MODIFICATION OF THE ANCIENT DOCTRINE OF RECRIMINATION

NORMAN ROSENBLUM

In a recent case, *Matlow v. Matlow*, 89 Ariz. 293, 297, 361 P.2d 648, 650 (1961), the Arizona court stated:

> In considering the social aspects of matrimony, it would be contrary to public policy to insist on the maintenance of a marriage which has utterly broken down with admittedly no likelihood of reconciliation.

Contrast this language to the statement on public policy found in the 1929 case of *Gordon v. Gordon*:[1]

> It is the policy of the State [of Arizona], an unnamed but interested party in every divorce suit, that the marriage relation, the foundation of society, and of civilization itself, be maintained. The best interests of the State demand that marriage ties lawfully formed be maintained as far as possible.[2]

Does the *Matlow* case represent a change of policy or only a clarification of the phrase "so far as possible"? Subsequent cases such as *Brown v. Brown*[3] and *Chester v. Chester*[4] indicate that the 1929 court could not have intended, by the use of that phrase, such a result as achieved in the *Matlow* case, for those cases state that no decree should be granted where the evidence reveals any recrimination. Apparently the *Matlow* case represents a change in public policy on the subject of divorce, although the court indicated there was conflicting evidence upon the issue of recrimination.[5] It is interesting to note the background of the doctrine of recrimination which the Arizona court has liberally and realistically modified.

The classic, strict definition of recrimination is "when both parties are guilty of matrimonial offenses entitling each to a divorce, neither will obtain one."[6] The notion that if both parties have a right

---

[1] 35 Ariz. 357, 360, 278 Pac. 375, 376 (1929).
[2] *Ibid.*
[3] 38 Ariz. 459, 300 Pac. 1007 (1931).
[4] 69 Ariz. 104, 210 P.2d 331 (1949).
[5] 89 Ariz. 293, 361 P.2d 648, 650 (1961).
[6] Goldsmith v. Goldsmith, 151 Misc. 198, 270 N.Y. Supp. 47 (1934).

to a divorce, neither party has such a right, first appears in the Mosaic Code. There "if any man take a wife, and go in unto her, and hate her and give occasions of speech against her, and bring up an evil name upon her" and such accusations are true then "she shall be his wife; he may not put her away all his days."[7] Recrimination was first applied in England in the ecclesiastical case of *Forster v. Forster*[8] where Sir William Scott commented that:

> I must take the law as it is and I shall therefore content myself that it (recrimination) appears a good moral and social doctrine which I have not the inclination, if I had the power, to innovate.[9]

The usual justification for the doctrine is based either on principles of equity or contract law. The equitable argument is based on the maxim "that he who comes into equity must have clean hands." This is strange since the rule did not arise in equity.[10] The courts that base the doctrine of recrimination on contract law argue that one may not complain of a breach of contract which he himself has breached.[11] This argument is rebutted by modern decisions on a realistic basis which state that the deceptive analogy to contract law ignores the basic fact that marriage is a great deal more than contract.[12]

Modifications of the strict doctrine of recrimination have appeared in several forms. Most of these modifications require the trial courts to focus their attention upon the conduct of the plaintiff. Some courts will grant a divorce if the misconduct of the plaintiff is not as severe as that of the defendant[13] while other courts permit the defense only if the misconduct of the parties is of the same type.[14] Still other jurisdictions permit only the adultery of the plaintiff as a recriminatory defense.[15] Repudiation of the doctrine has appeared either at the judge's discretion[16] or absolutely.[17]

---

[7] Deut. xxii; 13-19.

[8] 1 Hag. Con. 144, 147, 161 Eng. Rep. 504, 506 (1790). See Reddington v. Redington, 317 Mass. 760, 59 N.E. 775 (1945), 159 A.L.R. 1448 (1945), 21 IND. L.J. 53 (1945).

[9] 1 Hag. Con. 144, 147, 161 Eng. Rep. 504, 505 (1790).

[10] Mattox v. Mattox, 2 Ohio 234 (1826).

[11] Richardson v. Richardson, 114 N.Y. Supp. 912 (1906).

[12] Deburgh v. Deburgh, 39 Cal. 2d 858, 250 P.2d 598, 601 (1952).

[13] Longinotti v. Longinotti, 169 Ark. 1001, 277 S.W. 41 (1925). See also McFadden v. McFadden, 213 S.W.2d 71 (Tex. Civ. App. 1948).

[14] Metcalf v. Metcalf, 358 P.2d 983 (Wash. 1961); Hokamp v. Hokamp, 32 Wash. 2d 593, 203 P.2d 357 (1949).

[15] Kovac v. Kovac, 26 Ill. App. 2d 29, 167 N.E.2d 281 (1960); Reichl v. Reichl, 37 Pa. Dist. 477 (1940).

[16] Debaugh v. Debaugh, 39 Cal. 2d 858, 250 P.2d 598 (1952).

[17] "If it be assumed that appellant's bigamy led to adultery, that is likewise immaterial here, since recrimination is no longer a defense to a divorce suit." Bufford v. Bufford, 156 F.2d 567, 568 (D.C. 1946).

Courts which adopt the device of comparative rectitude relax the strict rule and consider which of the parties is less at fault. These courts in essence establish a ladder of marital wrong and grant the divorce to the spouse whose marital offense is less serious.[18] Thus in jurisdictions such as Nevada[19] and Wisconsin,[20] a party may be granted a divorce although not wholly free from fault.[21]

Some states require that to utilize the defense of recrimination in a divorce action, the recriminatory offense must be the same as that alleged by the plaintiff.[22] There is also a line of authority which indicates that to a charge of adultery, only the adultery of the plaintiff may be asserted, all other grounds being insufficient, thus limiting the doctrine of recrimination to adultery.[23] The District of Columbia uses the doctrine only to determine which party should be granted the decree,[24] and has in essence repudiated the doctrine.[25] In New Mexico where the ground for incompatibility exists, the court has the discretion to refuse the application for recrimination if the parties are irreconcilable, the basis of the discretion being public policy.[26]

Until the *Matlow* case Arizona had not made any real modifications on the doctrine of recrimination. Only one statutory reference can be found in Arizona to this doctrine and this concerns only adultery.[27] The Arizona court has not stated whether this statute is exclusive. Other courts which have interpreted similar statutes have held that such statutes are not exclusive and do not nullify the common law.[28] Also the court's statement in *Chester v. Chester*,[29] "no decree should be granted where the evidence shows recrimination" does not indicate that recrimination should be a defense solely where the plaintiff has committed adultery. In the *Chester* case the plaintiff was guilty of various cruelties, none of which was adultery.

Turning to the *Matlow* case, it is apparent that the approach of the court is different than in the *Gordon* and *Chester* cases. Here a husband sued his wife for divorce on the ground of mental cruelty; the wife counter-claimed on the same ground, and judgment was en-

---

[18] *Supra* note 13.
[19] NEV. REV. STAT. 125.120 (1957); See also KAN. GEN. STAT. 60-1056 (1949).
[20] WISC. STAT. ANN. 247.101 (1960).
[21] See also Weatherspoon v. Weatherspoon, 198 Ore. 660, 246 P.2d 581 (1952).
[22] *Supra* note 14.
[23] *Supra* note 15.
[24] D.C. CODE 16-403 (1951). See also Vanderhuff v. Vanderhuff, 144 F.2d 509 (D.C. 1944).
[25] *Supra* note 17.
[26] Clark v. Clark, 54 N.M. 364, 225 P.2d 147 (1950).
[27] ARIZ. REV. STAT. ANN. § 25-317 (1956).
[28] Huster v. Huster, 64 N.J. Super. 29, 165 A.2d 305 (1960).
[29] 69 Ariz. 104, 109, 210 P.2d 331, 334 (1949).

tered in favor of the husband. This judgment was affirmed on appeal. The court refused to adopt a strict construction rule that if the evidence revealed any recrimination at all, then the divorce should be denied, and gave to the trial judge the discretion of determining whether this defense could be applied in any given case in Arizona.

A line of authority has developed in California that is very similar to the *Matlow* case in Arizona. From 1858 to 1952 California followed *Conant v. Conant*[30] which laid down the strict recrimination doctrine. In 1952 in *Debaugh v. Debaugh*,[31] the court changed this long standing policy by holding that recrimination is not an absolute defense, but one to be applied at the discretion of the trial court. The court, however, indicated no standards which would show an abuse of discretion by applying the defense of recrimination. This was soon answered the following year in *Phillips v. Phillips*,[32] where the court held that it is an abuse to apply recrimination and deny divorce where the legitimate objects of marriage have been destroyed.[33] Idaho quickly followed these California decisions in 1953.[34] It should be noted that in the *Debaugh* case, the court stated that the trial judge should look at the following matters before deciding to bar recrimination as a defense: 1. prospect of reconciliation, 2. effect of marital conflict upon the parties, 3. effect of marital conflict upon third persons such as children, 4. the comparative guilt of the parties.

With this background the Arizona court was confronted with the *Matlow* case. The practical reason why the court refused to adhere to a strict policy concerning recrimination was, to hold that any recrimination would bar a divorce would be a degradation of marriage and a frustration of its purposes. The court stated:

> If the marriage has failed and the family life has ceased, the purposes of marriage are no longer served. In such case public policy will not discourage divorce since the relationship of husband and wife is such that the legitimate functions of marital life have been destroyed.[35]

It should be noted that the key argument the court makes is that to insist on a marriage that has utterly broken down is against public policy.[36] This is a clear test once the facts of the case have been

---

[30] 10 Cal. 249 (1858).
[31] 39 Cal. 2d 858, 250 P.2d 598 (1952).
[32] 41 Cal. 2d 869, 264 P.2d 926 (1953).
[33] *Id.* at 931.
[34] Howay v. Howay, 74 Idaho 492, 264 P.2d 961 (1953).
[35] 89 Ariz. 293, 361 P.2d 648, 650 (1961).
[36] *Ibid.*

determined. Failure of marriage and cessation of family life with no prospects of reconciliation are the two prime factors to consider in determining whether the doctrine of recrimination should be applied in any given case in Arizona. Each case must be carefully studied to see the effect of the marital strife upon the parties, their children, and the community.

If there is a basis for reconciliation, undoubtedly the public policy of the state still favors the maintenance of the marriage. However such public policy does not require the maintenance of a broken marriage that is beyond reconciliation. The state will not punish the parties to such a marriage by keeping them together. By keeping unfit partners together, as is still being done in many states by refusing divorces in situations where the marriage has become a nightmare of unhappiness, only discord and difficulty can result. The holding of the court in the *Matlow* case is a recognition and application of an intelligent approach to the social problem. Where the marriage has reached a stage where dissolution would be best for all the parties concerned, its dissolution should not be prevented by the use of the ancient doctrine of recrimination.