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Domestic Relations: Adultery as a Ground for Divorce

William S. Jett Jr.
University of Kentucky

compensation with optional compensation as the only alternative. Optional compensation, in turn, discriminates outrageously against motorists as a class, since they pay compensation when not at fault, and damages when they are at fault, with no offsetting benefits. The argument is sound but the premise is wrong. A distinction is to be noted between the kind of statute this contention is based on, and the kind advocated by the majority of those who favor the plan. In the former the taking out of insurance by every motorist is mandatory; while in the latter it is conditioned upon violation of some motor car law, or upon being involved in an accident as provided by the particular statute. No person is compelled to furnish security of any kind until he has violated some provision of the statute. The statute does not compel the motorist class as a whole to furnish security, but only those individuals who are violators of motor car laws and are reckless in their driving. It is submitted that this is in no way unjust or discriminatory.

Such a statute would act as a strong preventive of future accidents. The average wage earning owner who is unable to afford insurance would guard against careless or reckless driving, when he knows that once he has been in an accident or has violated some motor car law (as provided by the particular statute) he will be compelled to furnish security or else be barred from the roads. Certainly even a slight reduction in the number of accidents causing loss of life and limb justifies the increased burden placed upon the type of motorist the statute would require to furnish security.

In summary there are two reasons for having such an act: (1) protection of accident victims, (2) prevention of future accidents. Do these two interests outweigh the slight increase in the burden placed upon the motorist? The answer to this question must be in the affirmative. In conclusion it is proposed that Kentucky adopt a statute similar to that of Connecticut. There is no doubt as to the great need when it is recalled that in Kentucky in 1923 there were only 166 auto fatalities while in 1930 the number jumped to 514,[15]—an increase of over 200% in seven years. Certainly the present system of regulating the matter in this State is antique in its methods and wholly inadequate to cope with the problem.

EMERSON SALISBURY.

DOMESTIC RELATIONS: ADULTERY AS A GROUND FOR DIVORCE.

A husband sued for divorce on the grounds of adultery. It appeared that the wife had been guilty of adultery, but such had been condoned by the husband by subsequent cohabitation. Thereafter she again committed adultery. The court held that the second offense revived the original cause of action, and that the husband was entitled to a divorce.[1]

[15] World's Almanac (1935 ed.) p. 858.

[1] Wagner v. Wagner, 130 Md. 346, 100 Atl. 364 (1917).

Adultery is the voluntary sexual intercourse of a married person with a person other than the offender's husband or wife.[2] It was not, by itself, indictable at common law,[3] but was left to the ecclesiastical courts for punishment. However, even in the English ecclesiastical courts adultery was only a ground for divorce *a mensa et thoro*.[4] At the present time in this country all forty-seven states which permit an absolute divorce will grant it for adultery;[5] as do Alaska, the District of Columbia, and Hawaii.[6] An absolute divorce is not permitted in South Carolina.[7]

As to the number of acts of guilt necessary by either the husband or the wife in order to constitute adultery, the general rule is that one is sufficient.[8]

According to the general interpretation of the present law it is not necessary to prove the direct fact of adultery, for, being committed in secrecy, it is seldom susceptible of proof except by circumstances, which however are sufficient when they would lead the guarded discretion of a reasonable and just man to a conclusion of guilt.[9] It is frequently said by the courts that the circumstantial evidence must be of a "clear and positive nature."[10] And that a clear preponderance of the evidence is sufficient.

In all cases there is a presumption of innocence which must be overcome before adultery is proved.[11]

In order to prove adultery by circumstantial evidence the concurrence of both the disposition and opportunity must be shown.[12]

The general rule in the United States is that a divorce for adultery will not be granted on the uncorroborated admissions of the defendant.[13] There are statutes in many states requiring the corroboration of the complainant's testimony.[14]

If the party committing the adultery was insane at the time of committing the act it is no ground for a divorce.[15] Adultery committed while intoxicated is, however, a ground for a divorce.[16]

As to what constitutes a condonation of the offense of adultery the authorities are to a degree in conflict. The general rule is that

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[2] Bouvier, Law Dictionary.
[3] Wharton, Criminal Law, Sec. 1717.
[4] Madden on Persons and Domestic Relations (1931), 264–267.
[5] Vernier, Am. Family Laws (1932), Vol. 11, p. 18.
[6] *Supra*, Note 4.
[7] *Supra*, Note 4.
[8] *Supra*, Note 4.
[9] *Supra*, Note 3.
[10] Marshall v. Marshall, 55 App. D. C. 173, 3 F. (2d) 344 (1925); Brown v. Brown, 27 Idaho 205 (1915); Miller v. Miller, 94 W. Va. 177, 118 S. E. 137 (1923).
[11] *Supra*, Note 3.
[12] *Supra*, Note 3.
[13] *Supra*, Note 3.
[14] Local statutes should be consulted.
[15] *Supra*, Note 3.
[16] *Supra*, Note 3.

if either the husband or the wife condone the infidelity of the other such infidelity cannot be set up as a ground for divorce,[17] for "he who seeks equity must do equity." The weight of authority is that a continuance of cohabitation after knowledge of the commission of adultery is a condonation of that offense.[18] Some American courts use the term cohabitation as including sexual intercourse;[19] while the English courts recognize the fact that there can be cohabitation without sexual intercourse.[20] It is submitted that the English rule is the better rule.

If an act of adultery is condoned, and there is a renewal of the marital status, and thereafter the offending spouse again commits an act of adultery, it amounts to a revival of the original cause, and the injured party is entitled to a divorce on the grounds of adultery.[21] It is submitted that "condonation" is but a conditional forgiveness based upon the future good behavior of the offending spouse.

The doctrine of connivance, which is based on the maxim *volenti non fit injuria*, is a good defense in a divorce action.[22] Merely refraining from interfering with the commission of adultery by a suspected spouse is not connivance.[23]

Under the Kentucky statutes, section 2117, a single act of adultery by the husband is not sufficient to entitle the wife to a divorce, since the statute declares there shall be a living in adultery. The cases bear out the statute in this respect.[24] The wife must prove the husband is living in adultery,[25] but there need not be a living together continuously or for a given time.[26] Under the same statute a single act of adultery by the wife is sufficient to entitle the husband to a divorce.[27] The reason for this distinction between husband and wife has been thus stated: "The offense is a social as well as a moral one, and it is agreed by the civilians to be less grievous to the sufferer, though not less immoral, when it is committed by the husband, whose transgression cannot impose a supposititous offspring on the wife, than it is when committed by the wife, whose transgression may impose such an offspring on the husband; and hence it probably was, though the kindred fault of barrenness was also cause of divorce, that the right of repudiation was confined in the primitive ages to the husband; for there is no instance of an exercise of it by a wife till the time of Cicero or shortly before it."[28]

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[17] 69 U. Pa. Law Rev. 76 (1920-21).
[18] *Supra*, Note 17.
[19] Burns v. Burns, 60 Ind. 259 (1877).
[20] Dictum in Keats v. Keats, 1 S. W. & Tr. 334 (1858).
[21] *Supra*, Note 1.
[22] 2 Bishop, Marriage and Divorce, 6th Ed., Sec. 5, p. 3.
[23] Wilson v. Wilson, 154 Mass. 194, 28 N. E. 167 (1891); Engle v. Engle, 153 Iowa 285, 133 N. W. 654 (1911).
[24] Williams v. Williams, 136 Ky. 71, 123 S. W. 337 (1909); Baker v. Baker, 136 Ky. 617, 124 S. W. 866 (1910).
[25] Booth v. Booth, 12 Ky. L. Rep. 988 (1891).
[26] Baker v. Baker, *supra*, Note 24.
[27] Kentucky Statutes (1930), Section 2117.
[28] Cooper's Notes to Justinian, Lib. 1, Tit. 9, Section 1, p. 435.

In this state, to entitle a wife to a divorce on the grounds of her husband's adultery, it is not necessary to prove him guilty beyond a reasonable doubt, but only to establish his adulterous relations by the weight of the evidence and to the satisfaction of the chancellor.[29]

This distinction made by the Kentucky statutes between husband and wife as to the number of acts of guilt necessary to constitute adultery is without foundation. The modern tendency of the law is to treat the husband and wife as if they stood on equal footing. No longer is it the policy of the law to treat the wife as if she were a part of the personal property of the husband. She is entitled to the same degree of conjugal respect that he is. The law should not be relaxed in favor of the wife, but made stricter in regard to the husband so as to hold both to the same standard of conjugal loyalty to each other and require both to obey God's commandment.

Surely some future general assembly will see the light and abolish this unjust discrimination, thus following the example of forty-two other states in dealing impartially with those who plight their mutual faith at the altar.

WILLIAM S. JETT, JR.

GIFTS: RECOVERY OF ENGAGEMENT RING ON BREAKING OF ENGAGEMENT TO MARRY.

M gave W an engagement ring in consideration of her promise to marry him; at the same time each agreed and promised to marry the other. Approximately two years later M informed W of his unwillingness to perform his part of the contract and refused to marry her. A few days later while M and W were together, W took the ring from her finger and M took it from her hand and put it in his pocket. W demanded that the ring be returned to her possession, but M refused. W sued to recover the ring, if M still had it, or, if not, its value. *Held*, that the plaintiff was the owner of the ring and was entitled to it, or its value if the defendant did not have it.[1]

After a consideration of the problem as raised and decided in various cases the court concluded that where the donee breaches the contract, the donor has a right to recover any property or money which the donee received from the donor "in consideration of the marriage contract." The court went on to say that although the marriage contract may be supported by the promise of one to marry the other, i. e., the mutual promise of the parties, yet if the parties choose to promise or pay an additional consideration they will be bound thereby in the same manner as if it had been an ordinary commercial contract, for in modern ages the ring has become a part of the real consideration of the contract and can no longer be considered a mere custom or symbol. The court believed that the ring could be likened unto purchase money, or "earnest" money in a commercial

[29] *Supra*, Note 24.

[1] Schultz v. Duitz, 253 Ky. 135, 69 S. W. (2d) 27, 92 A. L. R. 600 (1934).