SUPREME COURT DECISION.

Jurisdiction of Probate Courts in Cases of Divorce.

Dissenting Opinion of Associate Justice P. H. Emerson, delivered May 21, 1874.

In the Supreme Court, yesterday, after Associate Justice Boreman read his opinion declaring th at Probate Courts in this Territory had no jurisdiction in divorce matters, Chief Justice McKean concurring, Associate Justice Emerson delivered the following dissenting opinion:

Alice Cast, complainant		Supreme Court
vs.		of
Erick M. Cast defendant.		Utah Territory.

I am compelled to dissent from the opinion just delivered. I cheerfully bear testimony to the patient investigation of my brethren. I recognize their greater learning, their maturer wisdom, their riper judgment, and I. bow before their superior authority. Yet I cannot surrender the convic tions of my own mind, convictions carefully and deliberately formed, and sincerely and conscientiously entertained. I propose in as few words as I can to give the reason for my dissent:

The bill in this cause was filed by the complainant in the Third District Court, to obtain a divorce from the defendant, on the ground of "failure to support, cruel treatment and misconduct on the part of the defendant, rendering it impossible for the parties to live in peace and union together, and that their welfare required a separation." These are all statutory grounds for a divorce. Upon the part of the defendant it was insisted in the court below that the District Court had no jurisdiction of this class of cases. That court held that it had. Th case was heard upon pleadings and proofs, and a decree of divorce from the bonds of matrimony was granted as prayed for. The defendant appeals to this court.

The question involved in this case is one of great interest. It has been extensively and ably discussed by the bar, and has awakened much interest and great anxiety in the minds of all classes of citizens of the Territory. It has been before the Supreme Court of the Territory at different times, and it is claimed that the decisions there are conflicting. The same question has also been raised before some of the present members of this court, when sitting as Judges of the District Courts, and the decisions there have not been uniform.

The terrible effects that would follow if one view taken of this case should be established as law, adds to the interest and public anxiety connected with the question in this case.

For twenty-two years one class of courts in this Territory have taken, under the Territorial law, jurisdiction in this class of cases, and marital and vast property rights have grown up under and out of these courts. And now the jurisdiction over the subject matter is not only questioned but denied.

For these reasons I was desirous that the decision in this case should be postponed from the time it was submitted at the last October term until the present adjourned term, that the conclusions arrived at might be the result of thorough investigation and careful study.

Section 1 of an act of the Territorial Legislature, entitled "An act in relation to Bills of Divorce," approved March 6th, 1852, 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." The balance of the act prescribes for what causes a divorce may be sought, and gives a mere outline or skeleton of the mode of procedure in such cases, with some minor details as to disposition of property, custody of minor children, &c., which are in no way important in this case.

Nowhere in the chapter is there any other than the Probate Court referred to, to take the jurisdiction of this class of cases.

The right of the District Courts of Utah to grant divorces from the bonds of matrimony for statutory causes is the real point in issue.

The question arises under the act of the Territorial Legislature above referred to, and supposed to involve some important considerations regarding constitutional law.

It will be seen that the Territorial Act specifies the causes for which divorces may be granted, and in express terms confers the jurisdiction to grant them upon the Probate Courts. It does not purport to give jurisdiction to the District Courts, nor is it claimed that there is any other legislation, either National or Territorial, that in terms undertakes to do so.

On the Territorial law therefore as it stands, if it is valid, the Probate Court may grant divorces, but no other court can, unless the power is to be derived by implication from the general terms in which the authority of other courts is conferred.

The argument on the part of the appellee embraces, and may be summed up in the following propositions:

1st.—That authority to grant divorces is inconsistent with the idea of a probate jurisdiction, and therefore could not be conferred upon a court which the original law provided for as a probate court.

2nd.—That though for this reason the Territorial act in question is void so far as it assumes to empower the Probate Court to grant divorces, yet that this void part does not infect the rest, and the act is entirely valid so far as it specifies the causes for which divorces may be granted.

3rd.—That there being then a right to a divorce, when one or more of the specified causes exist, and no court expressly and in terms empowered to grant it, the District Court of necessity, and under its general grant of powers may do so.

These three propositions it becomes necessary to examine successively, and if any one of them shall prove to be unsound, this proceeding must fail. That every one of them is baseless is my undoubting conviction.

The proposition that the idea of a Probate Court necessarily excludes authority in matters of divorce, sounds strangely enough when it is borne in mind, that our institutions come to us from a country where jurisdiction in matrimonial causes has always been exercised by the same judges to whom the law has confided authority in probate matters. It is true the Ecclesiastical Courts, which until recently have been the Probate Courts in England, were not empowered to grant divorces from the bonds of matrimony, but neither were any other courts; and so far as divorce was a matter of judicial cognizance at all, it was left exclusively to the ecclesiastical tribunals. Bishop, Mar. and Div. ch. 3. Indeed, Blackstone, speaking of the jurisdiction of these courts, which in many other particulars had been frequently questioned, adds that "matrimonial causes or injuries respecting the rights of marriage, are another and a much more undisturbed branch of the ecclesiastical jurisdiction;" and that causes matrimonial are now so peculiarly ecclesiastical that the temporal courts will never interfere in controversies of this kind, unless in some particular cases, "as when a marriage is called in question after the death of parties, and when it would tend to bastardize and disinherit the issue;" 3 Blackstone com. 92, 93.

And so thoroughly was the propriety of a union of probate and divorce jurisdiction fixed in the English mind that when recently it was deemed best to confer authority to grant divorce from the bonds of matrimony upon the courts, the Probate Court was the court selected to exercise that jurisdiction. (3 Cooley's Blackstone, 95 note. Brown & Hadley's Commentaries, vol. 3, ch. xiv.) And though the Lord Chancellor and the Judges of the Superior Courts of common law might sit in that court with the Judge of Probate, the latter wa the judge ordinary, and usually sat alone.

The English practice is therefore distinctly against the proposition taken, and is nearer in harmony with the Territorial statute than with the opposite view.

The American practice affords little more support, if indeed it does any, to the appellee's first proposition. There is no such thing as uniformity in the American States as to the jurisdiction that may be joined with that of the probate of wills, or, on the other hand, as to the courts that shall take cognizance of applications for divorce. In some States the constitution or the laws have been careful to confine the Probate Courts to matters concerning the administration of estates; but in others the probate jurisdiction is united with that of common law and chancery causes.

An example of the latter class may be seen in Iowa, where authority over probate matters is vested in the Circuit Courts, which are also with the District Courts empowered to try causes at law and in equity, and to grant divorces. Code 1872, pp. 399, 410.

In perhaps one half of the States of the Union the courts having probate powers have also a somewhat multifarious jurisdiction, embracing in some cases criminal jurisdiction, of which Oregon is an example. (Const. Art. 7, 12.) It would be idle to undertake to deduce any general rule from the constitutions and laws of the several States, as to the classification of the probate and divorce jurisdiction, or as to the delegation of either to any particular discription of court; but this may be said in general, that divorce is sometimes a proceeding in the common law courts, sometimes in the equity courts, and may sometimes be had in the courts exercising probate powers; so that the question of the the delegation of divorce jurisdiction, where not determined by the State constitution, seems to have been always regarded as one addressed to the legislative decision, and to be determined not according to any fixed rules, but according to the legislative view of what was most expedient.

If these views be correct, the whole argument for the appellee falls to the ground. The Organic act did not specifically provide for cases of divorce, and it became necessary, therefore, for the Territorial Legislature to prescribe the jurisdiction when it prescribed the causes. A case of divorce is not intrinsically a law case, for it was unknown to the common law. It is not intrinsically a chancery case for it was unknown to equity jurisprudence. The New York cases of Wightman *vs.* Wightman, 4 John's, Ch., 343, and Perry *vs.* Perry, 2 Paige, 505, relied upon by the appellee, are not authority further than this: that a court of equity, when a supposed marriage is not such in fact, but is void from inception, may declare it so, as they may declare any other contract void! But the true doctrine undoubtedly is that stated by Mr. Bishop, that no judicial tribunal in this country can take jurisdiction of divorce cases without the authority of statute. Bishop, Mar. and Div., 4th ed., sec. 71. It is a proceeding *sui generis*, and its being so regarded accounts for the diversity in American legislation.

It is not denied that the Territorial Legislature possesses a general authority to legislate on domestic concerns. Indeed that right has been most fully recognized by the Supreme Court of the United States in the case of other Territories, as well as of this, and the question is no longer open to argument. Miner's Bank *vs.* Iowa, 12 How., 1; Vincennes' University *vs.* Indiana, 14 How., 268; Clinton *vs.* Englebrecht, 13 Wall, 434. And as no other defect in the Territorial act is pointed out, than the excess of authority in granting divorce powers to the Probate Court, and it is not claimed that any specific provision of the Organic act is violated, it would seem as if the decision of the case might be rested here.

All presumptions favor the validity of legislation, and those who assail it must be able to show how, and why, and wherein it violates the fundamental law. The remedy for unwise legislation does not rest with the courts. Commonwealth *vs.* McClosky, 2 Rawle, 374; Sill *vs.* Village of Corning, 15 N. Y., 303; Cooley's Const. Law, 168, and cases cited. This court has nothing to do with legislative policy. "We are not made judges of the motives of the Legislature; and the court will not usurp the inquisitorial office of inquiring into the *bona fides* of that body in discharging its duties." People *vs.* Draper, 15 N. Y., 555; Sunbury and Erie R. R. Co. *vs.* Cooper, 33 Penn. Sta., 278; Baltimore *vs.* State, 15 Md., 376.

But if we were to concede that the Territorial act was invalid so far as it designated the divorce courts, I cannot conceive how the other parts of the act could be of any force whatever. That act was passed, as is very manifest from its provisions, for the specific purpose of empowering a particular class of courts to grant divorces. It was homogenous, and there is not a provision in it from which we may gather an intent that in any contingency any other court should receive this power. There is no room to suppose, or to suggest even, that the legislative intent was that if the Probate Court would not act some other court not named should do so. No one imagines or pretends that such were the facts. On the contrary it will scarcely be denied that when the District Court takes to itself the divorce jurisdiction, it does so in distinct disregard of the legislative will; it enforces the other which the Legislature would never have passed by itself, and in a manner to defeat the legislative intent.

Now it is admitted that a statute may sometimes be held void in part and valid as to the remainder, but this can never be done without the most manifest usurpation of legislative authority, except where the court on an inspection of the whole statute can satisfy itself that it is enforcing a legislative intent in so doing.

It can never so hold without the most manifest impropriety when it is plain that to do so, would defeat the legislative intent.

No court is at liberty to split legislation into fragments, and arbitrarily, from its own notions of what the law ouhgt to be, give effect to one fragment to the rejection of the rest. The furtherest a court can go is this; if when a void part of a statute is sticken out, that which remains is complete in itself, and capable of being executed in accordance with the legislative intent, wholly independent of that which was rejected, then it may be sustained.—Cooley's Const. Law 178; Warren *vs*, Charlestown, 2 Gray, 99; State *vs.* Berry Co. 5 Ohio N. S. 507; State *vs.* Douserman 28 Wis. 547; Compau *vs.* Detroit, 14 Mich. 272.

Applying this rule to the present case the statute fails entirely if the probate jurisdiction fails. No one can pretend that without the portion which confers that, the statute is either complete in itself or capable of being executed. No one attempts to execute it except by interpolating provisions, or by applying the doctrine that of necessity the District Courts must take jurisdiction, a most dangerous doctrine, when the judges themselves are to determine the necessity, and measure their own power; and a most manifest unsound doctrine, for it is among the very fundamental principles of free government, that the jurisdiction of courts shall be prescribed for them, and the judgments of the very highest courts in the land may be disregarded everywhere, when it can be shown that the only authority the court had for rendering them was its own assumption of power. For while the authority of a court of a general jurisdiction may be presumed, it may always be disproved; it must always emanate from the sovereignty, and the expression of the will of the soverignty must be found in the fundamental law, or in the statutes.—Bouv. Law Dict. "Jurisdiction."

Courts take their powers by grant, and not by any process of ratiocination as to what those powers should be. In other words, courts even as to their own jurisdiction do not make the law, but they administer. The judiciary must never lend themselves to the demands of the hour, or of any class or party, to make the written law echo, not the purposes or the intent of the framers, but such intents and purposes as they may think the framers ought to have had; its power never should be exercised to give effect to the will of the judge, but always to the will of the legislature or the will of the law; 1 Kent. com. 277. And to the honor of the judiciary be it said that no matter what the temptation or pressure of circumstances may have been, the higher courts throughout the land have universally and with great uninimity firmly held to this doctrine.

It has been well said by an able jurist and a learned author, Judge Redfield, "that the country has more to dread from a timid or a time-serving judiciary, than from all other sources, * * * * and that the day is not very remote when good men of all sections, and all parties, will unite in ascribing our salvation more to a pure, able, incorrupt and fearless judiciary, than to all other causes and forces combined, and if the time ever comes for the fall of this free republic, its enemies will enter the citadel through the broken walls of the great bulwark of liberty, caused by the want of principle, or the dread of self sacrifice in her judges."

Courts refuse to interfere with unwise and even oppressive legislation, if within constitutional bounds, claiming that they can arrest the legislative will only when it conflicts with a fundamental law; that the remedy in such cases is by an appeal to the justice and patriotism of the representatives of the people, and if that be wanting or fails, then to correct the evil in their sovereign capacity. Bennett *vs.* Boggs, Baldwin, 74; Satterly *vs.* Matthewson, 2, Peters, 4 12.

But suppose we make the further concession, that the Territorial act is void so far as it gives jurisdiction to the Probate Courts, but valid so far as it fixes the causes for divorce; it is still denied that the District Court can take jurisdiction. The idea that they are to have the authority because a proceeding for divorce assumes the same form as a suit in equity can have no foundation when it is seen that a divorce suit is a special proceeding and not an equitable cause at all. We might as well call a criminal suit a matter of equity jurisdiction, if the legislature should see fit to provide that the facts might be investigated on a bill. instead of an indictment or information, as unquestionably it might do in any case where the original law did not make other provisions.

These matters of form are left with the legislative discretion, but the substance of things is not to be determined by the forms. If we hold this law valid in so far as it gives a right to divorce for certain causes. the result must be this: not that the District Courts of necessity take the jurisdiction, but that divorce for the causes prescribed must be granted by that authority which in English and American law has always been recognized as possessing the power where it had not expressly and in terms been given to any particular court.

Now it has been seen that in England, so far as any court had this jurisdiction, it was possessed by the ecclesiastical courts. But as to divorce from the bonds of matrimony the English doctrine was that the authority was not judicial but legislative, and Parliament alone could exercise it; 1 Blackstone Com. 441. In this country it has been customary to confer the authority upon the courts, but in the colonial period it was exercised by the legislature and the overwhelming weight of American authority is that the right of divorce pertains to the legislature when not expressly delegated to the courts. Bishop Mar. Div. ch. 34, and cases cited. Cooley's Const. Law. 110.

This is so well understood and has been so often judicially declared, that whenever it has been deemed necessary to establish a different rule, express constitutional provisions have been adopted for that purpose, and these either name a court to exercise the authority, or they prohibit the legislature from exercising it, so that it becomes a necessity that some law should be passed conferring the jurisdiction upon the courts. In other words the settled American doctrine is that the granting of a divorce, is not, of necessity, a judicial act, so that it may still be done by the legislature, though all judicial power has already been conferred upon another department. Shaw *vs.* Pease 8 Cowen 541; Crane *vs.* Meginnis 1 Gill and J. 463; Gaines *vs.* Gaines 9 B. Munroe 295; Deshen *vs.* Deshen 1 yerg 110; Wright *vs.* Wright 2 Md. 429; Bishop Mar and Div. 686.

Giving a right to a divorce, therefore, does not imply that it must be granted by the courts. There must be something more than this: there must be the designation of a court, or the presumption would rather be that the Legislature was prescribing for its own government the cases in which it would exercise the legislative power of annulling the bonds of matrimony, just as it might prescribe in advance the cases in which it would or would not change the name of parties, or license the sale of lands, or pass private laws upon any other subject whatever. The doctrine of the appellee, if it proves anything, proves too much, for if it has any soundness, any validity whatever, it proves, not that the District Court may grant divorces, but that the Legislature, having determined what should be sufficient causoes for divorce, has stopped short at that point, and being unwilling to vest the competent courts with power to grant them, has thought proper to leave the jurisdiction where, by the settled rules of English and American law, it is inherent, that is to say in the Legislature.

This must be the rule of principle, and any ruling that any court can take the power of necessity, is one of