PETITIONERS' FAULT IN MATRIMONIAL ACTIONS

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Family law is today burdened with a number of monumental problems, evidenced by widespread debate on such matters as family court structure, migratory troubles, and adoption graymarkets.¹ These socio-legal foci have elicited imaginative stands from all legal ranks, with a consequent renaissance throughout the field of domestic relations. Judicial probing is beginning to reach far, touching long-neglected, important areas. One such zone is the unclean hands doctrine, often utilized by courts to deny relief to faulty petitioners in matrimonial actions.

Parties requesting relief in matrimonial litigation frequently have themselves acted indecorously either before or during the action. The petitioners' fault may involve perjury in the action, fraud perpetrated upon another court in a different suit, defiance of the positive law or of some societal injunction, or improper treatment of the defendant. When a petitioner is thus chargeable with bad conduct, a question arises as to whether a positive judgment is thereby barred. Many petitioners, soiled but otherwise worthy, have been denied relief, even though relief was designed for the welfare of society. Although rejection of a matrimonial petition for unclean hands is a firm American doctrine, the actual imposition of a bar depends somewhat upon jurisdiction and circumstance.

Although unclean hands as a bar in matrimonial actions cuts through annulment, divorce, support, and property rights, a considerable portion of today's clean hands law is antique and probably was without justification from the outset. In the past, techniques have been lacking to discover and adequately treat policy considerations present in petitioners' fault cases, giving rise to conceptual judgments, insufficiently consequence-oriented.

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1. See DESPÉRT, *CHILDREN OF DIVORCE* (1953); GELLHORN, *CHILDREN AND FAMILIES IN THE COURTS OF NEW YORK CITY* (1954); Bradway, *Divorce Litigation and the Welfare of the Family*, 9 VAND. L. REV. 665 (1956); Rheinstein, *The Law of Divorce and the Problem of Marriage Stability*, 9 VAND. L. REV. 633 (1956).

At present, however, an increasing judicial awareness of the wider significances of family law decisions is beginning to remake clean hands thinking. There has appeared a modern direction which takes a highly satisfactory tack, but which may out-rival the old law in vexatiousness of application.

VOID MARRIAGES

American courts differ as to whether they will grant an annulment to a person with soiled hands who has entered into a void marriage.² Many cases³ declare the clean hands doctrine inapplicable on grounds of the public's interest in a status determination. Others⁴ steadfastly apply the doctrine to deny relief in these circumstances.

Denial-of-annulment cases appear in New Jersey, for example,⁵ which was sealed in its present clean hands position by *Tyll v. Keller*.⁶ In that case the husband asked for an annulment on the ground that the wife had a prior subsisting marriage. The court denied an annulment, stating that plaintiff was entitled to a decree only if he proved unawareness, at the time of marriage, of the fact that defendant then had a living husband. Plaintiff failed to sustain this burden of proof.

The theme of *Tyll* was carried forward by *Ancrum v. Ancrum*,⁷ where husband-petitioner discovered the prior living husband two years after marriage. A brief separation followed; the parties then

2. For a working definition of the distinction between void and voidable marriages, see *Christensen v. Christensen*, 144 Neb. 763, 766, 14 N.W.2d 613, 615 (1944): "... a marriage is termed void when it is not valid for any legal purpose. It is void *ab initio* by statute and its invalidity may be maintained in any proceeding in any court between any proper parties, whether in the lifetime or after the death of the supposed husband and wife, and whether the question arises directly by petition for an annulment or collaterally in other proceedings. On the other hand, a marriage is voidable when it has legal imperfections in its constitution which can be inquired into only during the lives of both of the parties in a proceeding by annulment to obtain a judgment of a competent court declaring its invalidity. Otherwise a voidable marriage is legally valid for all civil purposes until its nullity is so pronounced."

If a marriage is void, it is ordinarily not necessary to obtain a court decree to make it void, even where a statutory annulment proceeding is provided. The purpose of such statutes is to protect the welfare of society by an orderly determination of status, to aid the tranquility of the parties, and to afford an opportunity to have proof of invalidity presented in the form of a judicial record at a time when evidence may be obtainable and the parties are living. See *Gearllach v. Odom*, 200 Ga. 350, 37 S.E.2d 184 (1946); *Townsend v. Morgan*, 192 Md. 168, 63 A.2d 743 (1949).

3. See *Johnson v. Johnson*, 245 Ala. 145, 16 So. 2d 401 (1944); *Sullivan v. Sullivan*, 219 Cal. 734, 28 P.2d 914 (1934); *Jardine v. Jardine*, 291 Ill. App. 152, 9 N.E.2d 645 (1937).

4. See *Tyll v. Keller*, 94 N.J. Eq. 426, 120 Atl. 6 (Ct. Err. & App. 1923); *Lodati v. Lodati*, 268 App. Div. 1003, 52 N.Y.S.2d 119 (2d Dep't 1944); see also *Otte v. Pierce*, 118 Colo. 123, 194 P.2d 331 (1948).

5. For the New Jersey background, see *Rooney v. Rooney*, 54 N.J. Eq. 231, 34 Atl. 682 (Ch. 1896); *Freda v. Bergman*, 77 N.J. Eq. 46, 76 Atl. 460 (Ch. 1910); *Davis v. Green*, 91 N.J. Eq. 17, 108 Atl. 772 (Ch. 1919).

6. 94 N.J. Eq. 426, 120 Atl. 6 (Ct. Err. & App. 1923).

7. 9 N.J. Misc. 795, 156 Atl. 22 (Ch. 1931).

resumed marital cohabitation, living together off and on for three more years. Annulment was denied. The court said it was unconscionable and criminal for the husband to continue to cohabit with knowledge of the prior marriage, and then at a later day repudiate the relation and bring suit for annulment. "His misconduct was such as appears to me as worthy of condemnation, and I am constrained to deny him the relief prayed for."⁸ In this manner, the judicial duty of decision is discharged by Arthurian romance.⁹

Of the cases *granting* annulment, *Johnson v. Johnson*¹⁰ is typical. There, a husband filed a bill seeking annulment, asserting he had a living wife at the time of the marriage. A demurrer to the bill was overruled. Noting that the marriage was void, the court said that "in such cases, the interests of society intervene, and the state is regarded as a third party,"¹¹ and therefore clean hands would not be applied. Unfortunately, the court left unexplained the interests which society holds, illustrative of the usual¹² and lamentable inadequacy of policy analyses in petitioners' fault cases.

Similar reasoning was advanced in an Illinois annulment proceeding, *Jardine v. Jardine*,¹³ where the petitioner had participated in a previous fraudulently obtained Nevada divorce secured by the defendant. As the *Jardine* fact pattern is a highly important one, some of the principal variations should be described.

If the foreign divorce decree is held entitled to full faith and credit, it dissolves the first marriage, and a subsequent marriage will not be void. In a proceeding brought to annul the second marriage, no problem concerning the petitioners' fault bar can arise since that marriage is valid, and relief through an annulment decree can never be granted. If, however, the prayer is for a declaratory judgment to

8. *Id.* at 798, 156 Atl. at 23.

9. See also *White v. Kessler*, 101 N.J. Eq. 369, 139 Atl. 241 (Ch. 1927). Pending determination of a divorce suit against her first husband, defendant married White. Thereafter, she and White cohabited and continued to do so until after the divorce became final. White knew about the divorce action, but claimed he erroneously believed no prior marriage existed in law since it was not consummated by sexual intercourse. The court said he was presumed to know the law, and so he had knowledge of the prior subsisting marriage. Held, no annulment, on the authority of *Tyll v. Keller*.

10. 245 Ala. 145, 16 So. 2d 401 (1944).

11. *Id.* at 148, 16 So. 2d at 404.

12. See *Anderson v. Anderson*, 7 Cal.2d 265, 60 P.2d 290 (1936); *Sullivan v. Sullivan*, 219 Cal. 734, 28 P.2d 914 (1934).

13. 291 Ill. App. 152, 9 N.E.2d 645 (1937). At the time of the marriage, the husband was already married since his Nevada divorce decree was void for want of jurisdiction, there having been fraud in establishing the Nevada domicile. The wife, who was the instant plaintiff, participated in the Nevada imposition, thus soiling her hands. An annulment was granted on the theory that the best interests of society were served by a legal determination of the parties' status. See also *Cook v. Cook*, 116 Vt. 374, 76 A.2d 593 (1950).

determine marital status, petitioners' fault is in issue since the desired relief, a declaration, can be withheld for unclean hands.¹⁴ Where decrees are not entitled to full faith and credit,¹⁵ annulments of subsequent marriages are possible, and questions of barring relief for petitioners' fault may be presented.

In the cases thus far discussed, the court's failure to declare a nullity does not establish legality, although many decisions which refuse to grant an annulment decree actually establish, to an extent, the invalidity of the void marriage. Thus, in *Lodati v. Lodati*,¹⁶ an annulment was denied to petitioner-husband on the ground that he knew the woman was not free to marry him. This finding of inability to marry, necessarily making the marriage void, would seem to be *res judicata* in a subsequent litigation between the parties or their privies. Nevertheless, the desired finality has not been achieved, for another suit could easily involve a stranger, such as a federal tax collector or a new mate, making relitigable the issue of marriage validity. Therefore, if a nullity decree is refused the parties may choose not to marry again for fear of future legal difficulties.

If, at a much later date, rights under a void marriage become in dispute, it may be necessary to show facts establishing invalidity which can no longer be proved. For example, fraud perpetrated upon a court in obtaining a divorce may result in an invalid decree. A second marriage, which we may assume is contracted, will be null. But the bigamist cannot get an annulment decree if the clean hands bar is applied. If his first spouse later dies, the bad-fellow is then permitted by society to remarry. He marries a third time and subsequently dies thirty years after the original divorce decree. The last lady of the three in our chain is clearly the lawful wife. But in establishing her rights, she must invalidate marriage number two which appears on the records. To do this she must prove fraud thirty years past the event, often an impossible task.

14. *Untermann v. Untermann*, 19 N.J. 507, 117 A.2d 599 (1955).

15. Some divorces are presently not entitled to recognition outside the jurisdiction where granted. Non-recognition may occur if the foreign divorce decree was won in an *ex parte* proceeding. See *Williams v. North Carolina*, 325 U.S. 226 (1945); *Cook v. Cook*, 116 Vt. 674, 76 A.2d 593 (1950). Even where both parties have appeared in the divorce action, a subsequent marriage may be void and our petitioners' fault inquiries relevant, notwithstanding *Sherrer v. Sherrer*, 334 U.S. 343 (1948), and *Coe v. Coe*, 334 U.S. 378 (1948), requiring recognition of the foreign divorce; in *Steadler v. Steadler*, 6 N.J. 380, 78 A.2d 896 (1951), the New Jersey court, interpreting *Sherrer*, held that fraud in establishing domicile vitiated a *duo parte* foreign divorce decree, collusively obtained. Interestingly, *Steadler, supra*, itself found it necessary to deal with the clean hands question, as it was argued that petitioner-wife should be estopped to attack the foreign decree in which she collusively participated.

16. 268 App. Div. 1003, 52 N.Y.S.2d 119 (2d Dep't 1944).

The annulment-granting cases have much to commend them,¹⁷ and their rule is simple to apply. Many interests require annulment.¹⁸ The peace of friends and neighbors may be implicated; born and unborn children can be affected; fresh mates will need protection; tax collectors and public prosecutors may be hindered in their duties by a cloudy marriage. New marriage licenses will probably be unobtainable without a decree, thus producing non-marriageables who are married to no one, in turn leading to enforced celibacy or promiscuity, and emotional insecurity. Business interests and credit may be adversely affected by the absence of a decree declaring the marriage void.

The above discussion should make evident the superiority of the cases which refuse to invoke the clean hands rule. Where a marriage is void, no persuasive reason appears as justification for court unwillingness to make a status declaration, and many community interests require a decree. Moreover, granting an annulment decree when a marriage is void does not necessarily negate fixing quasi-marital responsibilities in proper cases. Two parties may have engaged in a matrimonial enterprise, legally void, for a considerable time. The relationship established in fact could rightly be held to result in some incidents of marriage, such as continuing support, despite the actual break-up and the court decree of status-voidness.¹⁹

17. See Chafee, *Coming Into Equity With Clean Hands*, 47 MICH. L. REV. 1065, 1083 (1949): "It was an evil day when the first American judge to speak of clean hands had the bright idea of injecting the maxim into the very place where it would work its greatest mischief. . . ." *Id.* at 1084: "The clean hands maxim is an impertinent intrusion on a very difficult and important judicial job."

18. See *Freda v. Bergman*, 77 N.J. Eq. 46, 76 Atl. 460 (Ch. 1910); Chafee, *supra* note 17, at 1083.

19. In *Tonti v. Chadwick*, 1 N.J. 531, 64 A.2d 436 (1949), a husband sued to annul his marriage on the ground of the wife's prior subsisting marriage to Chadwick; the wife counterclaimed for support. The prior marriage was in fact undissolved because a Mexican divorce decree was void. The court would grant no annulment since it is common knowledge that mail-order Mexican decrees are not valid divorces. Thus, unclean hands precluded a decree, on the footing of *Tyll v. Keller*, 94 N.J. Eq. 426, 120 Atl. 6 (Ct. Err. & App. 1923). Further, the wife was found not entitled to support, as this obligation is predicated upon a lawful marriage.

The dissent, of principal interest to us, agreed that the annulment was properly denied on the basis of unclean hands, but it insisted that an obligation to support should have been imposed. It was reasoned that the husband's attempt to relieve himself of the obligation to support which he had voluntarily assumed and continued was unconscionable, and equity should not aid him in avoiding this financial responsibility.

In *Krause v. Krause*, 282 N.Y. 355, 26 N.E.2d 290 (1940), a second wife sued for separate maintenance, the husband having obtained no more than an invalid Nevada divorce from wife number one. The court announced that "the subsequent marriage between plaintiff and defendant . . . was void for the incapacity of the defendant to marry." *Id.* at 357, 26 N.E.2d at 291. Nevertheless, the court granted separate maintenance. The defendant was not allowed to escape his assumed obligations to the plaintiff.

The dissent in *Tonti* and the court in *Krause* show a refusal to be mastered by well-worn deductions such as no valid marriage, no support.

VOIDABLE MARRIAGES

Voidable marriages present the courts with a still more serious problem than the void marriage situation. The analogy to divorce is stronger. If the annulment is refused for unclean hands or for any other reason, the prospects for a new marriage are not merely cloudy but nil, absent a ground for divorce.

In *Carr v. Carr*,²⁰ a husband sued in New York for annulment on the ground that he was under-age at the time of his Michigan marriage. Both parties were from New York but had married in Michigan where parental consent was not required. Annulment was denied because, among other reasons, plaintiff came into court with unclean hands. The result reached was sensible since the husband was twenty when united in Michigan; but mechanical employment of the clean hands rule does not appear desirable.²¹ The plaintiff, who was quite mature, had undertaken considerable planning to place himself in a marital relation which he had enjoyed but from which he now wished court release. If the marriage was unworkable, it was perhaps better to refuse annulment and, in effect, ask plaintiff to make proof in a divorce action, where a general theory of disorganization exists and machinery is available to ascertain the wife's rights to continuing support.

However, if a court believes divorce grounds provide an inappropriate litmus for the particular relationship, it can produce a socially equitable result in an annulment action, finding its freedom to do equity by the presence of petitioner's fault. Instead of a hurried application of clean hands,²² the judge may open inquiry into the personal and social effects of the voidable marriage. A beneficial result would be more adequate presentation of evidence bearing upon such effects, as express relevancies, by counsel for each party.

A sound approach is found in *Walker v. Walker*,²³ an Ohio case in which the husband sought dismissal of his wife's divorce action on the ground of non-marriage, the parties being first cousins. Marriages of first cousins were found by the court to be voidable. The wife

20. 104 N.Y.S.2d 269 (Sup. Ct. 1951).

21. See *Christensen v. Christensen*, 144 Neb. 763, 14 N.W.2d 613 (1944), where there was a statute prohibiting persons with venereal disease from marrying in the state. At the time of marriage, both spouses knew plaintiff had venereal disease. Plaintiff falsified the affidavit required for a license. Held, no annulment. The court found the marriage voidable, and it applied clean hands to bar relief. "A court of equity will refuse its aid to a litigant who has been guilty of a violation of a statute, if the act of violation is directly connected with the matter in litigation." *Id.* at 769, 14 N.W.2d at 616.

22. See *Swenson v. Swenson*, 179 Wis. 536, 192 N.W. 70 (1923).

23. 84 N.E.2d 258 (Ohio 1948).

was granted a divorce, the court declaring it "inconceivable . . . that this marriage can be declared void and that this erst-while plaintiff who has a moderate pension and admitted that he would be able to go back to work can through this contemptible attempt to declare the marriage void, escape the obligation to give some support to his wife."²⁴ The parties were in their sixties at the time of suit and were in their thirties when married.

It is frequently held that the woman's concealment from the man of her pregnancy at the time of the marriage, or a false representation to him that she is pregnant by him when she is pregnant by another, amounts to fraud which makes the marriage voidable. But where a husband has illicit intercourse with his wife before marriage, a clean hands problem arises. In *Arndt v. Arndt*,²⁵ the wife concealed the fact that she was pregnant by another man, the spouses having had illicit pre-marital relations. The court held the clean hands doctrine not applicable and sent the case back for a determination by the trial court of the paternity of the child. Clean hands was ousted by invoking the familiar doctrine that the bad acts must relate directly to the matter at bar, and not to general poor character. The illicit intercourse between the parties was not the transaction in litigation: the acts complained of were the alleged illicit intercourse with another, resulting in pregnancy, and the subsequent concealment of that fact; plaintiff was not soiled with respect to these latter acts.

Such strained reasoning results from preoccupation with clean hands as a mighty rule. The *Arndt* decision is perhaps supportable by arguing that the basis for annulment, pregnancy by another, is distinguishable from concealed lack of chastity by the incapacity of the wife to fulfill her marital duties. This lack of marriageability is not lessened by fault on the part of plaintiff. Thus, the marriage begins in an unstable position. Further, the husband is put to the alternative of disowning the child and revealing his wife's prosmiscuity or permitting the child to share his resources.

Against these arguments are others embodying important social policies. The husband was on notice concerning his wife's pre-marital propensities, and took his chances when he entered marriage. The state may be interested in promoting self-reliance in marital choice. The husband is the most likely prospect, in many such cases, through which to channel the child's support. If the court denies an annulment, the husband is not apt to contest the child's legitimacy. Even if he

24. *Id.* at 259.

25. 336 Ill. App. 65, 82 N.E.2d 908 (1948).

does, the child's position will not be greatly impaired, since granting the annulment would in any event disclose the illegitimacy. Perhaps the husband should be forced to take his wife for better or worse, with pre-marital liabilities of this type. There are hazards involved in marriage, and the alleged acts may be another risk to impose where the husband has inquiry notice. The husband's resources are available to pay for his own mistakes, and arguably, they should be available to his chosen mate to pay for hers.

While these considerations are not intended to be exhaustive, or by way of resolution, they do indicate that much more is involved than the old chore-boy, clean hands. Yet the presence of a soiled petitioner could frequently be turned to advantage by a court. If petitioner is not at fault, a broad inquiry might be impossible since the litigable issue may be limited to testing the presence of stated grounds for annulment. If there is fault, the broader inquiry can be pursued since discretion arises to bar relief. The court's order can then be expected to facilitate an equitable, supportable social adjustment. This argument is applicable in voidable marriage situations where courts decide whether to continue or terminate otherwise legal relations. In void marriage cases, however, this employment of petitioners' fault in aid of proper dispositions is not possible, the marriages being, by definition, without validity, status determination is outside judicial discretion.

DIVORCE

In divorce cases, courts are often imposed upon by perjury and misrepresenting petitioners. This situation brings forth the clean hands principle since it is commonly held that one must both enter equity with clean hands and keep them clean during the suit.²⁶

In *Zearfoss v. Zearfoss*,²⁷ where adultery was alleged and a divorce prayed by the husband, the petitioner falsely claimed that the paramour's name was unknown to him. This untrue allegation was repeated in an affidavit in verification of the petition. The court dismissed the action, finding the husband's conduct ". . . unconscionable and requir[ing] the dismissal of the petition under well-established principles of equity."²⁸ While it is important that the integrity of the judicial system be protected, this aim may be pursued by other methods. In *Zearfoss*, it could be that the court was overly sensitive, and although the court states the representation is material, it is difficult to accept

26. See *Gluck v. Rynda Development Co.*, 99 N.J. Eq. 788, 134 Atl. 363 (Ct. Err. & App. 1926), *aff'd*, 100 N.J. Eq. 554, 135 Atl. 917 (Ct. Err. & App. 1927).

27. 112 N.J. Eq. 530, 164 Atl. 893 (Ch. 1933).

28. *Id.* at 531, 164 Atl. at 894.

the notion that plaintiff is a citizen who has forfeited his right to a basic status determination. Meanwhile, a marriage which may in fact be beyond hope, and a source of community trouble, cannot be operated upon by the judiciary.

Even if *Zearfoss* be thought correct, since the fraud was in the pleading, consider *Pfender v. Pfender*.²⁹ There, a petition for divorce had resulted in a decree *nisi* which was based upon charges of extreme cruelty, including an unjust accusation of infidelity and a threat against petitioner's life. When the decree was originally rendered, the court had been led to believe by petitioner's false and misleading testimony that friendly relations between himself and another woman were of short duration and had long since ended. At the present hearing on an application to set aside the decree *nisi*, it appeared that the affair between Mr. Pfender and Miss Haas had expanded continually, and that the petitioner had come to share an apartment with Miss Haas and her mother. The court vacated the decree *nisi*, and dismissed the petition for divorce. The very interesting language of the court follows:³⁰

"In *Clickner v. Clickner* . . . this court held that where a suitor in equity has been guilty of false or misleading testimony and conduct in the presentation and hearing of his cause, his suit will be dismissed irrespective of whether or not he might otherwise be entitled to relief. The rule of that case is plainly applicable here. This does not mean that the defendant's threat against the petitioner's life, and because of which the decree *nisi* was advised, was justified or in any sense excusable; it means only that the unconscionable conduct of a suitor in a matter in which he seeks relief will prompt a court of equity to remain passive."

It is believed that this reasoning is insupportable.³¹ Contempt and perjury indictments are the appropriate methods for handling the *Pfender* petitioner's fault problem. These remedies are constructed in independent proceedings in which allegedly bad persons are able to better safeguard their rights, while still receiving merited discipline. The matrimonial action, with its wider significance, is a less appropriate medium for punishing petitioners and, in any case, imposition of marital handicaps has not proved effective in securing the integrity of judicial proceedings. Possible benefit may lie in the direction of procedural reform in matrimonial cases.

29. 104 N.J. Eq. 107, 144 Atl. 333 (Ch. 1929).

30. *Id.* at 112, 144 Atl. at 335.

31. Another ground besides petitioner's deception supports the decision rendered, as petitioner was found to have committed adultery after the decree *nisi*.

Recrimination

The doctrine of recrimination is another petitioners' fault receptacle.³² Irrespective of its historical foundation, the doctrine is today recognized as a manifestation of the clean hands principle.³³ The usual American rule declares the petitioner barred from obtaining a divorce, whatever the strength of his affirmative proofs, where he is himself guilty of misconduct giving rise to a cause of action for divorce on any ground.³⁴ Thus, if both spouses prove grounds for divorce, neither can be given a decree. In light of the foregoing discussion, the point need not be labored that the automatic application of this proposition is without justification, as it enthrones the worst sort of clean hands thinking.

Nonetheless, the attitude of a good many courts is typified by *Hollingworth v. Hollingworth*,³⁵ where it was said that

"The social wisdom of the doctrine which, because of mutual fault, continues the marriage status as a matter of law when it has necessarily ended as a matter of fact has been the subject of severe criticism in recent days, but this court is committed to the doctrine that a plaintiff cannot have relief in equity unless he comes into court with clean hands. . . ." ³⁶

Some courts have even appeared to relish the doctrine.³⁷ Thus, in *Parks v. Parks*,³⁸ where neither spouse was granted a divorce, the court declared that "Equity relieves the injured party, but not the vanquished." ³⁹

In recent years, the use of recrimination ⁴⁰ has been considerably affected by the coming of comparative rectitude, new grounds for divorce such as insanity and incompatibility not based on fault, and the molding of recrimination into a discretionary device.

The modern approach was championed by Justice Traynor's outstanding opinion for the majority in the 1952 California case of *De Burgh v. De Burgh*.⁴¹ At trial, the court had found both parties guilty of extreme cruelty and had decided that both being guilty, neither was

32. See 41 CALIF. L. REV. 320 (1953).

33. See *Hoff v. Hoff*, 48 Mich. 281, 12 N.W. 160 (1882).

34. See *Morrison v. Morrison*, 142 Mass. 361, 8 N.E. 59, 56 Am. Rep. 688 (1886); MADDEN, PERSONS AND DOMESTIC RELATIONS 307 (1931).

35. 173 Ore. 286, 145 P.2d 466 (1944).

36. *Id.* at 293, 145 P.2d at 468.

37. See *Cody v. Cody*, 233 S.W.2d 777 (Mo. 1950).

38. 182 Ore. 322, 187 P.2d 145 (1947).

39. *Id.* at 329, 187 P.2d at 147.

40. See 41 CALIF. L. REV. 320, 322 (1953).

41. 39 Cal.2d 858, 250 P.2d 598 (1952).

entitled to a divorce. On appeal, it was held error to apply recrimination mechanically, and the case was sent back to the trial court for findings with respect to indicated social facts, these findings to be support for a further determination as to whether petitioner's fault should bar his claim.

De Burgh overcame a restrictive recrimination statute dating from 1872 and a long train of case law ensconcing the standard doctrine of recrimination. California Civil Code defined recrimination, elsewhere designated as a cause for the mandatory denial of divorce,⁴² as "a showing by the defendant of any cause of divorce against the plaintiff, in bar of the plaintiff's cause. . . ." ⁴³

Expressly disapproving contrary precedents, the court held the words "in bar" evidenced a legislative intention that the mere finding of a cause of divorce chargeable against the plaintiff is not to be considered recriminatory. An additional requirement that such a cause for divorce must be "in bar" of the plaintiff's cause is found in the statutory language. Three of the seven justices disagreed with this interpretation.

To decide whether the fault of a petitioner is "in bar," the opinion declared "there can be no precise formula for determining when a cause of divorce shown against the plaintiff is to be considered a bar to his suit for divorce, for the divorce court, as a court of equity . . . is clothed with a broad discretion to advance the requirements of justice in each particular case." ⁴⁴ The major considerations governing decisions were stated: the prospect of reconciliation, the effect of the marital conflict upon the parties, the conflict's effect upon third parties, and comparative guilt.⁴⁵

Under these headings, numberless subsidiary factors are plainly included. In scrutinizing reconciliation chances, for example, the scope of investigation embraces "whether the legitimate objects of matrimony have been destroyed," ⁴⁶ the ages and temperaments of the parties, the

42. CAL. CIV. CODE § 111 (Deering 1949).

43. CAL. CIV. CODE § 122 (Deering 1949).

44. *De Burgh v. De Burgh*, 39 Cal.2d 858, 872, 250 P.2d 598, 606 (1952).

45. Comparative guilt is a particularly important consideration in California since economic rights turn on which litigant obtains the decree where both ask for divorce. A California court may not give alimony to a party who has not secured a divorce decree; and, if a party is not granted a divorce, the other becomes an "innocent" party and may be awarded over one-half of the community property upon dissolution of the marriage. See *De Burgh v. De Burgh*, 39 Cal.2d 858, 874, 250 P.2d 598, 607 (1952). However, both may be granted a divorce, making neither an "innocent" party, thus forcing an equal division of the community property. *Hendricks v. Hendricks*, 125 Cal. App. 2d 239, 270 P.2d 80 (1954).

46. *Id.* at 864, 250 P.2d at 601.

length of their marriage, the seriousness and frequency of their misconduct and the likelihood of recurrence, the finality of the separation, and the sincerity of efforts to harmonize differences. Still more immense will be the sally into the effect upon third persons, where children's interests, those of friends, neighbors, and relatives, and multitudinous general community objectives need measurement.

It cannot be doubted that the balancing task in such scenarios tries the wisest judge. The opinion in *Gilmore v. Gilmore*,⁴⁷ commenting upon the refusal of divorce and alimony to plaintiff-wife while granting a decree to defendant, noted in a specific context that "[I]t was necessary . . . to weigh the conflicting charges of sexual abnormality, none of which were established as grounds for relief, plaintiff's continuous course of cruel conduct toward defendant, defendant's lack of cruelty toward plaintiff, defendant's adultery, plaintiff's need for support, and defendant's ability to provide it."⁴⁸

The absence of judicial ability to strike a true balance, if such there be, is not a legitimate criticism of *De Burgh*. If the *De Burgh* inquiry be the proper one, and our argument looks to its validity, the difficulty of application should not defeat the approach. *Someone* should make the investigation which is deemed to be appropriate; at present, that job falls to the judiciary, and the representation of litigant interests by counsel no doubt produces very substantial help. Conducting far-reaching searches could be highly educational for trial judges, who may be expected to become increasingly insatiable fact-seekers in other family cases. The scheme in essence calls for a fact-based common-sense judgment, which extends a judge no further than his individual limit.

It is evident, and significant, that the inquiry required by *De Burgh* in recrimination cases will influence other petitioners' fault litigations. Indeed, *De Burgh* itself suggests that the carry-over, possibly with the *De Burgh* requirement that findings support the determination of bar or no bar, might be mandatory in other categories of clean hands cases. This possibility is found in the emphasis upon recrimination as simply a species of unclean hands and the court's injunction to "[keep] in mind that the doctrine of recrimination, like the doctrine of unclean hands of which it is a part, is neither puristic nor mechanical, but an equitable principle to be applied according to the circumstances of each case and with a proper respect for the paramount interests of the community at large."⁴⁹

47. 45 Cal.2d 142, 287 P.2d 769 (1955).

48. *Id.* at 148, 287 P.2d at 773.

49. *De Burgh v. De Burgh*, 39 Cal.2d 858, 870, 250 P.2d 598, 605 (1952).

The *De Burgh* case has already passed its fact confines in affecting other decisions. The opinion was influential in speeding procedure, through construction of a rule of court, in an alimony litigation which followed a divorce decree;⁵⁰ the court noted that *De Burgh* requires the public's interest in matrimonial cases to be paramount. *De Burgh* also helped a court to the liberal view that the public interest in marriage required allowance of a supplemental complaint which stated a cause of action different from that pleaded in the complaint,⁵¹ rendering unnecessary the commencement of another action on the new ground. An Idaho case⁵² and a Montana case,⁵³ both involving recrimination problems, leaned heavily on *De Burgh* and incorporated its modern sociological approach into the jurisprudence of their states.

The majority opinion in *De Burgh* is at the center of our discussion, not only as it provides a forward look for mutual fault divorce actions and allows increased hope for breaking the stranglehold of the standard doctrine of recrimination, but most importantly because it gives a highly promising approach applicable generally to petitioners' fault problems in matrimonial actions. This writer espouses the *De Burgh* process for all matrimonial fault cases, its applicability being evident in all situations except perhaps void marriage cases. Although the granting of an annulment is recommended in all void marriage cases, the method of *De Burgh* is highly relevant in making the further determination of appropriate economic and other responsibilities.

One might question the approval of a discretionary tool in double fault divorce suits in preference to total exclusion of petitioners' fault from consideration.⁵⁴ The choice here made to condemn automatic recrimination and yet favor the *possibility* of its employment in exceptional cases, turns upon some lack of faith in "grounds" for divorce as infallible solvents. Under American statutes, these grounds are to a large extent empty forms, utilized with only partial success by the courts in the social behalf.

A theory introducing flexibility and comprehensive fact finding appears commendable. In an unusual case, conceivable circumstances might legitimately cause the fault of petitioner to foreclose a divorce where, for example, children would be harmed by a decree or extreme marital conduct makes petitioner particularly unfit for entry into a new marriage and defendant wishes continuance of the existing marriage,

50. *Hall v. Superior Court*, 278 P.2d 124 (Cal. App. 1954).

51. *Gilmore v. Gilmore*, 282 P.2d 598 (Cal. App.), *rev'd on other grounds*, 45 Cal.2d 142, 287 P.2d 769 (1955).

52. *Howay v. Howay*, 74 Idaho 492, 264 P.2d 691 (1953).

53. *Bissell v. Bissell*, 129 Mont. 187, 284 P.2d 264 (1955).

54. A similar query, and a similar answer, arises in connection with petitioners' fault and the granting of decrees in voidable marriage annulment actions.

or, to mention a *De Burgh* factor, the prospects for reconciliation seem to the court extraordinarily bright.

SUPPORT

Support, separate maintenance, and alimony actions witness their share of bad-acting parties. While factual variations on the basic plays can be readily suggested, the anatomy of petitioners' fault situations in matters of support need here be illustrated by only two cases.

Where a husband who petitioned for reduction of alimony had never voluntarily paid one cent under the existing alimony decree, *Bergwardt v. Bergwardt*⁵⁵ held that his lack of clean hands barred the petition. Alimony is a duty of continuing support which survives the demise of the marriage and in assessing *Bergwardt*, the frame of the general marital duty of support provides an initial standard.

Upon application of a wife for support, the court's paramount duty is to adjust the economic positions of the parties in the most socially desirable manner. Ordinarily this involves refusal on the one hand to burden the husband with a financial obligation so heavy that his livelihood, his mental health, and his other resource-sharers are prejudiced; and on the other hand, granting the wife sufficient economic assistance that her well-being and fulfillment of her marital duties are not jeopardized. Thus, the health of the marriage and the happiness of the parties are to be furthered by the court's decree. To paraphrase *De Burgh*,⁵⁶ there is little room for fault as a determining factor.

In *Bergwardt*, the marriage may no longer be susceptible to preservation, but the effect of alimony upon petitioner's earning capacity, his emotional welfare and his other obligations, and upon the woman's personal fulfillment within her social framework remain to be considered. There is little reason to give the ex-wife a bounty and to punish the ex-husband through a sum he cannot sustain, with resultant tendencies toward social disorganization in the wake of the overburdened obligor. If the woman's position has been economically impaired through payment defaults, this may become a legitimate factor in the award balance under general alimony principles without rigid use of clean hands. The problem of defaulting alimony obligors should be solved through improved supplementary proceedings in aid of judgments, and not by continuance of alimony awards inapplicable to the parties' factual position.

These considerations bearing on the proper content of alimony orders were recognized by the important 1954 case of *Du Pont v.*

55. 257 Ala. 288, 59 So. 2d 81 (1952).

56. *De Burgh v. De Burgh*, 39 Cal.2d 858, 250 P.2d 598 (1952).

Du Pont.⁵⁷ The lower court granted separate maintenance in the sum of \$300 monthly to the wife, who had been abandoned without just cause. The award was very meager in view of the economic circumstances of the husband; but plaintiff's pre-marital iniquities (living off men) and her subsequent perjurious statements about these iniquities at the trial induced the court to shrink the amount otherwise indicated. The trial judge frankly explained that "in the absence of the 'diminishing' factors mentioned above, [he] would here have awarded plaintiff a substantially larger sum because defendant has substantial means."⁵⁸

The trial judge's position was held erroneous, and his decision was reversed. The court said that curtailing the full extent of Mrs. Du Pont's rights may satisfy the demands of righteous indignation, but would also establish the intolerable precedent of offering husbands a cash premium for raking over their wives' pre-marital past. Significantly, the court noted that even where the bad conduct occurred after marriage, there is a marked tendency to regard separate maintenance orders "as being primarily matters of economics"⁵⁹ and that "the judiciary has no prerogative to impose sanctions for sin."⁶⁰

Normally, husband and wife live together; in such a state, the wife may not be relegated to sub-standard enjoyment of the family's economic resources. Where, as in the *Du Pont* situation, they are not living together because the husband has left the wife without legal excuse, the wife's premarital wrong should not be permitted to improve the husband's position. If he cannot dissolve the marriage and cannot justify leaving his wife, then, according to *Du Pont*, "the duty of support is automatically established and defined."⁶¹ Clean hands and appropriate matrimonial obligations are seen as distinct.⁶²

57. 103 A.2d 234 (Del. 1954).

58. 33 Del. Ch. 364, 374, 93 A.2d 500, 505 (1952).

59. 103 A.2d 234, 237 (Del. 1954).

60. *Id.* at 237.

61. *Id.* at 238.

62. It should be noted that in the cases involving intraspousal *property* rights, distinguished from *support* litigation, the social problems involved in status decrees and in determinations concerning marital incidents are largely absent. The courts often apply the clean hands rule without harmful results. In *Potter v. Boisvert*, 117 Cal. App. 2d 688, 256 P.2d 625 (1953), a partnership business, purchased with partnership funds, was put in the wife's name to prevent a wife whom the husband left in the East from learning his whereabouts. Held, the wife was the sole owner of the property. The husband did not come into equity with clean hands so he could not secure court aid.

Practical results are common in this area and are more easily accomplished. In *Marvin v. Foster*, 61 Minn. 154, 63 N.W. 484 (1895), the husband was not served in a Minnesota suit giving the wife a divorce. However, he remarried, relying on the judgment. The first wife died, and the husband asserted a right to her estate as a surviving spouse. The court held that the husband could not recover, noting that the husband was trying to assert the invalidity of the decree solely to obtain the former wife's property. See also *Rice v. Moore*, 194 Ark. 585, 109 S.W.2d 148 (1937); *Hooker v. Hooker*, 130 Conn. 41, 32 A.2d 68 (1943); *Joy v. Miles*, 190 Miss. 255, 199 So. 771 (1941).

After noting the inapplicability of clean hands, the *Du Pont* court considered the larger question of whether the perjury was extraneous to the issue of the amount this husband should provide for support of his wife. In answering the question affirmatively, the court made contempt the remedy for perjury, permitting the matrimonial petitioner to obtain her judgment on the basis of family economics alone. Thus, the fundamental judicial responsibility for producing situationally-defensible adjustments is given life.

CONCLUSION

Throughout the family problem area legal views are becoming less reliant upon deduction as the realization grows that more than lip-service must be rendered to the public interest. In order to adequately govern family life, personal-group needs are being recognized as the necessary object of intensive fact investigation. The clean hands doctrine is often a cruel distinguisher of persons. Enlightened consideration of the factors present in matrimonial litigation requires more beneficent exercise of judicial authority. The decision in *Du Pont* demonstrates the healing qualities required of judgments in such actions. When taken together with *De Burgh*, we have the most usable and forward-looking structure yet given to problems of petitioners' fault in American law.

Many a weak decision is still to be rendered, saddled as we are with a thick crust of poor clean hands law. Yet the persuasiveness of this law is lessening. Although *De Burgh* and *Du Pont* do not magically resolve related individual problems, they do provide a compelling direction by allowing an expanded inquiry into the social needs presented for service. This paper has attempted to encourage a broad use of these modern decisions, beyond the usual narrow category applications. Rarely have void-marriage fault cases, for example, been thought applicable to support problems or to the illumination of statutory recrimination questions. By grouping matrimonial petitioners' fault problems together, and displaying them as siblings, it is hoped that the advancing decisions will be considered relevant through the entire plane under discussion.