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RECRIMINATION IN THE DIVORCE LAW OF ILLINOIS

WILLIAM F. ZACHARIAS¹

RECRIMINATION,² as a defense to divorce, appeals to the popular mind as a righteous solution for the dilemma produced whenever "the pot calls the kettle black." For that matter it has almost as strong an appeal to the judge and the legislator when called upon to provide some solution for the difficult problem of adjusting rights and remedying wrongs between guilty spouses. There is cause, however, to question whether the solution which has been adopted, and the formula by which it is explained, is as beneficial and as adequate as it is righteous.

From time immemorial, at least so far as "civilized" peoples are concerned,³ the world has set its face against adultery. Biblical injunctions against the commission of this offence⁴ and the severity of the punishment inflicted upon those caught in adultery⁵ certainly indicate the attitude of the early Hebrews. The ancient literature of other races likewise bears witness to a condemnation of such practices⁶ and justify the husband's act in seeking a divorce therefor. But in those days the power over divorce rested exclusively with the husband and was effected by the simple act of writing out a statement that such action had occurred,⁷ except, perhaps, in Egypt

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² "Recrimination is a countercharge in a suit for divorce that the complainant has been guilty of an offense constituting a ground for divorce."—Joseph W. Madden, *Persons and Domestic Relations* (St. Paul, Minn.: West Publishing Co., 1931), p. 305.

³ John M. Zane, *The Story of Law* (New York: Ives Washburn, 1927), pp. 41-2.

⁴ Exodus 20:14; Deuteronomy 5:18.

⁵ Leviticus 20:10.

⁶ *Laws of Accad*, Sayce translation, Decision No. 16: "A woman unfaithful to her husband, and says to him: Thou art not my husband; into the river they throw her." Kocourek and Wigmore, *Sources of Ancient and Primitive Law* (Boston, Mass.: Little, Brown and Co., 1915), p. 386.

⁷ Deuteronomy 24:1; Code of Hammurabi, sec. 137-149, Kocourek and Wigmore, *op. cit.*, pp. 414-417; Code of Assur, Col. I, sec. 38: "If a man put

where the equality of the woman was maintained even after marriage, and frequently, by the terms of the marriage contract, the exclusive right to declare a divorce was reserved to her.⁸ It is unlikely, therefore, that recrimination as a defense to divorce could exist at a time when the marriage was terminated either by the violent death of the culprit, or by the act of the husband signing his own decree. The spirit of the doctrine echoes a later and higher moral development that finds its roots in the New Testament where it appears in the form of a criticism against the easy divorce methods provided in the Mosaic code.⁹

The Roman law seems to have given no thought to the moral aspects of divorce, nor to have even considered the doctrine of recrimination, for in that state marriage was chiefly a matter of agreement and likewise could be dissolved by a fairly simple and informal act.¹⁰ So strongly ingrained among the Romans, in fact, was the consensual nature of marriage that laws enacted during Justinian's time (*circa* 527 A.D.) seeking to prevent mutual divorce were soon repealed despite the efforts of a powerfully organized priesthood working to promote the sacramental character of marriage among the Christians and along with it the New Testament attitude condemning easy divorce.¹¹

Transferring the investigation to England, we find the Anglo-Saxon law silent on the subject, though recognizing divorce either by mutual consent or on account

away his wife he shall give her something if he wishes to; if he does not wish to, he shall not give her anything; she shall go empty out of his house," John H. Wigmore, *A Panorama of the World's Legal Systems* (St. Paul, Minn.: West Publishing Co., 1928), I, 91.

⁸ Wigmore, *op. cit.*, I, 26.

⁹ Matthew 5:32, "But I say unto you, that whosoever shall put away his wife, saving for the cause of fornication, causeth her to commit adultery. . . ."

¹⁰ Max Radin, *Handbook of Roman Law* (St. Paul, Minn.: West Publishing Co., 1927), pp. 115-6; *Institutes of Justinian* (Cod. v. 17.5) translated by Thomas C. Sandars (London: Longmans, Green and Co., 1888), p. 39.

¹¹ Radin, *op. cit.*, p. 117.

of the wife's infidelity or desertion.¹² Following the Norman invasion, the laws of England became divided into two distinct schools administered by separate courts. The common law courts, dealing with property and other civil rights, in general paid no regard to the institution of marriage except, perhaps, as an incident to the enforcement of other common law rights.¹³ The entire subject of marriage with the kindred subjects of divorce and family law was retained by the ecclesiastical courts which had, in an earlier day, developed around the Church.¹⁴ Until 1857 these courts retained sole and exclusive jurisdiction over divorce, though the nature of that divorce was really like the proceedings classified today as annulment proceedings or separation suits.¹⁵ During the earlier days of the court it must be remembered that the judges were clerics and the doctrines and concepts would necessarily be colored by the influence of their religious practices and teachings. Enumerated among the innovations introduced into English law was the sacramental idea of marriage uniting the husband and wife into one flesh¹⁶—a union deemed incorruptible by the hand of man by reason of assertions in the New Testament that it could only be dissolved by divine will.¹⁷

These changes set the stage for the introduction into

¹² W. S. Holdsworth, *A History of English Law* (Boston: Little, Brown and Co., 1922), II, 90.

¹³ Pollock and Maitland, *History of English Law* (Cambridge: University Press, 1911), II, 367, suggests the division was not abrupt and did not become complete until the 12th century.

¹⁴ Holdsworth, *op. cit.*, I, 6 and 580, et seq.; Blackstone, *Commentaries on the Law of England*, Book III, Ch. V., p. 63.

¹⁵ Divorce *a vinculo matrimonii*, or absolute divorce as understood in modern times, occurred only after a valid marriage had been found to exist, and was granted only by the legislature, so that the early references in the ecclesiastical decisions to this type of divorce should be read to mean divorce by way of annulment because of some impediment to a valid marriage.

¹⁶ Jean Domat, *The Civil Law in its Natural Order*, translated by William Strahan (Boston: Little and Brown, 1850), I, 12. The common law rules regarding husband and wife, domestic control, property rights, etc., are peculiarly predicated upon this concept and were not shaken in the Anglo-American law until the passage of Married Women's Acts during the 19th century.

¹⁷ Matthew 19:6; Mark 10:6.

law of the doctrine under consideration. Just how and when it appeared, however, is not clear,¹⁸ although it can well be conceded that legal standards would change to accord with the higher moral code, and it is not surprising to find the later lay judges refusing assistance to those who had violated the text of the Bible, and with it the law of the Church and its courts. Again it must be recalled that the principal ground for relief against the bonds of marriage urged upon the court would be the adulterous conduct of the spouse, hence the doctrine of recrimination would probably be found to have its primary basis in proceedings based upon such cause.¹⁹ It is certain that when the ecclesiastical court of England ceased to function as such and became merged with the law courts the doctrine had become a well recognized one requiring a denial of relief where the petitioner, relying on the respondent's adultery, was proven guilty of the same offence.²⁰

Brief attention must also be given to the system of equity developed in England, since the present divorce laws, as now administered in the United States, are usually placed in the hands of the American counterpart of the High Court of Chancery.²¹ The English equity court, during its history as an independent court, exercised no control over the marriage status as such, as it relegated the parties to the more appropriate tribunal already provided by the ecclesiastical court.²² It did one thing though which, perhaps more than anything else, shaped the

¹⁸ Pollock and Maitland, *op. cit.*, I, 16 and 40, illustrate how the ecclesiastical law developed though its antecedents were and are still obscured.

¹⁹ Other causes for divorce *a mensa et thoro*, such as cruelty and desertion, were recognized in later years, but they seem to stand on a different footing so far as recrimination is concerned. See *Harris v. Harris*, 2 Hagg. Consist. 148, 161 Eng. Rep. 696 (Eng., 1813), and *Chambers v. Chambers*, 1 Hagg. Consist. 439, 161 Eng. Rep. 610 (Eng., 1810).

²⁰ *Otway v. Otway*, 13 Prob. Div. 141 (Eng., 1888).

²¹ *Wightman v. Wightman*, 4 Johns. Ch. 343 (N. Y., 1820); *Anonymous*, 24 N. J. Eq. 19 (1873).

²² *John N. Pomeroy, Equity Jurisprudence* (San Francisco, Cal.: Bancroft, Whitney Co., 1886), III, 45, sec. 1120.

American doctrine of recrimination—it propounded the maxim, “He who comes into equity, must come with clean hands.”²³ It is unfortunate that the American chancellors who seized upon this maxim and applied it so glibly when dealing with the problem of recrimination did not investigate its antecedents, for had they done so they would have found that it really did not apply. The maxim assumes that the person guilty of the iniquity had some *equitable interest* to enforce, which the chancellor was not compelled to recognize except as a matter of grace which could be denied to one whose hands were soiled. Its chief application came in cases where relief was sought by way of specific performance, rescission because of fraud, or protection from an illegal contract.²⁴ It certainly could have no application in England to cases not cognizable in equity, such as divorce, since in these cases no equitable interest was involved.²⁵

One more comment must be made about the laws of England regarding divorce. The power over divorce *a vinculo matrimonii* after a valid marriage had been celebrated, absolute divorce as known today, rested exclusively in the hands of the state and could only be granted by legislative action. The procedure required a private act of Parliament initiated in the House of Lords, and the petitioner was obliged, as a condition precedent to its passage, to present the records of a divorce *a mensa et thoro* granted by the ecclesiastical court, and the recovery of a civil judgment against the adulterer in a common law action for criminal conversation.²⁶ Since the divorce *a mensa et thoro* would be denied if recrimination were present, it might be said that the doctrine thus

²³ The maxim is sometimes expressed in the form: “He that hath committed iniquity, shall not have equity.” Pomeroy, *op. cit.*, I, 432, sec. 397.

²⁴ Pomeroy, *op. cit.*, I, 435-443, secs. 400-3.

²⁵ The foundation of recrimination seems to rest more nearly on the civil law doctrine of compensation or set-off than on any equitable principle. See reference thereto in *Constantinidi v. Constantinidi and Lance*, [1903] P. D. 246, on p. 258.

²⁶ Holdsworth, *op. cit.*, I, 623.

indirectly affected legislative divorce, but the whole proposition was settled in 1857 in England with the creation of the Divorce Court at which time the whole subject of divorce was restated and the application of the doctrine of recrimination was placed in the hands of the judge to apply at his discretion, he being the sole tribunal over all forms of divorce.²⁷

With these considerations in mind we must now turn our attention to the American scene. That some part, at least, of the laws of England followed the colonists across the Atlantic is not to be disputed, but that part which did follow them was, of course, the common law of England as it stood around 1607 A. D. rather than the later developments thereof already noted, and then only so much of that law as was applicable to the condition of the colonies.²⁸ We are compelled, therefore, to commence our investigation of American law by noting:

1. That absolute divorce after a valid marriage was purely a legislative function;²⁹
2. That divorce *a mensa et thoro* was granted for limited cause by an ecclesiastical court, which court was not included among the institutions transferred to these shores, it being regarded as foreign to American principles;³⁰
3. That divorce *a mensa et thoro*, if possible, would be denied where petitioner, relying on respondent's adultery, had been guilty of the same offense;³¹
4. The equitable maxim above mentioned was no part of the doctrine of recrimination.³²

²⁷ The combined legislative and ecclesiastical control over both types of divorce was placed in the hands of a statutory Divorce Court in England at that time (Holdsworth, op. cit., I, 624) and under the Judicature Act of 1873 this court was merged with others into the High Court of Judicature under the title of Division of Probate, Divorce and Admiralty (Holdsworth, op. cit., I, 638-40), where the power rests today. The provisions of the act have been liberally interpreted, a divorce generally being refused only where it is shown that the petitioner's misconduct has caused that of defendant and the latter does not wish a divorce. See *Constantinidi v. Constantinidi and Lance*, [1903] P. D. 246; *Habra v. Habra and Habal*, [1914] P. D. 100.

²⁸ Ill. State Bar Stats. 1935, Ch. 28, par. 1.

²⁹ *Maynard v. Hill*, 125 U. S. 190, 8 S. Ct. 723, 31 L. Ed. 654 (1888).

³⁰ Bishop, *Marriage and Divorce*, II, sec. 291.

³¹ See footnote 20, supra.

³² See footnote 25, supra.

It is not to be expected that the colonists would be entirely free from marital difficulties, but prior to the Revolution the only remedy for relief from an injudicious marriage would seem to have been by application to the colonial governor and his council sitting as the local legislature,³³ or, in the years following the Revolution, by application to the several state legislatures.³⁴

Eventually the legislatures of the several states came to the point where they recognized that divorce was essentially a judicial function requiring an investigation of the truth of the charges made by the petitioner, and in this recognition they decided to assign the problem to the courts. There was no court in this country equivalent to the English ecclesiastical court, but because it was believed the court of equity was nearest in spirit to that institution, the jurisdiction over divorce, annulment, and separate maintenance was confided to the care of the chancery bench.³⁵ In later days constitutional provisions denying the legislature the right to pass special or private

³³ *Burtis v. Burtis*, 1 Hopk. Ch. (N. Y.) 557, 14 Am. Dec. 563 (1825), wherein Chancellor Sanford suggests that only four such divorces occurred in the province of New York prior to 1683.

³⁴ Bishop, *Marriage and Divorce*, I, sec. 39. Illustrations of legislative divorce in Illinois may be found in the laws of the earlier sessions, some even subsequent to 1827 when the first complete divorce act was passed to serve as the model which every subsequent Illinois act has followed almost verbatim. See: Laws of 1821 (2nd Assembly), p. 118; of 1831 (7th Assembly), pp. 71-2; of 1835-6 (9th Assembly), pp. 259-60; of 1836-7 (10th Assembly), p. 189 and of 1838-9 (11th Assembly), p. 79.

³⁵ In Illinois the first general divorce law, that of Feb. 22, 1819, authorized divorce *a vinculo matrimonii* where (1) prior marriage undissolved, (2) impotency, (3) adultery after marriage, or (4) desertion from state for two years, existed, and permitted divorce *a mensa et thoro* on the ground of cruelty. Sec. 2 thereof appears to put jurisdiction in "the several circuit courts" without defining how the proceedings should be conducted or on which side of the court they should be heard (Ill. Laws 1819, 1st Assembly, 2nd Session, pp. 35-6). In 1825, by an act passed on January 17th of that year, the 4th General Assembly amended the Act of 1819 by dropping the first ground for divorce *a vinculo matrimonii* and adding habitual drunkenness for two years as a further cause for divorce *a mensa et thoro* (Ill. Laws 1824-5, p. 169). The first comprehensive act on the subject was adopted on January 31, 1827, by the 5th Assembly, and section 2 thereof placed the jurisdiction in the several circuit courts, sitting as courts of chancery (Ill. Laws 1827, p. 181). This statute also appears in Ill. Rev. Laws 1833, p. 232-4. The same statute was re-enacted on March 3, 1845, and included in Ill. Rev.

laws completed the transfer of jurisdiction to the courts.³⁶ But in conferring jurisdiction over divorce upon the equity courts the legislatures were not placing the subject upon the same plane, nor mingling it, with the general and inherent powers of such courts,³⁷ consequently the court may act only in those cases enumerated in the statute conferring jurisdiction.³⁸

Since the power of equity to grant divorce is limited by the statute, it would be fair to presume that its power to deny divorce should likewise be limited to statutory causes, unless, perhaps, the legislature by its silence has given the court no guide on that score. That the legislature in Illinois has not been silent is clearly manifested by the provisions of the several statutes enacted during the history of the state placing upon the court the mandatory duty of denying divorce where it shall appear that the plaintiff is guilty of collusion, connivance, or recrimination.³⁹ Examination of these statutes, however, discloses

Stats. 1845 as Ch. 33. Substantially the same text, with slight changes in the order and number of the sections, was re-enacted on March 10, 1874, as Ill. Rev. Stats. 1874, Ch. 40, and, except for later modifications, reappears in Ill. State Bar Stats. 1935, as Ch. 40.

³⁶ Ill. Const. 1870, Art. V, sec. 22, expressly prohibits the passage of any special law granting divorce.

³⁷ "It is well settled that in this country the jurisdiction of courts of equity to hear and determine divorce cases is conferred only by statute. While courts of equity may exercise their powers as such within the limits of the jurisdiction conferred by the statute, such jurisdiction depends upon the grant of the statute and not upon general equity powers." *Smith v. Johnson*, 321 Ill. 134, p. 140, 151 N. E. 550 (1926). See also *Silkwood v. Silkwood*, 262 Ill. App. 516 (1931). Additional evidence for the distinction rests upon the fact that a trial by jury is granted, if requested, in divorce cases though generally not in other equitable actions. Ill. State Bar Stats. 1935, Ch. 40, sec. 7.

³⁸ *Vignos v. Vignos*, 15 Ill. 186 (1853); *Thomas v. Thomas*, 51 Ill. 162 (1869); *Harris v. Harris*, 109 Ill. App. 148 (1902).

³⁹ The first act, Ill. Laws 1819, pp. 35-6, is silent on the several defenses to divorce suits. The amendment thereof adopted in 1825 is not complete on the subject, but it does provide that where divorce *a mensa et thoro* is sought on the ground of habitual drunkenness, then, "in the latter case, it shall be incumbent on the complaining party to show that he or she had performed all the duties of a faithful and affectionate husband, or wife, as the case may be" (Ill. Laws 1824-5, p. 169), which statement points in the direction of such defenses. The identical provision quoted appears in: *Laws of 1827* (Act of Jan. 31, 1827, sec. 4), p. 181; *Rev. Laws, 1833*, p. 232-4; *Rev. Stat., 1845*, Ch. 33, sec. 4; and *Rev. Stats., 1874*, Ch. 40, sec. 10.

that "recrimination" is defined therein carefully as follows:

If it shall appear, to the satisfaction of the court . . . that both parties have been guilty of adultery, when adultery is the ground of the complaint, then no divorce shall be decreed

and again fair inference would seem to dictate that this was the only type of cases intended to be included in the doctrine.⁴⁰

⁴⁰ Ill. State Bar Stats. 1935, Ch. 40, sec. 10. For a list of similar statutes in other states see: Alabama, Code 1923, III, sec. 7413; Alaska, Comp. Laws, 1933, Ch. 113, sec. 3993; Arizona, R. C. 1928, sec. 2183; Florida, Comp. Gen. Laws, 1927, sec. 4983 (3); Indiana, Burns Ind. Stat. Anno. 1933, II, sec. 3-1202; Maine, Rev. Stat. 1930, Ch. 73, sec. 2; Minnesota, Mason's Minn. Stat. 1927, Ch. 71, sec. 8587; Missouri, Rev. Stat. 1929, sec. 1357; New Jersey, Comp. Stat. 1911, p. 2040, sec. 28; New York, Cahill Civil Prac. Act, 6th ed., sec. 1153; Oregon, Code Anno. 1930, I, p. 639, sec. 6-911; Pennsylvania, Purdon's Penna. Stat. Anno. 1929, Title 23, sec. 52; Tennessee, Williams, Tenn. Code Anno. 1934, V, sec. 8438; Texas, Vernon's Anno. Rev. Civil Stats. 1925, XIII, art. 4630. The text of these statutes, however, is no criterion as to the present state of the law.

Thus in Alabama, which once held desertion insufficient recrimination to a charge of adultery, *Richardson v. Richardson*, 4 Port. (Ala.) 467, 30 Am. Dec. 538 (1837), the later view is to permit any statutory cause for divorce to defeat any other cause, *Stabile v. Stabile*, 203 Ala. 635, 84 So. 801 (1920).

A weak case from Arizona, *Brown v. Brown*, 38 Ariz. 459, 300 P. 1007 (1931), the only one on the subject, appears to support the inference that unlike causes will suffice in that state.

In Indiana the court has enlarged the language of the statute to include recrimination arising from other divorce grounds, *Alexander v. Alexander*, 140 Ind. 555, 38 N. E. 855 (1894), *Eikenbury v. Burns et al.*, 33 Ind. App. 69, 70 N. E. 837 (1904), and *Eward v. Eward*, 72 Ind. App. 638, 125 N. E. 468 (1919).

Minnesota once applied its statute strictly by rejecting adultery as a recriminatory charge when a wife sued for divorce relying on the husband's drunkenness and cruelty, *Buerfening v. Buerfening*, 23 Minn. 563 (1877), but later decisions have gone far enough to indicate that at least mutual charges of cruelty will suffice, *Jokala v. Jokala*, 111 Minn. 403, 127 N. W. 391 (1910) and *Thorem v. Thorem*, 188 Minn. 153, 246 N. W. 674 (1933).

The Missouri statute is almost identical in language with that of Illinois and may have been copied from the latter, but the judicial decisions of that state have given an entirely different complexion to the doctrine. As early as 1848 a Missouri court was interpreting the statute to require that plaintiff be an "innocent person" so that any marital offense on his or her part would bar divorce, *Nagel v. Nagel*, 12 Mo. 53 (1848). This attitude has continued through a long line of decisions holding that either like or unlike causes may be offered as defenses, *Cherry v. Cherry*, 225 Mo. App. 998, 35 S. W. (2d) 659 (1931) and *Miles v. Miles*, 54 S. W. (2d) 741 (Mo. App., 1931) are illustrations, and recently the wife's sulky conduct, not amounting to a cause for divorce, was accepted as sufficient to show she was not "innocent" and hence sufficient to defeat her action based on a charge of cruelty, *Lawson v. Lawson*, 44 S. W. (2d) 191 (Mo. App. 1931).

In New Jersey unlike causes constitute recrimination, *Rankin v. Rankin*, 121 A. 778 (N. J. Ch., 1923), though each must be equivalent to an inde-

Had the courts of Illinois truly recognized the part they were intended to play in administering the divorce laws of the state and had they confined themselves to the guiding principles laid down for them by the legislature no confusion would have arisen, nor would there have been occasion to make this investigation. Unfortunately, though, they did not do so, and we must now examine the judicial decisions to arrive at the present scope of the doctrine of recrimination. The first recorded case arose in 1857, that of *Davis v. Davis*,⁴¹ wherein the wife charged the husband with adultery and he pleaded her own

pendent cause for divorce, *Cilente v. Cilente*, 104 N. J. Eq. 605, 146 A. 469 (1929).

The New York courts have been obliged to observe their statute since the only ground for divorce *a vinculo matrimonii* in that state is adultery, *Ryan v. Ryan*, 229 N. Y. S. 511 (1928), but when the action is for divorce *a mensa et thoro* then the enlarged doctrine of recrimination is applied since no statute regulates the court at this point, *Goldsmith v. Goldsmith*, 270 N. Y. S. 47 (1934) and *McKee v. McKee*, 271 N. Y. S. 384 (1934).

Oregon has also expanded the doctrine to the point where any marital offense will suffice to defeat any other offense, *Thomsen v. Thomsen*, 128 Ore. 622, 275 P. 673 (1929).

The decisions in Pennsylvania have generally been confined to like causes, *Yost v. Yost*, 54 Pa. Super. 365 (1913) and *Riester v. Riester*, 26 Pa. Co. 310 (1902), though there is language in the reports indicating that unlike causes will suffice, *Hugo v. Hugo*, 21 Pa. Co. 607, 9 Kulp 280 (1898).

Tennessee's only case, that of *Rayl v. Rayl*, 64 S. W. 309 (Tenn. Ch. App., 1900), fell squarely within the provisions of the statute; hence, no modification of the rule appears as yet in that state.

In Texas the courts have departed from the statute but only to the extent of denying divorce where like causes exist such as mutual charges of cruelty, *Staples v. Staples*, 136 S. W. 120 (Tex. Civ. App., 1911), *McNabb v. McNabb*, 207 S. W. 129 (Tex. Civ. App., 1918), and *Jasper v. Jasper*, 2 S. W. (2d) 468 (Tex. Civ. App., 1928).

Of the entire fifteen jurisdictions starting out with the same general legislation, only Alaska and Florida lack judicial interpretations thereof, and Maine is the only state where the courts have followed the precise command of the legislature, in fact an extreme construction has been placed on the statute of the latter state by a case denying divorce to the adulterer who relied on his wife's subsequent like offense after his own conduct had been condoned on the theory that if such condoned conduct was to be relieved from the effects of the statute the legislature would have so indicated, *Littlefield v. Littlefield*, 125 Me. 506, 131 A. 137 (1925). The doctrine of recrimination as applied in the several states, both from the standpoint of statutory law and judicial decision, is tabulated, considered, and the conflicting attitudes compared in *American Family Laws*, edited by Chester G. Vernier, II, 82, sec. 78, (Stanford University, Cal.: Stanford Univ. Press, 1932) in which he notes that only three states—Kansas, Minnesota, and Oklahoma—permit judicial discretion to operate on the subject.

⁴¹ 19 Ill. 334.

adultery as a defense. On the trial, the defendant's recriminatory charge was found to be untrue and the wife secured a decree which the Supreme Court affirmed, noting as they did so that:

Our courts all agree that a suit for a divorce on the ground of adultery is barred by proof of adultery of the complainant, though it may have been committed during the pendency of the suit.

The party, however, setting up adultery in recrimination, is required to prove such adultery by sufficient evidence.⁴²

No mention is made of the statute above referred to, nor was any reference necessary since the case did not fall within its purview.

The court again considered the doctrine in 1876 when deciding the case of *Bast v. Bast*,⁴³ a suit instituted by the husband on a charge of adultery to which the wife interposed the defense of desertion. In affirming a decree for the husband, Justice Breese wrote:

We do not think his desertion can exonerate the wife from the more serious charge of adultery. Neither that, nor drunkenness, nor cruelty, will, under our statute, constitute a sufficient recriminatory defense to a charge of adultery. Had appellee been guilty of a *like* offense, he could not claim a divorce.⁴⁴

No criticism can be addressed to the decision, for it squares with the law as it then stood, but one word therein—"like"—became the stumbling block in the path of a later court which seized upon this expression to pervert the uses to which the doctrine of recrimination should properly be put.

Succeeding decisions of both the Appellate and the Supreme Court⁴⁵ followed the two cases mentioned until 1898 when the case of *Duberstein v. Duberstein* was pre-

⁴² 19 Ill. 334, on p. 339.

⁴³ 82 Ill. 584.

⁴⁴ The word italicized is emphasized by the writer and not by the court.

⁴⁵ *Graves v. Graves*, 20 Ill. App. 652 (1886), where wife sued on ground of cruelty and husband relied upon her adultery, which he failed to prove; held, decree for wife affirmed; *Huling v. Huling*, 38 Ill. App. 144 (1890), where wife, suing for divorce on ground of adultery, was met with counter-charge of desertion but secured the decree on the authority of *Bast v. Bast*, 82 Ill. 584; *Gordon v. Gordon*, 41 Ill. App. 137 (1891), affirmed in 141 Ill.

sented for consideration.⁴⁶ This case involved a bill brought by a husband upon a charge of cruelty and a cross-bill predicated on a like charge of cruelty, both of which charges the court decided were sustained by the evidence. In passing on the legal effect to be given to the evidence, Magruder, J., defined recrimination as "a counter-charge by the defendant of a cause of divorce against the complainant" and quoted at length from the opinion in the *Bast* case.⁴⁷ The statement therein contained, already noted, that "had appellee been guilty of a *like* offense, he could not claim a divorce," must have attracted the judge's attention, for he immediately jumped to the conclusion that "like" offenses appeared in the cast under consideration, and the result followed, almost inevitably, that no divorce could be granted to either party. The doctrine of recrimination thereupon took the form that if like offenses, whether adultery or cruelty, were present, no divorce should be granted, but that if unlike divorce causes appeared, they would not operate to prevent a divorce for adultery.

No further change developed until 1901,⁴⁸ at which time the case of *Decker v. Decker*⁴⁹ was considered. In that case the wife sued for divorce on the grounds of the husband's impotency and cruelty⁵⁰ and the defendant answered by denying the cruelty and alleging that the complainant was guilty of adultery. An exception was taken to the answer on the ground that a cross-bill should have

160, 30 N. E. 446 (1892), denying divorce to both parties on ground each guilty of adultery and citing R. S. 1874, Ch. 40, sec. 10, quoted above, footnote 40; *Stiles v. Stiles*, 167 Ill. 576, 47 N. E. 867 (1897), reversing 62 Ill. App. 408, and holding husband entitled to divorce for adultery where wife's cross-bill alleging adultery and cruelty was unproved, the court saying the charge of cruelty would be insufficient even if proved.

⁴⁶ 171 Ill. 133, 49 N. E. 316 (1898), reversing 66 Ill. App. 579, which does not discuss the legal point involved.

⁴⁷ Footnote 43.

⁴⁸ During the interval the case of *Lenning v. Lenning*, 176 Ill. 180, 52 N. E. 46 (1898), affirming 73 Ill. App. 224, was decided, wherein a charge of adultery was met with a charge of adultery and divorce was denied.

⁴⁹ 193 Ill. 285, 61 N. E. 1108 (1900), affirming 95 Ill. App. 655.

⁵⁰ By stipulation of the parties the charge of impotency was withdrawn.

been used, but it was overruled; the complainant stood by the exception, and a decree was rendered dismissing the bill. The complainant's contention in the Supreme Court that adultery could only be pleaded in defense of an action for divorce based on adultery, relying squarely on the language of the statute, was rejected. The court, through Boggs, J., asserted that the statute was not passed simply to direct the course of pleadings in divorce cases, but was designed to protect the substantial rights of the public in the marital status and authorized the chancellor to deny a divorce in a proper case even though the bar was not raised by the pleadings. Turning, then, to the question of the substantive merit of the defense of adultery, the court proceeded to state:

It has been held . . . in the courts of other jurisdictions, that the court cannot distinguish between matrimonial offenses to which the law attaches the same consequences, and any infraction of the marriage duty which will entitle the injured party to a divorce may be pleaded as a recriminatory defense to a charge of the violation of any other of the marriage obligations which would justify a bill for divorce. Without accepting or rejecting this as the true doctrine . . . we hold the charge of adultery is a good recriminatory defense to the charge of cruelty. . . . From the standpoint of morality, adultery is the more serious of any of the statutory grounds for divorce.⁵¹

From this statement but one conclusion can be drawn—that the moral code of the court and of the public it represented still regarded adultery as the most heinous of marital offenses and that any such breach of the code would draw to it the inevitable result of prohibition of divorce, regardless of the other's wrong.

By this decision we are forced to pause and consider whether the court was making law or interpreting existing law. That the legislature had the power, when assigning the subject of divorce to the courts, to determine the reasons for denying relief has already been pointed out,⁵²

⁵¹ 193 Ill. 285, on p. 292.

⁵² See footnote 39.

and the application of the doctrine of *expressio unius est exclusio alterius* would dictate that all things not expressed in the enabling act should be regarded as deliberately omitted. Nevertheless the court, while recognizing that the legislature had enacted a complete code on the subject of divorce, asserted that:

In the absence of the section ample power and authority resided in the chancellor to refuse to grant a divorce for any or all of the reasons or grounds specified in section 10, but whether he should do so or not was within his judicial judgment and discretion, or his conscience, as it is most frequently called. The enactment of the section added nothing to the authority of the chancellor, but operated to make it his imperative duty to do that which, without the provisions of the section, he had ample power to do.⁵³

The confusion over the distinction between the chancellor sitting as a divorce judge and the chancellor hearing an equity cause clearly led to an erroneous assumption of authority not accorded to the judge sitting in the former capacity.⁵⁴

⁵³ 193 Ill. 285, on p. 289.

⁵⁴ Later Illinois decisions are: *Shoup v. Shoup*, 106 Ill. App. 167 (1902), holding cruelty charge when met by countercharge of cruelty will defeat divorce; *Hughes v. Hughes*, 133 Ill. App. 654 (1907), charge of adultery will triumph over a countercharge of cruelty even though proven; *Eames v. Eames*, 133 Ill. App. 665 (1907), where husband's charge of adultery sustained a decree for divorce against attack on unfounded charge of adultery; *Zimmerman v. Zimmerman*, 242 Ill. 552, 90 N. E. 192 (1909), in which complainant's bill based on cruelty and drunkenness was dismissed and divorce granted on cross-bill to defendant, who proved adultery, on ground that defendant's offenses, even if proved, would not operate legally to destroy the countercharge of adultery; *Garrett v. Garrett*, 252 Ill. 318, 96 N. E. 882 (1911), reversing 160 Ill. App. 321 (1911), where both charged cruelty and drunkenness but court held the recriminatory charges were not fully proven, hence not legally applicable; *Whitlock v. Whitlock*, 268 Ill. 218, 109 N. E. 6 (1915), reversing 187 Ill. App. 165 (1914), charge of adultery met with countercharge of cruelty, but court found neither charge proven and refrained from discussing what legal result would have been reached had each been proved. The abstract opinion in the Appellate Court had held the recriminatory charge insufficient; *Klekamp v. Klekamp*, 275 Ill. 98, 113 N. E. 852 (1916), suit for divorce for cruelty and drunkenness sustained in face of defense of adultery on ground the recriminatory charge had been condoned, hence inoperative to defeat the action; and *Hillenbrand v. Hillenbrand*, 211 Ill. App. 624 (1918), charge of adultery not defeated by a countercharge of cruelty.

The latest decision from the courts of Illinois appeared in 1931, when the Appellate Court for the First District passed upon the case of *Grady v. Grady*.⁵⁵ This was an action brought by the husband charging the wife with desertion. The defendant filed a cross-bill relying on charges of desertion and cruelty, to which the husband countered with an amended bill reciting a charge of adultery by the wife. A trial was had on the issues thus raised and the court, finding that the plaintiff's charges were untrue, dismissed his bill, and then also dismissed the cross-bill of the wife, though admitting her charges were proved, because her conduct in carrying on a flirtation with the alleged co-respondent was deemed sufficiently reprehensible to warrant denying her relief. After considering the evidence, the Appellate Court concluded that the plaintiff's charge of adultery and the defendant's countercharges of desertion and cruelty had both been proven. At this stage of the record it would be anticipated that the principle of recrimination as developed in Illinois from the previous decisions would require the court to direct a decree for the husband, but the court (McSurely, J., dissenting) refused so to do regarding the rule already stated as being subject to an exception where the facts were such as appeared in the record in the instant case—an exception to be inferred from the fact that the previous decisions had not negated such a possibility. The court then sought for the basis of the exception and found it in the chancellor's power to deny grace to one who comes into court with unclean hands, asserting, as it did so:

A court of equity is a court of conscience. Its arm is not shortened in such a case. A decree for divorce to this husband on these facts would offend the conscience and the sense of justice. . . . Under the general rules and principles of equity, without a statute, we think a chancellor in the State of Illinois has the like

⁵⁵ 266 Ill. App. 277.

power to settle the rights of parties before the court.⁵⁶ In the light of what has been said, the decision is pure judicial legislation. A concurring opinion was written by Mr. Presiding Justice O'Connor in which he predicated his agreement upon the fact that the wife's cause for divorce was complete, though not asserted, prior to the wrong committed on her part, and, by relying on a New Jersey case,⁵⁷ he arrived at the conclusion that her acts were (a) either caused by the husband's conduct, hence connived at by him, or (b) his breach of the marital status prevented him from relying on any future breach on her part.⁵⁸

The dissenting opinion of Mr. Justice McSurely objected strenuously to the departure thus made from the established rules and pointed out some of the difficulties which would face other courts when called upon to apply the newer interpretation thus placed thereon. He states: To determine whether the wife, guilty of adultery, may successfully defend by showing that the husband treated her with extreme cruelty would raise the confusing and illogical question as to what degree of cruelty would excuse the act of adultery.

So with desertion. By what criterion can the period of desertion be determined which would justify adultery by the deserted one?

It seems to me that both views expressed in the majority opinions rest upon the fallacious and dangerous assumption that the wronged wife has the right to commit a graver wrong, or at least cannot be held to an account.⁵⁹

His words do present a strong argument for the return in future cases to the older rules and it is possible that

⁵⁶ 266 Ill. App. 277, on p. 301.

⁵⁷ Rapp v. Rapp, 67 N. J. Eq. 236, 58 A. 167 (1904).

⁵⁸ It is unlikely that Judge O'Connor ever contemplated that the second possible conclusion should be drawn from his words, yet a simple reference to controlling principles in the law of contracts (if applicable to the marriage status) warrant such a statement, and decisions exist using just this explanation for the refusal to grant divorce to the wrongdoer whose offense is morally unequal with that of the other spouse. See Conant v. Conant, 10 Cal. 249, 70 Am. Dec. 717 (1858); Tillison v. Tillison, 63 Vt. 411, 22 A. 531 (1891); and Richardson v. Richardson, 114 N. Y. S. 912 (1906).

⁵⁹ 266 Ill. App. 277, on p. 305.

the step taken in this case will be nullified by future decisions.⁶⁰ Should the decision stand, it may serve as the introduction to an entirely new definition of recrimination: that divorce should be denied when both spouses have committed matrimonial offenses equivalent to cause for divorce even though they be unlike in nature.

Other courts in the United States have dealt with the problem in varying fashion. Some keep within the strict letter of the local statute,⁶¹ others apply the "like cause" interpretation thereof,⁶² and still others adopt a more sensible and easier applied rule that any cause will prevent divorce for any other cause whether authorized so to do or not.⁶³ No state has, as yet, rejected the doctrine

⁶⁰ It might be remarked that heretofore the law of the case was not binding upon other branches of the same court, nor, for that matter, on nisi prius courts, since the decisions of the Appellate Court were, by statute in Illinois, only to be regarded as the law of the case (Cahill's Ill. Stat. 1933, Ch. 37, sec. 49). In 1935, however, the section was amended by deleting this provision so that the decisions are now apparently of binding effect (Ill. State Bar Stats. 1935, Ch. 37, sec. 49). The open door thus provided is likely to prove too inviting to bench and bar and quite apt to lead them into strange pastures.

⁶¹ Maine seems to be the only state expressly so holding, though Alaska, Florida, and Tennessee must be considered in this category at present for lack of sufficient judicial expression. See footnote 40.

⁶² Georgia, Code 1926, sec. 2948; Michigan, Comp. Laws 1929, sec. 12732; Wyoming, Comp. Stat. 1920, sec. 4992. Arkansas (Crawford and Moses Dig. Stat. 1921, sec. 3507) and Nebraska (Comp. Stat. 1929, sec. 42-304) provide for recrimination by the use of the same ground, but the judicial decisions of these two states have interpreted these statutes to mean any statutory ground for divorce, illustrated in *Wilson v. Wilson*, 128 Ark. 110, 193 S. W. 504 (1917), and *Wilson v. Wilson*, 89 Neb. 749, 132 N. W. 401 (1911).

⁶³ California, Ragland Civ. Code 1929, secs. 111, 122; Colorado, Comp. Laws 1921, sec. 5598; Idaho, Comp. Stat. 1919, secs. 4634, 4636; Montana, Rev. Code 1921, secs. 5750, 5760; North Dakota, Comp. Laws Anno. 1913, secs. 4387, 4393; South Dakota, Comp. Laws 1929, secs. 144, 150, are some of the states having statutory enactments thereon. In addition thereto, by judicial decision, the rule has been made operative in the states of Alabama, Arkansas, Indiana, Missouri, Nebraska, New Jersey, Oregon, and possibly Arizona. For decisions from these jurisdictions see footnotes 40 and 62. The argument in favor of this interpretation, whether resting on statute or judicial decision, lies in the fact that divorce statutes, when enumerating causes for divorce, do not attempt to condemn any one kind of conduct more severely than any other kind but assign the same legal consequences to each. In such cases no consideration is given, nor any attempted, to questions of ethical values or varying moral standards and the court is therefore freed from attempting to distinguish between things indistinguishable before the law. See also discussion in 2 Bishop, *Marriage, Divorce and Separation*, Ch. 11, sec. 337-406.

of recrimination, but if the courts continue to talk about the marriage status as a civil contract it will not be long before some pioneer judge will apply ordinary contract law to this problem and permit divorce to the subsequent wrongdoer on the theory that the first wrong will serve to operate as a total breach of the contract excusing the other from the duty of observing its terms.⁶⁴ The result of so much judicial thought has produced an overwhelming gloss on a comparatively simple concept and, by extending the original province of the courts, has led society into a harmful stalemate.⁶⁵

Recognizing a problem may be one thing. Presenting a solution, however, is usually something not attempted except by the immature or the inexperienced. The statement of this problem, however, of itself seems to lead to one of three possible solutions for Illinois, and they are herewith presented. The first suggests a return to the pristine stage of the law as indicated by the language of the legislature, denying divorce only where "both parties have been guilty of adultery, when adultery is the ground of the complaint." This solution would leave unanswered the disposition to be made in cases where other matrimonial offenses are involved, whether like or unlike, and would result in striking from the law of Illinois every decision commented upon except those of *Gordon v. Gor-*

⁶⁴ It is true that a total breach of contract on one side is only an excuse for the other party to elect to declare a rescission, which must ordinarily take place before such person's obligation to observe the terms of the bargain is discharged. A suit for divorce based on the first wrongful act would evidence such an election. But is divorce necessary? Most states would answer affirmatively, but the doctrine that it might not be required could easily originate in one of the states where judicial discretion is permitted over the subject of recrimination as a judicial explanation for a particular decision, and, by a process of infiltration, be adopted in other states.

⁶⁵ The effects of denying divorce because of recrimination are probably too extensive to be measured. If the parties, following their lengthy and acrimonious battle, return to cohabitation and live peacefully thereafter, then no harmful social results accrue. But it is not to be expected of human flesh that this ideal solution will often be effectuated. Instead, both parties are usually thrown back into the world to remain married. The results can easily be imagined.

*don*⁶⁶ and *Lenning v. Lenning*,⁶⁷ the only cases out of a total of twenty decisions on the subject falling squarely within the statute. Moreover the vexatious questions of alimony and property rights in the other cases would remain unsolved to perplex future courts.

The second, and perhaps the most sensible solution, is to retain the doctrine of recrimination but extend it to cover every ground for divorce as a bar to every other cause as is done by statute or decision in thirteen of the states in the Union.⁶⁸ Retention of the rule in this form will serve two purposes. It will satisfy the wishes of those members in the community who regard divorce as a remedy solely for the innocent, treating the marital offender as outside the pale, and who punish both the wrongdoers by placing them beyond the aid of the law until they redeem themselves by a resumption of the matrimonial cohabitation. On the other hand, it will satisfy the courts, inasmuch as they will then be saved the bother of attempting to draw nice distinctions between degrees of conduct legally equal but morally unequal, and it will remove from judicial ken the otherwise difficult problem of adjusting alimony and property rights among such litigants. If the doctrine continues to grow in Illinois under judicial supervision, it must eventually take this form, since retrogression is not to be thought of, while rejection would be too simple an act for the judicial process to stomach.

The third alternative suggests the abolition of the doctrine of recrimination. An arching of mental eyebrows and an upraising of hands and voices in outraged protest usually follows upon the suggestion of so simple a solu-

⁶⁶ 141 Ill. 160, 30 N. E. 446 (1892).

⁶⁷ 176 Ill. 180, 52 N. E. 46 (1898).

⁶⁸ See footnote 63. The statement of the rule is not technically correct since it is legally impossible to have both spouses guilty of desertion at the same time and usually, if separation follows after one has been guilty of some other of the enumerated offenses, the conduct of the innocent party is not within the term "desertion." In other respects, however, the short statement of the rule is sufficient.

tion as the removal from the encumbered structure of the law of any of its useless appendages. But let us dare the storm and examine the evidence to see if this doctrine falls within the term "useless" and if its abolition will be followed by any drastic social upheaval. It is fundamental that law is only effective where it accords with and rests upon the mores of society, and when law and mores clash the former inevitably falls. Do the mores of present day society support the doctrine? If not, the death knell will ring eventually unless some social movement changes the popular attitude toward divorce. One needs little proof to support the conclusion that the present day social attitudes on marriage and divorce are tremendously different from those in the not so far distant past when marriage was deemed a sanctified institution and the divorced person a social pariah. Liberal divorce laws, keenly condemned though they may be in some quarters, reflect the present social idea that divorce is not an evil to be chosen only as a last resort in order to avoid a greater evil, but rather as a wholesome remedy to cure the ills that arise from human mismating.⁶⁹ Moral and ethical standards bow before the present demand that divorce be made an easy nostrum for the human unfortunates whose foresight, or lack of it, in the choice of a marital partner does not measure up to common standards, and the pressure is no less keen where both the partners have violated the bond, particularly where the joint violations fall short of the inbred social repugnance to adultery.

Recrimination as a defense in the law, and recrimination as a defense in actual practice are two different things. It is a rare divorce case today where the entire blame for marital disharmony rests upon only one of the

⁶⁹ Even where divorce laws are strict and causes few, the judicial recognition of the need of some safety valve to prevent worse social ills, finds an expression in extremely liberal views on annulment. See, for example, the judicial history of New York where divorce *a vinculo matrimonii* is granted on the sole ground of adultery but annulment is permitted on the flimsiest of pretexts. *Ryan v. Ryan*, 281 N. Y. S. 709 (1935).

litigants as any divorce judge would testify, yet thousands of uncontested divorces are granted yearly because the defendant-spouse would rather see the tie dissolved than present the full story to the chancellor. In many of these cases an existing recriminatory defense is not pressed, except, perhaps, as a weapon to compel an adjustment of property rights prior to the hearing, a weapon promptly abandoned when this advantage has been gained. The law is not powerless in such cases, for the court is usually directed to deny a divorce where collusion exists,⁷⁰ but courts are composed of human beings who only see what is presented and not that which is concealed. It is said that a recriminatory defense need not be pleaded and yet divorce will be denied if the court should discover that such defense exists,⁷¹ but again the law places a superhuman burden on the divorce chancellor which not infrequently fails to be discharged.⁷² Social mores at this point clearly diverge from the law as it is written, for, in a former day, the court would have been aided by the community in ferreting out the deception practiced upon it, while today the intermeddling of a stranger in a divorce suit would be a novelty worthy of comment.⁷³ The present state of the law directly tends, at this point, to make deceivers out of litigents who are willing to commit

⁷⁰ Ill. State Bar Stats. 1935, Ch. 40, sec. 10. Active concealment of a defense which would prevent divorce falls within the definition of this term.

⁷¹ *Decker v. Decker*, 193 Ill. 285, 61 N. E. 1108 (1901), contains dictum to this effect.

⁷² See N. P. Feinsinger and Kimball Young, *Recrimination and Related Doctrines in the Wisconsin Law of Divorce as administered in Dane County*, 6 Wis. L. Rev. 195 (1931), where, on p. 208, the authors comment on the experiences of the Divorce Commissioner (an advisory official of that court) by stating that "in his recollection he has reported marital misconduct and recommended denial of divorce to either spouse in more than one hundred cases, but that in only one was his recommendation followed by the court."

⁷³ Hon. Joseph Sabath, chancellor, Superior Court of Cook County, Illinois, in a conversation with the writer, suggested that in all his twenty-five years as a judge of that court, fifteen years of which time he sat on the bench in the divorce division thereof and disposed of over forty thousand cases, he has never received one suggestion from any person outside of the litigants or their attorneys that a recriminatory defense to a suit for divorce existed or might possibly exist.

moral, if not legal, perjury to avoid the effects of so old-fashioned a patch on the garments of the law. Respect for law and for the courts does not thrive under such circumstances, and it would be better for all to make honest people out of disappointed spouses by dissolving the marital bond without hampering their efforts by clamping down this rigid doctrine.

An argument frequently raised against granting divorce to the guilty parties rests upon the difficulty of adjusting property rights among those equally in the wrong. Most states provide that the innocent victim shall retain dower rights in the lands of the wrongdoer, who shall, in turn, forfeit his or her rights in the property of the former.⁷⁴ It is then argued that since no divorce can be granted without regarding one of the parties as the victor and necessarily granting such victor dower rights, then to do so would mean favoring one wrongdoer over the other, and therefore the easiest way out of the difficulty is to deny either a divorce, thus, indirectly, favoring both by leaving them to enjoy the customary interest in the other's property.⁷⁵ The obvious difficulty rests not in the divorce laws but rather in the statutes regulating property rights, which statutes are generally regarded as mandatory and beyond the reach of the chancellor unless the parties agree to forego the benefit thereof. The cure becomes apparent if the end is sufficiently desired: repeal the statute, or, if it is desirable to retain the benefits thereof for the innocent person, then amend the law to permit the chancellor to grant divorce where recrimination is present but leaving him to settle the question of dower right by the decree even to the point of denying it to both in a flagrant case if he, in his

⁷⁴ Ill. State Bar Stats. 1935, Ch. 41, sec. 14.

⁷⁵ Ill. State Bar Stats. 1935, Ch. 41, sec. 15, operates to destroy dower in the case of the person guilty of adultery if no reconciliation follows thereafter, but does not affect the rights of the person guilty of other marital wrongs even though serious enough to be cause for divorce.

discretion, should think such action appropriate.⁷⁶

It is not intended that this article shall be regarded as a plea for more frequent divorce, for, even if these suggestions are followed, such action is not likely to increase the total number of decrees granted annually by any substantial figure. It is, however, presented in the hope that it will result in a more enlightened and more humane administration of existing laws to the end that disappointed spouses be not obliged, like cats tied by the tail, to fight out their destinies to the point of exhaustion.⁷⁷

⁷⁶ What is said of dower incidentally applies equally well to the questions of alimony and custody of the children. In fact, alimony has always been regarded as a question for judicial discretion (Ill. State Bar Stats. 1935, Ch. 40, sec. 19) while the powers of the chancellor over the custody of children are proverbial.

⁷⁷ The older attitude might well be illustrated by the expression of Pearson, J., in *Horne v. Horne*, 72 N. C. 530 (1875), who says that "both husband and wife are two miserable wretches, and the case is too disgusting to be longer entertained by the Court."