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EDITOR AND PUBLISHER.

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MEMORIAL TO CONGRESS.

To the President of the United States, the Senate, and House of Representatives of the United States in Congress assembled:

Having read the memorial of "the members of the legal profession residing in Utah Territory," addressed to the Congress of the United States, and knowing the same to be in many respects untruthful and unjust, wronging alike the Legislature of the Territory and its citizens, we respectfully beg leave to point out some of its manifold errors and misrepresentations, and humbly suggest to the President, to your honorable bodies, to the honorable gentlemen who signed the memorial, and to the public, why it is that "the condition of Utah is exceptional from that of all other Territories," as stated by the memorialists, and if possible trace the source from which the evils flow.

The statement and memorial to which we have referred were not prepared, as the language would seem to indicate, by the members of the bar of Utah, but only by a portion of them, many of those who signed it never having read or fully known the nature of the statements, and a large portion of the bar being wholly ignorant of its very existence.

That there are imperfections and omissions in the laws of Utah Territory is undoubtedly true, and we know of no code of laws of which the same thing cannot with equal candor and truth be alleged, a fact undoubtedly sufficiently proved by the amendments and new laws that crowd alike the statutes of Territorial, State and General Government. That there are greater omissions and imperfections in the laws of Utah than in those of other Territories, or that they have occurred through any design or want of attention on the part of the Legislature of Utah, as stated by the memorialists, is certainly untrue, and we most confidently and respectfully submit the statutes to investigation.

The memorialists first complain of "long-continued and hitherto unchecked abuse of legislative power." Allow us to inquire with what justice this complaint can be made? The Governor of this Territory, appointed by the President of the United States, possesses extraordinary powers, which have been unknown to any other portion of the United States, except New Mexico, since the time of George III.

He has the absolute veto power. His powers in legislation are coextensive and coequal with that of the Legislature itself, save that he cannot originate an act. Every law that is passed for the people is enacted by and in the name of the Governor, and must receive his sanction and signature before it is valid for any purpose or enrolled among the statutes. (See section two, organic act of the Territory.)

All the laws passed by the Legislature must receive the approval of Congress.

Congress can at any time annul and disapprove any law or municipal charter. To a common mind, unacquainted with the legerdemain of "memorials," this would seem a sufficient check on the Legislature.

The "memorialists" set forth:

First, "from the beginning the Legislature of Utah has been inimical and subversive of the Federal authority within 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 General Government of all power within the Territory."

To sustain these propositions, and as proof of these wholesale assertions, they refer to the statutes of 1855, page 29, laws of Utah.

This statute, it is claimed, attempts to deprive the Federal courts of their authority, and the memorialists add "it is too plain for argument."

On examination of the statutes referred to, we find, laws of 1855, page 29.

Section 1. "That the district courts shall exercise original jurisdiction both in civil and criminal cases when not otherwise provided for by law; they shall also have a general supervision over all inferior courts to prevent and correct abuses."

Section twenty-nine, Probate courts "have power to exercise original jurisdiction, both civil and criminal, and as well at chancery as at common law, when not prohibited by legislative enactments, and they shall be governed in all respects by the same rules and regulations as regards practice as the district courts."

Section thirty of the same act PROVIDES FOR APPEALS FROM ALL DECREES OR DECISIONS OF THE PROBATE COURT TO THE DISTRICT COURT.

The memorialists claim that these sections seek to deprive the district courts of some of the powers delegated to them by the organic act and to confer the jurisdiction on the probate court.

A more fair and correct construction of even these sections would show that it was only the intent of the Legislature to confer upon the probate courts concurrent jurisdiction with the district courts in civil and criminal matters of the Territory; but if there is any doubt in regard to the construction of these sections this doubt is set at rest and made "too plain for argument" by the first section of chapter four, page 34, which provides "all courts of the Territory shall have common-law and equity jurisdiction."

That the Legislature did not intend to take away any of the powers of the district court is further proved and illustrated by the fact that they provided for an appeal in all cases to the district court. See sections one and thirty of the laws of 1855, pages 29 and 30. Under these sections the power of the district court over inferior courts is almost absolute.

It is plain from the examination of these sections that the Legislature did not intend to deprive the district court of any of its jurisdiction, but that it did by direct legislation confer upon it a jurisdiction in criminal cases in territorial matters which, in the opinion of many eminent lawyers, it did not possess by virtue of the provisions of the organic act. When we add that no attorney or court has ever sought in any way to question the jurisdiction of the district court, the enormity of the misrepresentation on the part of the memorialists in charging the Legislature with treasonable intentions can be fully appreciated.

Touching the complaint of the memorialists that "the Legislature has conferred common law, chancery, and criminal jurisdiction upon the probate court," we wish to submit the following propositions—

First, had the Legislature under the organic act a right to confer this jurisdiction upon a probate court?

Second, if they had the right to confer the jurisdiction, was it wise and proper legislation?

In support of the affirmative of the first proposition we would submit that the source of legislative, executive, and judicial authority in the Territories is in Congress, and Congress, to enable the people of this Territory to have full protection of life and property, has given to them a constitution, or charter, through the organic act, by which the people are empowered to legislate upon all rightful subjects consistent with the Constitution of the United States and said organic act.

We think that the right of the Legislature to determine the jurisdiction of the probate courts is clearly given by the organic act; but as the question has been much discussed, we will admit for the sake of the argument that the organic act is not clear on this subject.

Under these circumstances it is a rule of construction known to every lawyer, that the intention of the Legislature passing the law is to be ascertained and must govern in construing the law. To determine the intention of Congress, it is pertinent to inquire for what purpose does the Constitution of the United States confer upon Congress the right to provide a government for the Territories. Was it because the Government was to derive any profit therefrom? Clearly not, as the government of the Territories is an expense and not a source of revenue to the General Government. It could not be for the sake of governing, or, in other words, for the glory thereof. It was not because the Government wished to deprive the citizens of self-government. It was undoubtedly for the purpose of guarding the rights of its citizens and to aid and assist them in establishing a government of their own.

The district judges were not sent to Utah for the purpose of depriving its citizens of any right or privilege, but for the purpose of aiding in securing those rights and privileges and administering the laws both of Congress and of the Territorial Legislature until the Territory should be able to establish courts of its own. In the language of Chief Justice Chase, (Clinton vs. Engelbrecht)—

"The theory upon which the various governments for portions of the territory of the United States have been organized has ever been that of leaving to the inhabitants all the powers of self-government, consistent with the supremacy and supervision of national authority and with certain fundamental principles established by Congress."

The Legislature has given the supremacy to the district and supreme courts, presided over by judges appointed by Federal authority, and has also made it their duty "to report to the Legislature all omissions, discrepancies, or other evident imperfections which fall under their observation from time to time." (Section 4, judiciary act of 1855, page 29.)

The several Territories have taken upon themselves the expense of courts in Territorial business, according to their respective abilities, by proper legislation, all of them establishing local tribunals. All or nearly all of them have conferred jurisdiction upon the probate courts. The statutes of Colorado provide (see page 526, section 27) that the probate court of the said several counties shall have concurrent jurisdiction with the district court in all civil cases at law and in equity where the debt or sum demanded shall not exceed $2,000.

The organic act of Colorado Territory is precisely similar to our own in the matter of the authority conferred upon the Territorial Legislature. Like statutes under similar organic acts have been passed by all the Territories since the formation of the Government, and although Congress has possessed the absolute authority to annul all Territorial laws, it has never manifested any disposition to interfere with those of this class; and outside of this Territory they have rarely been questioned by bench or bar. Is it not, under these circumstances, fair to suppose that it was the intention of Congress to give to the Legislatures the right to legislate on this subject, and that it has approved of such legislation?

Such, indeed, is the language of Chief Justice Chase in the opinion above referred to.

It will not be disputed that if the Legislature of the Territory could extend the jurisdiction of the probate court to the amount of $2,000, that it may extend it to $10,000, $100,000, or give it unlimited jurisdiction. Principles are not affected by amounts, and the right of the Legislature having been established, it may confer such jurisdiction as in its judgment seems necessary for the best interests of the people.

Congress in defining the powers of the justice's courts (section nine of the organic act) has limited their jurisdiction to cases where the sum demanded does not exceed $100, and prohibited them from any jurisdiction where the title or boundary of land is in dispute.

In the same connection, and in the same section, it provides that the jurisdiction of the probate court shall be as limited by law. This section shows that the mind of Congress was especially directed to the jurisdiction of the different courts, and the fact that it limited the Legislature in their power to confer jurisdiction on the justice's courts and did not limit the power of conferring jurisdiction on the probate court, shows conclusively that they did not intend so to limit it. The act says the jurisdiction of the probate court shall be as "limited by law." What law? As limited by the law of Congress? No; there is no law of Congress on that subject. By the law of Vermont or Massachusetts? No. But it undoubtedly intended that the law, determining the jurisdiction of the court, should be passed by the Territorial Legislature.

It is contended that the name "probate court," of itself, limits and defines its powers, duties and jurisdiction. If the term "probate court" is so well understood, why is it necessary for this Territory, or any other State or Territory, to pass laws regulating and defining the powers of such court? All that it would be necessary for the legislature to do would be simply to provide for the election of a probate judge, and the court springs into existence "armed at all points, exactly *cap-a-pie*," with its terms regularly appointed and fully prepared to administer upon the estates of the deceased.

The term "probate court" never had any such narrow significance under any code of laws in the United States. No such court as the "probate court" is known to the common law. It has always been a creature of statute, with such authority as the Legislature of its respective locality has seen fit to confer upon it. "Probate court" in Illinois means a court that has jurisdiction in all criminal matters below the grade of felony, and in civil matters to the extent of $500, and the partition and sale of real estate.

"Probate court" in Colorado Territory means a court that has jurisdiction in criminal matters, and a common law and equity jurisdiction where the amount does not exceed two thousand dollars ($2,000).

"Probate court" in Nevada means a district court that has unlimited jurisdiction in all things.

"Probate court" in Wyoming Territory means a court of limited jurisdiction in criminal and civil matters; and so we shall find the term has a different signification in every State and Territory.

"What's in a name?" Had Congress established a court here, and called it the "Salt Lake court," it might with equal propriety be urged that on account of its name it had no other than maritime jurisdiction over the waters of Salt Lake.

Having shown that Congress has given to the legislature the right in relation to the jurisdiction of the probate court, we now address ourselves to the second proposition: Was it wise and proper for the Legislature to confer common law and equity jurisdiction on the probate court?

The Territory of Utah extends three hundred and sixty miles north and south, and two hundred and sixty-four miles east and west, and now contains a population equal to that of any other two Territories of the United States. Its inhabitants are settled mostly in towns and villages.

For this Territory and population Congress has provided three courts—

First district court, held at Provo.

Second district court, held at Beaver.

Third district court, held at Salt Lake City.

Of these courts the first two mentioned hold one term a year, and the last mentioned two terms a year. The time during which the first and second district courts have been in session up to within the last two years will not average two days in each year; and there has been a year or more at a time when no district court has been held outside of Salt Lake City. The district court in Salt Lake City is in session but a small portion of the time.

Of the judges appointed to the first and second districts, some have never seen the place appointed for holding their courts, and none of them have resided in their districts until very recently, unless an occasional visit can be called a residence. Consequently, any application for judicial interference, either in criminal, common law, or chancery jurisdiction, has been wholly impracticable.

But supposing these courts had been in regular session. St. George, a city of two thousand (2,000) inhabitants, possessing large agricultural and manufacturing interests, is situated in the southern portion of the Territory, in the second judicial district, and one hundred and twenty miles from Beaver, where the court is held. The facilities for traveling would enable a citizen of St. George to arrive at Beaver in about three days.

Would it not, under these circumstances, be highly inconvenient for him to transact any business in the district court? A citizen of Boston can travel to Chicago quicker, cheaper and more comfortably than a citizen of St. George can travel from his home to Beaver; yet we apprehend that the citizen of Boston would consider it something of a hardship should he be obliged to transact all his business at Chicago; and he would not be considered unreasonable should he ask for some local tribunal. Other towns in the Territory are similarly situated to that of St. George, and without local courts of some kind they are wholly without protection by judicial authority in property or person.

Under these circumstances, can it be said that the Legislature of Utah acted unwisely in conferring jurisdiction on the probate courts?

Would they not have fallen far short of their duty had they neglected to throw around their infant settlements, so widely separated, such protection as the probate courts have afforded? It is said by your memorialists "the Legislature has purposely neglected for twenty-one years, to pass a wholesome general system of laws necessary to the welfare of a civilized community."

It is a well-known fact that prior to the construction of railroads in this Territory the people of Utah were almost exclusively engaged in agricultural and pastoral pursuits. With simple habits and but small property, a people thus situated needed but few and simple laws, which the Legislature from time to time, as their wants and necessities demanded, enacted; and when the political economy of the country became so changed by the growing mining, commercial, railroad, and other interests incident thereto as to require additional legislation, the people were not slow to demand it, and the Legislature has responded most willingly and promptly, by proper and wise legislation, as an examination of the valuable and well-arranged code of laws passed February 17, 1870, will fully attest.