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## THE REVISED DIVORCE LAW OF WEST VIRGINIA

Divorce by judicial decree had its origin in the ecclesiastical law of England. The abolition of the common law ecclesiastical system in this country<sup>1</sup> called for some new scheme of granting "legal separation" to the parties. Some jurisdictions turned to legislative divorces, but this was found to be highly impractical.<sup>2</sup> In West Virginia divorce has always been governed by statute,<sup>3</sup> which is regarded as amendatory neither of the common law nor the ecclesiastical law, but a full and complete disposition of the subject.<sup>4</sup>

## I

Recent legislation<sup>5</sup> has materially altered the divorce law of this jurisdiction. The provisions revised are concerned with the type of divorce, the grounds therefor and the restrictions on remarriage. Various other sections of the divorce law have been altered,<sup>6</sup> as an incident to the major revisions, simply for clarity.

The ancient divorce *a mensa et thoro* has been abolished. This divorce seems to have been well established, not only in this but in other states. In Virginia,<sup>7</sup> the District of Columbia<sup>8</sup> and Maryland<sup>9</sup> the divorce from bed and board still exists as a separate institution from a divorce from the bond of matrimony and procurable on different grounds. In most states, however, the distinction between the two is wholly dispensed with and, in some, though the divorce from bed and board is retained, it is used largely in lieu of a suit for separate maintenance.<sup>10</sup>

West Virginia has a statute that provides for separate maintenance<sup>11</sup> which is available although no divorce is pending. In view of this statute and the fact that many evils have resulted from the continuation of the divorce from bed and board, the West Vir-

<sup>1</sup> See opinion of Chancellor Tucker in *Selden v. Overseers of the poor of Loudon*, 11 Leigh 127 (Va. 1849).

<sup>2</sup> See W. VA. CONST. art. 6, § 39, prohibiting legislative divorces.

<sup>3</sup> W. VA. CODE (1868) c. 64.

<sup>4</sup> *Boger v. Boger*, 86 W. Va. 591, 593, 104 S. E. 49 (1920).

<sup>5</sup> S. B. No. 47, Reg. Sess. 1935.

<sup>6</sup> W. VA. REV. CODE (1931) c. 48, art. 2, § 15, 18, 19 and 29.

<sup>7</sup> W. VA. CODE ANN. (Michie, 1930) c. 205, §§ 5103-5104.

<sup>8</sup> D. C. CODE (1924) c. 22, § 966.

<sup>9</sup> MD. CODE ANN. (Bagby, 1924) §§ 38-39.

<sup>10</sup> PA. STAT. (West, 1920) §§ 9154-9155, (Supp. 1928) § 9140; OHIO GEN. CODE ANN. (Page, 1926) § 11979; KY. STAT. (Carroll, 1930) § 2117.

<sup>11</sup> W. VA. REV. CODE (1931) c. 48, art. 2, § 29.

ginia Bar Association adopted a report recommending the abolition of bed and board divorces.<sup>12</sup>

In *Boger v. Boger*,<sup>13</sup> the court decided that unless the injured party after acquiring a divorce from bed and board desired a divorce from the bond of matrimony, the guilty party was without remedy. This meant that an injured party could wilfully bar the guilty spouse from remarriage. Every ground for a divorce from the bond of matrimony could, moreover, at the option of the injured party, be used to obtain a divorce from bed and board.<sup>14</sup> The situation was aggravated by the recognition of a divorce from the bond of matrimony obtained by the guilty party in another jurisdiction,<sup>15</sup> which devitalized the *Boger* decision where the guilty litigant was financially able to secure the foreign decree. In short, this condition was considered the major defect in the old law.<sup>16</sup>

Another objection to bed and board divorces was rested upon illegal marriages with third parties after a decree. This was confined, however, to a class of litigants which misunderstood the effect of the divorce.<sup>17</sup>

## II

The abolition of the divorce from bed and board necessitated a restatement and revision of the grounds for divorce. Adultery and conviction of felony after marriage as grounds for a divorce from the bond of matrimony remain unaltered. Formerly a divorce from bed and board could be obtained on the ground of desertion without reference to the period of the desertion, while the statute required a fixed period of three years as ground for a divorce from the bond of matrimony. The present law simply reduces this period from three to two years. The other grounds for a divorce from bed and board, namely, cruel treatment, habitual drunkenness and addiction to use of drugs, have been made grounds for a permanent divorce.

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<sup>12</sup> Report of Committee on Judicial Administration and Legal Reform, W. VA. BAR ASS'N REP. (1934) 104-114.

<sup>13</sup> *Boger v. Boger*, *supra* n. 4.

<sup>14</sup> W. VA. REV. CODE (1931) c. 48, art. 2, § 35.

<sup>15</sup> *Campbell v. Switzer*, 74 W. Va. 509, 82 S. E. 319 (1914).

<sup>16</sup> For an excellent discussion of the problem see Riley, *Divorce Under the 1931 Code*, W. VA. BAR ASS'N REP. (1932) p. 39, 48.

<sup>17</sup> For other objections to the continuation of the divorce from bed and board, see report to Bar Ass'n *supra* n. 12.

As the grounds of adultery and conviction of felony remain unchanged, no subsequent interpretation of the decisions thereunder will be required. To the extent that grounds for a divorce from bed and board have been made grounds for a divorce from the bond of matrimony, the courts may be expected to re-examine the decisions thereunder and require a high degree of proof to permit recovery.<sup>18</sup>

The ground of desertion has been dealt with in numerous decisions. In *Horkheimer v. Horkheimer*<sup>19</sup> desertion is defined as the voluntary separation without justification of one spouse from the other with intent to terminate the marriage relation. To warrant an absolute divorce the desertion must be continuous;<sup>20</sup> two independent periods of desertion cannot be combined to meet the statutory requirement.<sup>21</sup>

The court held in *Perine v. Perine*<sup>22</sup> that there might be desertion even though the parties remain in the same house, provided they maintain separate rooms and all marital relations cease. Other aspects of the subject, such as the degree of wilfulness<sup>23</sup> and the justification for the desertion,<sup>24</sup> will doubtless require re-examination by the courts.

Though desertion has always been a ground for an absolute divorce the other grounds under the new statute were formerly simply the basis for bed and board decrees. Decisions in cases involving those grounds were, doubtless, influenced by the fact that the divorce was not absolute<sup>25</sup> and the parties could have another day in court.

The ground of cruelty may be divided into three classes: (1) cruel or inhuman treatment, (2) reasonable apprehension of bodily hurt, and (3) a false charge of prostitution made by the husband

<sup>18</sup> For example, the ground of desertion for an absolute divorce is for a less period than that in adjacent states, except Kentucky and Pennsylvania. See notes 7, 9 and 10, *supra*.

<sup>19</sup> 106 W. Va. 634, 146 S. E. 614 (1929).

<sup>20</sup> *Vickers v. Vickers*, 95 W. Va. 322, 122 S. E. 279 (1923).

<sup>21</sup> *Burk v. Burk*, 21 W. Va. 445, 453 (1923).

<sup>22</sup> W. Va. 530, 146 S. E. 871 (1922); *Croll v. Croll*, 106 W. Va. 691, 146 S. E. 880 (1929).

<sup>23</sup> *Horkheimer v. Horkheimer*, *supra* n. 19.

<sup>24</sup> *Dawkins v. Dawkins*, 72 W. Va. 789, 792, 79 S. E. 822 (1913); *Perine v. Perine*, *supra* n. 22.

<sup>25</sup> While a divorce from bed and board is not absolute, it operates upon the rights and legal capacities of the parties the same as a divorce from the bond of matrimony. W. VA. REV. CODE (1931) c. 48, art. 2, § 16; and see revisers' note thereto.

against the wife. In *Maxwell v. Maxwell*<sup>26</sup> the test of cruel or inhuman treatment was stated to be whether under all the facts proven, the plaintiff could with safety to person and health continue to live with the defendant; while in a later case<sup>27</sup> the court goes further and requires evidence of personal violence. To state the matter plainly, however, as indicated in *White v. White*,<sup>28</sup> cruel and inhuman treatment is, like negligence, a relative term, which takes meaning in application to the circumstances of each particular case.

There must be deliberate and malignant threats by one spouse to inflict serious bodily harm and the other must fear execution of the threats to entitle the latter to a divorce for reasonable apprehension of bodily hurt.<sup>29</sup> Actual physical violence is, of course, a sufficient cause.<sup>30</sup> The court permitted a revival of condoned acts of cruelty, if such acts were subsequently repeated, in *Deusenberry v. Deusenberry*<sup>31</sup> and an analogous application could be made in the case of subsequent threats.

A false charge of prostitution made by a husband against his wife as a ground for an absolute divorce, may well be regarded narrowly by the courts. It might prove a facile collusive device for people of unrefined sensibilities. In *Schutte v. Schutte*<sup>32</sup> a charge of adultery was not deemed sufficient.<sup>33</sup> A husband cannot obtain a divorce on a charge of adultery made against him by his wife.<sup>34</sup> In *Dayton v. Dayton*,<sup>35</sup> however, the court granted a divorce from bed and board to the wife on an accusation that she was out in the woods at night for immoral purposes. The husband admitted that his accusation was based solely on suspicion and on trial the wife proved its falsity. This decision should be confined

<sup>26</sup> 69 W. Va. 414, 71 S. E. 571 (1911).

<sup>27</sup> *Smailes v. Smailes*, 171 S. E. 835 (W. Va. 1933).

<sup>28</sup> 106 W. Va. 680, 686, 146 S. E. 720 (1929).

<sup>29</sup> *Lord v. Lord*, 80 W. Va. 547, 92 S. E. 749 (1917).

<sup>30</sup> *Rice v. Rice*, 88 W. Va. 54, 106 S. E. 237 (1921). The courts have been lenient as to the amount of physical violence necessary to obtain a bed and board divorce; since, however, such cause is now a ground for a permanent divorce the courts will undoubtedly require a greater amount of physical violence.

<sup>31</sup> 82 W. Va. 135, 95 S. E. 665 (1918).

<sup>32</sup> The court distinguishes between adultery and prostitution. 90 W. Va. 787, 793, 111 S. E. 850 (1922).

<sup>33</sup> *Boos v. Boos*, 93 W. Va. 727, 117 S. E. 616 (1923).

<sup>34</sup> *Roush v. Roush*, 90 W. Va. 419, 111 S. E. 334 (1922).

<sup>35</sup> 107 W. Va. 299, 148 S. E. 118 (1929).

to its facts; an absolute divorce should not, it is believed, be granted on such evidence alone. The ground can generally, however, be restricted by requiring that the charge of prostitution be made not only to the wife but to others and by demanding strict proof of the accusation.

Habitual drunkenness after marriage has not been a common ground for a divorce in this jurisdiction. In only one case, *Mann v. Mann*,<sup>36</sup> has the statute been applied and there the court implied *obiter* that if the party seeking the divorce had contributed to the formation of the habit, the divorce would not have been granted.<sup>37</sup> It has been held that drunkenness, not habitual, does not excuse cruelty which is cause for a divorce.<sup>38</sup> In some jurisdictions the period of habitual drunkenness establishing the right to divorce is fixed by statute.<sup>39</sup>

The addiction of either party, after marriage, to use of opium, cocaine or other like drugs as a ground for divorce is of recent origin in this jurisdiction.<sup>40</sup> This personal fault is as serious a basis for divorce as habitual drunkenness but legal recognition of the fact was left by the courts to the legislatures.<sup>41</sup> The West Virginia enactment will require judicial interpretation. What constitutes addiction to drugs is a variable matter. *Ejusdem generis* may be deemed to restrict "other like drugs" to narcotics.

#### IV

The restrictions on remarriage have been liberalized. Under the former statute neither party could remarry for six months, the court at its discretion could impose a greater restriction on the guilty party and in adultery a five year restriction was imposed by statute on that party. The statute now provides that neither

<sup>36</sup> 96 W. Va. 442, 123 S. E. 394 (1924).

<sup>37</sup> "If there was any domestic cause which contributed to the formation of the habit and for which the wife was chargeable it does not appear in the record and there is no suggestion that she was the cause." *Mann v. Mann*, *supra* n. 36, at 446.

<sup>38</sup> *Maxwell v. Maxwell*, *supra* n. 26, at 417.

<sup>39</sup> See Kentucky statute requiring at least one year of habitual drunkenness and the Ohio statute requiring three years, *supra* n. 10.

<sup>40</sup> This ground was added by the revisers in 1931, W. VA. REV. CODE (1931) c. 48, art 2, § 6. It has not been considered by the Supreme Court of Appeals.

<sup>41</sup> See, refusing to grant a divorce on ground of cruelty where sole evidence was habitual use of drugs by the defendant *Smith v. Smith*, 7 Boyce 233, (Del. Super. 1919); *Ring v. Ring*, 118 Ga. 183, 44 S. E. 861 (1903). The ground of habitual drunkenness does not embrace habitual use of drugs. *Haynes v. Haynes*, 86 Fla. 350, 98 So. 66 (1919).

party shall remarry, anyone other than the former spouse, within sixty days, or pending appeal of the case in the supreme court.<sup>42</sup> The court is granted discretion to prohibit the guilty party from remarrying within not exceeding one year from the date of the decree. The report to the Bar Association<sup>43</sup> pointed out certain flaws in the old restrictions, namely, that they were binding only on a defendant on whom personal service was obtained; that the guilty party could remarry in another jurisdiction, but if he returned he was guilty of bigamy and the issue of that marriage probably illegitimate; that the guilty party would perhaps live in adultery for five years if he did not remarry; and, that the restrictions were frequently misunderstood by the litigants. This report, which was adopted, approved a restriction confined simply to the term of court in which the divorce was obtained.

The present statute though not as liberal as the report, is an adoption of the policy reflected therein. Since the public is vitally concerned in the institution of marriage, the problem of restrictions on remarriage after divorce is merely one of legislative policy. Neighboring jurisdictions have not generally placed restrictions on such remarriages.<sup>44</sup> While the policy was at one time toward restrictions in this jurisdiction,<sup>45</sup> a contrary policy is now reflected in the revised statute.<sup>46</sup>

## V

While numerous minor revisions are made in the divorce law, most of these were rendered necessary to clarify and conform these sections to the major amendments. It should be noticed, however, that the statutory method of maturing such suits has been dispensed with and such suits will now mature as other chancery causes. The provision requiring the divorce commissioner to have a thirty day notice before trial is still in force.

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<sup>42</sup> A subsequent remarriage would be void where the supreme court afterwards reversed the former divorce decree. See Note (1921) 7 VA. L. REV. (N. S.) 92, 94.

<sup>43</sup> See report to Bar Ass'n, *supra* n. 12, at 105.

<sup>44</sup> Only Virginia and Pennsylvania have restrictions. Virginia places a six months prohibition on both parties, VA. CODE ANN. (Michie, 1930) § 5113. Pennsylvania prohibits the guilty party, from marriage with the correspondent where the ground is adultery so long as the former spouse is living. PA. STAT. (West, 1920) § 9191.

<sup>45</sup> See *Hall v. Baylous*, 109 W. Va. 1, 6, 153 S. E. 293 (1930), setting out the argument advanced in favor of restrictions on remarriage.

<sup>46</sup> The report of the Bar Ass'n, *supra* n. 12, sets out fully the arguments against such restrictions.

Our present statute, unfortunately, does not prescribe a method of converting a divorce from bed and board into an absolute divorce.<sup>47</sup> This omission will give rise to numerous problems.<sup>48</sup> Under the old law, it was provided that a bed and board divorce could be converted into an absolute divorce in the same suit.<sup>49</sup> As no method is provided for under the present law, the courts will perhaps require a new suit to be brought to convert the temporary decree into an absolute divorce.<sup>50</sup>

The state's policy respecting divorce is not fundamentally changed by the present revisions. While the grounds of divorce have been enlarged and the bed and board divorce has been dispensed with, there is no attempt to commercialize our divorce process. The suit for separate maintenance continues, permitting the parties to separate and remain married. The residence requirements properly remain austere to the non-resident litigant.<sup>51</sup>

—HOUSTON A. SMITH.

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<sup>47</sup> The method of converting the bed and board divorce into an absolute divorce was set out in the Code. W. VA. REV. CODE (1931) c. 48, art. 2, § 20. Under the revision, section twenty of the Code is re-enacted and now reads that the bed and board decree shall be made final "in the manner prescribed by the code of West Virginia." No other section of the Code or the present revision prescribes such method.

<sup>48</sup> Judge Charles G. Baker of the Seventeenth Judicial Circuit has suggested the following problems relative to conversion: (1) If at the time of the passage of the new act a suit was pending for a bed and board decree on the ground of less than two year desertion, can the suit be converted into one for final decree and the cause kept on the docket until a two-year period of desertion has elapsed? (2) Where a suit is pending at the time of the passage of the act and the bill prays for a bed and board decree only, should the bill be amended either before or after conversion to pray for final decree or can such a decree be entered under the prayer for general relief? (3) Where a bill is pending prior to the passage of the act which seeks a temporary decree on the ground of less than two years' desertion and the plaintiff has proof of cruelty, can he file and amended bill, alleging cruelty, prior to conversion and then have the case converted into one for final decree, or can he ask to have the suit converted on his old bill and after conversion file an amended bill showing the additional facts? (4) Where there was, at the time of the passage of the act, a decree for bed and board on the grounds of desertion and the desertion has continued for less than two years at the time of the passage of the act, can the plaintiff immediately get a decree of divorce from the bond of matrimony or must he wait until two years desertion has elapsed?

<sup>49</sup> W. VA. REV. CODE (1931) c. 48, art. 2, § 20.

<sup>50</sup> While a new suit requires new process, this is a safe method of proceeding until the question is ruled on by the Supreme Court of Appeals. See *Dixon v. Dixon*, 73 W. Va. 7, 79 S. E. 1016 (1913).

<sup>51</sup> W. VA. REV. CODE (1931) c. 48, art. 2 § 8. The plaintiff must be a bona fide citizen and have resided in the state for at least one year immediately preceding the bringing of the suit.