

No. 12792

Supreme Court of Illinois

Foote

vs.

Foote

71641  7

132

Anna L. Foote

115

William B. Foote

132

12792

1859

No 132 - 27

Anna B. Fote

vs.

Wm E. Fote, Deft.

Argument on behalf
of deft in error
by Wm W. Orme
& Geo M. Scott

Filed April 22. 1859

L. Leland
clerk

Prepared

Supreme Court of State of Illinois
3. Grand Division

Anna B. Foote vs. W^m E. Foote -

Written Argument on part of defendant in error -

This is a proceeding to reverse so much of the decree of the McLean Circuit Court as awards to the plaintiff in error the sum of \$500. for alimony - said sum to be paid ~~annually~~ every year in quarterly payments - and to have the amount of said alimony increased -

What is the object of the allowance of alimony, at all, to the wife?

Simply to provide for her - in the absence of any separate estate of her own - an adequate amount for her support while separated from her husband. -

To make this allowance it is necessary for the Court to take into consideration the circumstances of the parties and their social position; the amount of property owned by, and the business done by the husband; the amount of the indebtedness of the husband and his condition and ability to pay the sum to be fixed by the Court for alimony -

Governed by these rules and considerations it

is insisted on the part of the defendant in error that not only should the decree of the Circuit Court be allowed to remain undisturbed, but that if there be cause for complaint it might properly be that the allowance of alimony is too high.

From an examination of the testimony in the record from pages 13 to 20, the Court will find that the defendant in error is indebted in amount one half as much as all his property is worth viz:

The value of the printing establishment - and which is the principal part of defendant's property - is from \$8000. to \$12000., taking the different estimates of the witnesses =

The defendant is indebted as appears from testimony of Shepard - page 18 - in the following sums \$4790.96 by Bills payable, \$860. on other School notes \$600. in small items &c. making the amount of \$6250.96 all together - very nearly the whole value of the printing establishment at the lowest estimate, and over half the value at the highest estimate -

The value of defendant's residence is stated in Worrell's testimony on page 15 to be about \$2000. = Guidley's testimony, page 20, is that the residence is only worth \$1500. and that defendant owes him the full sum of \$1500. on the residence -

The value of the tract of land mentioned in Worrier's testimony, page 15, is about \$1000.; and the testimony of Holmes, on page 20, is that the

defendant is indebted to him \$500. on said lot with a forfeiture of \$200. if defendant does not build a house on said tract of land. -

The testimony of Fell, on page 16, is that he sold to defendant a tract of land for \$15. per acre equal to \$2400. payable in eight annual instalments - one of said payments has been made and the land is not worth the balance of the purchase money unpaid -

It also appears from the testimony of Shepherd page 17, that the business of the defendant has fallen off from one source - the R. R. Co. - the sum of about \$2500. - And from the testimony of Lewis, pages 19 and 20, and the other evidence that defendant is a practical printer publishing a weekly and daily newspaper in Bloomington that he employs Editors for his paper and expends about \$25,000. per annum in carrying on and conducting his newspaper and job office =

And that the income or nett annual proceeds of both printing offices - Newspaper and Job office - was ~~was~~ not more than \$2500. -

Upon consideration of all the evidence the Circuit Court allowed \$500. alimony per annum payable quarterly -

The Court will also notice that defendant surrendered to Complainant a piano and household goods valued at \$500., and from December 30th 1857 to April 1858 defendant paid complainant the sum of \$200. -

Now from the foregoing review we insist here that the proof shows that defendant is a practical printer relying upon his skill at his trade and his activity and energy in his business for his support. - That his property is all perishable property, and not such property as by time enhances in value or affords any permanent income to its owner =

And therefore that the sum of \$500. per annum to be paid quarterly in money to complainant is a very high allowance of alimony made to complainant

Now the Court must look at the condition of the defendant, his business and circumstances. -

For if you weigh him down by an assessment of a high amount of alimony, you strike at his very capital - his energy and pride of business and by destroying them you destroy the source from whence the alimony will come - you break him up root and branch; - you destroy his pride and energy of character. - The Court will pardon us for calling attention to the fable of the "Goose that laid the Golden Eggs"

Were the defendant a man of property that, without his own personal skill and labor, produced him a regular income then the Court might properly apply a different rule for the assessment of ~~the~~ the alimony -

In a leading case on the subject of alimony
Peckford vs. Peckford 1st Paige Ch. Reports
p. 274 the Court adopted as a rule the allowance
of a third of the income from property - In that
case the defendant was worth \$12000. and
the Court allowed \$400. annual alimony -

In the case at bar the defendant, when his debts
are paid, will have little or no property and yet
he is made to pay \$500. annual alimony
and the complainant still demands more -

It must be evident to the Court that the ali-
mony is already high enough -

In the case of Lawrence vs. Lawrence
3^d Paige Ch. Rept. p. 270 to 273 the value
of defendant's property was \$2700. and the
allowance of alimony was \$75. per annum

Let the Court also bear in mind that
the monetary condition of the country is now
far worse than when this decree was entered.

Again the amount of alimony is subject to
change or alteration at any time by the Circuit
Court when a proper state of facts is shown
to the Court; such for instance that the defendant
has become more prosperous in business and is
accumulating property and could be better able
to increase the amount of alimony; or that
he had become entirely destitute of property
and dependant entirely on his daily labor and

could not so well pay the sum fixed; in the one case the Court would raise, in the other decrease the amount of alimony—

Again this question of alimony is to a great extent controlled by the discretion of the Court making the allowance, and unless the Court below has greatly abused that discretion this Court should scarcely feel itself justified in interfering—

In Asking of the Court a careful examination of the proof in ~~this~~ the record of this cause for the purpose of determining the ability of the defendant in error to pay the annual sum fixed upon him, and his inability to pay more we submit this case—

William W. Orme

Jno. M. Scott

Counsel for defendant in error—

Anna B Foote S.

William B. Foote

Herrice
Appeal from
Johnson Co

Argument of Thos Hoynes
on

the amount of Alimony
to be

allowed Comptt

Supreme Court of Illinois
3rd Grand Division

April Term 1859

Anna B. Forte

vs.

William E. Forte

Appeal -

The discretion to be exercised by the Court in the allowance of alimony is not an arbitrary discretion, but a Judicial discretion to be exercised in reference to the general principles of Law relating to the subject and upon an equitable view of all the circumstances of the particular case.

Bishop on Marriages & Divorce See. 603-

Rees. vs. Rees - 3 Phillimore 1 English
Ecclesiastical Rep 419-

Burr - 11 - Burr - 7 Hill - 207-

Lawrence vs. Lawrence - 3 Paige 267-

Cooke. vs. Cooke - 1 Eng. Ecclesiastical R. - 178-

Mc Gee. vs. Mc Gee. 10 Georgia - ~~477~~^{477 &} - 490-

When the delinquency of the Husband has been established and the wife is the injured party - driven by his cruelty or other wrongful conduct from the comfort of domestic enjoyments, she should be liberally supported - Bishop on M. & Divorce See. 603

But the alimony to be allowed should be a proportion of the husband's estate, but even in cases where there is no estate, the duty of a husband to support his wife does not depend upon his property. If she is compelled to seek a divorce on account of her misconduct, she loses none of her rights as a wife and he gains nothing by his own wrong. If he has no money or property the Court bases the alimony upon his earnings or ability to earn money -

Bishop on Marriage & Divorce sec - 604

Kerby - vs. Kerby - 1 Paige 261

Bunsler vs. Bunsler - 5 Pick 427.

As a general proposition the fund out of which the wife is entitled to her alimony is the income of the husband - and in the case at bar that is \$2500. nett from her business per annum, and while the wife has the care & charge - expense of maintenance & education of the family; leaving him with no expense but that of his individual support, it is at least equitable that he should contribute sufficient to enable his wife to support herself & children -

The limits in exercising the Judicial discretion always take into consideration the facts attested - these are children or other relatives to support or educate, on whom that burden devolves - the nature & extent of the Husband's dilection (Burr. & Burr. 7. Hill 207) the demeanor & conduct of the wife to her duty & habitation - the ability of each party to earn money - the condition in life - circumstances - health - place of residence and consequent necessary expenditures of the wife, the age of the parties, and whatever other circumstances may address themselves to a sound Judicial discretion and in the case of Bursler - v. - Bursler 5 Pick 427 - The Court in that case even ~~passed~~ went beyond the income of the husband by ordering a sale of his estate so that the amount necessary ^{to pay} ~~to cover~~ extraordinary expenses incurred by failing health on the part of his wife might be realized - declaring "that the Husband's & improper conduct ought not to excuse him from doing what by his marriage contract it would have been his duty to perform

Burton M. & D. Sec. 612.

Bursler. v. - Bursler. 5 Pick 427 -

Burr. & Burr. 7. Hill. 207 -

In the case of Williams - vs - Williams
4 Desaus. 4 Desausure - 183 - above the ground of the
183. Since was as in this case cruelly bad
treatment to the wife - the Court ordered
that One third of the net income
be paid to the wife - and also a
sufficient sum to board and educate
the daughters of whom there were
three the charge of whom was given to
the Mother -

In the case of Prather - vs - Prather 4
4 Desaus 33 Desausure - 33 - One third of the Husband's
income was allowed to the wife - the Court
declaring in that case - that the wife acquires
by her marriage in return for the comforts she
brings the right to maintenance support and
to a participation in her Husband's property
according to his degree and station in life

And again in a similar case
4 Desaus 174 Taylor - vs - Taylor. 4 Desausure ¹⁷⁴ - the Court
for similar reasons decreed to the wife for
her own maintenance only, one third of the
Husband's net income -

In the State of New York the Court
of Chancery has usually ^{allowed} to the wife for
permanent alimony from One Tenth to

one half of the Husband's income
Burr. n. Burr. 7. Hill 221 she was not to have the custody of
7. Hill 221 the Children - Burr. n. Burr. 7. Hill 221
opinion of Chief Senator -

Peckford n. In the case of Peckford - n. Peckford.
Peckford. 1 Paige Chy Rep. 246 - where there was no
1 Paige Chy Child was to be provided for. the Court allowed
246 - the wife. One third of the gross value
of the property in the shape of an annuity
which was equal to about one half of the
annual income during her life -

And the Court in this case says, "it is usual
to allow the wife for permanent alimony
from one half to one fourth of the Husband's
estate where she is not to have the
custody of the children" -

In Rudman - n. Rudman
5 Porter 5 Porter In Rep. 64 - the whole Real &
In 64 personal estate of the Husband ~~of the~~
was only between \$4000 + \$5000 - yet
because the Conduct of the defendant
was grossly improper, it was proper they
say to decree the wife the sum of
\$1,180 dollars - & the Court would not
interfere -

In the case of Lee Geo. n. Lee Geo
10 Geo. 491 - the whole estate was worth \$4000

and yet the Court gave the wife in that case an allowance of \$20 per month with no children to support or educate.

In the case of Kirby vs Kirby 1 Paige Ch R. 261. the husband was only worth \$1000. his income in all from his personal services as a sea Captain was \$35 per month. yet she (the wife) was allowed \$25 per month of his gross earnings less \$35.

In all the cases cited the Court took into consideration, what does not seem to have been taken into consideration by the Court here - the extent of the husband's delinquency and that his improper conduct compelled the wife to seek a divorce, - the husband's ability to pay & her rank and condition in life, - and that he was bound to support her in that condition; the necessary expense of her living where her relatives live - at Chicago - the condition of her health - Even these circumstances should have entitled her to receive at least from one fourth to one half of his income \$2500 dollars per annum without any

regard to Children - But when
it is considered that the Court also
devolved upon the wife the Support
& Education of the Children owing
to his brutality & unfitness to have them
care & ~~best~~ nurture - at least
one half of his income should have
been appropriated to bear ^{more than} ~~the~~ ~~expenses~~
three fourths of the whole expenditure
of their family when living together -

As we said before in this
case the Court below could not exercise
an arbitrary discretion, but a judicial
one - to be exercised in reference to
the general principles of Law - relating
to the subject and I hold in this
case that the Court exercised this
discretion contrary to all principles
settled upon this subject - and
that the decree in relation to the
amount of Alimony allowed under
the circumstances for the Support of
the wife & Children is a gross violation
of all the equitable considerations &
principles governing this class of cases -
And I submit this view
of the case with the reference I have

Made to Authorities & cases to the
Sounder Judgment of this Court. It
would be a reproach upon the Justice of
the Court - and the Character of our
Judiciary could a decree stand
which so manifestly violated not only
general Principles of Law, but inflicted
upon a poor forsaken wife and
her neglected Children, the hardship and
misery of going out an insufficient support
while the ~~same~~ ~~father~~ cruel Husband
and the Unnatural Parent riots in his
very abundance after driving them out
upon the Cold Charities of the world
utterly indifferent as to their wants, their
sufferings and their danger.

J. H. H. H.
— 3 —
of Council

Ottawa

April 26. 1859

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Superior Court

Anna E. Forte

132

u

William B. Forte

Argument
of
W. B. Forte
for applt.

Filed April 26 1839
L. Leland
Clerk

STATE OF ILLINOIS, SUPREME COURT,

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1859.

ANNA B. FOOTE, Appellant, vs. WILLIAM E. FOOTE, Appellee.

Appeal from McLean County Circuit Court—In Chancery.

ABSTRACT OF THE RECORD.

Record.

1 to 5

BILL in Chancery, filed by appellant against appellee, for divorce.

10

The bill was taken as confessed by defendant.

Cause was tried at the April Term of said Court, A. D. 1858.

Decree entered dissolving the bonds of matrimony theretofore subsisting between the complainant, Anna B. Foote, and the defendant, William E. Foote; and that the custody of the infant children of said parties be given to the appellant, Anna B. Foote. It was further decreed, that said William E. Foote pay as alimony to the said Anna B. Foote, for the support of herself and her two children, the sum of \$500 per annum, in equal quarterly instalments.

21

The complainant excepted to the allowance for alimony, as being inadequate, and not as much as should have been allowed by the evidence.

28

It appeared by the evidence of Thomas Lonergan that when complainant married defendant, she had a piano worth from \$200 to \$300; that on the day of her marriage, witness gave her \$100; that since their marriage witness had let her have money and furnished her house, amounting, in the aggregate, to between \$700 and \$800.

11

That the two children are both boys. That in his opinion \$1,200 per year would be the ordinary and necessary expenses for the support of complainant and her two children.

13

It appeared in evidence, by the testimony of John S. Auby, that \$1,200 would be a fair estimate for the support of complainant and children per year.

It was also proved, by the testimony of Robert Hill, that \$1,400 would be the annual necessary expenses for their support.

It was further proved that the defendant, about eighteen months before the decree was made, told Thomas F. Warrell that he was worth \$10,000, and was clear of debt.

15

That the proceeds of the job part of his office (he was a printer) was worth \$1,500 or \$2,500 per month. That the children are aged, one seven years, the other two years.

It also appeared, from the testimony of William Thomas, that witness was an insurance agent; that on the 15th of January, 1858, defendant applied to him to insure his printing establishment, and defendant then stated that the value of the property to be insured, at last invoice, was \$12,000. That a short time afterwards the witness remarked to defendant, that he thought the appraisement was too high, when defendant re-

Record. — plied that he had, since such appraisement, purchased upwards of three thousand dollars worth of property and put it in the office, making between \$15,000 and \$16,000 worth of materials and apparatus connected with the office.

16, 17

It was also proved, by the testimony of George W. Sheppard—see abstract, page 17 and 18—that he was book-keeper for defendant, and that in his opinion the annual *nett* proceeds of the whole Pantagraph office is about \$2,500 per annum. It also appeared, by the testimony of this witness, that defendant had about \$12,000 of unpaid bills standing out; that his bills payable amounted to the sum of \$4,790.96; That defendant owed on two school notes \$860—on debts about town \$600; that \$25,000 annually was necessary to carry on the office; there was then \$1,500 of debts the office which was available, and \$800 more of subscription debts.

It was also proved, by E. H. Rood, that the witness was (in connection with William Thomas) agent for four insurance companies; that defendant called upon them to insure his entire stock in Schemerhorn's building; that defendant said to him that there was \$13,000 worth of property in the Schemerhorn building; that his property in the other building amounted to \$1,000 or \$1,500; that they gave him a policy for \$9,000 on the property in the Schemerhorn building; that when he applied for the insurance, he stated the property was worth \$2,400; and that he had made subsequent purchases to \$1,500 or \$2,500.

18, 19

It was further proved, by the testimony of Edward J. Lewis, that the Pantagraph office, with good will, &c., free from debt was about \$15,000. This witness stated that he was not a practical printer, but was the general editor of the weekly and daily Pantagraph, published by defendant. Wm. McCracken estimated the value of the Pantagraph office at \$8,000, and stated that he might be mistaken to the amount of \$2,000 to \$3,000.

19

It also appeared in evidence that he owed \$800 on note to Merriman, and \$500 to Wm. H. Holmes for land, and \$1,500 to A. Gridley, upon his residence.

20

That defendant had paid complainant, since the commencement of this suit, \$200; that he had sent her piano and household goods, which amounted in the aggregate to \$500.

21

BRIER & BIRCH, *Compl'ts Solicitor.*

E. VAN BUREN, *of Counsel.*

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Anna B Foots

vs

William E Foots

Abstract

Deposited April
22

Filed April 20, 1859

Leland
Clerk

SUPREME COURT.

ANNA B. FOOTE,
Appellant,
vs
WILLIAM E. FOOTE,
Appellee. } IN CHANCERY.

BRIEF.

J. F. Smith

The Bill in this cause was filed by the Appellant to obtain a Divorce.

The Court made a decree dissolving the marriage, gave the appellant the custody of their two children, and decreed that the defendant should pay her as alimony \$500 per year, to be paid quarterly. To so much of the decree as relates to the alimony, the complainant excepted, as being inadequate in amount.

The only question here is, as to how much was necessary to support her, and her children, and as to the ability of the husband to pay what shall be fit and reasonable.

1 *Scam* 242—246.

It is difficult if not impossible to adopt any general rule as to the amount of alimony to be allowed, but it is submitted that the husband, in a case like this, should be decreed to pay a sufficient amount to support the complainant and her children, if he has the ability to do so. If she had remained his wife, the law would have compelled him to support her, the law also would compel him to support his children. If he so conducts himself as to compel the wife to seek for a divorce, and the court grants such an application, ought his misconduct to release him from an obligation that would otherwise exist? In other words, is an allowance which is insufficient to support her and her children, just, when he has the ability to pay sufficient for a decent support? Such a decree would permit the offending husband to profit by his own misconduct.

In this case \$500 is allowed for the support of the wife and her two children, the entire family of the defendant, except himself. All the witnesses upon the subject testify that \$1200 to \$1400 per year would be necessary for their support.

*See Testimony of Thos. Lonergan.
John S. Auley,
Robert Hill.*

The appellant is a practical printer.

His printing establishment, from his own account, as given to the insurance agent, was worth at least \$14,000.

*See Testimony of William Thomas.
E. H. Rood.*

His bills receivable due the office were,.....	\$12,000 00
He owed Bills payable.....	\$4,790 96
Two School Notes	860 00
Debts about town.....	600 00
Notes to Merriman.....	800 00
Note to Holmes.....	500 00
	<u>\$7,050 96</u>
	\$4,949 04

He also owed \$1500 to Gridley, and \$500 to Holmes. Both these debts, however, were for real estate, and leave a balance in his favor.

The Holmes lot is estimated at.....	\$1,000
Deduct Holmes' claims.....	500

Leaves Balance,.....\$ 500

*See Testimony of R. O. Warriner,
W. H. Holmes.*

His Residence Property was estimated at.....	\$2,000
Incumbrance to Gridley.....	1,500

Balance,.....\$ 500 \$500

Balance due Defendant.....\$1000

See Testimony of D. T. Worrel and Gridley.

RECAPITULATION.

Printing Establishment, say.....	\$14,000 00
Debts due him.....	\$12,000 00
Debts owing in all.....	7,050 06
	<u>\$ 4,949 04</u>
Balance due him.....	4,949 04
Value of Real Estate over and above all incumbrances.....	1,000 00

Amount of Defendant's Property.....\$19,949 04

It will be remembered that a large amount of the indebtedness is the Bills payable, that is, *the current expenses of the business*, and which have doubtless been paid.

Again. The surest test of a man's ability to pay, is his income. Upon that subject there is no conflict of evidence. The only evidence is the testimony of George W. Shepherd, who says the *nett* proceeds of the office is about \$2,500 per annum. That is the profits of the establishment, after paying all the expenses, including those bills payable, above spoken of, (for those bills payable are part of the expenses). Now, then, if the annual nett income of the defendant is \$2,500, he certainly should pay towards the support of the complainant and their children more than *one-fifth of his income*, and especially when that one-fifth is not sufficient by one half to pay for their support.

It is therefore submitted "that the allowance of alimony is inadequate, and not so much as should be allowed by the evidence."

BRIER & BIRCH,

Solicitors for Appellant.

E. VAN BUREN,

Of Counsel.

Sup. Court
Anna D Fook
Appellant :

vs
William E Fook
Appellee

Verdict & Costs

James H Birch
Atty for App

E Van Buren
Counsel