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Separation Actions in New York: Does Adultery Constitute the Exclusive Defense to an Action Founded on Adultery?

SEPARATION ACTIONS IN NEW YORK: DOES ADULTERY CONSTITUTE THE EXCLUSIVE DEFENSE TO AN ACTION FOUNDED ON ADULTERY?

I. INTRODUCTION

In 1947, for the first time in New York,[1] the "commission of an act of adultery" became a separate ground for separation, "except . . . where the plaintiff has also been guilty of adultery under such circumstances that the defendant would have been entitled, if innocent, to a divorce."[2] Prior to that enactment, it had been held, in proceedings upon the then existing grounds for separation, that the defense of justification, or recrimination, would prevent a spouse guilty of any misconduct from obtaining relief.[3] No attempt was made in 1947 to reconcile the apparently exclusive defense of adultery with the traditional and general defense of recrimination. Therefore, in the absence of any clear legislative intent or subsequent judicial construction, it is still uncertain whether, in New York, plaintiff's misconduct, other than adultery, constitutes a defense to an action based on adultery.

II. HISTORICAL DEVELOPMENT OF THE DOCTRINE OF RECRIMINATION

Although the doctrine of recrimination, in effect if not in name, can be found in the Mosaic Law,[4] it was first applied as such by the Ecclesiastical Courts of England.[5] It was there that recrimination or *compensatio criminum*[6] was popularized as a natural outgrowth of the equitable maxim of "clean hands."[7] As the court was quick to point out, "[I]t would be hard if a man could complain of the breach of a contract which he has violated . . . ."[8] In theory, the complaining spouse must have acted dutifully toward the offending spouse in order to obtain relief.[9] This approach to marital difficulties was perfectly reasonable, for "otherwise, the wife [or husband] would have nothing to do, but to mis-

1. Between 1813 and 1947, the New York separation statute underwent, with one exception, no substantial revisions. Compare N.Y. Sess. Laws 1813, ch. 102, §§ 10, 13, with N.Y. Civ. Prac. Act §§ 1161, 1163. The exception was the inclusion of the husband's right to sue, N.Y. Sess. Laws 1824, ch. 205, § 12, which, when contested as a result of other legislation, was affirmed by Perry v. Perry, 10 N.Y. Ch. 501 (1831).

2. N.Y. Sess. Laws 1947, ch. 774 (now N.Y. Dom. Rel. Law § 200(5)).

3. See notes 28 & 29 infra and accompanying text.

4. Deuteronomy 22:13-19. If a husband made false accusations concerning his wife's premarital chastity, he would be estopped from ever divorcing her. This penalty is, in effect, recrimination.

5. See 12 Halsbury, Laws of England ¶ 395 (3d ed. 1955) and accompanying notes. "The Ecclesiastical Courts borrowed from the later Roman Law the doctrines of compensatio criminis expressed by them in the phrase that the petitioner must come into Court with clean hands . . . ." Tickner v. Tickner, [1924] P. 118, 119 (remarks of King's Proctor).

6. Beeby v. Beeby, 1 Hagg. Ecc. 789, 162 Eng. Rep. 755 (Con. Ct. 1799).

7. Reeves v. Reeves, 2 Phill. Ecc. 125, 161 Eng. Rep. 1097 (Con. Ct. 1813).

8. Beeby v. Beeby, 1 Hagg. Ecc. 789, 790, 162 Eng. Rep. 755, 756 (Con. Ct. 1799).

9. Taylor v. Taylor, 2 Lee. 172, 161 Eng. Rep. 303 (Con. Ct. 1755).

conduct herself, provoke the ill treatment, and then complain."[10] Not all lapses of duty, however, were given equal weight as bars to relief. Consonant with the belief that adultery was the most serious offense against matrimony,[11] less serious transgressions would not bar an action founded upon adultery.[12] In practice, therefore, the court required that the recriminatory offense be at least *equally as grave* as the one charged. Once established, however, the defense of recrimination was automatically applied.

In a major court reorganization in 1858,[13] the jurisdiction of the Ecclesiastical Court was superseded[14] by a Court for Divorce and Matrimonial Causes.[15] The act directed the new court to "give Relief on Principles and Rules which in the Opinion of the said Court shall be as nearly as may be conformable to the Principles and Rules on which the Ecclesiastical Courts have heretofore acted . . . ."[16] The statute opened the door to a use of discretion[17] not previously possible under the Ecclesiastical Courts. Beyond relaxing the "equal gravity rule" of the earlier courts,[18] making it more difficult to obtain a separation, the new courts, motivated by "general interests of the morality of the country,"[19] were reluctant to make full use of the potential of the act.[20] With

10. Waring v. Waring, 2 Phil. Ecc. R. 132, 133, 161 Eng. Rep. 1098, 1099 (Con. Ct. 1813). Accord, Astley v. Astley, 1 Hagg. Ecc. 714, 162 Eng. Rep. 728 (Con. Ct. 1828).

11. See Harris v. Harris, 2 Hagg. Ecc. 376, 162 Eng. Rep. 894 (Con. Ct. 1829).

12. Id. at 411-16, 162 Eng. Rep. at 907-08, wherein the court stated, "there is no point . . . more settled, than that cruelty cannot be pleaded in bar of a charge of adultery." Id. at 411, 162 Eng. Rep. at 907.

13. Divorce and Matrimonial Causes Act, 1857, 20 & 21 Vict. c. 85 (repealed).

14. Divorce and Matrimonial Causes Act, 1857, 20 & 21 Vict. c. 85, § 2 (repealed).

15. Divorce and Matrimonial Causes Act, 1857, 20 & 21 Vict. c. 85, § 3 (repealed). The grounds for action were adultery, cruelty, and two years desertion. Divorce and Matrimonial Causes Act, 1857, 20 & 21 Vict. c. 85, § 16 (repealed).

16. Divorce and Matrimonial Causes Act, 1857, 20 & 21 Vict. c. 85, § 22 (repealed).

17. Divorce and Matrimonial Causes Act, 1857, 20 & 21 Vict. c. 85, § 31 (repealed).

18. Sopwith v. Sopwith, 2 Sw. & Tr. 160, 169, 164 Eng. Rep. 954, 958 (Div. Ct. 1861) (dictum). This early case decided under the new statute stated: "[I]n a suit instituted by the husband for divorce on account of adultery, the wife may plead cruelty, desertion, or such wilful misconduct as has conduced to the adultery . . . ." Ibid. Prior to 1858, it had been held that cruelty could not be pleaded by the wife as a bar to a separation sought by the husband on the ground of adultery. Cocksedge v. Cocksedge, 1 Rob. Ecc. 90, 163 Eng. Rep. 975 (Con. Ct. 1844).

19. Marven v. Marven, 122 L.T.R. (n.s.) 227 (P. 1919).

20. In Brooke v. Brooke, [1912] P. 136, 146, the court stated that discretion should be used cautiously, carefully and consistently, "not merely in accordance with what may be desirable or right for the parties immediately concerned . . . but also in accordance with what is right in the interests of public decency, and of the State." An earlier court had suggested that discretion should be regulated and "not [be] a free option subordinated to no rules." Morgan v. Morgan, L.R. 1 P. & D. 644, 647 (1869). Nevertheless, it was generally accepted that discretion was unlimited but should be exercised as suggested in Brooke v. Brooke, supra. Holland v. Holland, [1918] P. 273 (C.A.); Wickens v. Wickens, [1918] P. 265 (C.A.); Hines v. Hines, [1918] P. 364 (citing exceptional circumstances which should be present before discretion is used).

some degree of prophecy, however, one court did recognize the occasional incompatibility between discretion and the blind application of recrimination and recommended that, in such a contingency, the latter be disregarded.[21] The implication was obvious. The public may be better served by severing an unsuccessful union rather than by punishing equally guilty spouses by denying them relief.[22]

This precedent-breaking approach to matrimonial actions reached a climax when, in the case of *Blunt v. Blunt*,[23] the House of Lords declared: "There is no reason in principle why, where both sides are in mercy, if the judge decides to exercise his discretion, he should not exercise it in favour of both parties and pronounce the decree without drawing a distinction between them."[24]

Once begun, the movement away from the rigid application of recrimination common in the Ecclesiastical Courts, was steady and relatively swift.[25] Even if the drafters of the act of 1858 intended only procedural rather than substantive changes in the law, they provided the vehicle through which the equitable concept, that required the court to deny relief to erring spouses as a sort of punishment, became instead the concept that the public good is better served by freeing mutually discontented spouses.

III. The Doctrine in New York

By statute, New York has adopted the defense of recrimination, or justification,[26] and has in its application looked to procedures established by the Ecclesiastical Courts, especially the requirement of "clean hands."[27] Starting from

21. Constantinidi v. Constantinidi, [1903] P. 246, 258-59.

22. Tickner v. Tickner, [1924] P. 118.

23. [1943] 2 All E.R. 76 (H.L.).

24. Id. at 81.

25. In the period between 1858 and the Blunt decision in 1943, England changed from a policy of strict application of recrimination to the policy of dual divorce, as is shown by the discussion above. The fact that this change has not been confined solely to England is illustrated by Canadian decisions following Blunt. In E. v. E., 16 Mar. Prov. 474, [1943] 2 D.L.R. 313 (N.B. Div. Ct. 1942), the court adopted the position that it had discretion to grant a decree of divorce even though the petitioner was guilty of adultery. However, this discretion was exercised where petitioner was guilty only of an isolated act of misconduct after respondent had committed many. In this respect the court's position appears to be closer to comparative rectitude. See note 39 infra. This position was somewhat liberalized in favor of Blunt by Mansfield v. Mansfield, 24 Mar. Prov. 71, [1949] 3 D.L.R. 115 (N.S.). Here the Novia Scotia Supreme Court reversed the trial court, stating that the judge did not weigh all the facts in exercising his discretion. The court cited Blunt as a guide and stated: "I do think that in this case the interests of the community at large would be far better served by dissolving the marriage and . . . thus enable them to reestablish themselves and their offspring, if any, as respectable members of the community, than by refusing to do so." Id. at 81, [1949] 3 D.L.R. at 120.

26. N.Y. Dom. Rel. Law § 202.

27. Vernes v. Vernes, 232 App. Div. 707, 247 N.Y. Supp. 798 (2d Dep't 1931) (memorandum decision); Axelrod v. Axelrod, 2 Misc. 2d 79, 159 N.Y.S.2d 633 (Sup. Ct. 1956). In Vernes v. Vernes, supra at 707, 247 N.Y. Supp. at 799, the court pointed out

the assumption that the separation statute was not intended to benefit a misbehaving complainant,[28] courts have held that any misconduct, whether or not tantamount to an independent ground for separation, will constitute a bar.[29] To aid the court in its determination, a telescopic approach to separation has been adopted, bringing into focus the entire relationship[30] of the parties in the performance of their mutual obligations.[31] In this regard, New York goes further than the Ecclesiastical Courts in requiring the complainant to be an innocent party. Soundly criticizing this approach, a lower court,[32] echoing *Blunt*, has pointed out that "the result of a rigid application of the doctrine of recrimination is that the bonds of matrimony, broken by both parties, are the more closely riveted, and the unhappiness of the parties is made the reason for the continuance of their union."[33]

The quandary created by New York's interpretation of the doctrine is particularly manifest in actions founded upon adultery. From the status of the divorce law in New York,[34] it can be properly inferred that adultery is still regarded as the most serious matrimonial offense. Paradoxically, prior to 1947, adultery did not constitute an independent ground for separation.[35] However, to compensate for the inadequacy of the statute, the court of appeals had held that "if the adultery is open and notorious . . . two wrongs arise out of the act: the adultery itself . . . and cruelty . . . ."[36] Even though adultery was, thereafter, at least the equivalent of statutory cruelty, no court took the initiative to revert to the practice of the Ecclesiastical Courts when adultery could be met only by countercharges of adultery. As a result, in the comparatively few cases

that "in equity . . . the plaintiff . . . may have forfeited her right to relief by her subsequent misbehavior."

28. Mirizio v. Mirizio, 242 N.Y. 74, 150 N.E. 605 (1926); Spade v. Spade, 6 Misc. 2d 170, 163 N.Y.S.2d 146 (Sup. Ct. 1957).

29. Clarke v. Clarke, 159 N.Y.S.2d 263 (Sup. Ct. 1957), which held that the wife's insistence upon having her mother live with them was misconduct barring her action for her husband's abandonment.

30. Powers v. Powers, 84 App. Div. 588, 590, 82 N.Y. Supp. 1022, 1024 (2d Dep't 1903); Todd v. Todd, (Sup. Ct.) in N.Y.L.J., May 9, 1958, p. 12, col. 7. In Todd, the court stated: "Both of the parties have engaged in a course of conduct that precludes them from relief in equity." Id. col. 8.

31. Deisler v. Deisler, 59 App. Div. 207, 69 N.Y. Supp. 326 (2d Dep't 1901). The court stated that "in cases of this character it is important that the court know what has been the conduct of the wife toward the husband, as well as what has been his conduct toward her . . . ." Id. at 212, 69 N.Y. Supp. at 330, citing Hopper v. Hopper, 19 N.Y. Ch. 46, 48 (1844).

32. Scheidler v. Scheidler, (Sup. Ct.) in N.Y.L.J., Dec. 2, 1960, p. 19, col. 1.

33. Id. col. 3.

34. N.Y. Dom. Rel. Law §§ 170-77.

35. Allen v. Allen, 125 App. Div. 838, 110 N.Y. Supp. 303 (1st Dep't 1908). W sued H for separation alleging adultery. Denying relief, the court stated: "It is apparent that the complaint does not state a cause of action for a separation . . . for the mere allegation that the defendant has been guilty of adultery has never been held to amount to an allegation of cruel and inhuman treatment . . . ." Id. at 839, 110 N.Y. Supp. at 303-04.

36. Hoffman v. Hoffman, 232 N.Y. 215, 218, 133 N.E. 450, 451 (1921).

in which adultery (as cruelty) was countered with allegations of complainant's misconduct not amounting to adultery, the courts, in an historic oversight, made no effort to weigh the gravity of the offenses and relieve the more innocent spouse.[37]

Consequently, it would not be inconsistent with the 1947 amendment to hold that a reversion to the ecclesiastical practice was in fact contemplated by the legislature. Nevertheless, the statute is unclear. It is unfortunate that, in drafting the 1947 amendment, no attempt was made to clarify whether plaintiff's adultery would thereafter constitute the exclusive defense to a separation action based upon adultery. To hold otherwise would make the specification of this particular defense redundant since the general statutory defense of misconduct certainly comprehends adultery.

Yet, to say simply that the specific controls the general, as has been done in other cases,[38] is not altogether apposite where the specific neither contradicts the general nor purports to be exclusive. Furthermore, such a solution would fail to take cognizance of several principles upon which New York has traditionally acted. First, it would establish a hierarchy of defenses within the separation law. Secondly, it would adopt, by implication, a form of comparative rectitude[39] granting relief to the less guilty spouse. Thirdly, it would introduce a double standard in applying recrimination, making it easier to avoid the doctrine in cases of adultery than in any other.

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37. McKee v. McKee, 241 App. Div. 149, 271 N.Y. Supp. 384 (1st Dep't 1934), rev'd on other grounds, 267 N.Y. 96, 195 N.E. 809 (1935); Kamman v. Kamman, 167 App. Div. 423, 152 N.Y. Supp. 579 (4th Dep't 1915). In Fragomeni v. Fragomeni, 112 N.Y.S.2d 224 (Sup. Ct. 1952), W sued and H counterclaimed for separation, each alleging adultery. The court denied relief to both, stating that W "'had been guilty of misconduct which is made a bar under the statute to her recovery . . . .' [I]t follows that defendant's [H] counterclaim for separation should also be dismissed on the merits . . . ." Id. at 226, quoting from Hawkins v. Hawkins, 193 N.Y. 409, 412, 86 N.E. 468, 469 (1908). Quaere: In view of N.Y. Dom. Rel. Law § 200(5) and its specific defense of adultery, why did the court phrase the defense in the instant case in the term misconduct? Was the court making it the paramount test?

38. See, e.g., Gwynne v. Board of Educ., 259 N.Y. 191, 181 N.E. 353 (1932); Erie County Water Authority v. Kramer, 4 App. Div. 2d 545, 167 N.Y.S.2d 557 (4th Dep't 1957), aff'd, 5 N.Y.2d 954, 157 N.E.2d 712, 184 N.Y.S.2d 833 (1959); Baker v. Springer, 270 App. Div. 639, 62 N.Y.S.2d 907 (3d Dep't 1946); Papiernick v. City of New York, 202 Misc. 717, 115 N.Y.S.2d 454 (Sup. Ct. 1952); Moldofsky v. Triborough Bridge & Tunnel Authority, 199 Misc. 225, 99 N.Y.S.2d 639 (Sup. Ct. 1950).

39. Comparative rectitude weighs the guilt of both parties and grants relief to the less guilty spouse. See Steiger v. Steiger, 4 Utah 2d 273, 293 P.2d 418 (1956); Hendricks v. Hendricks, 123 Utah 178, 257 P.2d 366 (1953). The test applied in Eals v. Swan, 221 La. 329, 59 So. 2d 409 (1952), lucidly explains the doctrine, holding that "while mutual, equal fault operates as a bar to relief . . . the courts consider in each case the degree of guilt, and only where . . . [it] has been equal is the suit dismissed." Id. at 333, 59 So. 2d at 410. (Emphasis omitted.) See Smith v. Smith, 139 So. 2d 813 (La. 1962); Gilbert v. Hutchinson, 135 So. 2d 283 (La. 1961).

IV. The Doctrine in Other States

The problem is not peculiar to New York. In other jurisdictions, however, the problem arises more often in divorce proceedings. The neighboring jurisdictions of New Jersey and Pennsylvania have statutes which specifically state that adultery will bar an action based on adultery.[40] New Jersey, nevertheless, has held that any statutory ground for divorce will constitute a bar[41] because the statute "does not nullify the unwritten law. . . . [and] the recrimination doctrine is firmly embedded as part of our statutory and unwritten law."[42] Although the Pennsylvania statute requires the complainant to be "innocent and injured,"[43] impliedly justifying the application of recrimination as in New Jersey, a 1958 decision[44] clarified that state's position. While not disturbing the application of the doctrine in cases other than adultery, Pennsylvania now holds that "any statement or inference [in any other decision[45]] that conduct actually amounting to other grounds for divorce may be a defense in an action based on adultery was unintended and must be considered as purely gratuitous."[46] Illinois, like Pennsylvania, in spite of a judicially established condition that the complainant be an "innocent party,"[47] has refused to permit other grounds for divorce, including cruelty, desertion and drunkenness, to recriminate a charge of adultery.[48]

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40. N.J. Stat. Ann. § 2A:34–7 (1952); Pa. Stat. Ann. tit. 23, § 52 (1955).

41. Cusick v. Cusick, 129 N.J. Eq. 82, 86, 18 A.2d 292, 294 (Ct. Err. & App. 1941), citing with approval Csanyi v. Csanyi, 93 N.J. Eq. 11, 115 Atl. 76 (Ch. 1921); Young v. Young, 94 N.J. Eq. 155, 119 Atl. 92 (Ct. Err. & App. 1922); Rapp v. Rapp, 67 N.J. Eq. 236, 58 Atl. 167 (Ch. 1904); Seibert v. Seibert, 83 Atl. 230, 233 (N.J. Ch. 1922) (dictum) (grounds less than statutory grounds could not be used).

42. Huster v. Huster, 64 N.J. Super. 29, 34, 165 A.2d 305, 308 (App. Div. 1960).

43. Pa. Stat. Ann. tit. 23, § 10 (1929).

44. Berezin v. Berezin, 186 Pa. Super. 340, 142 A.2d 741 (1958).

45. Rech v. Rech, 176 Pa. Super. 401, 107 A.2d 601 (1954); Newman v. Newman, 170 Pa. Super. 238, 85 A.2d 613 (1952).

46. Berezin v. Berezin, 186 Pa. Super. 340, 345, 142 A.2d 741, 743-44 (1958). In Manley v. Manley, 193 Pa. Super. 252, 164 A.2d 113 (1960), the court cited Berezin for the general proposition that only adultery could recriminate adultery, but nevertheless extended the defenses to an action for adultery to include insanity of the defendant at the time of the adultery.

47. "Divorce is a remedy provided for an innocent party . . . ." Duberstein v. Duberstein, 171 Ill. 133, 145, 49 N.E. 316, 320 (1897). See Elston v. Elston, 344 Ill. App. 233, 100 N.E.2d 635 (1951), where the court required that "'to maintain a bill for separate maintenance by a wife against her husband, she must not only show that she has good cause for living separate and apart from him, but also that such separation was without fault on her part . . . .'" Id. at 241, 100 N.E.2d at 640, quoting from Bielby v. Bielby, 333 Ill. 478, 486, 165 N.E. 231, 234 (1929).

48. In Bast v. Bast, 82 Ill. 584, 585 (1876), the court stated: "We do not think his desertion can exonerate the wife from the more serious charge of adultery. Neither that, nor drunkenness, nor cruelty, will, under our statute, constitute a sufficient recriminatory defense to a charge of adultery." See Huling v. Huling, 38 Ill. App. 144 (1890) (per curiam). It should be noted, however, that the term "same statutory character" used in

Neither Massachusetts[49] nor Wisconsin[50] have statutes specifically establishing adultery as a defense to adultery. Since the Massachusetts statute establishes no hierarchy among its grounds for divorce,[51] it has been held that the recriminatory charge need not be the same as the one complained of, so long as it is itself an independent ground for divorce.[52] Until recently, Wisconsin adhered to a similar policy. A lower court was restrained from adopting a more liberal approach, such as in *Blunt*, by the Wisconsin Supreme Court[53] which suggested that any change in the established recriminatory policy "should come through the legislature."[54] In 1960, the legislature, endorsing a policy of comparative rectitude when dealing with charges of adultery, authorized the court to grant in its discretion a separation to the spouse guilty of the lesser offense.[55]

The discretion which Wisconsin courts have been empowered to use by statute has been assumed in far greater measure by California courts. Two recent decisions[56] have thrust that state into the mainstream of the revised attitude toward matrimonial problems forecast by *Blunt*, where equal guilt is no longer a reason for denying relief. The court in *De Burgh v. De Burgh*,[57] the more important of the two decisions, disapproving of the mechanical application of recrimination,[58] urged that California look instead to the public benefit to be derived from ending the masquerade of a marriage.[59]

Duberstein v. Duberstein, supra note 47, at 145, has been construed to mean that offenses of a like nature can recriminate each other. Garrett v. Garrett, 160 Ill. App. 321, rev'd on other grounds, 252 Ill. 318, 96 N.E. 882 (1911).

49. Reddington v. Reddington, 317 Mass. 760, 763, 59 N.E.2d 775, 777 (1945). The grounds for divorce are found in Mass. Gen. Laws Ann. ch. 208, §§ 1-2 (1955).

50. See Roberts v. Roberts, 204 Wis. 401, 236 N.W. 135 (1931). The grounds for divorce are found in Wis. Stat. § 247.07 (1961).

51. Reddington v. Reddington, 317 Mass. 760, 763, 59 N.E.2d 775, 777 (1945).

52. Id. at 764, 59 N.E.2d at 777.

53. Bahr v. Bahr, 272 Wis. 323, 75 N.W.2d 301 (1956). "The established recrimination doctrine stands in the way of a decree in favor of either party as culpable as both are here." Id. at 326, 75 N.W.2d at 302.

54. Id. at 326, 75 N.W.2d at 303.

55. "[W]here it appears from the evidence that both parties have been guilty of misconduct sufficiently grave to constitute cause for divorce, the court may in its discretion grant a judgment of legal separation to the party whose equities on the whole are found to be superior." Wis. Stat. § 247.101 (1961).

56. De Burgh v. De Burgh, 39 Cal. 2d 858, 250 P.2d 598 (1952) (suggesting that in cases of equal guilt each party should receive a divorce); Mueller v. Mueller, 44 Cal. 2d 527, 282 P.2d 869 (1955) (granting a divorce to both parties even though the doctrine of recrimination might have been applied).

57. 39 Cal. 2d 858, 250 P.2d 598 (1952).

58. Id. at 869, 250 P.2d at 605.

59. Id. at 864, 250 P.2d at 601. Judge Traynor noted that the public considerations when one party is guilty of a matrimonial offense are doubled when both are guilty. He also stated that "it would be froward indeed for the court, when it is called upon to evaluate an alleged recriminatory defense, to ignore the growing awareness that a marriage in name only is not a marriage in any real sense." Id. at 868, 250 P.2d at 603. See Phillips v. Phillips, 41 Cal. 2d 869, 877, 264 P.2d 926, 930 (1953).

V. Conclusion

As indicated, there are four avenues of approach to the problem of recrimination, three of which employ in varying degrees the traditional method of recrimination applied in the Ecclesiastical Courts: one, New York's present approach, the meticulous application of "clean hands"; two, a modified version of the above, followed in Massachusetts and New Jersey, permitting any statutory ground to recriminate; three, a compromise approach found in Pennsylvania, Illinois and Wisconsin, calling for the application of comparative rectitude. The fourth approach, differing from and disapproving of all of the above, is the modern, post-*Blunt* adaptation of the law practiced in California, which encourages the use of absolute judicial discretion to free spouses rather than to punish them.

New York's broad application of the defense of justification inevitably means difficulty in securing a separation if there is a genuine contest. This result is indicative of New York's attitude toward marital affairs in general, including the question of divorce. Without doing violence to the meaning of the statute, a more reasonable interpretation of recrimination would limit the defense minimally to misconduct sufficient to support an independent action for separation, and, in the case of adultery, would include a serious consideration of the use of comparative rectitude. Nevertheless, the traditional reluctance to facilitate divorce or separation in New York, having precluded the adoption of the former interpretation, may well prevent the adoption of the latter. In any case, the adoption of absolute discretion would represent such a complete reversal of policy that it is likely that the courts would be reluctant to take this step without specific legislative endorsement.