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Present Status of Connivance as a Defense to Divorce, The

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NOTES

THE PRESENT STATUS OF CONNIVANCE AS A DEFENSE TO DIVORCE

I. INTRODUCTION

The four usual defenses raised to bar actions for divorce are connivance, collusion, condonation, and recrimination. Connivance is ordinarily defined as consent to the misconduct alleged as grounds for divorce.[1] It differs from collusion in that there are present actual grounds for divorce, rather than fictitious causes or concealed defenses;[2] from condonation in that consent is given before the misconduct occurs, not forgiveness afterwards;[3] from recrimination in that it has to do with the very grounds on which the plaintiff sues, not some other act of misconduct.[4]

Connivance arose as a defense to actions for divorce based on adultery. The act of adultery is frequently unlawful and always immoral, besides being an injury to the plaintiff. Consent to the act is to some extent immoral and degrading; hence, the consent itself is corrupt. It is for this reason that the term "connivance" rather than "consent" is used by the courts in describing this particular defense. The scope of the coverage of connivance is much broader than any actually expressed willingness, for consent may be implied from the complainant's conduct. This concept of implied consent has proved a very flexible one.[5]

The term, connivance, also includes cases of procurement and cases where the plaintiff has actively participated in producing the misconduct.

1. Dennis v. Dennis, 68 Conn. 186, 36 Atl. 34 (1896); Manville v. Manville, 81 S. W. 2d 382 (Mo. App. 1935); Herriford v. Herriford, 169 Mo. App. 641, 155 S. W. 855 (1913); Santoro v. Santoro, 55 N. Y. S. 2d 294 (Sup. Ct. 1945). See also KEEZER, MARRIAGE AND DIVORCE § 299 (3d ed. 1946) ("Connivance is the consent of the complainant to the respondent's commission of the offense complained of. A corrupt intent is essential."); TIFFANY, DOMESTIC RELATIONS § 105 (3d ed. 1921); 27 C. J. S., *Divorce* § 64 (1941).
The term "connivance" is also used in other fields of law with a similar meaning as in divorce law. See, *e. g.*, Keith v. Wilson, 6 Mo. 435, 35 Am. Dec. 443 (1840) (connivance at the disobedience of a court order by a witness); People v. Munday, 293 Ill. 191, 127 N. E. 364 (1920); State v. Furth, 82 Wash. 665, 144 Pac. 907 (1914) (connivance of officer of an insolvent bank receiving deposits); Brandon v. Holman, 41 F. 2d 586 (4th Cir. 1930) (connivance within terms of a cashier's fidelity bond); *In re* Steiner, 199 La. 500, 6 So. 2d 641 (1942) (connivance by attorney with tax clerk for reduction of client's tax).

2. Rapp v. Rapp, 162 Mo. App. 673, 145 S. W. 114 (1912).

3. Hilbert v. Hilbert, 168 Md. 364, 177 Atl. 914, 98 A. L. R. 1347 (1935).

4. *See* Blankenship v. Blankenship, 51 Nev. 356, 276 Pac. 9, 10 (1929).

5. Leavitt v. Leavitt, 229 Mass. 196, 118 N. E. 262 (1918): "The right to a divorce is barred because, the marital wrong complained of having been consented to, no injury has been suffered." See also Pierce v. Pierce, 20 Mass. 299, 15 Am. Dec. 210 (1825); Nacrelli v. Nacrelli, 288 Pa. 1, 136 Atl. 228, 229, 230 (1927); 1 BISHOP, MARRIAGE AND DIVORCE 521 (6th ed. 1881); 1 NELSON, DIVORCE AND ANNULMENT 169 (2d ed. 1945).

Perhaps most courts explain this in terms of implied consent, but it seems more nearly like contributory negligence or assumption of risk. For if the plaintiff's conduct contributed in any substantial fashion towards bringing about the misconduct, his cause of action is barred.

Because of the corrupt consenting by one spouse to an act by the other in violation of the marital relation, a divorce will not be granted on the principle of *volenti non fit injuria.*[6] Also, the "clean hands" maxim in equity overlaps both of these distinct ideas.[7] If the plaintiff has consented—corruptly—to an immoral act, or if he has helped to bring that act about, he does not come to a court of justice with "clean hands."

In a vast majority of divorce cases where connivance is interposed as a defense, adultery is the alleged misconduct. The defense of consent, however, is equally applicable when divorce is sought on other grounds—*e.g.,* drunkenness,[8] use of drugs,[9] cruelty,[10] and desertion.[11] Here, the corrupt aspect is missing or not as strong, but the consent may be revealed either from an express willingness or from conduct which is a material factor causing the misconduct. In more than one-half of the United States, statutes provide for the defense of connivance, and in most other states it has been adopted by the judges as a survival of principles set forth by the English ecclesiastical courts.[12]

II. Acts Constituting Connivance

A. *Procurement*

The clearest case of connivance occurs where the complainant has deliberately arranged and planned that the offense shall be committed by the other spouse. The courts are completely in accord in this situation in refusing to allow divorce—a result which probably will not be changed. " 'A man who

6. In Note, 29 Col. L. Rev. 799 (1929), the writer states that "Connivance as a defense is grounded upon the principle that *scienti et volenti non fit injuria,* that it is inequitable that one should profit from his own wrong, and that a man seeking relief in a matrimonial cause 'must come with pure hands himself.'" This statement includes the principles upon which the defense of connivance is usually based. Dennis v. Dennis, 68 Conn. 186, 36 Atl. 34 (1896); Langewald v. Langewald, 234 Mass. 269, 125 N. E. 566, 39 A. L. R. 674 (1920); Leavitt v. Leavitt, 229 Mass. 196, 118 N. E. 262 (1918); Morrison v. Morrison, 142 Mass. 361, 8 N. E. 59 (1886); Benjamin v. Benjamin, 111 N. J. Eq. 400, 162 Atl. 612 (Ct. Err. & App. 1932); Sargent v. Sargent, 114 Atl. 428 (N. J. Ch. 1920); Hedden v. Hedden, 21 N. J. Eq. 61 (Ct. Err. & App. 1870); Nacrelli v. Nacrelli, 288 Pa. 1, 136 Atl. 228 (1927). But some courts speak in terms of an estoppel: Oyama v. Oyama, 138 Fla. 422, 189 So. 418 (1939); Riesen v. Riesen, 148 Ill. App. 460 (1909).

7. Nacrelli v. Nacrelli, 288 Pa. 1, 136 Atl. 228, 230 (1927).

8. Dorian v. Dorian, 298 Ill. 24, 131 N. E. 129 (1921).

9. *Cf.* Smithson v. Smithson, 113 Miss. 146, 74 So. 149 (1917).

10. Rosengren v. Rosengren, 115 N. J. Eq. 283, 170 Atl. 660 (Ct. Err. & App. 1934).

11. Cooper v. Cooper, 92 Mont. 57, 10 P. 2d 939 (1932); Heikes v. Heikes, 90 Pa. Super. 312 (1926).

12. 2 Vernier, American Family Laws § 76 (1932). See Morrison v. Morrison, 142 Mass. 361, 8 N. E. 59 (1886); Robbins v. Robbins, 140 Mass. 528, 5 N. E. 837, 54 Am. Rep. 488 (1886); Hedden v. Hedden, 21 N. J. Eq. 61 (Ct. Err. & App. 1870); Note, 29 Col. L. Rev. 799 (1929).

is so far forgetful of his own duties, moral and religious, and of all feelings of honor, as to connive at his own disgrace by being a party to her adultery, does not come to court of justice with clean hands, when he seeks a separation from her on account of the conduct which he has deliberately arranged should occur.'" [13]

B. *Failure to Intervene*

Where one spouse suspects the other of adultery and fails to intervene to prevent the occurrence of the act, the courts are about equally divided on the question of whether there is present an act sufficient to constitute connivance. In *Ratcliff v. Ratcliff*,[14] the plaintiff knew that her husband was having illicit relations with a girl staying at the married couple's home. Many mornings when the wife called her husband to breakfast she found him in bed with the girl. Plaintiff at first merely remonstrated with her husband but finally left him. In an action by the wife for divorce, the court held that this conduct on the wife's part was mere passive permission to the acts of adultery and not connivance.[15] And in *Shima v. Shima*,[16] it was held that a husband's suspicions of his wife, "his failure to put obstacles in her way and his desire for divorce do not amount to connivance." [17] The cases in which connivance is not founded upon a failure to intervene hold that the husband or wife may spy on the other for the purpose of obtaining evidence,[18] so long as one spouse does not lead the other into a "fresh wrong." [19]

For the other view, the court in the leading case of *Hedden v. Hedden*,[20] in holding that a husband was guilty of connivance for standing by without interference when he had reason to suspect that his wife would indulge in adultery, stated that "if a husband sees what a reasonable man could not see without alarm, or if he knows that his wife has been guilty of ante-nuptial in-

13. Nacrelli v. Nacrelli, 288 Pa. 1, 136 Atl. 228, 230 (1927). Procurement is similar to the doctrine of entrapment in criminal law. For the leading case on entrapment, see Sorrells v. Uinted States, 287 U. S. 435, 53 Sup. Ct. 210, 77 L. Ed. 413 (1932).

14. 221 Mo. App. 944, 288 S. W. 794 (1926).

15. The court placed specific emphasis on the corrupt-intent factor. *See* also Robbins v. Robbins, 140 Mass. 528, 5 N. E. 837, 839, 54 Am. Rep. 488 (1886), where it was held that "the fact must be found that the libellant either desired and intended, or at least was willing, that the libellee should commit adultery before the libellant can be said to have connived at it. There is a manifest distinction between the desire and intent of a husband that his wife, whom he believes to be chaste, should commit adultery, and the desire and intent to obtain evidence against his wife, whom he believes already to have committed adultery, and to persist in her adulterous practices whenever she has opportunities." And in Torlotting v. Torlotting, 82 Mo. App. 192 (1899), the court said that it did not wish to be understood to hold that a husband who suspected his wife of adultery is bound to try to prevent the act.

16. 130 F. 2d 809 (D. C. Cir. 1942).

17. *Id.* at 809. For a similar result, *cf.* Cochran v. Cochran, 35 Ia. 477 (1872); Fisher v. Fisher, 74 Pa. Super. 538 (1920).

18. Robbins v. Robbins, 140 Mass. 528, 5 N. E. 837, 54 Am. Rep. 488 (1886); Torlotting v. Torlotting, 82 Mo. App. 192 (1899).

19. Fisher v. Fisher, 74 Pa. Super. 538 (1920).

20. 21 N. J. Eq. 61 (1870).

continence . . . he is called upon to exercise a peculiar vigilance and care over her, and if he sees what a reasonable man could not permit, and makes no effort to avert the danger, he must be supposed to see and mean the result." [21]

C. *Obtaining Evidence*

Watching the guilty spouse for the purpose of obtaining evidence of an adulterous act is permitted by a great majority of the cases, even though affirmative action would have prevented the act.[22] A chaste spouse deserves a chaste mate, and if one commits adultery without procurement or consent by the other, conduct to secure evidence of the act should be allowed. The suspecting spouse, whose sole motive is to secure evidence, should, without being held guilty of connivance, be allowed to refrain from acting, in order that the suspected one avail herself or himself of the opportunity for illicit sexual relations. This conclusion will probably not be reached when there is a continued course of intimate conduct between a husband or wife and another party.[23]

In *Engle v. Engle*,[24] the plaintiff deliberately planned to catch her husband in *flagrante delicto* by making him believe that she was going away from home for a while. Because of this ruse, the husband was found in an act of adultery, and the court held that a suspicious husband or wife may take measures to secure proof and that "something more than maintaining a watch or hiring others to do so is necessary to establish either connivance or consent." [25] While steps may be taken to procure proof, one spouse must not lead

21. *Id.* at 74. In Eames v. Eames, 133 Ill. App. 665 (1907), an apparent indifference to acts of adultery was held to constitute connivance. See also Emerson v. Emerson, 12 Cal. App. 648, 55 P. 2d 1265 (1936); Dennis v. Dennis, 68 Conn. 186, 36 Atl. 34 (1896); Schwartz v. Schwartz, 158 La. 48, 103 So. 438 (1925); Manville v. Manville, 81 S. W. 2d 382 (Mo. App. 1935); Tarbell v. Tarbell, 123 N. J. Eq. 581, 199 Atl. 57 (Ct. Err. & App. 1938). In Herriford v. Herriford, 169 Mo. App. 641, 155 S. W. 855, 857 (1913), the court said that connivance may be "passive permitting" but went on to say that a suspicious spouse could take reasonable steps to obtain proof of the improper act.

22. Engle v. Engle, 153 Ia. 285, 133 N. W. 654 (1911); Harmon v. Harmon, 111 Kan. 786, 208 Pac. 647 (1922); Vinton v. Vinton, 264 Mass. 71, 161 N. E. 817 (1928); Robbins v. Robbins, 140 Mass. 528, 5 N. E. 837, 54 Am. Rep. 488 (1886); Torlotting v. Torlotting, 82 Mo. App. 192 (1899); Farwell v. Farwell, 47 Mont. 574, 133 Pac. 958 (1913); Fisher v. Fisher, 74 Pa. Super. 538 (1920). *Cf.* Karger v. Karger, 19 Misc. 236, 44 N. Y. Supp. 219 (Sup. Ct. 1897), in which the husband suspected his wife of adultery with X; the wife visited X at B's house; the husband spied on the wife and X, waited until they retired to a bed and then rushed out of his hiding place to surprise the wrongdoers. The court held that the husband had facilitated the act and that he was under a duty to prevent the debauchment of his wife.

23. In Harmon v. Harmon, 111 Kan. 786, 208 Pac. 647 (1922), two couples were together on many occasions, with husbands and wives interchanged for dancing in the dark and automobile rides, an act of adultery took place and the court termed this course of conduct as a form of connivance.

24. 153 Iowa 285, 133 N. W. 654 (1911).

25. 133 N. W. at 655. *Cf.* Torlotting v. Torlotting, 82 Mo. App. 192, 203 (1899): "We do not wish to be understood as holding that a husband, who reasonably suspects his wife of infidelity, may not himself watch her and employ agents to watch her, for the purpose of discovering whether the suspect is or is not guilty, or that when he suspects his wife is about to commit the act of adultery, he is bound to try to prevent the act; on the contrary in such circumstances we think he may, without

the other into a "fresh wrong" or place new temptation in the way. It is one thing to permit, another to invite.[26] The plaintiff must also be careful in his evidence-seeking expedition that his actions do not proceed beyond that of a mere spectator; if he becomes the manager of the affair he may be barred from relief.[27]

D. *Negligence*

Ordinarily, connivance will not be implied from mere negligence.[28] In a recent California case,[29] however, the court indicated that connivance may be implied if a husband's conduct constitutes culpable negligence in not preventing a marital wrong which later occurs. Also, the rule announced in *Hedden v. Hedden*[30] seems very close to holding that negligence may be enough to show consent, for the court there held that if a husband "sees what a reasonable man could not permit, and makes no effort to avert the danger, he must be supposed to see and mean the result."[31] By the New Jersey rule there is a duty imposed upon the husband to exercise vigilance in the care of his wife if he is convinced that his wife's honor is being placed in jeopardy. If he "makes no effort to avert the natural consequences of her conduct, he will be assumed to have contemplated and acquiesced in the result of such conduct."[32] The desirable result would seem to be not to bar a plaintiff from obtaining a divorce merely because of negligence in failing to prevent misconduct on the part of the defendant.[33]

E. *Desertion*

If an act of adultery takes place after one spouse has deserted the other, the fact of desertion standing alone will usually be insufficient to constitute consent to the act.[34] The reason stated by *Mattison v. Mattison*[35] is that "abandonment confers no license on the deserted party to offend against the

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being chargeable with connivance, permit his wife to proceed far anough in the commission of the act to discover to a certainty her lewd disposition."

26. Herriford v. Herriford, 169 Mo. App. 641, 155 S. W. 855 (1913); Fisher v. Fisher, 74 Pa. Super. 538 (1920).

27. Vinton v. Vinton, 264 Mass. 71, 161 N. E. 817 (1928).

28. McMillan v. McMillan, 120 Fla. 209, 162 So. 524 (1935); SCHOULER, DIVORCE MANUAL § 155 (Warren ed. 1944). See also Warn v. Warn, 59 N. J. Eq. 642, 45 Atl. 916 (Ct. Err. & App. 1899).

29. Emerson v. Emerson, 12 Cal. App. 648, 55 P. 2d 1265 (1936).

30. 21 N. J. Eq. 61 (Ct. Err. & App 1870). See also White v. White, 84 N. J. Eq. 512, 95 Atl. 197 (Ct. Err. & App. 1915); Sturm v. Sturm, 100 N. J. Eq. 378, 135 Atl. 755 (Ch. 1927).

31. Hedden v. Hedden, 21 N. J. Eq. 61, 74 (Ct. Err. & App. 1870).

32. Bingenheimer v. Bingenheimer, 66 A. 2d 327, 329 (N. J. 1949).

33. Note, 29 COL. L. REV. 799, 801 (1929): "Errors of judgment should not bar a trusting, if not loving, plaintiff."

34. Mattison v. Mattison, 60 Misc. 573, 113 N. Y. Supp. 1024 (Sup. Ct. 1908); KEEZER, MARRIAGE AND DIVORCE § 516 (3d ed. 1946).

35. 60 Misc. 573, 113 N. Y. Supp. 1024 (Sup. Ct. 1908).

marital vows." [36] Under statutes today the wife can compel the husband to provide her with adequate support, and there is less legal or moral reason that an abandoned woman should be privileged to commit adultery. The husband's wrong should not authorize the wife to commit a greater one.[37] Some courts, however, have indicated that if the wife's adulterous act is induced by destitution resulting from desertion, or if the wife deserts her husband, knowing that he will then seek the embraces of other women, connivance will be implied where the husband's or wife's conduct is a material factor in bringing about the wrongful act by the other.[38]

F. *Agents' Acts*

The cases are almost unanimous in holding that where one spouse is led into adultery by acts or procurement of the other spouse's agent a divorce will be disallowed even though the agent was not authorized or directed by the principal to bring about the adultery.[39] The suspected party must not be led into a "fresh wrong" by the other mate or his agent because of suspicion of a previous offense. When a husband employs detectives to "shadow" his wife he bears the risk of procurement of adultery by them and may be barred from divorce by reason of their unauthorized fraud. The husband is liable, one case reasoned, because he should know that the first thing the detective will do in order to trap the wife will be to furnish her with an opportunity for illicit intercourse.[40] In *Dennis v. Dennis*,[41] the wife's agent hired a lewd woman to lure the husband into adultery; although the agent was not authorized to do this specific act of hiring, his connivance was imputed to the wife. One who takes advantage of his agent's unauthorized fraud is answerable for it.[42]

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36. 113 N. Y. Supp. at 1026.

37. Ellett v. Ellett, 159 N. C. 161, 72 S. E. 861 (1911). There was a dissent in this case, however, on the grounds that divorce for adultery should be denied the husband where he has wrongfully abandoned his wife.

38. McMillan v. McMillan, 120 Fla. 209, 162 So. 524 (1935); Pike v. Pike, 100 N. J. Eq. 486, 136 Atl. 421 (Ch. Ct. 1927), 36 YALE L. J. 1186. See also Fonger v. Fonger, 160 Md. 610, 154 Atl. 443 (1931). In Richardson v. Richardson, 114 N. Y. Supp. 912, 916 (Sup. Ct. 1906), the wife left her husband's bed and board knowing that he would seek other women. The court held that " 'Connivance' means 'winking at', failing to prevent, helping by not hindering, taking no active hand, but standing by and knowingly . . . promoting, aiding, and abetting the business. It is a state of condition where all power, authority, influence, and action to prevent . . . are intentionally withheld."

39. Dennis v. Dennis, 68 Conn. 186, 36 Atl. 34 (1896); May v. May, 108 Iowa 1, 78 N. W. 703 (1899); Torlotting v. Torlotting, 82 Mo. App. 192 (1899); Lisle v. Lisle, 128 Pa. Super. 533, 194 Atl. 207 (1937); Wotherspoon v. Wotherspoon, 108 Pa. Super. 309, 164 Atl. 842 (1933), 18 MINN. L. REV. 223 (1934); Smith v. Smith, 218 S. W. 602 (Tex. Civ. App. 1919).

40. Smith v. Smith, 218 S. W. 602 (Tex. Civ. App. 1919).

41. 68 Conn. 186, 36 Atl. 34 (1896).

42. Illg v. Illg, 78 Pa. Super. 212 (1922).

III. RESULT OF CONNIVANCE AT ONE ACT OF ADULTERY AS TO OTHERS

A. *Subsequent Acts*

It has been generally held that connivance at one act of adultery will bar divorce for a subsequent adulterous act.[43] In *Hedden v. Hedden*,[44] the court states that there is a distinction between express and implied connivance in this matter: If a husband attempts to procure adultery and later seeks divorce on the grounds of another act of illicit intercourse he should be barred; if he merely permits or suffers acts which ought to convince him of his wife's guilt, the prior connivance at adultery should not bar him from divorce. The court further states that if a plaintiff has previously employed persons to have intercourse with his wife, this is sufficient consent to adultery by her with others subsequently, although no previous adultery be actually committed. One writer has said that the result should depend upon repentance by the husband. If the husband has reformed "after having induced his wife once to commit adultery . . . it seems contrary to principle to hold that by so doing he has fallen so low as to be forever unable to repent and reform in contemplation of law. Such a rule would seem to license the wife to continue her adultery secure from all restraint." [45] In the reported cases, however, there does not appear to be any trend towards a relaxation of the earlier rule.

B. *Prior Acts*

It has been generally held that connivance at one act of adultery will not bar divorce for a prior adulterous act.[46] In one case, a suspicious husband connived at illicit sexual relations between his wife and his brother; the court held that this did not preclude him from obtaining a divorce for a former adultery by the wife.[47] In *Morrison v. Morrison*,[48] it was stated that no authority was found for laying down the rule that connivance at one adultery is an absolute bar to divorce for a prior adultery; hence, the court felt that each case depends upon its own facts, the character of the connivance, and public policy.

IV. CONNIVANCE IN ACTIONS FOR CRIMINAL CONVERSATION AND ALIENATION OF AFFECTIONS

In actions for damages against third parties for alienation of affections [49]

43. Morrison v. Morrison, 142 Mass. 361, 8 N. E. 59 (1886); Woodard v. Woodard, 41 N. J. Eq. 224, 4 Atl. 424 (Ch. 1886); 19 C. J., *Divorce* § 210 (1920); KEEZER, MARRIAGE AND DIVORCE § 299 (3d ed. 1946).

44. 21 N. J. Eq. 61 (Ct. Err. & App. 1870).

45. Note, 29 COL. L. REV. 799, 804 (1929).

46. Morrison v. Morrison, 142 Mass. 361, 8 N. E. 59 (1886); Bailey v. Bailey, 67 N. H. 402, 29 Atl. 847 (1893).

47. Bailey v. Bailey, 67 N. H. 402, 29 Atl. 847 (1893).

48. 142 Mass. 361, 8 N. E. 59 (1886).

49. Woldson v. Larson, 164 Fed. 548 (D. C. Cir. 1908); Prettyman v. Williamson,

and criminal conversation,[50] the defense of connivance is available to the defendant and the same general principles are applicable. Though the doctrine of "clean hands" is not resorted to here as it would be in an action for divorce, the courts continue to disallow an action for a wrong to which there has been consent.

In *Kohlhoss v. Mobley*,[51] it was held that connivance is established as a conclusion from a line of conduct pursued by a husband in relation to his wife's adultery; and that connivance by him sufficient to bar an action for criminal conversation must be such conduct as, under an objective rather than subjective test, shows an intention to connive, evidenced by his active or passive consent to acts that would lead a reasonable person to believe that his wife is engaged in imoral conduct.

Likewise, a wife who consents to her husband's sojourn into another state in order that he might procure a divorce and remarry has been held not entitled to maintain a suit for alienation of affections.[52]

V. Conclusion

When it appears that there is no longer a possibility that husband and wife will live together in harmony and happiness, and when all hope of reconciliation and understanding is past, it would seem better both morally and socially to terminate the marriage by divorce. Marriage, when not attended by the usual considerations of love, fidelity, affection, happiness and cooperation, is a mere legal relationship which is useless both to the parties and society. Should the doctrine of connivance always prevent the severance of such a relationship? It is submitted that it should not, and that the courts should be more hesitant in applying the defense of connivance to misconduct alleged as cause for divorce. It would seem better to work out the problems of divorce for the best interests of society and of children of the parties, without regarding the divorce as being necessarily won by one party or the other. The concept that "divorce is a remedy provided for an innocent party" [53] should not be determinative of every case.

Where consent to an act of adultery is given once and divorce is sought

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1 Penne. 224, 39 Atl. 731 (Del. 1898); Puth v. Zimbleman, 99 Iowa 641, 68 N. W. 895 (1896); Milewski v. Kurtz, 77 N. J. L. 132, 71 Atl. 107 (Sup. Ct. 1908).

50. Morning v. Long, 109 Iowa 288, 80 N. W. 390 (1899); Kohlhoss v. Mobley, 102 Md. 199, 62 Atl. 236 (1905); Inderlied v. Bullen, 80 N. J. L. 7, 77 Atl. 469 (Sup. Ct. 1910); Lee v. Hammond, 114 Wis. 550, 90 N. W. 1073 (1902); Note, 68 A. L. R. 560, 575 (1930).

51. 102 Md. 199, 62 Atl. 236 (1905).

52. Nulsen v. Nulsen, 3 Cal. App. 2d 407, 39 P. 2d 509 (1934).

53. Blankenship v. Blankenship, 51 Nev. 356, 276 Pac. 9, 10 (1929). In Bradway, *The Myth of the Innocent Spouse*, 11 Tul. L. Rev. 377, 398 (1937), it is suggested that "the rule of the innocent spouse has long since outlived its social usefulness . . . and that the time is at hand to substitute for this outmoded rule and its accompanying procedure a more efficient and satisfactory system of control of familial relations."

on the grounds that another act has been committed, the result ordinarily depends upon whether the act relied on was subsequent or prior to the original consent. If prior, divorce will be allowed; if subsequent, divorce will be denied. No reasoning is found to justify this distinction. It would seem better to solve each case on its own merits without looking to see if the complainant has previously or subsequently been guilty of consenting to marital misconduct by the other spouse. Why should misconduct in a separate transaction have a bearing on the outcome of the case involved?

While connivance and recrimination are similar defenses in that the plaintiff's own misconduct bars divorce, it is only with regard to recrimination that a definite tendency towards a relaxation of the strict rule has developed.[54] Perhaps the doctrine of connivance will be next to undergo a critical analysis.

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54. The strict rule of recrimination has in part been broken away from by the recognition of the doctrine of "comparative rectitude." Stiles v. Stiles, 224 Ky. 526, 6 S. W. 2d 679 (1928); Trombley v. Trombley, 313 Mich. 80, 20 N. W. 2d 818 (1945); Urffer v. Urffer, 154 Pa. Super. 379, 35 A. 2d 580 (1944); SCHOULER, DIVORCE MANUAL § 180 (a) (Warren ed. 1944); see Note, 63 A. L. R. 1132 (1929). Nevada, by statutory provision, NEV. COMP. LAWS ANN. § 9467.01 (Supp. 1941), recognizes this comparatively new doctrine. See also D. C. CODE § 16-403 (1940); Vanderhuff v. Vanderhuff, 144 F. 2d 509 (D. C. Cir. 1944) (construction of the District of Columbia statute). *Cf.* KAN. GEN. STAT. ANN. § 60-1506 (1935); OKLA. STAT. tit. 12, § 1275 (1942). The rule of recrimination is repudiated in Pavletich v. Pavletich, 50 N. M. 224, 174 P. 2d 826 (1946), 18 MISS. L. J. 471 (1947); Huff v. Huff, 178 Wash. 684, 35 P. 2d 86 (1934). Critical discussions of the doctrine of recrimination may be found in Feinsinger and Kimball, *Recrimination and Related Doctrines in the Wisconsin Law of Divorce,* 6 WIS. L. REV. 196 (1931); Bunkley, *The Doctrine of Recrimination in Divorce Law,* 20 MISS. L. J. 327 (1949); Notes, 26 COL. L. REV. 83 (1926), 28 IOWA L. REV. 341 (1943), 29 MICH. L. REV. 232 (1931), 13 ORE. L. REV. 335 (1934), 1 U. of FLA. L. REV. 62 (1948). See also 21 IND. L. J. 53 (1945); 23 TEX. L. REV. 194 (1945); 33 VA. L. REV. 355 (1947).