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A BRIEF LOOK AT RECRIMINATION

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The equitable rule that one who invokes the aid of the court must come into it with a clear conscience and with clean hands has been applied by the courts in divorce proceedings and has formed the basis for the doctrine of recrimination. It is now well established in this country under this doctrine, that the defendant to an action of divorce may set up as a defense in bar that the plaintiff was guilty of misconduct which in itself is a ground for divorce. It is not necessary that the plaintiff's misconduct be the same or of the same degree as that alleged misconduct of the defendant's; but by the weight of authority, when divorce statutes specify certain acts of misconduct which will provide grounds for absolute divorce, any one is good as a bar—a recriminatory defense—regardless of a moral point of view. The misconduct must have been committed by the plaintiff knowingly and without connivance, justification, or excuse. Therefore, knowing that he who seeks redress for a violation of a contract based on mutual and dependent covenants must himself have performed the obligation on his part, what has been the progress and application of this principle in Colorado?

RECRIMINATION IN COLORADO

The statutory law is set out in the 1935 COLO. STAT. ANN., C. 56, §7, entitled "Cross-complaint—Both parties guilty—Divorce denied—" as follows:

> In any action for divorce the defendant may file a cross-complaint in which may be set forth any one or more causes for divorce or separate maintenance against the plaintiff; and if upon the trial of such action both parties shall be found guilty of any one or more of the causes of divorce, then divorce shall not be granted to either of said parties.

The statute has not been amended, and this is the statutory law in Colorado today, as far as recrimination is concerned. The statute specifically says that the parties may be found guilty of "any" ground for divorce, and Colorado has followed this line of application from as far back as 1892 as evidenced by the case of *Reddington v. Reddington.*[1]

In that case the defendant was guilty of desertion and non-support, and the plaintiff guilty of adultery; it was held that both the complaint and the cross-complaint should have been dismissed. The court in its opinion stated, "In estimation of law, all grounds of divorce are of equal force and validity, notwithstanding supposed differences in point of morals, and in the gravity of the

[1] 2 Colo. App. 8, 29 P. 811 (1892).

offenses involved." From this opinion we can conclude that Colorado is in accord with the weight of authority as mentioned ante, in that the offenses of the plaintiff and the defendant need not be the same.

Courts May Sua Sponte Declare Recrimination and Deny Divorce

A first suggestion of the court's power to deny divorce on the grounds of recrimination when the defendant has not set up the plaintiff's misconduct as either a bar or a cross-complaint, appeared in the opinion of the case of *Ward v. Ward.*[2] Here the court said where the trial develops facts which would make the granting of a divorce inequitable or unjust, the court has a duty to see to it that a decree of divorce is denied. This inference became the rule rather than remaining a suggestion in the case of *Garver v. Garver.*[3] The court stated as follows: "If upon the testimony presented, the wife applying for the divorce appears to have been herself guilty of willful desertion, it is the duty of the court, upon its own motion to deny her application." Because of this case, the rule seems to be settled that in Colorado the court can deny divorce and claim recrimination on its motion.

Effect of Recrimination on Alimony

In the case of *Cupples v. Cupples,*[4] the wife sued for separate maintenance. The husband-defendant set up a recriminatory defense, but did not seek a divorce. The court held that (1) the defendant could set up a recriminatory defense and did not have to seek a divorce and (2) the fact that the defendant had established facts which would entitle him to a divorce was not sufficient reason for the disallowance of alimony. However, the case of *Elliott v. Elliott,*[5] decided shortly after the *Cupples* case, *supra,* and in effect seems to change the *Cupples* ruling, states the apparent prevailing rule in Colorado as follows: "If by reason of misconduct of both parties neither was entitled to a divorce, and the complaint was dismissed as to the divorce, it is error for the court to decree alimony and separate maintenance to the plaintiff, the action should have been dismissed." The *Elliott* case leaves the writer with the impression that Colorado extends the "clean hands" doctrine to alimony, and before a party can seek alimony the party desiring the court's aid must come into the court with clean hands.

Another sidelight may be noted here from a 1916 Colorado case[6] which points out that failure by a defendant to a divorce action to comply with an order granting the plaintiff temporary alimony and suit money is not sufficient ground to prevent the defendant from making his defense of recrimination, or any defense he has, as it would then be depriving the defendant of his

[2] 25 Colo. 33, 52 P. 1105 (1898).
[3] 52 Colo. 227, 121 P. 165 (1912).
[4] 31 Colo. 443, 72 P. 1056 (1903).
[5] 34 Colo. 298, 83 P. 630 (1905).
[6] Frey v. Frey, 61 Colo. 581, 158 P. 714 (1916).

constitutional right to be heard before being deprived of his property or personal rights.

Miscellaneous Notes As to Recrimination

The case of *Sholes v. Sholes* [7] states that where a wife sues for divorce on grounds of mental cruelty and is denied divorce because of recrimination, she is also denied separate maintenance in a subsequent action using the same acts of cruelty during the same period of time, since it has been judicially determined that the charge of cruelty was not sustained, there was left no basis for a suit of separate maintenance.

The case of *Harms v. Harms* [8] points out that where a divorce action is brought by a resident of the state of the forum against a non-resident, a divorce may be granted the non-resident upon his or her cross petition, in spite of the fact that the statute requires the plaintiff in an action for divorce to have been a resident for a specified time. The defendant, in such a case, need not plead statutory residence and is not limited by the statute concerning acts of cruelty committed within the state of Colorado, but would be free to establish cruelty committed subsequent to the marriage no matter where committed.

It should also be noted that condoned adultery is not a bar to a divorce, because it is not a ground for divorce.[9]

RECRIMINATION AND ITS APPLICATION IN OTHER JURISDICTIONS

Thirty-two jurisdictions have recrimination statutes. Of these 32 jurisdictions, 29 provide for recrimination as an absolute defense, while 3 give the court the power to use its discretion for the final determination of the effect of the complainant's misconduct.

Doctrine of Comparative Rectitude

The doctrine of comparative rectitude has been defined as the principle that, under proper circumstances, relief by way of divorce may be given to the party least at fault, although both parties have shown ground for divorce.[10] The courts adopting this doctrine seem to apply it in cases where it appears that the parties cannot possibly live together again, the idea being that it is not only for the parties' welfare but for the general welfare of society as well. It has also been suggested that the mere fact that both parties are at fault and desirous of a divorce, is sufficient reason for granting divorce.

The Ohio court [11] in repudiating comparative rectitude stated, "A court cannot find both parties guilty of acts of misconduct constituting a ground for divorce and then grant a divorce to the party the less guilty of the two. One party must be guilty and the other innocent of acts constituting a ground for divorce, before

[7] 72 Colo. 175, 209 P. 1046 (1922).
[8] 120 Colo. 212, 209 P. 2d 522 (1949).
[9] Jones v. Jones, 71 Colo. 420, 207 P. 596 (1922).
[10] 159 A.L.R. 734.
[11] Veler v. Veler, 57 Ohio 155, 12 N.E. 2d 783.

a court can enter a decree." While the Michigan court [12] stated, "The scales of equity cannot be adjusted to measure degrees of culpability between erring spouses."

Same Offense Doctrine

Those following this doctrine advocate that no divorce may be decreed to the complainant if he is guilty of the same offense charged against the defendant. This doctrine departs from the general rule that a recriminatory offense need not be of the same nature as the offense of which the defendant is guilty, and states that the defendant can only set up as a recriminatory defense the same offense the plaintiff has charged him with. This doctrine is expressly followed by the Texas courts [13] in their holdings that the misconduct of the plaintiff, in order to constitute a defense to the suit, must, even if sufficient to give the defendant cause for divorce upon the assumption of his entire innocence, be of the same general character and degree as the misconduct of the defendant relied on by the plaintiff as ground of suit, and must have been provocatory of the defendant's acts of misconduct.

By use of this doctrine, the doctrine of recrimination is greatly cut down as to its extensive application, and the complainant also has a much greater chance of obtaining a divorce. In effect, the same offense doctrine is an extension of the doctrine of comparative rectitude, and they both enjoy little popularity.

Statutes Allowing the Court to Use Its Discretion

Some states have seen the ills of recrimination in that the court forces the erring spouses to continue the marriage contract—it leaves the parties where it found them, when they both have dirty hands—and these states have passed statutes which grant to the trial court the authority to exercise its discretion as to the granting or denying of a divorce when the parties appear to be in equal wrong. Such jurisdictions as Kansas,[14] Minnesota,[15] Oklahoma,[16] and Wyoming [17] have deemed it proper to give their courts such discretionary powers.

Types of Statutes [18]

There are 8 types of statutes in the 32 jurisdictions following recrimination which are as follows: (where the defendant is guilty of . . . the defendant can recriminate by showing the plaintiff guilty of . . .).

Adultery—adultery (15); any cause—any cause (6); any

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[12] Vardon v. Vardon, 266 Mich. 341, 253 N.W. 320.

[13] Hale v. Hale, 26 Am. Rep. 294; Trigg v. Trigg, 18 S. W. 313.

[14] Larsen v. Larsen, 134 Kans. 436, 7 P. 2d 120; Roberts v. Roberts, 103 Kans. 65, 173 P. 536.

[15] Vanderhuff v. Vanderhuff, 144 F. 2d 509, 79 App. D. C. 153.

[16] Panther v. Panther, 147 Okla. 131, 295 P. 219; Lyon v. Lyon, 39 Okla. 111, 134 P. 650.

[17] Jegendorf v. Jegendorf, 61 Wyo. 277, 157 P. 2d 280.

[18] Vernier Family Laws, 1932.

cause—same crime or misconduct (3); any cause—cause of equal wrong (2); any cause—adultery (3); adultery—any cause (1); any cause—adultery or like cause (1); desertion, cruelty, adultery, intoxication—like conduct (1).

THE PROS AND CONS OF RECRIMINATION

After this brief look at recrimination and its by-product doctrines the question still remains as to what would be a suitable solution. Should some of these doctrines such as comparative rectitude or the same offense doctrine be adopted, or should the recrimination provision be excluded from our statutes, or shall we call the existing statute satisfactory for our needs and let it remain as it is? Needless to say, the state of the divorce laws is quite controversial and many opinions exist as to their ultimate fate.

Those advocating that recrimination doctrines and applications should be strictly construed and adhered to use an argument which is fairly well summed up by the Colorado court in a 1905 case [19] which states as follows:

> The complainant must come with clean hands and a chaste character not stained with the infamy and crime of which she complains. The parties are in *pari delicto,* and to grant relief to either of them would be offering a bounty to guilt. It would place the permanency of the marriage contract, in every case, at the disposal of the contracting parties, and remove one of the strongest motives to that correctness and chastity of conduct which is necessary to render the marriage state either pleasant or convenient.

This is a fairly accurate statement of the general argument set forth by those beating the drum for recrimination. In other words, what they are saying is that the law deems the party seeking a divorce to be innocent. If under the statute the parties to the marriage—and sadly enough to the divorce—are in *pari delicto,* how can the courts decide which is the innocent and which the injured party? And going a step farther they ask, can either have the contract vacated at the expense of the other, when it has been equally infracted by both? Therefore these advocates believe the rule should be to allow the defendant to recriminate for any of the causes which would dissolve the contract, whether it be *codem delictum* or not.

On the other side of the fence we find those who believe that something should be done about recrimination, and a good summary of their arguments in support of relaxation of the doctrine of recrimination appeared in the K. C. Law Review,[20] which states,

[19] Elliott v. Elliott, 34 Colo. 298, 83 P. 630 (1905).

[20] Vol. 10 K. C. Law Review 249,50.

> Denial of divorce seldom restores life to families sociologically dead when they came into court, and that if anything is preserved it is but the dead and empty shell of what has been and is no longer a realization, that upon the refusal of divorce, those things which cannot be done legally are often done illegally, relationships are formed, nameless children are born, and that even if the parties forces themselves to remain together, their children will probably not thank them for it or even be imbued with any high and lasting ideals about their family, or the family as a sociological concept. If this is the justification for permitting divorce where only one party is at fault, how much more reasonable is it to permit divorce where both parties hold their marriage vows in contempt, and the likelihood that attempts at reconcilliation will fail are thereby doubled. Possibly at one time—when a party convicted of adultery was prohibited from marrying again —a distinction could be made. But if so, it is no longer valid today. With a few limitations, the defendant as well as the successful petitioner is permitted to remarry and possibly achieve the happiness he failed to find in his first marriage.

These arguments are sound, for it seems that the parties to a divorce action differ from those in the ordinary civil action. In the divorce action the judge protects the state's interest in an orderly society, the interest of the citizens, and above all the court should protect the welfare of the children who might be affected by divorce proceedings. Therefore a strict application of the clean hands doctrine is nothing more than a form of punishment dealt to the erring spouses, and omits consideration of the interests of those who are no more than innocent bystanders but who are nevertheless dealt misery because they are adversely affected by a decree which leaves both the guilty litigants where the court found them—and in the situation where they placed themselves. To compel two persons who both seek divorce to live together seems to be a moral injustice, for divorce itself is the climax—it is a word describing shattered domestic harmony and affection which has been replaced by discord and strong hatred.

Therefore the choice which we are left with is (1) a dissolution of the existing marriage with the possibility of future happiness and respectability through remarriage or (2) continuing the existing marriage and harboring a pretended legal cohabitation which in all probability will result in promiscuity by both parties to satisfy passions and quell emotions. It seems to the writer that there is only one available choice—that is the first—because this choice best meets the needs of our present-day society. The problem exists and the question remains what shall we do about it?