless her district judges are ubiquitous, it follows that in Montana there must constantly be at least six probate judges who are clothed by her Territorial legislature with all the great powers of chancellors, who are clothed with the highest function of all chancery jurisdiction—the power to issue a writ of injunction.

"I can find no words of censure for the Territorial legislatures which thus endeavored to provide the people with local courts of jurisdiction. I can see no defiance of the United States in this character of legislation, nor any harm to any person on earth. In all these Territories, Utah, as well as the rest, the right of appeal from the probate to the district court is accorded, and the aggrieved party can always avail himself of the distinguished legal abilities of the district judges if he is not satisfied with the probate court decision."

Let me add, Mr. Chairman, that the right of the legislature of Utah to vest such powers in the probate courts has been so questioned by lawyers and denied by Federal Judges that no practical use is made of the grant.

In criminal cases the district courts promptly release on *habeas corpus* any person imprisoned on a judgment of a probate court.

In civil cases the defeated party has but to sue out a writ of error, and the district court will set aside the judgment on the ground that the probate court has no jurisdiction. No lawyer, except for the purpose of making a test case, will commence an action in the probate court, whose jurisdiction is denied, when he can bring the same case in the district court, whose jurisdiction is unquestioned. As a consequence, there are no civil cases in the probate courts of Utah, and the "chancery powers" of probate courts are never invoked.

There is no "disorder," nor is there any danger of a "violent collision," for the simple reason, that the power of the district court has never been questioned, and no probate judge has ever disregarded its decrees.

The memorialists say:

"Persons accused of crimes, and committed to custody by the district court or judges, are discharged on *habeas corpus* by the probate judges."

All that can be said in reply to this statement is, that it is not true, and as evidence that it is not true, I invite your attention to the fact that the memorialists have not cited any instance of the kind.

I believe that there is one case of the kind, and only one. Brigham Young was held in the custody of the United States marshal by order of the district court. While in custody the Supreme Court of the United States rendered a decision in the case of Engelbrecht *vs.* Clinton, which established the proposition that the United States marshal who held him in custody was not an officer of the district court at all, and that the grand jury which indicted him was an illegal body. The decision was announced by telegraph; its authenticity and purport were notorious facts. Even the acting United States district attorney of Utah felt impelled to apply to the acting district judge for Mr. Young's discharge, but the district judge declined to order his discharge, on the ground, I am informed, that no certified copy of the decision of the United States Supreme Court in Engelbrecht *vs.* Clinton, had been received. It would have taken a week, perhaps longer, to obtain the certified copy. The old gentleman was tired of his winter's confinement, and so he *habeas corpussed* the United States marshal before the probate court of Salt Lake county, and the probate judge ordered his discharge, to the great delight, doubtless, of the United States marshal, who obeyed the order.

If the probate court had no jurisdiction to order Mr. Young's discharge, the United States marshal had no jurisdiction to keep him in custody, and no great harm was done.

With this exception, I repeat that there is no instance of a probate judge discharging a person committed by a district judge.

The memorialists further say that the Utah legislature—

"Has assumed to grant and parcel out to a few favorites the timber in the mountains and kanyons, and also the usufruct and control of streams of running water in the Territory, rendering the body of the people dependent therefor on them."

Mr. Chairman, these grants have all been repealed or have expired, or are abandoned, and while they were in existence, Mr. Hooper says—

"No attempt was ever made to maintain ejectment upon them in any court, probate or district. They were never esteemed as of any particular value; no settler, Mormon or non-Mormon, was ever excluded from land by warrant of their authority. There is not a foot of land held in Utah under them. They belong to the past, and there never was an hour in that past when any person on earth was injured by them." * * * "I challenge the world to present one single authenticated case of a would-be settler being prevented from settlement by Mormon grants or Mormon interference. That there are but few non-Mormon farmers in Utah is probably true. The arid, treeless plains of Utah, redeemed to gardens only by the construction of costly ditches and the ceaseless toil of irrigation, presented few attractions to these farmers who were free to choose either the genial climate of California, or the broad and fertile acres of Iowa or Nebraska.

"Nothing but a desire to reach a spot where they could enjoy their religious faith unmolested could have induced any considerable number of persons to come to Utah at all."

The memorialists have cited at length a statute authorizing the probate judges to take charge of the property of any deceased or abscondent person, and designate this statute among the anomalies of legislation. It is anomalous in that it ranks abscondent persons with deceased persons. So far as the statute applies to persons dying intestate, without heirs or creditors, there is nothing anomalous in it. It finds its parallel in every locality where there is such an officer as a public administrator. To class an abscondent person with a deceased person is perhaps a novelty in legislation, but I am not therefore willing to condemn it as either unjust or unwise. The abscondent is dead to the community from whence he absconds, and it is better for him, his heirs or creditors, that his property should be cared for by a public officer, rather than it should be left to the prey of the first casual appropriator. To place the proceeds of the sale of such property, for safe keeping, in the hands of the treasurer of the perpetual emigrating fund, is perhaps quite as just to the community, and as just to the abscondent, or the estate of the deceased, as if those proceeds were absorbed in the vortex of "fees" that usually whirls around escheated estates, or turned over to some "fund" that should clutch it and assimilate it, as the devil-fish gathers sustenance for his embracing but imperceptible film.

The statute of limitations, to which the memorialists refer, differs in no respect from other statutes of limitations. It is prospective in its operations—necessarily. It would be difficult for even a Utah legislature to pass an *ex post facto* law, or a law that should impair the obligation of contracts.

Among the last accusations of the memorialists I find the following:

"The mayors of corporations are authorized to exercise the right of eminent domain (an attribute of sovereignty) by taking private property for public uses anywhere within their corporations without any check to oppression. (See charters of Salt Lake, Provo, &c.) The by-laws and ordinances of these cities authorize the seizure and destruction of the property of the citizens. The case of Englebrecht *et al.* vs. Clinton *et al.*, recently before the United States Supreme Court, originated in a proceeding of this kind."

As an answer to these broad and unsubstantiated assertions, I refer to section 76 of Great Salt Lake city charter, page 118, General Laws Utah:

"When it shall be necessary to take private property for opening, widening, or altering any public street, lane, avenue, or alley, the corporation shall make a just compensation therefor to the person whose property is so taken, and if the amount of such compensation cannot be agreed upon, the mayor shall cause the same to be ascertained by a jury of six disinterested men, who shall be inhabitants of the city."

And the only "property of the citizens" which can, under the charters, be seized and destroyed, is described in section 22, page 115, General Laws Utah, as "all instruments and devices used for the purposes of gaming."

It is submitted that the specifications of the memorialists fail to sustain their charges.

They allege that the legislation of Utah has been inimical to and subversive of the Federal authority.

The laws they cite in support of this allegation either never existed or are repealed.

They assert that the Utah legislature has neglected to establish a wholesome general system of laws. The civil practice act of 1870 is a standing refutation of this charge.

They insist that the municipal charters are extraordinary grants of power, and the municipal ordinances oppressive, vexatious, and arbitrary.

The charters and ordinances prove to be similar to those of all other American municipalities, and the administration of justice and public order proves to be equal, economical, and usual.

They declare that there are in Utah two hostile jurisdictions.

It appears that there is in every case a right of appeal granted to the Federal courts, and no instance of a clashing of jurisdictions.

I conclude this portion of my argument by inviting your attention again to the fact, that the memorialists have based their demand for Congressional legislation with respect to Utah upon the basis of conditions which—if they ever existed—have now passed away.

HOUSE BILL 3,791. PRINTERS' NO. 3,073.

The bill proposed by Mr. Merritt is based upon the complaint of the memorialists, but it goes beyond their complaint, and proposes to remedy some things of which the memorialists do not complain.

The first section of the bill proposes to destroy at one blow every sheriff in Utah. It makes the United States marshal the sheriff of twenty one counties and three judicial districts, and gives him almost unlimited power without exacting from him any bond or security whatever. It requires each of his deputies to give a ten-thousand dollar bond to the marshal, "conditioned for the faithful discharge of their duties as such deputy," but the marshal gives no bonds and furnishes no security to anybody.

"The river Rhine it is well-known
Washes the city of Cologne—
But tell me, oh, ye gods divine,
What power shall wash the river Rhine?"

The second section abolishes all county and prosecuting attorneys, and makes the United States district attorney the prosecuting attorney of the Territory. No bonds are to be exacted from him, or from the assistants whom he is authorized to appoint.

The fifth section is neither objectionable nor necessary. It provides that only citizens of the United States over the age of twenty-one years shall be competent to serve as grand or petit jurors in Utah—that is the law now. The sixth section simply re enacts the present territorial law with respect to grand juries. There is no objection to this, neither does there seem to be any necessity for it.

The seventh section takes the selection of juries away from the local authorities, and imposes that duty upon the district judge, United States attorney, and United States marshal. It seems rather unfair to the citizen who may be charged with a public office, that the judge who is to preside at his trial, the attorney who is to prosecute him, and the officer who has him in custody, shall have the power to pick out the men who are to pass upon his fate.

It seems a little unfair to the bar of Salt Lake to give to one of their number—the United States district attorney—the power to pick out one-third of the jurymen who are to determine the rights of litigants. It is certainly an immense grant of power to give—as this bill proposes—a district judge, attorney, and marshal, the power to roam over an entire Territory to find an eligible jury, for it will be noticed that under the provisions of this section district and county lines are abolished in the selection of jurors. The jurors for the third district court, which meets at Beaver, two hundred miles south of the railroad, may all be selected from Logan, eighty miles north of the railroad, or the entire three hundred jurors for the three judicial districts might all be selected from Corinne, or Alta, or any place in the Territory able to furnish the required number of idle and adventurous persons who would be content to embark in an anti-Mormon crusade. Neither a residence qualification, nor a property qualification, nor a tax-paying qualification, nor a local-citizenship qualification is proposed to be required of jurors. "Any citizen of the United States over twenty-one years of age," who chances to pass through Utah in a Pullman car, is an eligible juror anywhere from Salt Lake to Beaver. It is submitted that section seven, of House Bill No. 3,791, presents the most simple and yet the most sweeping and efficacious plan for packing juries ever devised by man.

It is also proposed in this section to set aside the ordinary rule of law that talesmen shall not be summoned from the bystanders, and it further proposed to allow "each party" in a criminal case six peremptory challenges.

It is submitted that, outside of Utah, there is not a State or Territory in this Union where a defendant, charged with a capital felony, is restricted to six peremptory challenges, or where, in the trial of any criminal charge whatever, the prosecution is allowed the same number of challenges as the defendant.

The ninth section of the bill of Mr. Merritt contains, perhaps, the most extraordinary proposition of legislation ever seriously presented. It provides that the fees of the United States marshal and his deputies, (the sheriffs of twenty-one counties,) the "emoluments" of the United States district attorney and his assistants, (the prosecuting officers of twenty-one counties,) the compensation of the three hundred jurors and the army of talesmen, shall all be paid out of the Territorial treasury, and I quote the section:

"If the Territorial legislature shall fail to provide by law for the payment of said fees and compensation, then the same shall be paid out of the money appropriated by Congress for the compensation of members of the Territorial legislature!!!"

It is submitted that the expenses of courts, sheriffs, and juries ought to be paid, and usually are paid, by the community in which the court is held; that the property-owner of Washington county, in Southern Utah, ought not to be compelled to contribute toward the expense of the administration of justice in Salt Lake county.

I cannot believe that the other proposition, the proposition to coerce, or rather bribe, the members of a territorial legislature—even to do their duty—will ever pass Congress.

What of self-government would be left to the people of Utah if such a law should be enacted? The veto power of the Governor is absolute; the judicial power will be absolute in the hands of the district judges if this bill pass. And now it is proposed to enter the legislative hall, and say to the representatives of the people in the territorial legislature, "Either vote out of the public treasury money enough to pay the cost of the monstrous system inflicted upon you, or we will take it out of your pockets."

It appears that, notwithstanding its elaborateness, the section under consideration is still defective. It should provide that the list of ayes and noes in the territorial legislature on the question of voting an appropriation for the "fees, emoluments, and compensation" of marshals, attorneys, and jurors should be carefully kept by the district judge, and that only those who voted "no" should have their mileage and per diem confiscated. It would be unjust to those patriotic ayes who might vote for the appropriation to submit them to the same financial depletion as the contumacious noes.

The tenth section proposes to set aside a well-known rule of evidence. It proposes in a criminal prosecution for bigamy, polygamy, or adultery, to allow the marriage to be proven by such evidence as is admissible to prove a marriage in civil cases. If it is hoped by the operations of this section to bring about convictions of persons charged with polygamy, I submit that it is likely to be ineffective. The plural wife of a Mormon is not a "wife" in the legal sense, whatever she may be in fact, or in their theology. No ceremony of marriage is performed in such cases by any civil magistrate or clergyman authorized by law to solemnize marriages, and the relation of the parties is, therefore, in law, only that of concubinage, proof of which when made might bring about a conviction for adultery, but clearly not for bigamy or polygamy.

The twelfth section gives the United States marshal or any of his deputies a power over the troops