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Recrimination and Comparative Rectitude

Why do people buy air trip accident insurance? From a practical viewpoint, the answer is simply that they consider the flight a risk against which they are not otherwise insured, or one for which they desire additional coverage. Many life and accident policies contain various aviation risk exclusion clauses which generally exclude from coverage any injury or death sustained while traveling in an aircraft.[42] The trend now is to include coverage for scheduled air carriers[43] since air travel is no longer considered to be an ultrahazardous activity.[44] Undoubtedly, many travelers purchase air trip policies because they are so readily available in airport waiting rooms and because they may seem to offer additional security to one embarking on a trip by a strange medium.

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RECRIMINATION AND COMPARATIVE RECTITUDE

Where both parties to a divorce action have been guilty of misconduct amounting to statutory grounds for divorce, several states deny relief to either party on the ground of recrimination regardless of the circumstances in the case. In these jurisdictions the showing of a valid recriminatory defense is an "absolute bar" to the granting of a divorce.[1]

Much has been written concerning the origin of the doctrine of recrimination and many legal theories have been advanced to sustain its application.[2] All of these theories supporting the doctrine, however,

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[42]E.g., Kinard v. Mutual Benefit Health & Acc. Ass'n, 108 F. Supp. 780 (W.D. Ark. 1952) (health and accident insurance); McDaniel v. Standard Acc. Ins. Co., 221 F.2d 171 (7th Cir. 1955) (life insurance). See generally, Annot., 17 A.L.R.2d 1041 (1951); Vance, Insurance § 100 (3d ed. 1951). Cf. Annot., 155 A.L.R. 1026 (1945).

[43]E.g., McBride v. Prudential Ins. Co. of America, 147 Ohio St. 461, 72 N.E.2d 98 (1947) (life insurance); Hall v. Mutual Benefit Health & Acc. Ass'n, 220 S.W.2d 934 (Tex. Civ. App. 1949) (air travel accident insurance); Downs v. Nat'l Cas. Co., 146 Conn. 490, 152 A.2d 316 (1951) (health and accident insurance); General American Indem. Co. v. Pepper, 161 Tex. 263, 339 S.W.2d 660 (1960), travel accident insurance). See generally, 1 Appleman, Insurance Law and Practice § 601 at 735 n.2 (1941); Vance, Insurance § 100 at 631 (3d ed. 1951).

[44]Cf. Prosser, Torts § 42 at 203, § 61 at 345 (2d ed. 1955).

[1]Alexander v. Alexander, 140 Ind. 555, 38 N.E. 855 (1894); Paulsen v. Paulsen, 84 Iowa 131, 50 N.W.2d 567 (1951); Green v. Green, 125 Md. 141, 93 Atl. 400 (1915); Morrison v. Morrison, 142 Mass. 361, 8 N.E. 59 (1886); Hoellinger v. Hoellinger, 38 N.D. 636, 166 N.W. 519 (1918).

[2]The doctrine originated in the application of the principle of "compensatio criminis" in Roman law actions for judicial separation. Where the husband defended upon the grounds of the wife's adultry, the wife could overcome the defense

are to some extent, unsatisfactory. Some writers have argued that the doctrine has no place in our modern society and that it should be excluded from our divorce courts.[3] Nevertheless, with varying restrictions the doctrine is still upheld in the majority of American states, often on the grounds that a litigant must come into equity with "clean hands."

In the recent North Dakota case of *Kucera v. Kucera*,[4] the wife sued for a divorce alleging extreme mental cruelty. The defendant counterclaimed for a divorce on the basis of the wife's adultery and also on the grounds of extreme mental cruelty. The trial court, finding sufficient evidence to support the wife's claim, granted her a decree dissolving the bonds of matrimony.

On appeal it was found that, while defendant had failed to prove his allegation of adultery, his evidence did establish misconduct of the wife amounting to extreme mental cruelty and also willful desertion, even though the latter ground was not raised in the pleadings.[5] A North Dakota statute denies the right to a divorce where the de-

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by showing the husband's adultery. See Forster v. Forster, 1 Hagg. Con. 142, 161 Eng. Rep. 504 (1790). Later authority rests the doctrine on principles of contract, stating that the plaintiff cannot recover if he has violated the mutual covenants of the agreement. Connant v. Connant, 10 Cal. 249 (1858). The most common argument advanced for the doctrine of recrimination is the maxim that a party must come into equity with "clean hands," and one seeking divorce who has himself committed acts of misconduct cannot be said to come before the court with "clean" hands." Roxborough v. Roxborough, 269 Mich. 569, 257 N.W. 747 (1934). There is authority to the effect that acceptance of the doctrine was to some extent a manifestation of the public policy to prohibit two persons, both of whom have exhibited complete irreverence for the marital status, from entering upon new marriage contracts. Nebraska acknowledged this policy in such a situation when it said that "neither. . . [party] should be relieved from the restraint of the marriage relation and permitted to contract new alliances." Goings v. Goings, 90 Neb. 223, 133 N.W. 199 (1911). Similarly, the Oregon court said that "if a divorce is denied these parties and they refuse to settle their differences and effect a reconciliation, or put in order the pieces of this broken home... at least they cannot, either of them, go out and start another home, to crumble and fold when the storm strikes." Parks v. Parks, 182 Ore. 322, 187 P.2d 145, 147 (1947).

[3]Note, 26 Colum. L. Rev. 83 (1926).

[4]117 N.W.2d 810 (N.D. 1962).

[5]A showing of the existence of a recriminatory defense may arise in several ways: (1) alleged by the defendant in his counterclaim for a divorce decree in his favor; (2) in the pleadings as a defense to the principal action; (3) where allegations as to plaintiff's misconduct were not included in the pleadings, but the court noticed the defense on its own motion. See Street v. Street, 48 Del. 272, 101 A.2d 803 (1953), where the court granted a divorce decree to the husband, and in an entirely different action the following week learned of the existence of a recriminatory defense against the husband and vacated the divorce decree on its own motion. See also, Green v. Green, 125 Md. 141, 93 Atl. 400 (1915), where in an uncontested action, the husband's own testimony showed that he had been guilty of adultery.

fendant has shown grounds for divorce against the plaintiff "in bar of the plaintiff's cause of divorce."[6] The statute has been construed to mean tht the court may not weigh the gravity of the offenses proved, and so cannot exercise discretion and allow a divorce in the face of a recriminatory defence.[7] Therefore, the court reached the result that this statute was an absolute bar to the granting of a divorce to either party.[8] On this record the decision in *Kucera,* although solidly supported by precedent in the jurisdiction, is not supported in logic, nor does it seem to serve any valid public interest of the state. The court acknowledged this when, in stating that the statute barred the exercise of discretion, it held that a divorce must be denied "even though we believe the legitimate ends of the marriage have been destroyed and a divorce perhaps would be the better solution for the difficulties facing the parties."[9]

A great deal of uncertainty exists in the law in this area. Courts, on the one hand, recognize their duty to safeguard the sanctity of marriage, while on the other hand, they acknowledge that it is futile to require two persons to remain legally bound in matrimony when there exists little hope that the parties will live together again. The decisions fall generally into four categories. First, one category, exemplified by *Kucera,* extends the principle of recrimination to its extreme, holding that any statutory ground for divorce proved against a plaintiff will absolutely bar his relief.[10] Secondly, a few states, led by Nevada, have adopted the doctrine of comparative rectitude, under which the chancellor weighs the comparative fault of the parties and grants a divorce to the one least blameworthy.[11] A third category of cases recognizes that there are inequities in a rigorous application of the doctrine of recrimination and has provided relief by limiting the application of the doctrine to certain classes of cases.[12] Finally, the fourth category includes decisions which, while not mentioning comparative rectitude, have allowed the trial courts to exercise discretion and in some instances have granted a divorce even though the party bringing the action is chargeable with misconduct.[13] The decisions in this

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[6]N.D. Cent. Code §§ 14-05-10, 14-05-15.

[7]Hoellinger v. Hoellinger, 38 N.D. 636, 166 N.W. 519 (1918).

[8]Supra note 4, at 814.

[9]Ibid.

[10]Supra note 1.

[11]Eals v. Swan, 221 La. 329, 59 So. 2d 409 (1952); see, Gabler v. Gabler, 72 Nev. 325, 304 P.2d 404 (1956); see, Nev. Rev. Stat. § 125.120 (1961).

[12]Guillot v. Guillot, 42 R.I. 230, 106 Atl. 801 (1919).

[13]Vanderhuff v. Vanderhuff, 144 F.2d 509 (D.C. Cir. 1944); Stewart v. Stewart, 158 Fla. 326, 29 So. 2d 247 (1946).

category recognize that rarely will a divorce action come before the courts where either party is entirely blameless.

The decisions from Massachusetts are typical of the first category. For example in *Reddington v. Reddington,*[14] the Supreme Judicial Court thought that to allow judicial discretion in granting or denying a divorce would result in derogation from the expressed objective of uniformity of justice.[15] Massachusetts expresses the view that the whole public policy of the state is to be found in the divorce statute; therefore, no judicial discretion can be allowed. The inequities inherent in this holding are apparent in the result of an early Rhode Island case, *Mathewson v. Mathewson,*[16] in which the husband deserted the wife, enlisted in the service, and remained absent for twenty-seven years. The wife, presuming his death, remarried, after which the husband returned accompanied by a second wife and children. Even though the action was not contested, the court refused the wife a divorce because she lived with the second husband for a short time after she had knowledge of the return of the first husband. The result was reached due to the existence of the recriminatory defense.[17]

A further shortcoming in the absolute recrimination rule is that it may result in the working of fraud upon the court. Often such suits are not contested, but this may result only after one of the parties has been required to give up substantial financial benefits to insure that the existing recriminatory defense will not be used against him.[18]

An increasing number of states have begun to liberalize their views with regard to the doctrine of recrimination. In several states this liberalization has taken form in the acceptance of the doctrine of comparative recitude, the second category of decisions outlined above. By this principle where both spouses are at fault the one least guilty may be given a divorce. This doctrine has found great favor with modern sociological writers in that it tends to de-emphasize the element of fault in the divorce proceeding. The cornerstone of the doctrine is to allow divorce regardless of fault on the theory that society will be better served by terminating marriages in law which are, and have been, non-existent in fact. It has been suggested that in compara-

[14]317 Mass. 760, 59 N.E.2d 775 (1945).

[15]59 N.E.2d at 778.

[16]18 R.I. 455, 28 Atl. 801 (1894); accord, Whippen v. Whippen, 147 Mass. 294, 17 N.E. 644 (1888).

[17]"It appearing, then, that the petitioner, whether equally guilty with the respondent or not, has been guilty of conduct which would be a sufficient ground for divorce, she is not entitled to this relief prayed for in her petition." 28 Atl. at 802.

[18]DeBrugh v. DeBrugh, 39 Cal. 2d 858, 250 P.2d 598, 604 (1952).

tive rectitude, where the parties are found to be at equal fault neither will be given relief,[19] but the statutes generally provide that when the parties are found in equal wrong, the court "may" in its discretion refuse to grant a divorce.[20]

The third group of cases offers some relief to the parties by excepting certain inequitable cases from the principle of recrimination, or by applying it only in limited situations. One example of this is in the area of cases based on adultery, traditionally the strongest recriminatory defense. Pennsylvania has allowed a divorce regardless of the plaintiff's adultery where the plaintiff's ground is the defendant's desertion, and the adulterous act occurs after the desertion has continued for the necessary statutory period so as to become a valid ground for divorce.[21] If the adulterous act occurs within this period, the plaintiff is denied a divorce.

Among other exceptions, Illinois has allowed an adulterous wife a divorce based on the husband's cruelty where the defendant had condoned the adultery by cohabitation after the commission of adultery.[22] The Texas court held that in order to employ a recriminatory defense with success, the conduct relied on by the plaintiff as grounds for divorce must have been induced by or in retaliation of plaintiff's own misconduct.[23] The relief provided by these exceptions and limitations to recrimination is desirable, but retains an element of inflexibility in the court's approach; therefore, the preferable course is to retain the principle of recrimination in the statutes, vesting the trial courts with discretion to decree divorce regardless of recrimination where public policy would be thereby served.

This is the view taken by cases representing the final category of decisions. In a 1952 decision, *DeBurgh v. DeBurgh*,[24] the Supreme Court of California, upon facts similar to those in *Kucera*, ruled that the trial court must exercise discretion when confronted with a recrimination case. The California Civil Code provides: "Divorces must

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[19]Eals v. Swan, 221 La. 329, 59 So. 2d 409 (1952). White v. White, 281 P.2d 745 (Okla. 1955).

[20]E.g., Kan. Gen. Stat. Ann. § 60-1506 (1949).

[21]Ristine v. Ristine, 4 Rawle 460 (Pa. 1834), Mendenhall v. Mendenhall, 12 Pa. Super. 290 (1900). Contra, Kirn v. Kirn, 138 Va. 132, 120 S.E. 850 (1924). See, Clapp v. Clapp, 97 Mass. 531 (1867).

[22]Klekamp v. Klekamp, 275 Ill. 98, 113 N.E. 852 (1916).

[23]Trigg v. Trigg, 18 S.W. 313 (Tex. 1891). Texas has further limited its doctrine by requiring that the plaintiff's misconduct must be of the same general character as that of the defendant. Warfield v. Warfield, 161 S.W.2d 533 (Tex. Civ. App. 1942).

[24]39 Cal. 2d 858, 250 P.2d 598 (1952).

be denied upon showing: ... 4. Recrimination; ..."[25] and further provides: "Recrimination is a showing by the defendant of any cause of divorce against the plaintiff, in bar of the plaintiff's cause of divorce."[26] Judge Traynor, speaking for the majority said:

> "It has sometimes been assumed that any cause of divorce constitutes a recriminatory defense. The legislative language however, is ill-adapted to such a broad purpose .... Had the Legislature meant to make every cause of divorce an absolute defense, it could easily have provided that: 'divorces must be denied upon ... a showing by the defendant of any cause of divorce against the plaintiff.' We are bound to consider the additional requirement that such a cause of divorce must be 'in bar' of the plaintiff's cause of divorce."[27]

The court did not enumerate the conditions necessary to establish recrimination "in bar" to plaintiff's relief,[28] but stated that the qualification worked as a mandate upon the courts to recognize and apply the public policy of the state through judicial discretion in weighing the extenuating circumstances of the case, which may require that a divorce be granted irrespective of the showing of a valid recriminatory defense. The rule announced, as opposed to a mechanical application of the concepts of fault as manifested by the statute enumerating specific grounds for divorce, resulted in the ultimate decision that a recriminatory defense "in bar" to the wife's cause for divorce had not been made out. Thus, it would appear that the court in *Kucera* could have found authority to affirm the trial court's exercise of judi-

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[25]Cal. Civ. Code § 111.

[26]Cal. Civ Code § 122.

[27]250 P.2d at 600.

[28]The court at page 606 did indicate, however, that four major considerations should govern this decision:

1. *The prospect of reconciliation*—Based on the ages and temperaments of the parties, the seriousness and frequency of their misconduct, the length of their marriage, and any other relevant considerations, the court should determine the likelihood that the marriage can be saved.

2. *The effect of the marital conflict upon the parties*—If continued, where the marriage is likely to result in physical brutality, then in the interest of the welfare of the parties the relation should be terminated.

3. *The effect of the marital conflict upon third parties*—The court should be reluctant to terminate a marriage where children are involved; however, extreme hatred and violence may dictate otherwise.

4. *Comparative guilt*—The parties will seldom be "in pari delicto" before the court. Also, one spouse may indicate substantial repentance and reform. A consideration of these factors should bring the court to decide whether public policy demands the continuance of the marriage.

cial discretion without requiring a statutory amendment.[29] By so doing, the court could have reached the result which it thought to be more prudent.

This result has been reached in the District of Columbia where the court recognizes the doctrine of recrimination but refuses to hold that it is an absolute bar to the granting of a divorce. The decision was reached in the case of *Vanderhuff v. Vanderhuff*,[30] on a liberal reading of a 1935 amendment to the divorce statutes;[31] however, the construction has been criticized as not supported by the statute.[32] Parliament acknowledged the propriety of allowing the trial court discretion in recrimination cases from the earliest time that it allowed the courts to grant absolute divorce.[33]

It is important to note that in many instances the results obtained in states following the doctrine of recrimination applied with judicial discretion and those reached in jurisdictions following comparative rectitude will not vary. For this reason, many states appear beset with uncertainty in their decisions. Michigan experimented with the doctrine of comparative rectitude and then rejected it, re-embracing the principle of recrimination.[34] Pennsylvania has remained uncommitted.[35] Florida, in *Stewart v. Stewart*,[36] leaned toward comparative rectitude but did not openly adhere to the doctrine.

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[29]Three members of the court in DeBurgh, concurred in the result but dissented as to the reasoning of the majority opinion, stating that it was a judicial repeal of the recrimination provision of the Code. 250 P.2d at 608. Also, in Mueller v. Mueller, 44 Cal. 2d 527, 282 P.2d 869 (1955), on the strength of the comparative guilt language in DeBurgh, (supra note 28) a divorce was granted to both parties a course normally associated with the doctrine of comparative rectitude. However, at least two other states with statutes similar or identical to those of California and North Dakota have relied on the DeBurgh case to read discretion into their recrimination statutes. Howay v. Howay, 74 Idaho 492, 264 P.2d 691 (1953); Bissell v. Bissell, 129 Mont. 187, 284 P.2d 264, 271 (1955). In Howay the court expressly said that it was not extending the discretionary power of the court as far as California had in DeBurgh. 264 P.2d at 697.

[30]144 F.2d 509 (D.C. Cir. 1944).

[31]D.C. Code § 16-403 (1940); 144 F.2d at 509-10.

[32]Note, 23 Texas L. Rev. 194 (1945).

[33]Matrimonial Causes Act, 1857, 20 & 21 Vict., c. 85 § 31.

[34]Weiss v. Weiss, 174 Mich. 431, 140 N.W. 587 (1913), allowed a divorce where both parties were at fault based on "the peculiar exigencies of the case" but later in Hatfield v. Hatfield, 213 Mich. 368, 181 N.W. 968 (1921), reaffirmed the doctrine of recrimination and criticized the position taken in the earlier case. The latter position was affirmed in Radzinski v. Radzinski, 234 Mich. 144, 207 N.W. 821 (1926).

[35]Dearth v. Dearth, 141 Pa. Super. 344, 15 A.2d 37 (1940).

[36]158 Fla. 326, 29 So. 2d 247 (1946). The majority in Stewart used language to the effect that they were merely allowing discretion to be exercised in connection with recrimination, but Justice Fabisinski, dissenting, took the position that the majority was adopting comparative rectitude.

The distinction between recrimination with discretion and comparative rectitude is one of emphasis and approach. The latter approach embraces the theory that to deny divorce results only in frustration of the parties, tending to promote adulterous relationships and increasing the danger of illegitimate births. Thus, for the immediate benefits of the parties, divorces are decreed more freely. With this approach, there comes a decline in the importance of the family unit in our society. The court accepting comparative rectitude, in essence, holds that this is preferable to imposing the hardships of denying a divorce to a delinquent plantiff.

On the other hand, the doctrine of recrimination places emphasis on the stability of the martial status. When the parties come before the court to resolve their differences, individual re-evaluation and improvement in conduct are sought as objectives,[37] as opposed to freely allowing the parties to go their separate ways. Since *Williams v. North Carolina*,[38] no state may absolutely impose its public policy, with regard to the institution of marriage, upon its citizens. By that decision North Carolina was required to give "full faith and credit" to a Nevada divorce decree granted after six weeks domicile in that state and resting on constructive service upon the defendant. The fact that one state may have its public policy thwarted by the decree of a laxer state should not play a role in the determination of what the policy shall be. It is contended that recrimination as a defense to a divorce action should be retained in our law. But its application should be tempered by the allowance of judicial discretion. Further, the exercise of this discretion in turn should be tempered by the realization that the family is the basic unit of our society which nurtures and develops the individual initiative characterizing a free nation. It is in the best public interest that this status be continuing from one generation to the next. But where a marriage has been destroyed to the point where no value to society can be expected and the welfare of the parties may be endangered by violence, hatred, and immorality, then little utility can be obtained from its continuance. Only when recrimination is viewed in this light can it result in a nearer approach to equality and uniformity of justice.

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[37]In Andrews v. Andrews, 162 Ore. 614, 94 P.2d 300 (1939), the court, after denying a divorce where both parties were convinced that they could no longer live together, said: "It is hoped that common sense and righteousness may yet prevail in this disturbed household."

[38]317 U.S.287 (1942). See also Sherrer v. Sherrer, 343 U.S. 343 (1948).