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No. \_\_\_\_\_

# Supreme Court of Illinois

Piepho

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vs.

Piepho

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# SUPREME COURT OF ILLINOIS.

## CENTRAL GRAND DIVISION.

JANUARY TERM, A. D. 1877.

LOUIS PIEPHO, *Appellant*,

*vs.*

ELIZABETH PIEPHO, *Appellee*.

BRIEF OF APPELLANT.

This cause was commenced by Bill, filed in the Hancock Circuit Court, on the 18th day of May, 1876, by Louis Piepho, the appellant, praying for a divorce from Elizabeth Piepho, on the ground of the natural impotency of defendant. The Bill alleges the marriage of said parties, by legal authority, on the 2d day of May 1863; that the complainant was, at that time, in the military service of the United States; that immediately after said marriage he left to join his regiment in the field; that on his discharge from the army, in 1864, he returned to his home and lived with said Elizabeth from that time until the month of January 1872, when said Elizabeth became insane; that she was sent to the Insane Hospital at Jacksonville, at that time, and has since remained in that institution; that soon after his return from the army he discovered that said Elizabeth was an hermaphrodite, and when sexually excited, no male could have sexual intercourse with her. The Bill charges that, at the time of the

said marriage, the said Elizabeth was naturally impotent; that such impotency is continued to the present time, and on the ground of such impotency prays for a divorce.

At the June Term, 1876, of the Hancock Circuit Court, Bryant F. Peterson was appointed Guardian *ad litem*, for said Elizabeth, and as such Guardian filed a demurrer to Complainant's Bill. The Court, at the same term, entered an order sustaining the demurrer and dismissing Complainant's Bill. From this order an appeal was taken and the cause brought to this Court.

The Errors assigned are: 1st. The Court erred in sustaining the demurrer to Complainant's Bill: 2d. The Court erred in dismissing Complainant's Bill.

The Demurrer is general, for want of equity, assigning no special causes; but on the argument, before the Court below, the grounds taken by the opposite counsel, were,

1st. That the long time the Complainant lived with the Defendant, after he discovered that she was impotent, (more than seven years,) bars him from any relief in equity, and

2nd, That the Defendant being insane, and an inmate of an insane hospital, no suit for divorce can be sustained against her, for any cause, while her insanity continues.

In reference to the first point, the attention of the Court is called to the fact, that in this State there is no statute of limitation, defining the time within which a suit for divorce shall be commenced, after the right accrues. The language of the statute (Sec. 1, Chap. 40, R. S.) is: "That in every case in which a marriage has been, "or hereafter may be contracted and solemnized between any two "persons, and it shall be adjudged, in the manner hereinafter provided, that either party at the time of such marriage was, and continues to be naturally impotent \* \* \* it shall be lawful for "the injured party to obtain a divorce and dissolution of such marriage contract." It is true that in relation to several of the causes for divorce, set forth in the statute, this Court has held, that if the parties continue to live together, after the commission of an act by one party, which would entitle the other to a divorce, comes to his or

her knowledge, the fact of the parties so living together, amounts to a condonation. But I apprehend that this only applies to such causes as occur by the act of either party, after marriage, and not to such as existed at the time of the marriage. For instance the statute specifies as a cause: "that he or she had a wife or husband living at the time of such marriage." Suppose the injured party, in such case, should continue to live with the other, after knowledge came to him or her, that he or she had a wife or husband living, would that fact condone the offense? I think no court would hold to such doctrine. A cause which would have prevented a marriage, had it been known to the innocent party, and which affects the essential conditions and purposes of the marriage contract, as well as the public morals, cannot be disposed of by condonation. Such marriages are voidable, if not void, from the moment they are entered into, and no act of either party can make them otherwise.

This Court has repeatedly held, that in cases where the husband has been guilty of extreme and repeated cruelty towards the wife (and in other cases, where the cause of divorce arises from the act of one of the parties after marriage,) that, if after the commission of the acts of cruelty, the parties continued to live and cohabit together the offence is condoned; but if the offending party afterwards repeats the cruelty, the condonation goes for nothing, and the former offences are revived; because the condonation was on the condition, that the offence condoned should not be repeated. Hence, it follows in regard to that class of cases, in which the cause of divorce existed at the time of the marriage, which are continuous and ever recurring, and which neither the skill of man or the act of either party can remove, cannot in the nature of things, be condoned. It therefore follows that, if condonation of causes of divorce is conditioned, that the offence condoned shall not be revived, it cannot apply to cases where the offence is continuous and not within the volition of the offending party to remove.

But it is said the long time that the Complainant has slept on his rights brings this cause within the range of stale claims, in Chancery. It is true that when a party having an equitable claim which a Court of Chancery might enforce, rests on his rights for a long time, and then seeks relief, a Court of Equity, in some cases, denies relief on account of the staleness of the claim, even when there is

no statutory bar. The doctrine of stale claims rests upon the presumptions arising from the long acquiescence of the party, seeking relief, that his alleged equitable claim is not well founded, or that his rights have been released; but in no case when the right of the Complainant to relief, is given by statute, and in which no presumptions can arise as to the origin or release of the right, will a Court of Equity deny relief, unless the right of relief is barred by the statute of limitations. To deny relief, in such cases, when there is no statutory bar, would be judicial legislation—the interposition of an arbitrary judicial bar, when there is no statutory one. There is no case reported, either English or American, where there was a plain statutory right to relief given, and no statutory bar, in which relief has been denied on the ground of the staleness of the claim. In the case at bar, the Complainant had a plain right to a divorce from the moment when he discovered that the defendant was from natural causes impotent. He had that right for a year, for ten years, and would have it even for twenty years, there being no statutory bar to his enforcement of that right: and there being no possibility of his releasing or waiving it, there is no presumption against him, arising from a lapse of time. He did not enforce his right, as long as the malformation was not generally known to the community, from motives of delicacy as the Bill states. Possibly he did not know that his wife's impotency gave a right to a divorce, and from the same motives of delicacy, he was restrained from taking legal advice on the subject. There are no doubt hundreds of cases where the right to a divorce exists, on the ground of natural impotency, but where the parties aggrieved are restrained from enforcing the right by motives of delicacy. This delicacy may be removed by the hardening process of lapsing time, or, as in the case at bar, by a public exposure. And then, when the aggrieved party finally seeks relief in the courts, is he or she to be told, "Oh! you have rested too long on your rights. Although the Statute interposes no bar, yet the Court has got a notion in his head that you have let this matter run a little too long, and therefore can't give you relief."

The Statute provides that if a husband is guilty of habitual drunkenness for the space of two years, the wife shall be entitled to a divorce. Suppose, after the wife's right to a divorce is complete, he continues to be an habitual drunkard for twenty, or even twenty-

five years, and the wife continues to live with him all that time, is she, because she has endured the offensive company of a drunken husband for so long a time, to be told that her claim to a divorce has become stale? By no means. All she has to do is to prove what the statute requires—lapse of time, during which she has endured wrong, and from motives creditable to her womanhood, has sought no relief in the Courts, cuts no figure in the case.

It is against the policy of the law to tie, by an indissoluble knot a person having fully developed procreative faculties to a mate who is naturally impotent. In the first place, it is a fraud, perpetrated on the part of the deficient party, upon the other—a fraud which vitiates the marriage contract, and entitles the aggrieved to relief whenever she or he chooses to seek it in the courts. In the second place it is against public policy, which favors an increase of population, flowing from healthful marriage relations: and in the third place it tends to vitiate public morals; for the party with fully developed organs of generation, being unable to gratify the natural sexual desires in the marriage bed, is sorely tempted to seek gratification by illicit practices.

*Secondly.*—The court below, in sustaining the demurrer to complainant's Bill, took the position that no Bill for divorce, for any cause, can be entertained against an insane person.

The general principle and rule is, that whenever any claim, demand or right which a court of law or equity can enforce, exists against a sane person, the person having such claim, demand or right is not barred or hindered from enforcing it, by reason of the person, against whom such right, demand or claim exists, becoming insane. In all such cases the law provides for the defense of the person under disability, by the appointment of a *guardian ad litem*, and by requiring strict proof of the party seeking to enforce a right against an insane individual. This is the general rule, intended for universal application, and if there is any exception, it should be based on some conclusive reason or upon the long continued and well established usages of the courts. The plausible reasoning of a law writer, based on some pet theory of his own, or the isolated dictum of an inferior judge, without any well established precedents to support it, should not be allowed to interfere with the universal application of the rule as above laid down.

The direct question, whether under any circumstances, a court of equity will decree a divorce in a case where the defendant is an insane person, does not appear to have ever arisen before this court: but two cases are reported, in which that question might have been presented, had this court or the counsel for the defendants, considered it of sufficient importance to discuss. The cases referred to are, *first*: Haymaker vs. Haymaker, 18 Ills., 139, where the divorce was sought on the ground of "insanity at the time of making the marriage contract and the marriage, and confirmed incurable insanity "since." The court refused to grant the divorce on the ground that the statute did not authorize a divorce on account of insanity, and the further ground, that the 8th section of the statute of 1845 did not give to the court, unlimited discretion to grant divorces, but only for such causes as were sufficient, under the canon and common law: but no question was raised as to whether the court could or would grant a divorce against an insane person, for any cause specified in the statute. The court argues the case entirely on the ground that insanity, under our law, is no ground for divorce, and concludes the argument in these words: "The procreation and nurture of children "being one of the objects of marriage, the law has provided that corporeal infirmity, or impotency, before marriage, shall be cause to "dissolve it. This provision is made for a sound body, but none for "the mind." The Defendant, in that case was in the Hospital for the Insane, as in the case at bar, but neither the learned counsel or the court could see anything in that case, but the simple question whether insanity was a ground for divorce, and the court intimated in the above extract that had the ground of divorce been impotency, which was provided for by the statute, the complainant would have had a good case.

Again, in Lloyd vs. Lloyd, 66 Ills, 87, a similar case appears; the ground on which the divorce was sought being insanity. The court denied the prayer of the bill, for the same reason as in the case of Haymaker vs. Haymaker; but neither counsel or court intimated that the insanity of the defendant was *per se*, a bar to a proceeding for divorce for any and all causes laid down by statute.

In Massachusetts I find two cases reported where the defendants were insane: the ground in each case being adultery committed by defendant. First, in Broadstreet vs. Broadstreet, 7 Mass., 473, the

libel charged adultery in the wife, on a day certain, and prayed for a divorce from the bonds of matrimony.

“ Wild suggested to the court that the wife was insane at the time mentioned in the libel, and that she had continued so to this time.” Issue was joined in the case and it being proved that the wife was insane when the adultery was committed, the libel was dismissed. But there was no attempt to bar the action because the defendant was insane.

Again, in the case of Mansfield vs. Mansfield, 13 Mass., 412, the wife filed a libel for divorce against her husband for adultery.— The husband was called and a default taken; it being suggested to the court that the husband had become insane since the commission of the adultery, the court set aside the default and continued the cause, “observing to the proctor for the libellant that if so advised, she might during the vacation, procure the appointment of a guardian to her husband in the Probate Court, and upon the appearance of such guardian in the suit, further proceedings might be had; and if sufficient cause appeared, a divorce might be decreed.”

So far as my investigation has extended I have not been able to find a case in this country or in any appellate court in England, where an insane person was made defendant to a divorce suit, that the cause has been disposed of otherwise than on its merits, and in no one case, except one before an inferior court in England, has the insanity of the defendant been held, *per se*, to be a bar to the prosecution of a suit for divorce. Certain it is, there has grown up no practice in the courts which establishes that a divorce case is an exception to the general rule, in regard to enforcing rights, claims and demands against insane persons.

There is another view of this case, arising from its peculiar nature, as set forth on the face of the Bill, which I will briefly allude to. The Bill alleges that the defendant is an hermaphrodite. All writers on Medical Jurisprudence affirm that all of this class of individuals are naturally impotent, and their impotency is such as cannot be removed; but further than this, some hermaphrodites have the female organs predominant, while in others the male organ is the most prominent, and from this fact it sometimes becomes a nice point in

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above

law to determine whether in a given case, the Hermaphrodite should be classed as male or female. There are several cases cited in the books, in England, when the question, as to which sex the Hermaphrodite belonged, arose in determining the descent of estates under the laws of primogeniture. In this country the same question has in several cases arisen in determining whether the Hermaphrodite was entitled as a male citizen to vote. Suppose in the case at bar the proof should turn out that the defendant is an Hermaphrodite and that the male organ in the subject predominates; then we would have a plain case of a man married to a man. In such a contingency I hardly think this court would permit the doctrine of condonation, stale claim, or that other far-fetched idea that the insanity of a defendant is *per se* a bar to a divorce suit, to be interposed in order to deny complainant the relief he seeks.

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