

PREFACE

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This year Washington celebrates 100 years of statehood, and we certainly don't want the State's one-hundredth birthday to go by without appropriate salutes. One of the better ways to commemorate our State's Centennial is this symposium issue of the University of Puget Sound Law Review.

Without intentionally trespassing on the fields of history dealt with by the learned authors of the Articles in this issue, I shall endeavor to preface their writings with what bureaucrats call an "overview" of a little history and geography.

To those who tend to think of boundaries and sovereignty as somehow fixed and immutable, I point out that for a long time it was distinctly possible that where we live now would become a part of Her Britannic Majesty's Possessions in North America. Indeed it was not until 1846, a mere 143 years ago, that there was any certainty that there would ever be a State of Washington. California was a part of Mexico (it was ceded to the United States in 1848) and its northern boundary of forty-two degrees North was not in dispute. Similarly, there was agreement that the southern boundary of the Russian possessions was fifty-four degrees forty minutes North. But what of the vast area between those two latitudinal boundaries and between the Pacific Ocean and the Rocky Mountains? The British said it was part of Her Majesty's Possessions in North America. The United States said, "It's ours." Indeed, one of James K. Polk's slogans in the Presidential campaign of 1844 was "Fifty-four forty or fight!" Polk was elected, but cooler heads prevailed; the two countries didn't fight, and the Treaty of 1846 between the United States and Great Britain fixed the International Boundary at forty-nine degrees North, where it is today.

All the land south of that boundary to the California border and west of the Continental Divide of the Rocky Mountains became the United States Territory of Oregon. A few years later, in 1853, Congress carved out of its northern portion

the new Territory of Washington. But when Oregon became a state in 1859, its boundaries were contracted to what they are now, and everything else in the old Oregon Territory became part of the Territory of Washington. Suddenly, then, Washington included not only the land that is now the State of Washington, but also all of what are now Idaho, western Montana, and part of Wyoming. Suppose that you lived at Flathead Lake or near the Grand Tetons and had to transact business at the Territorial capital. What did you do? Well, I suppose you saddled up, took your rifle and set out. To where? To Olympia!

That, of course, was a bit much, and fairly soon Congress fixed it by creating the Territory of Idaho in 1863 and that of Montana in 1864. That was pretty good for Congress because the country was then preoccupied with the Civil War.

So by 1863, Washington Territory had the same boundaries as the State of Washington now has. With that matter "settled," statehood was the next step. California had been admitted almost as soon as it was acquired from Mexico. Oregon became a state in 1859. Even sparsely populated Nevada made it in 1864. What happened to Washington? Its boundaries could be defined, it had a large enough population, it was a fruitful land with ample natural resources, it had good rivers and harbors, and it was strategically located vis-à-vis Great Britain. Yet it remained a territory for thirty-six years—from 1853 to 1889. Why?

In the Fall 1988 issue of Washington State Historical Society's magazine *Columbia* there is a short and scholarly article, "The Long Wait for Statehood," by the noted Idaho historian Merle Wells. Illustrated with maps and mercifully free of footnotes, it takes us through all the tortuous vicissitudes of the factional, regional, and political circumstances present in the area that is now Washington, Idaho, and western Montana. I shall not deal with them in any detail because Wells has done it for us, and in the Winter 1989 issue of *Columbia*, Professor Keith A. Murray's article, "Statehood for Washington," gives us more information on the subject.

Here's the general idea: (1) There were many diverse opinions about where boundaries should be and what new states should be formed. (2) Because the country west of the Cascade mountains was so different, economically and ecologically, from eastern Washington, the Idaho panhandle, and western Montana, it was urged that the two regions should be

separate states. (3) There was tension between southern Idaho and the panhandle. (4) The people in Olympia, Vancouver, Walla Walla, Boise, and Lewiston each wanted their town to be the capital. (5) At one time there were more miners in the Idaho panhandle than there were people in western Washington—that scared the westerners. (6) Shifts in party control of Congress seemed to come at inconvenient times—a Democratic Congress was not keen on admitting a state that would “go Republican,” and vice versa. Wells says that in 1876 the Democrats “learned an important lesson that they did not forget.” In that year they agreed to admit Colorado, and Colorado promptly “went Republican” in the Presidential election. If Colorado’s electoral votes had gone for Samuel J. Tilden, the Republican Rutherford B. Hayes would not have been elected in 1876. Wells also reports that as late as 1888 Congress passed a bill adding the Idaho panhandle to Washington, but that President Harrison refused to sign it. Finally, in 1889 Congress admitted five new states: Washington, Idaho, Montana, and the two Dakotas. The matter was settled, and the new states knew what they were and could organize and proceed with business.

As we celebrate our centennial, it is important to note that Washington’s legal history transcends the temporal boundaries of statehood. Indeed, while it may not be exactly *de rigueur* for the writer of a preface to a legal symposium to discuss specific law, I think it not amiss to invite attention to a Washington Territory case that in its time was much discussed and was frequently cited by courts all across the country, but which now is largely forgotten. The case is *Maynard v. Hill*, 125 U.S. 190 (1888).

The main “actor,” although he had been dead for fifteen years by 1888, was David S. Maynard, a physician and entrepreneur who came west from Ohio in 1850 and settled in Seattle before there was a town there. Indeed, Bill Speidel in his 1978 book, “Doc Maynard,” called him “The man who invented Seattle.” As was not uncommon in “The Days of ’49,” Maynard left his wife Lydia and their two children in Ohio and came west alone, by wagon train from St. Louis, to seek his fortune. On the long journey he befriended a young widow, Catherine, whose husband had died of cholera on the trip.

In April 1852 Maynard, as a married man, filed for a donation land claim of 640 acres in what is now part of downtown

Seattle. Later that year he filed a petition for a divorce from Lydia, asserting that before he left Ohio he had found her "lying with" another man. Lydia was never served with the petition and knew nothing of it for months. The land then was still a part of Oregon Territory, so the petition was addressed to the Territorial Legislature in Salem. On December 22, 1852, the Legislature enacted a statute divorcing Doc from Lydia. Three weeks later Doc and widow Catherine were married.

Filing for a donation land claim simply gave you an "inchoate right of possession." To have your claim ripen into title you had to live on the land and cultivate it for four years. In due course, in 1856, Maynard filed his proofs. The matter went clear up to the Secretary of the Interior. He ruled that Doc's original 1852 claim for 640 acres was proper when made because he was then married to Lydia, but that they were not married during all the four years; so Doc was entitled to only 320 acres, the amount that a single man could get. So he awarded the west 320 acres to Doc and declared the east 320 acres to be "public land." He ruled that Lydia had no interest in it because she was not Doc's wife during the four years and that Catherine had no interest in it either for the same reason and also because she was not Doc's wife at the time of his 1852 filing. Not long afterward two men, Hill and Lewis, got title patents to the east 320 acres.

After Lydia's death, her two children, as her heirs, sued Hill and Lewis asserting that the 320-acre tract was rightfully Lydia's and that Hill and Lewis should be declared to be holding it in trust for the two Maynard children. To make their case the children had to persuade the courts that the legislative divorce was invalid. They lost in the Washington Territorial courts and subsequently lost in the Supreme Court of the United States.

The case was argued in the Supreme Court for two days and decided one month later. Courts had time in those days. We were not yet a litigious society. For example, all the cases decided by the Supreme Court of Washington Territory in thirty-six years are contained in three volumes.

The Maynard children's lawyer was Cornelius H. Hanford. It must have been one of his last appearances as a lawyer, for soon afterward he became the last Chief Justice of Washington Territory and, after statehood, the first and only federal judge in the new District of Washington.

Neither Hanford nor Mr. Justice Stephen J. Field, who wrote the Court's opinion, had any trouble with the Secretary of the Interior's interpretation of the land-grant law. Assuming that Doc's divorce from Lydia was valid, the Secretary was correct in determining that Lydia had no claim to the land. But was the divorce valid? Hanford said "No" on three grounds: (1) Lydia was never served with Doc's petition, or even notified of it, and hence the legislature had denied her due process of law; (2) the territorial legislature had no jurisdiction to grant divorces; and (3) marriage is a contract, and the Organic Act creating Oregon Territory had in it a provision similar to the "contract clause" of the U.S. Constitution. Hence, said Hanford, the statute divorcing Doc from Lydia was a law impairing their contract of marriage and was therefore invalid.

Those questions are not of much concern to us today. For example, we all know that our state constitution prohibits legislative divorces. But in 1888 all three questions were matters of first impression in the Supreme Court, and *Maynard v. Hill* became a "landmark case."

On the due process point, the Court said legislatures do not have to give notice and hold hearings. If a statute deals with a subject within the legislature's powers, the courts will not go behind it and look into the circumstances leading to its passage.

As to the power of the territorial legislature to dissolve a marriage by statute, the Court said the legislature had power to deal with all "rightful subjects of legislation" and that marriage and divorce had always been such a subject, starting right from the power of the English Parliament to enact "bills of divorcement."

The "contract clause" question was potentially the most serious and far-reaching. Congress and the federal courts have no power to grant divorces. If the contract clause extends to marriage, then the states could not divorce people either, and the populace would be in what A.P. Herbert called "holy deadlock." But the Court wouldn't go for Hanford's argument. It said that, while marriage is a contract all right, it is also an institution of public concern, and the contract clause does not apply to it.

So now you know about *Maynard v. Hill*. You may never have occasion to cite it, but perhaps it will add something to

your enjoyment of our history. And it isn't often that you encounter in one case three such historic figures as "Doc" Maynard, Judge C. H. Hanford, and Mr. Justice Stephen Field.