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# Divorce -- Separation

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### Divorce—Separation.

Plaintiff separated from his wife without cause and without agreement, express or implied; however, from time to time he provided her with money for her support. In an action for an absolute divorce on the ground of two years of separation,<sup>1</sup> *held*, divorce denied because the mere living separate and apart for a period of two years would not entitle either party to a divorce. The statute authorizes divorce only where there has been a separation agreement.<sup>2</sup> Further, the court indicated that the abandoning party may not have a divorce at all in this state.<sup>3</sup>

A statute making separation a ground for divorce first appeared in 1907.<sup>4</sup> It required ten years of continuous separation, and a divorce under its provisions was conditioned upon there being no children born of the marriage.<sup>5</sup> Divorce under this 1907 statute could be had on application of either party, the injured party or the one at fault.<sup>6</sup> This was later changed by the 1919 consolidation<sup>7</sup> which restricted the right to secure a divorce to the injured party.<sup>8</sup> In 1921 the period of separation required was cut from ten years to five<sup>9</sup> and in 1933 from five to two years.<sup>10</sup>

However, in 1931, another statute had been enacted providing for

<sup>1</sup> P. L. N. C. 1933, c. 163, N. C. CODE ANN. (Michie, 1935) §1659(a), amending P. L. N. C. 1931, c. 72, provides: "Marriages may be dissolved and the parties thereto divorced from the bonds of matrimony, on application of either party, if and when there has been a separation of husband and wife, either under a deed of separation or otherwise, and they have lived separate and apart for two years, and the plaintiff in the suit for divorce has resided in this state for a period of one year."

<sup>2</sup> For discussion of separation agreements: (1924) 2 N. C. L. REV. 192; (1926) 11 CORN. L. Q. 544; (1932) 27 ILL. L. REV. 315.

<sup>3</sup> *Parker v. Parker*, 210 N. C. 264, 186 S. E. 346 (1936).

<sup>4</sup> P. L. N. C. 1907, c. 89 amending §1561 of c. 31 of Revisal of 1905.

<sup>5</sup> P. L. N. C. 1917, c. 57 amended P. L. N. C. 1907, c. 89 by abolishing the requirement that no children shall be born of the marriage.

<sup>6</sup> *Cooke v. Cooke*, 164 N. C. 272, 80 S. E. 178 (1913). The defendant had previously obtained a divorce from bed and board and now the plaintiff sued for a divorce on the ground of ten years of separation. *Held*: there was nothing in the statute to indicate that only the injured party could sue. In the words of Justice Brown, "After ten long years of separation, why inquire into whose fault it was, why dig up from their graves the buried memories of broken lives?"

<sup>7</sup> C. S. 1919, c. 30, §5. The ten year separation statute which was consolidated with the other divorce statutes provided that marriages could be dissolved and the parties thereto divorced from the bonds of matrimony, on application of the party injured, where there had been a separation of husband and wife for ten years.

<sup>8</sup> *Sanderson v. Sanderson*, 178 N. C. 339, 100 S. E. 590 (1919). The court distinguished *Cooke v. Cooke*, 164 N. C. 272, 80 S. E. 178 (1913), on the ground that at the time the *Cooke* case was decided there was no restriction in the statute on the right of either party to sue, whereas the amended statute clearly gives the right only to the injured party. *Lee v. Lee*, 182 N. C. 61, 108 S. E. 352 (1921) (adhered to the *Sanderson* case in holding only the injured party could sue); *Reeves v. Reeves*, 203 N. C. 792, 167 S. E. 129 (1933).

<sup>9</sup> P. L. N. C. 1921, c. 63.

<sup>10</sup> P. L. N. C. 1933, c. 71.

divorce after five years separation on application of either party if no children had been born of the marriage.<sup>11</sup> This statute was not an amendment to the old law but was in addition to the then existing statute; thus there were two different separation statutes existing at the same time. The 1931 act was also amended in 1933 to cut the separation period from five to two years.<sup>12</sup>

Involuntary separation of defendant caused by incarceration in the state hospital for the insane<sup>13</sup> or by imprisonment in the state penitentiary<sup>14</sup> has been held not to be such separation as contemplated by the statute. In 1929 the statute was amended by allowing divorce if the separation was either voluntary or involuntary, provided involuntary separation was in consequence of a criminal act committed by the defendant prior to such divorce proceeding.<sup>15</sup> However, plaintiff may not obtain a divorce for separation where by court decree he was forced to live apart from his wife by reason of an assault on her.<sup>16</sup> *Cooke v. Cooke*<sup>17</sup> held that separation includes legal separation, hence a divorce from bed and board may become a ground for absolute divorce. The court in addition pointed out that there was nothing in the statute to indicate that separation must be by mutual consent.

The 1931 statute, already referred to,<sup>17a</sup> under which the present suit was brought, permits either party to sue.<sup>18</sup> Therein it is like the separation statute as it existed before 1919. Therefore the court in the principal case might have been expected to revert to its holding under the old law, and to have permitted either the injured or the injuring party to sue.<sup>19</sup> However, the court indicated that the party who has wrongfully abandoned the other may not obtain a divorce. Probably the court did not give the statute the meaning the legislature intended; the new 1931 law would seem to allow divorce to either party; the only requirement being that they live separate and apart for two years. The

<sup>11</sup> P. L. N. C. 1931, c. 72.

<sup>12</sup> P. L. N. C. 1933, c. 163, N. C. CODE ANN. (Michie, 1935) §1659(a) also removed condition "that no children shall have been born to the marriage".

<sup>13</sup> *Lee v. Lee*, 182 N. C. 61, 108 S. E. 352 (1921); (1919) 6 VA. L. REV. 133; (1919) 19 COL. L. REV. 505.

<sup>14</sup> *Sitterson v. Sitterson*, 191 N. C. 319, 131 S. E. 641 (1926); Comment (1926) 11 ST. LOUIS L. REV. 316.

<sup>15</sup> P. L. N. C. 1929, c. 6.

<sup>16</sup> *Reynolds v. Reynolds*, 208 N. C. 428, 181 S. E. 338 (1935). The court said that an action never lies where plaintiff must base his claim in whole or in part on a violation by himself of the criminal or penal laws of the state.

<sup>17</sup> 164 N. C. 272, 80 S. E. 178 (1913).

<sup>17a</sup> See Note 11 *supra*.

<sup>18</sup> *Long v. Long*, 206 N. C. 706, 175 S. E. 85 (1934). A separation agreement and a property settlement had been made. The court in granting divorce to the plaintiff, who had abandoned his wife, cited P. L. N. C. 1933, c. 163, and seemed to base its decision on the fact that the statute allowed either party to sue. *Campbell v. Campbell*, 207 N. C. 859, 176 S. E. 250 (1934).

<sup>19</sup> *Cooke v. Cooke*, 164 N. C. 272, 80 S. E. 178 (1913).

court's addition to the statute by interpretation reaches a desirable end, in that it prevents one party from abandoning the other without cause and then taking advantage of his own wrong to secure a divorce.

The court further declared that to obtain a divorce under the 1931 act there must be a separation by mutual agreement, express or implied.<sup>20</sup> The question then arises, where a party has been wrongfully abandoned without any agreement, is that party to be denied a divorce? The answer is that under the older statute, passed in 1907, and already discussed herein together with its subsequent modifications, the divorce may be secured.<sup>21</sup>

It is hard to see any necessity for two separation statutes, with diverse and confusing interpretations. The next legislature should pass a single separation statute and expressly repeal the others.

JAMES A. WELLONS, JR.

### Insurance—Subrogation—Right of Insured Debtor and Creditor to Insurance Money.

X Company made a loan of \$3,000 to A and took a mortgage on A's house as security. A conveyed the house to B, who assumed the mortgage, and as additional security the X Company took out an insurance policy on the life of B, paying the premiums therefor. Fifteen months later B conveyed to C, and C in turn to D, each assuming the mortgage. Title to the house remained in D until the death of B two and one-half year later. The X Company collected the insurance, kept an amount equal to the sum due on the mortgage, and sent the mortgage to D who cancelled it of record. The administratrix of B brought action for the surplus insurance and also asked to be subrogated to the position of X Company as to the mortgage, contending that the estate itself had satisfied the indebtedness. By agreement of the defendants, X company and D, the administratrix was allowed that portion of the insurance in excess of the debt. The court refused to allow subrogation, and thus allowed D to hold the property free from the mortgage indebtedness.<sup>1</sup>

<sup>20</sup> The words of the court are: "Where a husband and wife have lived separate and apart from each other for two years, following a separation by mutual agreement, express or implied, their marriage may be dissolved; but where they have lived separate and apart from each other for two years, without a previous agreement between them, neither is entitled to a divorce, under the statute, C. S. §1659 (a)." *Parker v. Parker*, 210 N. C. 264, 266, 186 S. E. 346, 347 (1936). *Hyder v. Hyder*, 210 N. C. 486 (1936) followed *Parker v. Parker*.

<sup>21</sup> John A. Livingstone, *Grounds for Divorce*, *The Raleigh News and Observer*, September 13, 1936, at p. 3 discusses the case of *Parker v. Parker*. H. W. McGALLIARD, "WOMAN AND THE LAW" c. on Divorce, which shall soon be published by the N. C. Institute of Government.

<sup>1</sup> *Miller v. Potter*, 210 N. C. 268, 186 S. E. 350 (1936).