

13721

No. _____

Supreme Court of Illinois

Bergen

vs.

Bergen

that the proofs were submitted to the Court, from which it satisfactorily appeared to the Court that the material facts charged in the bill were true, and that the Defendant had been guilty of adultery as charged in the bill.

I Cannot perceive how this decree can be reversed, unless the Court disregards and overturns its former decisions.

In granting the divorce, the Court committed to the Complainant, Sarah E. Bergen, the custody of the children, as it had a right to do. The Court also appointed Francis Goodspeed receiver, "to take an account of the property, (P. 25 of Record), real and personal, and mixed of the said John Bergen, and all accounts, choses in action for him, the said John Bergen, and apportion the same between the said Complainant and said John Bergen, in the manner following:—First, the said Receiver shall set off to the said Complainant all the household and kitchen furniture, and including the piano forte, provisions of every kind and nature, and all the fire-wood which the said John Bergen had at the time said Complainant filed her Bill, or that he may now have. Second, The said Receiver shall then divide the said property, real, personal and mixed, notes, accounts, choses in action, between the said Complainant, Sarah E. Bergen, and the said Defendant, John Bergen, as equally as the same can be done; which said division, when made, shall vest in the said Sarah E. Bergen, her heirs and assigns, a good and perfect title to the property, which shall be so set off to her; and said division shall, when made, vest in the said John Bergen the remainder of said property so set off to him, after paying the amount herein specified and required to be paid by said Receiver, and the said Receiver shall pay the remainder to said Bergen, his heirs and assigns. Third, By the agreement of the parties, it is ordered, adjudged and decreed, that the said Receiver shall, out of the portion of said property set off to the said Defendant, John Bergen, pay to Jesse O. Norton the sum of \$250; to Josiah McRoberts the sum of \$250.00, for fees, &c., in this suit and for prosecuting in the case for incest; and, also, the sum of \$250.00 to Elisha C. Fellows, and \$250.00 to Henry Snapp, out of said portion set off to said John Bergen, for their (Fellows and Snapp) services, as well in defending this Bill, as in defending the said criminal prosecution, &c." Thus it appears by the Record that said Bergen was present in court by himself and counsel, when the decree was rendered and agreed to the decree, relative to the allowance of fees to the attorneys engaged on both sides of the case, and in pursuance of such agreement, it was inserted in the decree. I frankly admit, that without such agreement, I do not believe the Court would have the power to insert such a provision for attorney's fees in the decree; but this could in no way, even if inserted in the decree, without such agreement affect the decree for divorce, and the custody of the children and alimony, for this Court has full power to correct the decree, if it is not properly entered. I do not, however, believe, under the state of facts disclosed by the record, that the decree is in any respect erroneous.

In regard to the question of alimony, this Court in the case of *Stewartson vs. Stewartson*, 15 Ill. 145 says:—"Unless the Court can see that manifest injustice has been done, it will not disturb the decree of the Court below upon a question of alimony." I believe the Court will be satisfied, before we are through with the case, that substantial justice has been done, both in the granting of the decree, in determining the custody of the children, and in the matter of alimony.

In the case of *Wheeler vs. Wheeler*, 18 Ill. Rep. 39, on the question of alimony, the court says:—"Alimony as applied to the ~~material~~ relation, is that maintenance or support, which the husband, on separation, is bound to provide for the wife, and is measured by the wants of the person entitled to it, and the circumstances or ability of him who is bound to furnish it;" and the Court refer to 1 Bouvier's Law Dictionary 99, 1 Blackstone's Com. 441-3 *ibid* 94 and 1 Kent's Com. 128.

On the 22d day of March, 1855, during the same Term in which the decree was granted, the record shows that Francis Goodspeed, the Master to whom the matter had been referred, made report in writing to the Court of his "actings and doings as such receiver" up to that time. He reported that he had received the title papers, for the following described real estate, owned by said John Bergen, to wit:—"15 ft. L. 5, B. 22 old Joliet, commencing 42 ft. E. of S. W. cor of said Lot; also L. 4 of the subdivision of L. 6, B. 23 old Joliet, by M. Wetherbee, F. L. Cagwin, J. T. McDougall, John Bergen and A. Cagwin; also 20 ft. of L. 2, B. 15 West Joliet, commencing 43 feet N. of S. E. cor. of said Lot; also 24 ft. L. 7 and 8, B. 26 old Joliet, commencing 42 ft. E. of N. W. cor. of L. 8 and running S. side of L. 7, thence E. 24 ft., thence N. to Jefferson st., and thence W. 24 ft. to place of beginning." That of personal estate, he had received of notes, &c., on divers persons, the amount of

Cash,	\$ 1771,76	
		516,37
		<hr/>
Making the sum in notes, &c., and cash,		\$ 2288,13
That he had paid to Norton & McRoberts	\$ 245,00	
And to Fellows & Snapp	245,00	
	<hr/>	
Making		\$ 490,00

and taken their receipts, which are shown in his report.

The report further shows, (on p. 27 of record, near bottom,) that "By the approbation and consent of said John Bergen and Sarah E. Bergen, the undersigned has made division of the above described real estate between them, as follows, viz:—Said Sarah E. Bergen to have the 15 ft. L. 5, B. 23 old Joliet, commencing 42 ft. E. of S. W. cor. of said Lot, and L. 4 of subdivision of L. 6, B. 23 old Joliet, as above described at the sum of \$ 1800,00
Also the 24 ft. of Lots 7 and 8, B. 26 old Joliet, as above described, at 2550,00
The said John Bergen to take the 20 ft. of L. 2, B. 15 West Joliet, as above described, and the note against S. W. Smith, being for a certain interest in the livery stable, on L. 6, B. 23 old Joliet, at the sum of \$ 2000,00

From these proceedings it would not appear that said John Bergen was in jail, and in duress, or that the proceedings were carried on secretly, but that he was present in court, at the trial of the case and the pronouncing of the decree, and that he was present before the Master in Chancery, and consented to and approved the division of property by the Master, after the decree was pronounced.

On the 15th September, 1855, at the September Term of the Court, said John Bergen came into court and by his attorney, E. C. Fellows, entered his motion for an order on the Receiver for \$120,00, and the Court ordered that the Receiver pay him \$120,00.—[P. 29 of Record.

December 16, 1855, being at the December Term, 1855, the Receiver made a detailed report to the Court in the case, of his doings since the March Term, 1855, in which report he set out the different amounts of money collected, and the names of the persons from whom collected, and the amounts paid out and to whom paid, and brought into court the receipts for such payments. From this report, (extending from p. 30 to 35 inclusive and the receipts of moneys paid out to p. 40,) it appears that the Receiver had collected, since the March Term of court, \$1674,36
 And paid out on Bergen's debts and to Bergen, 1644,74

Leaving a balance in his hands of \$20,62

It also appears by this report, that Bergen, himself, had much to do in collecting and settling and paying debts, and he reported and paid over to the Receiver \$319,31, as moneys collected from some 36 different persons, after having paid out, on debts owing from him, the amount of \$660,85, to some 13 different persons.

The receipts given to the Receiver for the moneys paid by him on Bergen's debts, &c., are all contained in the record, and among them are three receipts given by Bergen, himself, as follows:

1855, Sept. 8, recd. for note and mort. on L. Hunt, on int. 10 per ct., for	\$526,00
" " 17, " cash , Cash	120,00
" " " " notes,	48,66
	\$694,66

Making

The Receiver in that report, gave a list of notes and accounts in his hands, not collected, amounting to \$950,27

After giving a detailed statement of his receipts of money and payments, the Receiver goes on to say—"The two foregoing lists, the one as being collected, and the other as being paid out by Bergen, himself, are the accounts rendered to me by the said Bergen, of his settlement of running accounts with the persons therein named, the balance of the money so collected by him, after deducting the amount of that paid out by him, was paid over to me, from time to time, and is noted in the foregoing list of moneys received on account of the estate as collected by Bergen."

The master's report was referred, by the Court, to a special master, as appears by the record, for examination and was reported as correct and approved by the Court, and afterwards, the master (Goodspeed) was ordered by the Court, as appears from the record, to return to said Defendant, John Bergen, the balance of uncollected accounts, books, &c., &c., remaining in his hands, as Receiver, belonging to him, the said John Bergen.

The following are the amounts received by the parties respectively under the decree:

John Bergen, under the division of real estate as reported by the Master,	\$2000,00
" " cash and notes and mortgage,	694,66
" " accounts and notes returned to him under final order of Court,	950,27
" " cash, being balance in Receiver's hands after paying \$10 to Special Master,	19,62
" " attorney's fees paid by order of Court and under his agreement,	1000,00
	\$4664,55

Sarah E. Bergen, on the division of real estate, by the approbation and consent of John Bergen, valued at	\$4350,00
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Excess in favor of John Bergen, \$314,55

This is how "he left without means to buy a coat," as alleged in the abstract made by his counsel.

I can discover no legal reasons for disturbing the decree in any manner, and these are certainly no moral reasons; and the case is respectfully submitted on the part of Defendant in Error.

URI OSGOOD, Solic'r and of Counsel
for Def't in Error.

Supreme Court

Sarah H. Bergen Depⁿ in Error
ads.

John Bergen Plⁿ in Error

Argument of Depⁿ in Error

Mrs Orgood of Counsel
for Depⁿ in Error

Filed May 26. 1859

W. L. Orgood
Clerk

IN THE SUPREME COURT.

THIRD DIVISION.

APRIL TERM, 1859.

JOHN BERGEN, Plaintiff,

vs.

SARAH E. BERGEN, Defendant.

} Error to Will Circuit Court.

} IN CHANCERY.

ABSTRACT.

- RECORD. Sarah filed her bill, March 28, 1855, for a *divorce and alimony*, alleging marriage, 2-4 births of eight children—three living—*adultery* with Phœbe and others. His abandonment of her and the children for parts unknown. His owning real and personal estate over \$8,000 in value. She without means of support.
- 10
- 8 Process served March 2, 1855.
- 10 Injunction restraining him from selling granted on filing bill.
- 14 March 12, motion filed for *alimony* and *receiver*: bill referred to Master.
- [No report.] Motion *entered*, March 16, to dissolve injunction.
- 18 Proof filed, of parties residing in the county *four years* as man and wife.
- 22 *Washburn's* affidavit, that John *admitted* to him the charge of adultery with Phœbe.
- Decree.*
- 24 Cause submitted. Bill taken as confessed. Says adultery was proved. On motion, marriage *dissolved*. Sarah to keep children. Receiver appointed to take account of *real, mixed* and *personal* estate, and *apportion* the same between John and Sarah, viz.:
- 1st. Give her *all* the household and kitchen goods and furniture, including piano, provisions, and fuel.
- 2nd. Divide *equally all the rest* of his estate between him and her. *To vest in her, her heirs and assigns, a perfect title to all set off to her. That set off to him, vest in him after paying* the amounts herein specified, out of *his portion*, then give him the residue left of it.
- 25 3rd. By agreement, pay Norton \$250, McRoberts \$250, for their fees in this suit and for prosecuting on the criminal charge for incest. Fellows & Snapp \$250 each for *defending* said suits. [That being one-eighth of his reputed estate.] To pay *all costs* out of *his share*.

RECORD. <u>26</u>	March. 22. Receiver reports he received cash on <i>deposit</i> , - - \$675 74
	Notes and accounts, - 1,771 56
	<u>\$2,447 30</u>

28 He paid Norton & Roberts \$245, Fellows & Snapp \$345, (*attorney's fees*.) Set
29 off to Sarah \$4,350 of real estate; to John \$2,000 of real estate. Fees of Receiver,
\$75. Gave John \$120, *his part*, Sept. 15.

Reports his collections of the debts \$1,674 36. Paid out \$1,477 34. His fees, \$167 40. John collected debts, \$319 21, and paid out \$660 85 by direction of Receiver. [All this in four weeks' time.]

40 Osgood, Special Master, allowance of Receiver's fees just, and settled *his accounts*. Books and accounts returned to John. [He left without means to buy a coat.]

Note.—Is not this administration upon the LIVING (dead) with a vengeance?

John assigns for error:

1. The Circuit Court erred in its orders and decree, and in every member, branch, and part thereof.
2. In attorney's fees as stated, and never performed.
3. In not dissolving injunction.
4. In decreeing an *equal* division of his real estate, and giving her all his personal property.
5. In confirming report giving her \$4,350 of his realty—he only getting \$2,000 worth, *contrary to the decree*.
6. In making him pay all the costs out of his *little share*.
7. In not showing what was done with the *stock in trade*, as set forth in petition.
8. In not making some provision for the *children* out of the estate set off to the wife.
9. In turning Phoebe out on the world without one cent, she being the daughter by his *former wife*, deceased.

ARGUMENT.

1. The statute authorizes allowance of *alimony* only, which is defined to be "*maintenance out of his income*," only.

See *Bishop on, etc.*, §§ 617, 618, 619, and there cited.

2. There are other States, which authorize, *by express statutes*, to restore to the wife the property she had brought with her, or its equivalent; *others*, more or less of his estate by division. Treating the case as if the husband was *dead*, giving only one-fifth or one-third, etc.

Bishop, §§ 634, 628, 620, 630, 620, 621, and there cited.

3. There is no legal evidence to support the decree for divorce. The only evidence is the affidavit of *one* witness, and that is *hearsay*—an *admission*, to get out of prison, and to get rid of a wife making so grave a charge against her husband, if any such was made, (but which he positively denies ever having so stated, and, if so stated, it was at a time when he was *non compos mentis* a part of his time *in jail*, and that it was *wholly false*), and was therefore improper evidence. There was cross-examination, or notice of the taking thereof. But it was taken privately and secretly. See *Wright's Ohio R.* 354, and 632 in point, on a statute like ours, forbidding such evidence unless it arose prior to the suit, and not made with a view of such divorce. The whole proceeding in a divorce case is *adversary*, neither *consent* of parties, nor *waiver of legal requisites will satisfy the law*.

Wright's R. (O.) 643.

Wherefore, John's prayer is, that the said decree be reversed, and that he be allowed to *answer* and show what the truth is in this matter.

MORRIS,

For Plaintiff in Error.

121

John Bergan

or

Sarah E. Bergan

Abstract

Filed May 27, 1859
L. Leland
Clerk

13721