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OF THE

STATE OF MAINE,

DURING ITS SESSION

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TWENTIETH LEGISLATURE.

NO. 17. **SENATE.**

OPINION

OF THE

JUSTICES

OF THE

SUPREME JUDICIAL COURT.

[Wm. R. Smith & Co.....Printers to the State.]

STATE OF MAINE.

In Senate, Feb. 11, 1840.

Ordered, That the Justices of the Supreme Judicial Court, be requested to give their opinion on the following questions, to wit:

Question 1st. Have the Legislature the power to grant Divorces in cases where the Supreme Judicial Court have jurisdiction?

Question 2d. Have the Legislature the power to grant Divorces in cases where the Supreme Judicial Court have no jurisdiction?

OPINION.

To the Honorable the
Senate of the State of Maine:

The Justices of the Supreme Judicial Court, in obedience to your order of the eleventh inst., have considered the questions thereby proposed to them, and now have the honor to transmit the following observations as their opinion.

The questions presented to the Justices under that clause of the constitution, which requires them "to give their opinion upon important questions of law and upon solemn occasions," are perhaps almost necessarily presented under circumstances indicating that an opinion is expected speedily. And they are received, when the mind, having been greatly exhausted by the pressing labors of other official duties, no longer possesses its natural vigor, and cannot exercise even its accustomed extent of thought or power of reason. And it cannot be allowed the time for that extensive research and patient examination and reflection, which the importance of the questions, often a little aside from the range of its accustomed studies and duties, may

demand. And it is not excited to action and aided by the elaborate examination and forcible reasoning of other minds, which have been interested to examine and argue them. Opinions formed under such circumstances, can scarcely claim the respect which might be readily yielded to those formed under more favorable auspices.

Marriage is usually and justly regarded in christendom, as an institution of divine origin, and regulated, to a certain extent, by the divine command. And in countries where neither the Jewish law nor christian religion has been received, regulations of it have been regarded as disclosed by the light, and existing in the law of nature. There can, however, be no doubt, that it is subject to the regulation of municipal law, in all those numerous incidents wherein the divine law is silent. The mode of entering into the contract; to what extent and in what manner it shall affect the personal liberty and safety of the parties, and in what manner these shall be protected and secured; the effect which it shall have upon their estates during its continuance and after it is terminated by death; the duties which it imposes upon each, and the obligations under which it places them to others, are some of the matters coming rightfully within the control of the legislative power. And they prove, that it is also a civil institution to be regulated by law for the common good. The common law considers it in no other light than

as a civil contract, leaving morality and religion to act upon it according to their own principles. This contract, to be binding, must, like others, be entered into by those having ability to contract, and who freely do so in the manner which the law prescribes or allows. When thus executed, it confers upon the parties certain legal rights, according to the then existing state of the law. The rights of the parties to their property or estates, are no longer the same. Former rights are diminished or modified, and new ones are acquired. These rights the law recognizes as having been derived from the contract of marriage, and enforces them. Here then is a contract, valid in law, and from the obligations of which neither party can be freed, but by some course of procedure which the law admits to be effectual, to declare that it is no longer binding. Whatever this may be, it has the effect of depriving one party to the contract of legal rights, and of releasing the other party from legal obligations.

Such rights and duties, when acquired and existing by virtue of a deed, bond, promissory note, other contract of similar character, cannot be destroyed or released by the legislative power. To do this, would violate that clause in the constitution of this State, which declares that the legislative power shall pass no "law imparing the obligation of contracts." The rights and obligations secured by this class of contracts, are precisely such as the parties

to them, acting in obedience to the laws, choose to make them; and such as the contract itself sets forth and defines. The only proper proof of them is found in the language of the contract. The Legislature, by no law of general policy for the regulation of municipal affairs, or of moral or intellectual culture, would act upon or affect them. These contracts may be dissolved at the election of the parties interested, In all these respects, they are unlike and differ from the marriage contract—that cannot be dissolved by the consent of the parties. The State has an interest in it as a civil institution, designed to cherish virtue and to promote the happiness of the community. All the rights and duties arising out of it, except those occasioned by the difference of the sexes, are not provided for in the contract; nor are their existence proved by it. They are acquired solely by a law of the State, and are such as that determines that they ought to be. It is for the legislative power to determine what will promote the general welfare and the happiness of the people in the regulation of this relation in life, as well as in that of parent and child, and master and servant. It may by law declare, that the husband shall have no right to the estates of the wife, and the wife none to those of the husband. Such a law would change the rights of the parties, as they have heretofore existed under the marriage contract, in all those cases where the title had not been changed by being

reduced to actual possession. And in the same manner may every right and duty existing under it, saving those before excepted, be altered or destoyed by general laws regulating the relation of husband and wife. And the contest itself will be left shorn of all privileges and duties, rights and obligations, except those personal ones before named. No rights or duties would be left, which could be asserted and enforced in a court of common law. In an ecclesiastical tribunal, there might be a suit relating to marital rights. This, however, may be regarded as a process to enforce moral duties. Was it intended by that clause in the constitution, to preserve the mere existence of a contract, when all other rights than these were liable to be destroyed? Or was it intended to protect those contracts only, securing a pecuniary or other beneficial interest, which could become the subject of estimation, and of compensation?

The language used in the constitution of this State for the preservation of the obligation of contracts, appears to have been copied from the constitution of the United States. Several cases have come before the Supreme Court of the United States, requiring a construction of that clause of the constitution. It is believed that in no one of them has it received a more enlarged construction, than in the case of Dartmouth College against Woodward, reported in the 4th vol. of Mr. Wheaton's reports.

It was there decided, that a grant of an eleemosynary private corporation, was a contract protected by that clause, although there was no other party who could or did complain, than the Trustees under the charter. Among the reasons prominently assigned for this construction, are the following:—"It is a contract for the security and disposition of property. It is a contract on the faith of which real and personal estate has been conveyed to the corporation. It is, then, a contract within the letter of the constitution, and within its spirit also," unless, says the opinion, its being invested in trustees makes a difference. It had been alleged in the argument of that case, that a construction so enlarged, would include many contracts never designed to have been included, and among others, the marriage contract. In answer to this argument, Chief Justice Marshall observes:

"The provision of the constitution never has been understood to embrace other contracts than those with respect to property, or some object of value, and confer rights which may be asserted in a court of justice. It never has been understood to restrict the general right of the Legislature to legislate on the subject of divorces. Those acts enable some tribunal, not to impair a marriage contract, but to liberate one of the parties, because it has been broken by the other. When any State Legislature shall pass an act annulling all marriage contracts, or

allowing either party to annul it without the consent of the other, it will be time enough to inquire whether such an act be constitutional." Where it is said that this clause has never been understood to restrict the right to legislate on the subject of divorces, it is supposed that reference was made to the practice existing before, and continued since, the adoption of the constitution of the United States, in many of the State Legislatures, to grant divorces. This practice, continued to this day in several of them, and being, it is believed, the only method by which a divorce can now be obtained in four or five of them, exhibits a practical construction of that clause, indicating that it was not intended to operate upon the marriage contract. The more this clause is extended by construction, the more is the legislative power of the States diminished. These considerations lead the undersigned to the conclusion, that a just construction of that clause does not forbid the Legislature to grant divorces.

The constitution of this State provides, that "the powers of this government shall be divided into three distinct departments, the legislative, executive, and judicial,"—and that "no person or persons belonging to one of these departments, shall exercise any of the powers properly belonging to either of the others, except in the cases herein expressly directed or permitted,"—and that "the judicial power of this State shall be vested in a Supreme Judicial

Court and such other Courts as the Legislature shall from time to time establish." The constitution does not define the extent, or prescribe the limits, of the judicial power. The Supreme Court cannot exercise its judicial power by virtue of the constitution alone, but must astertain the extent of its powers and duties from the enactments of the Legislature. The judicial power is, therefore, in our constitution, whatever the laws of the State, from time to time enacted, declare it to be. And when any subject is thus declared by law to be of judicial cognizance, it becomes a part of the judicial power, in the only sense in which that term in the constitution can have a practical operation. Other departments of the government, while it so remains a part of the judicial power, are forbidden to exercise it. If the Supreme Court acts upon a question of divorce over which it has jurisdiction, and decides that by the rules of law and evidence a divorce cannot be granted—and the party then applies to the Legislature, and it takes jurisdiction and grants the divorce, it practically allows the party an appeal from the highest tribunal established by or known to the constitution. And it would appear to present one of the practical evils designed to be provided against in that clause of the constitution. It would present the spectacle of two different departments of the government acting upon the very question which had been committed to

one of them to determine finally as a judicial question. The result of this reasoning is, that in the opinion of the undersigned, the Legislature cannot "grant divorces in cases where the Supreme Judicial Court have jurisdiction."

There may be questions, in their nature essentially judicial, which have not been thus assigned to, and incorporated into, the judicial power. And the question arises, and it is one of great delicacy and importance, and calling for a more extensive research and examination than can now be permitted, whether any subject, although in its nature judicial, can, under our constitution, be regarded as coming within the judicial power, unless it has by law been so assigned to it. There is no other mode of ascertaining with certainty, what subjects are comprehended within that power. Men's judgments may greatly differ respecting what questions are in their own nature essentially judicial. One of the principal objects of the provision for the division of power, doubless, was to avoid the danger and mischief of a conflicting exercise of power upon the same subject. By the proposed construction, this can never take place between the legislative and judicial powers, in those cases over which the judicial power by law has no jurisdiction, although they may be apparently proper for judicial decision. To declare that all questions apparently more fit for the exercise of judicial than legislative power, were

included within the judicial power, would be, therefore, to extend that power by construction, beyond what is necessary to avoid the mischiefs to be apprehended from a conflict of power. And it would leave the judicial power so vague and undefined, as to afford frequent occasions for those very conflicts and mischiefs which it was the intention to avoid. It may be objected to this construction, that it would permit the Legislature, by refusing to pass any law giving to the judicial power cognizance of any class of contracts or questions, to usurp the whole judicial power, and to decide upon all contracts and questions arising between party and party. It is not to be presumed that it would refuse to perform its duty and so violate the constitution as to annihilate, for all practical purposes, one department of the government. And if it could be supposed to do so, it could not itself exercise the power thus improperly withheld, in all that class of cases which are required by the constitution to be tried by a jury. The objection is not believed to be of sufficient importance to require that other insuperable difficulties existing to prevent such an exercise of power, should be stated. An eminent jurist, and one possessed of high powers of mind, has declared that the question of divorce involves investigations which are properly of a judicial nature. There may, however, be in the judgment of the Legislature, other proper causes of divorce than

such as have by law been assigned to, and thereby become a part of the judicial power.

Under written Constitutions and laws, defining the powers and duties of the different departments of government, the justness of the old maxim, that a good judge acts well his part by enlarging his jurisdiction, is not perceived. The better rule would seem to be for all to exercise the powers granted, without any attempt to enlarge or restrict them by a strained construction.

If this reasoning be not erroneous, it will be perceived, that the language of the Act of March 5, 1834, declaring "that the Supreme Judicial Court shall have exclusive jurisdiction in all cases of divorce," does not enlarge or extend the judicial power beyond the cases over which it has jurisdiction; and such does not appear to have been the intention of the Legislature. Nor could the Resolve passed in the Senate, on the 8th, and in the House, on the 9th of March, 1838, for the like reasons, have any such effect; even if it could be regarded as any thing more than the deliberate judgment of the two branches of the Legislature then existing. Other reasons have been noticed, which appear rather to exhibit the inexpediency, or the danger, or the injustice of the exercise of the power by the Legislature, than to prove it to be unconstitutional.

While they may believe with the distinguished

jurist before alluded to, that "the jurisdiction over divorces ought to be confined exclusively to the judicial tribunals under the limitations prescribed by law," the undersigned, from the information to which they can now obtain access, are not prepared to deny, that "the Legislature have the power to grant divorces, in cases where the Supreme Judicial Court have not jurisdiction;" and they therefore answer the second question in the affirmative, and the first in the negative.

NATHAN WESTON,
NICHOLAS EMERY,
ETHER SHEPLEY.

STATE OF MAINE.

IN SENATE, February 17, 1840.

The foregoing opinion of the Justices of the Supreme Judicial Court, on questions proposed to them by the Senate, on the 11th inst., was read, and laid upon the table, and

ORDERED, That three hundred copies of the same be printed for the use of the Legislature.

[Extract from the Journal.]

Attest: WILLIAM TRAFTON, *Secretary.*