

MAINE STATE LEGISLATURE

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DOCUMENTS

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THE LEGISLATURE

OF THE

STATE OF MAINE,

DURING ITS SESSION

A. D. 1844.

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1844.

TWENTY-FOURTH LEGISLATURE.

No. 43.]

[HOUSE.

REPORT AND RESOLVE

RELATING TO

D I V O R C E S .

[WM. R. SMITH & Co....Printers.]



STATE OF MAINE.

HOUSE OF REPRESENTATIVES, }
February 29, 1844. }

The joint standing committee on the Judiciary, to whom was referred, "a resolve defining the power to grant divorces as a judicial power," have had the same under consideration, and ask leave to submit the following

REPORT:

Petitions to the Legislature to decree divorces, have become frequent. It is believed, that all will agree, that if the Legislature possesses the power, it is inexpedient to exercise it. The hall of legislation is an unsuitable forum, for the investigation of such questions. If entertained at all, they necessarily consume time and delay the public business. In three instances, the Legislature unfortunately assumed the power to decree divorces. But the committee entertain no doubt, that the power is strictly *judicial* in its character, and that it cannot be constitutionally exercised by the Legislature in any case whatever; and they feel constrained to set forth some of the reasons, that lead to that conclusion, in the hope, that such questions may hereafter be confined to the proper tribunal.

Marriage is not an ordinary contract, to be entered into and dissolved at the pleasure of the parties. It is a civil institution, of the greatest interest to society. Upon its due regulation depend the parental and filial relations, the education of children, and the promotion of the public morals. The marriage contract is, however, not so permanent, but that it may be broken or violated by one of the parties; and when thus broken or violated, ground is furnished for a divorce or a decree releasing the other party. Our

Constitution declares, that "the Legislature shall have full power to establish all reasonable laws and regulations for the defence and benefit of the people of this State, not repugnant to this Constitution nor that of the United States." By virtue of this power, the Legislature has determined, what shall be such a violation of the marriage contract on the one part, as will justify a decree releasing the other party. To declare the causes of divorce is the appropriate business of legislation. The Legislature, having determined by law, what shall be a sufficient breach of the contract, to justify a decree of divorce ; it is not within their province to make a decree in any given case. The Constitution declares, "That the powers of this government shall be divided into three distinct departments, the legislative, the executive, and the judicial."

If then the power to decree a divorce, is a *judicial* power, it cannot be exercised by the Legislature. A decree of divorce is not "a law or regulation" for civil conduct; it is a proper exertion of judicial power. The Constitution declares that, "the judicial power of this State, shall be vested in a Supreme Judicial Court, and such other Courts, as the Legislature may from time to time establish." The Legislature was by the Constitution under obligation to establish the Supreme Judicial Court, and vest "the judicial power." They could not refuse to establish the Court and exercise "the judicial power," themselves. It has been argued, that there is no other way, to ascertain what is *judicial power* but by the existing statutes, and that any power not vested in the courts of law is not judicial. This argument is wholly fallacious. The power, that is vested in the Courts, must have been judicial, before it was vested, otherwise the Legislature had no right to vest it. "The judicial power shall be vested," &c. The Legislature was to vest the power. The power to be vested, was that which was, then considered "judicial," before it was vested. The meaning of the phrase "judicial power" in the Constitution, is to be ascertained, by a reference to the laws of Massachusetts. Whatever was "judicial power" in Massachusetts at the time, was "judicial power" within the meaning of the Constitution.

In the Constitution of Massachusetts adopted in 1780, the power

to decree divorces is placed under the head of "The Judiciary Power." By the statute of Massachusetts, passed in March 1786, the Legislature declared, "that all questions of divorce and alimony, shall be heard and tried in the Supreme Judicial Court, holden for the county, where the parties live." This statute was in force, when Maine was formed into a separate State. When the Constitution was formed, the power to decree divorces was exclusively judicial. The statute of Maine in the year 1821, is in the same words as the statute of Massachusetts, and the statute of 1834, and the Revised Statutes are to the same effect. Thus we have the proof, that the power to decree divorces, was considered a "judicial power," and confined exclusively to the Supreme Judicial Court from the year 1786 till 1836. No legislative divorce was ever decreed or attempted for more than fifty five years after 1780.

In the year 1836, the first bill of divorce was passed in this State. The power, however, was disclaimed by the Legislature, and in the year 1838, the committee on the judiciary reported a resolve disclaiming the power, supported by an able report; which were adopted by both branches of the Legislature and approved by the Governor.

There could be nothing to produce doubt but for the opinion of the Supreme Judicial Court, in answer to questions propounded by the Senate in 1840. That opinion is not a binding precedent, like the opinions between party and party. It is merely advisory. Such advisory opinions have frequently been overruled by the Legislature. The very same Legislature to which the opinion was communicated, over ruled it, and by the fourth section of the 89th chapter of the Revised Statutes, vested exclusive jurisdiction in the Supreme Judicial Court in all cases of divorce.

Whenever a legal cause for divorce exists, it implies guilt, and a breach of the contract in the other party. In all such cases, none pretend, that the Legislature can decree divorces.

But if no law is violated, if the contract is not broken, if no legal cause of divorce exists, then it is contended, the Legislature may decree a divorce. It is said the Court has not the power; it

must exist somewhere; therefore it is in the Legislature. The committee think this strange logic. If no law has been violated; if no guilt or breach of the marriage contract is proved upon the party accused, then no power to decree a divorce, exists or ought to exist in any department of the government.

“No State can pass any *ex post facto* law or law impairing the obligation of any contract.” “An *ex post facto* law is one which renders an act punishable in a manner in which, it was not punishable, when it was committed.” To separate a husband from his wife without his consent, is a severe punishment. A legislative divorce, decreed, when no cause for divorce exists according to pre-existing laws, is *ex post facto* in its nature, impairs the most sacred of all contracts, and therefore is null and void. The Legislature cannot empower the court to decree a divorce in such a case, much less make the decree. Desertion for five years is a cause of divorce. Desertion for two years is not. The Legislature may alter the law, and make a desertion for two years a cause of divorce; but they cannot authorize the Court to decree a divorce for two years desertion prior to such change of the law; much less can the Legislature decree the divorce for that period of desertion. That such action on the part of the Legislature, would be unconstitutional, was decided in the case of *Sherburne v. Sherburne*, 6 Grenl. 210.

To place the power of making laws, and the power of interpreting them, in the same hands, was always considered despotic. Hence the provision that the three different departments of the government, should be distinct. Still more despotic would it be, for the Legislature to determine questions between parties, according to their arbitrary will, and without regard to the existing law. It is in vain to urge that the Legislature would not be disposed to act in an arbitrary manner. The people have seen fit in their Constitution, to limit the Legislature, so that they have no power in an arbitrary manner, to pass *ex post facto* laws or laws impairing the obligation of contracts. The consequences of the doctrine contended for, when carried out, would be dreadful. The Legislature might, upon the same plea, inflict an infinite number of penalties, for acts not illegal when done, because the court has no power to

inflict them. They might upon the same plea, sentence to imprisonment, and to death, for acts not done in violation of law. *Such power is not in the Court ; it must exist somewhere ; therefore it is in the Legislature.* If such a doctrine should be suffered to prevail, and be carried out, it would take away all security for life, liberty, and property.

The iniquity of the doctrine contended for, in the matter of divorce, is further apparent from the consideration, that the Constitution does not require notice to be given to individuals in any case. If the doctrine is true at all, the Legislature may divorce any married pair, without application, and without notice, when neither party has violated the contract, and against the wishes of both parties. But if any legal cause of divorce exists, the Legislature cannot act. In no case can the Legislature allow the injured wife any alimony. This is the doctrine. It is cruel and arbitrary.

Moreover, this alleged power over divorce, if admitted at all, will practically be unlimited. The cause for divorce does not appear in the bill. If the Legislature should act on a case coming within the declared jurisdiction of the Supreme Judicial Court, that fact would not be known by the bill. The presumption of law would be, that all was right. For these reasons, and many more that might be given, the committee recommend, that the resolution referred to them should be adopted by the Legislature ; and they further recommend that the resolve, together with this report, be published among the resolves of the State.

J. C. WOODMAN, *Per Order.*



S T A T E O F M A I N E .

RESOLVE, defining the power to grant Divorces, as a
judicial power.

RESOLVED, as the sense of this Legislature, that the
2 power to grant divorces is in its nature a judicial
3 power, and cannot be constitutionally exercised by
4 the Legislature in any case whatever.

STATE OF MAINE.

HOUSE OF REPRESENTATIVES, }
February 29, 1844. }

ORDERED: That 1,000 copies of the foregoing Report and
Resolve, be printed for the use of the Legislature.

WM. T. JOHNSON, *Clerk.*