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Clyde L. Colson
West Virginia University College of Law

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WEST VIRGINIA DIVORCE LAW

CLYDE L. COLSON

II. GROUNDS FOR DIVORCE

4. Cruelty. Although the West Virginia statute provides that a divorce may be granted for "cruel or inhuman treatment, or reasonable apprehension of bodily hurt," it is construed as if it provided simply that cruelty is ground for divorce. Even if the legislature had not stated that cruelty or "cruel or inhuman treatment" should include any conduct which gives rise to "reasonable apprehension of bodily hurt", the court itself would no doubt have reached that result. Here again it should be observed that cruelty, which formerly was ground only for a divorce from bed and board, was in 1935 made ground for an absolute divorce.

In early times, to obtain a divorce for cruelty it was in general necessary to show physical violence — actual danger to life or limb. Although the English ecclesiastical courts did not wholly exclude mental cruelty, they seldom found it sufficient unless accompanied by physical violence. Two factors have contributed to the development of the modern view that mental cruelty alone is enough. The more important factor was the establishment of a scientific basis for mental cruelty — a realization that by reason of the close interrelation of mind and body it is impossible to inflict serious mental suffering without threatening, if not actually causing, equally serious physical injury. The second factor which influenced the courts to discard the view that there could be no divorce for cruelty without proof of physical violence was an increasing liberalization toward divorce in general. This liberalized policy, however, probably had greater play in the determination that particular misconduct did constitute mental cruelty. It is thus seen that cruelty as ground for divorce is entirely relative and accurately reflects the extent to which a court has recognized that mental suffering affects bodily health and also the strictness or

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** Associate Professor of Law, West Virginia University.
100 For other statutory expressions which are construed to mean "cruelty", see MADDEN, PERSONS AND DOMESTIC RELATIONS (1931) 268.
101 "Cruel and inhuman treatment and apprehension of bodily injury . . . are so closely related that the same state of facts might establish either or both." Lord v. Lord, 80 W. Va. 547, 551, 92 S. E. 749 (1917).
liberality of its policy toward divorce. Today practically all courts hold that mental cruelty is ground for divorce and some go so far as to base a finding of cruelty on evidence which at best shows mere incompatibility of temperament.  

West Virginia has always recognized that there may be cruelty without physical violence. In Goff v. Goff, one of the first cases in which a divorce was granted in this state on the ground of cruelty, Judge Brannon after reviewing the evidence said:

"Observe there is no violence to the wife's person. Once the law demanded this; but advancing civilization and right reason have changed the law. . . . If the husband's treatment be coarse, unnatural, abusive, so as to . . . prey on the wife's mind, produce mental anguish, impair her nerves and endanger her health, it is enough."  

In this its first comprehensive discussion of cruelty as ground for divorce the court in substance adopted the test which it has since consistently applied. Briefly stated, cruelty consists of personal violence or any other course of conduct which actually causes or which creates reasonable apprehension that it will cause bodily harm or impairment of health.

Although in a few comparatively recent cases the court has defined cruelty as "personal violence or other acts tending to break down the health and happiness of the offended spouse", it is extremely doubtful that the term "happiness" adds anything to the test stated above. It will be observed that even when happiness is mentioned the court requires that both health and happiness be endangered. As will be seen shortly, there are so many cases in which conduct well calculated to destroy happiness alone has been held insufficient that a conclusion that the court has materially lowered its standard of cruelty is unwarranted. A statement of the

162 MADDEN, op. cit. supra n. 160, §§ 84-85; Peck, Domestic Relations (3d ed. 1930) 164-165.
163 Goff v. Goff, 60 W. Va. 9, 16-17, 53 S. E. 769 (1906). And see Arnold v. Arnold, 112 W. Va. 481, 484, 164 S. E. 850 (1932), where in comparing mental cruelty to physical violence Judge Maxwell said: "Observation teaches us that a fixed and constant attitude and course of conduct sapping and undermining the mental and physical organisms of a sensitive and refined woman may be more cruel than intermittent blows."
true relation of happiness to cruelty and one less likely to be misleading because it emphasizes the necessity of actual or threatened bodily harm is found in Lord v. Lord:

"It is necessary to go beyond abuse and mistreatment, however shameful, and find an injurious effect or result, jeopardy or impairment of health by destruction of happiness and peace of mind."\textsuperscript{166}

Note, then, that the destruction of happiness as such is insufficient and that it becomes ground for divorce only when it endangers the health of the offended spouse.

In a detailed study of the cases, apparently inconsistent decisions that particular conduct does or does not amount to cruelty become understandable if one constantly bears in mind that cruelty is "a relative term, and of necessity must depend upon the circumstances of each particular case."\textsuperscript{167} In the very nature of things this must be true because sensibility to cruelty is variable. As it was so clearly put by our court in an early case dealing with cruelty as justification for desertion,

"Owing to the diversity of human character, and the variety existing in the degrees of culture, refinement, and sensibility of different parties, the causes which would be regarded as insufferable cruelty by one might be utterly disregarded by another."\textsuperscript{168}

The supreme court of Pennsylvania expressed the same idea when it said, "We do not divorce savages and barbarians because they are such to each other."\textsuperscript{169} This being true, the test of cruelty is not whether the conduct would be likely to cause either apprehension of bodily harm to, or physical or mental suffering endangering the health of, the ordinary person but whether it did have that effect on this particular individual, taking into consideration his physical qualities and his degree of refinement. Note, however, that this is subject to a slight limitation designed to take care of the supersensitive person. This limitation is found in the rule that apprehension of bodily harm will constitute cruelty only if the apprehension be reasonable. In other words, even though misconduct of one spouse does in fact give rise to fear of injury on the part of the other, the misconduct will not constitute cruelty unless

\textsuperscript{166} 80 W. Va. 547, 551, 92 S. E. 749 (1917).
\textsuperscript{168} Martin v. Martin, 33 W. Va. 695, 704, 11 S. E. 12 (1889).
\textsuperscript{169} Richards v. Richards, 37 Pa. 225, 228 (1860).
it would have caused such fear on the part of a reasonable person of like sensibilities.

The most obvious cruelty is physical violence, and if sufficiently serious, it is of course ground for divorce.\(^{170}\) But actual violence will not amount to legal cruelty unless it causes or is likely to cause personal injury or impairment of health. Hence slight violence by the wife which does not in fact endanger the husband is insufficient.\(^{171}\) The same rule would apply to slight violence by the husband to the wife, but note that a different standard of measurement would be used apparently on the theory that the wife is physically less able to stand violence without ill effect.\(^{172}\) Here again, however, no absolute rule can be laid down. The result should depend on the the relative strength and physical condition of husband and wife in the particular case.

Even though no violence is inflicted, a threat of violence which gives rise to reasonable apprehension of bodily harm or which causes worry endangering health is cruelty.\(^{173}\) As was said in Lord v. Lord,

"When the words of threat are the expression of determined malignity, and there is reasonable ground to apprehend that they will be carried into effect, they constitute a sufficient ground for divorce."\(^{174}\)

In Lord v. Lord, however, it was held that because the wife’s threats to shoot or poison her husband were made only in the heat of anger and were not believed by the husband who continued to live with her without fear, they did not amount to cruelty.\(^{175}\)

There are several West Virginia cases dealing with the interesting question whether it is cruelty for one spouse falsely to accuse the other of crime or immorality. In Maxwell v. Maxwell, the first

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\(^{172}\) This seems a fair inference from the fact that the court quoted this language with approval; "It is not every slight violence committed against the wife by the husband, even in anger, which will authorize a divorce. Much less will slight acts of violence by a wife from which the husband can easily protect himself constitute cruelty entitling him to a divorce." 14 Cyc. 602. Huff v. Huff, 73 W. Va. 330, 332, 80 S. E. 846 (1914) (italics supplied).

\(^{173}\) Goff v. Goff, 69 W. Va. 9, 17, 53 S. E. 769 (1906) (repeated insults and threats of violence).

\(^{174}\) 80 W. Va. 547, 551, 92 S. E. 749 (1917).

\(^{175}\) And see Roush v. Roush, 90 W. Va. 491, 495, 111 S. E. 334 (1922).
case dealing with this problem, in its discussion of an alleged accusa-
tion by the husband that the wife had been guilty of criminal 
abortion, the court said:

“If a husband accuse his wife falsely of such crimes such accusa-
tions would be cause for divorce, provided, as in the case of other false accusa-
ciations of crime, they be made under such circumstances, as to bring the wife into disrepute, . . .
and inflict upon her grievous mental suffering, impairing or likely to impair her health or mind. . . . The test is the mental suffering of the wife. . . .” 170

Because no such suffering was shown it was held that the accusation was not cruelty. With one statutory exception the court has consistently followed the rule laid down in this case that a false accusation of crime will not be cruelty unless it causes mental suffering endangering health.

The statutory exception is found in the provision that a “charge of prostitution made by the husband against the wife falsely shall be deemed cruel treatment.” 177 Although a false charge of prostitution may cause mental suffering, as in Boos v. Boos, 178 it is not necessary to show this, proof of the accusation alone being sufficient. 170

A charge by the husband that the wife is guilty of adultery or infidelity is viewed as less serious than a charge of prostitution and will not ordinarily be considered cruelty. 180 Here again, however, no absolute rule is possible. The charge will be cruelty if it causes or is likely to cause impairment of health, as in White v. White 181 where the husband’s accusation was made while the wife was still suffering the effects of childbirth. The rule that cruelty is entirely relative and depends upon the sensibilities of the particular person affected is well illustrated by the application of a

170 69 W. Va. 414, 419, 71 S. E. 571 (1911). This case at 420 also holds that false arrest is not cruelty unless the health of the accused is endangered.
178 93 W. Va. 727, 734, 117 S. E. 616 (1923).
180 Schutte v. Schutte, 90 W. Va. 787, 793, 111 S. E. 340 (1922); Criser v. Criser, 109 W. Va. 696, 156 S. E. 34 (1930). That a false charge of adultery may be cruelty, although the statute specifies only a charge of prostitution, see Roush v. Roush, 90 W. Va. 491, 492, 111 S. E. 334 (1922).
181 106 W. Va. 650, 654, 146 S. E. 720 (1929). But in Nicely v. Nicely, 81 W. Va. 569, 577, 94 S. E. 749 (1917), the wife was granted a divorce on this ground, no mention being made of impairment of health.
different standard of measurement in determining whether it is cruelty for a wife falsely to accuse her husband of infidelity. Discussing this problem in *Roush v. Roush*, the court said:

"For obvious reasons a charge of adultery against the wife ordinarily is much graver than the same charge against the husband and if such charge is falsely made by the husband, and especially so if it is malicious and unfounded, and tends to cause the wife great mental distress and to undermine her health, it is ground for divorce. But it should take much stronger proof where the husband sues on this ground. Such a charge would affect different men differently. A gay Lothario would feel complimented; while a sensitive man of high position, good character and reputation might be subjected to great mental suffering, far beyond that which such a charge would naturally have upon the average man. But in the present case we do not think plaintiff has shown that he has been so affected."

It is generally held that if one of the parties in a suit for divorce charges the other with adultery but fails to prove the charge it is not cruelty unless the accusation was made in bad faith. In *Schutte v. Schutte* although the court reached a result consistent with the general rule, it did so on the ground that a charge of adultery is not ordinarily cruelty rather than on the ground that such a charge made in good faith in an action for divorce is privileged. In fact, the dictum that had the charge involved an accusation of prostitution it would have been cruelty is wholly inconsistent with the general rule and should not be followed. To do so might discourage the bringing of an action for divorce even though one reasonably believed that he had ground for divorce. *Schutte v. Schutte* also involved the analogous question whether it was cruelty to institute a lunacy proceeding which subsequently failed for want of proof. The court's holding that the charge of insanity was not cruelty because the proceeding was instituted in good faith is obviously based on better reasoning than its dictum in the same case that an unsubstantiated charge of prostitution in a divorce proceeding is cruelty even though it was made in good faith.

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182 90 W. Va. 491, 493, 111 S. E. 334 (1922). For another case in which the wife's accusation was held not to be cruelty, see Huff v. Huff, 73 W. Va. 330, 30 S. E. 346 (1914).
183 Note (1927) 51 A. L. R. 1188.
185 *Id.* at 789.
In order to constitute cruelty it is not necessary that the conduct of one spouse be the direct cause of the other's mental suffering. It is enough that he indirectly cause it by exposing the other to conditions which actually occasion the suffering. Thus, the husband's arbitrary selection of a domicile where the wife is subjected to the domination of his relatives or to actual violence at their hands is cruelty if there is threatened bodily injury or impairment of health.

There is much variety in the conduct which our court has held not to be cruelty, either because in the particular case it entailed no danger to health or because it was not considered serious enough to be recognized as basis for mental cruelty though in fact it may have caused mental suffering. The cases decided on the latter ground merely reflect the court's policy against too great freedom of divorce. In view of the trend toward greater liberality of divorce as evidenced both by the legislative revision of our divorce statute in 1935 and by some of the more recent decisions, it is not unreasonable to anticipate that the court will in time recognize as basis for mental cruelty conduct which heretofore has been considered not serious enough to be ground for divorce. In any event, this possibility should be borne in mind in a consideration of these cases.

It has already been seen that denial of sexual intercourse is neither desertion nor justification for desertion, and it is equally well settled that such denial does not constitute cruelty. The court's holding that degenerate and unnatural sexual conduct is not ground for divorce, which of course means that it is not cruelty, seems wholly unsound. It is difficult to conceive conduct better calculated to occasion mental distress to a normal person.

It has been held in several cases that mere expression of hatred or disavowal of love is not cruelty. It is also settled that

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169 Beuhring v. Beuhring, 111 W. Va. 135, 161 S. E. 25 (1931) (cruelty justifying the wife in leaving so that the husband was guilty of constructive desertion). For other cases of cruelty as basis for constructive desertion see ante pp. 215-217.
170 ante pp. 204-206, 214, which see for discussion of the problem whether such refusal should be ground for divorce.
"mere incompatibility constitutes no ground for divorce".\textsuperscript{192} Similarly, neglect or failure to support is not cruelty, though it may be if it causes or threatens impairment of health.\textsuperscript{193}

As will be seen later habitual drunkenness is one of the separate grounds for divorce.\textsuperscript{194} Although drunkenness which is not habitual is not itself ground for divorce and hence is not cruelty, it is no excuse for cruelty\textsuperscript{195} and physical or mental suffering caused by the drunkenness will be ground for divorce.\textsuperscript{196}

The party seeking divorce must of course sustain the burden of proving cruelty by a preponderance of the evidence.\textsuperscript{197} When the trial court has found on conflicting evidence that cruelty did or did not exist, the appellate court ordinarily "will refuse to reverse, although it might have rendered a different decree. . . . in the first instance."	extsuperscript{198} If, however, the finding is against a clear preponderance of evidence, it will be set aside on appeal.\textsuperscript{199}

As will be recalled, our statute requires that divorce cases be tried independently of the admissions of the parties in the pleadings or otherwise.\textsuperscript{200} At first blush it would appear that this statute was violated in two cases where much weight was given to the fact that the defendant had admitted his guilt of cruelty by executing a bond to keep the peace. In one of the cases the court said:

"This writing is a clear admission upon his part that he had been guilty prior thereto of breaches of the peace toward the plaintiff, and is a solemn admission by him of the falsity of the evidence he has given upon this hearing."\textsuperscript{201}

\textsuperscript{192} Wills v. Wills, 74 W. Va. 709, 711, 82 S. E. 1092 (1914). And see Herbeck v. Herbeck, 107 W. Va. 36, 146 S. E. 881 (1929), where the court reversed a decree granting a divorce for cruelty on evidence which showed only that the parties as the plaintiff alleged were "not temperamentally suited to each other."

\textsuperscript{193} Maxwell v. Maxwell, 69 W. Va. 414, 421, 71 S. E. 571 (1911).

\textsuperscript{194} \textit{Infra at 306.}

\textsuperscript{195} See Maxwell v. Maxwell, 69 W. Va. 414, 417, 71 S. E. 571 (1911).

\textsuperscript{196} Watson v. Watson, 112 W. Va. 77, 78, 163 S. E. 768 (1932).

\textsuperscript{197} Deusenberry v. Deusenberry, 82 W. Va. 135, 138, 95 S. E. 665 (1918).

\textsuperscript{198} Harwood v. Harwood, 112 W. Va. 344, 347, 164 S. E. 290 (1932).

\textsuperscript{199} Rice v. Rice, 88 W. Va. 54, 106 S. E. 237 (1921); White v. White, 106 W. Va. 680, 687, 146 S. E. 720 (1929).

\textsuperscript{200} W. Va. REV. CODE (1931) c. 48, art. 2, § 11.

\textsuperscript{201} Rice v. Rice, 88 W. Va. 54, 57, 106 S. E. 237 (1921). \textit{Accord:} White v. White, 106 W. Va. 680, 686, 146 S. E. 720 (1929). Although it did not clearly appear from the facts stated in Rice v. Rice that the writing executed by the defendant was a formal bond to keep the peace, it was referred to as such in White v. White where the court cited the Rice case as authority for the proposition than an admission of cruelty made in a bond to keep the peace is admissible in a divorce case.
Despite this apparent disregard of the statute, in view of the fact that the sole purpose of the legislature was to prevent the procurement of divorces through collusion and of the further fact that there is little danger of collusion through execution of a bond to keep the peace, the soundness of the court's position is obvious.

In pleading it is not necessary to charge cruelty in the language of the statute. As was said in one case, the bill is sufficient if

"The facts alleged as constituting cruel and inhuman treatment were charged with such reasonable certainty as to enable defendant to meet them at the trial. This is all that good pleading requires in any case, whether it be divorce or otherwise."\(^{202}\)

5. Habitual drunkenness. Although habitual drunkenness was formerly ground only for a divorce from bed and board, in the 1935 revision it was provided that an absolute divorce may be granted

"(e) For habitual drunkenness of either party subsequent to the marriage. . . ."\(^{203}\)

It is interesting to note that until quite recently the statutory provision was that a divorce could be decreed "where either party after marriage becomes a habitual drunkard."\(^{204}\) Under this former statute it was necessary to determine whether the guilty spouse was to the knowledge of the other an habitual drunkard before marriage. If so, apparently there was no ground for divorce.\(^{205}\) If, however, the habitual use of intoxicants began after the marriage, a divorce would be granted.\(^{206}\) The court has not yet had occasion to construe the present statute, but it would seem that drunkenness prior to marriage is now immaterial, it being sufficient to show that it has since the marriage been habitual.

\(^{204}\) W. Va. Code (Barnes, 1923) c. 64, § 6 (italics supplied).
\(^{205}\) Stuart, Adm'r v. Neely, Adm'r, 50 W. Va. 508, 512, 40 S. E. 411 (1901). In this case the question was whether the wife was guilty of desertion and thus had forfeited her dower rights. It was held that she was not because the husband's habitual drunkenness, of which she had no notice prior to the marriage, was ground for divorce and hence was justification for her desertion.
\(^{206}\) Mann v. Mann, 96 W. Va. 442, 123 S. E. 394 (1924).
6. Drug addiction. No case was found dealing with this last ground for divorce. The language of the statute is again so clear as to render comment unnecessary:

"A divorce ... may be decreed:

"(f) For the addiction of either party, subsequent to the marriage, to the habitual use of opium, morphine, cocaine or other like drug."\(^{207}\)

III. DEFENSES

1. Delay in filing suit. It is clear that the general statute of limitations has no application to divorce proceedings. As was said in one West Virginia case,

"The remedy for divorce is in equity, not at law ... Divorce being the subject of equity cognizance, in the absence of any statute only principles of delay or laches in the bringing of the suit could apply."\(^{208}\)

There is only one statutory reference to the time in which suit for divorce must be brought. This is found in the provision that no divorce may be granted on the ground of adultery committed more than three years before the filing of the suit.\(^{209}\) It should be noted, however, that this three year requirement is not strictly a statute of limitations but is more in the nature of a condition precedent to divorce for adultery. This is illustrated by the recent case in which a divorce was refused because it had "not been made


\(^{208}\) Kittle v. Kittle, 86 W. Va. 46, 50, 102 S. E. 799 (1920).

\(^{209}\) "No divorce for adultery shall be granted on the uncorroborated testimony of a prostitute, or a partieps criminis, or when it appears that the parties voluntarily cohabited after the knowledge of the adultery, or that it occurred more than three years before the institution of the suit; nor shall a divorce be granted for any cause when it appears that the suit has been brought by collusion, or that the offense charged has been condoned, or was committed by the procurement or connivance of the plaintiff, or that the plaintiff has, within three years before the institution of suit, been guilty of adultery not condoned." W. Va. REV. CODE (1931) c. 48, art. 2, § 14. This section has been quoted in full in order to show that it covers the four well recognized defenses of collusion, condonation, connivance and recrimination. Formerly the section applied only to suits for divorce on the ground of adultery but in 1931 it was amended so as to apply to all divorce actions. That the amendment was intended to be only a declaration of existing law is apparent from the Revisers' Note. This makes the statute of little value in determining whether particular conduct is a bar to divorce. Consequently, it is necessary to turn to the cases for the definition and development of these various defenses.
to appear affirmatively that the acts of adultery complained of occurred within three years.\textsuperscript{210}

2. Unclean hands. In addition to recognizing the regular defenses of collusion, condonation, connivance and recrimination which will be considered later, our court has often applied the equitable doctrine of unclean hands as a bar to divorce. In Hall \textit{v. Hall}, the first case in which this was done, the court said:

"To obtain relief in a court of equity, the plaintiff must come with clean hands, and this maxim applies in divorce cases as well as in others of equitable cognizance. This is the principle underlying the defenses of connivance, collusion and recrimination, everywhere recognized and permitted."\textsuperscript{211}

As has already been seen this doctrine was used in Hall \textit{v. Hall} and in Hamilton \textit{v. Hamilton}\textsuperscript{212} to relax the rule that no misconduct short of ground for divorce would justify desertion.\textsuperscript{213} Note, however, that it is applicable to suits for divorce on any ground.\textsuperscript{214} It should also be observed that though the doctrine of unclean hands is said to be the basis of three of the four regular defenses, it is by no means limited to cases in which one of those defenses is present. In fact it is ordinarily resorted to only in cases where there is no other bar to relief.

In Edwards \textit{v. Edwards} the court intimates by way of dictum that a divorce may be refused even though the inequitable conduct has no causal relation to the ground for divorce.\textsuperscript{215} Recently, however, this was expressly repudiated in Hatfield \textit{v. Hatfield} where after reviewing the decisions the court said:

\textsuperscript{210} Brown \textit{v. Brown}, 111 W. Va. 324, 326, 161 S. E. 555 (1931). This case also illustrates the rule that a divorce for adultery will not be granted on the uncorroborated testimony of the \textit{particeps criminis}.

Query whether the one seeking a divorce must make its "appear affirmatively" that none of the defenses, which were mentioned in the statute quoted in the last note, is present. In view of the fact that the statute was intended only to be declaratory, it seems unlikely that the court would construe it so as to impose this extraordinary duty on the plaintiff. That the problem is raised, however, throws some doubt on the assertion of the Revisers that the inclusion of the new matter in the statute, though it was already law, "can do no harm, and may do good."

\textsuperscript{211} 69 W. Va. 175, 179, 71 S. E. 103 (1911).

\textsuperscript{212} 87 W. Va. 534, 105 S. E. 771 (1921).

\textsuperscript{213} \textit{Ante} at 213.


\textsuperscript{215} 106 W. Va. 446, 457, 145 S. E. 813 (1928).
"Thus, we find that in each of the cases in which petitioner’s relief has been barred by reason of ‘inequitable conduct’, there has been a causal relation between such conduct and the offense charged... Of course, where respondent’s offense is in no manner connected with misconduct of the petitioner, and that misconduct is insufficient on which to base a ground for divorce, then petitioner’s misconduct will not bar his relief."216

Upon a finding that the husband’s misconduct had not "caused or contributed" to his wife’s adultery, he was granted a divorce.

3. Collusion. The gist of this defense is "agreement between the parties whereby they seek to obtain a divorce by an imposition on the court." In one of our first divorce cases it was said:

"It must not be lost sight of that the state must be regarded as a party to all such suits... and it is the duty of the court, as far as may be, to see to it that there is no collusion; no suppression of evidence; in a word, no divorce by agreement, or otherwise, in violation of the statute."218

It has already been pointed out in another connection219 that in order to guard against collusion the legislature has provided that the bill shall not be taken for confessed, that the case shall be tried independently of the admissions of the parties and that a divorce shall not be granted on the uncorroborated testimony of the parties; and further that the court may in its discretion appoint a divorce commissioner who shall "take all necessary steps to prevent fraud and collusion in divorce cases." Whenever it appears that the parties have through concerted action attempted to impose a fraud on the court or to obtain a divorce by agreement, the court may of its own motion dismiss the bill for collusion.222

4. Condonation. Forgiveness of past misconduct amounting to a ground for divorce constitutes condonation and bars the right to a divorce for the condoned offense. Obviously condonation "im-

216 113 W. Va. 135, 144, 167 S. E. 89 (1932). In this same case on a former appeal, the court had reached the opposite conclusion. Hatfield v. Hatfield, 109 W. Va. 212, 216, 153 S. E. 493 (1930).
217 MADDEN, op. cit. supra n. 160, § 89, which see for a more detailed treatment than will be here attempted.
219 ante at 125.
221 Id. § 24.
222 See Bacon v. Bacon, 68 W. Va. 747, 749, 70 S. E. 762 (1911).
plies knowledge of the offense committed. Since forgiveness of known misconduct will deprive the injured party of his right to relief, he is under no duty to accept an offer of reconciliation and thus condone the other’s offense. This should be distinguished from the rule in desertion cases which requires the acceptance of a bona fide offer of reconciliation made before the desertion period is complete. The distinction is that in the desertion case there is no right to a divorce whereas in a case involving condonation the right has already accrued.

Condonation is conditioned upon the offender’s subsequent good behavior, and if this condition is broken, the condoned offense is revived. Though in all the West Virginia cases so holding the conduct condoned was cruelty which was revived by subsequent unkindness, the principle of conditional condonation is not thus limited. It is generally held that any condoned offense may be revived by subsequent adultery, desertion or cruelty, and in the latter case it is not necessary that the acts of cruelty be so serious as to constitute ground for divorce. There is probably one exception in this state to the general rule of conditional condonation. In view of the statutory provision that ‘‘no divorce for adultery shall be granted . . . when it appears that the parties voluntarily cohabited after the knowledge of the adultery,’’ it is doubtful that there can be conditional condonation of adultery, the court having said in a recent case that such cohabitation ‘‘is a conclusive defense.’’

Although condonation or forgiveness may be proved by an express agreement, it is more often inferred from the conduct of

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223 Madden, op. cit. supra n. 160, at 305. And see W. Va. Rev. Code (1931) c. 48, art. 2, § 14, where provision is made for condonation of adultery by voluntary cohabitation ‘‘after the knowledge of the adultery’’. This necessary element of knowledge should be read into the following language dealing with condonation in general.

224 Rice v. Rice, 88 W. Va. 54, 60, 106 S. E. 237 (1921).

225 Ante at 208.


227 Madden, op. cit. supra n. 160, at 301-303, and authorities there cited.


229 Deussenberry v. Deussenberry, 115 W. Va. 604, 606, 177 S. E. 440 (1934). If the court should see fit, however, there would seem to be no reason why it should not read into the statute the general rule that condonation is always conditional.

230 Rice v. Rice, 88 W. Va. 54, 106 S. E. 237 (1921) (formal written agreement followed by resumption of cohabitation).
the aggrieved party. Thus, resumption or continuation of cohabitation after knowledge of the offense is condonation. 231 It should be noted that although the literal meaning of the word "cohabit" is to live together, usually its legal meaning in divorce cases is to have sexual intercourse, and for purposes of condonation it is generally held that a single voluntary act of intercourse is sufficient. 232 The important element of condonation is the intent to forgive which is easily inferred from voluntary intercourse, but this intent is not so readily inferred from the mere fact that the parties continue to live together. If the presumption of intercourse which arises from this fact is rebutted, and if the living together is reasonably explained on some theory other than that there was an intent to forgive, as by showing that the wife remained in the home in order to care for her children, there is no condonation. 233 Further it was held in Norman v. Norman 234 that intercourse itself is not necessarily condonation. In that case it was clear that the wife, who was recuperating from a severe beating by her husband, had no intent to forgive and submitted only because she was physically too weak to resist.

5. Conivance. This defense consists of corrupt consent by one spouse to an offense by the other and includes an element of passive encouragement or active procurement. 235 It has arisen most often in cases of adultery. Although it is hard to draw the line between passive conduct amounting to mere submission which is all right and passive conduct encouraging the offense which will bar the right to divorce, this statement by the Massachusetts court is helpful:

"He [the husband] may properly watch his wife, whom he suspects of adultery, in order to obtain proof of that fact. He may do it with the hope and purpose of getting a divorce, if he obtains sufficient evidence. He must not, however, make opportunities for her, though he may leave her free to follow opportunities which she has herself made. He is not obliged to throw obstacles in her way, but he must not smooth her path to the adulterous bed." 236

235 MADDEN, op. cit. supra n. 160, § 88.
In the only West Virginia case involving connivance of adultery, the attempt to procure commission of the offense was unsuccessful, but the court said that had it been successful, the right to a divorce would have been barred.\footnote{Nicely v. Nicely, 81 W. Va. 269, 275, 94 S. E. 749 (1917).} Despite occasional statements by our court that one will not be permitted to take advantage of an offense which he has caused or encouraged,\footnote{See, for example, Crouch v. Crouch, 78 W. Va. 708, 712, 90 S. E. 235 (1916).} there have been no other cases dealing with the defense of connivance as such. Relief has been denied on other grounds, as that a separation which was encouraged is not desertion because consented to,\footnote{Ante at 210.} or that encouragement of an offense in such inequitable conduct as to call for application of the clean hands doctrine.\footnote{Supra at 308.} No doubt, should a case arise in which one party had encouraged or procured the other's addiction to drink or drugs, the court would refuse relief under our statutory provision that no divorce shall be granted when "the offense charged . . . was committed by the procurement or connivance of the plaintiff."\footnote{W. Va. Rev. Code (1931) c. 48, art. 2, § 14.}

6. Recrimination. According to the doctrine of recrimination, if both parties have a right to divorce, neither has. Thus, in Morris v. Morris the husband was denied a divorce for the wife's desertion because he had been guilty of adultery.\footnote{W. Va. Rev. Code (1931) c. 48, art. 2, § 14.} Note that corresponding to the rule that adultery is ground for divorce only if committed within three years of the filing of the suit is the statutory provision that it may not be used as a recriminatory defense unless committed within three years.\footnote{113 W. Va. 800, 169 S. E. 475 (1933).}

Hatfield v. Hatfield,\footnote{". . . nor shall a divorce be granted . . . when it appears . . . that the plaintiff has, within three years before the institution of suit, been guilty of adultery not condoned." W. Va. Rev. Code (1931) c. 48, art. 2, § 14.} in which the defense of unclean hands was limited to cases where there was a causal relation between the inequitable conduct and the ground for divorce, contains by way of dictum a full and instructive discussion of the doctrine of recrimination. It was stated that historically it is an off-shoot of the general equitable defense of unclean hands. Tracing the doctrine of recrimination from its beginning, the court pointed out that recently a few states have shown a tendency to relax the original

\footnote{113 W. Va. 135, 167 S. E. 89 (1932).}
strict rule. Having raised a query as to the desirability of this tendency, Judge Lively, who before had been speaking for the court, said that in view of the legislative recognition of the defense of recrimination, his discussion would reflect only his own personal view and was "not to be considered as a pronouncement of the court." He then proceeded to question the soundness of the whole doctrine of recrimination. His language is so forceful and so convincing that it is worth while to quote at length:

"... we must not lose sight of the fact that the parties in a divorce proceeding differ from those in the ordinary civil suit or action. In the former cause, the state looks to the trial chancellor as a protector of its interest in an orderly society, in the welfare of the children which might be affected by a divorce decree, as well as the welfare of every citizen; hence, it would seem [that] a strict application of the clean hands doctrine, without more, is merely a punishment of the litigants and omits consideration of the interests of those [who are] innocent but who are adversely affected by a decree which leaves the parties in the situation where they have placed themselves. Divorce is the climax of domestic discord; the affections which united the parties in marriage have disappeared and hate and disharmony have loomed in their places. To compel two persons to live together under such circumstances would seem to do violence to the moral sensibilities of an enlightened age.... Is not the interest of society generally best subserved by a dissolution of the marital status and the possibility of future respectability through re-marriage rather than a pretended legal cohabitation attended by probable promiscuity to satisfy the human passions? Courts which administer the divorce laws should not close their eyes to the physiological and sociological imperfections of mankind."

As an a priori proposition, one would hardly suppose that extended argument would be necessary in support of a rule that would allow a divorce when both husband and wife have been guilty of conduct constituting ground for divorce. It is difficult for the legal mind, and even more so for the lay mind, to appreciate the rule that when there are two reasons for granting a divorce, no

245 Id. at 141. The specific reference was to the legislative recognition of adultery as a recriminatory defense. It might be argued that by expressly providing for adultery as a defense by way of recrimination the legislature intended to exclude all other grounds, but it is apparent from this statement of the court that the doctrine is not so limited: "To constitute recrimination... the conduct relied upon... must... constitute ground for divorce." Id. at 142. This argument might be used, however, if the court should wish to modify its strict rule.

246 Id. at 141.
reason at all exists. In any attempt to determine why the courts ever adopted the paradoxical doctrine of recrimination, one is forced to the conclusion "that this doctrine has been accepted without adequate consideration." 247 It is unfortunate that the rule is so firmly imbedded that our court was unwilling to concur in Judge Lively's reexamination of the reasons for and his criticism of the doctrine. As he clearly demonstrated, a realistic and sociological approach to the problem, which takes into consideration not only the interests of the litigants themselves but also all other interests involved, can lead to no other conclusion than that the rule should be so changed as to meet the requirements of existent social conditions.

Although worthy of consideration in the study of all problems connected with divorce, this recent statement is of particular pertinency in a discussion of recrimination:

"Divorce is an effect, not a cause. It is a symptom, not the disease. It is safe to assert, except in the most attenuated institutional sense, that divorce never broke up a single marriage. It is adultery, cruelty, desertion, drunkenness, incompatibility, the decay or transfer of affection, and the like that destroys marriages . . . . It is only when every other marriage tie has been severed, after the parties have discontinued their marital relations, and have gone their separate ways, when the marriage actually has no longer any existence in fact, that persons resort to the divorce court in order that the remaining artificial bond, created by the law, may be dissolved by the law also." 248

Without following the implications of this language to the extent of advocating the removal of all restrictions on divorce, one may certainly go so far as to advocate removal of a restriction, which like the doctrine of recrimination, finds its justification in precedent rather than in its contribution toward the satisfactory ordering of domestic relations under modern social conditions.

It should be noted that all that can be said against the doctrine of recrimination applies with equal, if not greater, force to our court's recognition of the defense of unclean hands, by which an otherwise valid right to divorce is barred by misconduct less than ground for divorce. 249 Although the limitation placed on the

247 Note (1926) 26 Col. L. Rev. 83, 84.
248 Lichtenthaler, Divorce, A Social Interpretation (1931) 16.
249 The West Virginia doctrine of unclean hands and the general doctrine of recrimination were criticized in a recent Note (1931) 20 Mich. L. Rev. 232.
defense of unclean hands in *Hatfield v. Hatfield* was a step in the right direction, in view of the legislature’s recognition of recrimination as a defense and the consequent unwillingness of the court to question the doctrine, there is little reason to expect a change in our law unless by legislative action. It is to be hoped, then, that the legislature will see fit to remove this restriction which now prevents the court, even after all hope of reconciliation is doubly gone, from decreeing legal dissolution of a marriage which in all but form has been dissolved already.*

* A discussion of alimony, suit money, and custody of children as involved in suits for divorce will appear in a later issue.