

DIVORCE: STATUTORY ABOLITION OF MARITAL FAULT.

I

Within the past generation American legislatures have made statutory changes in the law of divorce that materially weaken the basic doctrine that divorce will be granted only upon proof of marital fault of defendant, and blamelessness of plaintiff. This trend is seen in statutes permitting divorce for insanity or continuous separation, which have produced basic changes in other accepted elements of American divorce, and, perhaps more significantly, indicate a legislative interest in making American divorce law coincide with contemporary mores.

American divorce law was greatly influenced by English ecclesiastical law,¹ which regarded marriage as a sacrament and hence permitted its dissolution only by the death of one of the parties. "Divorce" was granted only as relief to an innocent spouse who had suffered from the other's intentional wrongdoing and was merely permission to live apart despite the marital obligation. Absolute divorce was unknown to the ecclesiastical courts, but the English system of legislative divorce was adopted by the American colonies and was later utilized by state legislatures. When judicial divorce replaced this system, the result was a mixture of legislative practice and the judicial precedents of the ecclesiastical system.² American legislatures generally provided by statute that divorce would be granted only for specified marital faults. These consisted of enumerated intentional acts, hence, insanity of the defendant spouse at the time of the commission of the offending acts was a bar to divorce.³ Innocence of the plaintiff spouse was required, and it was emphasized by the doctrine of recrimination: divorce would not be allowed when defendant showed that plaintiff was also guilty of some marital fault. Finally, divorce was denied when there had been collusion, an agreement between the parties to dissolve the marriage.

The legal theory of the innocent suffering spouse has long been regarded as a myth.⁴ In actual practice, divorce today is usually but a judicial ratification of prior agreement between the parties. Despite the requirement of an adversary proceeding, statistics conclusively show that for many years eighty-five per cent or more of divorce decrees have been granted without an actual contest.⁵ And although no American jurisdiction has yet abandoned entirely the concept of mari-

¹ BISHOP, *MARRIAGE AND DIVORCE* (5th ed. 1873) 54; 1 HOLDSWORTH, *HISTORY OF ENGLISH LAW* (1922) 621; 1 NELSON, *DIVORCE AND ANNULMENT* (2d ed. 1945) 1; 17 AM. JUR. (1938) 149; 7 ENCYC. BRIT. (11th ed. 1910) 334.

² BISHOP, *op. cit.* *supra* note 1, at 79.

³ 19 C. J. 76.

⁴ Bradway, *The Myth of the Innocent Spouse* (1937) 11 TULANE L. REV. 377.

⁵ MARSHALL and MAY, *THE DIVORCE COURT: MARYLAND* (1932) 199. Reports published intermittently by the U. S. Bureau of the Census show that since 1887 no less than eighty-three per cent of divorces have been uncontested (U. S. Bureau of Census, Reports on Marriage and Divorce, 1922-1930, 1932).

tal fault, many jurisdictions have adopted one or more statutory provisions that are thoroughly inconsistent with the concept.

Divorce based upon separation.

Foremost among these statutes is the provision that divorce will be permitted when the parties have been living apart for a specified number of years. The first such statute was adopted by Wisconsin as early as 1866,⁶ and sixteen other American jurisdictions⁷ followed with increasing rapidity, at least two-thirds of such statutes having been passed in the last fifteen years. It is said that the public policy expressed by this type of statute is that the interests of society are best served by allowing the termination of marital relations which have in fact ceased to exist.⁸ As will appear in the following discussion of the cases, the prevailing judicial interpretation of this type of statute indicates that as to this ground of divorce the doctrines of fault and recrimination are abolished, and that there has been acceptance of the fact that the divorce decree is only a ratification of the private agreement of the spouses to end the marriage. As subsequently noted, there have been some differences in the degree of change these statutes have occasioned, but these variations for the most part reflect differences in the wording of the statutes.

Most "separation" statutes merely require that the parties have lived separately and apart for a number of years.⁹ These are generally construed to authorize divorce regardless of the fault of plaintiff and whether or not the separation was voluntary on the part of both parties.¹⁰ Thus, Kentucky has held that five years of continuous separation is a ground for divorce, although the separation was caused by the cruel and inhuman treatment of defendant by plaintiff.¹¹ And the Louisiana supreme court has said that its statute introduced a new and independent cause for divorce, and does not take into consideration the question of what cause, or whose fault, produced the separation.¹²

Arkansas, however, construed its statute, which allowed divorce

⁶ Wis. Stats. 1866, c. 37.

⁷ ARIZ. CODE (1939) § 27-802; ARK. DIG. STAT. (Pope, 1937) § 4381(7); D. C. CODE (1940) § 16-403; Idaho Laws 1945, p. 191; KY. REV. STATS. (1942) § 403.020; LA. GEN. STAT. (Dart, 1939) § 2202; MD. CODE (Flack, Supp. 1943) art. 10, § 40; MINN. STAT. (1941) § 518.06; NEV. COMP. LAWS (Supp. 1931-1941) § 9467.06; N. C. GEN. STATS. (1943) § 50-6; R. I. GEN. LAWS (1938) c. 416; TEX. STAT. (Vernon, Centennial ed. 1936) art. 4629; 2 UTAH CODE (1943) 40-3-1; VT. LAWS 1941, p. 53; WASH. REV. STAT. (Remington, 1932) § 982; WIS. STAT. (1943) § 247.07; WYO. LAWS 1941, p. 3.

⁸ Note (1927) 51 A. L. R. 763.

⁹ Alaska, Arizona, Arkansas, Idaho, Kentucky, Louisiana, North Carolina, Texas, and Washington. (Statutes cited *supra* note 7.)

¹⁰ Notes (1935) 97 A. L. R. 985; (1927) 51 A. L. R. 763; (1938) 17 TEX. L. REV. 93.

¹¹ Brown v. Brown (1916) 172 Ky. 754, 189 S. W. 921; Best v. Best (1927) 218 Ky. 648, 291 S. W. 1032; Sandlin v. Sandlin (1942) 289 Ky. 290, 158 S. W. (2d) 635; (1938) 26 Ky. L. J. 145; KY. REV. STATS. (1944) § 403.020.

¹² North v. North (1927) 164 La. 293, 113 So. 852. *Accord*: Goudeau v. Goudeau (1920) 146 La. 742, 84 So. 39.

when there had been "continuous separation", to mean that plaintiff was not entitled to a divorce unless he was without fault.¹³ This rule was changed by legislative amendment.¹⁴ Similarly, North Carolina's statute provided for divorce when there had been continuous separation for two years without the fault of plaintiff,¹⁵ but a later enactment provides that divorce will be granted after a separation of two years on the application of either party.¹⁶ North Carolina now holds that divorce will be granted under the later statute even though plaintiff has committed some marital fault.¹⁷ So construed, these statutes have created an exception to the basic requirements of divorce law of guilt of defendant and innocence of plaintiff.

A minority view is found in Washington whose statute has been construed to mean that divorce for continuous separation will not be allowed if plaintiff has committed some marital fault.¹⁸ A later case, however, has held that when the separation is due to the fault of both parties a divorce will be allowed.¹⁹ This would seem to establish a half-way position, retaining the doctrine of recrimination for the protection of an "innocent" defendant, but abrogating the absolute rule that divorce will not be allowed unless plaintiff is shown to be innocent.

A variation in statutory scheme is found in Nevada²⁰ and Rhode Island,²¹ which provide that the question of fault is to be considered by the trial judge in exercising his discretionary power to grant divorce. This has not been construed, however, to mean that fault must be treated in accordance with the conventional ecclesiastical rule. The Nevada supreme court has clearly said that divorce does not depend upon the comparative rectitude of the parties, but rests upon the probability of their not being able to live together in such a manner as to be for their best interests and those of society.²² Similarly, the supreme court of Rhode Island has stated that it is within the discretion of the trial court to hold that a divorce should be allowed as being in the best interests of the parties and of society, irrespective of the earlier behavior of plaintiff.²³ Thus in these states, in divorce based upon separation the doctrine of recrimination is not available as a defense. Mis-

¹³ *White v. White* (1938) 196 Ark. 29, 116 S. W. (2d) 616, 17 TEX. L. REV. 93.

¹⁴ Ark. Acts 1939, p. 38 [amending § 4381(7)], applied in *Brooks v. Brooks* (1940) 201 Ark. 14, 143 S. W. (2d) 1098; *Jones v. Jones* (1940) 199 Ark. 1000, 137 S. W. (2d) 238.

¹⁵ N. C. GEN. STATS. (1943) § 50-5.

¹⁶ *Ibid.* § 50-6.

¹⁷ *Long v. Long* (1934) 206 N. C. 706, 175 S. E. 85; *Taylor v. Taylor* (1945) 225 N. C. 80, 33 S. E. (2d) 492; *Byers v. Byers* (1942) 222 N. C. 298, 22 S. E. (2d) 902.

¹⁸ *Pierce v. Pierce* (1922) 120 Wash. 411, 208 Pac. 49.

¹⁹ *Evans v. Evans* (1935) 182 Wash. 297, 46 P. (2d) 730.

²⁰ NEV. COMP. LAWS (Supp. 1931-1941) § 9467.06.

²¹ R. I. GEN. LAWS (1938) c. 416.

²² *George v. George* (1935) 56 Nev. 12, 41 P. (2d) 1059, 97 A. L. R. 983.

²³ *Smith v. Smith* (1934) 54 R. I. 236, 172 Atl. 323.

conduct of plaintiff is important only insofar as it bears upon the likelihood of the parties being unable to compose their differences.²⁴

Another statutory variation is found in three jurisdictions which require that the separation must be "voluntary".²⁵ The courts of the District of Columbia and Wisconsin have construed this type of statute to mean that the issue of fault, as such, is unimportant, but that divorce will not be granted unless the separation was acceptable to both parties.²⁶ Even when the separation is initially due to the misconduct of plaintiff, if the "innocent" party acquiesces in the separation for the required period, divorce will be granted.²⁷ However, if one of the parties, in the course of the separation, has in good faith expressed a desire to continue the marital relationship, the divorce will be denied.²⁸ Maryland has given its statute a more restricted application, and it seems settled that unless both parties agree to the separation at its inception, as well as during the required period, the statute does not apply.²⁹ Here again is an exception to the established doctrine of recrimination, a doctrine retained only as it may evidence that the separation is not voluntary. And again there is acceptance of the fact that the judicial decree is only a ratification of the agreement of the parties to end their marriage.

In Minnesota and Utah the statute allowing divorce when there has been separation specifies that the parties must have been living separately under a decree of limited divorce or separate maintenance.³⁰

In contrast with the prevailing provisions, the statutes of two jurisdictions seem intended to provide that divorce will not be granted to the party who was at fault in causing the separation. Thus in Vermont the statute states that divorce will be granted on the ground of

²⁴ Indeed, it would seem that a plea of recrimination would make the issuance of a divorce decree more likely. Mutual marital misconduct would indicate that it was impossible for the parties to continue the normal relationship of husband and wife.

²⁵ D. C. CODE (1940) § 16-403; MD. CODE (Flack, Supp. 1943) art. 10, § 40; WIS. STAT. (1943) § 247.07.

²⁶ *Bowers v. Bowers* (App. D. C. 1944) 143 F. (2d) 158; *Thompson v. Thompson* (1881) 53 Wis. 153, 10 N. W. 166; *Sanders v. Sanders* (1908) 135 Wis. 613, 116 N. W. 176.

²⁷ *Parks v. Parks* (App. D. C. 1940) 116 F. (2d) 556.

²⁸ *Krause v. Krause* (1922) 177 Wis. 165, 187 N. W. 1019.

²⁹ *Beck v. Beck* (1941) 180 Md. 321, 24 A. (2d) 295, Note (1943) 7 Md. L. REV. 146.

³⁰ This quite obviously makes divorce on the ground of separation impossible unless the innocent spouse takes the initiative originally, for only such a spouse can obtain a separation decree. Seemingly this would remove the doctrine of recrimination in the divorce action, as plaintiff is allowed divorce on the basis of separation obtained by defendant, which was, of course, based upon the fault of plaintiff. This result was reached in Minnesota in *Gerdts v. Gerdts* (1936) 196 Minn. 599, 265 N. W. 811, (1942) 26 MINN. L. REV. 213, 223. It is interesting to note that, as is logical, other jurisdictions with separation statutes allow divorce under such circumstances, although their statutes are not restricted to this precise situation.

separation if the separation was not due to the fault of plaintiff.³¹ The Wyoming statute is even more restrictive, and provides that divorce will not be granted if the separation is caused "wholly or in part" by the party seeking the divorce.³² The Wyoming supreme court has recently construed this statute to mean that there is no absolute right to divorce because of separation.³³ It pointed out that the statute differs from those adopted by other jurisdictions, and implied that plaintiff must show some justification for the desire to be free from marital obligations. However, it was said that the provision does not require proof that the separation is due to such extreme provocation as cruelty or intolerable indignities. The court concluded by holding that a separation caused by the incompatibility of the parties, which endangered the health of plaintiff, met the requirements of the statute. Thus in both of these states the doctrine of recrimination has been adhered to in divorces granted for separation, but seemingly there is no requirement that plaintiff suffer from the intentional wrongdoing of defendant.

In practice, the statutes allowing separation as a ground for divorce have not been widely utilized. Statistics indicate that a very small percentage of unhappily married spouses are willing to pass through the long separation required to establish what they already believe to be true, *i.e.*, that their marriage has failed.³⁴ In recognition of this fact, perhaps, recent legislation shows a tendency to reduce the separation period, which in the majority of jurisdictions has been five years or more.³⁵

A problem arises under the various statutes discussed above as to the nature of the separation for which divorce will be granted. It is generally held that separation must be so open and notorious that the community in which the parties live may see that they are living apart.³⁶ It has also been held to be important that the parties under-

³¹ Vt. Laws 1941, p. 53. *Guibord v. Guibord* (1945) Vt., 44 A. (2d) 158.

³² Wyo. Laws 1941, p. 3.

³³ *Jegendorf v. Jegendorf* (1945) Wyo., 157 P. (2d) 280.

³⁴ Statistics published by the Bureau of the Census from 1925 to 1931 indicate that only four-tenths of one per cent of all divorces granted in the United States during this period were on the ground of separation (U.S. Bureau of Census, Reports on Marriage and Divorce, 1922-30, 1932). However, this does not accurately represent the situation in the states where "separation" statutes exist. For example, the Bureau's figures show that in 1939 slightly more than three per cent of divorces granted in Maryland and Wisconsin were on the ground of separation (U.S. Bureau of Census, Vital Statistics—Special Reports (1943) vol. 17, p. 464).

³⁵ Amendments in Arkansas, Nevada, North Carolina, and Louisiana have reduced the statutory period of separation to three years in the first two states, and to two years in the latter two. Moreover, of the last six jurisdictions which have adopted statutes allowing divorce when there has been continuous separation, three require only three years of separation before divorce will be allowed. (Utah, Vermont, and Wyoming Statutes cited *supra* note 7.)

³⁶ *Hava v. Chavigny* (1920) 147 La. 330, 84 So. 892; Note (1927) 51 A.L.R. 763

stand throughout the period of separation that it is intended to be final. Thus, divorce has been denied when correspondence was conducted as though the separation were temporary and the parties were to remain husband and wife,³⁷ and also when the parties engaged in sexual intercourse during the required period.³⁸ A minority rule is suggested by the District of Columbia where a divorce was granted although the parties continued to live in the same dwelling, the court stating that the statute required separate lives, not separate roofs.³⁹ When the separation is due to the imprisonment of one of the spouses, divorce on grounds of separation is generally denied.⁴⁰ Kentucky, however, has allowed a divorce even in this situation, stating that the fact that the separation was caused by the imprisonment of one of the spouses was immaterial.⁴¹ In view of the prevailing rule that even the spouse who causes the separation may obtain a divorce after the requisite period, the holding of the Kentucky court would seem to be a logical one.

However, if the separation is due to the confinement of defendant for insanity, the courts have universally held that the separation statute is inapplicable. In some jurisdictions this rule seems to rest on the requirement that separation be the voluntary act of both parties;⁴² other jurisdictions apparently base their holding on the theory that separation must be the conscious act of both parties.⁴³

Divorce based upon insanity.

As previously mentioned, in the absence of statute insanity is a bar to divorce,⁴⁴ and even the most aggravated cruelty by the insane spouse affords no basis for divorce.⁴⁵ This rule is, of course, consistent with the basic theory borrowed from ecclesiastical practice that divorce is allowed only where there is deliberate wrongdoing by defendant. But here again that theory has been subjected to widespread statutory encroachment, and today twenty-seven American jurisdic-

³⁷ *Bockman v. Bockman* (1941) 202 Ark. 585, 151 S.W. (2d) 99; *Young v. Young* (1945) N.C., 34 S.E. (2d) 154.

³⁸ *Reilly v. Reilly* (1937) 57 R.I. 432, 190 Atl. 476.

³⁹ *Boyce v. Boyce* (App. D.C. 1946) 153 F. (2d) 229.

⁴⁰ *Sitterson v. Sitterson* (1926) 191 N.C. 319, 131 S.E. 641; Note (1927) 51 A.L.R. 763.

⁴¹ *Colston v. Colston* (1944) 297 Ky. 250, 179 S.W. (2d) 893; *Davis v. Davis* (1897) 102 Ky. 440, 43 S.W. 168.

⁴² *Leveque v. Borns* (1932) 174 La. 919, 142 So. 126, (1933) 7 TULANE L. REV. 265; *Galiano v. Monteleone* (1933) 178 La. 567, 152 So. 126.

⁴³ *Carlson v. Carlson* (1939) 198 Ark. 231, 128 S.W. (2d) 242; *Serio v. Serio* (1940) 201 Ark. 11, 143 S.W. (2d) 1097; *Begley v. Jones* (1932) 246 Ky. 135, 54 S.W. (2d) 639; *Messick v. Messick* (1917) 177 Ky. 337, 197 S.W. 792; *Camire v. Camire* (1921) 43 R.I. 489, 113 Atl. 748.

⁴⁴ 19 C.J. 76.

⁴⁵ *Walker v. Walker* (1925) 140 Miss. 340, 105 So. 753, 42 A.L.R. 1525.

tions provide for divorce when one of the parties is incurably insane.⁴⁶ Apparently, the first of these statutes was adopted by Washington in 1885,⁴⁷ and other American jurisdictions have followed in an ever-increasing number. Over half of these statutes have been passed during the last fifteen years, a pattern similar to that already noted in the adoption of statutes allowing divorce when there has been a period of continuous separation.

These statutes generally require that the insane spouse be confined in an asylum for a specified period of time just prior to the commencement of the action, that the confined spouse be represented by counsel, and that plaintiff's responsibility for support of the confined spouse continue after divorce. The constitutionality of this type of statute has been sustained by many decisions.⁴⁸ Typical is an Indiana case in which the court rejected the contention that the statute was void for uncertainty, and held that "incurable insanity" had a meaning sufficiently certain for judicial or legislative cognizance.⁴⁹

The statutory responsibility placed upon plaintiff for support of the insane spouse after divorce was construed by the supreme court of Kansas to be a codification of the common-law duty of support. Accordingly, the ex-husband's responsibility was held to continue even though the divorced wife had an independent estate.⁵⁰ The requirement that the insane spouse be confined to an asylum for several years before divorce will be allowed is probably a statutory provision for the minimum evidence necessary to conclusively establish an unsound mind. This is illustrated by a Maryland decision construing such a provision when defendant had been placed in a private home rather than an institution. The court held that this showed defendant was still in a mental condition requiring supervision, and that therefore divorce could be granted under the statute.⁵¹

The Utah statute was at one time so rigorous in its protection of the insane spouse that divorce was denied when the confinement was

⁴⁶ ALA. CODE (1940) tit. 34-20; ALASKA LAWS (1933) § 3990; ARK. LAWS 1943, p. 988; CAL. CIV. CODE § 92; 2 COLO. STAT. (1935) c. 56, § 2; CONN. GEN. STAT. (1930) § 5174; DEL. LAWS 1937, p. 611; HAWAII REV. LAWS (1945) § 12210; IDAHO CODE (1932) § 31-603; IND. STATS. (1933) § 3-1201; KAN. GEN. STAT. (Corrick, 1935) § 60-1501; MD. CODE (Flack, Supp. 1943) art. 10, § 41; MINN. STAT. (1941) § 518.06; MISS. CODE (1942) § 2735; MONT. LAWS 1937, p. 108; NEB. LAWS 1945, p. 329; NEV. COMP. LAWS (Supp. 1931-1941) § 9460; N. M. STAT. (1941) § 25-710; N. C. LAWS 1945, p. 1059; N. D. REV. CODE (1943) § 14-0503; ORE. COMP. LAWS (1940) § 9-907; 1 S. D. CODE (1939) § 14.10703; TEXAS LAWS 1941, p. 383; 2 UTAH CODE (1943) 40-3-1; VT. PUB. LAWS (1933) § 3116; WASH. REV. STAT. (Remington, 1932) § 982; WYO. LAWS 1943, p. 53.

⁴⁷ Wash. Laws 1885, p. 120.

⁴⁸ Note (1938) 113 A. L. R. 1248.

⁴⁹ State v. Brown (1937) 213 Ind. 118, 11 N. E. (2d) 679, (1938) 113 A. L. R. 1243.

⁵⁰ Sandhagen v. Vogel (1938) 147 Kan. 570, 77 P. (2d) 949.

⁵¹ Dodrer v. Dodrer (1944) 183 Md. 413, 37 A. (2d) 919.

outside the borders of the state,⁵² but this rule has been changed by amendment, and constructive service is now permitted in such circumstances.⁵³ The latter is the general practice and is justified by the courts on the ground that the additional provision for representation by counsel furnishes adequate protection for the insane spouse.⁵⁴

Relatively few cases have been reported under the many statutes providing for divorce on the ground of insanity, and the available statistics, although out-dated, suggest that only a small percentage of divorces are granted on this ground.⁵⁵ The statutes in question are nevertheless important as indications of a changing point of view. They suggest a legislative willingness to remove the requirement of "deliberate wrong", to abolish the doctrine that divorce is relief granted only to an "innocent suffering spouse", and to recognize that divorce today is a means of judicially terminating a marriage that has in fact ceased to function.

II

In practice, legislative action has not been found necessary to facilitate the dissolution of a marriage when both parties wish it done. Sociological, legal, and statistical surveys of the operation of our divorce courts prove that the requirements of contest, innocence, and guilt have become mere formalities.⁵⁶ Despite strict rules against the collaboration of the parties, the judicial action in decreeing divorce is more often than not a mere ratification of an agreement of the spouses to dissolve the marriage for reasons that seem satisfactory to them.

Under such circumstances it must be admitted that the function

⁵² *Schafer v. Ritchie* (1916) 49 Utah 111, 162 Pac. 618.

⁵³ UTAH CODE (1943) 40-3-1 (Ann. § 13).

⁵⁴ *Gorges v. Gorges* (1926) 42 Idaho 357, 245 Pac. 691.

⁵⁵ Statistics from 1925 to 1931 show that throughout the United States no more than one-tenth of one per cent of divorces were granted on the ground of insanity (U. S. Bureau of Census, Reports on Marriage and Divorce, 1922-1930, 1932). The special survey made in 1939 indicates that in states with statutes allowing divorce because of insanity the same ratio prevailed [U. S. Bureau of Census, Vital Statistics—Special Reports (1943) vol. 17, p. 464]. However, the need for this type of statute may be thought to be imperative even though a relatively small number of people are affected. This was the view of the Texas legislature in enacting its statute in 1941 (Texas Laws 1941, p. 383). It has been suggested that such a statute be adopted in Wisconsin. (1944) WIS. L. REV. 106.

⁵⁶ MARSHALL and MAY, *THE DIVORCE COURT: MARYLAND* (1932) 35, 199; (1921) 9 CALIF. L. REV. 175. A spot check in the Superior Court of Alameda County in 1946 indicated that conditions there are much the same as those reported by the above authorities. An official of the court stated that no more than five per cent of divorces in that court are contested. A total of fifty-six cases were studied by the writer, and in no case was the decree refused; in fifty-one cases the alleged ground of divorce was "cruelty", with a very formalized pleading of harsh treatment by defendant and of blamelessness of plaintiff. In the uncontested cases any problems of alimony, division of property, or custody had been previously arranged among the parties.

of the divorce court has changed. In most cases the actual role of the judge is no longer to decide whether a divorce will be granted, for the decree itself is seldom denied.⁵⁷ Instead, the attention of the court is focused on what is generally the only ground of dispute between the parties, the so-called incidental relief: custody of children, the amount of support or alimony that will be allowed the wife and/or children, division of marital property, and other economic considerations. Here, evidence of the actual, rather than the fictional, marital conduct of the parties would aid the judge in making a sound decision. It is therefore interesting to note the procedure followed by courts in dealing with such incidental relief when divorce is granted because of separation.

It has been previously shown that most of the states whose statutes provide for divorce when there has been continuous separation do not consider the misconduct of plaintiff in deciding whether or not the marriage should be dissolved. The issue of fault is, however, generally considered in awarding alimony and in dividing the marital property. Conventionally, alimony is not awarded a wife who is guilty of marital misconduct,⁵⁸ and as divorce was traditionally granted only to an innocent party, a wife is entitled to alimony only when she is plaintiff. However, when divorce is granted because of separation it is often true that a defendant wife is innocent of marital misconduct. It is therefore in accordance with the spirit of the conventional rule that a defendant wife may be awarded alimony if she proves that her husband has been guilty of marital fault. This principle is well illustrated by a series of Arkansas cases: plaintiff husband was awarded a divorce because of three years of separation, but as he had mistreated his wife, she was entitled to alimony;⁵⁹ similarly, a defendant wife was awarded alimony where an adulterous husband was granted a divorce under the separation statute;⁶⁰ and the same court said that where both parties were guilty of misconduct, evidence on the subject could be considered in adjudicating property rights.⁶¹

An early Kentucky decision stated that since either party could maintain an action for divorce when there had been continuous separation, alimony could be awarded a defendant wife without regard to the question of fault.⁶² Later Kentucky cases,⁶³ however, have con-

⁵⁷ This is not to suggest that courts are no longer occupied with the law of divorce. Divorce suits are so numerous that even though a relatively small percentage are contested, and reach the appellate bench, the number is still large enough to account for a considerable proportion of appellate decisions.

⁵⁸ 2 NELSON, *op. cit. supra* note 1, § 14.31.

⁵⁹ Jones v. Jones (1940) 201 Ark. 546, 145 S. W. (2d) 748.

⁶⁰ McCall v. McCall (1942) 204 Ark. 836, 165 S. W. (2d) 255.

⁶¹ Howard v. Howard (1942) 204 Ark. 929, 166 S. W. (2d) 12.

⁶² Newsome v. Newsome (1894) 95 Ky. 383, 25 S. W. 878.

⁶³ Irwin v. Irwin (1899) 107 Ky. 24, 49 S. W. 432; Stiles v. Stiles (1928) 224 Ky.

sistently held that when divorce is obtained because of separation, the fault of the wife is a material factor in deciding whether or not she should be awarded alimony. This is probably the law in Kentucky today.

The Louisiana supreme court originally held that a wife could only obtain alimony as an incident of her own suit for divorce or separation, and therefore a defendant wife was not entitled to alimony in a suit based on separation.⁶⁴ This rule was soon changed by amendment.⁶⁵ The Nevada statute provides that a divorce for separation is subject to the same procedure and requirements as are actions based on other grounds of divorce. It has been held, however, that this does not mean that the doctrine of recrimination applies in such suits, on the ground that the doctrine is a substantive rule and is not within the meaning of "procedure" and "requirements".⁶⁶ The latter was said to concern custody of children, disposition of property rights, alimony, and the like.

It is, of course, the general rule that custody of children is not to be determined on the basis of "marital fault", but is within the discretion of the court, which should make the welfare of the child the paramount consideration.⁶⁷ However, in deciding which parent will best serve the child's welfare, evidence of the marital conduct of the parties may well be of value, and this evidence should be available to the court.

III

Is it wise, when the function of the divorce court has in actual practice become so far removed from basic theory, to continue the present ritual of innocence and marital fault? It must be recognized that for millions of Americans the divorce action is their only personal experience in court. The present artificiality in the dissolution of marriage must certainly bolster the traditional view of laymen that the law is concerned only with ritual and form, and not with actuality. Some authorities have suggested that a more satisfactory legal remedy could be devised if it were officially recognized that divorce is now granted because the parties themselves do not desire the marriage to continue, and that the attention of the court should be focused pri-

526, 6 S. W. (2d) 679; *Vallandingham v. Vallandingham* (1929) 232 Ky. 123, 22 S. W. 424; *Jones v. Jones* (1935) 261 Ky. 647, 88 S. W. (2d) 673; *Baker v. Baker* (1938) 271 Ky. 735, 113 S. W. (2d) 16; *Hayes v. Hayes* (1938) 275 Ky. 273, 121 S. W. (2d) 698.

⁶⁴ *North v. North*, *supra* note 12.

⁶⁵ LA. CIV. CODE (Dart, 1945) § 160. *Paulsen v. Reinecke* (1935) 181 La. 917, 160 So. 629, 97 A. L. R. 1184.

⁶⁶ *Herrick v. Herrick* (1933) 55 Nev. 59, 25 P. (2d) 378.

⁶⁷ 2 NELSON, *op. cit. supra* note 1, at 167; Weinman, *The Trial Judge Awards Custody* (1944) 10 LAW & CONTEMP. PROB. 721; Note (1945) 33 CALIF. L. REV. 306.

marily on the social and economic relationships involved in the dissolution of marriages.⁶⁸

Such official recognition seems implicit in the recent action of the legislatures of Alaska⁶⁹ and New Mexico⁷⁰ in providing for divorce on the ground of incompatibility. As yet there are few reported cases dealing with the effect of these statutes. However, the decision in *Chavez v. Chavez*⁷¹ indicates that the New Mexico statute will not be given a revolutionary interpretation. In that suit plaintiff asked for divorce on the grounds of desertion and nonsupport, and defendant pleaded recrimination as a bar to the action, offering evidence tending to show the adultery of plaintiff. The majority opinion rejected the contention that the incompatibility statute had by necessary implication repealed the defense of recrimination, and held that such evidence was properly admissible. Seemingly the effect of the incompatibility amendment will be restricted to divorces asked for on that ground. However, two justices, one concurring specially and the other dissenting, said that the divorce statute must be considered as a whole, and that the addition of incompatibility as a ground for divorce meant that the doctrine of recrimination did not exist in New Mexico.

In considering the possibility of improving American divorce procedure it is interesting to note that early in the century the Scandinavian countries, after a survey of their marital law, concluded that divorce would best be treated in accordance with contemporary mores rather than in accordance with social beliefs of the past century. Accordingly, the joint Norwegian-Danish-Swedish Commission in their report of 1910 recommended that divorce be granted at the parties' mutual request when there was "deep and constant discord". To assure that such discord existed, it was suggested that the final decree be preceded by a year's separation, during which time efforts at reconciliation should be attempted by a pastor or some other person designated by the court. This recommendation was adopted in Sweden in 1910, Denmark in 1915, and Norway in 1918. It was not followed by any marked increase in the divorce rate, and reports

⁶⁸ MARSHALL and MAY, *THE DIVORCE COURT: OHIO* (1933) 368. For a broad survey of the problems inherent in the present legal treatment of divorce, and a comparison of divorce laws of America and Western Europe, see the symposium, *Divorce* (1943) 28 IOWA L. REV. 179; Silving, *Divorce Without Fault* (1944) 29 IOWA L. REV. 527; 9 DUKE B. A. J. 49.

⁶⁹ Alaska Laws 1935, p. 120.

⁷⁰ N. M. STAT. (1941) § 25-701 (adopted in 1933, N. M. Laws 1933, p. 71).

⁷¹ (1935) 39 N. M. 480, 50 P. (2d) 264. *Accord*: Poteet v. Poteet (1941) 45 N. M. 214, 114 P. (2d) 91; Sands v. Sands (1944) 48 N. M. 458, 152 P. (2d) 399.