U.S. Supreme Court

MAYNARD v. HILL, 125 U.S. 190 (1888)

125 U.S. 190

MAYNARD et al.
v.
HILL et al. 1

March 19, 1888

[125 U.S. 190, 191] This is a suit in equity to charge the defendants, as trustees of certain lands in King county, Washington Territory, and compel a conveyance thereof to the plaintiffs. The lands are described as lots 9, 10, 13, and 14, of section 4, and lots 6, 7, 8, and 9, of section 5, in township 24 north, range 4 east, Willamette meridian. The case comes here on appeal from a judgment of the supreme court of the territory, sustaining the defendants' demurrer, and dismissing the complaint. The material facts, as disclosed by the complaint, are briefly these: In 1828, David S. Maynard and Lydia A. Maynard intermarried in the state of Vermont, and lived there to- [125 U.S. 190, 192] gether as husband and wife until 1850, when they removed to Ohio. The plaintiffs, Henry C. Maynard and Frances J. Patterson, are their children, and the only issue of the marriage. David S. Maynard died intestate in the year 1873, and Lydia A. Maynard in the year 1879. In 1850 the husband left his family in Ohio and started overland for California, under a promise to his wife that he would either return or send for her and the children within two years, and that the mean time he would send her the means of support. He left her without such means, and never afterwards contributed anything for her support or that of the children. On the 16th of September following he took up his residence in the territory of Oregon, in that part which is now Washington Territory, and continued ever afterwards to reside there. On the 3d of April, 1852, he settled upon and claimed, as a married man, a tract of land of 640 acres, described in the bill, under the act of congress of September 27, 1850, 'creating the office of surveyor general of public lands in Oregon, and to provide for the survey, and to make donations to settlers of the said public lands,' and resided thereon until his death. On the 22d day of December, 1852, an act was passed by the legislative assembly of the territory, purporting to dissolve the bonds of matrimony between him and his wife. The act is in these words:

> 'An act to provide for the dissolution of the bonds of matrimony heretofore existing between D. S. Maynard and Lydia A. Maynard, his wife.
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> 'Section 1. Be it enacted by the legislative assembly of the territory of Oregon, that the bonds of matrimony heretofore existing between D. S. Maynard and Lydia A. Maynard be, and the same are hereby, dissolved.
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> 'Passed the house of representatives, December 22, 1852.
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> 'B. F. HARDING, Speaker of the House of Representatives.
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> 'Passed the council, December 22, 1852.
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> 'M. P. DEADY, President Council.' [125 U.S. 190, 193] The complaint alleges that no cause existed at any time for this divorce; that no notice was given to the wife of any application by the husband for a divorce, or of the introduction or pendency of the bill for that act in the legislative assembly; that she had no knowledge of the passage of the act until July,

1853; that at the time she was not within the limits or an inhabitant of Oregon; that she never became a resident of either the territory of state of Oregon; and that she never in any manner acquiesced in or consented to the act; and the plaintiffs insisted that the legislative assembly had no authority to pass the act; that the same is absolutely void; and that the parties were never lawfully divorced. On or about the 15th of January, 1853, the husband, thus divorced, intermarried with one Catherine T. Brashears, and thereafter they lived together as husband and wife until his death. On the 7th of November, 1853, he filed with the surveyor general of Oregon the certificate required under the donation act of September 27, 1850, as amended by the act of h e 14th of February, 1853, accompanied with an affidavit of his residence in Oregon from the 16th of September, 1850, and on the land claimed from April 3, 1852, and that he was married to Lydia A. Maynard until the 24th of December, 1852, having been married to her in Vermont in August, 1828. The notification was also accompanied with corroborative affidavits of two other parties that he had, within their knowledge. resided upon and cultivated the land from the 3d of April, 1852.

On the 30th of April, 1856, he made proof before the register and receiver of the land-office of the territory of his residence upon and cultivation of his claim for four years, from April 3, 1852, to and including April 3, 1856. Those officers accordingly, in May following, issued to him, and to Catherine T. Maynard, his second wife, a certificate for the donation claim, apportioning the west half to him and the east half to her. The certificate was afterwards annulled by the commissioner of the general land-office, on the ground that as it then appeared, and was supposed to be the fact, [125 U.S. 190, 194] Lydia A. Maynard, the first wife, was dead, and that her heirs were therefore entitled to half of the claim.

On a subsequent hearing before the register and receiver, the first wife appeared, and they awarded the east half of the claim to her and the west half to the husband, From this decision an appeal was taken to the commissioner of the general land-office, and from the decision of that officer to the secretary of the interior. The commissioner affirmed the decision of the register and receiver so far as it awarded the west half to the husband, but reversed the decision so far as it awarded the east half to the first wife, holding that neither wife was entitled to that half. He accordingly directed the certificate as to the east half to be canceled. The secretary affirmed the decision of the commissioner, holding that the husband had fully complied with all the requirements of the law relating to settlement and cultivation, and was therefore entitled to the west half awarded to him, for which a patent was accordingly issued. But the secretary also held that, at the time of the alleged divorce, the husband possessed only an inchoate interest in the lands, and whether it should ever become a vested interest depended upon his future compliance with the conditions prescribed by the statute; that his first wife accordingly possessed no vested interest in the property. He also held that the second wife was not entitled to any portion of the claim, because she was not his wife on the first day of December, 1850, or within one year from that date, which was necessary, to entitle her to one-half of the claim under the statute; and the plaintiffs insist that the decision of the commissioner and secretary in this particular is erroneous, and founded upon a misapprehension of the law.

Subsequently the east half of the claim was treated as public land, and was surveyed and platted as such under the direction of the commissioner of the general land-office. The defendants Hill and Lewis, with full knowledge, as the bill alleges, of the rights of the first wife, located certain land scrip known as Porterfield land scrip, upon certain portions of the land, and patents of the United States were issued to [125 U.S. 190, 195] them accordingly, and they are applicants for the remaining portion. The complaint alleges that the other defendant, Flagg, claims some interest in the property, but the extent and nature thereof are not stated. Upon these facts the plaintiffs claim that they are the equitable owners of the lands patented to the defendants Hill and Lewis, and that the defendants are equitably trustees of the legal title for them. They therefore pray that the defendants may be adjudged to be such trustees, and directed to convey the lands to them by a good and sufficient deed; and for such other and further relief in the premises as to the court shall seem meet and equitable. To this complaint the defendants demure d on the ground that it did not state facts sufficient to constitute a cause of action. The court sustained the demurrer, and gave judgment thereon in favor of the defendants. On appeal the supreme court of the territory came to the same conclusion,-that the complaint did not state a sufficient cause of action; that no grounds for relief in equity appeared upon it; and that the defendants' demurrer should be sustained. Judgment was accordingly entered that the complaint be dismissed. To review this judgment the case is brought to this court.

MATTHEWS and GRAY, JJ., dissenting.

Henry Beard and Cornelius Hanford, for appellants.

[125 U.S. 190, 203] Walter H. Smith, for appellees.

Mr. Justice FIELD, after stating the facts as above, delivered the opinion of the court.

As seen by the statement of the case, two questions are presented for our consideration: First, was the act of the legislative assembly of the territory of Oregon of the 22d of December, 1852, declaring the bonds of matrimony between David S. Maynard and his wife dissolved, valid and effectual to divorce the parties? and, second, if valid and effectual for that purpose, did such divorce defeat any rights of the wife to a portion of the donation claim?

The act of congress creating the territory of Oregon and establishing a government for it, passed on the 14th of August, 1848, vested the legislative power and authority of the territory in an assembly consisting of two boards, a council and a house of representatives. 9 St. c. 177, 4. It declared that the legislative power of the territory should 'extend to all rightful subjects of legislation not inconsistent with the constitution and laws of the United States,' but that no law should be passed interfering with the primary disposal of the soil; that no tax should be imposed upon the property of the United States; that the property of non-residents should not be taxed higher than the property of residents; and that all the laws passed by the assembly should be submitted to congress, and, if disapproved, should be null and of no effect. It also contained various provisions against the creation of institutions for banking purposes, or with authority to put into circulation notes or bills, and against pledging the faith of the people of the territory to any loan. These exceptions from the grant of legislative power have no bearing upon the [125 U.S. 190, 204] questions presented. The grant is made in terms similar to those used in the act of 1836, under which the territory of Wisconsin was organized. It is stated in Clinton v. Englebrecht, 13 Wall. 444, that that act seemed to have received full consideration; and from it all subsequent acts for the organization of territories have been copied, with few and inconsiderable variations. There were in the Kansas and Nebraska acts, as there mentioned, provisions relating to slavery, and, in some other acts, provisions growing out of local circumstances. With these, and perhaps other exceptions not material to the questions before us, the grant of legislative power in all the acts organizing territories, since that of Wisconsin, was expressed in similar language. The power was extended 'to all rightful subjects of legislation,' to which was added in some of the acts, as in the act organizing the territory of Oregon, 'not inconsistent with the constitution and laws of the United States,' a condition necessarily existing in the absence of express declaration to that effect. What were 'rightful subjects of legislation,' when these acts organizing the territories were passed, is not to be settled by reference to the distinctions usually made between legislative acts and such as are judicial or administrative in their character, but by an examination of the subjects upon which legislatures had been in the practice of acting with the consent and approval of the people they represented. A long acquiescence in repeated acts of legislation on particular matters is evidence that those matters have been e nerally considered by the people as properly within legislative control. Such acts are not to be set aside or treated as invalid, because, upon a careful consideration of their character, doubts may arise as to the competency of the legislature to pass them. Rights acquired, or obligations incurred under such legislation, are not to be impaired because of subsequent differences of opinion as to the department of government to which the acts are properly assignable. With special force does this observation apply, when the validity of acts dissolving the bonds of matrimony is assailed; the legitimacy of many children, the peace of many families, and the settlement of many estates depend- [125 U.S. 190, 205] ing upon its being sustained. It will be found from the history of legislation that, while a general separation has been observed between the different departments, so that no clear encroachment by one upon the province of the other has been sustained, the legislative department, when not restrained by constitutional provisions and a regard for certain fundamental rights of the citizen which are recognized in this country as the basis of all government, has acted upon everything within the range of civil government. Loan Ass'n v. Topeka, 20 Wall. 663. Every subject of interest to the community has come under its direction. It has not merely prescribed rules for future conduct, but has legalized past acts, corrected defects in proceedings, and determined the status, conditions, and relations of parties in the future.

Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature. That body prescribes the age at which parties may contract to marry, the procedure or form essential to constitute marriage, the duties and obligations it creates, its effects upon the property rights of both, present and prospective, and the acts which may constitute grounds for its dissolution.

It is conceded that to determine the propriety of dissolving the marriage relation may involve investigations of a judicial nature, which can properly be conducted by the judicial tribunals. Yet, such investigations are no more than those usually made when a change of the law is designed. They do not render the enactment, which follows the information obtained, void as a judicial act because it may recite the cause of its passage. Many causes may arise, physical, moral, and intellectual, such as the contracting by one of the parties of an incurable disease like leprosy, or confirmed insanity, or hopeless idiocy, or a conviction of a felony, which would render the continuance of the marriage relation intolerable to the other party, and productive of no possible benefit to society. When the object of the relation has been thus defeated, and no jurisdiction is vested in the judicial tribunals to grant a divorce, [125 U.S. 190, 206] it is not perceived that any principle should prevent the legislature itself from interfering, and putting an end to the relation in the interest of the parties as well as of society. If the act declaring the divorce should attempt to interfere with

the rights of property vested in either party, a different question would be presented.

When this country was settled, the power to grant a divorce from the bonds of matrimony was exercised by the parliament of England. The ecclesiastical courts of that country were limited to the granting of divorces from bed and board. Naturally, the legislative assemblies of the colonies followed the example of parliament and treated the subject as one within their province. And, until a recent period, legislative divorces have been granted, with few exceptions, in all the states. Says Bishop, in his Treatise on Marriage and Divorce: 'The fact that at the time of the settlement of this country legislative divorces were common, competent, and valid in England, whence our jurisprudence was derived, makes them conclusively so here, except where an invalidity is directly or indirectly created by a written constitution binding the legislative power.' Section 664. Says Cooley, in his Treatise on Constitutional Limitations: 'The granting of divorces from the bonds of matrimony was not confided to the courts in England, and, from the earliest days, the colonial and state legislatures in this country have assumed to possess the same power over the subject which was possessed by the parliament, and from time to time they have passed special laws declaring a dissolution of the bonds of matrimony in special cases.' Page 110. Says Kent, in his Commentaries: 'During the period of our colonial government, for more than a hundered years preceding the revolution, no divorce took place in the colony of New York, and for many years after New York became an independent state there was not any lawful mode of dissolving a marriage in the life-time of the parties but by a special act of the legislature.' Volume 2, p. 97. The same fact is stated in numerous decisions of the highest courts of the states. Thus, in Cronise v. Cronise, 54 Pa. St. 260, the supreme court of Pennsylvania said: 'Special divorce laws [125 U.S. 190, 207] are legislative acts. This power has been exercised from the earliest period by the legislature of the province, and by that of the state, under the constitutions of 1776 and 1790. The continual exercise of the power, after the adoption of the constitution of 1790, cannot be accounted for except on the ground that all men, learned and unlearned, believed it to be a legitimate exercise of legislative power. This belief is further strengthened by the fact that no judicial decision has been made against it. Communis error facit jus would be sufficient to support it, but it stands upon higher ground of contemporaneous and continued construction of the people of their own instrument.' In Crane v. Meginnis, 1 Gill & J. 474, the supreme court of Maryland said: 'Divorces in this state from the earliest times have emanated from the general assembly, and can now be viewed in no other light than as regular exertions of the legislative power.' In Starr v. Pease, 8 Conn. 541, decided in 1831, the question arose before the supreme court of Connecticut as to the validity of a legislative divorce under the constitution of 1818, which provided for an entire separation of the legislative and judicial departments. The court, after stating that there had been a law in force in that state on the subject of divorces, passed 130 years before, which provided for divorces on four grounds, said, speaking by Mr. Justice DAGGETT: 'The law has remained in substance the same as it was when enacted in 1667. During all this period the legislature has interfered like the parliament of Great Britain, and passed special acts of divorce a vinculo matrimonii. And at almost every session since the constitution of the United States went into operation, now 42 years, and for the 13 years of the existence of the constitution of Connecticut, such acts have been, in multiplied cases, passed and sanctioned by the constituted authorities of our state. We are not at liberty to inquire into the wisdom of our existing law on this subject, nor into the expediency of such frequent interference by the legislature. We can only inquire into the constitutionality of the act under consideration. The power is not prohibited either by the con- [125 U.S. 190, 208] stitution of the United States or by that of the state. In view of the appalling consequences of declaring the general law of the state or the repeated acts of our legislature unconstitutional and void,-consequences easily conceived but not easily expressed, such as bastradizing the issue and subjecting the parties to punishment for adultery,-the court chould come to the result only on a solemn conviction that their oaths of office and these constitutions imperiously demand it. Feeling myself no such conviction, I cannot pronounce the act void.' It is to be b served that the divorce in this case was granted on the petition of the wife, who alleged certain criminal intimacies of her husband with others, and the act of the legislature recited that her allegation, after hearing her and her husband, with their witnesses and counsel, was found to be true. The inquiry appears to have been conducted with the formality of a judicial proceeding, and might undoubtedly have been properly referred to the judicial tribunals; yet the supreme court of the state did not regard the divorce as beyond the competency of the legislature. The same doctrine is declared in numerous other cases, and positions similar to those taken against the validity of the act of the legislative assembly of the territory, that it was beyond the competency of a legislature to dissolve the bonds of matrimony, have been held untenable. These decisions justify the conclusion that the division of government into three departments, and the implied inhibition through that cause upon the legislative department to exercise judicial functions, was neither intended nor understood to exclude legislative control over the marriage relation. In most of the states the same legislative practice on the subject has prevailed since the adoption of their constitutions as before, which, as Mr. Bishop observes, may be regarded as a contemporaneous construction that the power thus exercised for many years was rightly exercised. The adoption of late years, in many constitutions, of provisions prohibiting legislative divorces would also indicate a general conviction that, without this prohibition, such divorces might be granted, notwithstanding the separation of the powers of government into departments, by which judicial [125 U.S. 190, 209] functions are excluded from the legislative department. There are, it is true, decisions of state courts of high character, like the supreme court of Massachusetts and of Missouri, holding differently; some of which were controlled by the peculiar language of

their state constitutions. Sparhawk v. Sparhawk, 116 Mass. 315; State v. Fry, 4 Mo. 120, 138. The weight of authority, however, is decidedly in favor of the position that, in the absence of direct prohibition, the power over divorces remains with the legislature. We are therefore justified in holding-more, we are compelled to hold, that the granting of divorces was a rightful subject of legislation according to the prevailing judicial opinion of the country, and the understanding of the profession at the time the organic act of Oregon was passed by congress, when either of the parties divorced was at the time a resident within the territorial jurisdiction of the legislature. If within the competency of the legislative assembly of the territory, we cannot inquire into its motives in passing the act granting the divorce; its will was a sufficient reason for its action. One of the parties, the husband, was a resident within the territory, and, as he acted soon afterwards upon the dissolution and married again, we may conclude that the act was passed upon his petition. If the assembly possessed the power to grant a divorce in any case, its jurisdiction to legislate upon his status, he being a resident of the territory is undoubted, unless the marriage was a contract within the prohibition of the federal constitution against its impairment by legislation, or within the terms of the ordinance of 1787, the privileges of which were secured to the inhabitants of Oregon by their organic act,-questions which we will presently consider.

The facts alleged in the bill of complaint, that no cause existed for the divorce, and that it was obtained without the knowledge of the wife, cannot affect the validity of the act. Knowledge or ignorance of parties of intended legislation does not affect its validity, if within the competency of the legislature. The facts mentioned as to the neglect of the husband to send to his wife, whom he left in Ohio, any means for her support or that of her children, in disregard of hisp rom- [125 U.S. 190, 210] ise, shows conduct meriting the strongest reprobation, and, if the facts stated had been brought to the attention of congress, that body might and probably would have annulled the act. Be that as it may, the loose morals and shameless conduct of the husband can have no bearing upon the question of the existence or absence of power in the assembly to pass the act. The organic act extends the legislative power of the territory to all rightful subjects of legislation 'not inconsistent with the constitution and laws of the United States.' The only inconsistency suggested is that it impairs the obligation of the contract of marriage. Assuming that the prohibition of the federal constitution against the impairment of contracts by state legislation applies equally, as would seem to be the opinion of the supreme court of the territory, to legislation by territorial legislatures, we are clear that marriage is not a contract within the meaning of the prohibition. As was said by Chief Justice MARSHALL in the Dartmouth College Case, not by way of judgment, but in answer to objections urged to positions taken: 'The provision of the constitution never has been understood to embrace other contracts than those which respect 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.' And in Butler v. Pennsylvania, 10 How. 402, where the question arose whether a reduction of the per diem compensation to certain canal commissioners below that originally provided when they took office, was an impairment of a contract with them within the constitutional prohibition; the court, holding that it was not such an impairment, said: 'The contracts designed to be protected by the tenth section of the first article of that instrument are contracts by which perfect rights, certain, definite, fixed private rights of property, are vested.' It is also to be observed that, while marriage is often termed by text writers and in decisions of courts as a civil contract, generally to indicate that it must be founded upon the agreement of the parties, and does not require any religious ceremony for its solemnization, it is something more [125 U.S. 190, 211] than a mere contract. The consent of the parties is of course essential to its existence, but when the contract to marry is executed by the marriage, a relation between the parties is created which they cannot change. Other contracts may be modified, restricted, or enlarged, or entirely released upon the consent of the parties. Not so with marriage. The relation once formed, the law steps in and holds the parties to various obligations and liabilities. It is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress. This view is well expressed by the supreme court of Maine in Adams v. Palmer, 51 Me. 481, 483. Said that court, speaking by Chief Justice APPLETON: 'When the contracting parties have entered into the married state, they have not so much entered into a contract as into a new relation, the rights, duties, and obligations of which rest not upon their agreement, but upon the general law of the state, statutory or common, which defines and prescribes those rights, duties, and obligations. They are of law, not of contract. It was a contract that the relation should be established, but, being established, the power of the parties as to its extent or duration is at an end. Their rights under it are determined by the will of the sovereign, as evidenced by law. They can neither be modified nor changed by any agreement of parties. It is a relation for life, and the parties cannot terminate it at any shorter period by virtue of any contract they may make. The reciprocal rights arising from this relation, so loug as it continues, r e such as the law determines from time to time, and none other.' And again: 'It is not then a contract within the meaning of the clause of the consitution which prohibits the impairing the obligation of contracts. It is rather a social relation like that of parent and child, the obligations of which arise not from the consent of concurring minds, but are the creation of the law itself, a relation the most important, as affecting the happiness of individuals, the first step from barbarism to incipient civilization, the purest tie of social life, and the true [125 U.S. 190, 212] basis of human progress.' And the chief justice cites in support of this view of the case of Maguire v. Maguire, 7 Dana, 181, 183, and Ditson v. Ditson, 4 R. I. 87, 101. In the first of these the supreme court of Kentucky said that marriage was more than a contract; that it was the most elementary and useful of all

the social relations; was regulated and controlled by the sovereign power of the state, and could not, like mere contracts, be dissolved by the mutual consent of the contracting parties, but might be abrogated by the sovereign will whenever the public good, or justice to both parties, or either of the parties, would thereby be subserved; that being more than a contract, and depending especially upon the sovereign will, it was not embraced by the constitutional inhibition of legislative acts impairing the obligation of contracts. In the second case the supreme court of Rhode Island said that 'marriage, in the sense in which it is dealt with by a decree of divorce, is not a contract, but one of the domestic relations. In strictness, though formed by contract, it signifies the relation of husband and wife, deriving both its rights and duties from a source higher than any contract of which the parties are capable, and, as to these, uncontrollable by any contract which they can make. When formed, this relation is no more a contract than 'fatherhood' or 'sonship' is a contract.'

In Wade v. Kalbfleisch, 58 N. Y. 282, the question came before the court of appeals of New York whether an action for breach of promise of marriage was an action upon a contract within the meaning of certain provisions of the Revised Statutes of that state, and in disposing of the question the court said: 'The general statute, 'that marriage, so far as its validity in law is concerned, shall continue in this state a civil contract, to which the consent of parties, capable in law of contracting, shall be essential,' is not decisive of the question. 2 Rev. St. 138. This statute declares it a civil contract, as distinguished from a religious sacrament, and makes the element of consent necessary to its legal validity, but its nature, attributes, and distinguishing features it does not interfere with or attempt to define. It is declared a civil contract for certain [125 U.S. 190, 213] purposes, but it is not thereby made synonymous with the word 'contract' employed in the common law or statutes. In this state, and at common law, it may be entered into by persons respectively of fourteen and twelve. It cannot be dissolved by the parties when consummated, nor released with or without consideration. The relation is always regulated by government. It is more than a contract. It requires certain acts of the parties to constitute marriage independent of and beyond the contract. It partakes more of the character of an institution regulated and controlled by public authority, upon principles of public policy, for the benefit of the community.'

In Noel v. Ewing, 9 Ind. 37, the question was before the supreme court of Indiana as to the competency of the legislature of the state to change the relative rights of husband and wife after marriage, which led to a consideration of the nature of marriage; and the court said: 'Some confusion has arisen from confounding the contract to marry with the marriage relation itself. And still more is engendered by regarding husband and wife as strictly parties to a subsisting contrat . At common law, marriage as a status had few elements of contract about it. For instance, no other contract merged the legal existence of the parties into one. Other distinctive elements will readily suggest themselves, which rob it of most of its characteristics as a contract, and leave it simply as a status or institution. As such, it is not so much the result of private agreement as of public ordination. In every enlightened government it is pre-eminently the basis of civil institutions, and thus an object of the deepest public concern. In this light, marriage is more than a contract. It is not a mere matter of pecuniary consideration. It is a great public institution, giving character to our whole civil polity.' In accordance with these views was the judgment of Mr. Justice STORY. In a note to the chapter on marriage in his work on the Conflict of Laws, after stating that he had treated marriage as a contract in the common sense of the word, because this was the light in which it was ordinarily viewed by jurists, domestic as well as foreign, he adds: 'But it appears to me to be something more than a mere contract. It is rather to be [125 U.S. 190, 214] leemed an institution of society founded upon consent and contract of the parties, and in this view it has some peculiarities in its nature, character, operation, and extent of obligation different from what belong to ordinary contracts.' Section 108n..

The fourteenth section of the organic act of Oregon provides that the inhabitants of the territory shall be entitled to all the rights, privileges, and advantages granted and secured to the people of the territory of the United States north-west of the river Ohio by the articles of compact contained in the ordinance of July 13, 1787, for the government of the territory. The last clause of article 2 of that ordinance declares 'that no law ought ever to be made or have force in said territory that shall, in any manner whatever, interfere with or affect private contracts or engagements, bona fide and without fraud, previously formed.' This clause, though thus enacted and made applicable to the inhabitants of Oregon, cannot be construed to operate as any greater restraint upon legislative interference with contracts than the provision of the federal constitution. It was intended, like that provision, to forbid the passage of laws which would impair rights of property vested under private contracts or engagements, and can have no application to the marriage relation.

But it is contended that Lydia A. Maynard, the first wife of David A. Maynard, was entitled, notwithstanding the divorce, to the east half of the donation claim. The settlement, it is true, was made by her husband as a married man in order to secure the 640 acres in such case granted under the donation act. But that act conferred the title of the land only upon the settler who at the time was a resident of the territory, or should be a resident of the territory before December 1, 1850, and who should reside upon and cultivate the land for four consecutive years. The words of the act, that 'there shall be, and hereby is, granted to every white settler

or occupant,' is qualified by the condition of four years' residence on the land and its cultivation by him. The settler does not become a grantee until such residence and cultivation have been had, by the very terms of the act. Until then he has only a promise of a title; what is sometimes vaguely called [125 U.S. 190, 215] an inchoate interest. In some of the cases decided at the circuit, the fourth section of the act was treated as constituting a grant in proesenti, subject to the conditions of continued residence and cultivation, that is, a grant of a defeasible estate. Adams v. Burke, 3 Sawy. 418. But this view was not accepted by this court. In Hall v. Russell, 101 U.S. 503 , the nature of the grant was elaborately considered, and it was held that the title did not vest in the settler until the conditons were fully performed. After citing the language of a prv ious decision, that 'it is always to be borne in mind, in construing a congressional grant, that the act by which it is made is a law as well as a conveyance, and that such effect must be given to it as will carry out the intent of congress,' the court said: 'There cannot be a grant unless there is a grantee, and consequently there cannot be a present grant unless there is a present grantee. If, then, the law making the grant indicates a future grantee, and not a present one, the grant will take effect in the future, and not presently. In all cases in which we have given these words the effect of an immediate and present transfer it will be found that the law has designated a grantee qualified to take according to the terms of the law, and actually in existence at the time.' ... Coming, then, to the present case, we find that the grantee designated was any qualified settler or occupant of the public lands. ... who shall have resided upon and cultivated the same for four consecutive years, and shall otherwise conform to the provisions of the act. The grant was not to a settler only, but to a settler who had completed the four years of residence, etc., and had otherwise conformed to the act. Whenever a settler qualified himself to become a grantee he took the grant, and his right to a transfer of the legal title from the United States became vested. But until he was qualified to take, there was no actual grant of the soil. The act of congress made the transfer only when the settler brought himself within the description of those designated as grantees. A present right to occupy and maintain possession, so as to acquire a complete title to the soil, was granted to every white person in the territory, having the other requisite qualifica- [125 U.S. 190, 216] tions, but beyond this nothing passed until all was done that was necessary to entitle the occupant to a grant of the land.' In Vance v. Burbank, 101 U.S. 521 , the doctrine of the previous case was reaffirmed, and the court added: 'The statutory grant was to the settler, but, if he was married, the donation, when perfected, inured to the benefit of himself and his wife in equal parts. The wife could not be a settler. She got nothing except through her husband.' When, therefore, the act was passed divorcing the husband and wife, he had no vested interest in the land, and she could have no interest greater than his. Nothing had then been acquired by his residence and cultivation, which gave him anything more than a mere possessory right to remain on the land so as to enable him to comply with the conditions, upon which the title was to pass to him. After the divorce she had no such relation to him as to confer upon her any interest in the title subsequently acquired by him. A divorce ends all rights not previously vested. Interests which might vest in time, upon a continuance of the marriage relation, were gone. A wife divorced has no right of dower in his property; a husband divorced has no right by the courtesy in her lands, unless the statute authorizing the divorce specially confers such right.

It follows that the wife was not entitled to the east half of the donation claim. To entitle her to that half she must have continued his wife during his residence and cultivation of the land. The judgment of the supreme court of the territory must therefore affirmed; and it is so ordered.

MATTHEWS and GRAY, J.J., dissented.

BRADLEY, J., was not present at the argument and took no part in the decision.

Footnotes

[Footnote 1] Affirming 5 Pac. Rep. 717.

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