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flicting interests. And, by not acting solely for the benefit of the estate, the administrator breached his fiduciary obligation. Consequently, the agreement's provision for a five percent real estate commission was inapplicable. Without either the administrator or the attorney receiving a commission, the Court concluded that the administrator's offeror's bid was the highest and therefore directed that the property be sold to him.

DOMESTIC RELATIONS

WITHHOLDING OF SEXUAL RELATIONS AS CONSTITUTING ABANDONMENT

It has been held in this state that wilful refusal to have sexual relations in marriage, if without sufficient legal cause, constitutes abandonment,[1] and as such will support an action for separation under Section 1161 of the Civil Practice Act.[2]

In *Diemer v. Diemer*,[3] the Court reexamined this holding and in addition, was forced to interpret what constitutes, first, a wilful refusal, and secondly, sufficient legal cause. This case involved cross actions for separation. The parties to the action had married in a Protestant Church about five years prior to this suit, in accordance with the husband's faith, although the wife was Roman Catholic. They were both approximately forty years of age at the time of their marriage and had considered and discussed the possible problems that might confront them. The husband made it entirely clear that he was firm in his faith and too old to change. His wife agreed with his position and expressed a desire to attend his church. This she did, and a year and a half after their marriage, she became a member of his congregation. Their marriage was happy and untroubled and the husband was admittedly, by the wife's own trial testimony, a fine man and a good husband. About three years after the marriage a child was born, and at about the same time the wife began to regret her loss of the Catholic faith. She consulted a priest, and was told that in the eyes of the Church, her marriage was invalid.

She then decided, and so informed her husband, that her marital relations would be denied to him until he remarried her in the Catholic Church. He refused but she remained firm in her denials. They continued to live together in this manner for several months until finally the husband realized his wife would not change her mind. He then left home and commenced this suit, continuing to support her and the child.

In trial court, he sued for separation on the grounds of cruel and inhuman treatment.[4] The Court denied a legal separation but awarded custody of the

1. Mirizio v. Mirizio, 242 N.Y. 74, 150 N.E. 605 (1926).
2. N.Y. Civ. Prac. Act § 1161(3) states that an action for separation is maintainable for the abandonment of the plaintiff by the defendant.
3. 8 N.Y.2d 206, 203 N.Y.S.2d 829 (1960).
4. N.Y. Civ. Prac. Act § 1161(1) provides for a separation based on the cruel and inhuman treatment of plaintiff by defendant.

child to the wife. The Appellate Division affirmed in a memorandum decision with one dissent.[5]

On review by the Court of Appeals, it was noted that the decisions of both lower courts were based on the fact that, as to proving cruel and inhuman treatment, the wife's conduct was not intentionally intended to produce harm, and that apparently the husband had not actually sustained any damage to his health. The Court felt that the criteria thus applied was too restrictive,[6] and that the essentials of cruelty are here established; however, the Court preferred to base its opinion on the ground of abandonment as alleged and proved by the facts. Abandonment is no longer limited to a mere "technical physical separation",[7] but is rather a denial of a fundamental marital right which strikes at the civil institution of marriage.

The Court, in *Mirizio v. Mirizio*,[8] was faced with a situation somewhat similar to the present case. There the parties had been married in a civil ceremony, with a prior agreement not to consumate their marriage until another ceremony had been performed in a Catholic Church in accordance with the wife's faith. After the civil ceremony, the husband refused to comply with the agreement, and the wife therefore refused to consumate the marriage. The wife subsequently commenced an action for separation on the ground of abandonment, and in a well reasoned opinion considering the underlying issues of law and policy, the Court held that her denial of sexual relations was a denial of a right so fundamental to the civil institution of marriage as to undermine the essential structure of that institution, and therefore, her legal misconduct was a valid defense to the action. It is meaningful to note that the equities of the situation were with the wife in that case, as the prenuptial agreement was recognized, and the husband's refusal to comply with that agreement was totally without justification. But the Court felt that the denial of sexual relations was so antagonistic to the institution of marriage that public policy demanded she be granted no legal relief.

It is in marriage and only in marriage that the State condones sexual relations. Any other right arising out of the marriage contract can be legally contracted for. It is, therefore, this one essential attribute that distinguishes the institution from all other legal contracts. To deny this fundamental right denies and defeats the institution of marriage itself.

The Court holds that the reasoning in the *Mirizio* case dictates the conclusion here. There is no hostility toward religion or principles of moral conduct on the part of the Court, but "as a matter of long-continued policy . . . [our state]

5. 6 A.D.2d 822, 176 N.Y.S.2d 231 (2d Dep't 1958).

6. See Sherman v. Sherman, 7 N.Y.2d 1032, 200 N.Y.S.2d 419 (1960), where a separation was granted on the grounds of cruel and inhuman treatment. The cruelty amounted to excessive spending by the wife, "making an unhappy home" and causing the husband "great mental pain and suffering."

7. Heermance v. James, 47 Barb. 120, 126 (1866).

8. Supra note 1.

has fixed the status of the marriage contract as a civil contract",[9] and as such, an unjustified denial of primary rights strikes at the heart of the contract itself.

It is only for this Court to decide then whether the denial was legally justified. The Court holds it was not. The argument that the suffering caused was unintentional cannot stand. It was the wife's purpose in denying sexual relations to coerce the husband into submitting to her request. This was admitted and she cannot now argue she did not intend him to suffer.

The mere fact that she acted without malice, and through a deep religious conviction, gave her acts no legal justification. And, if she be free to repudiate the validity of her marriage, her husband also must enjoy the same privileges and be allowed to free himself of his marital obligations.

The majority of this Court cannot agree with defendant's further contention that the husband may not prevail on the ground of abandonment because the conduct was characterized in the complaint as cruelty. The Court holds that the time has passed when form was all important and the pleader was absolutely bound by the labels he placed on the allegations in his complaint. The complaint here alleges, and the defendant has admitted in her testimony, all the facts necessary to support an action for separation based on abandonment. It is for the Court to determine the legal force and effect of those allegations.

By a 5-2 decision, the Court reversed the Appellate Division, and directed that a decree of separation be granted in favor of the husband.

The dissenting opinion by Judge Desmond does not go to the merits of the case, but is based on the Court's discussion of the issue of abandonment when abandonment was not pleaded. Judge Desmond feels this to be a departure from the settled rule that parties to a private suit fix the theory of suit and no appellate court can present the losing side with a new theory.

With this contention the writer cannot agree. The Civil Practice Act requires pleadings contain "a plain and concise statement of the material facts on which the party pleading relies".[10] The Rules of Civil Practice for a complaint in an action for separation requires only that the pleader must "specify particularly the nature and circumstances of the defendant's misconduct and set forth the time and place of each act complained of with reasonable certainty".[11]

The cause of action for separation is alleged. The facts pleaded constitute abandonment. The mere fact that the wife's conduct was not so labeled should not prevent the court from determining the legal force and effect of the facts pleaded. It was held in *Savings Bank of New London v. New York Trust Co.*[12] that "Neither the prayer for relief nor the theories of the plaintiff nor his

9. Id. at 83, 150 N.E. 608.
10. N.Y. Civ. Prac. Act § 241.
11. N.Y. Rules of Civ. Prac. Rule 280.
12. — Misc. —, 27 N.Y.S.2d 963, 971 (Sup. Ct. 1941).

characterization of the plea control the court . . . in its construction of the pleading nor legal effect thereof, nor the wrong shown by the facts, nor as to the relief or remedy to be granted . . . " To the writer this appears to be the better view.

Nunc Pro Tunc ORDERS UNDER THE CODE OF CIVIL PROCEDURE SECTION 1774.

The purpose of a *nunc pro tunc* order is to install in the record a fact which, through mistake, oversight, or other error, has been omitted from the record.[13] "While a court may record an existing fact *nunc pro tunc,* it cannot record a fact as of a prior date when it did not then exist." [14]

In the case of *Cornell v. Cornell,*[15] the plaintiff wife obtained an interlocutory divorce decree from Elven Cornell in 1915. In 1930 she remarried. Elven died in 1938, and her second husband died in 1956. The latter's will left his residuary estate to the intervenor in the present case. The plaintiff elected to take her intestate share. The intervenor contended that since no final judgment was entered upon plaintiff's interlocutory divorce decree, her marriage in 1930 was void. This is a suit to have that final decree entered *nunc pro tunc.* The Court of Appeals reversed the Appellate Division and entered the order.

The Appellate Division had reversed the trial court,[16] and denied such an order relying on the 1909 case of *In re Crandall's Estate.*[17] In that case, the husband obtained an interlocutory divorce decree. He then died after the interlocutory period had expired without a final judgment being entered. After his death, his former attorney sought a *nunc pro tunc* order to have such judgment entered. The Court of Appeals held that Section 1774 of the Code of Civil Procedure prevented such an order.

In the *Cornell* case, the plaintiff's first husband died before Section 1176 of the Civil Practice Act came into effect,[18] therefore Section 1774 of the old Code controls this case as well. The relevant portion provided, "Within thirty days after the expiration of said period of three months final judgment shall be entered as of course . . . unless for sufficient cause the court in the meantime shall have otherwise ordered." [19]

The Court in the *Crandall* case held that ". . . the entry of final judgment, especially under the circumstances presented to us, [is not] automatic and of course." [20] These circumstances were that the husband, who had obtained the

13. Merrick v. Merrick, 266 N.Y. 120, 194 N.E. 55 (1934).
14. Guarantee Trust Co. v. Philadelphia, Reading & N.E. R.R. Co., 160 N.Y. 1, 7, 54 N.E. 575, 577 (1899). See also, Mohrmann v. Kob, 291 NY. 181, 51 N.E.2d 921 (1934).
15. 7 N.Y.2d 164, 196 N.Y.S.2d 98 (1959).
16. 9 A.D.2d 11, 189 N.Y.S.2d 812 (3d Dep't 1959).
17. 196 N.Y. 127, 89 N.E. 578 (1909).
18. This amendment became effective September 1, 1946. The N.Y. Civ. Prac. Act replaced the Code of Civ. Proc. in 1920.
19. The several amendments to the N.Y. Code of Civ. Proc. § 1774 did not alter this language between the time of the Crandall case and the original divorce suit between the Cornells in 1915.
20. Supra note 17 at 131, 89 N.E. 580 (1909).