Louisiana Law Review

Volume 1 | Number 2
January 1939

Separation from Bed and Board - "Mutual Wrongs" Doctrine

W. S.

"write ups" in addition to the space bought;[11] or to show that a vendee by authentic act of sale had agreed to share equally with the vendor any profits from resale of the real estate purchased;[12] or that the vendor of phonographs had agreed verbally to have the merchandise delivered at least two weeks before Christmas, and to send a salesman to Louisiana to assist in demonstrating and selling the instruments.[13] Parol has been admitted, however, to show that the lessor of certain property gave verbal notice to the lessee that no liquor could be sold on the premises, though the restriction was not included in the written instrument;[14] and the vendee of a second hand car was permitted to show that the consideration named for the car included a sum for which the vendor agreed verbally to secure collision insurance for the purchaser.[15]

In accordance with the weight of Louisiana authority and under an application of the accepted criterion, it would seem that the parties in the instant case "naturally and normally" would have included the alleged collateral agreement—an important guaranty—in the written contract; thus the parol proof should have been barred. No harm was done in the principal case, since the evidence offered did not prove the existence of the purported oral agreement, yet this decision should not be taken as a precedent for further relaxation of the rule protecting the integrity of written contracts.

C. O'Q.

SEPARATION FROM BED AND BOARD—"MUTUAL WRONGS" DOCTRINE—A wife sued for separation from bed and board on the grounds of slander, defamation and cruel treatment. In denying these allegations, the husband averred—without making any reconventional demand—that his wife had an ungovernable temper and that, as a result of her cruelty to him, they had been living separate and apart for more than two years. On original hearing the plaintiff was awarded a decree of separation from bed and

11. The Item Company, Ltd., v. Wormington Machinery Power & Equipment Co., Inc., 4 La. App. 519 (1926).

12. Pfeiffer v. Nienaber, 143 La. 601, 78 So. 977 (1918) (O'Niell, J., dissenting).

13. Brenard Mfg. Co. v. M. Levy, Inc., 161 La. 496, 109 So. 43 (1926).

14. New Orleans and Carrollton Railroad Company v. Darms, 39 La. Ann. 766, 2 So. 230 (1887).

15. McConnell v. Harris Chevrolet Co., Inc., 147 So. 827 (La. App. 1933).

board. *Held,* on rehearing, with two justices dissenting, that since both parties were at fault, and since the complainant was not comparatively free from wrong, no judgment could be granted in her favor. *Aragon v. Herrmann,* La. Sup. Ct., Docket No. 34,577 (1938).

At an early date,[1] the rule seems to have been settled that the provisions for separation from bed and board in certain cases are made for the relief of the oppressed party, not for the purpose of interfering in quarrels where both parties commit reciprocal excesses and outrages. This original doctrine of mutual wrongs was reasserted[2] and then qualified to the effect that the wrongs should be similar in nature and so proportional in extent as to render it difficult to ascertain which party is mainly at fault. This reduced the instances of application of the broad doctrine that reciprocal wrongs are mutually defeasible.[3]

From the language of a later case, *Schlater v. LeBlanc,*[4] it would seem that the welfare of the children is a prime factor for consideration. In that case, a separation was granted despite the fact that both parties were at fault since this appeared to be in the interest of the children. On the other hand, where the facts supported the belief that, because of children, there remained some endearing ties which would make it possible for the spouses to live together companionably, then the court properly applied the doctrine of mutual wrongs in order to keep open an opportunity of reconciliation.[5] In those instances where children are not involved and both parties are guilty of equal wrongs of a serious nature toward the other, then neither party will be granted relief in Louisiana, as the court adheres strictly to the original rule.[6]

---

1. Durand v. Her Husband, 4 Mart. (O.S.) 174 (La. 1816).
2. Trowbridge v. Carlin, 12 La. Ann. 882, 884 (1857).
3. Thomas v. Tailleu, 13 La. Ann. 127 (1858).
4. 121 La. 919, 930; 46 So. 921, 924 (1908). In this case the court stated as follows: "All during the time . . . there were disagreements, gloom, unhappiness in the family. There was suffering on the part of each, as we infer, which would not down. There was incompatibility between the two, difference in their natures." The court took cognizance of the incompatibility, the chance for future happiness, the welfare of the family as a whole.
5. Castanédo v. Fortier, 34 La. Ann. 135, 136 (1882). Where the parties had been married over twenty years and had eleven children the court justified its dismissal of the action in the following language: "Both [of the parties] are fond of their children and we are of the opinion . . . that this common and endearing tie, exercising a soothing and hallowing influence, renders reconciliation and reunion highly probable."
6. Durand v. Her Husband, 4 Mart. (O.S.) 174 (La. 1816); Lalande v. Jore, 5 La. Ann. 32 (1850); Amy v. Berard, 49 La. Ann. 897 (1897); Snell v. Aucoin, 158 La. 767, 104 So. 709 (1925); Gormley v. Gormley, 161 La. 121, 108 So. 307 (1926); McKoin v. McKoin, 168 La. 32, 121 So. 182 (1929).

In France, the strong tendency, worked out mainly with regard to divorce, is to consider reciprocal fault as double reason for releasing the parties rather than no reason at all.[7] Certainly the majority of French writers favor this view.[8] It must not be forgotten, however, that particularly in the case of cruel treatment there is much to be said for the view that mutual recriminations due to the heat of provocation may tend to cancel one another.[9] Much must also be said for the French doctrine that where mutually intolerable offenses are not present, wide discretion should be left to the judge[10] to attempt a reconciliation.

This question of whether two wrongs can ever make a right has not been materially discussed in the Louisiana decisions. The court has insisted upon the preservation of the marital status, but the constant change in our customs and conventions may bring about further modification of the present doctrine and its effects. In the event of releasing the spouses from an impossible marital relationship, the question as to which spouse should be granted the decree is of no importance except as to alimony[11] and custody of children, the matter of primary consideration being the dissolution of the marriage relationship for the benefit of all parties concerned.

W. S.

WILLS—REVOCATION OF SECOND WILL REINSTATES THE FIRST ONE—Upon the death of the testatrix, two purported wills in olographic form were offered for probate, one dated August 27, 1927 and the other April 5, 1928. The will bearing the posterior date con-

---

7. *"Lorsque le demandeur est lui-même coupable envers son conjoint, la seule conséquence de ce fait est que les causes du divorce existent en double, et qu'il y a deux raisons au lieu d'une pour le prononcer."* 1 Planiol, Traité Elémentaire de Droit Civil (12 ed. 1937) 422, nº 1205.

(Translation) "When the plaintiff is himself guilty towards his spouse, the only consequence of this fact is that the grounds for divorce are double, and that there are two reasons instead of one for pronouncing it." See also 1 Marcadé, Explication Théorique et Pratique du Code Napoléon (5 ed. 1852) 607, nº 769.

8. See 1 Colin et Capitant, Cours Elémentaire de Droit Civil Français (8 ed. 1934) 216, nº 189 (5).

9. Cass., 18 janv. 1881, Dalloz. 1881.1.125; Cass., 12 janv. 1903, Sirey.1903.1. 279.

10. 7 Aubry et Rau, Cours de Droit Civil Français (5 ed. 1913) 301-302, § 477.

11. See Mouille v. Schutten, 190 La. 841, 865, 183 So. 191, 198-199 (1938) (O'Niell, C.J., dissenting on the admission of testimony, not on the merits).