Statement of the case.

Similar remarks might be made respecting the second claim of the patent of August, the only remaining one alleged to have been infringed. All the elements of the combination have not been used by the defendants.

DECREE AFFIRMED.

This case was argued before the CHIEF JUSTICE took his seat, and he did not participate in the judgment.

FERRIS v. HIGLEY.

1. The act of Congress under which Utah was organized as a Territory provided for a Supreme Court, District Courts, Probate Courts, and justices of the peace, and distributed the judicial power among them.
2. It gave to the Supreme and District Courts a general jurisdiction at common law and in chancery, and limited and defined the powers of the justices of the peace.
3. It declared that the legislative power should extend to all rightful subjects of legislation not inconsistent with the Constitution of the United States or with the organic act.
4. The act of the Territorial legislature conferring on the Probate Courts a general jurisdiction in civil and criminal cases, and both in chancery and at common law, is inconsistent with the organic act, and is, therefore, void.

ERROR to the Supreme Court of the Territory of Utah. The case, which involved a question as to the jurisdiction of the Probate Courts of Utah, was thus:

In 1850 Congress passed an act "to establish a Territorial government for Utah;" the organic act governing the Territory.* The act is a long act, of seventeen sections. It defines the boundaries of Utah; establishes an executive power and defines its duties; provides for a secretary of the Territory and defines his duties. It establishes also a legislative power; declares of whom it shall be composed, and

* Act of September 9th, 1850; 9 Stat. at Large, 453.

how the persons composing it shall be elected, and the qualification of the voters electing them.

In defining the legislative power it says among numerous other things:

"SECTION 6. The legislative power of said Territory shall extend to all rightful subjects of legislation consistent with the Constitution of the United States and the provisions of this act.

"All the laws passed by the legislative assembly and governor shall be submitted to the Congress of the United States, and *if disapproved shall be null and of no effect.*"

It then thus establishes the judicial power:

"SECTION 9. The judicial power of said Territory shall be vested in a Supreme Court, District Courts, Probate Courts, and in justices of the peace."

The same section then declares of how many justices the Supreme Court shall consist; that the President of the United States shall appoint them (as the act also does that he shall the governor, secretary, attorney, and marshal, enacting that the United States shall pay the salaries of all), and how many judges of the Supreme Court shall make a quorum, and for what term their commissions shall run. It divides the Territory into judicial districts, makes District Courts, enacts that the judges of the Supreme Court shall hold them; and adds:

"The jurisdiction of the several courts herein provided for, both appellate and original, and THAT OF THE PROBATE COURTS and of justices of the peace SHALL BE AS LIMITED BY LAW. *Provided*, that justices of the peace shall not have jurisdiction of any matter in controversy, where the title or boundaries of land may be in dispute, or where the debt or sum claimed shall exceed one hundred dollars, and the said Supreme and District Courts respectively shall possess chancery as well as common law jurisdiction."

The act gives power to the *Supreme* and *District* Courts to appoint their clerks, and enacts additionally:

"Writs of error, bills of exception, and appeals shall be allowed in all cases from the final decisions of said *District* Courts

to the Supreme Court, under such regulations as may be prescribed by law. . . .

"Writs of error and appeals from the final decisions of said *Supreme* Court shall be allowed, and may be taken to the Supreme Court of the United States in the same manner and under the same regulations as from the Circuit Courts of the United States."

But though the act goes into full details about the Supreme and District Courts, and, in fact, about everything else relating to the government of the Territory, it says nothing more in any part of it about Probate Courts than the eleven words above quoted, on page 376, in small capitals.

With this act of Congress in force as the fundamental law of the Territory, the Territorial legislature in 1855* passed an act, entitled "An act in relation to the judiciary." That act says:

"The several *Probate Courts* in their respective counties *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; and they shall be governed in all respects by the same general rules and regulations as regards practice as the District Courts."

Congress had not enacted any act "*dis*approving" of this Territorial act, and thus rendering it, by Federal legislation, null and of no effect.

In this state of enactment, Congressional and Territorial, Higley sued Ferris in the *Probate* Court of Salt Lake County, on a promissory note for $1000, and obtained a judgment there. The case coming into the District Court of the third judicial district, was reversed, on the ground that the Probate Court had no jurisdiction of such a suit; and this judgment being affirmed on appeal to the Supreme Court, it was now brought here by writ of error to that court.

The question, of course, was whether under the organic act of the Territory vesting the judicial power of that Ter-

* January 19.

ritory "in a Supreme Court, District Courts, Probate Courts, and in justices of the peace," and declaring that the jurisdiction of those courts—mentioning specially "that of the Probate Courts"—should be as *limited by law*—the said organic act—in its grant of power to the Territorial legislature to legislate on all "rightful subjects of legislation consistent with the provisions of the act"—meant that the jurisdiction of the courts should be limited—that is to say, should be defined by *its* law—the law of the Territory—alone; or whether it also referred to and included the ancient law, well known in nearly all the United States of America, which fixes the constitution of those courts which under various names, including that of Probate Courts, have the care of the estates and concerns of persons deceased.

Messrs. C. J. Hillyer and T. Fitch, for the plaintiff in error:

It cannot be argued that the establishment and definition of jurisdiction of courts of record is not "a rightful subject of legislation," or that Territorial legislation to that end with respect to local courts, is inconsistent with the Constitution of the United States.

The only inquiry is then whether the Territorial statute conferring common-law and chancery jurisdiction upon Probate Courts is inconsistent with the provisions of the act of Congress.

It is submitted that Congress, in declaring that the jurisdiction of the Probate Courts shall be "as limited by law," intended a law to be hereafter enacted either by itself or by the Territorial legislature, and that the Territorial legislature, in conferring upon the Probate Courts common-law jurisdiction to an unlimited extent, did no more than it was empowered by the act of Congress to do. It is further submitted that the failure of Congress to subsequently annul this act of the Territorial legislature by a disapproving statute validates the exercise of power by the Territorial legislature, even if it had been originally of doubtful validity.

The idea that Congress, in using the words "as limited by law," intended, not statutory enactments alone, but "the

law" in its broader sense, wherein the history of Probate Courts, the constructions of eminent writers and the interpretation of courts as to the powers and jurisdiction of Probate Courts in general are considered as part of "the law," can hardly be sustained. A grant of power from the law-making body, accompanied by a reservation that such power so granted may afterwards be "limited by law," means a law to be thereafter enacted, and not a judicial construction of existing enactments.

Neither can it be argued that, as the section of the act of Congress heretofore quoted confers original chancery and common-law jurisdiction upon the District Courts, it therefore, by necessary implication, excludes such jurisdiction from all other courts under the application of the maxim. The act of Congress referred to is not a penal statute, and the maxim, "*Expressio unius*," &c., does not apply.

The words "*have* power" in the Territorial act, are unusual in a statute meant to grant power. The usual words are, "*shall* have power." One of the judges of the court below was of the opinion that the words used were meant as a simple declaration of the Territorial legislature that the jurisdiction already existed, though he did not rest the case on that ground. His opinion is submitted.

No opposing counsel.

Mr. Justice MILLER, delivered the opinion of the court.

The single question in this case is whether the Probate Court had jurisdiction to hear and determine such an action as it heard and determined in the present case; and this must be decided by a construction of the statute of the Territory and the provisions of the act of Congress organizing the Territory.

A statute of the Territorial legislature enacts that "the several Probate Courts, in their respective counties, 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, and they shall be gov-

erned in all respects by the same general rules and regulations as regards practice as the District Courts."

In a very learned opinion of one of the judges of the Supreme Court of the Territory, we find an ingenious argument in support of the idea—though the case is not rested on this ground—that this provision was not intended to confer jurisdiction, but was a mere declaration of the opinion of the Territorial legislature that the jurisdiction already existed. This is founded on the use of the words "have power" in the present tense, instead of "shall have power," in the future. We have no doubt that the legislature intended to *confer* the power by that sentence. No statute or other law existed previously by which any one ever supposed that such power existed. The form of expression here used is not at all uncommon for that purpose, especially in enactments which, like this, are parts of a general code of laws. The legislature was not in any manner called upon to give its opinion of the powers of the Probate Court, but it was in fact making a general system of laws for the Territory. It is inconceivable that it meant anything else but to establish the court and prescribe its jurisdiction.

But the power of the legislature to confer this jurisdiction on the Probate Courts is a much more serious question.

The organic act, in defining the power of the Territorial legislature, declares that "it shall extend to all rightful subjects of legislation consistent with the Constitution of the United States, and with that act."

We may, I think, assume, without much hazard, that defining the jurisdiction of a Probate Court, or, indeed, of any court, may be fairly included within the general meaning of the phrase rightful subject of legislation. Nor do we think there is anything in such legislation inconsistent with the Constitution of the United States. There remains then only the further inquiry whether it is inconsistent with any part of the organic act itself.

That act established a complete system of local government. It stands as the constitution or fundamental law of the Territory. It provides for the executive, legislative, and

judicial departments of government. It prescribes their functions, their manner of appointment and election, their compensation and tenure of office. In regard to the judiciary, it creates the courts, distributes the judicial power among them, and provides all the general machinery of courts, such as clerk, marshal, prosecuting attorney, &c.

It is here then, if anywhere, that we should look for anything inconsistent with the power conferred on the Probate Courts by the Territorial legislature. The ninth section of the act declares that "the judicial power of the Territory shall be vested in a Supreme Court, District Courts, Probate Courts, and justices of the peace," and it prescribes the organization and number of the District Courts. The judges of these are appointed by the President, by and with the advice and consent of the Senate of the United States. And then it declares that "the jurisdiction of the several courts herein provided for, both appellate and original, and that of the Probate Courts, and of the justices of the peace, shall be as limited by law: Provided, That justices of the peace shall not have jurisdiction of any matter in controversy where the title or boundary of lands may be in dispute, or where the debt or sum claimed shall exceed one hundred dollars, and the said Supreme and District Courts, respectively, shall possess chancery as well as common-law jurisdiction."

Provision is made in the same section for appeals and writs of error from the District Courts to the Supreme Court of the Territory, and from that court to the Supreme Court of the United States, but no provision is made for any such review of the decisions of the Probate Courts or of the justices of the peace.

The common-law and chancery jurisdiction here conferred on the District and Supreme Courts, is a jurisdiction very ample and very well understood. It includes almost every matter, whether of civil or criminal cognizance, which can be litigated in a court of justice. The jurisdiction of the justices of the peace is specifically limited as regards the moneyed value on which it may decide, and by the exclu-

sion of matters concerning real estate. Of the Probate Courts it is only said that a part of the judicial power of the Territory shall be vested in them. What part? The answer to this must be sought in the general nature and jurisdiction of such courts as they are known in the history of the English law and in the jurisprudence of this country. It is a tempting subject to trace the history of the probate of wills and the administration of the personal estates of decedents, from the time that it was held to be a matter of exclusive ecclesiastical prerogative, down to the present. It is sufficient to say that through it all, to the present hour, it has been the almost uniform rule among the people, who make the common-law of England the basis of their judicial system, to have a distinct tribunal for the establishment of wills and the administration of the estates of men dying either with or without wills. These tribunals have been variously called Prerogative Courts, Probate Courts, Surrogates, Orphans' Courts, &c. To the functions more directly appertaining to wills and the administration of estates, have occasionally been added the guardianship of infants and control of their property, the allotment of dower, and perhaps other powers related more or less to the same general subject. Such courts are not in their mode of proceeding governed by the rules of the common law. They are without juries and have no special system of pleading. They may or may not have clerks, sheriffs, or other analogous officers. They were not in England considered originally as courts of record; and have never, in either that country or this, been made courts of general jurisdiction, unless the attempt to do so in this case be successful.

Looking then to the purpose of the organic act to establish a general system of government, and its obvious purpose to say what courts shall exist in the Territory, and how the judicial power shall be distributed among them, and especially to the fact that all ordinary and necessary jurisdiction is provided for in the Supreme and District Courts, and that of the justices of the peace, and that the jurisdiction of the Probate Court is left to rest on the general nature

and character of such courts as they are recognized in our system of jurisprudence, is it not a fair inference that it was not intended that that court should be made one of general jurisdiction? that it should not be converted into a court in which all rights, whether civil or criminal, whether of common-law or chancery cognizance, whether involving life, or liberty, or property, should be lawfully tried and determined?

For all such cases, when tried in the District Courts, provision is made for correction of errors and mistakes by appeal to a higher court. But no such provision is made in regard to the Probate Courts, a thing which certainly would have been done if it had been supposed that all judicial power would have been vested in them.

It is supposed that a sufficient answer to this course of reasoning is found in the declaration of the ninth section of the organic act already cited, that the jurisdiction of the several courts therein provided for, "shall be as limited by law." The argument is that this refers to laws to be thereafter made by the Territorial legislature, and that as the power of that body extended to all rightful subjects of legislation, it extended to this of totally changing the jurisdiction of these courts. We are not prepared to say that, in deciding what law is meant in this phrase, "as limited by law," we are wholly to exclude laws made by the legislature of the Territory. There may be cases when that legislature conferring new rights, or new remedies, or establishing anomalous rules of proceedings within their legislative power, may direct in what court they shall be had. Nor are we called on to deny that the functions and powers of the Probate Courts may be more specifically defined by Territorial statutes within the limit of the general idea of the nature of Probate Courts, or that certain duties not strictly of that character may be imposed on them by that legislation.

But we hold that the acts of the legislature are not the only law to which we must look for the powers of any of these Territorial courts. The general history of our jurisprudence and the organic act itself are also to be considered,

and any act of the Territorial legislature inconsistent with the latter must be held void. We are of opinion that the one which we have been considering is inconsistent with the general scope and spirit of that act in defining the courts of the Territory, and in the distribution of judicial power amongst them, inconsistent with the nature and purpose of a Probate Court as authorized by that act, and inconsistent with the clause which confers upon the Supreme Court and District Courts general jurisdiction in chancery as well as at common law. The fact that the judges of these latter courts are appointed by the Federal power, paid by that power—that other officers of these courts are appointed and paid in like manner—strongly repels the idea that Congress, in conferring on these courts all the powers of courts of general jurisdiction, both civil and criminal, intended to leave to the Territorial legislature the power to practically evade or obstruct the exercise of those powers by conferring precisely the same jurisdiction on courts created and appointed by the Territory.

The act of the Territorial legislature conferring general jurisdiction in chancery and at law on the Probate Courts is, therefore, void.

This view is supported by the decisions of courts of Kansas,* on a similar statute; by decisions in Idaho,† and by the decisions of the Supreme Court whose judgment we are here called on to reverse.

JUDGMENT AFFIRMED.

The CHIEF JUSTICE, not having heard the argument, took no part in the decision of this case.

* Locknane *v.* Martin, McCahon, 60; Dewey *v.* Dyer, Ib. 77; Mayberry, Graham et al. *v.* Kelly, 1 Kansas, 116.

† The People *v.* Du Rell, 1 Idaho, 30; Moore *v.* Konbly, Ib. 55.