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Marion County Superior Court

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RULING ON DEMURRER TO PETITION FOR ANNULMENT OF MARRIAGE*

This proceeding is quite unusual. Both parties are petitioners yet neither is specifically either a plaintiff or defendant. No summons was issued. Both parties are represented by the same learned counsel. The prosecutor has appeared on behalf of the State and has filed a demurrer for insufficient facts on behalf of the defendant.

The petition is one to annul a marriage entered into between the parties; the petition recites that Henry R. Steinkuhler is past 66 years of age, and Elizabeth P. Steinkuhler is ten years younger; that said Steinkuhler had been married to a former wife, Elsie, who while in a state of mania due to the menopause, had sued for and obtained a divorce,which proceeding was "regular, proper and valid;" that such mania " in due time passed away;" that the petitioners intermarried September 2, 1913, but later learned that the affections and family ties between said Elsie and Henry had not been eradicated, and that (with their study of the Bible) petitioners were both convinced they were violating the law by living together as man and wife, whereupon, three years ago, they separated. Wherefore they ask an annulment of their marriage contract and her former name Bowman be restored.

Some marriages are void and other voidable. The former need no annulment proceeding (except to make a record); the latter are binding until annulled. Still others are valid, incapable of being annulled, but terminated only by divorce.

Marriage creates a social status wherein not alone the parties but the State is interested; *Di Lorenzo v. Di Lorenzo,* 174 N. Y. 467, 95 Am St 609, 43 L R A 92, 3 Amer Rul Cas 252. Marriage differs from other civil contracts in that it is not revocable at the will or consent of the parties; *Hilton v. Roylance,* 25 Uthah 129, 95 Am St 821, 58 L R A 723. It has always been a matter of legislative control; *Maynard v. Hill,* 125 U S 190; *Grigby v. Duket,* 90 Wis 272, 48 Am St 928, 31 L R A 515.

Although a valid marriage can not be entered into by one whose divorce from a former spouse is invalid (*Collins v. Voorhees* 47 N J Eq 315, 24 Am St 412, 14 L R A 366, 3 Amer Rul Cas 139) it will be noted the petition in the case at bar expressly says the decree divorcing Elsie from Henry was "regular, proper and valid." As between a former and a subsequent marriage all the presumptions favor the latter; in re Sloan, 50 Wash 86, 17 L R A ns 960; including the presumption that such former marriage was legally dissolved, *Schaffer v. Richardson,* 125 Ind 88, L R A 1915 E, 186 (annot). We have then in this case a

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***This is a ruling on demurrer by Judge Moll in *In Re Marriage of Henry R. Steinkuhler and Elizabeth P. Bowman,* Superior CT. No. 35298. It gives a judicial pronouncement in a most unusual legal action.**

valid divorce between Henry and Elsie and a subsequent valid marriage between Henry and Elizabeth, petitioners.

Tolen v. Tolen, 2 Blkfd 407 1831) 21 Am Dec 742 contains a valuable historical discussion the dissoluiton of the marriage relation by consent, by legislation and by decree. Petitioners rely on the former, and demurrant insists on the latter, and insists further the petition is insufficient on that score. In the Tolen case, *supra,* it is said (p 408) "Divorces are of two kinds, *a mensa et thoro,* and *a vinculo;* and the causes of divorce are as different as there are different states and governments. By the civil law, either party might renounce the marriage union at pleasure. Justinian for a short time abolished divorces, but was compelled to revive them again. He restored the unlimited freedom of divorce, and gave as a reason that the hatred, misery and crimes, which often flowed from indissoluble connections, required that marriage should be subject to dissolution by mutual will and consent. By the ecclesiastical law, a marriage may be dissolved and declared void *ab initio,* for canonical impediments existing previous to marriage. In the Roman Catholic States heretofore, divorces were not allowed, because marriage was considered by them a sacrament and indissoluble. The Napoleon Code admits of divorce for several named causes to be pronounced by the tribunals, where the parties can not agree on a dissolution, and in all cases where the parties agree thereto. In England a divorce *a vinculo* is seldom granted except for adultery, but divoces *a mensa et thoro* are very common and often for very trifling causes. In some of our states, divorces *a vinculo* are restrained by constitutional provisions, which require the assent of two thirds of the legislature founded on previous judicial investigation. In some, divorces are granted solely by special acts of the legislature; in others, divorces *a vinculo* are judicially granted for adultery only; and in others, not only for adultery but also for ill treatment, abuse, abandonment, and many other causes. In our state, divorces *a vinculo* only are granted; a divorce *a mensa et thoro* is not authorized" Legislative divorce were granted in Indiana in territorial days. Since 1903, limited divorces may be decreed. The inference in the *Tolen Case,* that a marriage valid (or even voidable) when entered into can be dissolved only by judicial decree based on some statutory ground, has never been questioned, modified or departed from. "An action for divorce is brought for the purpose of dissolving a marriage; while a nullity suit is brought for the purpose of having a void marriage declared void, or a voidable marriage judicially made void. In the divorce suit the marriage is recognized as valid and adjudged to be dissolved from the date of the decree, but in the nullity suit the marriage is not recognized, but is adjudged void, that is, that there was no marriage, and the rights of the parties are the same as if the marriage had never taken place." *Henneger v. Lomas,* 145 Ind 287, 298, 32 L R A 848. The court at p. 300 distinguishes *Bishop v. Redmond,* 83

Ind 157, by saying the complaint there "did not state any statutory cause for divorce, but did state facts sufficient to entitle appellee to a decree of nullity on the ground of fraud. It was only upon this theory that the action of the trial court could be sustained." In the case at bar no statutory grounds for divorce are averred, in truth, a divorce is not sought. "The right to a divorce exists only by legislative grant, the marriage contract in this respect being regulated and controlled by the sovereign power, and not being like ordinary contract subject to dissolution by mutual consent of the contracting parties, but only for causes sanctioned by the law." 9 R C L 252, citing many leading cases, among them *Maynard v. Hill, supra.*

No decree of nullity can be entered upon the mere consent of the parties of record, because they can not bind the public; there must be a complaint in due form for a cause authorized by law. *Sickles v. Carson,* 26 N J Eq 440; *Blott v. Rider,* 47 How. Pr. (BY) 90.

We conclude the complaint is insufficient because:

1. It shows affirmatively a legal divorce between Henry and Elsie;

2. It shows affirmatively a legal marriage between Henry and Elizabeth;

It shows no cause existing at or since their marriage justifying a dissolution, either by annulment or divorce;

4. Consent of the parties is not sufficient.

The demurrer is sustained, with exceptions to both petitioners.

THEOPHILUS J. MOLL

Judge of the Superior Court, Marion County.