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Incompatibility of Parties as Ground for Divorce

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of the juror's own mind, and, if they purport to state something different or contrary to the belief or judgment expressed in his verdict, they will not be considered. The juror by submitting such an affidavit is impeaching himself. He says that he violated his sworn duty and word in arriving at and giving forth the verdict he pronounced. Such is the true meaning of the expression "that a juror shall not be permitted to impeach his own verdict."

ALBERT OLSEN.

INCOMPATIBILITY OF PARTIES AS GROUND FOR DIVORCE—This brief note is concerned with two recent decisions in the State of Washington touching the law of divorce, *Shaw v. Shaw*,[1] decided August 22, 1928, by Department One, and *Haller v. Haller*,[2] decided October 8, 1928, by Department Two.

The facts of both cases turn upon incompatibility or the inability of the parties to live together. In the *Shaw* case the court holds that since the enactment of the Session Laws of 1921, p. 331,[3] this is no longer ground for divorce in this state. In the *Haller* case the other department of the court apparently holds that it is a ground for divorce. The *Shaw* case points out that the present law of divorce is predicated upon the element of fault of the delinquent spouse and that the divorce is granted upon the application of the "injured" party

Upon principle it is difficult to distinguish between the basic facts of these two cases. They were both cases of an unfortunate alliance. In both cases there was no "fault" of either party, sufficient as the court intimates to constitute any one of the statutory grounds for divorce. In the *Shaw* case the wife became insane, which was not a fault. In the *Haller* case the husband drifted into the more subdued years, so that, as the court says, the very great divergence of their ages prevented this man and woman from deriving an appreciable amount of happiness from their marriage, and for a long period of time they had not lived together as husband and wife, although occupying the same home. And the court further referred to the "difficulty of attempting to mate 'January' and 'May,' " and substantially bases its decision upon the following paragraph of the opinion.

> "An examination of the record discloses that it is not only impossible for these parties to live together as husband and wife, but that it is to their interest and the interest of society that they be divorced."

If the rule stated in the *Shaw* case is correct, requiring fault of one or both of the parties in some one or more of the causes stated

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[1] 148 Wash. 622, 269 Pac. 804 (1928).
[2] 49 Wash. Dec. 153, 270 Pac. 822 (1928).
[3] Rem. Comp. Stat., sec. 982.

in the present statute governing divorces, it would seem that the reason contained in the above quoted paragraph in the *Haller* case would not be valid, unless it be a "fault" in a man to personify "January" rather than "May" In the *Shaw* case it was no fault of the wife that she became insane, and in the *Haller* case it was no fault of the husband that in time he bowed down to the inevitable weight of years. As to the disparity of the ages of this husband and wife, that was a condition which existed *ab initio*. It is difficult also to understand how the interest of society requires that these parties be divorced.

It appears that in both of these cases that the parties were "unhappy" together and therefore could no longer live together, due to causes which were not the fault of anybody and over which they had no control. In one case the court holds this is not ground for divorce under our present statute, in the other it holds that it is ground for divorce. The question therefore naturally arises, is the fact of unhappiness in the marriage relation sufficient ground for judicially terminating that relation.

Prior to the statute of 1921, the divorce statutes contained this provision, to-wit

> " and a divorce may be granted upon application of either party *for any cause deemed by the court sufficient*, and the court shall be satisfied that *the parties can no longer live together* "[4]

The Session Laws of 1921, page 331, amending the divorce statute and in enumerating the grounds for divorce, omitted the above quoted provision, and now provides that divorce shall be granted on the application of the party "injured."

It is submitted that this omission indicates the intention of the Legislature to deprive the courts of discretionary power in divorce cases, which the above provision apparently gave, and that the jurisdiction of the courts now is to consider and determine divorce cases upon the statutory grounds only Under our practice causes in divorce are of purely statutory origin, and the powers of the courts therein are derived entirely and exclusively from statute. The courts have no inherent or equitable powers to determine divorce causes and they have no discretionary powers therein unless granted by the statute.

It is submitted that under the present statutory law, the decision in the *Shaw* case is right, the decision in the *Haller* case subject to criticism, in that the court apparently exercised powers with which it was once vested but which it now no longer possesses.

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[4] Rem. & Bal. Code, sec. 982.