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The Supreme Court opinion in the *Wilburn* case engendered much unfavorable comment.<sup>22</sup> The court of appeals in the *A/S J. Ludwig Mowinckels Rederi* case appeared determined that the *Wilburn* rule should not be recklessly expanded. The fact situation before the court was ideal to defeat any possible extension of the *Wilburn* rule. An indemnity provision in any contract approaches the field of insurance as close as possible without actually entering the realm of that subject.<sup>23</sup> Should the decision of the court of appeals be either affirmed by the Supreme Court<sup>24</sup> or followed by the other circuits, the day of *Wilburn* with its tendency toward the application of state law in the field of maritime contracts may well be in its twilight.<sup>25</sup>

MICHAEL C. SLOTNICK

## DIVORCE—DECREE MUST SPECIFY PREVAILING PARTY

In a divorce action the complainant wife alleged extreme cruelty and requested custody of the child. Her husband counterclaimed for divorce on the ground of extreme cruelty and also sought custody of the child. The court entered a decree granting a divorce without specifically adjudicating the equities for and against the parties and granted temporary custody of the child to the husband. *Held*, the chancellor must reconsider and specifically determine by his final decree the party entitled to the divorce. *Friedman v. Friedman*, 100 So.2d 167 (Fla. 1958).<sup>1</sup>

English ecclesiastical courts allowed a defendant to counterclaim for affirmative relief in a divorce suit by setting out the misconduct of the

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22. For a severely critical analysis of the *Wilburn* case see GILMORE & BLACK, ADMIRALTY 61-63 (1957); see also Comment, 50 NW. U. L. REV. 677, 681-83 (1955); Note, 1 N. Y. L. F. 360 (1955). For a more favorable comment see Note, 103 U. PA. L. REV. 813 (1955); see also Note, 35 B. U. L. REV. 435 (1955).

23. An insurance contract contains five elements: one party possesses an insurable interest; the interest is subject to some well-defined peril, which may cause loss to the riskbearer; the other party to the contract assumes the risk of loss; the contract is an integral part of a general scheme for distributing the loss; and the insured makes a ratable contribution. Where only the first three elements are present, a risk shifting device results. An indemnity provision in a contract belongs to the category of risk-shifting devices. VANCE, INSURANCE 1-5 (3d ed. 1951).

24. *A/S J. Ludwig Mowinckels Rederi v. Commercial Stevedoring Co.* has been filed on the appellate docket of the Supreme Court on a petition for certiorari. 27 U. S. L. WEEK 3057 (Sept. 9, 1958).

25. Gilmore and Black in their recent hornbook on admiralty inquire as to the meaning of the *Wilburn* case: "Wilburn may mean merely that the States are to have a limited competency to regulate certain terms of marine policies. It could as a matter of cold logic be read to mean that there is no federal maritime law at all. It may very well turn out to mean anything between these extremes." GILMORE & BLACK, ADMIRALTY 63 (1957). The *A/S J. Ludwig Mowinckels Rederi* case, limiting the *Wilburn* case to maritime insurance, appears to answer this inquiry.

1. The court also reversed a companion case, on the same grounds, *Howell v. Howell*, 100 So.2d 170 (Fla. 1958).

plaintiff.<sup>2</sup> This defense, recrimination,<sup>3</sup> acted as a plea in bar and if the defendant was himself free from blame he could obtain relief as if he were the plaintiff.<sup>4</sup> When both parties were at fault relief would be denied to both of them. Denial rested on the equitable maxim that, "he who comes into equity must come with clean hands."<sup>5</sup> This reasoning still serves to bar many divorce actions.<sup>6</sup> However, it has been relaxed to permit termination in law of certain marriages which have ceased to exist in fact.<sup>7</sup> Another approach relaxing recrimination in divorce actions is the doctrine of comparative rectitude.<sup>8</sup> Rather than completely bar a divorce where both parties are guilty, this doctrine allows relief to the lesser offender.<sup>9</sup> Some states specifically refuse to recognize this approach.<sup>10</sup>

In the instant case the problem arose when the trial court did not award relief to one party or deny relief to both parties. Instead it granted relief to both parties by, in effect, dissolving the marriage. Ordinarily, in civil actions, a decree should show in whose favor and against whom it is rendered or it will be held void for uncertainty.<sup>11</sup> However, there is a strong line of decisions in divorce cases affirming decrees which fail to specify which party prevailed in the divorce action.<sup>12</sup> Actually, a decision which fails to name a victor in no way affects the

2. *Hatfield v. Hatfield*, 103 W.Va. 135, 167 S.E. 89, 91 (1932).

3. "Recrimination is a showing by defendant of any cause of divorce against the plaintiff in bar of plaintiff's cause of divorce." *McCullum v. McCullum*, 301 S.W.2d 565, 566 (Ark. 1957).

4. *Berdolt v. Berdolt*, 56 Neb. 792, 77 N.W. 399 (1898); *Ames v. Ames*, 109 Misc. 171, 178 N.Y. Supp. 177 (Sup. Ct. 1919).

5. *Harton v. Little*, 188 Ala. 640, 65 So. 951, 952 (1914).

6. *Veazy v. Blair*, 86 Ga.App. 721, 72 S.E.2d 481 (1952); *Gullett v. Gullett*, 25 Ind. 517 (1865); *Butcher v. Butcher*, 296 Ky. 740, 178 S.W.2d 616 (1944).

7. *Vanderhuff v. Vanderhuff*, 144 F.2d 509 (D.C. Cir. 1944).

8. "The doctrine of comparative rectitude may be defined as the principle that where both parties are guilty of misconduct for which a divorce may be granted, the court will grant a divorce to the one who is less at fault." 17 AM. JUR. *Divorce & Separation* §265 (1957); *Busch v. Busch*, 68 So.2d 350 (Fla. 1953); *Lassen v. Lassen*, 134 Kan. 436, 7 P.2d 120 (1932); *Panther v. Panther*, 147 Okla. 131, 295 Pac. 219 (1928).

9. *Barnes, J.*, referred to the doctrine of recrimination as follows: "It is not an absolute but a qualifying doctrine. If it were to be applied strictly great inequity would be done, for it so often happens that neither party to a suit has been free from fault." *Stewart v. Stewart*, 158 Fla. 326, 327, 328, 29 So.2d 247, 248 (1946); Annot., 170 A.L.R. 1073 (1946). *Accord*, *Dunn v. Dunn*, 217 S.W.2d 124 (Tex. 1948); *McFadden v. McFadden*, 213 S.W.2d 71 (Tex. 1948); *Marr v. Marr*, 191 S.W.2d 512 (Tex. 1943); *Hendricks v. Hendricks*, 123 Utah 178, 257 P.2d 366 (1953).

10. *Blankanship v. Blankanship*, 51 Nev. 356, 276 Pac. 9 (1929); *Sandrene v. Sandrene*, 121 N.E.2d 324 (Ohio 1952); *Karth v. Karth*, 78 Ohio App. 517, 71 N.E.2d 520 (1946).

11. *McFadden v. McFadden*, 157 Fla. 477, 26 So.2d 502 (1946); *Brewies v. Brewies*, 27 Tenn. App. 68, 179 S.E.2d 84 (1943).

12. *Crimditch v. Crimditch*, 71 Ariz. 194, 225 P.2d 489 (1950); *Ackel v. Ackel*, 57 Ariz. 14, 110 P.2d 238 (1941); *Schuster v. Schuster*, 42 Ariz. 190, 23 P.2d 559 (1933); *Brown v. Brown*, 38 Ariz. 459, 300 Pac. 452 (1921); *Finnegan v. Finnegan*, 76 Idaho 500, 285 P.2d 488 (1955); *Hulett v. Hulett*, 152 Miss. 476, 119 So. 581 (1928); *Flagg v. Flagg*, 192 Wash. 679, 74 P.2d 189 (1937).

decree of the court where custody of children,<sup>13</sup> alimony,<sup>14</sup> and disposition of property<sup>15</sup> are concerned as these matters are within the sound discretion of the court.<sup>16</sup> This type of decree has been attacked because of uncertainty<sup>17</sup> and because it creates in effect an annulment of a valid marriage not provided for by divorce statutes.<sup>18</sup>

In this decision the court has specifically receded from its position in *Williamson v. Williamson*.<sup>19</sup> There the court held: "the failure of the chancellor to make specific findings of fact in an equity suit is not a reversible error."<sup>20</sup> The trial court in the *Williamson* case had merely divorced each party from the other as had the trial court in the instant case. The court in the instant case has specifically reaffirmed its subsequent stand in *Sahler v. Sahler*<sup>21</sup> and *MacFadden v. MacFadden*.<sup>22</sup> Both of these cases held that designation of the successful party was necessary. A decision of the court somewhat consistent with the *Friedman* decision may be found in *Knox v. Knox*<sup>23</sup> which held in substance that a decree which fails to specify the victor is not improper if the record obviously discloses the party in whose favor the divorce was decreed. This same conclusion has been reached by the Supreme Courts of California<sup>24</sup> and Texas.<sup>25</sup> In *Batteiger v. Batteiger*,<sup>26</sup> a Florida case decided since the *Friedman* case, the court held that an original final decree which failed to award a divorce specifically to one of the parties was in error.

It is the writer's opinion that the court here missed an opportunity to reaffirm its progressive divorce decision in the *Williamson* case.<sup>27</sup> There seems to be no reason for determining which is the victor between two guilty parties. As stated before, there is no need for a victor in resolving

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13. *Landy v. Landy*, 62 So.2d 707 (Fla. 1953); *Hastings v. Hastings*, 45 So.2d 115 (Fla. 1950); *Johnson v. Johnson*, 214 La. 912, 39 So.2d 340 (1949).

14. *Lindley v. Lindley*, 84 So.2d 17 (Fla. 1955); *Kahn v. Kahn*, 78 So.2d 367 (Fla. 1955); *Pross v. Pross*, 72 So.2d 671 (Fla. 1954); *Longino v. Longino*, 67 So.2d 203 (Fla. 1953).

15. *Slaughter v. Slaughter*, 171 F.2d 129 (D.C. Cir. 1948); *Porter v. Porter*, 67 Ariz. 273, 195 P.2d 132 (1948); *Edwards v. Edwards*, 262 S.W.2d 130 (Ark. 1953); *Halberstadt v. Halberstadt*, 72 So.2d 810 (Fla. 1954).

16. See cases cited note 10 *supra*.

17. See cases cited notes 13, 14, 15 *supra*.

18. "Action for divorce is distinguished from one for annulment in that divorce action is predicated on valid marriage and decree terminates relationship from date thereof while annulment destroys existence of void or voidable marriage and everything appertaining thereto from the beginning." *Widger v. Widger*, 14 N.J. Misc. 880, 881, 188 Atl. 235, 236 (1936).

19. 153 Fla. 357, 14 So.2d 712 (1943).

20. *Id.* at 358, 14 So.2d 713.

21. 154 Fla. 477, 17 So.2d 105 (1944).

22. 157 Fla. 477, 26 So.2d 502 (1946).

23. 159 Fla. 206, 31 So.2d 159 (1947).

24. *Ramacciotti v. Ramacciotti*, 131 Cal. App. 191, 20 P.2d 961 (1933).

25. *Broner v. Broner*, 267 S.W.2d 577 (Tex. 1953).

26. *Batteiger v. Batteiger*, 109 So.2d 602, 603 (Fla. App. 1959).

27. *Williamson v. Williamson*, 153 Fla. 357, 14 So.2d 712 (1943).

issues of child custody,<sup>28</sup> alimony,<sup>29</sup> and property disposition.<sup>30</sup> Our society often imposes cruel punishments on the party who is said to have lost in a divorce action. There is no reason why one party or the other should be burdened for life with this social stigma.

GEORGE TRAVERS

## TORTS: AIRPLANE NOT WITHIN GUEST STATUTE

An action was brought for damages resulting from the death of a guest in the crash of a private airplane in Florida. The complaint alleged lack of ordinary care by the pilot. Defendant's demurrer, relying on plaintiff's failure to allege gross negligence as required by the Florida Guest Statute,<sup>1</sup> was overruled. *Held*, affirmed, an airplane is not a "motor vehicle" within the meaning of the Florida Guest Statute. *Gridley v. Cardenas*, 3 Wis. 2d 623, 89 N.W. 2d 286 (1958).

The Florida Supreme Court has never determined whether an airplane is a "motor vehicle" within the Florida Guest Statute.<sup>2</sup> Only two jurisdictions have defined the same term within their own guest statutes,<sup>3</sup> and both reached the same result as the instant case. In each decision, the court relied on the vernacular<sup>4</sup> and statutory<sup>5</sup> definition of "motor vehicles" and utilized the rules of statutory construction embodied in *McBoyle v.*

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28. Cases cited note 13 *supra*.

29. Cases cited note 14 *supra*.

30. Cases cited note 15 *supra*.

1. FLA. STAT. § 320.59 (1957) "No person transported by the owner or operator of a motor vehicle as his guest or passenger, without payment for such transportation, shall have a cause of action for damages against such owner or operator for injury, death or loss, in case of accident, unless such accident shall have been caused by the gross negligence or willful and wanton misconduct of the owner or operator of such motor vehicle . . . ." (Emphasis added.)

2. The Florida Supreme Court refused to rule on a question of this nature, certified to it by the Osceola County Circuit Court. The reason given was improper certification by the lower court. *Sieverts v. Loffer*, 45 So.2d 483 (Fla. 1950).

3. *In re Hayden's Estate*, 174 Kan. 140, 254 P.2d 813 (1953); *Hanson v. Lewis*, 11 Ohio Op. 42, 26 Ohio L. Abs. 105 (C.P. 1937).

4. "Vehicle—that in or on which a person or thing is or may be carried from one place to another, esp. along the ground, also through the air; . . . a means of conveyance. Motor—the causing, setting up, or imparting motion. Equipped with or driven by a motor or motors. Of or pertaining to automotive vehicles . . . . To ride in, travel by, or drive, a motor-propelled vehicle, as an automobile or airship." WEBSTER, NEW INTERNATIONAL DICTIONARY 2824 (2d ed. 1950).

5. KAN. STAT. ANN. ch. 8, §126 (1957) "Vehicle—Every device in, upon or by which any person or property is or may be transported or drawn upon a public highway, excepting devices moved by human power or used exclusively upon stationary rails or tracks. Motor vehicle—Every vehicle, as herein defined, which is self-propelled." OHIO REV. CODE ANN. tit. 45, §4501.01 (1958) "Vehicle—Everything on wheels or runners, except vehicles operated exclusively on rails or tracks . . . . Motor Vehicle—Any vehicle propelled or drawn by power other than muscular power . . . ."