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The Doctrine of Recrimination

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DIVORCE

THE DOCTRINE OF RECRIMINATION

Libel for divorce by wife alleging statutory grounds of cruel and abusive treatment. The libelee answered that the libelant "has spent a great deal of time in the company of a certain young man . . . and has been on terms of intimacy with said man." This was not an allegation of adultery. The trial judge held, although the wife proved grounds for divorce, she was not entitled to a decree nisi as she was not an innocent party. Reversed. The doctrine of recrimination does not apply unless the libelant's act constitutes a statutory cause for divorce. *Reddington v. Reddington*, — Mass. —, 59 N.E. (2d) 775 (1945).

The statutory grounds for divorce are similar in Indiana and Massachusetts.¹ Indiana, however, expressly recognizes by statute the doctrine of recrimination when the party seeking the divorce is guilty of adultery;² while Massachusetts does not recognize the doctrine by statute for any cause.³ Massachusetts, however, recognizes the doctrine by judicial decision.⁴ In the United States thirty-two jurisdictions recognize the doctrine of recrimination by statute.⁵ There are eight types of recriminatory defense statutes, and the number of jurisdictions using each type is as follows: complaint of adultery—defense of adultery (15); complaint of any cause for divorce—defense of any cause for divorce (6); complaint of any cause for divorce—defense of same crime or misconduct (3); complaint of any cause for divorce—defense of any cause of equal wrong (2); complaint of any cause for divorce—defense of adultery (3); complaint of adultery—defense of any cause for divorce (1); complaint of any cause for divorce—defense of adultery or like cause for divorce (1); complaint of desertion, cruelty, adultery, intoxication—defense of like conduct (1).⁶

By judicial decision Indiana extends the doctrine of recrimination to: complaint of cruel and inhuman treatment—defense of cruel and inhuman treatment;⁷ complaint of adultery—defense of abandonment;⁸ complaint of any cause which is a ground for divorce—defense of any cause which is a ground for divorce.⁹ The Supreme Court of Indiana has said "Where each of the married parties has committed a matri-

1. Compare Ind. Stat. Ann. (Burns, 1933) §3-1201; Ind. Stat. Ann. (Burns, 1943 Replacement) §3-1201, with Mass. Gen. Laws (Ter. Ed. 1931) c. 208, §1, 2.
2. Ind. Stat. Ann. (Burns, 1933), §3-1202.
3. Mass. Gen. Laws (Ter. Ed. 1931) c. 208, §1, 2; See *Reddington v. Reddington*, — Mass. —, 59 N.E. (2d) 775, 777 (1945).
4. *Pratt v. Pratt*, 157 Mass. 503, 32 N.E. 747 (1892); *Morrison v. Morrison*, 142 Mass. 361, 8 N.E. 59 (1886); *Robbins v. Robbins*, 140 Mass. 523, 5 N.E. 837 (1836).
5. 2 Vernier, *American Family Law* (1932) 87.
6. *Id.*
7. *Alexander v. Alexander*, 140 Ind. 555, 38 N.E. 855 (1894).
8. *Eikenbury v. Eikenbury*, 33 Ind. App. 69, 70 N.E. 837 (1904).
9. See *McMurrey v. McMurrey*, 210 Ind. 595, 596, 4 N.E. (2d) 837 (1936) *Alexander v. Alexander*, 140 Ind. 555, 559, 38 N.E. 855, 856 (1894), cited *supra* note 7.

monial offense, which is a cause for divorce, so that when one asks for this remedy, the other is equally entitled to the same, whether the offenses are the same or not, the court can grant the prayer of neither."¹⁰

The rule announced by the Indiana¹¹ and Massachusetts¹² courts seems a harsh one, but it is the rule followed by a majority of American jurisdictions.¹³ It is based upon the principle that divorce is a remedy only for an innocent party,¹⁴ and public policy is against granting divorces, except where an innocent person is injured, because of the social interests of the state in maintaining the marriage relationship.¹⁵ Some jurisdictions have impliedly adopted the doctrine of comparative rectitude as an exception to the doctrine of recrimination, and will grant a decree to the party least in fault, where it appears that the parties cannot live together and both are guilty of an offense constituting ground for divorce.¹⁶ In the District of Columbia the divorce laws have been liberalized so that recrimination is no longer an absolute bar to divorce.¹⁷ The state of Washington has granted a decree of divorce to both parties in a suit wherein each party proved cruelty.¹⁸ Kansas, Minnesota, and Oklahoma provide by statute that the court shall use its discretion as to whether a divorce will be granted where recrimination is shown.¹⁹ A Nevada statute provides that the court shall not deny a divorce on the ground of recrimination, but may in its discretion grant a divorce to the party least in fault.²⁰ The courts of England, since 1857, have not been bound to deny divorces to petitioners guilty of adultery.²¹ Switzerland, the Scandinavian countries, Esthonia, and Germany all recognize divorce without fault

10. See *Alexander v. Alexander*, 140 Ind. 555, 559, 38 N.E. 855, 856 (1894), cited *supra* notes 7 and 9.
11. See *McMurrey v. McMurrey*, 210 Ind. 595, 596, 4 N.E. (2d) 837 (1936), cited *supra* note 9; *Alexander v. Alexander*, 140 Ind. 555, 38 N.E. 855 (1894), cited *supra* notes 7, 9, and 10.
12. *Cumming v. Cumming*, 135 Mass. 386 (1883).
13. 2 Vernier, *American Family Laws* (1932) 83.
14. See Mr. Justice Howard, in *Alexander v. Alexander*, 140 Ind. 555, 559, 38 N.E. 855, 856 (1894), quoting Stewart, *Marriage and Divorce*, §314, "Divorce is a remedy provided for an innocent party; a divorce granted to both parties is an anomaly; if both parties have a right to a divorce, neither has"; *Gullett v. Gullett*, 25 Ind. 517 (1865); *Eikenbury v. Eikenbury*, 33 Ind. App. 69, 74, 70 N.E. 837, 839 (1904).
15. See *Eikenbury v. Eikenbury*, 33 Ind. App. 69, 72, 70 N.E. 837, 838 (1904), cited *supra* note 14.
16. Notes (1912) 63 A.L.R. 1132; Notes (1907) 6 Ann. Cas. 171.
17. D.C. Code (1940) tit. 16, §403; *Vanderhuff v. Vanderhuff*, 144 F. (2d) 509 (1944); *Parks v. Parks*, 116 F. (2d) 556 (1940).
18. *Flagg v. Flagg*, 192 Wash. 679, 74 P. (2d) 189 (1937).
19. 2 Vernier, *American Family Laws* (1932) 84.
20. Vernier, *American Family Laws* (Supp. 1938) 48.
21. 20 & 21 Vict. c. 85, s. 3 (1857); 15 & 16 Geo. V, c. 49, s. 178 (1925); 1 Edw. VIII & 1 Geo. VI, c. 57, s. 4 (1937).

of either party, or divorce by an action brought by a spouse, admittedly guilty of marital offenses.²²

The doctrine of recrimination is hard to defend from a social view point. It prevents the dissolution of the marital status of parties whose conduct is admittedly unfavorable to a successful marriage.²³ Where one party violates his marital duties the remedy of divorce is granted.²⁴

FEDERAL JURISDICTION

SUITS AGAINST THE STATE

Petitioner, non-resident Foreign manufacturing corporation, seeks a refund of gross income taxes from the board of the department of treasury¹ of the State of Indiana.² The taxes were claimed to have been derived from sales occurring in Indiana;³ petitioner alleged violation of the Commerce Clause and the Fourteenth Amendment of the United States Constitution.⁴ United States District Court denied recovery. Circuit Court of Appeals affirmed.⁵ Certiorari granted.⁶ Held, complaint dismissed. The consent of the State of Indiana to suit for a tax refund in the state court does not extend to suit in a federal court.⁷ No decision on the merits. *Ford Motor Co. v. Department of Treasury of State of Indiana*, et al., 65 Sup Ct. 347 (1945).

Petitioner's right to maintain this action in federal court depends on (1) whether the action is against the individual or the state, and (2) if against the state, whether the state has consented to suit in

22. Silving, "Divorce Without Fault" (1944) 29 Iowa L. Rev. 527.

23. See *Vanderhuff v. Vanderhuff*, 144 F. (2d) 509 (1944), cited supra note 17.

24. Ind. Stat. Ann. (Burns, 1933) §3-1201; Ind. Stat. Ann. (Burns, 1943 Replacement) §3-1201.

1. The action is brought against the department of treasury of the State of Indiana, and M. Clifford Townsend, Joseph M. Robertson, and Frank G. Thompson, the Governor, Treasurer, and Auditor, respectively, of the State of Indiana, who together constituted the board of the department of treasury, as provided by Ind. Stat. Ann. (Burns, 1943 Replacement) §64-2614. See Ind. Stat. Ann. (Burns, 1943 Replacement) § 60-101.

2. Petitioner followed the statutory procedure for obtaining a refund as set forth in Ind. Stat. Ann. (Burns, 1943 Replacement) §64-2614(a).

3. Indiana claimed the taxes under Ind. Stat. Ann. (Burns, 1943 Replacement) § 64-2602.

4. U.S. Const. Art. I, § 8; U.S. Const. Amend. XIV, § 1.

5. *Ford Motor Co. v. Department of Treasury of State of Indiana* et al., 141 F. (2d) 24 (C.C.A. 7th, 1944).

6. *Id* at 322 U.S. 721 (1944).

7. The suit was barred by U.S. Const. Amend. XI, "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state." See Hyneman, "Judicial Interpretation of the Eleventh Amendment" (1927) 2 Ind. L. J. 371, especially pps. 380-382.