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Divorce - "Voluntary" Two-Year Separation

Harriet S. Daggett

DIVORCE—"VOLUNTARY" TWO-YEAR SEPARATION—Husband sued wife for divorce under the two-year separation act,[1] alleging that the living separate and apart began on May 1, 1941. The wife pleaded in defense that the husband had been inducted into the armed services of the United States in October 1941, was still in the service at the time he instituted suit, could not count the time spent in the armed forces, and hence could not obtain his divorce under the statute. The supreme court of the state affirmed the judgment of the lower court, granting the husband a final divorce. A preponderance of the evidence showed the wife to have been "at fault" so she received no alimony. The children were given into the wife's custody and were granted the full amount of the stipend for support allowed by the United States government. Attorney fees, one hundred dollars, were given to the wife and costs were charged to the plaintiff husband. *Davis v. Watts*, 23 So.(2d) 97 (La. 1945).

Interest centers on the divorce decree under the two-year act judicially amended by the insertion of the word *voluntary* in the statute which required proof of only the "continuous living separate and apart of the spouses"[2] for two years or more. This doctrine was first reported in *Leveque v. Borns*[3] and reaffirmed in *Galiano v. Monteleone*.[4] The foundation case of *Vincent v. Le Doux*[5] wherein Judge Monroe wrote the majority opinion on rehearing gave unlimited effect to the statute, which then required a seven-year period of separation but otherwise contained the same language as the present two-year act. The words of the statute were said to be "clear and free from all ambiguity," to make "no distinction between the sick and the well, the competent and the incompetent, or the faulty and the faultless."[6] Justice Monroe said that to fail to grant a divorce because of lack of voluntariness would cause the following result:

> ". . . the husband who, by his ill treatment compels his wife, capable of discharging all her marital duties, and willing to

ing by parties and those deriving under them? See Powell, And Repent at Leisure, An Inquiry Into the Unhappy Lot of Those Whom Nevada Hath Joined Together and North Carolina Hath Put Asunder (1945) 58 Harv. L. Rev. 930.

1. La. Act 430 of 1938, § 1 [Dart's Stats. (1939) § 2202].

2. Ibid.

3. 174 La. 919, 142 So. 126 (1932). In *Leveque v. Borns* it was stated that in the unreported case of Artigues v. Laland, Louisiana Supreme Court Docket No. 26752 (1925), the court had found the doctrine of the *Vincent* case to be "fundamentally unsound." See also Note (1933) 7 Tulane L. Rev. 265.

4. 178 La. 567, 152 So. 126 (1933).

5. 146 La. 144, 83 So. 439 (1919).

6. 146 La. 144, 151, 83 So. 439, 441.

> do so, to live apart from him, may obtain a divorce from her, because of her so living, but the husband whose wife, notwithstanding the kindest of treatment by him, is incapable of living with him, by reason of her own infirmities, can never obtain a divorce, but must wait until released by death. In other words, the husband, in the one case, obtains his release by taking advantage of his own wrong, and in the other is denied relief from the same condition, though guilty of no wrong."[7]

The legislature was said to have

> "... unmistakably declared the public policy of the state to be that it is better, in the interest of society and good morals, that married persons, who, for whatever reason there may be, no longer live together, or are likely to do so, should be released from the bonds that were intended to keep them together, and should be allowed to establish other and perhaps happier marital relations."[8]

The *Vincent* case was sweepingly repudiated in *Leveque v. Borns,* leaving it distinguishable on its facts, however, since the separation in the *Vincent v. Le Doux* case had started voluntarily.

The opinion in the instant case does not discuss this matter at all and contains on the point but one statement:

> "Inasmuch as the separation took place prior to the husband's entry into the armed forces and the record shows the defendant refused to become reconciled with him, and more than two years have elapsed since the separation, we think the trial judge, under the provisions of Act No. 430 of 1938 (Section 2202 of Dart's General Statutes), properly granted the plaintiff a divorce."[9]

The court is certainly to be congratulated on the application of the factual distinction of *Vincent v. Le Doux* and this decision may be a step toward abandonment of the inserted word "voluntarily." The implication might be, however, that had the separation not *started* "voluntarily" that the decree would not have been awarded.

It is hoped that this line of cases dealing hitherto with the mentally ill will not be carried over to men and women in the

7. 146 La. 144, 153, 83 So. 439, 442.
8. 146 La. 144, 157, 83 So. 439, 443.
9. Davis v. Watts, 23 So.(2d) 97, 98 (La. 1945).

armed forces who are trying to regularize their domestic affairs after the many changes wrought by the emotional chaos of war.[10] The present divorce rate is one of the many disturbing signs of our time, undoubtedly adding another unstabling element to our uneasy community life. However, the straining at this technical gnat while swallowing the camels now surrounding divorce actions seems to the writer to be not only futile but harmful and apt to induce more irregular living, more manufactured evidence and even greater social dissatisfaction. It was argued in the *Vincent v. Le Doux* case that to allow the judgment "would do violence to any man's conscience." The same could be said even more forcefully where the abandoned spouse is sick of body instead of mind or where for any reason one spouse ceases to be satisfactory to the other. Mutual consent certainly is not the criterion. Involuntariness is the general rule as to one of the spouses. Why should it matter that the separation started "involuntarily" on the part of both of the spouses, if, two years of it having passed, one "voluntarily" wishes a release? Divorce obviously is a social problem primarily and the court adopted the voluntary test in a hard fact case and for the best interests of the state. It seemed strange that it stalled at the mentally-ill hurdle after having allowed the guilty plaintiff to proceed unhindered in situations ordinarily considered more serious. Under its interpretation of the statute, it consistently refused to allow a defense of adultery[11] or any other so-called marital wrong to bar the decree and stood its ground despite all criticism, relying on the legislature to change the act if there was public demand. The same attitude was taken in regard to the statute granting relief to the spouse against whom a judgment of separation had been granted.[12] One indignant and intrepid defendant even went so far as to accuse the court of assisting the plaintiff to compound the "crime of bigamy"[13] by making it possible for the allegedly adulterous plaintiff to marry his accomplice![14]

The court's attitude toward "guilty" plaintiffs relying on the statute was also favorable in its decision that the time already

10. See attitude in jurisdictional questions manifested in Burgan v. Burgan, 22 So.(2d) 649 (1945) and dissenting opinion by Chief Justice O'Niell in Zinko v. Zinko, 204 La. 478, 15 So.(2d) 859 (1943).

11. Dowie v. Becker, 149 La. 160, 88 So. 777 (1921).

12. See La. Act 56 of 1932, amending and re-enacting La. Act 25 of 1898, § 1 [Dart's Stats. (1939) § 2209]; Tortorich v. Maestri, 146 La. 124, 83 So. 431 (1919).

13. Art. 161, La. Civil Code of 1870.

14. Stallings v. Stallings, 179 La. 663, 154 So. 729 (1934).

spent apart from the abandoned spouse might properly be counted even though Mr. Hurry had "sped to court."[15] The court must have thought that some halt must be called in the rush for divorces and is certainly not to be criticized for acting conscientiously in a matter of such vital concern to the commonwealth. However, present conditions would indicate to the writer at least that this attempt to stem the tide has been and will be a deterrent of no value and should be abandoned. As a social policy the matter should be left to the time when the legislature may restate the law of divorce as a whole.

HARRIET S. DAGGETT*

EMOTIONAL DISTURBANCE — THEATER PROPRIETORS — DUTY OF COURTEOUS TREATMENT—Plaintiff, accompanied by his wife, presented tickets for admission to defendant's theater. An attendant refused to admit him on the ground that plaintiff was a cripple and that his presence during crowded hours involved a hazard to his safety. The refusal was apparently made in the presence only of the attendants and plaintiff's wife. *Held,* on appeal to the supreme court, that plaintiff is entitled to damages for emotional disturbances arising out of breach of contract. *Vogel v. Saenger Theatres, Incorporated,* 22 So.(2d) 189 (La. 1945).

Emotional disturbance is not usually recognized as an independent actionable wrong. However, the general rule that there can be no recovery without physical injury is clouded with exceptions. The exceptions created by the courts involve actions where the defendant has wilfully violated some right which the court recognizes. If a technical battery,[1] a trespass,[2] an invasion of the right of privacy,[3] a case of false imprisonment[4] or

15. Hurry v. Hurry, 141 La. 954, 76 So. 160 (1917).

* Professor of Civil Law, Louisiana State University.

1. Spearman v. Toye Bros. Auto & Taxicab Co., 164 La. 677, 114 So. 591 (1927); William Small & Co. v. Lonergan, 81 Kan. 48, 105 Pac. 27 (1909); Davidson v. Lee, 139 S.W. 904 (Tex. Civ. App. 1911); Western Union Telegraph Co. v. Bowdoin, 168 S.W. 1 (Tex. Civ. App. 1914).

2. Matheson v. American Teleph. & Teleg. Co., 137 S.C. 227, 135 S.E. 306 (1926).

3. Brents v. Morgan, 221 Ky. 765, 299 S.W. 967 (1927); Rhodes v. Graham, 238 Ky. 225, 37 S.W.(2d) 46 (1931).

4. Shannon v. Sims, 146 Ala. 673, 40 So. 574 (1906); Ross v. Kohler, 163 Ky. 583, 174 S.W. 36 (1915); Chicago, R. I. & P. Ry. Co. v. Radford, 36 Okla. 657, 129 Pac. 834 (1913).