SUPREME COURT.

ASA L. KENYON } In Supreme Court,
vs. } Jan. Term, A. D.
SUSAN KENYON. } 1861, Utah Ter'y.

APPEAL FROM THE DISTRICT COURT FOR CARSON CITY.

Opinion of Hon. J. F. Kinney, Chief Justice.

Susan Kenyon filed her petition in the district court for divorce, charging adultery, and praying that the bonds of matrimony between her and her said husband be totally dissolved; also for the care and custody of the children, and for a separate estate out of the property of the defendant.

Kenyon answered, denying the facts charged, and alleged that the petitioner was herself guilty of the crime imputed to him.

A bill of exceptions was taken on the trial by which it seems, among other objections made to the jurisdiction of the court, and overruled, was one, that the district court had no jurisdiction of the action of divorce.

The court decreed a divorce from bed and board, the care and guardianship of the children, and two thousand and five hundred dollars as alimony to the plaintiff.

The defendant appeals, and contends under the statutes of Utah, the district court has no jurisdiction whatever over cases of divorce. Other questions are raised; ut this is the only one necessary to consider. Sec. 1, page 162 Revised Laws, is relied upon in support of this position. It provides "That the Court of Probate in the county where the plaintiff resides, shall have jurisdiction in all cases of divorce and alimony, and of guardianship and distribution of property connected therewith."

If this statute is not in conflict with the Organic Act, it is supreme, and must be observed. It is not in conflict unless it either derogates from the powers exclusively conferred upon the district courts by the act, or confers unwarranted powers upon the probate courts. Part of sec. 9 reads as follows: "And be it further enacted that the judicial power of said Territory shall be vested in a supreme court, district courts, probate courts, and in justices of the peace."

After providing for a supreme court, it states that the Territory shall be divided into three judicial districts, and a district court shall be held in each of said districts by one of the justices of the supreme court, at such time and place as may be prescribed by law, and the judges shall, after their appointments, respectively reside in the districts which shall be assigned them. The jurisdiction of the several courts herein provided for, both appellate and original, and that of the probate courts, and justices of the peace, shall be as limited by law. Then follows an inhibition upon justices of the peace; and the section further provides that the supreme and district courts respectively, shall possess chancery as well as common law jurisdiction.

The judicial power of the Territory is vested in four separate and distinct courts.

The legislation as to one of those courts, that of justices of the peace, is restricted, and confined within certain well defined bounds; but with this exception, the jurisdiction of the several courts shall be as limited by law, except that the legislature cannot curtail the chancery and common law jurisdiction of the supreme, and district courts. No law of the Territory can deprive these courts of the power to exercise this jurisdiction, because it is conferred by a higher authority. The portion of the section under consideration, contains two radical provisions, two insuparable legislative barriers: first against conferring jurisdiction upon justices of the peace, in certain cases; second, against encroaching upon the common law and chancery jurisdiction of the supreme and district courts.

Is the statute conferring exclusive jurisdiction upon probate courts in actions of divorce, an interference with this jurisdiction of the district courts? To arrive at a proper solution of this question, we must inquire what is meant by chancery, and common law jurisdiction. Chancery jurisdiction may be defined to be a judicial power to hear and determine all cases wherein the law, for its universality cannot afford relief.

Early in the history of jurisprudence, the administration of justice in the ordinary courts was found to be incomplete, and hence arose the necessity of separate courts of equity, which were organized about the reign of King Edward III, for the purpose of correcting that, wherein the law was defective, and matters of fraud were among the objects to which the jurisdiction of chancery was originally confined.

Soon after these courts were established in England, a fierce struggle arose between the law and equity courts, in relation to the jurisdiction and powers of each; but as we trace the history of English jurisprudence, we find the prejudice which at first existed on the part of the common law courts, yielding to the necessity and utility of a distinctive equity jurisprudence. Arnold *vs.* Grimes, 2nd G. Greene, 77.

Follow this court from the reign of Edward III., at first feeble and affording relief in only a very few cases, until it branches out with enlarged powers and builds up a stately jurisprudence of its own, both in England and America, and with its extended jurisdiction we venture the assertion that as an equity court purely, without the aid of statute, it has never entertained a case of divorce so as to render a final decree between the parties.

The application for divorce from bed and board is not necessarily an equity proceeding. It may be either at law or chancery, as the legislature may prescribe. In England until very recently it was confined exclusively to the ecclesiastical or spiritual courts, and in the United States the petition is filed either in the chancery or law courts, according to the provisions of the statutes of the different states. The celebrated case of Burch *vs.* Burch, recently tried in Illinois, appears to have been at law and the entire case tried by a jury. In other states the chancellor hears and tries the issue, in some instances upon written evidence alone, and in others upon written and oral. We say then that the jurisdiction in divorce cases does not necessarily belong to chancery, and that clause of the Organic Act which confers upon the district courts chancery jurisdiction is not violated by the statute of Utah giving another court the right to try all cases of divorce. But the question arises, Is not the common law jurisdiction of the court trampled upon? Common law jurisdiction we understand to mean the power of the court to hear and determine cases according to the rules of the common law. Statutes are frequently invoked in aid of the common law, but common law courts, as such, are not dependent upon statutes, unless they have become incorporated into and form part of the common law, which is the case with some of the old English statutes. It is no part of the powers of common law courts, unaided by statute, to grant divorces from bed and board. Cases of this kind do not belong to their jurisdiction when sitting strictly as common law courts. Opposed to this view we are referred to the case of Wightman *vs.* Wightman, 4 John Ch. R. 343.

That was a case where the plaintiff married the defendant under a fit of insanity, had never lived with her husband, and had continued under aberration of mind, with occasional lucid intervals.

The question arose before the chancellor whether the court could take jurisdiction, as there was no statute in the state of New York for divorce *a vinculo matrimonii*, except in case of adultery, and the *cause* for divorce must arise after marriage. The learned chancellor declared the contract null and void *ab inito*, on the ground that the plaintiff had not the capability to contract no more than if she had been an idiot. But the court expressly says that the power resides somewhere to declare the contract void, and contends that it must reside in that court, as it has an exclusive jurisdiction, not only over cases of lunacy, but of matrimonial causes. This decision, when properly examined, will be found to sustain the position we have assumed, that proceedings for divorce do not necessarily belong to either the chancery or common law jurisdiction of the district courts.

Two questions only remain for our consideration. First, whether the legislature has granted to the probate court, by giving it jurisdiction in all cases of divorce, more judicial power than it is authorized to confer by the Organic Act. And second, whether the defendant below, after having answered, could raise the question of jurisdiction. The judicial power of the Territory is vested in certain courts. Among those named is the probate court. The jurisdiction of these courts shall be limited by law. We have seen that neither the common law or chancery jurisdiction of the district courts is infringed by providing for the probate court to grant divorces. This being the case it follows that under that clause, "limited by law," the legislature has the right to select another forum to try, and clothe another tribunal with the power to hear and determine actions for divorce.

The tribunal is the probate court, and we see nothing incompatible with the provisions of the Organic Act or the organization of the district courts to prevent the legislature from passing the law conferring exclusive jurisdiction in such cases upon this court. But it may be said that the defendant could not object to the jurisdiction after having answered. This would be true if the court had jurisdiction of the subject matter, and the judgment did not appear upon the face of the record *coram non judice*.

In the celebrated case of Voorhies *vs.* the United States, 10 Peters 161, the doctrine is well settled, that if the judgment is not warranted by the constitution or law of the land, the most solemn proceedings can confer no right which is denied to any judicial act under color of law, which can properly be deemed to have been done *coram non judice*, that is, by persons assuming the judicial function in the given case without lawful authority. Wright *vs.* Marsh, Lee and Develan, 2, G. Greene, 94. The line which separates error in judgment from the usurpation of power is very definite, and is precisely that which denotes the case when a judgment or decree is reversible only by an appellate court, or may be declared a nullity collaterally when offered in evidence in an action concerning the matter adjudicated or purporting to have been so. In the one case the record is absolute verity, in the other mere waste paper. If then the court below exercised a power not conferred by the Organic Act or the laws of this Territory, and not inherent in the court, the judgment is void and may be taken advantage of anywhere or before any court.

It is a principle as old as the law itself, that consent cannot confer jurisdiction, and if the court proceeded to try the case and render the decree in an action over which it had no control, the jurisdiction of which belonged to another court, the answer of the defendant could not confer such jurisdiction and the judgment is void.

That such is the case, we think we have abundantly shown by the fact that actions of divorce do *not* necessarily belong to courts of chancery or common law jurisdiction, that they may be provided for by statute, and the judicial power of the territory residing in part with the probate courts, the legislature had the right which they have exercised to give them the exclusive control over these actions.

The decree of the court below is reversed and set aside. — *Mountaineer*, Feb. 9, 1861.

Correspondence.

Editor Deseret News, Sir:—Ever feeling anxious for the liberation of the vast wealth locked up in the air, soil and water of our Territory, I venture, in my humble way, to address a few letters to our people upon the culture of the grape. If you consider these letters sufficiently interesting and instructive, by giving them a place in your columns you will much oblige a lover of progress.

It may be considered that they come out of season; not so, the fall is the time to secure plants, either for fall planting, or heeling in for early spring planting. The object of these letters is to attract the attention of the people of Utah to a remunerative industry, which is sadly neglected in our Territory, and for which our soil and climate are most admirably fitted.

The California grape is not in many respects the grape for extensive vineyard culture in the Great Basin. It is too tender, and never ripens its fruit to the centre with us; and from it we never can make wine that will, by its merits, hold a prominent position in commerce. Wine can be made from the Calfornia grape grown in Utah by adding sugar or good spirits to improve the must, to keep it. Yet I consider that vine indispensible to us as a late garden variety. We need a grape that holds within itself, all the requisites of a good, spicy, generous red wine; and from which wine can be manufactured without any additions as easily as making cider from apples.

Much credit is due to the energy displayed by American pomologists for obtaining, from the great laboratory of nature, grapes that are fitted to an extensive area of North America, which embrace the great requisites of hardiness, earliness, vigor and superior excellence for wine, raisins and table use.

Messrs. Levi Richards, D. O. Calder, T. W. Ellerbeck, of Salt Lake City, and others have given much of their time, attention and means to the introduction of good varieties of native grapes into our Territory, and have done much in training the public taste for most excellent fruit, yet the taste should not be the only standard to judge by. A grape may not be par excellent to the taste, and yet possess such sterling qualities as to make its presence indispensible in a fine collection.

The vales of Utah will yet flow with generous wine. It can be produced here from the best native grapes by millions of gallons annually. Tens of thousands of pounds of the finest of raisins can be produced annually in Utah with the sweet, rich flavor and aroma of those from the Muscat of Alexandria.

It is not my pupose to bore your readers with an elaborate article to show them how much I know on this subject, neither shall I steal anybody's thunder; but I will recommend a few good grapes that are fitted to our climate and soil, and briefly describe them. I will also, in my simple way, describe the method of cultivation, pruning and training, necessary to secure the best results.

The following list does not embrace all of the good native grapes, but in it is embraced nearly all the leading excellencies of a very large class. Eumelan, Iona, Israrella, Delaware, Diana, and Concord.

I will now give, briefly, the characteristics of the above six varieties, which I obtain from the most reliable sources, and in which the utmost confidence may be placed.

Eumelan.—A black grape, bunch of large size, elegant form, and proper degree of compactness; berries of large size, with fine bloom and clear surface, adhering firmly to the bunches long after ripening. For the table it is meaty, uniform in texture and of tender melting flesh. It ripens evenly and perfectly all through; and as soon at the centre as at the circumference. Flavor, pure and refined, very sugary, rich and vinous. For making red wine it has no near competitor among American grapes. The vine is vigorous, hardy and productive inhabit. Ripens earlier than the Hartford Prolific.

Iona. The vine is of the best habit, strong, vigorous and hardy, with large, short-jointed canes, and abundant, thick, fleshy, and enduring foliage, which remains until wood and fruit are fully ripened. Sets its fruit late, and matures early, avoiding late spring and early autumn frosts. The berries are large or very large, and the bunches very large, like the European grapes. In flavor it is rich, spicy, with a fine, delicate, muscatel aroma added to its sugary and refreshing wine, making it one of the most delightful and refreshing grapes. For late keeping it is equal to the best, not in the least disposed to rot, or lose its vinous spirit, but dries readily to the most spirited of raisins, for which it is most admirably fitted, having only a few very small seeds. The berries are of a wine color, the flesh is of a uniform consistence quite to the center, and as sweet at the centre as near the skin. In quality and appearance it resembles the Red Fontignan. Ripens fully two weeks before the Isabella.

Israella. A black grape, ripening one week before the Iona, is the earliest black grape that is large, excellent, healthy and hardy. When ripe it has no acidity or toughness remaining, being exceedingly sweet, rich and good throughout its entire substance, and exceedingly productive. It is called the "American Hamburg," the berries being large, globular and very dark, adhering to the peduncle firmly and remaining a bunch when dried to raisings.

Delaware. One of the very best, earliest, and hardiest of American grapes. Its character is pretty well known in Utah.

Diana. Seedling from the Catawba. Vine much more hardy than the parent, and the fruit ripens two weeks earlier, with purer, richer, and even more spirited flavor. Its bunches large and compact. The berries are often very large; it is inclined to overbear, which, when permitted, renders its berries smaller than the Catawba. The fruit ripens very early and becomes very good, but with some degree of the foxy odor of its parent. It is one of the indispensible varieties, ranking next to the Delaware and Iona in value, either as a grape for the table or for wine.

Concord. A very vigorous and healthy grower, and bears abundantly, ripens ten days before the Isabella, and