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TWENTY YEARS OF WEST VIRGINIA MARRIAGE AND DIVORCE LAW

CLYDE L. COLSON

ALMOST twenty years have passed since the publication of a series of articles dealing with the substantive law of marriage and divorce in West Virginia. Most of the marriage and divorce cases decided during this time involve no more than the application of already well-established principles. Such cases will not be discussed in this article. There have been enough new developments in the field, however, both by legislation and by court decision, to make worthwhile this effort to bring the articles up to date.

I. MARRIAGE

1. Formal Requisites

Probably the most important development in the marriage law of this state was the decision in Kisla v. Kisla. In that case the marriage, by formal religious ceremony, was performed in West Virginia under a license issued in Pennsylvania. The court held the marriage void ab initio, thus establishing the proposition that in order to have a valid marriage not only must there be a formal religious ceremony, as had already been held, but such ceremony must also be performed under a license issued in this state. In the former article it was argued at some length that should the question ever arise the court ought to hold the license requirement of our statute to be directory only. In light of later changes in our statute with respect to the issuance of marriage licenses, however, the holding in the Kisla case that the license requirement is mandatory is no doubt a sound one. The statutory changes referred to are the 1937 requirement of a three-day waiting period after application for the license before it may be issued, and the 1939 provision that no license may be issued unless each of the parties to be married has satisfactorily passed a standard serological test for syphilis. The obviously desirable objectives of these new requirements could be defeated entirely if our court had adopted the rule that a marriage without a license is nevertheless valid.

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2 Colson, West Virginia Divorce Law, 43 W. Va. L.Q. 120, 203, and 298 (1937)
In its decision the court was careful to point out that it was dealing only with the question of the necessity of a license, and that it was not passing upon the validity of a marriage performed under a defective license:

"... In the case before us no effort was made to comply with the statutory provisions relating to marriage licenses; hence, there is no question herein involving a defective license."\(^6\)

In thus leaving open the question of the effect of marriages under defective licenses, the court is still free to hold valid a marriage performed under a West Virginia license issued in the wrong county or one improperly issued to a minor without the necessary parental consent. In view of the large number of such defective licenses, it is still confidently believed that whenever the question is presented our court will sustain the validity of marriages performed under such licenses.

2. Annulment

The case of *Allen v. Allen*\(^7\) contains a good discussion of fraud as a ground for annulment, by clear implication under our statute as well as under general equity principles. After emphasizing that to justify annulment of the marriage contract the fraud must have been perpetrated at or before the marriage and must have been calculated to induce consent to the marriage, the court stated that a secret intent on the part of one party to refrain permanently from engaging in normal sexual intercourse would constitute such fraud as would vitiate the marriage. In the particular case, however, it was held that such intent was not clearly established.

In *Cole v. Compensation Commissioner*;\(^8\) the court reaffirmed its questionable position that although under our statute a wholly bigamous marriage is voidable only, and may not be treated as void until it has been annulled by a court of competent jurisdiction, the marriage of a divorced person during the prohibited period for remarriage following the divorce is absolutely void and is therefore subject to collateral attack. In refusing to overrule two former cases to the same effect,\(^9\) decided in 1930 and 1933, the court with some justification argued that its former position had received legislative approval when the pertinent section of the statute was amended in 1935:

\(^7\) 126 W. Va. 415, 28 S.E.2d 829 (1944).
\(^8\) 121 W. Va. 111, 1 S.E.2d 877 (1939).
Moreover, the action of the legislature reducing the statutory period from six months to sixty days and the time within which the trial court can prohibit the guilty party from remarrying from five years to one year, without qualifying in the least the word 'void', contained in the statute, after that word had been defined in Hall v. Baylous, supra, and McManus v. State Compensation Commissioner et al., supra, is a legislative interpretation clearly evincing intent to render null and of no effect all marriages attempted to be contracted within the prescribed time. With deference, we feel constrained not to accept the distinction suggested by Judge Maxwell in his able dissent to the opinion in Hall v. Baylous, supra. Here, claimant, having subjected herself to the jurisdiction of the Circuit Court of Raleigh County in her divorce suit, voluntarily has acquired a judicial status which, in our opinion, ties her more solemnly and effectively than she would be had she never been divorced and had entered into a bigamous marriage as claimant did in Sledd v. State Compensation Commissioner, supra.”

Although in these three cases, the only ones decided on this point, the marriage occurred during the period when by the statute both parties were prohibited from marrying, it is assumed, though this has not yet been decided, that the same rule would be applicable to a marriage by the guilty party during the additional period in which by the divorce decree his remarriage may have been prohibited by the court.

Attention should be called to the fact that in the light of recent United States Supreme Court decisions, particularly those involving segregation, the West Virginia statutes prohibiting marriages between white persons and negroes and providing for the annulment of such marriages are to say the least of doubtful constitutionality.

Shamblin v. Compensation Commissioner involved an interesting question concerning the effect of an annulment. A widow who was receiving compensation for the death of her former husband innocently contracted a bigamous marriage with a man who at the time had two wives living and undivorced. Payment of compensation was discontinued on the date of her second marriage. Upon discovery of the facts, she instituted suit to annul the bigamous marriage and was granted a decree of annulment six months later. The compensation commissioner reinstated her as a recipient

13 122 W. Va. 652, 12 S.E.2d 527 (1940).
of compensation as of the date of the annulment decree, but denied her claim to compensation during the period of six months after the marriage and before its annulment. An order of the Workmen's Compensation Appeal Board sustaining the action of the commissioner was reversed on appeal, the court holding that she was entitled to compensation during the six-month period because by reason back the annulment decree made the marriage a nullity from the beginning.

The question of the jurisdiction of our courts to annul marriages by residents of this state who marry in another state to evade our laws was raised in Bell v. Bell. In that case after the parties had been married in Maryland to evade compliance with our statutes concerning marriages under the age of consent, they returned to West Virginia, but did not live together in this state as man and wife. The statute governing the case provided that

"If any person resident in this State shall, in order to evade the law, and with an intention of returning to reside in this State, go into another state or country, and there intermarry in violation of the provisions of section one, article two of this chapter, and shall afterwards return and reside here, cohabiting as man and wife, such marriage shall be governed by the same law, in all respects, as if it had been solemnized in this State."

It was properly held, as a matter of statutory construction, that the jurisdiction of our courts to annul marriages contracted outside the state in order to evade our law was limited to cases in which the parties after returning to this state establish a marital domicile here and live together as husband and wife. Recognizing the fact that in the case of many such runaway marriages no marital domicile is ever established in this state, the legislature in 1941, after the decision in the Bell case, amended the statute by deleting the phrase "cohabiting as man and wife". As a consequence, under the present statute our courts have jurisdiction to annul marriages contracted by West Virginians in other states in evasion of our law, if after the marriage they return and reside here, regardless of whether they establish a marital domicile in this state.

14 122 W. Va. 223, 8 S.E.2d 183 (1940).
II. Divorce

1. Jurisdiction, Venue and Procedure

It will be recalled that when the code was revised in 1931 the legislature established exceedingly strict jurisdictional requirements that must be met before our courts may grant a divorce. The obvious purpose of these requirements, which were discussed in detail in a former article, was to discourage the development of a divorce racket in this state by making it very difficult, though not impossible, for a nonresident to establish a domicile here for the purpose of obtaining a divorce. The case of Taylor v. Taylor contains a valuable discussion of domicile and residence in divorce cases and also raises some interesting possibilities as to an easy method of getting around our strict jurisdictional requirements.

In the Taylor case the plaintiff husband and his wife maintained their marital domicile in Mercer County in this state until December 1940. They then established a domicile in the District of Columbia, thus as the court held ceasing to be residents of this state within the meaning of our divorce statutes. Neither party returned to West Virginia until their separation, after which the plaintiff again established his domicile in Mercer County in February 1944. Note that although both parties were former residents, the court attached no importance to this fact and presumably the decision would have been the same had neither party been a resident of the state until the husband's return in 1944. Only a few weeks after his return the plaintiff instituted a suit for divorce against his nonresident wife on the ground of adultery. There was some conflict in the evidence on the question whether the wife was personally served with process in this state, but however that may be she made a general appearance and filed a cross bill for divorce from the plaintiff on the grounds of habitual drunkenness and cruelty. It is important to note that all of the acts alleged by both parties as grounds for divorce occurred while they were both nonresidents. On this point the court quite properly held that the general appearance by the wife satisfied the requirement of personal service, thus making inapplicable the following requirement of our statute:

"Provided, however, that in any case in which the defendant cannot be personally served with process within this State,

such suit shall not be maintainable unless the plaintiff at the
time the cause of action arose was an actual bona-fide resident
of this State and has been such a resident for at least one year
next preceding the commencement of suit, or that since the
cause of action arose has become such a resident and has con-
tinued so to be for at least two years next preceding the com-
 mencement of suit."20

If the court had held otherwise on the question whether the require-
ment concerning personal service had been satisfied, it would then
have been necessary for the plaintiff to satisfy a two-year residence
requirement, the cause of action having arisen while he was a non-
resident, before a court in this state would have had jurisdiction of
his suit for divorce on any ground.21

Remember that when the ground for divorce is adultery no
specified period of residence in this state is necessary if the court
has personal jurisdiction over the defendant, the only requirement
being that the plaintiff be a domiciled resident at the time he in-
stitutes the suit. After the defendant filed her cross bill in the
principal case, the plaintiff moved to dismiss the cross bill on the
ground that the court lacked jurisdiction of the case, and at the
hearing on the motion he testified, contrary to the allegation in
his original bill, that he was not a resident of the state when he
started the suit. The trial court found that he was a resident at
that time, held that it had jurisdiction, and overruled the motion.
The plaintiff then by leave of court dismissed his bill of complaint.
After a hearing on the merits of the defendant's cross bill, the court
granted her a divorce from the plaintiff. On appeal the court
affirmed the decree, two judges dissenting, over the strong objec-
tion of the plaintiff that the trial court lacked jurisdiction to enter
any judgment in the case, except an order of dismissal.

There can be no question as to the correctness of the court's
holding that the plaintiff was a domiciled resident at the time he
filed his original bill. The finding of the trial court against the
plaintiff on the question whether he had the necessary intent to
establish a domicile on his return to Mercer County, though based
on conflicting testimony, was properly sustained by the court be-
cause the finding was not clearly wrong or against the pre-
ponderance of the evidence. In its discussion of the law applicable
to these facts, the court said:

"... It is to be noted that, under the statute, no definite
period of time is required to establish a legal residence. Like-

wise, in the absence of any statutory regulation, no definite period of residence or specified length of time in a particular place is necessary to establish a domicile; but, when accompanied with the element of intent, any residence, however short, will be sufficient to establish a domicile, even if it is but for a day.”

This being true, note that a person who had never before been in this state could in one day establish his domicile here and could on the same day file a suit for divorce on the ground of adultery. Note also that under our statute, as was properly held in this case, the court would have full jurisdiction to hear and decide the case.

In the principal case, however, the court never did hear the suit for divorce on the ground of adultery because that suit, over which the court clearly had jurisdiction, was voluntarily dismissed by the plaintiff. Following the rule laid down in the earlier case of Hale v. Hale, the court stated:

“The trial court having jurisdiction of the case, it was within its power to hear and determine the merits and to grant the defendant the relief prayed for in her answer and cross bill, as it did, even though the defendant was not, at the time of the trial, a bona fide resident of this State. The court retained its jurisdiction for that purpose notwithstanding the action of the plaintiff in dismissing his bill of complaint, which he did, on his own motion and by leave of the court, at the conclusion of the hearing of the motion to dismiss the case upon the ground that the court had no jurisdiction to entertain it.”

It is submitted that the application of the principle of the Hale case to the particular facts in the principal case is open to serious question. Note that under this decision, contrary to the purpose and spirit of the jurisdictional requirements of our divorce statutes, on a cross bill filed by a nonresident defendant our courts have jurisdiction to hear and determine divorce causes which could not have been brought independently by the nonresident as a plaintiff in an original action.

On the facts in the principal case, since neither of the grounds for divorce alleged in the cross bill was adultery and since both alleged causes of action arose when neither party was a resident of this state, the nonresident wife could not as plaintiff have instituted a suit for divorce against the husband after he became a resident until he had resided here for a period of two years. There

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23 104 W. Va. 254, 139 S.E. 754 (1927).
would therefore seem to be real doubt as to the soundness of a rule that would permit our court to take jurisdiction of these same causes of action merely because they were contained in a cross bill filed in a suit by the resident husband. If the husband had been a resident of this state for two years before he filed his suit for divorce, and the wife had then filed her same cross bill, no one would contend that the husband by dismissing his own suit could thereby deprive the court of jurisdiction to decide the issues raised by the defendant. To that extent, the principle of the *Hale* case is sound enough. This criticism of the rule has nothing to do with the plaintiff's effort to deprive the court of jurisdiction by withdrawing his case. The real objection is that the defendant in his cross bill is granted relief on the basis of a cause of action over which our court would otherwise have had no jurisdiction. It is submitted that the doctrine of the *Hale* case should be modified so as to prevent a non-resident defendant from obtaining any affirmative relief on his cross bill that he could not have obtained in an independent suit filed by him as plaintiff. It is at least worthy of note that the *Hale* case was decided in 1927, which was several years before the legislature established our present strict jurisdictional requirements in divorce cases.

Not only does the decision in the principal case run counter to the policy of the legislature in laying down these strict requirements, but it is feared that the decision may invite collusive action by the parties to confer easy divorce jurisdiction on our courts. Note that under the decision in this case West Virginia might easily become a Mecca for those seeking quick divorces unless great care is taken to prevent collusion. Suppose that a nonresident couple, neither of whom has ever been in this state, should decide that they want a West Virginia divorce. The only thing necessary would be for one of them to move into the state with the avowed intention of making this his permanent residence. If he testified to this effect, it would be an exceedingly difficult matter to prove that he had no such intent. Then without residing here for any stated period, and even on the day he established his domicile here, he could file for divorce on the ground of adultery. The nonresident could then submit to the jurisdiction of the court and file a cross bill for divorce on any ground recognized in this state. It would not even be necessary for the plaintiff to introduce any evidence as to the alleged adultery. Note that in the principal case the husband introduced no evidence, having voluntarily withdrawn his suit. As soon as the case could be matured, the court could proceed to
grant a divorce on the cross bill without either party having satisfied any residence requirement other than the plaintiff's establishment of a domicile here. It may be said that such a combination of circumstances would in and of itself be evidence of collusion, but admittedly the whole thing could be bona fide, as it apparently was in the Taylor case, and the collusion, if any, would be hard to prove. In order to avoid such a result it is submitted that our court might do well to apply the same jurisdictional requirements to a cause of action for divorce set forth in a cross bill as would be applied to the same cause of action in an original suit.

As was stated in the Taylor case, and specifically held in Anderson v. Anderson, if all other jurisdictional requirements are satisfied the defendant by making a general appearance may waive his right to question the court's jurisdiction of his person for lack of proper service of process. In contrast to this rule, and contrary to the general rule with respect to venue, it is important to note that in divorce cases the defendant may not waive the venue requirements of our statute, which are treated in all respects as going to the jurisdiction of the court and its competence to render a valid decree. In a case in which Marion County was the county in which the parties last cohabited and in which the defendant resided, and was therefore the only county in which suit could properly be brought, our court said:

"Plaintiff alleges that defendant having filed an answer in the instant suit has given his consent to the establishment of jurisdiction by the Circuit Court of Preston County. This position is untenable. We are here concerned with the matrimonial status of plaintiff and defendant, which is the subject matter of this suit. Jurisdiction of the subject matter is not conferred by consent."28

As to the validity and effect of a decree entered by a court lacking jurisdiction so far as venue is concerned, the court said:

"The provisions of Code, 48-2-9, are mandatory and, in a divorce proceeding wherein the defendant is a resident of this State, facts showing compliance therewith must be alleged in the bill of complaint in order to validate any action of the court therein. Otherwise the proceeding is void in all respects.27

From this it would seem to follow that the decree, being void for

lack of jurisdiction, would be subject to collateral as well as direct attack. This is not entirely clear, however, as witness the following statement in a recent case:

“There being no direct attack upon the decree entered by the Circuit Court of Ritchie County on October 9, 1944, and the replication filed by the relator being, at most, a collateral attack thereon, we cannot hold void the Ritchie County decree. There is an intimation that this decree was obtained through fraud, in that plaintiff therein was not a bona fide resident of Ritchie County at the time he instituted his suit, and, therefore, that court did not have jurisdiction; but there is no satisfactory proof of that contention in the record before us. We cannot hold void the decree of the circuit court where the attack thereon is, at the most, collateral; nor could we do so in a direct attack, without supporting proof.”

Compare the following from a later case:

“A decree entered in a divorce proceeding where the court does not have jurisdiction of the subject matter is void, and may be attacked collaterally or directly.”

It should be pointed out, however, that this later statement is not directly in point because the court’s lack of jurisdiction in the case was placed on a different and rather startling ground. There is no quarrel with the statement as such. Indeed, the result in the case would not be open to serious question had the court’s lack of jurisdiction been placed on the ground of the nonresidence of the parties, which it would seem might well have been done. The court, however, specifically refused to consider this point:

“Further contentions are made to the effect that the divorce decree entered in the Circuit Court of Nicholas County is void for the reasons that both spouses were resident of and domiciled in Florida for a period beginning before the institution of that suit and continued to be domiciled there until after the entry of the decree; that they last cohabited as husband and wife in Florida; and that the divorce decree was obtained by fraud. We think it unnecessary to now consider the merits of these questions, in so far as they relate to that part of the decree granting the divorce, since that part of the decree has been held to be void for another reason.”

The actual ground on which the court held the decree void for lack of jurisdiction and hence subject to direct or collateral attack.

30 Id. at 192.
seems very doubtful, and possible applications of the decision are most disturbing. In 1949 the husband brought suit in this state, in the Circuit Court of Nicholas County, for a divorce on the ground of cruelty. He alleged in his complaint the conduct of the wife which he claimed amounted to cruelty. The wife made a general appearance. The commissioner in chancery to whom the case was referred found that the wife was guilty of cruelty. In May 1950 the circuit court confirmed the report of the commissioner and entered a decree granting the husband a divorce. The wife did not appeal. Some years later she instituted the chancery suit in the principal case, praying that the decree in the former divorce suit be set aside and held void. As stated above, this relief might well have been granted on the ground that the court lacked jurisdiction of the suit because the jurisdictional requirements of our statute were not satisfied. This, however, the court refused to do, choosing rather to hold the decree void on the ground that the allegations charging cruelty in the divorce suit did not state a cause of action.

Until the decision in this case it was thought that nothing could be clearer than the proposition that even if the trial court did err in holding that the alleged acts constituted cruelty, the only way to correct such an error would be by appeal. Certainly this would be true in other areas of the law. Suppose, for example, that in a suit for damages caused by the alleged negligence of the defendant, a demurrer on the ground that the complaint failed to state a cause of action should be erroneously overruled. Suppose further that after trial judgment should go against the defendant, without an appeal being taken. In a separate suit brought some years later to set aside the judgment on the ground that the complaint failed to state a cause of action, assuredly our court would not hold the judgment void because of the trial court's lack of jurisdiction in the former case. To do so would violate every principle involved in the doctrine of res judicata. Yet that is exactly what the court did in the principal case, and this on the ground that the lack of jurisdiction appeared on the face of the record by reason of the plaintiff's failure to allege a good ground for divorce. Of course this would have been true if, for instance, the alleged ground had been insanity which is not a ground for divorce at all in this state. The difference here is that the defendant did allege a good ground for divorce, to wit, cruelty, and merely failed to allege facts which in the opinion of the upper court amounted to cruelty,
though the trial court was of a contrary opinion. If the principal

case is good law, query how much confidence may be placed in

many unappealed divorces granted by our circuit courts.

Before leaving the question of jurisdiction and venue, attention

should be called to a 1953 amendment of our statute. Before 1953

if the defendant was a resident of this state a suit for annulment or

a suit for divorce could be brought either in the county in which

the parties last cohabited or in the county where the defendant

resided, but if the defendant was a nonresident, suit could be

brought only in the county where the plaintiff resided. The 1953

amendment permits such a suit, when the defendant is a non-

resident to be brought either in the county where the plaintiff resides

or in the county in which the parties last cohabited. 31

In a former article attention was called to the fact that, because

of a supposed ambiguity in our statutes concerning the duties of

divorce commissioners and of commissioners in chancery in divorce

cases, some circuit courts had been allowing the divorce commis-

sioner to act in both capacities. 32 This practice was specifically

condemned by our court, as follows:

"Code 48-2-26 provides that the circuit court, instead of

trying a divorce suit in chambers, may refer the cause 'to

one of the commissioners in chancery of such court, or to a

special commissioner, who shall take and return the testimony

in such case, together with a report of all such facts as the

commissioner may be able to obtain', etc. It has been the

practice in some circuits to make this reference to the divorce

commissioner. This practice is referred to in the Revisers' Note to 48-2-24

with the comment that while the statute possibly admits such construction, the Revisers thought the statute

was not so intended. 48-2-24 particularizes the duties of

the divorce commissioner as follows: ' . . . to investigate all di-

vorce suits; to appear at all trials and examine witnesses when

necessary, and defend the interests of the State; to bring before

the court, at the trial, all witnesses necessary to develop the

ture facts and generally take all necessary steps to prevent

fraud and collusion in divorce suits.' This statute recognizes

the State as a party, though a silent party, to every divorce

suit, and makes a divorce commissioner the special representa-

tive of the State. 48-2-26 makes the commissioner in chancery,

to whom a cause is referred, the impartial representative of

the circuit court. Thus the two positions are incompatible, and

reference under 48-2-26 should not be made to a divorce

commissioner." 33


In 1945 an important change was made concerning the duties of a commissioner in chancery to whom a case is referred. Before 1945 the divorce commissioner could do no more than report his findings of fact to the court, but under the 1945 amendment it became his duty to report his findings of fact, "together with his recommendation concerning whether a divorce, annulment or affirmation, as the case may be, should be granted, and concerning any other matter on which the court may request his recommendation."34

Another important change in the procedure in divorce cases occurred as the result of the decision in State ex rel. Watson v. Rodgers.35 Prior to this decision it had been the practice in many counties to permit the parties by consent to waive maturity of divorce cases at rules. Warrant for this practice, permissible in other equity cases, was found in the provision of our statute that divorce suits "shall be instituted and conducted as other chancery suits, except as provided in this article."36 In the Rodgers case, much to the surprise of many members of the bar, it was held that the divorce article did provide otherwise, as follows:

"Suit for divorce or annulment shall mature the same as other cases in chancery, and when properly matured the case shall be placed on the docket for trial..."37

It was held that under this provision the parties could not consent to waive maturity of the case at rules. In order to validate decrees previously entered in cases in which maturity at rules had been waived, the legislature in 1947 provided that all such decrees should be recognized as valid unless before July 1, 1947 proper steps were taken to have the decrees set aside.38 There has been no case involving the validity of this curative statute.

Another matter of procedure about which there had apparently been some difference of opinion was expressly covered in another statutory amendment in 1947:

"An infant plaintiff or defendant in any divorce or annulment suit shall appear, answer, demur or plead by a next friend, and no guardian ad litem shall be required unless specifically ordered by the court or the judge hearing the cause."39

37 Id. § 23.
38 Id. § 31.
39 Id. § 11a.
2. **Grounds for Divorce**

(a) *Adultery.* The only important development in our law with respect to adultery as ground for divorce is found in the clarification by the court of its rule concerning the degree of proof necessary to establish adultery. It was mentioned in a former article that our court has at various times laid down three different rules as to the degree of proof required: (1) By preponderance of the evidence, (2) by clear and convincing evidence, and (3) by evidence that will admit of no other conclusion, which is at least the equivalent of proof beyond a reasonable doubt.40 Although it was pointed out that the second rule was the one laid down in by far the greater number of cases, the conclusion was drawn that in its then most recent decisions our court had adopted the third rule. In a series of cases decided since then, the court appears definitely to have returned to the second rule, which is the one followed in most states. The following is a clear statement of the present position of the court:

"The contention of the plaintiff that the evidence is not sufficient to convict her of adultery as charged is wholly untenable. The well established rule, uniformly recognized and applied in the decisions of this Court, is that to warrant a decree on the ground of adultery the burden rests upon the complainant to make out his case by evidence which is sufficiently clear, strong and convincing to carry conviction of guilt to the judicial mind and that evidence which raises only a strong suspicion of guilt is not sufficient."41

(b) *Desertion.* The case of *Hewitt v. Hewitt*42 settled a question concerning the continuity of the period of desertion that had been doubtful under previous decisions.43 There had been no clear rule as to the effect of litigation between the parties on the required desertion period. The *Hewitt* case clearly established the "time out" rule, holding that the period prior to the litigation could be tacked on to the period following the litigation to make up the required continuous period of desertion, it being necessary only that the period during the pendency of the suit be deducted from the total elapsed time from the date of the original desertion.

(c) *Habitual Drunkenness.* It was not until the case of *Kessel*

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v. Kessel\(^{44}\) that our court had occasion to make a specific definition of habitual drunkenness as a ground for divorce under our statute. In denying the divorce on the particular facts of the case, it was said:

“In a bill for divorce, where the bill alleges habitual drunkenness as a ground therefor, proof that defendant occasionally became intoxicated from drinking intoxicating liquors does not establish the allegation of habitual drunkenness within the meaning of Code 48-2-4, as amended by Chapter 35, Acts of the Legislature, 1935; to sustain such charge it must appear that the drunkenness has become a fixed habit, so frequently indulged in as to show an inability to control the appetite for intoxicating drink, when opportunity is afforded to procure the same.”\(^{45}\)

3. Defenses

(a) Unclean Hands. In several recent cases the court correctly applied its doctrine that a plaintiff otherwise entitled to a divorce may be denied relief because of inequitable conduct on his part that is a substantial contributing cause of the defendant’s misconduct.\(^{46}\) There would seem to be serious question, however, as to the court’s application of the unclean hands doctrine in Cottle v. Cottle.\(^{47}\) The pertinent part of the opinion on this point is as follows:

“We, however, are of the opinion that the moving of furniture and personal effects from the home and establishing an abode for herself and child elsewhere, does not entitle defendant to a divorce, because defendant himself was guilty of cruel and inhuman treatment, as heretofore stated, which was not condoned; and in our opinion plaintiff was not justified, without notice to defendant, in removing herself and child from the home and establishing a separate abode elsewhere. Her actions in this regard were such inequitable conduct as would preclude her from a divorce.”\(^{48}\)

In the first place, when the plaintiff left the defendant she had a ground for divorce based on his cruelty. Therefore she was not guilty of desertion because she was justified in leaving. In fact, had she continued to live with the defendant she would have condoned his offense and thereby lost her right to a divorce. Hence it is difficult to see how our court could hold that her action was

\(^{44}\) 131 W. Va. 239, 46 S.E.2d 792 (1948).

\(^{45}\) Id., syl. 2.


\(^{47}\) 129 W. Va. 344, 40 S.E.2d 863 (1946).

\(^{48}\) Id. at 357.
such inequitable conduct as to bar her right to a divorce. Furthermore, even if it had been inequitable conduct, it had no causal relation whatever to the defendant's cruelty, and hence did not come within the unclean hands doctrine as consistently applied by our court in other cases.

(b) Collusion. The case of McNinch v. McNinch\(^{49}\) contains an interesting discussion of collusion and the responsibilities of the divorce commissioner with respect thereto. In that case the plaintiff charged his wife with adultery. She filed an answer in the nature of a cross bill, denying the charge and asking for a divorce from the plaintiff on the ground of cruelty. Her counsel then filed her sworn written statement that she agreed with the plaintiff not to defend the case in consideration that the custody of their child be granted her by the court during each summer. After filing this affidavit her counsel withdrew from the case. Without more, the court proceeded to hear the plaintiff's evidence and entered a decree granting him a divorce. This was reversed on appeal, the court holding that the facts were sufficient to put the court on notice of probable collusion between the parties, and that the court should not have heard the case until there had been a full and complete investigation by the divorce commissioner on the question of collusion. As was said by the court:

"... The office of divorce commissioner was created for the purpose, as disclosed by the terms of the statute, of preventing imposition upon the public and those directly interested in divorce proceedings. The commissioner, therefore, should have voluntarily stepped into the breach in this case, and upon his neglect to do so, the court should have called upon him to act."\(^{50}\)

The court might well have pointed out that the trial chancellor himself is also charged with the responsibility of preventing collusion in divorce cases, and that consequently the court should have acted if the divorce commissioner did not.

(c) Condonation. In Miles v. Miles,\(^{51}\) contrary to what had been thought to be the rule in this state, our court held that, except in a case of adultery, voluntary sexual intercourse is not necessarily condonation of an existing ground for divorce. In the particular case, however, it was held that this circumstance plus other evidence of forgiveness did amount to condonation.

\(^{49}\)117 W. Va. 774, 188 S.E. 231 (1936).
\(^{50}\)Id. at 776.
\(^{51}\)151 W. Va. 513, 48 S.E.2d 669 (1948).