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Alimony - Effect of Fault Under R.S. 9:301

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The rule of the present case, in securing the application of laches on both sides of federal court to claims based on unseaworthiness, tends to promote the uniformity of maritime substantive law, and so fulfills the policy behind the Supreme Court cases which developed the theory of maritime law supremacy.[27] Complete uniformity in this regard, however, would not exist unless state courts entertaining claims for personal injury caused by unseaworthiness were also bound to apply the doctrine of laches. There are apparently no cases holding state courts so bound.[28] However, the Supreme Court has required state courts to apply substantive maritime law instead of state law in determining the burden of proof of the validity of a seaman's release,[29] and the proper limitation applicable to a claim based on unseaworthiness when joined with a claim under the Jones Act.[30] It is conceivable, therefore, that in the future a state court may be compelled to apply the admiralty doctrine of laches to a claim for personal injury caused by unseaworthiness.

C. Jerre Lloyd

ALIMONY — EFFECT OF FAULT UNDER R.S. 9:301

The wife separated from her husband, who was frequently visiting the home of an unmarried woman, and she brought suit for divorce on the grounds of adultery. Because she failed to prove the alleged adultery, the divorce was not decreed, but she

had used in Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1953). See note 19 *supra*, for a brief exposition of that case.

27. The notion that maritime law should be uniform throughout the country was announced by the Supreme Court in Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917). The doctrine of the supremacy of maritime law outside the admiralty courts can be traced to this case. See GILMORE & BLACK, ADMIRALTY 374 (1957). However, state law has been allowed to supplement maritime law in the areas of liens, wrongful death statutes, partition and sale of vessels, arbitration, and insurance. See Romero v. International Terminal Operating Co., 79 S.Ct. 468, 480 (U.S. 1959).

28. The United States Supreme Court declined to decide the question in both Engel v. Davenport, 271 U.S. 33 (1926) (state may not apply its limitation period to the Jones Act, which contains a three-year limitation period of its own), and McAllister v. Magnolia Petroleum Co., 357 U.S. 221 (1958) (when claim based on unseaworthiness is joined with count for negligence under the Jones Act, state may not apply a limitation of less than three years to either count).

29. Garrett v. Moore-McCormack Co., 317 U.S. 239 (1952) (suit in state court for negligence under the Jones Act and maintenance and cure).

30. McAllister v. Magnolia Petroleum Co., 357 U.S. 221 (1958). The Jones Act provides that: "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury." 41 STAT. 1007 (1920), 46 U.S.C. § 688 (1952).

continued to live separate and apart from her husband. The husband subsequently obtained a divorce on the grounds of a two-year separation in fact,[1] and the wife was awarded alimony.[2] The husband appealed from this award, claiming the wife was not free from fault, as required by the Code. The Supreme Court *held* affirmed. The wife will be denied alimony only when her misconduct is an "independent contributory or proximate cause of the separation." Chief Justice Fournet dissented on the ground that the burden of proof is on the wife to show that she is free from fault in causing the marital discord that culminated in the separation and in this case the evidence falls far short of such proof. *Kendrick v. Kendrick,* 106 So.2d 707 (La. 1958).

Originally, Article 160 of the Civil Code allowed the wife alimony *only if she had obtained* the divorce or a separation beforehand. This meant that the husband had to be "at fault" within the contemplation of Article 138 of the Code.[3] The allowance of

1. LA. R.S. 9:301 (1950): "When married persons have been living separate and apart for a period of two years or more, either party to the marriage contract may sue . . . .for an absolute divorce, which shall be granted on proof of continuous living separate and apart of the spouses, during the period of two years or more."

2. LA. CIVIL CODE art. 160 (1870): "If the wife who has obtained the divorce has not sufficient means for her maintenance, the Court may allow her in its discretion, out of the property and earnings of her husband, alimony which shall not exceed one-third of his income; provided, however, that in cases where, under the laws of this State a divorce is granted solely on the grounds that the married persons have been living separate and apart for a certain specified period of time, and the husband has obtained a divorce upon the grounds of such living separate and apart, and the wife has not been at fault, then the Court may allow the wife, in its discretion, out of the property and earnings of her husband, alimony which shall not exceed one-third of his income

"This alimony shall be revocable in case it should become unnecessary, and in case the wife should contract a second marriage."

3. *Id.* art. 138: "Separation from bed and board may be claimed reciprocally for the following causes:

"1. In case of adultery on the part of the other spouse;

"2. When the other spouse has been convicted of a felony and sentenced to death or to imprisonment at hard labor in the state or federal penitentiary;

"3. On account of habitual intemperance of one of the married persons, or excesses, cruel treatment, or outrages of one of them toward the other, if such habitual intemperance, or such ill-treatment is of such a nature as to render their living together insupportable;

"4. Of a public defamation on the part of one of the married persons towards the other;

"5. Of the abandonment of the husband by his wife or the wife by her husband;

"6. Of an attempt of one of the married persons against the life of the other;

"7. When the husband or wife has been charged with a felony, and shall actually have fled from justice, the wife or husband of fugitive may claim a separation from bed and board, on producing proofs to the judge before whom the action for separation is brought, that such husband or wife has actually been guilty of such felony, and has fled from justice;

"8. On account of the intentional non-support by the husband of his wife,

a divorce merely for living separate and apart for a required number of years first appeared in our law in 1916. From 1916 to 1928 it was possible for the husband to obtain a divorce on these grounds; and even though the wife may have been blameless, she would be denied alimony only because she was not the one who obtained the divorce.[4] To remedy this situation, Article 160 was amended in 1928 to allow alimony to the wife against whom a judgment of divorce was rendered, if the grounds were solely for living separate and apart and the wife was not "at fault." With this there arose the new problem, unsettled even today, of determining when the wife is not "at fault" within the contemplation of Article 160 as amended.[5] The court, in deciding the fault issue, usually rests its decisions on the finding as to which party was predominately at fault, apparently balancing the merits of the positions involved, but without establishing a definite criterion to use in close cases.[6] In the recent case of *Oliver v. Abunza,*[7] the court used this approach in determining that the wife was not at fault. In a concurring opinion Justice McCaleb indicated that the wife should have been adjudged not at fault because she had obtained a judgment of separation on the grounds of abandonment after her husband had left her; thus there was judicial recognition that she was not the cause of the separation. In *Moser v. Moser,*[8] it was the husband's contention that when his wife was denied a judicial separation after she had separated from him, this should be *res judicata* of the fault issue in his subsequent suit for divorce. The court rejected this idea, however, saying that because the husband was found not to be at fault does not necessarily mean that the wife was.

The approach of Justice McCaleb in the *Oliver* case and the husband in the *Moser* case suggests a logical interpretation of Article 160 as amended. From 1916 to 1928, the husband who

who is in destitute or necessitous circumstances, or by the wife of her husband who is in destitute or necessitous circumstances;

"9. When the husband and wife have voluntarily lived separate and apart for one year, and no reconciliation has taken place during that time."

Note: The ninth clause is not applicable to our discussion because it does not list a cause which allows one spouse to separate from the other.

4. North v. North, 164 La. 293, 113 So. 852 (1927).

5. For a discussion of the disadvantages of determining the alimony award by the fault issue, see *The Work of the Louisiana Supreme Court for the 1941-1942 Term — Civil Code and Related Subjects,* 5 LOUISIANA LAW REVIEW 193, 196 (1943).

6. See, e.g., Hornsby v. Hornsby, 208 La. 316, 23 So.2d 105 (1945); White v. Broussard, 206 La. 25, 18 So.2d 641 (1944); Jones v. Jones, 200 La. 911, 9 So.2d 227 (1942); Scott v. Scott, 197 La. 726, 2 So.2d 193 (1941).

7. 226 La. 456, 76 So.2d 528 (1954).

8. 220 La. 295, 56 So.2d 553 (1951).

was clearly at fault within the meaning of Article 138 could obtain a divorce on the grounds of a separation in fact, and the innocent wife could not receive alimony.[9] This was the evil that the 1928 amendment was designed to correct. Thus, the legislature must have intended that the wife whose husband had obtained a divorce on the grounds of a separation in fact should be allowed alimony where the husband was at fault under Article 138. This would mean that the wife should be found not at fault if she would have been entitled to a judicial separation when the separation in fact took place.[10] The court could determine this if one of the parties actually sued for a separation prior to the husband's divorce suit, or if neither party sued for a separation, the court could determine from the facts, in the divorce suit, whether the separating spouse had a legal cause to leave under Article 138. If not, that spouse should be adjudged at fault for abandonment. By use of this approach, the court would have a definite legislative criterion on which to determine the fault issue.

There are indications in the prior jurisprudence as pointed out by Chief Justice Fournet's dissenting opinion in the instant case, that the burden of proof is on the wife to show that she is not at fault in her claim for alimony.[11] However, in the above approach, it is submitted that the burden should always be on the separating spouse to show a legal cause in leaving, because a separation without legal cause is the equivalent of abandonment within Article 138. This would be true whether the separating spouse be the husband or the wife. Thus, the wife would be considered free from fault (1) as a result of such a finding in a separation suit which may have been brought after the separation in fact took place or, assuming neither party sued for separation, (2) if, having separated from her husband, the wife proved in the divorce suit that she had grounds for separation under Civil Code Article 138, or (3) if the husband, having sep-

9. North v. North, 164 La. 293, 113 So. 852 (1927).

10. In the cases where the court finds that the parties separated by mutual consent, with neither having a legal cause under Article 138, then fault would exist as to neither, and it would appear that the wife would not be "at fault" and should receive alimony. See Bienvenue v. Bienvenue, 192 La. 395, 188 So. 41 (1939). If the court finds that both parties had a legal cause for separation under Article 138, then both parties would be at fault, and it would appear that alimony should not be allowed.

11. The court has handled this problem many times without going into the burden of proof. The cases found which did go into this issue, however, have held that the burden is on the wife. See Creel v. Creel, 218 La. 382, 49 So.2d 617 (1950); Hawthorne v. Hawthorne, 214 La. 905, 39 So.2d 338 (1949).

arated from his wife, failed to prove in the divorce suit that he had grounds for separation under Article 138. Of course, if the parties separated by mutual consent, neither having grounds for separation under Article 138, then it would appear that fault would exist as to neither, and alimony should be awarded.

The majority in the instant case found the wife not to be at fault, but it did not reveal the method used in determining this. Applying the facts in this case to the suggested approach would put the wife in the position of proving that when she left her husband she had legal cause to do so, if she were to receive alimony. Whether or not she would have received the award is questionable because the court may or may not have considered the actions of the husband to have been cruelty within the contemplation of Article 138(3),[12] thus giving her a legal cause to leave. But in any event, by use of this approach there would be less danger to the stability of marriage which could result from awarding alimony to an abandoning wife whose husband did not give her legal cause for divorce or separation.[13]

Peyton Moore

CONSTITUTIONAL LAW — PREEMPTION OF STATE SUBVERSIVE ACTIVITIES LAW BY FEDERAL LAW

Defendant was charged with a violation of the Louisiana Subversive Activities Law[1] in that she was a member of the Communist Party, which she knew to be a subversive organization. Her motion to quash the bill of information was based, in part, on the contention that the subject matter of subversive activities had been preempted by federal legislation. The trial court sustained the motion. On appeal to the Louisiana Supreme Court, the state argued that only sedition against the United States had been preempted and that states could prosecute for seditious activities against local or state governments. *Held,*

12. In Adams v. Adams, 196 La. 464, 199 So. 392 (1940), the court did not decide whether the very acts complained of here would have allowed a separation on the grounds of cruelty because they were not proved.

13. This does not, however, preclude the danger which could arise from indiscriminately awarding alimony to the wife who obtains a divorce after a two-year separation in fact, whether or not she was at fault. But where this situation presented itself in McKnight v. Irwin, 228 La. 1088, 85 So.2d 1 (1956), the court inferred that if the wife had claimed alimony, the fault issue would have been raised, and the award made only if she was not at fault.

1. La. Acts 1954, No. 603, now LA. R.S. 14:366-380 (Supp. 1958).