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Proposals for Changes in Pennsylvania Law of Divorce

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PROPOSALS FOR CHANGES IN THE PENNSYLVANIA LAW OF DIVORCE

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AT THE 1955 Judicial Conference of Pennsylvania,[1] The Honorable Vincent A. Carroll of the Philadelphia Common Pleas Courts proposed a revision of the Divorce Laws to include in one proceeding the questions of divorce, property settlement and custody and support of children.

There are two other changes in our laws relating to marriage and divorce, that ought to be considered. Both of these may seem to be relaxing our divorce laws, but neither is proposed for that purpose.

I.

The first proposal would be for the repeal of Section 5(h) of the Marriage Law of August 22, 1953,[2] and, if necessary, Section 9 of the Act of March 13, 1815,[3] which forbid the marriage of an adulterer to a paramour during the lifetime of the offended spouse.

One can see at once the poetic justice in such a provision, that insult shall not be added to injury by permitting the offender to profit by the results of his, or her, own sin. It is more difficult, however, to fit this penalty of disqualification to marry the paramour into the mores of a Commonwealth which permits remarriage to innocent and guilty alike in every other instance of divorce a vinculo matrimonii and which permits the guilty party to a bigamous marriage to procure an annulment.

The principle of permitting the guilty party to a void marriage to seek annulment has indeed been carried to the extreme of permitting an adulterer to obtain an annulment against his paramour.[4]

The origin of the rule is lost in the shades of mystery—that is to say that we have had neither the time nor the patience to trace it to any source. There is language to that effect as far back as Leviticus,[5] but that clearly refers to relations while the marriage subsists. On the other hand, in Deuteronomy[6]

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* President Judge, thirty-first judicial district of Pennsylvania.

1 383 Pa. xxxii (1956).

2 PA. STAT. ANN., tit. 48, §§ 1-5(h).

3 PA. STAT. ANN., tit. 48, § 169.

4 Maurer v. Maurer, 163 Pa. Super. 264, 60 A.2d 440 (1948).

5 Ch. 18, v. 18.

6 Ch. 24, v. 1.

a wife put away for some indecency is entitled to a bill of divorcement and remarriage.

In the Christian era, of course, there is clear language which forbids remarriage under any circumstances[7] excepting perhaps for the husband of an adulterous wife[8] or for the husband or wife of an unbeliever.[9]

In Pennsylvania law, the disqualification became a general principle at the same time that a general divorce law was enacted.[10] It was not reenacted into the Divorce Law of May 2, 1929,[11] but was saved from repeal in the repealer clause of that Act. It is now a part of the Marriage Law of 1953.[12]

I am assuming that the remarriage of persons divorced from the bond of matrimony has become the public policy of this Commonwealth and, accepting that proposition, our inquiry is whether there is validity to the exception.

It would be difficult to prove that the disqualification has reduced the number of extra marital relations. Any social worker could testify that the known prevalence of illicit relationships would indicate that it has not had that effect.

Nor is there any great likelihood that the married person who has been willing to commit adultery would hesitate to continue the illicit relationship, simply because marriage to the paramour is forbidden. Having risked a charge of adultery, he would be unlikely to be deterred by fear of a charge of fornication. Adultery should certainly continue to be punished as a crime against society under our criminal laws but past adultery should bear no continuing penalty for the private satisfaction of the wronged spouse. Relaxation of the disqualification to marry would in no way relieve a convicted adulterer from the prescribed penalty but it would lend vitality to the command to "Go and sin no more".[13] Denial of the right of remarriage surely has encouraged continuance in sin.

As for the wronged spouse, he—the masculine form is used to cover both sexes—has it within his own power to prevent marriage of his spouse with the paramour by refraining from obtaining a divorce. If the wife is the injured spouse, she has the additional remedy of vindicating her rights by obtaining

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[7] MATT., ch. 5, v. 32; I COR., ch. 7, v. 11.

[8] MATT., ch. 19, v. 9.

[9] I COR., ch. 7, v. 15.

[10] See Act of 1785, 2 Sm. Law 343 and the Act of 1815, P.L. 150, 6 Sm. Law 286, tit. 48, PA. STAT. ANN., § 169.

[11] P.L. 1237, tit. 23, PA. STAT. ANN. §§ 1 to 69.

[12] P.L. 1344, tit. 48, PA. STAT. ANN. § 1.

[13] JOHN, ch. 8, v. 11.

a divorce a mensa et thoro, which will effectually prevent her husband's remarriage.

When the innocent spouse, therefore, seeks his own freedom to remarry, the disqualification on the part of the offenders to marry each other places a blight on society without any commensurate balm to the injured spouse.

Having no graduate students at our command, the number of injured spouses who seek solace in remarriage cannot be cited, but the percentage must be extremely high. In fact, in some cases the remarriage is so precipitous that one wonders whether an alert proctor or detective could not have made out a good case of recrimination.

One cannot wax enthusiastic about the sad plight of frustrated sinners, but we are interested in public morals and in the right of children to grow up as the legitimate offspring of their parents. Rights of inheritance[14] will not compensate for being the fruit of an illicit relationship.

The very language giving the right of inheritance indicates the futility of forbidding remarriage for it relates to birth during coverture, which necessarily implies a marriage in defiance of the law, since otherwise, without acknowledgment, the child would be filius nullius.

When the law of the land does not reflect the community mores, the community usually seeks a detour about the barrier that has been erected. Thus, divorces are rarely brought on the grounds of adultery but rather on the grounds of indignities to the person; this is easier to prove and is less distasteful. This course will probably be still more widely pursued since the case of *Phipps v. Phipps*,[15] which recognized marital infidelity as a source of indignity and repeated acts as a course of indignities.

At this point, I have some statistics from my own experience. In 23 years on the bench, 3.5% of the cases for divorce have been based upon charges of adultery. Yet a study of the testimony—unreliable as it may be in uncontested cases—reveals that "other men" and "other women" have been the chief cause of dissension in 47% of the cases.

It might be argued therefore that the problem is not acute. We are not contending that there should be more charges of adultery in divorce cases, but it stands to reason that the few offenders who have had to meet that charge should not suffer from a disqualification from which most of their fellows have escaped.

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[14] See § 9 of the Act of 1815, note 10 *supra*.
[15] 368 Pa. 291, 81 A.2d 523 (1951).

The bold and honest cure for this situation is to retain all other penalties for adultery but to repeal the disqualification from marriage pur autre vie.

II.

The second inconsistency in our divorce laws lies in the persistence of a provision that a divorce cannot be obtained from an incompetent spouse, who is not "hopelessly insane".

This provision has a curious history. In 1905, the legislature passed an Act[16] that reads in part as follows:

> "Clause A. That from and after the passage of this act, in cases where the husband or wife is a hopeless lunatic or non compos mentis, the courts of common pleas of this Commonwealth are invested with the authority to receive a petition or libel for divorce; the affidavit, as now required by law to such petition for libel, to be made by the petitioner; and the service of subpoena in divorce shall be made as now provided, such service to be made upon the committee of such lunatic; and all the provisions of the several acts relating to divorces shall apply to all applications made under this act.
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> "Clause B. That the fact of the lunacy of the husband or wife, and such circumstances as may be sufficient to satisfy the mind of the court as to the truth of the allegation, shall be set forth in the petition; and upon the hearing of the case before the court, a master, or issue to be tried by jury, the question of lunacy shall be fully established by expert testimony, together with every other matter of fact that is affirmed by one party and denied by the other, and the same shall be heard and investigated in the matter prescribed by the provisions of the several acts concerning divorces.
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> "Clause C. No divorce shall be granted under this act to any petitioner or libellant unless it be proved beyond a reasonable doubt that the husband or wife of the petitioner is hopelessly insane: Provided, however, That if the husband or wife has been for ten or more years an inmate of an asylum for the insane, it shall be conclusive proof of hopeless insanity."

Many courts believed this Act created a new cause of divorce, namely, hopeless insanity. Rumor had it that the Act was passed for the benefit of some prominent Pennsylvanians, but rumor has no place in these august columns.

Divorces were granted under this supposed power until two cases, *Baughman v. Baughman*,[17] and *Johnston v. Johnston*,[18] reached the Superior Court of Pennsylvania, which held that the Act did not in fact create a new ground

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[16] Act of April 18, 1905, P.L. 211.
[17] 34 Pa. Super. 271, 274 (1907).
[18] 34 Pa. Super. 606 (1907).

for divorce, but that it merely provided the procedure where divorce was sought from an insane—the word insane had not yet become a forbidden word —spouse.

With these decisions we have no quarrel, although we are convinced that the legislature intended to make hopeless insanity a ground for divorce, but used inapt language to accomplish that purpose.

The 1909 Legislature bowed to the Court's decision and, if the 1905 Legislature had actually intended to establish a new ground for divorce, the 1909 Legislature abandoned that idea. Instead it passed an Act [19] validating final decrees in divorce granted under the false supposition that hopeless insanity had been made a ground for divorce and let the matter go at that.

Whether such validating act was necessary or whether the decrees unappealed from would have stood as "the law of the case," would make an interesting subject for another article, except that divorces granted fifty years ago must by now be pretty generally moot.

When the Divorce Laws were codified in the Divorce Law of 1929, parts of the Act of 1905 were incorporated as Sections 18, 25, 30, 45, and 53.[20] When the Procedural Rules for divorce were promulgated, Sections 25 and 30 of the Divorce Law were suspended and Sections 18, 45, and 53 were saved from suspension.

The combined legislation and decisions have left upon our books two more exceptions to the general law of marital rights and divorce procedure. The Act of 1905, *supra,* Section 1, Clause D, provided for continued support of the wife after a divorce a vinculo matrimonii and this provision has been continued in Section 45 of the Divorce Law of 1929.[21] This is the only situation in which that obligation survives such a divorce in Pennsylvania, since the provisions for support after a divorce by the husband for cruelty and indignities were repealed by Sec. 75 of the Divorce Law of 1929. Since the principle of continuing support after an absolute divorce is the general rule rather than the exception in most other jurisdictions, I do not press this point of its incongruity in Pennsylvania divorce law. It is interesting to note, however, that although divorce from an insane person can be had only on proof of *hopeless* insanity, if the respondent does in fact recover, she has lost the right of support, but the divorce remains valid.[22]

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[19] Act No. 219 of May 3, 1909, P.L. 390; see also Act of May 13, 1927, P.L. 991.
[20] PA. STAT. ANN., tit. 23, §§ 18, 25, 30, 45, and 53 respectively.
[21] PA. STAT. ANN., tit. 23, § 45.
[22] Emerick v. Emerick, 116 Pa. Super. 241, 176 Atl. 509 (1935); Hickey v. Hickey, 158 Pa. Super. 511, 45 A.2d 380 (1946).

What is more serious is that an injured spouse with a perfectly good cause for divorce against an incompetent spouse is debarred from establishing his rights unless the spouse is "hopelessly insane". That this is the law cannot be doubted in the light of *Schwarzkopf v. Schwarzkopf*,[23] and *Boyer v. Boyer*.[24]

This problem must be distinguished from several others. I am not contending that insanity should be made a cause for divorce. I have no quarrel with the decisions which disregard as indignities, acts prompted by the spouse's mental illness,[25] or which hold that an insane spouse cannot persist in desertion.[26] I agree that the rights of an incompetent spouse should be zealously guarded in any legal proceeding, for divorce or otherwise.

However, there is no good reason why, if a good cause of divorce has arisen, the later incompetency of the offending spouse should stand in the way of the innocent and injured spouse who seeks to assert his legal rights. Section 18 of the Divorce Law of 1929 would indicate legislative provision that a respondent's insanity or state of being non compos mentis should not bar a divorce proceeding, but Section 53 overrules any such implication unless there is hopeless insanity. The result of the present situation is that a person with a good cause of action, but with a spouse with a curable mental illness or with one about which science is unable to make a pessimistic prognosis, must be denied rights granted to all others with an equally good cause of action in other fields.

Any insane person is fully protected by Sections 18 and 45 of the Divorce Law of 1929 and by Pennsylvania Rules of Civil Procedure 2051 to 2075 relating to incompetents as parties. If, as was held in *Baughman v. Baughman*,[27] Section 53 of the Divorce Law of 1929 is purely procedural, it could be suspended by a Procedural Rule. A more certain method of solution would be by repeal of that section.

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[23] 176 Pa. Super. 441, 107 A.2d 610 (1954).
[24] 163 Pa. Super. 520, 63 A.2d 495 (1949).
[25] Baines v. Baines, 181 Pa. Super. 427, 124 A.2d 646 (1956).
[26] Kisner v. Kisner, 69 Pa. D. & C. 67 (1950).
[27] *Supra* note 17.