

B v B

High Court Apia
11, 31 August 1931
Luxford CJ

MARRIAGE AND DIVORCE - Husband's petition for dissolution of marriage on the ground of separation by agreement for three years - s 304 Samoa Act, 1921 - Divorce and Matrimonial Causes Act, 1928 (NZ) - Petitioner's offer of resumption of cohabitation during separation withdrawn before acceptance - Parties continuing to live separate and apart for required period of time.

Andrews for petitioner.
Klinkmueller for respondent.

Cur adv vult

LUXFORD CJ. This is an action for a decree to dissolve the marriage which took place between the parties on the 1st day of June, 1901.

The petitioner alleges that he and his wife mutually agreed to separate on the 21st day of July, 1928, and from that time down to the present they have continued to live separate and apart. The petitioner makes no allegation whatever against his wife. On the contrary, he speaks of her in the highest terms of commendation concerning her conduct and the manner in which she has devoted her life to her home and her husband's welfare. Unfortunately, however, circumstances arose, whether genuine or imaginary I cannot say, but to which it is not necessary for me to refer specifically, which seriously interfered with the smooth running of the domestic relations of the parties.

In the month of August, 1927 the respondent with the consent and approval of the petitioner left Samoa on a trip to Germany. Although the petitioner had doubts at that time whether he and his wife would ever live together again, there is no evidence to show that separation was discussed between them.

The correspondence between the parties was placed before the Court at the hearing of the case. From a perusal of the letters it is clear that the circumstances which interfered with their domestic relations before the departure of the respondent were uppermost in their minds and gave rise to the passages in the correspondence upon which the petitioner bases his present application.

On 31st January, 1928 the petitioner wrote a long letter to the respondent in which the following occurs:-

Let me say right here, that I do not live over the life with you again, as I had to. If you cannot believe in your husband being honest and true to you then I think it is better that we go each his own way.

In the same letter he exhorts his wife to make it possible for them to live happily together again.

On the 13th March, 1928 the following passage occurs in a letter from the petitioner to the respondent:-

I only want to tell you that I am perfectly happy and satisfied as I am now fixed and am not anxious to have things changed again. So you had better stay there as long as you want to.

On the 13th April, 1928 the respondent wrote a long letter to the petitioner in which she says inter alia:-

If I don't get enough from the Sparkasse (Savings Bank) to live on then I'll return at once and as you say you don't want anything changed in the house, it means you don't want me back, then I'll look for another place and hope you will give me enough to live on. I also want peace.

If the correspondence had ended at this stage there could be little doubt but that the parties had definitely agreed to separate. The petitioner, however, decided to give the respondent another opportunity to resume marital relations for on 5th June, 1928 he wrote a further letter to the respondent in which he says:-

If you read my letter of 31st January carefully you will find that all and everything is said about our affair, both the one way and also the other way. Now I am not going to have any 'tifaga' when you arrive here in Apia; if you are coming home to me, that is, if you have read this letter carefully and thought it over and have made up your mind that nothing is ever going to disturb our home life again, send me the one word by wireless, "Cheerful", and I shall know and be at the Customs to receive my dearly beloved Carrie of twenty-five years ago. If you have decided the other way, that is, that you cannot live with me in peace, send just the word "coming" instead of the word "cheerful" and I shall not be there to in any way make things unpleasant for you.

Soon after this letter was received by the respondent she left Germany on her return journey to Samoa. The petitioner repented of the offer he made in his letter of 5th June and sent a letter by special delivery post to reach his wife on her arrival at Honolulu. This letter is dated the 29th June, 1929 and unequivocally expresses the petitioner's intention to live separate and apart from his wife. In law I regard this letter as a withdrawal of the petitioner's offer to cancel the agreement to separate which is evidenced by the letters of 31st January, 13th March, and 13th April.

The elementary rule of law applies to this case, namely, that an offer may be withdrawn at any time before acceptance. The respondent did accept the petitioner's offer by sending the word "cheerful" in a radiogram from the steamship "Sierra" on the 13th July, 1928. The evidence before the Court, however, establishes that this radiogram was despatched after the respondent had received the letter of 29th June - in other words, after the offer contained in the letter of 5th June had been withdrawn.

After the respondent returned to Apia she made no attempt to resume cohabitation or to apply for restitution of conjugal rights. I have no doubt that she realised that her husband's decision was final, especially as he had commenced a liaison with another lady, and that nothing she could do would change her husband's course.

The evidence is clear that the parties have lived separate and apart since the respondent returned to Samoa on 31st July, 1928 and that they have so lived in pursuance of the agreement to separate contained in the letters of 31st January, 13th March, and 13th April. It follows therefore that the petitioner is entitled to succeed.

The decree of dissolution is to lie in the office of the Court until further Order. That Order will be made when all questions of maintenance and the wife's costs in this suit have been settled. Leave to apply is reserved.