

# Recrimination as Bar to Divorce on Ground of Three-year Voluntary Separation - *Matysek v. Matysek*

Robert F. Hochwarth

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**Recrimination As Bar To Divorce On Ground Of  
Three-Year Voluntary Separation**

*Matysek v. Matysek*<sup>1</sup>

In this divorce action the wife (appellee) was granted an absolute divorce on the ground that the parties had voluntarily lived separate and apart, without cohabitation,

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<sup>1</sup> 212 Md. 44, 128 A. 2d 627 (1957), cited in *Hughes v. Hughes*, ... Md. ..., 132 A. 2d 119, 120 (1957).

for a period of more than three years prior to the filing of the bill and that the separation was beyond any reasonable expectation of reconciliation.<sup>2</sup> The husband (appellant) set up recrimination, based on the wife's adultery, as a defense. The Chancellor in the lower court ruled as a matter of law that recrimination was not available as a defense to a suit for divorce based on voluntary separation, and was affirmed on appeal.

The Court of Appeals, speaking through Chief Judge Brune, stated that the statute authorizing the granting of divorces in cases of voluntary separation<sup>3</sup> established a non-culpatory ground for divorce and thus introduced a new social policy into our law of divorce. The Legislature by this statute manifested an intention to permit the marriage relationship to be terminated in law, as well as in fact, without regard to fault. The Court would not read into the statute a limitation which is not there expressed and which seemed to it inconsistent with its general purpose.

The Court based its decision on the ground that the granting of a divorce on a non-culpatory ground should not be barred by the fault of either party. While this question had not previously been decided by the Court, it cited an opinion by the trial judge in the first Maryland case dealing with the voluntary separation statute to the effect that recrimination would not be a defense.<sup>4</sup> It also quoted a note on that case in the *MARYLAND LAW REVIEW*<sup>5</sup> and several textbook writers<sup>6</sup> approving this doctrine.

Prior to the enactment of the voluntary separation and similar statutes, Maryland, together with a great majority of states, held that recrimination was a defense to a divorce action. The doctrine developed from the Ecclesiastical Courts of England, which in turn followed Mosaic and Canon law,<sup>7</sup> and is a derivative of the "clean hands" doctrine of equity.<sup>8</sup> Therefore, if both spouses were guilty of uncondoned adultery, the Ecclesiastical Courts would not grant relief by way of divorce to either of them.<sup>9</sup>

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<sup>2</sup> MD. CODE (1951) Art. 16, Sec. 33 ("fifthly").

<sup>3</sup> *Ibid.*

<sup>4</sup> *Campbell v. Campbell*, 174 Md. 229, 198 A. 414 (1938).

<sup>5</sup> 2 Md. L. Rev. 357 (1938).

<sup>6</sup> MYERBERG, *THE PRACTICAL ASPECTS OF DIVORCE PRACTICE* (1951) 46; 1 NELSON, *DIVORCE AND ANNULMENT* (2nd ed. 1945) Sec. 10.09.

<sup>7</sup> *Courson v. Courson*, 208 Md. 171, 174, 117 A. 2d 850 (1955).

<sup>8</sup> *Fisher v. Fisher*, 93 Md. 298, 300, 48 A. 833 (1901).

<sup>9</sup> For an excellent history of the development of recrimination from Roman property law to modern times, see: BEAMER, *The Doctrine of Recrimination in Divorce Proceedings*, 10 Kan. City L. R. 213 (1942).

This decision of the Court of Appeals limiting the doctrine of recrimination seems more impressive if we look at it in the light of past decisions of the Court. The doctrine has been so well established in Maryland that, when it appears that the complainant is himself guilty of conduct that would be a cause for a divorce a vinculo, it is considered not only the right but the duty of the Chancellor to refuse a divorce, even though the defense of recrimination has not been formally set up.<sup>10</sup>

Some states, taking a less severe position, have adopted the doctrine of "comparative rectitude". Under this doctrine, if both spouses are at fault in the eyes of the law, the spouse least at fault may be given a divorce.<sup>11</sup> Maryland has never recognized this doctrine<sup>12</sup> although the Court has held that a suit for divorce a vinculo matrimonii is not barred by recrimination merely because the conduct of the complainant was such as to entitle the defendant to a divorce a mensa et thoro.<sup>13</sup>

Any discussion of the law of recrimination in other jurisdictions is hampered by the fact that thirty-two states and territories have statutory provisions on the subject.<sup>14</sup> Some of these statutes instruct the courts to apply recrimination in all cases. Others apply the doctrine only in cases of adultery or other grounds and a few give the courts discriminatory power to apply the doctrine.

While the decisions from other jurisdictions on this problem are comparatively scarce, a number of cases have held that it is not necessary that the party seeking the divorce be wholly without fault or be the "injured and innocent" spouse when the ground of divorce is voluntary separation.<sup>15</sup> These cases are concerned with the question of the fault of the complainant based on the acts of the parties that lead to the separation, but do not decide whether acts independent of or subsequent to the separation are recriminatory. The majority of states have held that the fault of the parties and their actions prior to the voluntary separation need not be a subject of inquiry, since the

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<sup>10</sup> *Geisselman v. Geisselman*, 134 Md. 453, 463, 107 A. 185 (1919); *Duckett v. Duckett*, 143 Md. 551, 559, 123 A. 55 (1923).

<sup>11</sup> *Eals v. Swan*, 221 La. 329, 59 So. 2d 409 (1952); see also 159 A. L. R. 734, for annotations of cases on comparative rectitude.

<sup>12</sup> *Supra*, n. 7, 177.

<sup>13</sup> *Appeltofft v. Appeltofft*, 147 Md. 603, 128 A. 273 (1925).

<sup>14</sup> 2 VERNIER, *AMERICAN FAMILY LAWS* (1932), Sec. 78.

<sup>15</sup> *Colston v. Colston*, 297 Ky. 250, 179 S. W. 2d 893 (1944); *Goudeau v. Goudeau*, 146 La. 742, 84 So. 39 (1920).

statutes show there need be no injured party, nor an injuring party, in order to apply the statute.<sup>16</sup>

The first reported case to hold that recrimination is not applicable as an independent bar in a suit for divorce based on a long continued separation seems to be the Arkansas case of *Young v. Young*.<sup>17</sup> Here, however, the Court reached its result due to a clause in the statute providing that "the question of who is the injured party shall be considered only in the settlement of property rights of the parties and the question of alimony".<sup>18</sup>

In the instant case the Court of Appeals cited two Idaho cases<sup>19</sup> in support of its decision. In Idaho's voluntary separation statute the divorce ". . . shall be granted on proof of the continuous living separate and apart",<sup>20</sup> while under the Maryland statute<sup>21</sup> the courts "may decree a divorce". In the case of *Joliffe v. Joliffe*,<sup>22</sup> the Idaho Court said:

"Our statute clearly indicates divorce is available to either party without reference to fault, and is *mandatory in terms*.<sup>23</sup> It expresses the public policy of the State."

In a Texas case<sup>24</sup> cited by the Court of Appeals, the Court granted a divorce to the adulterous plaintiff based on Texas's ten-year voluntary separation statute.<sup>25</sup> This statute, like Maryland's, used the words, "a divorce *may* be granted . . ." The Texas Court held that neither the plaintiff's conduct causing the separation nor his subsequent acts precluded him from a divorce. To support its holding the Texas Court cited an A. L. R. annotation, "Effect of Fault of Party Under Voluntary Separation Statutes",<sup>26</sup> and ignored any distinction between fault leading to the separation and fault independent of the separation.

While the instant case may be distinguished from many of the cases holding that recrimination is not a bar under

<sup>16</sup> *Knabe v. Berman*, 234 Ala. 433, 175 So. 354, 114 A. L. R. 864 (1937); See 51 A. L. R. 763, 97 A. L. R. 985, 111 A. L. R. 867, and 166 A. L. R. 498, for annotations of cases covering this subject.

<sup>17</sup> 207 Ark. 36, 178 S. W. 2d 994, 152 A. L. R. 327 (1944).

<sup>18</sup> ARK. STAT. ANN. (1947) Sec. 34-1202 (Seventh).

<sup>19</sup> *Joliffe v. Joliffe*, 76 Ida. 95, 278 P. 2d 200 (1954); *Finnegan v. Finnegan*, 76 Ida. 500, 285 P. 2d 488 (1955).

<sup>20</sup> IDAHO CODE (1948) Sec. 32-610.

<sup>21</sup> MD. CODE (1951) Art. 16, Sec. 33 ("fifthly"). Emphasis added.

<sup>22</sup> *Supra*, n. 19, 203.

<sup>23</sup> Emphasis added.

<sup>24</sup> *Robertson v. Robertson*, 217 S. W. 2d 132 (Tex. Civ. App. 1949).

<sup>25</sup> VERNON'S TEXAS ST. (1948) Art. 4629 (4).

<sup>26</sup> *Supra*, n. 16.

voluntary separation statutes, there seems to be one theme running through all the decisions. It is generally expressed or implied that the public policy of these statutes is based on the proposition that where a husband and wife have lived apart for a long period of time, with no intention of resuming conjugal relations, the best interests of society and of the parties themselves will be promoted by a dissolution of the marital bond. Therefore, the majority of courts in interpreting these statutes permit the marriage relationship to be terminated in law as well as in fact, and disregard the question of fault.<sup>27</sup> This decision of the Maryland Court of Appeals follows these liberal interpretations.

This new doctrine should also apply to the three other non-culpatory grounds for an absolute divorce that exist in Maryland today. Insanity is non-culpatory in its nature. The ground of imprisonment for a felony is culpatory in itself, but non-culpatory as far as matrimonial offenses are concerned. It appears reasonable that the fault of the plaintiff should not be a bar to a divorce based on these grounds, for the same reasoning as applied by the courts in suits based on voluntary separation. The misconduct theory of divorce has been abandoned for these grounds and, therefore, the misconduct of the plaintiff should be immaterial.

The ground of impotency seems also to be non-culpatory, but, unlike voluntary separation, imprisonment and insanity, it is not a "new" ground for divorce. Therefore, decisions as to the application of recrimination in this area might be influenced by any cases that applied recrimination before the courts distinguished culpatory and non-culpatory grounds for divorce. However a search of the reported Court of Appeals cases in Maryland fails to divulge any application of recrimination in this area, and the better policy would seem to be that a suit based on impotency should not be barred by the fault of the plaintiff.

The Maryland Court of Appeals has not yet gone as far as did the United States Court of Appeals for the District of Columbia Circuit in liberalizing the doctrine of recrimination in the case of *Vanderhuff v. Vanderhuff*.<sup>28</sup> It seems almost certain from *dicta* in the *Vanderhuff* case and subsequent cases<sup>29</sup> that the District of Columbia will ultimately reject the doctrine of recrimination as an absolute bar to divorce in fault as well as non-fault cases, although no holding squarely in point has been found. The Court in

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<sup>27</sup> *Ibid.* See also 152 A. L. R. 327, 336, 170 A. L. R. 1076, 1081.

<sup>28</sup> 144 F. 2d 509 (App. D. C. 1944).

<sup>29</sup> See, *e.g.*, *Thompson v. Thompson*, 164 F. 2d 705 (App. D. C. 1947).

the *Vanderhuff* case stated that Congress in adding non-culpatory grounds for divorce showed a legislative policy of permitting the " 'termination in law of certain marriages which have ceased to exist in fact',"<sup>80</sup> and thus recrimination should no longer be an absolute, but only a discretionary, bar to divorce.<sup>81</sup>

The Maryland Court of Appeals refused to apply this doctrine in *Courson v. Courson*,<sup>82</sup> and restated its position in the instant case, stating that in view of the settled law in this state it is for the Legislature, and not the courts, to decide that recrimination is not an absolute bar in cases where divorce is sought on a culpatory ground.

Since the Legislature has decided that it is for the best interests of the State to grant divorces even in situations where no fault is involved, there now seems to be little justification except *stare decisis* for a doctrine that permits a divorce where one party is at fault, but to refuse it where both are at fault. It is now the policy of the Legislature to permit a divorce based on grounds that are consensual and not culpatory, and the courts should not be bound to refuse a divorce because of the misconduct of the plaintiff. It is no longer necessary to have a guilty party in these actions and the requirement of an innocent plaintiff should no longer be of paramount importance.<sup>83</sup> Since the Court of Appeals is reluctant on its own initiative to limit further the doctrine of recrimination, an amendment of the existing statutes to forbid the courts to apply recrimination as an automatic bar to divorce on any ground seems desirable.

ROBERT F. HOCHWARTH

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<sup>80</sup> *Supra*, n. 28, 510. Notice the similarity to the language of the Court of Appeals in the instant case, 212 Md. 44, 54, 128 A. 2d 627 (1957).

<sup>81</sup> Kansas, Oklahoma and Nevada by statute allow the trial court to exercise its discretion in granting or denying a divorce when recrimination is shown.

<sup>82</sup> *Courson v. Courson*, 208 Md. 171, 178, 117 A. 2d 850 (1955).

<sup>83</sup> The requirement of an innocent plaintiff was criticized long before non-culpatory grounds for divorce became prevalent. *e.g.* An excerpt from the opinion of Sir C. Creswell in *Hope v. Hope*, 1 Swa. and Tr. 94, 164 Eng. Rep. 644 (1858):

"A curious doctrine this —  
a singular kind of subtraction —  
to subtract crime from crime, and  
there remains nothing but innocence."