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DIVORCE-SEPARATION FOR STATUTORY PERIOD AS A GROUND OF DIVORCE REGARDLESS OF FAULT

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DIVORCE—SEPARATION FOR STATUTORY PERIOD AS A GROUND OF DIVORCE REGARDLESS OF FAULT—*H* sued *W* for a divorce on the statutory grounds that the parties had lived apart without cohabitation for ten years. The facts showed that the separation was caused by the willful abandonment of *W* by *H* and that *H* had lived in adultery after the separation and had not contributed to *W*'s support since the separation. The trial court denied the divorce. On appeal, *held*, reversed. Where *H* and *W* have lived apart for the statutory period without cohabitation, *H* was entitled to the divorce regardless of the cause of the original separation and regardless of his subsequent conduct. *Robertson v. Robertson*, (Texas, 1949) 217 S.W. (2d) 132.

Statutes similar to the one in question have been enacted in about fifteen states.[1] The majority of the courts which have considered the issue of the principal case have held that the misconduct of the plaintiff will not prevent the

[1] 3 NELSON, DIVORCE AND ANNULMENT, 2d ed., 612-613 (1945).

divorce from being granted.[2] Only two states have held that a defense of recrimination will prevent the divorce,[3] and in one state the statute specifically states that the divorce cannot be granted to the party in fault.[4] In at least one other state fault of either party will defeat the proceeding because the separation by statute must be voluntary, and it is not considered voluntary when the separation is caused by the fault of either party.[5] Many of the cases supporting either the majority or minority view reach their conclusion solely on the grounds of statutory construction. As the statutes differ in wording and context, little can be gained by a survey of these cases. However, there is a wide divergence of opinion between the two views concerning the policy considerations which underlie the statutes. The courts, in the states which have denied the divorce because of fault, have refused to believe that the legislature intended to remove the defense of recrimination in an action for divorce on the statutory ground under discussion. In support of this position these courts point to the analogy in equity that the party at fault cannot gain a right out of his own wrong.[6] These decisions seem to be erroneous in light of the actual reason for the passage of the separation statutes. One of the two minority states, however, seems to be at the point of overruling its former decisions and adopting the majority rule.[7] The same cannot be said for the other state. The decisions there first recognized that fault was no defense and then changed to the present position.[8] The majority view rests on the probability that any husband and wife who have lived apart for the statutory number of years cannot live together in happiness. If this is so, there is no reason why the parties should be denied a divorce and, moreover, it is felt that it is in the best interest of the state and society that the divorce be granted. There is nothing to be gained by refusing the divorce, and a divorce will reduce the danger of immorality and perhaps give both parties a second chance for marital happiness. Therefore, fault of the plaintiff will not be a defense because there is an overriding policy in favor of granting the divorce.[9] Evidence of fault is used for other purposes, however, in some of the states following the majority view. In two states the decisions seem to hold that a divorce may not be refused

[2] Jones v. Jones, 199 Ark. 1000, 137 S.W. (2d) 238 (1940); Brown v. Brown, 172 Ky. 754, 189 S.W. 921 (1916); North v. North, 164 La. 293, 113 S. 852 (1927); George v. George, 56 Nev. 12, 41 P. (2d) 1059 (1935); Gerdts v. Gerdts, 196 Minn. 599, 265 N.W. 811 (1936); Smith v. Smith, 54 R.I. 236, 172 A. 323 (1934).

[3] Pierce v. Pierce, 120 Wash 411, 208 P. 49 (1922); Byers v. Byers, 223 N.C. 85, 25 S.E. (2d) 466 (1943).

[4] Wyoming Comp. Stat. Ann. (1945) §3-5906.

[5] Jakubke v. Jakubke, 125 Wis. 635, 104 N.W. 704 (1905).

[6] Supra, note 3.

[7] Pierce v. Pierce, supra, note 3; McGarry v. McGarry, 181 Wash 689, 44 P. (2d) 816 (1935); Evans v. Evans, 182 Wash. 297, 46 P. (2d) 730 (1935).

[8] Long v. Long, 206 N.C. 706, 175 S.E. 85 (1934); Parker v. Parker, 210 N.C. 264, 186 S.E. 346 (1936); Byers v. Byers, supra, note 3.

[9] Herrick v. Herrick, 55 Nev. 59, 25 P. (2d) 378 (1933); 1 NELSON, DIVORCE AND ANNULMENT, 2d ed., 146 (1945). See also supra, note 2.

because of fault alone, but evidence of fault is admitted to show whether the parties might still live together in happiness. If the court feels there is such a possibility, it may grant or refuse the divorce at its discretion.[10] In one state the statute itself allows evidence of fault to be admitted on the question of alimony and property rights,[11] and in one other state it has been suggested that if both plaintiff and defendant ask for the divorce the court may consider the question of fault in awarding the decree and in granting alimony and property settlements.[12] Perhaps the rules adopted in the latter two states are the best. Under them, fault will not prevent the divorce, but it will eliminate the danger of the guilty party's receiving a decree which will cut off all the alimony and property rights of the innocent party or which will award alimony and property to the guilty party. If the innocent party is protected on these matters there seems to be no legal objection to the majority rule.

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[10] George v. George, supra, note 1. Smith v. Smith, supra, note 2; McKenna v. McKenna, 53 R.I. 373, 166 A. 822 (1933).

[11] Brooks v. Brooks, 201 Ark. 14, 143 S.W. (2d) 1098 (1940).

[12] Gerdts v. Gerdts, supra, note 2.