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DOMESTIC RELATIONS—THE MODERN TREND TOWARD REJECTION OF RECRIMINATION

The Supreme Court of New Mexico in *Pavletich v. Pavletich*¹ recently overruled a previous decision² and held that where the husband and wife are irreconcilable, divorce will no longer be denied on the ground of recrimination. This is a commendable reform by a contemporary court with respect to an age-encumbered inheritance. A critical examination of modern mores, statutes, decisions, and practical application of the doctrine proves recrimination is effete and should be stricken from the law. A pertinent observation was made by the court in question in these words:

“The views of the people in the courts of the world on recrimination as a bar to divorce are slowly changing.”³

Recrimination is a counter-charge in a divorce suit that the complainant also has been guilty of an offense which is a ground for divorce.⁴ In the majority of states the doctrine is well settled, and the paradoxical result follows that if both parties are guilty of matrimonial offenses which are grounds for divorce neither can obtain one.⁵

The four basic theories ordinarily offered in support of the doctrine of recrimination are: (1) the clean hands maxim; (2) a contract theory of marriage; (3) the theory that divorce is a remedy for the innocent and the injured exclusively; and (4) the maintenance of family unity. The doctrine is based primarily and most frequently on the equitable maxim that he who comes into equity must come with clean hands.⁶ Basing the doctrine of recrimination upon the premise of the necessary applicability of an equitable maxim is clearly a fallacy, because history shows that divorce did not originate in equity but had its ancestry in the ecclesiastical courts.⁷ Therefore the doctrine of recrimination need not necessarily inherit the traits of equity, since it is not the offspring of equity exclusively. Some jurisdictions even speak of divorce as an action

¹ 50 N.M. 224, 174 P 2d 826 (1946)

² *Chavez v Chavez*, 39 N.M. 480, 50 P 2d 264 (1935).

³ *Pavletich v Pavletich*, 50 N.M. 224, 174 P 2d 826, 830 (1946).

⁴ MADDEN, *PERSONS AND DOMESTIC RELATIONS* (1931) sec. 92.

⁵ *Day v Day* 71 Kan. 385, 80 Pac. 974 (1905) *Buckley v. Buckley*, 214 Ky 566, 283 S.W 1031 (1926) *Manning v. Manning*, 188 Ky 140, 221 S.W 522 (1920) *Green v. Green*, 125 Md. 141, 93 Atl. 400 (1915), *Daly v Daly* 137 Pa. Super. 403, 9 A. 2d 192 (1939) MADDEN, *op. cit. supra* note. 4.

⁶ *Brazell v. Brazell*, 54 Cal. App. 2d 458, 129 P 2d 117 (1942) *Day v. Day*, 71 Kan. 385, 80 Pac. 974 (1905) *Phillips v. Phillips*, 48 Ohio App. 322, 193 N.E. 657 (1933)

⁷ *Zacharias, Recrimination in the Divorce Law of Illinois* (1936) 14 CHI-KENT REV. 217, 220.

at law rather than a suit in equity.⁸ Other jurisdictions do classify it broadly as an equity action, i.e., as *suu generis*.⁹ and yet the clean hands doctrine is strictly applied in many jurisdictions where divorce proceedings are treated as equitable.¹⁰ Thus, analysis indicates the reason that the equitable maxim is so firmly entrenched in our law may well be attributed in no small degree to lackadaisical courts and historical accident, rather than to logic and reason. And as will be suggested in the following paragraphs, there is not even justification for borrowing and applying the clean hands maxim in the divorce cases which are made to turn upon recrimination. The maxim is neither necessary nor suitable.

Another theory offered is that marriage is a contract, and on principles of contract law the plaintiff cannot demand rescission if he has failed to perform the condition of the contract on his part.¹¹ This line of approach becomes unconvincing when the argument has to be met that the marriage relation differs fundamentally from the ordinary contract,¹² and that difference properly excludes any necessary application of principles of rescission to the marriage status. It is also contended that divorce is a remedy for the innocent and injured exclusively.¹³ This seems a product of facile rationalization by courts rather than a basis upon which to found a theory.

The courts express the view that the family is the basic unit of society and must be preserved.¹⁴ This is an attempt at a sociological justification and evinces procrastination of modern day thought when used in support of recrimination. Beamer has severely criticized this theory in the following words:

"Forty-seven out of the forty-eight of our state governments, and a respectable majority of foreign governments all of whom, it is assumed, have a vital interest in the maintenance of the family have decided that the interests of both the family and of the state can best be served by permitting divorce in certain situations. And the present tendency seems to be toward a further liberalization of the divorce laws. This decision and tendency may be said to be due to a slowly awakening realization that denial of divorce seldom restores life to families sociologically dead when they come into court, and that if anything is preserved it is but the dead and empty shells of what has been and is no longer—a realization that upon the refusal of

⁸ *Watts v. Watts*, 312 Mass. 442, 45 N.E. 2d 273 (1942).

⁹ *Lingner v. Lingner*, 165 Tenn. 525, 56 S.W. 2d 749 (1933),
Broch v. Broch, 164 Tenn. 219, 47 S.W. 2d 84 (1932)

¹⁰ *Hatfield v. Hatfield*, 213 Mich. 368, 181 N.W. 968 (1921),
Maurer v. Maurer, 150 Ore. 130, 42 P. 2d 186 (1935)

¹¹ *Spansenburg v. Carter*, 151 La. 1038, 92 So. 673, 677 (1922)

¹² *Maynard v. Hill*, 125 U.S. 190, 31 L. Ed. 654, 8 Sup. Ct. 773 (1888).

¹³ *See Day v. Day*, 71 Kan. 385, 80 Pac. 974 (1905).

¹⁴ *See Decker v. Decker*, 193 Ill. 285, 61 N.E. 1108, 1109 (1901).

divorce, those things which cannot be done legally are often done illegally, those things which cannot be done openly are done clandestinely; that other relationships are formed, nameless children are born; and that even if the parties force themselves to remain together, their children probably will 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 when only one party is at fault, how much more reasonable is it to permit divorce when both parties hold their marriage vows in contempt, and the likelihood that attempts at reconciliation 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.”¹⁵

A careful survey of statutes and cases is instructive. In the United States there are thirty-two jurisdictions recognizing the doctrine of recrimination by statute. Of these statutes there are eight general types, varying from those permitting any ground for divorce as a defense in recrimination to those statutes which permit only adultery as a bar.¹⁶ Vernier has stated, “It is quite apparent that most of these statutes are not a product of constructive social thought. The recrimination statutes are a good example of the uselessness and mischievous nature of the varied family legislation existing in some of our states.”¹⁷ It has been held under a statute that adultery cannot be set up by way of recrimination unless the adultery of the defendant is the ground for divorce.¹⁸ We have the result that while adultery will bar a suit for divorce on the ground of adultery, it will not bar a suit on the ground of a less grievous offense such as cruelty, for example.

Equally as absurd as these statutes are some of the cases. In one of them the wife because she had sulky spells was held not an innocent party and was not entitled to a divorce for her husband's brutal treatment.¹⁹ The husband, in another case, asked for divorce on the grounds of his wife's inability to enter into the marital relations. When the wife set up her husband's cruelty as a defense, the husband was subsequently refused a divorce.²⁰

In still another case the husband deserted his wife and she heard nothing of him but rumors of his death for twenty-seven years.

¹⁵ Beamer, *The Doctrine of Recrimination in Divorce Proceedings* (1941) 10 KAN. CITY LAW REV. 213, 249.

¹⁶ 2 VERNIER, AMERICAN FAMILY LAWS (1932) sec. 78.

¹⁷ *Id.* at sec. 78, pp. 83-85.

¹⁸ *Buerfening v. Buerfening*, 23 Minn. 563 (1877), MADDEN, PERSONS AND DOMESTIC RELATIONS (1931) sec. 92.

¹⁹ *Lawson v. Lawson*, — Mo. App. — 44 S.W. 2d 191 (1931).

²⁰ *Carmichael v. Carmichael*, 106 Ore. 198, 211 Pac. 916 (1923) *Cf. Decker v. Decker*, 193 Ill. 285, 61 N.E. 1108 (1901)

He returned with a second wife and children, but by then the first wife had remarried and she continued to live with her second husband. She was deemed guilty of such gross misconduct that she was refused a divorce.²¹

If these preceding instances are criticized as exceptions, the typical one is certainly not free from absurdity. In the typical case a wife sues for divorce on the charge of cruelty and the divorce is refused when it is shown that the husband had cause for divorce against her also on the ground of cruelty,²² or on some other ground. Surely in such a case, there is no likelihood of preserving a happy family. Social, if not legal, reasons demand a divorce! A denial of an absolute divorce by modern courts today by reason of recrimination deprives the parties of a more extensive right than did the ecclesiastical courts which prevented only the divorce *a mensa et thoro*.

Recent decisions show that the trend is to discard recrimination. Some of these which reaffirm the public's interest in the preservation of marriage have become realistic and have recognized that society does not wish to perpetuate a status out of which harm must necessarily result.²³ This trend is evidenced by the following limitations that have been placed upon the doctrine: (1) statutes making recrimination no longer an absolute bar; (2) statutes allowing the court to exercise discretion in applying the doctrine; (3) the doctrine of comparative rectitude; and (4) modern case authority pointing toward a repudiation of the doctrine. There is recent legislation in the District of Columbia²⁴ liberalizing divorce laws so that recrimination is no longer an absolute bar to divorce. In the case of *Vanderhuff v. Vanderhuff* the United States Court of Appeals in the District of Columbia said:

"From a social point of view it is hard to defend a rule that recrimination is an absolute bar to the granting of a divorce. It requires parties who are guilty of conduct which makes their marriage impossible of success to continue their marital relationship as a sort of punishment of their sins. We believe our present statute has changed the policy which made recrimination an absolute bar to divorce."²⁵

The courts of England since 1857 have not been bound to pronounce a decree to a petitioner guilty of adultery.²⁶ In Nevada²⁷ it is provided by statute that a court shall not deny a divorce on

²¹ *Matthewson v. Matthewson*, 18 R.I. 456, 28 Atl. 801 (1894)

²² *Alexander v. Alexander*, 140 Ind. 555, 38 N.E. 855 (1890).

²³ *Lingner v. Lingner*, 165 Tenn. 525, 56 S.W. 2d 749 (1933)

²⁴ D. C. CODE (1940) tit. 16, sec. 403.

²⁵ *Vanderhuff v. Vanderhuff* (App. D. C. 1944) 144 F. 2d 509 (1944).

²⁶ 20 & 21 VICT., c. 85, sec. 31 (1857), 15 & 16 GEO. V c. 49, sec. 178 (1925), 1 ED. VIII & 1 GEO. VI, c. 57, sec. 4 (1937).

²⁷ NEV. COMP. LAWS (Hillyer Supp. 1931-1941) sec. 9467.01.

ground of recrimination, but may in its discretion grant a divorce to the one least at fault. Kansas²⁸ and Oklahoma²⁹ also have statutes allowing the court to use its discretion as to the refusal to grant divorce.

A definite limitation is the doctrine of comparative rectitude applied by the courts in several jurisdictions.³⁰ The cases accepting this principle permit granting of divorce to the party least at fault when the interests of the parties and of society will be served.

As regards modern case authority a court of the State of Washington, apparently without benefit of statute, has allowed a decree of divorce where each party proved cruelty.³¹ Even in a jurisdiction which strictly applies the "clean hands" doctrine, there are increasing objections in *dicta* which emphasize that the doctrine of recrimination is founded on public policy, and that public policy may wish it relaxed.³²

The sociological movement in jurisprudence which is uppermost today, puts the human factor in the central position and uses logic as an instrument. To quote from the *Pavletich* case:

"Is it really believed that spouses who have engaged in litigation, sometimes for years, are going to take up their marital relationships because seven federal judges have decided, sometimes in a few minutes, that they ought to try again, that it was not proved, And yet, countries which refuse to impose a business partnership on an unwilling party, do not hesitate to impose on unwilling spouses this most intimate of human relations."³³

The theory of recrimination as outlined is seldom put into actual practice and it is the law's continued application of the doctrine which drives many irreconcilable married persons to bargaining as a result of which one party agrees to default and "justice" is done in a lawyer's office, instead of by an impartial court. Today collusion thrives upon recrimination and the only case where there is likelihood of resort to the defense of recrimination is the one where the litigant fails to "bargain" successfully out of court. The courts, in perpetuating a static theory through blind adherence to *stare decisis* have hindered justice rather than furthered it. It is indeed cause for gratification that the New Mexico court in an approach both rational and realistic has rejected the doctrine.

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²⁸ GEN. STAT. OF KAN. ANN. (1935) c. 60, art. 15, sec. 1506.

²⁹ OKLA. STAT. (1941) tit. 12, sec. 1275.

³⁰ *Weiss v Weiss*, 174 Mich. 431, 140 N.W. 587 (1913), *Johnsen v. Johnsen*, 78 Wash. 423, 139 Pac. 1200 (1914).

³¹ *Flagg v Flagg*, 192 Wash. 679, 74 P. 2d 189 (1937).

³² See *Hollingworth v. Hollingworth*, 173 Ore. 286, 145 P. 2d 466, 468 (1944), *McElwee v. McElwee*, 171 Ore. 462, 138 P. 2d 208, 210 (1943).

³³ *Pavletich v. Pavletich*, 50 N.M. 224, 174 P. 2d 826 (1946).