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George D. Basye

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RETREAT FROM RECRIMINATION—

DeBURGH v. DeBURGH

"If both parties have a right to divorce, neither party has." This is the classical statement of the often criticized, yet widely followed doctrine of recrimination, which renders divorce impossible when both spouses have been guilty of misconduct serious enough to give the other a cause of action for divorce. With some variation, the doctrine is applied in this form, either by statute or decision, in a large majority of the states, which included California, until the recent case of DeBurgh v. DeBurgh.2

Since 1872, the California statute has defined recrimination as "a showing by the defendant of any cause of divorce against the plaintiff, in bar of the plaintiff's cause of divorce." This section has been interpreted as making every cause of action shown against the plaintiff an absolute and automatic bar to relief in every case.4 In the DeBurgh case, however, the Supreme Court re-examined the section, and found that, had this been the meaning, the phrase "in bar of the plaintiff's cause of divorce" was superfluous. Its insertion implied, the court said, that a showing of a cause of divorce against the plaintiff would not in every case be "in bar" of the plaintiff's relief, but only in the discretion of the trial court.

To justify this interpretation and to indicate how the discretion ought to be applied, the court suggested that recrimination, like the equitable doctrine of clean hands "of which it is a part,"5 does not prevent relief when a denial would be "harmful to the public interest"; and that "public policy does not discourage divorce where the relations between husband and wife are such that the legitimate objects of matrimony have been utterly destroyed."7

While the DeBurgh case appears to be a dramatic reversal by the Cali-

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1 Hoffman v. Hoffman, 43 Mo. 547 (1869).
2 39 Cal. 2d 858, 250 P. 2d 598 (1952).
5 Supra note 2, at 870, 250 P. 2d, at 605; Nelson, LAW OF DIVORCE § 425 (1895). Recrimination and "clean hands" have had separate developments historically, and some writers, seeking leniency in recrimination cases, especially where there is no express statute, have argued that they should be kept separate. See Zacharias, Recrimination in the Divorce Law of Illinois, 14 C穿过-KENT Rev. 217 (1935); Bunkley, Recrimination in Divorce Law, 20 Miss. L. J. 327 (1949). The courts, however, frequently use the terms interchangeably. See Hollingworth v. Hollingworth, 173 Ore. 286, 293, 145 P. 2d 466, 468 (1944).
6 Supra note 2, at 868, 250 P. 2d at 603.
7 Id. at 864, 250 P. 2d at 601, quoting in part from Hill v. Hill, 23 Cal. 2d 82, 93, 142 P. 2d 417, 422 (1943). The court apparently discusses "clean hands" in order to avail itself of the flexibility inherent in the traditions of equity. It has been suggested that in absence of a statute making divorce proceedings equitable in nature, the result would be better reached on the grounds of public policy, rather than in the name of equity. 1 Nelson, DIVORCE AND ANNULMENT 8 (2d ed. 1945). This is especially true since "clean hands" has usually been thought to justify the doctrine of recrimination, and to prevent, rather than promote, its relaxation. See Zacharias, and Bunkley, both supra note 5.
In at least two-thirds of the states, recrimination is still applied, as it was in California before the DeBurgh case, as a bar to the plaintiff's action for divorce on any ground when the plaintiff is guilty of misconduct giving rise to a cause of action for divorce on the same or any other ground.11 The statutes of many states provide for recriminatory defense in all cases.12 In some states the statute provides for recrimination only in certain situations, but the courts apply it to all cases,13 and some courts have

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8 See e.g., Chambless v. Chambless, 255 Ala. 35, 49 So. 2d 917 (1951); Chester v. Chester, 69 Ariz. 104, 210 P. 2d 331 (1949); Elston v. Elston, 344 Ill. App. 233, 10 N.E. 2d 635 (1951); Paulsen v. Paulsen, 50 N.W. 2d 567 (Iowa, 1951); Russell v. Russell, 145 Me. 113, 72 A. 2d 640 (1950); Reddington v. Reddington, 317 Mass. 760, 59 N.E. 2d 775, 159 A.L.R. 1448 (1945); Egbert v. Egbert, 149 Neb. 227, 30 N.W. 2d 669 (1948).


10 For the history and excellent criticisms of the recrimination doctrine, see Beamer, The Doctrine of Recrimination in Divorce Proceedings, 10 Kan. City L. Rev. 213 (1942); Bradway, The Myth of the Innocent Spouse, 11 Tulane L. Rev. 377 (1937); Feinsinger and Young, Recrimination and Related Doctrines in the Wisconsin Law of Divorce, 6 Wis. L. Rev. 193 (1931); Comment, 28 Iowa L. Rev. 341 (1943).

11 See Nelson, Divorce and Annulment 359 (2d ed. 1945); Madden, Persons and Domestic Relations § 92 (1931).

12 This was not the case in California before the enactment of the codes. In Conant v. Conant, 10 Cal. 249, 258 (1855), it was said that to be entitled to an absolute divorce (divorce from bed and board then being possible) plaintiff must be "without reproach." This extreme position was not followed in California. Mayo v. Mayo, 3 Cal. 2d 51, 43 P. 2d 535 (1935); Smith v. Smith, 119 Cal. 183, 48 Pac. 730, 51 Pac. 183 (1897); and see cases cited in DeBurgh v. DeBurgh, supra note 2, at 866, 250 P. 2d at 602.

In Pennsylvania and West Virginia, the courts will still deny the divorce though plaintiff's misconduct is less serious than that required to constitute a cause of action. See Newman v. Newman, 170 Pa. Super. 238, 85 A. 2d 613 (1952); Rohrbaugh v. Rohrbaugh, 68 S.E. 2d 361 (W. Va., 1951); Hatfield v. Hatfield, supra note 9. Though speaking in terms of recrimination, these cases seem rather to be based on provocation.


The last four mentioned contain the same sentence as Cal. Civ. Code § 122. Querer: will courts of these states interpret this sentence as the California court has done in the DeBurgh case?

adopted a "common law" defense of recrimination without the aid of statute.\footnote{\textit{E.g.}, Reddington v. Reddington, \textit{supra} note 8; Oberlin v. Oberlin, 201 Miss. 228, 29 So. 2d 82 (1947).}

Amelioration of the orthodox doctrine of recrimination has come about chiefly by three means: (1) "Comparative rectitude," (2) the development of new grounds for divorce not based on fault, and (3) by making recrimination a discretionary, rather than an automatic, defense.

"Comparative Rectitude"

In almost all jurisdictions today, plaintiff's misconduct, to bar his relief, must be "equal" to that of the defendant at least to the extent of constituting a cause of action. A few states carry this limitation further, holding that recrimination is a bar to the divorce only where plaintiff's misconduct is of equal gravity with that of which he complains. If it can be said that the plaintiff, though guilty of misconduct amounting to grounds for divorce, has nevertheless been the "lesser offender," his misconduct will not bar the decree.\footnote{\textit{E.g.}, Eals v. Swan, 221 La. 329, 59 So. 2d 409 (1952); McFadden v. McFadden, 213 S.W. 2d 71 (Tex. Civ. App. 1948); Marr v. Marr, 191 S.W. 2d 512 (Tex. Civ. App. 1945). See also Note 159 A.L.R. 734 (1945). This result is codified in Nevada. "... [W]hen it shall appear ... that both ... have been guilty of ... wrongs which may constitute grounds for a divorce, the court shall not for this reason deny a divorce, but in its discretion may grant a divorce to the party least in fault." NEv. COMM. LAWS § 9467.01 (1931). See Lamb v. Lamb, 57 Nev. 421, 65 P. 2d 872 (1937).}

This is the doctrine called "comparative rectitude," which allows the court to recognize degrees of fault within the limits of statutory misconduct. It is only when the plaintiff's misconduct gives rise to a cause of divorce that the liberalizing effect of "comparative rectitude" is seen, for a divorce can be granted to the "lesser offender," even in most orthodox jurisdictions, if his offense does not constitute a cause of action.\footnote{\textit{E.g.}, Pointer v. Pointer, 251 S.W. 2d 334 (St. Louis Ct. App. 1952); Weatherspoon v. Weatherspoon, 246 P. 2d 581 (Ore. 1952); Reddington v. Reddington, \textit{supra} note 8.}

\textit{New Grounds Not Based on Fault}

The requirement of recrimination that the spouse to whom the divorce is granted be to some degree "innocent" stems from the concept that divorce is based on the fault of the defendant. When a divorce is granted on some basis other than the misconduct of the defendant, there would seem to be no justification for the requirement that the plaintiff be innocent. Another limitation on the application of recrimination is to be found, therefore, in the recent growth of new statutory grounds for divorce which
seem based on conditions other than the fault of the parties, such as separation, incompatibility, and insanity.

Several states now have statutes which provide that separation for a certain length of time is a ground for divorce.\textsuperscript{17} The courts of these states are in substantial agreement that only the fact of separation need be proven, and plaintiff's guilt in causing the separation need not prevent the dissolution of a marriage which has already ceased to exist in fact.\textsuperscript{18}

The newest ground for divorce is "incompatibility," which, as yet, is found in New Mexico,\textsuperscript{19} Alaska,\textsuperscript{20} and the Virgin Islands.\textsuperscript{21} In two of these jurisdictions the courts have declared that recrimination is not an absolute defense to an action of divorce on this ground.\textsuperscript{22} Incompatibility is not descriptive of misconduct, but of a situation. It is not one spouse or the other, but both who are incompatible.\textsuperscript{23} Therefore, incompatibility cannot be pleaded as a defense to an action for incompatibility, for if the situation of incompatibility gives rise to a defense as well as a cause of action, no divorce could ever be granted on that ground.\textsuperscript{24}

No cause of action against the plaintiff will necessarily prevent a decree when sought for this ground.\textsuperscript{25} The two courts which have discussed incompatibility say, however, that the plaintiff's misconduct may still be shown, and the judge apparently has discretion to deny the decree.\textsuperscript{26} Recrimination is thus not wholly eliminated.\textsuperscript{27}

Insanity is another new statutory ground for divorce which is not

\textsuperscript{17} E.g., Ark. Stat. § 34-1202 (1947) (three years); Nev. Comp. Laws § 9467.06 (1931) (three years); R.I. Gen'l Laws c. 416 § 3 (1938) (ten years); Wis. Stat. § 247.07 (1949) (five years); Wyo. Comp. Stat. Ann. § 3-5906 (1948) (two years); Wash. Rev. Code § 26.08.20 (1951) (five years).


The Arkansas statute, supra note 17, expressly provides that in a divorce action on the grounds of separation, the "question of who is the injured party shall be considered only in the settlement of the property rights . . . and alimony." See Young v. Young, 207 Ark. 36, 178 S.W. 2d 994 (1944).

See, however, the Wyoming statute, supra note 17, which provides that no decree shall be granted for separation, if "such separation has been induced or justified by cause chargeable to the party seeking divorce." But in Jegendorf v. Jegendorf, 61 Wyo. 277, 157 P. 2d 280 (1945), it was held that the trial court must decide, in its discretion, when such "cause" is sufficient to bar a decree. This seems to involve the defense of provocation, rather than recrimination, however.


\textsuperscript{20} Alaska Comp. Laws Ann. § 56-5-7 (1949).


\textsuperscript{22} Id.; Pavletich v. Pavletich, supra note 9 (New Mexico).

\textsuperscript{23} Ibid.; Poteet v. Poteet, 45 N. M. 214, 114 P. 2d 91 (1941).

\textsuperscript{24} Burch v. Burch, supra note 21 at 808; Clark v. Clark, 54 N. M. 364, 367, 225 P. 2d 147, 149 (1950).

\textsuperscript{25} Ibid.

\textsuperscript{26} Ibid. In the dissent to the Clark case, it was contended that evidence of plaintiff's misconduct should be admissible solely to show the existence of incompatibility. This was thought to be the intent of Pavletich v. Pavletich, supra note 9. See also Note, 21 A.L.R. 2d 1267 (1950).

\textsuperscript{27} See discussion of discretion, text infra. at note 32.
based on the fault of the defendant, and so should not be barred by misconduct of the plaintiff. It would seem strange indeed if a divorce based on defendant's insanity could be defeated by a showing that the plaintiff was cruel or adulterous.28

These new grounds have had a further impact on recrimination beyond their own scope. Three jurisdictions have taken enactment of such grounds into the divorce statutes as evidence of legislative intent that recrimination should not be an absolute defense to an action for divorce on any ground.29

Recrimination as a Discretionary Defense

A few jurisdictions have curtailed the effect of recrimination by giving the trial judge discretion to grant a decree in spite of the fact that both parties are guilty, as the California court has done in the DeBurgh case. In England, discretion has existed since the Matrimonial Act of 1857, which provided that "... the court shall not be bound to pronounce a decree if... petitioner has... been guilty of adultery..."30 The English courts recognized that this gave them discretion to grant as well as to deny a decree.31 Though the discretion was declared to be unfettered,32 it was, in fact, restricted by the belief that "public morality" favored the denial of a decree to the guilty party, and only exceptional circumstances would justify granting it.33

This view of the demands of "public morality" seems still to have been present in 1943 when, for the first time in England, an appeal was taken from a decree granting a divorce in spite of the plaintiff's fault. The Court of Appeal held that the trial judge had abused his discretion.34 The House of Lords, however, upheld the trial court's decision, saying that in exercis-
ing his discretion, the judge should consider the interests of society, and that it is "... contrary to public policy to insist on the maintenance of a union which has utterly broken down." Thus, where it had been thought that public policy required denying the decree in all instances of mutual fault unless exceptional circumstances were shown, it is now held that public policy favors granting the decree where the marriage has utterly failed.

This new attitude of favoring divorce when both parties are at fault and the marriage utterly destroyed, reached its logical result in *Redman v. Redman.* There the trial court denied the decree because the plaintiff was guilty of adultery and desertion, and both parties had established extra-marital relationships. The Court of Appeals, following what they felt to be the import of the House of Lords decision in *Blunt v. Blunt,* called this an abuse of discretion, the first English reversal of an exercise of discretion, either in granting or denying a decree.

In a few American jurisdictions as well, the application of recrimination now lies in the discretion of the trial court. Kansas and Oklahoma, like England, have statutes worded to give discretion to deny the decree, but they too were slow to recognize that discretion to grant was also implied. The Minnesota statute was thought to permit discretion, but the court has refused to so interpret it. Florida has adopted discretion by decision without regard to its statutes, while the District of Columbia.

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35 As well as: (1) The interests of the children, (2) the interests of third parties concerned, (3) the prospects of reconciliation, (4) the desire of the petitioner to remarry. Blunt v. Blunt, *supra* note 31, at 525.
36 *Id.* at 525.
37 [1948] 1 All Eng. 333.
38 *Supra* note 31.
40 "When the parties appear to be in equal wrong, the court may in its discretion refuse to grant a divorce..." KAN. GEN. STAT. § 60-1506 (1949).
42 *Supra* note 30.
43 See e.g., _Day v. Day_, 71 Kan. 385, 80 Pac. 974 (1905). But in _Roberts v. Roberts_, 103 Kan. 65, 173 Pac. 537 (1918), the Kansas court recognized that "discretion to refuse implies discretion to grant," and since that time discretion seems to have been applied more freely. See e.g., _Lassen v. Lassen_, 134 Kan. 436, 7 P. 2d 120 (1932); _Cates v. Cates_, 194 Okla. 414, 152 P. 2d 261 (1944); _Panther v. Panther_, 147 Okla. 131, 295 Pac. 219 (1931). See also Note, 15 IOWA L. REV. 498 (1930).
44 "In any action... on the ground of adultery, although the fact of adultery be established, the court may deny a divorce... when it is proved that the plaintiff has also been guilty of adultery..." MINN. STAT. § 518.08 (1949) (emphasis added). Minnesota was long considered to have discretionary recrimination. See 2 _VERNED, AMERICAN FAMILY LAWS_ 84 (1932); Vanderhuff v. Vanderhuff, *supra* note 18, at 509. Despite the seemingly permissive words "may deny," however, the Minnesota Court has held that recrimination is an absolute defense, Hove v. Hove, 219 Minn. 590, 18 N.W. 2d 580 (1945), except that an adulterous plaintiff may get a divorce on any other ground than adultery. _Arp v. Arp_, 229 Minn. 6, 38 N.W. 2d 67 (1949). See critical Note, 31 MINN. L. REV. 744 (1947).
45 _Stewart v. Stewart_, 158 Fla. 326, 29 So. 2d 247, 170 A.L.R. 1073 (1946). Apparently, recrimination is to be only a discretionary defense in every case, though the statute provides that when both parties are guilty of adultery, "no divorce shall be decreed." _FLA. STAT._ § 65.04 (1949).
the Virgin Islands, and probably New Mexico, have found evidence of legislative intent that recrimination should only be a discretionary defense, though their statutes do not mention recrimination.

**CALIFORNIA JOINS THE RETREAT**

In a well-reasoned opinion which promises to be a landmark case in other states as well, the California Supreme Court, by a four to three decision, brought California into the small but growing group of jurisdictions which give the trial judge discretion to grant a divorce though both parties are guilty of misconduct serious enough to constitute grounds for divorce. As in England, Kansas, and Oklahoma, this was done by interpreting the recrimination statute. But recrimination is an absolute defense in California, for Civil Code Section 111 says "Divorces must be denied on showing (of) ... recrimination." It is in the definition of recrimination that the discretion was found. Thus, while other courts may have discretion in applying recrimination after it is recognized, California courts have discretion in deciding whether or not recrimination exists. Though the phraseology is different, the discretion would seem to be the same.

As in England, this result was accomplished, or perhaps prompted, by the court's recognition of a changed public policy toward divorce. While in Conant v. Conant the California Supreme Court had felt that marriage was to be preserved at all costs, in the DeBurgh case, nearly one hundred years later, the court recognized that refusal to put an end to marriages which are hopelessly destroyed would make a "mockery of marriage." This announcement that public policy does not always discourage divorce is not altogether new in California. It was first declared in Hill v. Hill, where it was held that a property settlement to be effective only on divorce did not violate public policy by "encouraging" divorce. In Weil v. Weil,

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48 Clark v. Clark, supra note 24; Pavletich v. Pavletich, supra note 9. Though the Clark case was more conservative in its treatment of recrimination than the Pavletich case, and both involved attempts to use it as a defense against an action for incompatibility, see text supra, at note 24-27, it seems likely that recrimination is not an absolute defense to any ground in New Mexico. Sadler, J., dissenting in Pavletich v. Pavletich, supra, suggests that the question may not be important, however, as incompatibility may swallow up all other grounds.
49 In South Carolina, the question is open. In the first case involving the problem of mutual guilt subsequent to the re-enactment of divorce in that state, 46 S. C. Stat. 216 (1949), the court discussed favorably the "modern trend" in recrimination, citing 170 A.L.R. 1076 (1946) (annotation to Stewart v. Stewart, supra note 45), but refrained from deciding the point. Jeffords v. Jeffords, 216 S.C. 451, 58 S.E. 2d 731 (1950).
50 DeBurgh v. DeBurgh, supra note 2.
51 Id. at 862-863, 250 P. 2d at 600.
52 Cal. Civ. Code § 122, see text at note 3, supra. The dissenting judges in the DeBurgh case felt that the unequivocal language of § 111 precluded any discretion, and denied that Cal. Civ. Code § 122 was intended to allow it. Supra note 2 at 875, 250 P. 2d at 608.
53 See text, supra, at note 36.
54 Supra note 11.
55 Supra note 2 at 867, 250 P. 2d at 603.
56 Supra note 7.
57 37 Cal. 2d 770, 236 P. 2d 159 (1951).
the California Supreme Court upheld a trial judge who had suggested that he favored absolute divorce where the marriage was of short duration, and discouraged a wife from seeking a separate maintenance decree. The *DeBurgh* case is a third instance of application of this new policy that divorce is not always to be discouraged, and it seems probable that there will be further ramifications of it in California divorce law, quite apart from the problem of recrimination.68

REMNANTS OF RECRIMINATION IN CALIFORNIA

What remains of the defense of recrimination in California after the *DeBurgh* case? Though still a possible defense, it is obviously not as potent a weapon as before. A husband, for example, seeking to defeat a divorce action by his wife, would now be ill-advised to reply solely on a showing of his wife’s guilt, for more is required than a conclusion by the judge that the wife’s conduct, which constitutes a cause of divorce for the husband, is “in bar” of her relief. Justice Traynor, writing the majority opinion in the *DeBurgh* case, lists “certain major considerations [which] will govern the court’s decision”: the prospects of reconciliation, the effect of marital conflict on the parties involved, their children, and society, and the comparative guilt of the parties.69 The trial court will apparently be required to make findings on enough of these considerations to support his conclusion that the plaintiff’s misconduct is, or is not, “in bar” of the divorce.60

It would seem then that the defendant must show, in addition to a cause of divorce against the plaintiff, either:

1) that in spite of the mutual misconduct shown, there is some benefit to be derived from continuing the marriage, either to the parties themselves through a reconciliation, or to their children; or,

2) that he is himself the lesser offender.

The latter possibility stems from Justice Traynor’s suggestion that the trial court should consider the “comparative guilt” of the parties,61 which seems to incorporate the doctrine of “comparative rectitude” into the law of California.62

If the defendant cross-complains for a divorce, and one or both parties

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68 E.g., the defense of provocation, though distinguished in the *DeBurgh* case, might well be affected by this new policy, for certainly the marital situation involved is often one where the "legitimate objects of matrimony have been utterly destroyed." *Supra* note 2, at 864, 250 P. 2d at 603. See e.g., Harp v. Harp, 204 Cal. 193, 267 Pac. 101 (1928). Cf. Stewart v. Stewart, *supra* note 45, wherein the Florida court treats provocation, like recrimination, as part of the “clean hands” doctrine, see notes 5 and 7 *supra*, and therefore granting the decree is within the judge’s discretion. See also 1 *Nelson*, *Law of Divorce* § 425 (1st ed. 1895).

69 *Supra* note 2, at 872–873, 250 P. 2d at 606. Compare the considerations suggested by the House of Lords in the Blunt case, note 35 *supra*.

60 See Noble v. Noble, 115 A.C.A. 896, 899, 252 P. 2d 1001, 1003 (1953). This is the first case to mention the *DeBurgh* decision. Since the trial court found that the husband, to whom the divorce was granted, was not guilty of the misconduct alleged, the problem of recrimination was avoided.

61 *Supra* note 2, at 873, 250 P. 2d at 606.

62 See text *supra* at notes 15, 16.
show a cause of action, the likelihood of the divorce being denied would seem to be small. Surely it could not be denied because one spouse or the other was the greater offender, for the other party would then appear to be entitled to a decree. Nor need it be denied when both are found to be equally at fault. The denial would then have to be based on a finding that there was still some validity in the marriage, because of a possible reconciliation or other benefit to the parties or their children.

It might be asked whether the defendant can show that there is still some value to the marriage and at the same time seek a decree for himself? Of course, the judge might find on his own motion that continuation of the marriage would be advantageous. Both parties sought a decree in the DeBurgh case, and the possibility that on retrial the divorce might be denied entirely was not precluded. Before the DeBurgh case, the defendant seeking a divorce might be successful either in defeating the plaintiff through recrimination or in obtaining a decree himself. Now, however, it may be advisable to choose one of these alternatives, and either seek a divorce or defend with recrimination for the evidence which the judge will need to support his findings and conclusion may be different in the two cases.

The possibility of remand may be a deterrent against the continued application of recrimination. When a judge finds the plaintiff’s misconduct to be “in bar” of his relief, as presumably some will continue to do, the supreme court seems to have left open a wide door to remand the case by finding that one or more of the “major considerations” has not been mentioned in the findings, and therefore that the discretion has not been wholly exercised. This would not appear to be a problem of abuse of discretion.

If the judge makes all the necessary findings, however, and concludes that the cause of action shown against the plaintiff is “in bar” of his relief, his exercise of discretion would probably be upheld in most cases. Still, there may be cases in which it will be held an abuse of discretion to deny the decree, as it has been in England.

Is there also a limit to the judge’s discretion to grant a decree? If trial courts refuse to find that the plaintiff’s guilt is “in bar” of his action, either from a dislike of recrimination, or by interpreting the DeBurgh case as a mandate to do so, the question of the scope of their discretion to grant a decree may arise. A case is conceivable in which it might be an abuse of discretion not to find the plaintiff’s fault to be in bar of the decree because, for example, of the interests of the children.

63 Supra note 2 at 869, 250 P. 2d at 604.
64 But for the inconsistent findings of recrimination and “mutual provocation,” on which all seven judges agreed that the case should be remanded, this would have been the situation in the DeBurgh case. According to the majority, there would still be at least two factors missing: 1) an express conclusion that the plaintiff’s misconduct was “in bar,” and 2) findings on all the considerations necessary to support such a conclusion. Apparently, absence of either one would justify a remand. See Id. at 873, 250 P. 2d at 606.
65 Redman v. Redman, supra note 37; accord, Richards v. Richards, supra note 39.
66 As to the scope of review of a trial court’s discretion, see Angell v. Angell, 84 Cal. App. 2d 339, 344, 191 P. 2d 54, 58 (1948). “Discretion...does not mean...the whim or caprice...” See also Nemer v. Nemer, 117 A.C.A. 43, 254, P. 2d 661 (1953).
Thus the DeBurgh case has not freed California from the problem of recrimination. The dissenting judges say there is nothing left but an "embalmed corpse," but if so, it may be some time before it is laid peacefully to rest.

DIVORCE TO BOTH PARTIES—A NEW PROBLEM

The DeBurgh case may have buried the concept of recrimination as an absolute defense, but it has given birth to a new problem, that of divorce to both parties, which may take several years of judicial growing pains to mature. The court declares that the trial judge might decide that one of the spouses should be granted a divorce, or "it is also possible . . . that a divorce will be granted to both . . . " There is no provision for such a decree in the California statutes, but neither is there apparently, in England, Florida, and the Virgin Islands, where the courts have recognized that a divorce to both parties is possible. In Washington, divorce to both parties is now codified.

Washington and England, the two jurisdictions cited in the DeBurgh case, appear to have different approaches to the decree for both parties. The Washington courts, when both spouses seek a divorce, seem rather automatically to grant the decree to both parties. The English courts, on the other hand, recognizing that the English statute gives them discretion to grant or deny the divorce, apparently believe that when both spouses are guilty of misconduct which would provide grounds for divorce, they may exercise their discretion in one of three ways: (1) by denying the decree, (2) granting a divorce to one of the parties, or, (3) by granting a decree to both.

The DeBurgh case seems to lean more to the English approach, commenting that the court may decide that one of the parties should be

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67 Supra note 2, at 880, 250 P. 2d at 610.
68 Id. at 873, 250 P. 2d at 607.
70 Simmons v. Simmons, 122 Fla. 325, 165 So. 45 (1936).
72 "If the court determines that either party, or both, is entitled to a divorce . . ." WASR. REV. CODE § 26.08.110 (1951) (enacted, Wash. Laws. 1921, p. 332 § 2). But such a decree was recognized before the statute was enacted. McDonall v. McDonall, 95 Wash. 553, 164 Pac. 204 (1917); Hilleware v. Hilleware, 92 Wash. 99, 158 Pac. 999 (1916); Schirmer v. Schirmer, 84 Wash. 1, 145 Pac. 981 (1915).
73 Flagg v. Flagg, 192 Wash. 679, 74 P. 2d 189 (1937); Blunt v. Blunt, supra note 35.
75 Though not discussed in any of the cases cited, this practice may have been inspired by the section, long a part of the Washington statute, which provides that " . . . defendant may file a cross-complaint for divorce, and the court may in such case grant a divorce if any, in favor of either party, or as an application of both." Code of Wash. § 2004 (1881). See also WASR. REV. CODE § 26.08.150 (1951).
76 See note 69, supra.
california law review

330

generated a decree, but that it is possible that a divorce will be granted to both. In discussing the factors for the judge to consider in exercising his discretion, the court points out that "... comparative guilt may have an important bearing upon whether or not either one or both should be granted relief." This may well imply that where each seeks a divorce, a decree should be granted to both parties only in those few instances wherein the judge cannot distinguish between the relative merits of the two pleas.

In Washington, when a divorce has been granted to both spouses, and one objects to the court granting a decree to the other, it is said that the parties are quite as effectively divorced, whether the decree is given to both or only to one, and that therefore the objection is "sentiment rather than substance." It is mere sentiment, apparently, because in Washington, the decree only dissolves the marriage, and alimony and property rights do not depend on which party receives the divorce. Such an objection would have considerable substance in California, however, since according to the DeBurgh case, when the decree is granted to both parties, the property must be divided equally.

In California, the party granted a divorce on grounds of cruelty or adultery might well expect to receive more than half of the community property. Appeals from a decree to both spouses with an equal division of the property may therefore be frequent, and the nature of the judge's discretion to grant such a decree may soon confront the appellate courts. If, as the DeBurgh case seems to suggest, the decree is to be granted to both parties only in those cases where neither party can be said to have a more meritorious plea, then it would seem just that the property be divided equally. However, if divorce to both spouses should come to be granted in every case of mutual fault, then the supreme court might someday see fit to allow an unequal division of the property, a result which is perhaps not wholly excluded by the statute.

70 DeBurgh v. DeBurgh, supra note 2 at 873, 250 P. 2d at 607.
71 Id. at 873, 250 P. 2d at 606.
72 Thus the court seems to adopt "comparative rectitude," adding to it the opportunity to grant the decree to both parties in those cases in which, because of the equality of guilt, no divorce could be granted in a "comparative rectitude" state. See note 15 supra.
73 Schirmer v. Schirmer, supra note 72 at 3, 145 Pac. at 982; Hilleware v. Hilleware, supra note 72; McDonall v. McDonall, supra note 72; Merkel v. Merkel, supra note 74.
74 "... such disposition of the property of the parties ... as shall be just and equitable, having regard to the respective merits of the parties." Wash. Rev. Code § 26.08.110 (1951).
75 That nothing depends upon which party receives the divorce in Washington is shown most graphically in Regenvetter v. Regenvetter, 124 Wash. 173, 213 Pac. 917 (1923), where the decree was given to the husband, and refused the wife. The court admitted that the decree might have been given to the wrong party, but added that they were just as divorced, whichever spouse was granted it.
76 Supra note 2 at 874, 250 P. 2d 607.
77 Tipton v. Tipton, 209 Cal. 443, 288 Pac. 63 (1930); Eslinger v. Eslinger, 47 Cal. 62 (1873); cf. Webster v. Webster, 216 Cal. 485, 14 P. 2d 522 (1932).
78 "If the decree is rendered on the ground of adultery, incurable insanity or extreme cruelty, the community property shall be assigned to the respective parties in such proportions as the court, from all the facts of the case, and the conditions of the parties, may deem just." Cal. Civ. Code § 146 (1). Compare the Washington statute, supra note 80.
The DeBurgh decision suggests, as have many writers, that a strict application of recrimination encourages uncontested divorces, since appearance of both parties might jeopardize the decree by revealing their mutual guilt. This, it is alleged, may be used by the more “unscrupulous” litigant as a bargaining point in arriving at a property settlement which customarily precedes such divorces. This has resulted, it is said, in the courts abdicating their duty, and leaving marital problems to be settled in the lawyer’s office, with the judge merely assenting to the bargain already made.

The DeBurgh opinion seems to anticipate an increase in contested divorces. The court says that a proper application of discretion in recrimination cases “would encourage estranged couples to bring their differences before the chancellor, where the interests of society as a whole can be given proper recognition and where settlement negotiations can be supervised and unfair advantages prevented.” However laudable this might be, it may take more than the removal of the threat of recrimination to cause an appreciable increase in contested divorces. Where no large amount of property is involved, at least, other factors such as convenience and expense may induce the parties to send only one spouse to court. It may also be that parties would prefer to settle their differences in the privacy of an attorney’s office to airing them in open court.

The supreme court has modified the doctrine of recrimination in California in the way which seems most likely to permit a just and equitable result in every case. The court’s interpretation of Section 122 to allow discretion seems both plausible and workable. Statutory change is not likely to be forthcoming, in view of the controversial nature of the field, as any change would probably be attacked as a movement toward easier divorce. The DeBurgh decision does not, however, make divorce easier, except in the relatively small number of cases where the judges felt bound to apply recrimination automatically. There is no reduction in the requirement that

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84 Supra note 2, at 869, 250 P. 2d at 604.
85 E.g., Beamer, supra note 10, at 250, Comment, 28 Iowa Law Rev. 341 (1943).
86 DeBurgh v. DeBurgh, supra note 2 at 869, 250 P. 2d at 604; Bradway, supra note 10 at 385.
87 Comment, 28 Iowa L. Rev. 341 (1943).
88 Supra note 2, at 869, 250 P. 2d at 604. The English courts attempt to learn the real issues involved, even in uncontested divorces, by requiring the plaintiff to file a “discretion statement” admitting his own misconduct, and asking that the court “exercise its discretion in his behalf.” There is a public official, the Proctor, to raise the question of the plaintiff’s guilt in uncontested actions. See Feinsinger, Divorce Law and Administration in England, 9 Wis. L. Rev. 342 (1934); Blunt v. Blunt, supra note 34. The “discretion statement” is a judicial innovation originating in Apter v. Apter and Bliss [1930] P. 246.
89 Trial judges are apparently able to escape recrimination in all but a few of the cases in which it might arise, by finding that the plaintiff’s misconduct does not constitute a cause of divorce. See Comment, 28 Iowa L. Rev. 341 (1943). Well v. Well, supra note 57, may be an example of this. See also Noble v. Noble, supra note 60. A survey by Feinsinger and Young, supra note 10, showed that recrimination actually prevented a decree in only a minute portion
defendant be guilty, only a change in the requirement that the plaintiff be innocent. It does seem to make divorce actions a great deal more honest, by making it unnecessary for the judge to ignore the plaintiff's guilt in order to put an end to a hopeless situation when the parties are married only in law, but divorced in fact.

Since the legislature seldom heeds the suggestions and advice of courts pointedly lamenting that some archaic statutory provision should be changed, the supreme court is to be commended for taking this step to bring a little more rationality to the divorce law within the framework of the present codes.

George D. Basye

of the cases in which mutual fault seemed to be present. See, also, dissenting opinion of Brand, J., in Evans v. Evans, supra note 9, at 425, 157 P. 2d at 503, who suggests that if recrimination were sternly applied in all cases, "the entire divorce system, as it now exists in fact, would become unrecognizable."