

CLARKE v. CLARKE.

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4-6051

143 S. W. 2d 540

Opinion delivered October 7, 1940.

1. DIVORCE AND ALIMONY.—Where plaintiff had not cohabited nor lived with his wife for three years and had resided in Arkansas sixty days, he had a statutory right to file suit for divorce.
2. DIVORCE AND ALIMONY.—Although act 20 of 1939 puts the injured and the injuring spouse on the same footing in respect of the right to a divorce based upon three years of separation, the courts are expressly given broad discretion in the matter of alimony.

Appeal from Garland Chancery Court; *Sam W. Garratt*, Chancellor; affirmed in part and reversed in part.

Jay M. Rowland, for appellant.

Curtis L. Ridgway, for appellee.

GRIFFIN SMITH, C. J. The appeal presents two questions: (1) Was the evidence sufficient to sustain the decree. (2) Should alimony have been awarded. Appellee receives \$60 a month as a Spanish American war pension allowance. Pending the determination of this appeal the pension bureau has remitted only \$30 monthly to appellee, the balance to be paid either to the wife or the husband as equities may be determined by judgment of this court.

The parties were married in 1903 and have six children, all of whom are of age. The complaint alleges that

separation occurred in 1934. In 1937 appellee (who had lived with his wife in Michigan) went to Florida and there filed suit for divorce. The action was dismissed on petition of the plaintiff, who in November of that year moved to Garland county. Appellant lives in Detroit and has a gross income of approximately \$25 per week paid by three of her children who board and room with her.

The fact of separation, within the meaning of the seventh subdivision of § 2 of act 20 of 1939, is established by a preponderance of the evidence. If the husband and wife had "lived separate and apart . . . for three consecutive years without cohabitation" the husband's statutory right to the decree accrued. *Jones v. Jones*, 199 Ark. 1000, 137 S. W. 2d 238.

Act 20 provides that ". . . the question of who is the injured party shall be considered only in the settlement of the property rights of the parties and the question of alimony." The trial court denied alimony. While it is difficult to determine who the injured party is, there seems to have been fault on both sides. In this state of the record the decree of divorce will be affirmed, but the cause will be remanded, with directions that the sum of \$30 per month be paid appellant from November, 1939, until this decree becomes final, and thereafter the sum of \$15 per month be paid.
