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Donald E. weiland

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RECRIMINATION AS A DEFENSE IN DIVORCE CASES

Because of the construction of the Pennsylvania Divorce Law,¹ as enacted in 1929, and because of the holding of a very early case,² the use of recrimination as a defense in divorce cases has been severely restricted. The tendency of the recent decisions, however, has been to avoid the early restrictions and extend its use wherever and whenever possible. It is the purpose of this note to examine the recent cases with a view towards determining the status of recrimination as a defense in suits for divorce in Pennsylvania.

Section 52 of our Divorce Law provides in part:

"In any action or suit for divorce for the cause of adultery, if the respondent shall allege and prove or it shall appear in the evidence, that the libellant has been guilty of a like crime. . . it shall be a good defense and a perpetual bar against the same."

At no other place in the Act is a similar section to be found which applies to any grounds for divorce other than adultery.

One of the primary rules of construction, often referred to as *expressio unius est exclusio alterius*, is that when the Legislature uses a provision in one respect and not in others, it must have *intended* to exclude it in those respects in which it was not used. Applying this maxim to the Divorce Law we are forced to the conclusion that recrimination was intended to be a defense only in those instances in which the divorce suit was based on adultery, and the defense is libellant's like crime. It should be here noted that under this section the time of libellant's act of adultery is immaterial.

In 1834, in the historical case of *Ristine v. Ristine*,³ the Supreme Court applied this maxim to a similar provision of the Divorce Law⁴ then in existence, and held that adultery of the libellant committed after the respondent had left the libellant was *not* a bar to the libellant's obtaining a divorce for desertion. This holding was extended by subsequent cases⁵ so as to exclude recrimination as a defense in all cases except those brought on the grounds of adultery, and this became a firmly established principle in the law of divorce in Pennsylvania. To this day the holding of the *Ristine* case has never been directly overruled.

The courts continued to follow this principle after the new divorce law was passed in 1929. But the more recent cases have managed, to a great extent, to avoid in one way or another the effect of that holding. One method of avoidance has been by limiting the holding of the *Ristine* case to its own particular facts.

¹ Act of 1929, P.L. 1237, 23 P.S. 52, as last amended by the Act of April 18, 1945, P.L. 255 1, 23 P.S. 25.

² *Ristine v. Ristine*, 4 Rawle 459 (1834).

³ *Ibid.*

⁴ Act of March 13, 1815.

⁵ *Mendenhall v. Mendenhall*, 12 Pa. Super. 290 (1899); *Fay v. Fay*, 27 Pa. Super. 290 (1899).

This was done by the Superior Court in the very recent case of *Commonwealth ex rel. Cartmell v. Cartmell*.⁶ The court said that the holding in the *Ristine* case was limited to the situation where the recriminatory act attempted to be used as a defense was committed after the cause of action had accrued against the respondent. The Court there said:

"Our cases without exception are to the effect that a libellant's adultery, committed *after* his right to a divorce on the ground of indignities or desertion has accrued, is not cause for refusing a divorce, and that is the limit of the holding of the *Ristine* case."

While the language used in the *Ristine* case apparently was not intended to be so narrowly construed, this narrower interpretation is entirely sufficient to support the result there reached. Thus such a distinction does avoid much of the effect of this earlier holding.

But there is still the problem of avoiding the effect of the application of the maxim *expressio unius est exclusio alterius* to the present Divorce Law. Beginning with *Daly v. Daly*⁷ in 1939, the courts have avoided the effect of this maxim by making use of Section 10 of the Divorce Law. This provides that only "an innocent and injured spouse" may obtain a divorce from the bonds of matrimony. It was this that provoked the oft-quoted statement of the Superior Court in *Daly v. Daly*, *supra*:

". . . where both parties are nearly equally at fault, so that neither can clearly be said to be the 'injured and innocent spouse' the law will grant a divorce to neither, but will leave them where they put themselves."

The recent cases have said that in considering whether the libellant is an "innocent and injured spouse" the courts will take into consideration any misconduct of the libellant which would have been grounds for divorce had the action been brought by the respondent, if such misconduct was near the time of the act complained of. When this reasoning is applied it becomes apparent that the maxim does not bar the use of recrimination as a defense. It has been used in actions for divorce brought on the grounds of desertion,⁸ cruel and barbarous treatment⁹ and indignities to the person,¹⁰ provided however, that the cause of action has not accrued prior to the commission of the recriminatory act.¹¹

Having concluded that recrimination actually is a defense in many instances, although the Pennsylvania courts refuse to call it such, the problem arises as to

⁶ —Pa. Super.—, 63 A. 2d 691 (1949).

⁷ 137 Pa. Super. 403, 9 A. 2d 192 (1939).

⁸ *Champ v. Champ*, 38 Luz. L. Reg. Rep. 205.

⁹ *Harding v. Harding*, 156 Pa. Super. 438, 40 A. 2d 869 (1944); *Daly v. Daly*, 137 Pa. Super. 403, 9 A. 2d 192 (1939).

¹⁰ *Castner v. Castner*, 159 Pa. Super. 387, 48 A. 2d 117 (1946); *Anthony v. Anthony*, 160 Pa. Super. 18, 49 A. 2d 877 (1946).

¹¹ *Clark v. Clark*, 160 Pa. Super. 562, 52 A. 2d 351 (1947); *Stauffer v. Stauffer*, 49 Lanc. Rev. 265; *Commonwealth ex rel. Cartmell v. Cartmell*, —Pa. Super.—, 63 A. 2d 691 (1949).

the burden of proof. Is an affirmative duty put on the libellant to allege and prove that he or she is an innocent and injured spouse, or is the burden upon the respondent to prove that the libellant is not an innocent and injured spouse? From the holding in *Daly v. Daly*¹² one might easily conclude that the burden is on the libellant to prove his own good conduct, for the court there laid down the rule that the court would refuse the divorce unless the libellant established by clear and satisfactory proof that he was the innocent and injured spouse.

This language, however, was explained in the subsequent case of *Anthony v. Anthony*¹³ where the Superior Court said that this was not a rule of pleading but a rule for the evaluation of *all* the evidence. Speaking through Rhodes J. the court said:

"In order to determine whether a particular libellant is an 'injured and innocent spouse' the court must not only examine and weigh the evidence relating to the many complex factual situations which make up the total picture of marital conduct, but it must evaluate this evidence with relation to the defenses available to the respondent in connection with the particular grounds for divorce relied on by the libellant."

This language was cited with approval in *Bock v. Bock*.¹⁴ There the libellant sued for divorce alleging indignities to the person. There was testimony from which it might be inferred that the libellant had committed adultery; but as it was only an inference the court implied that it could not give it much weight. The court went no further than this, however, for it concluded that even if the adultery had been committed it could not avail the respondent, as it could not have been committed until long after the libellant's cause of action had accrued.

It can be seen, however, from the foregoing cases that the burden of proving that libellant was not an innocent and injured spouse has never been put on the respondent. Is this an inconsistency? Ordinarily the burden of proving an affirmative defense is on the party relying thereon; and regardless of what the courts call it, recrimination is an affirmative defense. But it must also be remembered that under the Divorce Law one of the prerequisites to obtaining a divorce is that the libellant be an "innocent and injured spouse." Actually, the courts seem to be reluctant to expressly place this burden on either party. This may best be illustrated by the language used by the Superior Court in *Jacobson v. Jacobson*:¹⁵

"However, the burden was on libellant to prove his case by clear and satisfactory evidence, with a preponderance thereof in his favor. *It must also clearly appear* that libellant was the innocent and injured spouse." (Italics supplied)

¹² See note 7, *supra*.

¹³ 160 Pa. Super. 18, 49 A. 2d 877 (1946).

¹⁴ 162 Pa. Super. 506, 58 A. 2d 372 (1948).

¹⁵ 154 Pa. Super. 449, 36 A. 2d 189 (1949).

This also is the effect of the language of *Anthony v. Anthony*,¹⁶ *i. e.*, that if after evaluating *all* the evidence with respect to the defenses available to the respondent, the court finds that both parties are nearly equally at fault, they will grant a divorce to neither.

In this respect it must be noticed that in the application of Section 52 of the Divorce Law, which is the only principle of recrimination recognized as such by the Pennsylvania courts, the courts have been unanimous in holding that the burden of proving the libellant's like crime is on the respondent.¹⁷ Thus it can be seen that while recriminatory acts may be used as a defense under the "innocent and injured spouse" provision of the Divorce Law, the defense is not treated the same procedurally as is the affirmative defense of recrimination provided for by the Act.

In conclusion then, it is to be noted that the only true principle of recrimination recognized by the Pennsylvania courts is that provided for by the Divorce Law itself. This is the situation where the libellant sues for divorce on the grounds of adultery and the respondent defends on the ground that the libellant has also committed adultery. In spite of this however, the courts have allowed recriminatory acts as a defense, but have refused to call such defense recrimination, choosing rather to allow the defense under the provision of the Divorce Law which requires that the libellant be an "innocent and injured spouse". In the former situation the burden of proving the recriminatory act is affirmatively put on the respondent; but in the latter case the courts say that if it appears from *all* the evidence that the libellant is not an innocent and injured spouse they will not grant the divorce to either party. Thus by the use of this device, the courts seem to have remedied one of the obvious defects of the Divorce Law as it was written.

DONALD E. WIEAND

¹⁶ See note 13, *supra*.

¹⁷ *Jackson v. Jackson*, 49 Pa. Super. 18 (1912); *Isaacs v. Isaacs*, 149 Pa. Super. 508, 27 A. 2d 531 (1942).