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Recrimination v. Comparative Rectitude in Divorce Suits

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RECRIMINATION V. COMPARATIVE RECTITUDE IN DIVORCE SUITS

"Recrimination is a showing by the defendant of any cause of divorce against the plaintiff, in bar of plaintiff's cause of divorce."[1] That is to say, if both parties have grounds for a divorce, neither can obtain one.

In *Kirn v. Kirn* 138 Va. 132, 120 S.E. 850 (1924) the Supreme Court of Appeals of Virginia recognized recrimination as a defense and stated that it would bar a divorce *a vinculo* or *a mensa et thoro*. This rule has been softened by statute[2] to the extent that a divorce from bed and board shall not be a bar to either party's obtaining a divorce from the bonds of matrimony if no cause for absolute divorce was existing and known to the party applying for the divorce from the bonds of matrimony before the decree of divorce from bed and board was entered. The public policy of this statute was followed in *Haskins v. Haskins,* 188 Va. 525, 50 S.E. 2d 437 (1948) where the court held that the acts which would justify a divorce *a mensa et thoro* for the defendant do not have to be reduced to a divorce decree for the statute to apply. *Kirn v. Kirn* was overruled to this extent. To have held otherwise would have resulted in the ridiculous situation of a spouse against whom a divorce *a mensa et thoro* had been granted being in a more advantageous position than one against whom no decree had been granted.

The origin and history of recrimination are very adequately discussed by E. Riggs McConnell, *Divorce-Recrimination-The English Doctrine of Judicial Discretion.*[3] Before the Matrimonial Causes Act[4] of 1857 in England, all divorces were in the jurisdiction of the Ecclesiastical Courts. These courts would not grant an absolute divorce because of the belief that marriage is an Act of God and indissoluble; they also applied the doctrine of recrimination to the limited decrees that they did grant, although they seemed to be dissatisfied with the result occasionally. The Act of 1857 gave exclusive jurisdiction of divorce suits to the secular courts; it gave them power to grant an absolute divorce; and also allowed the court discretionary power to grant a decree where the petitioning spouse was guilty of recriminating offenses which were conduced by

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1. BLACK, LAW DICTIONARY, 2nd Ed.
2. VA. CODE ANN. § 20-117 (1950).
3. 19 VA. LAW REV. 400 (1933).
4. 20 & 21 Vict. Ch. 85 § 31.

the behavior of the defendant. This discretionary power was specifically denied in this state in *Kirn v. Kirn.* Our court has, however, admitted that a wife could abandon her husband if through no fault of her own, and for her safety and happiness, and if it was consistent with social order and public policy; and she could receive separate maintenance notwithstanding such abandonment.[5]

Most courts have based the doctrine of recrimination on the "clean hands" principle of equity.[6] A divorce is acquired by suit in equity, and he who seeks equity must do equity. Some courts base the doctrine on a "breach of dependent covenants."[7]

Some states have relaxed the rule to the extent that they consider the comparative rectitude of the parties.[8] For example, a Texas court said, "If the recrimination on the part of the injured spouse is insignificant compared with the great provocation on the part of the other, the divorce may be granted."[9] Other courts[10] use their discretion, following the English theory rather than a strict rule. Although there is a great conflict on this subject, the greater number of states are in accord with the Virginia policy of disregarding comparative rectitude of the parties. Some are even stricter, making grounds for limited divorce a bar to absolute divorce.[11] The trend in most states is to be more lenient in granting divorces. In a recent New Mexico case[12] the court wisely granted a decree to the husband on the grounds of incompatibility, holding the husband's alleged adultery after separation, and that a state of incompatibility still existed were immaterial. All states are not so liberal; under similar circumstances a South Carolina[13] decision was to the effect that, recrimination being a defense, such facts were material regardless of their order in time. Such divergence between the different states would seemingly warrant a campaign for uniformity.

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5. Haynor v. Haynor, 112 Va. 123, 70 S.E. 531 (1911).
6. Hatfield v. Hatfield, 113 W. Va. 135, 167 S.E. 89 (1932).
7. Comfort v. Comfort, 112 P.2d 259 (1941).
8. Longinotti v. Longinotti, 169 Ark. 1001 277 S.W. 41 (1925); Dearth v. Dearth, 141 Pa.S. 344, 15 A.2d 37 (1940); Pavletich v. Pavletich, 50 N.M. 224, 174 P.2d 826 (1946); Marr v. Marr, 191 S.W.2d 512 1945); Staples v. Staples, 136 S.W. 120 (1911).
9. Jones v. Jones, 60 Tex. 451 (1883).
10. Lasser v. Lasser, 134 Kan. 436, 7 P.2d 120 (1934); Panther v. Panther, 47 Okla. 131, 295 P. 219 (1931); Lyon v. Lyon, 39 Okla. 111, 134 P. 650 (1913).
11. Rankin v. Rankin, 121 A. 778 (1923).
12. Pavletich v. Paveltich, *supra.*
13. Jeffords v. Jeffords, 58 S.E.2d 731 (1950).

Objectively appraised, today's divorce situation is incongruous with the principal basis for the doctrine of recrimination that a divorce suit is for the benefit of an innocent party. The petitioning party must come into court with clean hands. For example: H and W are married and domiciled in State A which applies the doctrine of recrimination strictly. H deserts W, grounds for divorce in State A. Several years after W meets X who wishes to marry her, and they have an affair. Now both H and W would be entitled to a divorce were it not for recrimination. They can attempt, by collusion to get a divorce illegally[14] in State A, concealing the recriminating acts of whichever party is nominally the defendant; or, they can go to State B which allows divorce under the New Mexico rule of comparative rectitude. Such a decree would be open to attack in every state in the Union as to domicile in State B.[15] What is State A gaining by such a policy? It is forcing its citizens to use illegal methods to attain a socially beneficial result. Does the state believe that the difficulty of obtaining a divorce will deter the parties? In *Haynor v. Haynor* the court quoted Sir William Scott in *Evans v. Evans,* 1 Hogg C.R. 35: "When people understand they must live together, except for a few reasons known to the law, they learn to soften by mutual accommodation that yoke which they know they cannot shake off. They become good husbands and good wives; for necessity is a powerful master in teaching duties which it imposes."

Must people live together these days when women are able to earn their way as well as men? Is refusal of a divorce not more like a yoke which prevents happiness in another marriage? Nothing is harder to do than what one must do.

Another line of reasoning is quoted in *Kirn v. Kirn* from BISHOP, MARRIAGE, DIVORCE AND SEPARATION §§ 370, 365: "A reason conclusive is, that where the facts tendered to the court show a ground for divorce in favor of each of the two parties and the law makes the consequences of the divorce different according as it is given to the one party or the other, the court cannot choose between them, extending the law's justice to the one and withholding it from the other; it cannot render a sentence in favor of both, because such sentence would contain a nullifying contra-

14. Grim v. Grim, 126 Va. 245, (1919); Walker v. Walker, 120 Va. 410 (1917).

15. Williams v. North Carolina, 325 U. S. 226 (1945).

diction, giving and taking away the same thing at the same time. So that the statute, authorizing the divorce and fixing the consequences, and omitting to prefer the one offense or party over the other, by necessary construction forbids divorce either to both, or to one to the exclusion of the other's rights." The catchword is "consequences." Why must the consequences depend on who wins the divorce? Why must in fact one party win? Divorce is and should be by nature different from a contract action. The courts are called on to give relief to both parties and refuse because they cannot pick one party over the other. The highest court of the State of Washington in *Flagg v. Flagg,* 192 Wash. 546, 74 P.2d 189 (1937),[16] where both parties were found guilty of cruelty under the divorce statute and it was impossible for the parties to live together again, held that both parties were entitled to a divorce. Who has won this divorce? What has become of the problem of the consequences? Property settlements, alimony, and custody of any children can be settled in the court's discretion according to the needs of the parties, the ability to pay, and the equities of each individual case.

Such matters should not be argued on legal principles in the narrow sense, on the same plane, for example, as property law. We are dealing with different commodities. It is not herein intended to advocate the granting of divorces where no grounds exist which would entitle either party to a decree, but to repudiate the doctrine of recrimination as a defense to a divorce suit; to object to the idea that one party must necessarily win the case, and therefore come into court with clean hands. Since recrimination is an established doctrine in this state an appeal is therefore made to the legislature for more realistic divorce laws which will satisfy the needs and desires of the people. Other states have discovered that it is more important to cure a social defect than to maintain antiquated legal principles. Virginia, it is hoped, will not linger behind forever.

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16. *Accord,* Schirmer v. Schirmer, 83 Wash. 676, 145 P. 981 (1915).