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Alimony - Evidence of Fault - Accrued Payments Under Suspensive Appeal

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appearance of the party at the hearing? In the past courts have limited the cure of a defective notice to an actual appearance and participation in the hearing.

In this case the court has extended the doctrine of waiver of notice by an actual appearance and participation in the proceeding to an appearance with counsel in the corridor, adjoining the hearing room. Because of the peculiar facts in the case, it is believed that such an extension is justified. First, the parties did appear, in a sense of the word; and although they did not participate in the hearing, they were given full opportunity to do so. It was their own choice in refusing the request to participate in the hearing. Second, the alleged non-compliance with the act[8] did not prejudice the parties. This was evidenced by the parties having been present at the proper place, at the correct time, and with counsel. Their appearance at the hearing with counsel was precisely the object to be accomplished by the notice.

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ALIMONY—EVIDENCE OF FAULT—ACCRUED PAYMENTS UNDER SUSPENSIVE APPEAL—In June of 1940, plaintiff husband was awarded an absolute divorce on the ground of two years voluntary separation. The wife reconvened for alimony, and the court, concluding that the evidence did not warrant a finding that she had been at fault,[1] awarded alimony at the rate of five dollars a week. Plaintiff's evidence, which might have proved that the parties had never lived together, was ruled inadmissible on the ground that it was irrelevant in determining the fault issue. From the alimony judgment, he appealed suspensively. Since neither litigant sought to have the case removed to the preference docket until 1947, eight and one-half years passed before the supreme court heard the case. *Held,* on appeal, the evidence admitted below was inconclusive on the issue of fault and evidence that the parties had never lived together would have been relevant in determining this issue. The case was remanded for admission of the excluded evidence and determination of the fault issue, with instructions to reinstate the prior judgment if defendant was not found to have been at fault. *Reich v. Grieff*, 38 So. (2d) 381 (La. 1949).

8. La. Act 185 of 1944 [Dart's Stats. (Supp. 1947) § 2248].

1. The defendant wife against whom is pronounced a judgment of divorce on the grounds of two year separation may be awarded alimony if she was not at fault in causing the separation. Art. 160, La. Civil Code of 1870.

In Louisiana, the criteria for determining the question of fault have never been well settled.[2] Alimony has been awarded where evidence showed that the separation had occurred by mutual consent.[3] The principle accepted here is that "at fault" denotes main fault. But the negative approach has been taken in some decisions[4] requiring that the wife "not be at fault," meaning apparently that she must be "predominantly" free from fault.[5] The case under consideration perhaps supports this position as it was remanded because the evidence did not establish the fact that the wife was free from fault. Although an examination of the cases fails to reveal a definitely settled approach,[6] the "main fault" criterion seems the more desirable, as there is little real justification for relieving a husband of the obligation to pay alimony if his responsibility for the separation is as great as or greater than that of his wife.[7]

In any event, the supreme court consistently has inquired into many circumstances of the marital relationship in order to determine the fault issue. In this respect, the instant case is directly in line with prior cases.[8]

In deciding that over $2200 in alimony, which had accrued for eight years under suspensive appeal, could be recovered in a lump sum (if the district court again failed to find the wife at fault), the court resolved any doubt that may have been created in this direction by the earlier case of *Scott v. Scott*.[9] In the *Scott* case alimony amounting to $1500 had accrued for only three years; but the court felt that testimony taken three years pre-

2. For a discussion of the disadvantages of allowing alimony to turn on the question of fault, see Daggett, The Work of the Louisiana Supreme Court for the year 1941-1942 Term—Family Law (1943) 5 LOUISIANA LAW REVIEW 193, 196, commenting on August v. Blache, 200 La. 1029, 9 So. (2d) 402 (1942).

3. Bienvenue v. Bienvenue, 192 La. 395, 188 So. 41 (1939).

4. Pitre v. Burlett, 190 La. 127, 182 So. 123 (1938).

5. "Experience and common sense should tell us that when matrimonial difficulties arise, the fault is almost never all on one side." 2 Vernier, American Family Laws (1932) § 104. Art. 3556, § 13, La. Civil Code of 1870, illustrates three degrees of fault and one for which no responsibility attaches. No court has held that any fault at all on the part of the wife would defeat alimony.

6. Martin v. Martin, 191 La. 761, 186 So. 94 (1939); Alexander v. Jackson, 195 La. 808, 197 So. 510 (1940); Davis v. Watts, 208 La. 290, 23 So.(2d) 97 (1945).

7. See Keezer, The Law of Marriage and Divorce (Morland's 3rd ed. 1946) §§ 631-632; Vernier, loc. cit. supra note 5.

8. Pitre v. Burlett, 190 La. 127, 182 So. 123 (1938); Bienvenue v. Bienvenue, 192 La. 395, 188 So. 41 (1939); Martin v. Martin, 191 La. 761, 186 So. 94 (1939); Alexander v. Jackson, 195 La. 808, 197 So. 510 (1940).

9. 197 La. 726, 2 So.(2d) 193 (1941).

viously would not accurately show the wife's *present* need or the husband's *present* ability to pay. The case was remanded for a determination of the present financial conditions of the parties, and the wife was deprived of the alimony that had accrued under suspensive appeal.[10] The manner in which the *Scott* case was handled is difficult to reconcile with the general scheme of our system of appeals and with the laws on increase and reduction of alimony.[11] Although the evidence in the lower court was not conflicting or inadequate, it was ignored, and the lower court was required to consider what in effect was a new controversy. The supreme court evidently failed to take into consideration the fact that the appeal questioned only the validity of the judgment below.[12] A somewhat similar approach had been taken in the earlier case of *Abrams v. Rosenthal*,[13] an alimony suit in which the husband attempted to introduce new evidence in the supreme court to show the income of the wife during a period subsequent to the original trial. Apparently the income of the wife had changed pending appeal. Relying on its so-called "equity" powers, the supreme court remanded the case for consideration of the new evidence. Whether the supreme court is vested with authority to remand a case on the basis of new evidence not material to any issue involved in the original trial is open to serious doubt.[14] Article 906 of the Code of Practice confers broad powers upon the supreme court to remand cases, and on the basis of this article the supreme court has been considered to have authority to remand a case with instructions to hear evidence arising after trial in the lower court, but indicative of conditions as of the time of the trial below.[15]

In the present case, the court did not mention the *Scott* or

10. Chief Justice O'Niell, speaking for a unanimous court, said, "The lawmakers never intended that alimony should be paid in a large lump sum, or otherwise than in installments of such amounts and of such frequency as she needs the money." 197 La. 726, 730-731, 2 So.(2d) 193, 194 (1941).

11. Art. 232, La. Civil Code of 1870, allows parties at any time to institute summary proceedings to obtain the benefit of any change in status.

12.. In neither appellant's or appellee's brief was the contention made that the financial condition of the parties had changed pending appeal.

13. 151 La. 987, 92 So. 567 (1922).

14. Cf. Slagle v. Slagle, 205 La. 694, 698, 17 So.(2d) 923, 924 (1944), where the cases was remanded because of error below with instructions to the effect, "in the interest of justice, it is being remanded without restriction on the part of either party to introduce any evidence that may be available touching on Slagle's ability to meet these alimony payments from June 1 until his resumption of work, as well as thereafter."

15. Robison v. Howell, 22 La. Ann. 524 (1870); Union National Bank v. Evans, 43 La. Ann. 372 (1891); Vilce v. Travelers Ins. Co., 18 So.(2d) 243 (La. App. 1944); McClung v. Delta Shipbuilding Co., 33 So.(2d) 438 (La. App. 1948).

Abrams cases. There is no inference that the decision purports to limit the discretion exercised in those cases. Hence, although the *Reich* case does not necessarily manifest a change in the interpretation of the law, at least it represents a changed attitude in its application to certain factual situations. The approach now taken seems to be more logical and correct, as a strict adherence to the *Scott* and *Abrams* cases would lead to the paradox of a wife being deprived of alimony for a period during which she was entitled to it as a matter of law.

E. DREW MCKINNIS

CIVIL LAW PROPERTY—ENCROACHMENTS ON RIVER BANKS BY RIPARIAN OWNERS—Defendant owned a warehouse that extended from the adjacent land across the bank[1] to the water line of a navigable river, within the corporate limits of Madisonville. Plaintiff city brought suit to compel the defendant to destroy or remove the warehouse on the ground that it obstructed and embarrassed the use of the bank, which is common to all. *Held,* under Article 862 of the Civil Code,[2] the building should be permitted to remain, for it merely encroaches upon the bank and does not *absolutely* prevent its use. *Town of Madisonville v. Dendinger,* 38 So.(2d) 252 (La. 1948).

It is elementary that "the use of the banks of navigable streams or rivers is public,"[3] and Louisiana courts have almost

1. Art. 457, La. Civil Code of 1870: "The banks of a river or stream are understood to be that which contains it in its ordinary state of high water; for the nature of the banks does not change, although for some causes they may be overflowed for a time.

"Nevertheless on the borders of the Mississippi and other navigable streams, where there are levees, established according to law, the levees shall form the banks."

"The bank of a river is that space which the water covers when the river is highest in any season of the year." Sweeney v. Shakespeare, 42 La. Ann. 614, 7 So. 729, 21 Am. St. 400 (1890).

2. Art. 862, La. Civil Code of 1870: "If the works, formerly constructed on the public soil, consist of houses or other buildings, which can not be destroyed, without causing signal damage to the owner of them, and if these houses or other buildings merely encroach upon the public way, without preventing its use, they shall be permitted to remain, but the owner shall be bound, when he rebuilds them, to relinquish that part of the soil or of the public way, upon which they formerly stood."

3. Art. 455 La. Civil Code of 1870: "The use of the banks of navigable rivers or streams is public; accordingly every one has a right freely to bring his vessels to land there, to make fast the same to the trees which are there planted, to unload his vessels, to deposit his goods, to dry his nets, and the like.

"Nevertheless the ownership of the river banks belongs to those who possess the adjacent lands."