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Comparative Rectitude in Divorce Actions (*Stewart v. Stewart*, Fla. 1947)

RECENT CASES

COMPARATIVE RECTITUDE IN DIVORCE ACTIONS*

The doctrine of recrimination in divorce actions is an application of the equitable maxim that one coming into equity must do so with clean hands.[1] In the event that there is no innocent party to pray relief, the court in effect refuses its aid and allows the wrongful acts of the parties to recriminate—or literally "accuse in return"—and counterbalance each other.[2] The doctrine of recrimination was well settled in divorce actions in the United States at an early date,[3] although deviations from the strict doctrine in order to achieve substantial justice have appeared in the law from time to time almost from the beginning.[4]

Until very recently, it was generally thought that the doctrine of

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* Stewart v. Stewart, 29 So. 2d 247 (Fla., 1947).

1 Devlin v. Devlin, 24 So. 2d 704 (Fla. 1946) (Recrimination not mentioned but divorce denied to an admittedly adulterous spouse on the ground of unclean hands); accord, Adams v. Adams, 12 Ore. 176, 6 Pac. 677 (1885); Carmichael v. Carmichael, 106 Ore. 198, 211 Pac. 916 (1923); Hall v. Hall, 69 W. Va. 175, 71 S. E. 103 (1911); Day v. Day, 71 Kan. 385, 80 Pac. 974 (1905).

2 Blankenship v. Blankenship, 51 Nev. 356, 276 Pac. 9 (1929), 63 A.L.R. 1127 (ann.); Hall v. Hall, *supra* Note 1; Morrison v. Morrison, 142 Mass. 361, 362, 8 N. E. 59, 60 (1886).

3 Mattox v. Mattox, 2 Ohio (2 Ham.) 233, 15 Am. Dec. 547 (1826); Conant v. Conant, 10 Cal. 249, 70 Am. Dec. 717 (1858); Pierce v. Pierce, 33 Iowa 238 (1872); Cassidy v. Cassidy, 63 Cal. 352 (1883) (Under Civil Code); Trigg v. Trigg (Sup. Texas), 18 S. W. 313 (1891). (This doctrine is of ancient equitable origin; being recognized by the Mosaic Code, the Roman law, the ecclesiastical courts, and finally finding its way into the common law).

4 Inskeep v. Inskeep, 5 Iowa (5 Clarke) 204 (1857) (Where the court, acting under the Iowa Code said, "So, there may be cases which arise under the law, where the parties are mutually at fault, in which a divorce might be decreed."); Trowbridge v. Carlin, 12 La. Ann. 882 (1857); Thomas v. Tailleu, 13 La. Ann. 127 (1858), affirmed by Dillon v. Dillon, 32 La. Ann. 643 (1880); Machado v. Bonet, 39 La. Ann 475, 2 So. 49 (1887); Colvin v. Colvin, 15 Wash. 490, 46 Pac. 1029 (1896), see dissent; O'Brien v. O'Brien, 36 Ore. 92, 58 Pac. 892 (1899); Day v. Day, *supra*, Note 1; Abshire v. Hanks, 19 La. Ann. 425, 44 So. 186 (1907); Rolfsen v. Rolfsen, 115 S. W. 213, 1201 (Ky., 1909); Garrett v. Garrett, 252 Ill. 318, 96 N. E. 882 (1911); Staples v. Staples, 136 S. W. 120 (Texas, 1911); Weiss v. Weiss, 174 Mich. 431, 140 N. W. 587, (1913); Johnson v. Johnson, 78 Wash. 423, 139 Pac. 189, 1200 (1914); Schirmer v. Schirmer, 84 Wash. 1, 145 Pac. 981 (1915).

recrimination in divorce actions was firmly established in Florida law. It has been clearly stated several times by the Florida Supreme Court,[5] and although in each instance the statement was actually dictum, the doctrine of recrimination was assumed to be settled law in this state. The recent Stewart case[6] has shown this assumption, made on the basis of dicta alone, to be in error.

Recrimination on grounds of adultery has a statutory basis in Florida. Since the Act of October 31, 1828, the Florida statutes have provided that "If it shall appear to the court . . . that both parties have been guilty of adultery, then no divorce shall be decreed."[7] This statute has had, however, a singularly uneventful history.[8] The Chisholm case[9] in 1929 was apparently the first Florida Supreme Court case to refer to the statute, and it merely held the statute inapplicable where the adultery was committed through an honest belief of the guilty party that she had been legally divorced and remarried. The Chisholm decision, however, contained a passing statement which seems to have been the basis for all the later dicta. The court said, "Other states hold to the more reasonable and perhaps sounder doctrine that, when one party commits an act affording grounds for divorce against the other, that the court will not grant the prayer of such a one for divorce from the other." Three years later, the Florida Supreme Court cited this case as authority for the full-blown doctrine of recrimination.[10] Speaking through Justice Terrell, the court said, "The general rule is that to constitute a defense by recrimination the misconduct that defendant charges complainant with must be such that if proven will afford defendant a ground for divorce." This statement, although not necessary to the decision of the case, has been cited ever since as good Florida law.

The Stewart case was not completely unheralded. A tacit departure from the doctrine of recrimination had already been made in the case of Simmons v. Simmons[11] where a double divorce was allowed on the grounds of the husband's extreme cruelty and the adultery of the wife. The husband brought the action and proved his wife's adultery. His wife in her answer asked for a divorce on the grounds of extreme cruelty which she likewise succeeded in proving. The double divorce granted was the complete antithesis of the doctrine of recrimination. Neverthe-

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5 MacFadden v. MacFadden, 26 So. 2d 502 (Fla., 1946); Sahler v. Sahler, 154 Fla. 206, 17 So. 2d 105 (1944); McMillan v. McMillan, 120 Fla. 209, 162 So. 524 (1935); Welch v. Welch, 112 Fla. 590, 152 So. 173 (1933).

6 Stewart v. Stewart, 29 So. 2d 247 (Fla., 1946).

7 F.S.A. 1941, Sec. 65.04 (3) Second Clause.

8 *Cf.* Devlin v. Devlin, 24 So. 2d 704 (Fla. 1946), wherein an adulterous husband was refused a divorce on the general doctrine of unclean hands with no mention of the statute.

9 Chisholm v. Chisholm, 105 Fla. 402, 142 So. 302 (1932).

10 McMillan v. McMillan, *supra* Note 5.

11 122 Fla. 325, 165 So. 45 (1936).

less, the Supreme Court in two succeeding cases restated the doctrine of recrimination as if the Simmons case had never been decided.[12] With Stewart v. Stewart[13] the strict doctrine of recrimination was at last discarded, and its application made a matter of judicial discretion.

In the Stewart case, the parties leveled at each other a bewildering complex of charges of misconduct, misbehavior, desertion and general abandonment of the marriage obligation. The Circuit Court dismissed the wife's counterclaim for separate maintenance on the strength of the master's finding that the equities were with the plaintiff husband. On appeal from a decree for the plaintiff, the Supreme Court per curiam stated: "We are of the opinion that this misconduct on his part (adultery of the husband as charged in the answer) was established and that, both parties being at fault, the case should have been dismissed."[14] On rehearing, the order of reversal was set aside and the husband's decree was affirmed.[15]

Associate Justice Fabisinski in his dissent in the Stewart case recognizes that the Stewart case introduced the principle of "comparative rectitude" into the divorce law of Florida. After reviewing the history of the application of the doctrine of recrimination in other jurisdictions, he said that, "our state has established the doctrine by statute. If it is to be adopted in Florida, I think we should 'pass a law.' "[16] The statement goes too far. The only statutory recrimination in Florida is that based on double adultery.

Comparative rectitude, as applied by the majority of the court in the Stewart case, is based on the principle that under proper circumstances, relief by way of divorce may be given to the party least at fault, though both parties have shown a ground for divorce. There is in this country a distinct trend towards thus relaxing the ancient doctrine of recrimination.[17] The return to cohabitation which the canon law presumed to take place when the court refused a separation, does not in fact take

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12 MacFadden v. MacFadden and Sahler v. Sahler, *supra* Note 5.

13 29 So. 2d 247 (Fla., 1947).

14 *Id.* at 248.

15 The court said, . . . "judging from the cold record it might reasonably be said that each proved his or her charges . . ., and it might reasonably be said that recrimination has been established by each against the other . . . However, the master and Chancellor found the equities with the plaintiff and it has not been made to affirmatively appear that inequity has been done by the Chancellor by his decree of divorce." The opinion makes no mention of F.S.A. 1941, Sec. 65.04 (3) discussed above. If the husband were guilty of adultery as the court found in its first opinion, there would seem to be no way to avoid the clear terms of the statute. This point, however, is ignored in the decision on rehearing.

16 29 So. 2d 247, at 249.

17 For two recent cases reviewing the trend see Pavletich v. Pavletich, et al., 50 N. Mex. 224, 174 Pac. 2d 826 (1946); Reddington v. Reddington, 317 Mass. 760, 59 N. E. 2d 775 (1945).

place today; thus leaving one of the historical foundations for the doctrine an outmoded concept of the ecclesiastical courts.

In the Stewart case, speaking through Judge Barns, the court says, "The application of the doctrine of recrimination like the doctrine of clean hands is a matter of sound judicial discretion dependent on public policy, public welfare and the exigencies of the case at bar." This is a distinct step towards practical justice by an enlightened court. Since the state is a third party to all contracts of marriage,[18] divorces are granted for reasons of policy and not as a punishment to one party or a favor to the other. If reasons of public policy sanction a divorce where one party alone is guilty of a matrimonial offense, a fortiori such divorce should be sanctioned where both are guilty. The marriage relationship is doubly broken and the obstacles to further cohabitation and preservation of the family unit are likewise doubled.

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[18] Potter v. Potter, 101 Fla. 1199, 133 So. 94 (1931); Gallemore v. Gallemore, 94 Fla. 516, 114 So. 371 (1927).