Chapter 6

Grounds for Divorce and Defenses

6-1. Cruel and Inhuman Treatment

The Domestic Relations Law provides that an action for divorce may be maintained by a husband or wife to procure a judgment divorcing the parties and dissolving the marriage on the ground of "the cruel and inhuman treatment of the plaintiff by the defendant such that the conduct of the defendant so endangers the physical or mental well-being of the plaintiff as renders it unsafe or improper for the plaintiff to cohabit with the defendant."[1]

6-2. Proof of Cruel and Inhuman Treatment

In Hessen v Hessen,[2] the Court of Appeals rejected a restrictive interpretation of the cruel and inhuman treatment ground and accepted the policy behind the "double standard" to the extent that financial hardship on the wife and the duration of the marriage were factors to weigh and balance in determining whether or not a divorce judgment should be entered against a wife on such ground. The court said that the hardship factor was relevant in determining the degree, scope and probable effect of misconduct between spouses. The observation was made that "An appearance of misconduct, which in a matured marriage might fail to justify a finding of substantial misconduct, but only of transient discord, may in a newer marriage justify or even compel an inference of substantial misconduct." The Court of Appeals made it clear that it rejected a restrictive interpretation of the cruel and inhuman treatment ground which was unwarranted by the statutory language and legislative history. It held that the cruel and inhuman treatment ground does not require that cohabitation be "unsafe" in addition to being "improper" nor does it permit divorce on the basis of mere incompatibility. Under the Divorce Reform Law, "it was intended that marital misconduct to constitute cruel and inhuman treatment be distinguished from mere incompatibility, and that serious misconduct be distinguished from trivial." The Court stated that the correct view would seem to permit the court below "to exercise a broad discretion in balancing the several factors in each case".

Brady v. Brady [3] is the leading case on what constitutes cruel and inhuman treatment. In Brady, Special Term granted the husband a divorce based on cruel and inhuman treatment and awarded the wife support. At the

1 Domestic Relations Law §170 (1). See Volume 1, Chapters 6 and 7, Law and the Family New York, 2d Edition Revised, for a comprehensive discussion of grounds for a divorce and defenses.

2 Hessen v Hessen, 33 NY2d 406, 353 NYS2d 421, 308 NE2d 891 (1974).

3 Brady v Brady, 101 AD2d 797, 475 NYS2d 470 (2d Dept., 1984), aff'd 64 NY2d 339, 476 NE2d 290, 486 NYS2d 891 (1985)

trial, the husband testified that on several occasions during 1976, his wife physically assaulted him. According to the husband, the wife had asked him to leave the marital home in 1977, but for the next two years, he returned home at irregular intervals. He left permanently in 1979. He further testified that after 1976 he and his wife only had sexual relations once, despite his repeated advances. The trial court concluded that this twenty-six-year marriage was a "dead marriage," and even though the assaultive acts that the husband alleged occurred in 1976 were insufficient to support a divorce on cruel and inhuman treatment, the court granted plaintiff a divorce as a matter of discretion. The Appellate Division, Second Department, modified the judgment and dismissed the cause of action for divorce, stating that such discretion cannot be exercised in a manner at variance with the established law in New York.

The Court of Appeals affirmed the Appellate Division's decision.[4] The Court held that the principles set forth in Hessen, detailing the necessary showing of cruel and inhuman treatment in a long-term marriage, are still to be followed. It observed that subsequent cases after Hessen established that a plaintiff must generally show a course of conduct by the defendant spouse that is harmful to the physical or mental health of the plaintiff, thereby making cohabitation unsafe or improper.[5] Citing Hessen, the Brady court pointed out that the determination of whether conduct constituted cruel and inhuman treatment would depend, in part, on the length of the parties' marriage, because what might be considered substantial misconduct in the context of a marriage of short duration, might only be "transient discord" in that of a long marriage.[6] Chief Judge Wachtler, writing the opinion for a unanimous Court in Brady, rejected the plaintiff's argument there was no longer any reason to require a higher showing of misconduct in a long-term marriage. As to plaintiffs' contention that the rationale for the Hessen rule had been eliminated by the equitable distribution law, the Brady Court stated that the fundamental reason for such a rule was, and remains, the commonsense notion that the conduct that the plaintiff alleged as the basis for a cause of action must be viewed in the context of the entire marriage, including its duration, when deciding whether particular actions can be properly labeled as cruel and inhuman treatment.[7] The Court stated": "Therefore, we reaffirm the holding in Hessen that whether a plaintiff has established a cause of action for a cruelty divorce will depend, in part, on the duration of the marriage in issue. The existence of a long-term marriage does not, of course, serve as an absolute bar to the granting of a divorce for cruel and inhuman treatment, and even in such a marriage "substantial misconduct" might consist of one violent episode such as a severe beating."

What is required is a showing of a course of conduct by the defendant spouse which is harmful to the physical or mental health of the plaintiff and makes cohabitation unsafe or improper. In order for the court to grant a divorce on cruelty grounds, there must be substantial evidence of cruel and inhuman treatment no matter which spouse is the plaintiff.

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4 64 NY2d 339, 476 NE2d 290, 486 NYS2d 891 (1985)

5 See Brady v Brady, 64 NY2d at 339, 476 NE2d at 290, 486 NYS2d at 891 (1985); Phillips v. Phillips, 70 AD2d 30, 419 NE2d 573 (2d Dept., 1979); Carratu v. Carratu, 70 AD2d 503, 415 NYS2d 835 (1st Dept., 1979) Bruhuber v. Bruhuber, 58 AD2d 1015, 397 NYS2d 42 (4th Dept., 1977); John W.S. v. Jeanne F.S., 48 AD2d 30, 367 NYS2d 814 (2d Dept., 1975). The applicable statute requires a finding of fault, and a showing of mere irreconcilable or irremediable differences is thereby insufficient. See Hessen, 33 NY2d at 410, 308 NE2d at 894, 353 NYS2d at 425-26 (citing NY Dom. Rel. Law 170(1) 1977).

6 See Brady v Brady, 64 NY2d at 344, 476 NE2d at 292, 486 NYS2d at 893 (1985) (citing Hessen, 33 NY2d at 411, 308 NE2d at 895, 353 NYS2d at 426-27).

7 See Brady v Brady, 64 NY2d at 344-45, 476 NE2d at 293, 486 NYS2d at 894 (1985).

6-3. Defenses - Cruel and Inhuman Treatment

The Domestic Relations Law contains no affirmative defenses to cruel and inhuman treatment. However, the defendant may show that misconduct by the plaintiff (the lure and attraction of another woman is a classic example) was the cause of his leaving the defendant wife rather than the alleged cruel and inhuman treatment of the wife.[8]

Insanity is not a defense to cruel and inhuman treatment.[9]

The Domestic Relations Law provides that no action for divorce may be maintained on a ground which arose more than five years before the date of the commencement of the action, except where abandonment or separation pursuant to agreement or judgment is the ground.[10]

Civil Practice Law and Rules 207, which suspends the running of a statute of limitations during the absence of the defendant from the state[11] applies to actions for divorce.[12] Therefore, the period of absence of the defendant from the state must be added to the ordinary five-year period for commencing an action for divorce.[13] This is so even though the plaintiff might have brought an action in rem for divorce by service by publication on the defendant.[14]

6-4. Abandonment

The Domestic Relations Law provides that an action for divorce may be maintained by a husband or wife to procure a judgment divorcing the parties and dissolving the marriage on the ground of the abandonment of the plaintiff by the defendant for a period of one or more years.[15]

The essence of abandonment is a refusal by one spouse to fulfill "basic obligations springing from the marriage contract".[16]

Abandonment as a divorce ground is not subject to the traditional divorce defenses[17] nor to the statute of limitations which applies to the adultery, cruel and inhuman treatment, and imprisonment grounds.

6-5. Proof of Abandonment

Abandonment requires proof of four elements: (1) a voluntary separation of one spouse from the other; (2) with intent not to resume cohabitation; (3) without the consent of the other spouse; and (4) without justification. [18] As a practical matter, each of these elements may involve subjective rather than objective criteria. The conduct

8 Bloom v. Bloom, 52 AD2d 1030 (4th Dept., 1976).See Walden v. Walden, 41 AD2d 664.

9 Pajak v. Pajak, 56 NY2d 394, 452 NYS2d 381.

10 Domestic Relations Law §210.

11 CPLR 207.

12 Ackerman v. Ackerman, 200 NY 72, 93 NE 192 (1910); Gouch v. Gouch, 69 Misc 436, 127 NYS 476 (1910).

13 Ackerman v. Ackerman, 200 NY 72, 93 NE 192 (1910); Hawkins v. Hawkins, 110 App Div 42, 96 NYS 804 (1905); Gouch v. Gouch, 69 Misc 436, 127 NYS 476(1910).

14 Simonson v. Nafis, 36 App Div 473, 55 NYS 449 (1899).

15 Domestic Relations Law §170 (2).

16 Mirizio v. Mirizio, 242 N. Y. 74, 81, quoted in Diemer v. Diemer, 8 N Y 2d 206, 210.

17 Maryon v. Maryon, 60 App Div 2d 623, 400 NYS2d 160 (2d Dept 1977).

18 Phoenix v. Phoenix, 41 App Div 2d 683, 340 NYS2d 977 (3d Dept, 1973), app dismd 33 NY2d 691, 349 NYS2d 672, 304 NE2d 369

of the defendant must be unjustified and without the consent of the other spouse. [19] There cannot be a mutual abandonment.[20]

6-6. Actual Abandonment

In an action for a divorce on the ground of abandonment, it is sufficient to show that the defendant has left the marital home for the requisite period, has never returned and has on several occasions told his or her spouse that he or she has no intention of returning.[21]

6-7. Constructive Abandonment

A "constructive abandonment" occurs when a spouse fails to fulfill a "basic obligation arising from the marital contract".[22] A spouse remaining at home may be guilty of constructive abandonment where the other spouse is justified in departing from the marital home or in terminating the marital relationship by reason of the conduct of the spouse remaining at home. In such cases, for example when the wife locks out the husband[23] or when the husband's abuse drives the wife from the home, the spouse who left the home is not the deserter; the spouse who caused the other to leave is instead the deserter de jure. [24]

"Constructive abandonment" also refers to a cessation of sexual relations as constituting an abandonment even though the parties may continue to live together.

The leading case on constructive abandonment based upon a cessation of sexual relations is the Court of Appeals decision in Hammer v. Hammer.[25] There, the Court of Appeals firmly established the rule that there must be a demand for sexual relations before there can be an abandonment. Appellate courts have strictly construed Hammer to require "repeated demands", and have denied a divorce where the husband's proof did not permit a finding that for at least one year he, at least periodically, requested a resumption of marital sexual relations. "A refusal or failure to engage in marital relations, to rise to the level of constructive abandonment, must be unjustified, willful and continued, despite repeated requests from the other spouse for resumption of cohabitation." [26]

In Hammer v. Hammer, [27] the husband alleged that his wife had refused to have sexual relations with him for more than four years. The Appellate Division found that even crediting all the husband's testimony, "he did nothing for 10 years by way of legal process to assert his marital rights, but was apparently content to permit the situation to continue..." Under the circumstances the court found that he consented to a sexless relationship, and held that

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19 Schine v. Schine, 31 NY2d 113, 335 NYS2d 58, 286 NE2d 449 (1972). Solomon v. Solomon, 290 N. Y. 337, 340, 342; Matter of Maiden, 284 N. Y. 429, 432-433.

20 Belandres v. Belandres, 58 App Div 2d 63, 395 NYS2d 458 (1 Dept 1977)

21 Giella v Giella, 55 Misc 2d 727, 286 NYS2d 621 (1968).

22 Lyons v. Lyons, 187 AD2d 415, 589 NYS2d 557.

23 Schine v. Schine (1972) 31 NY2d 113, 335 NYS2d 58, 286 NE2d 449.

24 Where the wife changes the lock on the entrance door of the marital abode, or where she insists on living alone, thus effectively excluding the husband, this act, unless justified, constitutes abandonment. See Fox v. Fox, 17 Misc 2d 998, 1002, aff'd. 17 A D 2d 939; Harris v. Harris, 46 Misc 2d 355, 356, 358.

25 Hammer v Hammer, 41 App Div 2d 831, 342 NYS2d 9 (2d Dept 1973)

26 Caprise v. Caprise, 143 AD2d 968, 533 NYS2d 622 (2d Dept., 1988); See also Biegeleisen v Biegeleisen, 253 A.D.2d 474, 676 N.Y.S.2d 684 (2d Dept., 1998).

27 Hammer v Hammer, 41 App Div 2d 831, 342 NYS2d 9 (2d Dept 1973)

before he could predicate a divorce action on the ground of defendants' refusal to have sexual relations with him, "he must demand in good faith a renewal both of the marital relation and its obligations and, if the other refuses, such refusal will [then] furnish the basis of an action." The appellate decision in Hammer was affirmed in a memorandum decision by the Court of Appeals, which found that the Appellate Division acted within its discretion in determining that the wife was not chargeable with constructive abandonment.[28]

It is sufficient to show that the defendant has failed or refused to have sexual relations with the plaintiff for the requisite period, without justification, and despite repeated requests therefore.[29]

6-8. Defenses: Abandonment

The Domestic Relations Law contains no affirmative defenses to abandonment.

6-9. Defenses - Abandonment - Lack of Justification as an Element of the Cause of Action

The plaintiff must establish that his spouse, who has left the marital home or refused to have sexual relations with him, or who has locked him out of the marital residence lacked justification for doing so.[30]

In order to constitute an abandonment, the evidence must establish a "hardening of resolve" by one spouse not to live with the other. A separation "may not be said to constitute, as a matter of law, a definitive abandonment when it is bounded by a lawsuit, maintained upon reasonable grounds and with sincerity of conviction for the very purpose of determining whether the separation shall continue." [31] Thus, a wife who leaves the home under the reasonable misapprehension that her husband has been guilty of cruelty or adultery may not be guilty of abandonment. [32]

A wife's refusal to have sexual relations with her husband was found to be justified by his consistent and repeated demands for anal and oral sex, as well as his demands that she wear erotic nightwear. The court found that the husband's unconventional sexual demands were responsible for her general lack of desire for "conventional" sexual relations. She accommodated his demands on occasion, but found that his "favored forms of sex were either painful or unpleasant." Notwithstanding this, she expressed her wishes to continue in a loving marital relationship with him, including, what the court termed "normal sexual relations." The refusal to have sexual relations in "an atmosphere of coercion and lack of consideration", was not unjustified and did not constitute constructive abandonment. [33]

6-10. Defenses - Abandonment - Reconciliation

Reconciliation of the parties and resumption of sexual relations may defeat a claim of abandonment. However, "an estranged couple's attempt at a reconciliation, even where it involves the brief and isolated resumption of cohabitation and/or sexual relations, after a matrimonial action has already been commenced, does not, as a matter of law, preclude an entry of judgment in favor of the spouse who originally had an otherwise valid claim for

28 Hammer v Hammer, 34 NY2d 545, 354 NYS2d 105, 309 NE2d 874 (1974)

29 Caprise v. Caprise, 143 A.D.2d 968, 533 NYS2d 622 (2d Dept., 1988).

30 Phillips v. Phillips, 70 App Div 2d 30, 419 NYS2d 573 (2d Dept 1979).

31 Phillips v. Phillips, 70 App Div 2d 30, 419 NYS2d 573 (2d Dept 1979).

32 Fischel v. Fischel, 286 App Div 842, 142 NYS2d 236 (1955).

33 George M. v. Mary Ann M., 171 AD2d 651, 567 NYS2d 132, (2d Dept., 1991).

abandonment. Rather, the trial court should examine the totality of the circumstances surrounding the purported reconciliation, before determining its effect, if any, upon the pending marital proceeding. Among the many factors for the trial court to consider are whether the reconciliation and any cohabitation were entered into in good faith, whether it was at all successful, who initiated it and with what motivation."[34]

6-11. Burden of Proof - Adultery

The Domestic Relations Law provides that an action may be maintained by a husband or wife to procure a judgment divorcing the parties and dissolving the marriage on the ground of the commission of an act of adultery.[35]

It is important to keep in mind that adultery, as distinguished from the other grounds for divorce in New York, is subject to the traditional defenses of recrimination, connivance, and condonation, and also to a five-year statute of limitations.[36]

6-12. Definition of Adultery.

The Domestic Relations Law defines adultery as the commission of an act of sexual or deviate sexual intercourse, voluntarily performed by the defendant, with a person other than the plaintiff after the marriage of the plaintiff and the defendant.[37] Deviate sexual intercourse includes, but is not limited to, sexual conduct as defined in Penal L 130:00, subd 2, and Penal L 130:20, subd 3.[38]

6-13. Proof of Adultery - In General

In a divorce action grounded upon the adultery of the defendant, the plaintiff has the burden of proving the material allegations of his or her complaint, including the allegation of adultery, even though the defendant defaults in appearing or pleading, or the answer does not put in issue the allegation of adultery.[39]

The Court of Appeals has held that proof as to a wife's adultery which is obtained by means of an illegal search and seizure, by a forcible entry into the wife's home by the husband and his hired detectives, is admissible in a divorce action. The rule as to criminal cases has no application.[40]

The allegation that the defendant committed adultery with a certain person must be supported by testimony which identifies that person as the person with whom the acts were committed. [41] It is not supported by testimony

34 Haymes v Haymes, 221 A.D.2d 73, 646 N.Y.S.2d 315 (1st Dept., 1996).

35 Domestic Relations Law §170 (4).

36 See Domestic Relations Law §171 as to the defenses to a divorce action based upon adultery, and see Domestic Relations Law §200(4), with reference to defenses to a separation action based upon adultery.

37 Domestic Relations Law §170 (4).

38 Domestic Relations Law §170 (4).

Penal Law §130.00 provides that "deviate sexual intercourse" "means sexual conduct between persons not married to each other consisting of contact between the penis and the anus, the mouth and penis, or the mouth and the vulva." Apparently, bestiality is omitted if the definition is taken literally since the reference is to deviate sexual intercourse with a "person".

39 Domestic Relations Law §211.

40 Sackler v. Sackler, 15 NY2d 40, 255 NYS2d 83, 203 NE2d 481 (1964).

41 Mondano v. Mondano,122 NYS 731 (Sup 1910)

establishing the fact that the plaintiff committed acts of adultery with persons other than the one named in the allegation.[42]

The plaintiff must satisfactorily prove the adultery even though the defendant does not deny the factual allegations in the complaint that he has been living with another woman from 20__ to the present time. [43]

An admission of adultery in an answer does not justify a finding that adultery has been committed by the defendant, since if this were true it would permit the granting of a divorce on the consent of the defendant.[44]

An allegation that the defendant committed adultery with a person whose name is unknown to the plaintiff may be established by proof that the adultery alleged was committed with a person known as "May,"[45] or with a person called . . . , or otherwise identified. [46]

6-14. Proof of Adultery - By Circumstantial Evidence

In order to prove adultery, there need not be direct evidence of the actual act or acts of adultery [47] since adulterous acts are usually secret and clandestine, proof of them ordinarily can be made only by circumstantial and indirect evidence.[48] There are facts and circumstances which, unexplained, and in the line of the common experience, justify reaching the conclusion that a spouse has been guilty of adultery.[49]

Circumstantial evidence is evidence of a fact which does not directly prove a fact in dispute but which permits a reasonable inference or conclusion that the fact exists. Those facts which form the basis of an inference must be proved and the inference to be drawn must be one that may be reasonably drawn.[50]

It has frequently been held that in order to establish adultery by circumstantial evidence, the plaintiff must prove opportunity, inclination, and intent.[51] There must be evidence of some relation between the parties and conduct on their part as would tend to establish that the desire and willingness existed to engage in an act of adultery when the opportunity arose.[52] Proof of opportunity alone to commit adultery is not sufficient.[53] The evidence of inclination and intent must be clear, positive, and satisfactory, such as to lead a reasonable man to the conclusion that the adulterous act was committed when the opportunity to do so was present.[54] Where it is shown

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42 Kane v. Kane, 3 Edw Ch. 389; Mondano v. Mondano, (1910, Sup. 122 NYS 731.

43 Kirshner v. Kirshner, 7 App Div 2d 202, 182 NYS2d 286 (2d Dept 1959).

44 Taylor v. Taylor, 123 App Div 220, 108 NYS 428 (1908)

45 Miller v. Miller, 194 App Div 183, 185 NYS 313 (1920)

46 Mitchell v. Mitchell, 61 NY 398 (1875)

47 Davidson v. Davidson, 134 App Div 958, 119 NYS 141 (1909); Harris v. Harris, 83 App Div 123, 82 NYS 568 (1903).

48 Yates v. Yates, 211 NY 163, 105 NE 195 (1914); Mattison v. Mattison, 203 NY 79, 96 NE 359 (1911); Cullen v. Cullen, 205 App Div 276, 199 NYS 598 (1923); Cottrell v. Cottrell, 165 App Div 693, 151 NYS 289 (1915); Shaw v. Shaw, 155 App Div 252, 140 NYS 109 (1913).

49 Harris v. Harris (1903) 83 App Div 123, 82 NYS 568.

50 N.Y. Pattern Jury Instr.--Civil 1:70 (3d Ed.). See the current edition which is N.Y. Pattern Jury Instr.--Civil Division 5, Committee on Pattern Jury Instructions Association of Supreme Court Justices

51 Trumpet v. Trumpet, 215 NYS2d 921 (Sup 1961); Fleck v. Fleck, 6 Misc 2d 202, 163 NYS2d 218 (1957); Brooks v. Brooks, 120 NYS2d 335 (Sup.1953).

52 Brooks v. Brooks, 120 NYS2d 335 (Sup 1953).

53 Pollock v. Pollock, 71 NY 137 (1877) ; Bosch v. Bosch, 275 App Div 1046, 91 NYS2d 841 (1949); Nottingham v. Nottingham, 209 App Div 459, 204 NYS 750 (1924); Cottrell v. Cottrell, 165 App Div 693, 151 NYS 289 (1915) ; Graham v. Graham, 157 App Div 52, 141 NYS 766 (1913); Keville v. Keville, 122 App Div 388, 106 NYS 993; Brooks v. Brooks, 120 NYS2d 335 (Sup 1953) .

54 Brooks v. Brooks, 120 NYS2d 335 (Sup 1953).

that the parties had the 'lascivious desire" and the opportunity to gratify it, the fact that they did gratify it may be inferred from other facts.[55]

It has frequently been stated that in order to establish the charge of adultery by circumstantial evidence the evidence must be more consistent with guilt than with innocence.[56] Where circumstances are as consistent with innocence as with guilt or are reconcilable with innocence, a presumption of guilt is not justified.[57]

The circumstantial evidence as to adultery need not be so strong as to permit no other possible conclusion.[58] It need not convince the court beyond all doubt.[59] However, it should point clearly to guilt.[60]

6-15. Proof of Adultery By Testimony of Third Persons - Paramour, Prostitute, Private Detective - Rule of Corroboration in Uncontested Divorce Cases

In an action for divorce on the ground of adultery, the testimony of a correspondent that she had intercourse with a spouse is viewed with suspicion, and the courts will not generally grant a divorce based on such uncorroborated testimony, without some corroboration. [61]

Similarly, because of the doubtful character and unreliability of testimony given by private detectives and prostitutes, their testimony is viewed with suspicion and is generally held to be insufficient to justify a judgment of divorce, without some corroboration.[62]

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55 Kay v. Kay, 235 App Div 25, 256 NYS 147 (1932); Rathje v. Rathje, 232 App Div 664, 247 NYS 880 (1931); Roth v. Roth, 90 App Div 87, 85 NYS 640 (1904), affd 183 NY 520, 76 NE 1107.

In Kerr v. Kerr, 134 App Div 141, 118 NYS 801 (1909) there was evidence that the defendant met a woman who was not his wife at a railroad station, took her to a hotel where he registered with her, under an assumed name as husband and wife, obtained a room for them, went with her into the elevator, as if going to the room, taking their luggage with him. In addition, neither of them was observed coming down, although the witness waited in the hotel until midnight. The Court stated in finding the evidence sufficient to sustain a finding of adultery: "We have it of old that 'it is presumed he saith not a pater noster' there."

In Salomon v. Salomon, 102 Misc 2d 427, 423 NYS2d 605 (1979) it was held that since one act of adultery is sufficient grounds for divorce, and since the evidence of the wife's adultery was "clear and convincing," the husband was entitled to summary judgment of divorce. The wife's testimony clearly indicated that she committed adultery with Ralph Nathan, and she did not deny this allegation in her reply affidavit. The husband's motion for summary judgment was granted on his cause of action for "adultery with a man or men whose name or names are unknown as well".

56 Trumpet v. Trumpet, 215 NYS2d 921 (Sup 1961); Fleck v. Fleck, 6 Misc 2d 202, 163 NYS2d 218 (1957).

57 Allen v. Allen, 101 NY 658, 5 NE 341 (1886); Pollock v. Pollock, 71 NY 137 (1877); Rolfe v. Rolfe, 244 App Div 863, 279 NYS 796 (1935); Cottrell v. Cottrell, 165 App Div 693, 151 NYS 289 (1915); Roth v. Roth, 90 App Div 87, 85 NYS 640 (1904), affd 183 NY 520, 76 NE 1107; Brooks v. Brooks, 120 NYS2d 335 (Sup 1953).

58 Allen v. Allen, 101 NY 658, 5 NE 341 (1886).

59 Fleck v. Fleck, 6 Misc 2d 202, 163 NYS2d 218 (1957).

60 Braun v. Braun, 245 App Div 194, 281 NYS 25 (1935).

In Hess v. Hess, 25 App Div 2d 548, 267 NYS2d 537 (2d Dept 1966) circumstantial evidence of adultery was insufficient where it merely established that the wife was in another man's hotel room in a "shortie" nightgown, and there was no evidence that 'lucky Pierre" was ever in that room.

61 Glaser v. Glaser, 36 Misc 231, 73 NYS 284 (1901); Delling v. Delling, 34 Misc 122, 69 NYS 479 (1901); Fawcett v. Fawcett, 29 Misc 673, 61 NYS 108 (1899).

62 Winston v. Winston, 165 NY 553, 59 NE 273 (1901), affd 189 US 506, 47 L Ed 922, 23 S Ct 852.

With regard to detectives, see Yates v. Yates, 211 NY 163, 105 NE 195 (1914); Kruczek v. Kruczek, 264 App Div 242, 35 NYS2d 289 (1942), affd 289 NY 826, 47 NE2d 434; Cottrell v. Cottrell, 165 App Div 693, 151 NYS 289 (1915); Shaw v. Shaw, 155 App Div 252, 140 NYS 109 (1913); Steele v. Steele, 170 NYS 454 (Sup 1918).

The rule requiring corroboration of the testimony of the detective does not apply to the testimony of an unpaid detective who obtained evidence as a friend of one of the parties,[63] nor to the testimony of a person who was a witness to the sexual act, but not as a paid detective.[64]

This rule requiring corroboration is not a rule of evidence, but merely one for the guidance of the judicial conscience in uncontested cases.[65] It is not followed as a matter of law in litigated cases where a jury determines the issues of fact.[66] The rule is not that, as a matter of law, such evidence could not be considered by a judge or jury, but that it should be given only such weight as the judge or jurors deem it is entitled to receive.[67] The courts, realizing the secret nature of adultery, have held that very slight corroboration of the testimony of private detectives, or of prostitutes, is sufficient to grant a divorce.[68] This is especially true where the defendant fails to testify in his or her own behalf.[69] The corroboration which such evidence should receive need not be sufficient, standing by itself, to prove the fact of adultery, but must simply be such as to justify a belief that the incriminating testimony given is true.[70] The corroboration may be established in surrounding circumstances,[71] or in letters of the defendant to the correspondent.[72]

6-16. Proof of Adultery by Proof of Divorce and Remarriage.

In an action for divorce on the ground of adultery, proof that the defendant obtained an invalid foreign divorce, and proof that the defendant entered into a subsequent marriage is insufficient to prove adultery, even though the proof is offered by the defendant.[73] There must be proof of the defendant's cohabitation with the second spouse in order to establish the adultery.[74]

Where the plaintiff proves that the defendant remarried after obtaining an invalid foreign judgment of divorce, and also proves that the defendant resided with his or her alleged second spouse, this is sufficient to authorize an inference of adultery.[75]

With regard to prostitutes, see McCarthy v. McCarthy, 143 NY 235, 38 NE 288 (1894); Moller v. Moller, 115 NY 466, 22 NE 169 (1889).

63 Yates v. Yates (1914) 211 NY 163, 105 NE 195.

64 Filocco v. Filocco (1942) 263 App Div 296, 32 NYS2d 552.

65 Yates v. Yates (1914) 211 NY 163, 105 NE 195; Simons v. Simons (1945) 270 App Div 88, 58 NYS2d 558; Trumpet v. Trumpet (1961, Sup) 215 NYS2d 921; Barber v. Barber (1953, Sup) 119 NYS2d 773; Steele v. Steele (1918, Sup) 170 NYS 454.

66 Simons v. Simons (1945) 270 App Div 88, 58 NYS2d 558.

67 Yates v. Yates (1914) 211 NY 163, 105 NE 195.

68 See Yates v Yates (1914) 211 NY 163, 105 NE 195.

69 Winston v. Winston (1901) 165 NY 553, 59 NE 273, affd 189 US 506, 47 L Ed 922, 23 S Ct 852; McCarthy v. McCarthy (1894) 143 NY 235, 38 NE 288; Moller v. Moller (1889) 115 NY 466, 22 NE 169.

70 Winston v. Winston, supra; Moller v. Moller (1889) 115 NY 466, 22 NE 169.

71 Winston v. Winston, 165 NY 553, 59 NE 273 (1901), affd 189 US 506, 47 L Ed 922, 23 S Ct 852.

72 McCarthy v. McCarthy, 143 NY 235, 38 NE 288 (1894; Moller v. Moller (1889) 115 NY 466, 22 NE 169.

73 Taylor v. Taylor, 123 App Div 220, 108 NYS 428 (1908).

74 Taylor v. Taylor, supra; Fox v. Fox, 23 Misc 2d 504, 206 NYS2d 317 (1960).

75 Hoyt v. Hoyt, 286 App Div 580, 146 NYS2d 133 (1955).

6-17. Proof of Adultery by Proof of Confessions - Rule of Corroboration

A judgment of divorce will not be granted, based upon adultery grounds, solely upon the confessions of the parties. Courts require some corroboration of the confession.[76]

This rule, requiring corroboration of testimony is not a rule of evidence, but merely one for the guidance of the judicial conscience.[77] The reason for this rule is to avoid the danger of collusion. The corroboration evidence does not have to be sufficient, in and of itself, to prove the adultery;[78] the evidence must only tend corroborate the confession.[79]

A confession of adultery by the defendant which is clear, distinct, sincere and not collusive, which is corroborated by the correspondence of the defendant or other evidence, constitutes a sufficient basis for a judgment of divorce.[80]

The testimony of a policeman was that he had seen plaintiff chasing defendant; that he stopped plaintiff, who accused the defendant of having sexual relations with a doctor at his office; and that all three of them went to the doctor's office, where the doctor and defendant admitted their guilt. This was sufficient corroboration of the out-of-court confessions of adultery of the defendant and of the correspondent to warrant granting plaintiff a divorce in his uncontested action.[81]

6-18. Defenses to Adultery - In General

Adultery is distinguished from the other grounds for divorce in New York because it is subject to the statutory defenses of recrimination, connivance, and condonation, and also to a five-year statute of limitations.[82]

6-19. Defenses to Adultery - Insanity as a Defense

In an action for divorce based upon adultery, proof that a spouse was mentally incapable at that time the adultery of understanding the nature, quality, effect, and consequences of the adulterous act, is a complete defense.[83] There is no statute expressly making insanity of the defendant at the time the adultery was committed a defense, but insanity is a defense because the act of adultery implies consent or acquiescence, and an insane person lacks the ability to consent.[84]

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76 Betts v. Betts, 1 Johns Ch 197; Rivett v. Rivett, 270 App Div 878, 61 NYS2d 7 (1946); Buchanan v. Buchanan, 229 App Div 631, 243 NYS 436 (1930); Monypeny v. Monypeny, 171 App Div 134, 157 NYS 11 (1916); Irwin v. Irwin, 69 NYS2d 780 (Sup 1946); Feraco v. Feraco, 69 NYS2d 652 (Sup 1946); Madge v. Madge, 42 Hun 524 (1886); Anonymous, 17 Abb Pr 48; Lyon v. Lyon, 62 Barb 138.

77 Barbara v. Barbara, 57 NYS2d 156 (Sup 1945).

78 Monypeny v. Monypeny, 171 App Div 134, 157 NYS 11 (1916); Lake v. Lake, 60 NYS2d 105 (Sup 1946).

79 Monypeny v. Monypeny, supra.

80 Madge v. Madge, 42 Hun 524 (1886).

81 Crowley v. Crowley, 18 Misc 2d 586, 186 NYS2d 60 (1959).

82 See Domestic Relations Law §171 for the defenses to a divorce action based upon adultery. See Domestic Relations Law §200(4) for the defenses to a separation action based upon adultery.

83 Laudo v. Laudo, 188 App Div 699, 177 NYS 396 (1919); Horn v Horn, 142 App Div 848, 127 NYS 448 (1911); Rathbun v. Rathbun, 40 How Pr 328.

84 Laudo v. Laudo, 188 App Div 699, 177 NYS 396 (1919); Cook v. Cook 53 Barb 180.

6-20. Defenses to Adultery - Statute of Limitations

The Domestic Relations Law provides that no action for divorce may be maintained on a ground which arose more than five years before the date of the commencement of the action, except where abandonment, or separation pursuant to agreement or judgment is the ground.[85]

The Domestic Relations Law also provides that a divorce will not be granted although the adultery of the defendant is established, where there has been no express forgiveness, and no voluntary cohabitation of the parties, but the action has not been commenced within five years after discovery by the plaintiff of the offense charged.[86]

Where the injured party acquiesces for five years after obtaining knowledge of the adultery, he or she is presumed to have pardoned or forgiven the offense.[87] Moreover, if the plaintiff knew about the existence of the continuous adultery of the defendant for more than five years before the commencement of the action for divorce, it is a bar to the action, even though the plaintiff produces evidence of adultery with the correspondent within the five-year period.[88]

Civil Practice Law and Rules 207, which suspends the running of a statute of limitations during the defendant's absence from the state[89] applies to actions for divorce.[90] Thus, the period of the defendant's absence from the state must be added to the ordinary five-year period for commencing an action for divorce.[91] This is true even though the plaintiff might have brought an action in rem for divorce by service by publication on the defendant.[92]

6-21. Defenses to Adultery - Affirmative Defense of Recrimination – (Adultery of the Plaintiff)

The Domestic Relations Law provides that the plaintiff is not entitled to a divorce even though the adultery of the defendant is established, "where the plaintiff has also been guilty of adultery under such circumstances that the defendant would have been entitled, if innocent, to a divorce."[93] This is the defense of recrimination. The adultery of the plaintiff must be established sufficiently to obtain a divorce by the defendant.[94]

However, where the adultery of the plaintiff was committed with the connivance of the defendant, the defendant cannot use the adultery of the plaintiff as a defense to a divorce action brought against him or her,[95] since the defendant could not establish grounds for divorce against the plaintiff because of the defendant's connivance.

Where the adultery of the plaintiff is committed more than five years before the commencement of the action for a divorce, and the defendant knew about the adultery at that time, it does not bar the plaintiff's right to a

85 Domestic Relations Law § 210.

86 Domestic Relations Law §171(3).

87 Ackerman v. Ackerman, 200 NY 72, 93 NE 192 (1910); Gouch v Gouch, 69 Misc 436, 127 NYS 476 (1910).

88 Ackerman v. Ackerman, 200 NY 72, 93 NE 192 (1910); Valleau v. Valleau, 6 Paige 207; Coyne v. Coyne, 271 App Div 895, 67 NYS2d 488 (1946), affd 297 NY 927, 79 NE2d 748; Rosenbaum v. Rosenbaum, 56 Misc 2d 221, 288 NYS2d 285 (1968).

89 CPLR 207

90 Ackerman v. Ackerman, 200 NY 72, 93 NE 192 (1910); Gouch v. Gouch, 69 Misc 436, 127 NYS 476 (1910).

91 Ackerman v. Ackerman (1910) 200 NY 72, 93 NE 192; Hawkins v. Hawkins (1905) 110 App Div 42, 96 NYS 804; Gouch v. Gouch (1910) 69 Misc 436, 127 NYS 476

92 Simonson v. Nafis, 36 App Div 473, 55 NYS 449 (1899).

93 Domestic Relations Law §171(4).

94 Weiger v. Weiger, 270 App Div 770, 59 NYS2d 444 (1946); Kapitola v. Kapitola, 189 App Div 459, 178 NYS 734 (1919); Ryan v Ryan, 132 Misc 339, 229 NYS 511(1928).

95 Bleck v Bleck, 27 Hun 296 (1882).

judgment. Since the defendant could not obtain a divorce against the plaintiff because of the lapse of time, it follows that the plaintiff's misconduct is not a defense to his adultery.[96]

The adultery of the plaintiff is not a defense to the plaintiff's action for a divorce on the grounds of adultery where the defendant has forgiven or condoned the plaintiff's adultery since the defendant could not maintain an action for a divorce on the basis of a condoned offense.[97] However, the adultery of the plaintiff bars a divorce in his or her favor, even though the defendant could not have maintained an action for divorce, based upon adultery, for failure to comply with the New York residence requirements.[98]

Where the defendant pleads the adultery of the plaintiff as a defense or counterclaim in an action for divorce, that issue must first be determined before the plaintiff is entitled to a divorce, even though the plaintiff establishes that the defendant is guilty of adultery.[99]

6-22. Defenses to Adultery - Affirmative Defense of Forgiveness (Condonation)

The Domestic Relations Law[100] provides that, although the adultery of the defendant is established, a divorce will not be granted where the adultery has been forgiven by the plaintiff.[101]

6-23. Defenses to Adultery - Proof of Forgiveness

The forgiveness of adultery may be proven "either affirmatively[102] or by the voluntary cohabitation of the parties with knowledge of the adultery".

Where the defendant in an action for a divorce based on adultery interposes the defense that the adultery has been forgiven by the plaintiff, the forgiveness may be proven by establishing the voluntary cohabitation of the parties,[103] provided it is with knowledge of the adultery. Where the plaintiff has voluntarily cohabited with the defendant with full knowledge that the defendant has committed adultery, it is presumed that the plaintiff has forgiven the injury, and the defense is proven.[104]

Cohabitation, and thus forgiveness, will be inferred from the fact that the parties are living together as husband and wife, where nothing appears to the contrary.[105] However, in the absence of any other evidence tending to establish forgiveness, a single act of intercourse between the husband and wife is not sufficient to prove forgiveness,

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96 Fleischer v Fleischer, 188 Misc 402, 68 NYS2d 6 (1947); Mays v. Mays, 22 NYS2d 702 (Sup 1940), affd 261 App Div 984, 27 NYS2d 436; Ryan v. Ryan, 132 Misc 339, 229 NYS 511(1928).

97 Ryan v. Ryan, supra.

98 Leseuer v. Leseuer, 31 Barb 330.

99 Paul v. Paul, 11 NYS 71 (Sup). See Rect. v. Rect., 36 App Div 2d 939, 321 NYS2d 398 (1st Dept 1971).

100 Domestic Relations Law §171(2).

101 Forgiveness, thus legally releasing the injury, is called "condonation". Wood v. Wood, 2 Paige 108.

In Uhlmann v. Uhlmann, 17 Abb NC 236, the Court held that "condonation" is a purely technical term of the English ecclesiastical law. The New York statute uses the word "forgiveness".

102 Domestic Relations Law §171(2).

103 Domestic Relations Law §171(2).

104 Wood v. Wood, 2 Paige 108. Brown v. Brown, 21 NYS2d 325 (Dom Rel Ct 1940).

105 Larger v. Larger, 9 Misc 236, 44 NYS 219 (1897).

particularly where the intercourse occurred at a time when the plaintiff was emotionally upset and under the influence of alcohol.[106]

For cohabitation of the husband and wife to constitute forgiveness of the adultery, it must take place with full knowledge of the adultery.[107] This means that the cohabitation must be with the knowledge that the defendant committed adultery.[108] It must appear with reasonable clearness[109] that the plaintiff had obtained knowledge upon which to base a belief in the guilt of the defendant,[110] not only of the particular act of adultery but of all the then existing charges of adultery.[111] The plaintiff must not only have some indication of the fact of adultery but must believe the fact to be true.[112]

Where the adultery is denied by the allegedly guilty party, the plaintiff's mere circumstances of a suspicious nature do not constitute sufficient knowledge by the plaintiff of the adultery such that his or her subsequent cohabitation establishes forgiveness. A husband or wife is justified in relying upon the other spouse's denial of adultery, so long as he or she does not have substantial evidence of guilt.[113]

A court may not find that a plaintiff condoned the defendant's adultery where his or her knowledge of the adultery is based entirely on the other's spouse's confession of adultery.[114] It must appear that the plaintiff has some proof, in addition to the confession of adultery. This is a practical rule since the confession alone is not sufficient as proof of adultery.[115]

6-24. Revival of Condoned Offense

Forgiveness of the adultery which constitutes a defense to an action for divorce based upon adultery is not absolute but is conditioned upon the defendant's future good conduct.[116] Where a spouse commits adultery subsequent to the forgiveness, the forgiven adultery is revived so that a divorce may be granted.[117] The condonation is

106 Kiley v. Kiley, 115 NYS2d 341 (Sup 1952).

107 Domestic Relations Law §171(2).

108 Dunnells v Dunnells, 272 App Div 779, 69 NYS2d 651 (1947); Uhlmann v Uhlmann, 17 Abb NC 236.

109 Merrill v. Merrill, 41 App Div 347, 58 NYS 503 (1899).

110 Digs v. Digs, 187 App Div 859, 175 NYS 791 (1919); Harris v. Harris, 83 App Div 123, 82 NYS 568 (1903); Deisler v. Deisler, 59 App Div 207, 69 NYS 326 (1901); Abbott v Abbott, 132 Misc 11, 228 NYS 611 (1928).

111 Uhlmann v. Uhlmann, 17 Abb NC 236.

112 In Abbott v Abbott, 132 Misc 11, 228 NYS 611 (1928) there was evidence that while his wife was living apart from him, the husband received a letter from her landlord, complaining of her conduct, but he apparently did not believe the charges, as he threatened to prosecute the landlord for sending such a letter. This evidence was held to be insufficient to show condonation by subsequent cohabitation.

In Merrill v. Merrill, 41 App Div 347, 58 NYS 503 (1899) an action by a wife for divorce on the ground of adultery, evidence that the husband of the correspondent came to defendant's house and, in the presence of the plaintiff, accused defendant of the adultery with his wife was held insufficient to sustain a finding of condonation, in view of the evidence that when he was accused, the defendant protested his innocence, and convinced both the plaintiff and the accuser that some other man was the guilty party, and volunteered his help in discovering the man's identity.

113 Harris v. Harris, 83 App Div 123, 82 NYS 568 (1903); Deisler v. Deisler, 59 App Div 207, 69 NYS 326 (1901); Merrill v. Merrill, 41 App Div 347, 58 NYS 503 (1899); Uhlmann v. Uhlmann, 17 Abb NC 236.

114 Merrill v. Merrill, 41 App Div 347, 58 NYS 503 (1899). Uhlmann v. Uhlmann, 17 Abb NC 236.

115 Merrill v. Merrill, 41 App Div 347, 58 NYS 503 (1899).

116 Ohms v. Ohms, 285 App Div 839, 137 NYS2d 397 (1955); Kreighbaum v. Kreighbaum, 118 Misc 100, 192 NYS 516 (1922).

117 Smith v Smith, 4 Paige 432. Clark v. Clark (1867) 30 NY Super Ct 276.

nullified and the original offense of adultery is revived by subsequent cruelty, abuse, or indignities amounting to marital misconduct or conjugal unkindness.[118]

6-25. Defenses to Adultery - Affirmative Defense of Connivance and Procurement

In an action for a divorce even though the adultery of the defendant is established it is a statutory defense if it is established that the adultery was committed by the procurement or with the connivance of the plaintiff.[119]

"Connivance" has been defined to be the 'corrupt consenting of a married party to that offense of the spouse for which that party afterward seeks a divorce".[120] It may be established by declarations of the plaintiff and by evidence of his or her conduct and the surrounding circumstances.[121]

Where a spouse has conspired with another person to have that person commit adultery with her spouse, she connives at the adultery.[122] However, a spouse is not guilty of connivance merely because he or she fails to prevent or discourage the adultery by his or her spouse.[123]

Where a spouse suspects that his or her spouse is about to commit adultery, he or she may spy on his spouse or obtain evidence of the adultery from other persons, without being guilty of connivance.[124] However, where a spouse employs detectives or agents for the express purpose of committing adultery with his or her spouse, there is a corrupt consent and a connivance at the adultery.[125]

An act of adultery is deemed to have been procured by the plaintiff where it appears that it was committed by the defendant with an agent of the plaintiff employed by the plaintiff to procure evidence of the defendant's adultery, since the plaintiff is charged with responsibility for the act of the agent, although the agent was not hired for the purpose of committing adultery.[126]

6-26. Defenses to Adultery - Collusion

Collusion between the parties to a divorce action will bar the granting of a judgment of divorce even though the adultery of the defendant is established. Collusion is a statutory defense.[127]

The term "collusion" as applied to a divorce action has been broadly defined to be an agreement between a husband and wife to procure a judgment dissolving the marriage, which, if the facts were known, the court would

118 Johnson v Johnson, 14 Wend 637; Ohms v. Ohms, 285 App Div 839, 137 NYS2d 397 (1955); Timerson v. Timerson, 2 How Pr NS 526. Hoffmire v Hoffmire, 3 Edw Ch 173, affd 7 Page 60. Kreighbaum v Kreighbaum, 118 Misc 100, 192 NYS 516 (1922).

119 Domestic Relations Law §171(1).

120 Santoro v. Santoro, 55 NYS2d 294 (Sup 1945), affd 269 App Div 859, 56 NYS2d 539.

121 Santoro v. Santoro, 55 NYS2d 294 (Sup 1945), affd 269 App Div 859, 56 NYS2d 539; Myers v. Myers, 41 Barb 114.

122 Fisher v. Fisher, 220 NY 710, 116 NE 1044 (1917). Armstrong v. Armstrong, 45 Misc 260, 92 NYS 165 (1904).

123 Reiersen v. Reiersen, 32 App Div 62, 52 NYS 509 (1898) (where a husband believes that his wife has committed adultery and intends to continue to commit adultery whenever she has the opportunity, and he does not actively interfere to prevent the adultery, in order to obtain evidence of it, although, if he wanted to he could prevent it, he is not guilty of connivance.); Pettee v Pettee, 77 Hun 595, 28 NYS 1067 (1894), affd 148 NY 735, 42 NE 725.

124 Reiersen v. Reiersen, 32 App Div 62, 52 NYS 509 (1898). Pettee v. Pettee, 77 Hun 595, 28 NYS 1067 (1894), affd 148 NY 735, 42 NE 725.

125 Helmes v. Helmes, 24 Misc 125, 52 NYS 734 (1898).

126 McAllister v. McAllister, 137 NYS 833 (Sup 1912).

127 Hanks v. Hanks, 3 Edw Ch 469; Dodge v. Dodge, 98 App Div 85, 90 NYS 438 (1904); Galloway v. Galloway, 92 App Div 300, 86 NYS 1078 (1904); Goldner v. Goldner, 49 App Div 395, 63 NYS 431 (1900); Bowe v. Bowe, 55 Misc 403, 106 NYS 608 (1907); Cowan v. Cowan, 23 Misc 754, 53 NYS 93 (1898); Huntley v. Huntley, 73 Hun 261, 26 NYS 266 (1893).

not grant.[128] The term "collusion" in matrimonial law also has been more narrowly defined as "an agreement between husband and wife for one of them to commit, or to appear to commit, or to be represented in court as having committed, a breach of matrimonial duty, for the purpose of enabling the other to obtain the legal remedy of divorce, as for a real injury. Where the act complained of as a ground for the divorce has in truth not been done, collusion is a real or attempted fraud upon the court."[129]

The General Obligation Law provides that an agreement made between a husband and wife shall not be considered a contract to alter or dissolve the marriage unless it contains an express provision requiring the dissolution of the marriage or provides for the procurement of the grounds for a divorce.[130]

The courts have not always been careful to distinguish between connivance and collusion. While connivance and collusion are closely related, the distinction between them is that connivance is a corrupt consenting, whereas collusion is a corrupt agreement. To constitute collusion there must be an agreement between husband and wife to procure a divorce.[131]

The readiness of one of the parties to a divorce action to assist the other in the legal proceedings is not of itself collusive, although it invites scrutiny into the facts to ascertain whether they are false, or, if true, whether there was an agreement to procure a divorce.[132] The mere act of the defendant furnishing information to the plaintiff of his past acts of adultery does not constitute collusion barring the plaintiff from a divorce; it is only a circumstance to be considered by the court in determining whether there actually has been collusion.[133] The law contemplates collusion in the act of adultery, not in the furnishing of evidence of the adultery.[134] The failure of the defendant to appear and defend an action for a divorce on the grounds of adultery is not collusion, although it may, in connection with other circumstances, be evidence of it.[135]

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128 Doeme v. Doeme, 96 App Div 284, 89 NYS 215 (1904).

129 Fuchs v. Fuchs, 64 NYS2d 487 (Sup 1946); See also McIntyre v. McIntyre, 9 Misc 252, 30 NYS 200 (1894)

130 Gen Oblig L 5-311., as amended in 1966. Conduct that previously was regarded as "collusive" is not regarded as collusive. See Taft v Taft, 156 AD2d 444, 548 NYS2d 726 (2d Dept., 1989). Gen Oblig L 5-311 provides that a contract between a husband and wife to "alter or dissolve the marriage" is void.

In Charap v Willett, 84 A.D.3d 1003, 925 N.Y.S.2d 94 (2d Dept., 2011), the Appellate Division held that the parties written stipulation was void as against public policy, since it expressly required the former wife to seek dissolution of the marriage and "provides for the procurement of grounds of divorce" (General Obligations Law 5-311). As the offending provision represented the only consideration provided by the former wife for the agreement, which did not contain a severability provision, the stipulation was void in its entirety (cf. Taft v. Taft, 156 A.D.2d 444).

131 Doeme v. Doeme, 96 App Div 284, 89 NYS 215 (1904); Bowe v. Bowe, 55 Misc 403, 106 NYS 608 (1907); McIntyre v. McIntyre, 9 Misc 252, 30 NYS 200 (1894).

132 Dodge v. Dodge, 98 App Div 85, 90 NYS 438 (1904).

133 Rosenzweig v. Rosenzweig, 231 App Div 13, 246 NYS 231 (1931); Lake v. Lake, 60 NYS2d 105 (Sup 1946).

134 Rosenzweig v. Rosenzweig, 231 App Div 13, 246 NYS 231 (1931).

135 In Galloway v. Galloway, 92 App Div 300, 86 NYS 1078 (1904), the defendant interposed an unverified answer denying the allegations of adultery in the complaint. At the trial the defendant's attorney did not cross-examine witnesses except with regard to particulars which tended to strengthen the plaintiff's case rather than to establish a defense. The defendant offered no testimony. The court held that the circumstances were sufficiently strong to show collusion and to justify the denial of a divorce.

Committing an act of adultery, or creating the appearance of having committed adultery, with the consent or privity of the other spouse, or under an arrangement between the spouses, has been held to be collusion.[136]

6-27. Defenses to Adultery - Distinction between Collusion and Settlement

There is an exceedingly fine line drawn between collusion and proper settlement of differences prior to divorce. If the term is given a broad definition, many, if not most, uncontested divorces accompanied by settlement agreements may be labeled "collusive". The proper definition of the term, however, should depend upon the legal and social consequences entailed. Since today our public policy encourages parties to amicably settle differences and permits the parties to obtain a "no-fault" divorce, only a blatant conspiracy to fabricate facts and to work a serious fraud on the court, should be deemed "collusion".

6-28. Burden of Proof - Imprisonment for Three Years

The Domestic Relations Law provides that an action may be maintained by a husband or wife to procure a judgment divorcing the parties and dissolving the marriage on the ground of the confinement of the defendant in prison for a period of three or more consecutive years after the marriage of the plaintiff and the defendant.[137]

There must be at least three years of confinement but it is not clear whether the action may be brought after the felon's release. If the "protective" purpose of this law is accepted, then it should make no difference that the divorce action is filed after the prisoner's release except that the general statute of limitations of five years applies.[138]

6-29. Proof of Confinement in Prison

In an action for divorce based upon the confinement of the defendant in prison for a period of three or more consecutive years after the marriage of the plaintiff and the defendant, it is necessary to show that the defendant has been in prison for three or more years.[139]

Proof of being sentenced to prison for a period not to exceed three years is not sufficient.[140] The person against whom an action is brought must be physically imprisoned. Where the defendant has not been confined in prison for a period of three years at the time suit is instituted, the action may not be maintained.[141]

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136 Dodge v. Dodge, 98 App Div 85, 90 NYS 438 (1904); Goldner v. Goldner, 49 App Div 395, 63 NYS 431 (1900); Huntley v. Huntley, 73 Hun 261, 26 NYS 266 (1893).

In Cowan v. Cowan, 23 Misc 754, 53 NYS 93 (1898) the wife was denied a divorce where it appeared that the husband committed adultery for the purpose of providing her with grounds for a divorce, and in collusion with her son, who told her what he had done.

137 Domestic Relations Law §170 (3).

138 Domestic Relations Law §210.

139 Short v. Short, 57 Misc 2d 762, 293 NYS2d 590 (1968).

140 Short v. Short, 57 Misc.2d 762, 293 NYS2d 590 (1968).

141 Short v. Short, 57 Misc.2d 762, 293 NYS2d 590 (1968).

In Cerami v. Cerami, (1978) 95 Misc.2d 840, 408 NYS2d 591, the defendant shot and killed his former supervisor. Before defendant was ordered committed to the Rochester Psychiatric Center in 1974, he was confined in local jails and in facilities operated by the State Dept. of Correctional Services between March 23, 1970 and August 1, 1974, for more than four consecutive years. The Court held that the period of the husband's confinement between arrest and sentencing constituted confinement "in prison" for purposes of the statute, even though parts of this confinement were served in a state hospital after the determination that he was not competent to stand trial. It also held that the time during which he was incarcerated in the state prison and in the county jail (after the original judgment of conviction had been vacated by the Court of Appeals, and before he had been found not guilty by reason of insanity), constituted confinement "in prison" for purposes of the

The fact that after serving three or more years the conviction was reversed and a new trial granted does not preclude the granting of a divorce on the imprisonment ground.[142]

6-30. Defenses - Imprisonment for Three Years - Statute of Limitations

The Domestic Relations Law provides that no action for divorce may be maintained on a ground which arose more than five years before the date of the commencement of the action except where abandonment or separation pursuant to agreement or judgment is the ground. Therefore, the statute of limitations is a defense to an action for a divorce on the grounds of confinement in prison for a period of three years. [143]

6-31. Burden of Proof - Living Apart Pursuant to a Separation Judgment

The Domestic Relations Law provides that an action may be maintained by a husband or wife to procure a judgment divorcing the parties and dissolving the marriage where the parties have lived separate and apart pursuant to a decree or judgment of separation for a period of one or more years after the granting of such decree or judgment, and satisfactory proof has been submitted by the plaintiff that he or she has substantially performed all the terms and conditions of such decree or judgment.[144]

The ground is subject to two limitations: (1) the separation pursuant to the decree of legal separation must have been for the designated period (two or more years before Sept. 1, 1972, one or more years thereafter); and (2) the plaintiff seeking the conversion must submit satisfactory proof that he or she has "substantially" performed the terms and conditions of the separation decree.[145]

The traditional divorce defenses, such as recrimination, condonation, and connivance, do not apply to this ground.

6-32. Burden of Proof - Living Apart Pursuant to Separation Agreement

The Domestic Relations Law provides[146] that an action for divorce may be maintained by a husband or wife to procure a judgment divorcing the parties and dissolving the marriage on the ground that the husband and wife have lived separate and apart pursuant to a written agreement of separation, subscribed and acknowledged by the parties thereto and acknowledged or proved in the form required to entitle a deed to be recorded, for a period of

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statute. It concluded that the husband's more than four years of physical confinement between March 23, 1970 and August 1, 1974, included more than three consecutive years of confinement "in prison" and that the terms of the statute were satisfied.

In Colascione v. Colascione, 57 Misc.2d 199, 291 NYS2d 559 (1968) the Court held that "actual physical incarceration for the statutory period of three consecutive years gives rise to the right to a divorce", without more and is unaffected by a reversal of the conviction.

In Pergolizzi v. Pergolizzi, 59 Misc.2d 1027, 301 NYS2d 366 (1969) the court held that a spouse's post sentencing incarceration in a Department of Correction facility is to be counted as part of the requisite three year period entitling the other spouse to a divorce.

142 Colascione v. Colascione, 57 Misc.2d 199, 291 NYS2d 559 (1968).

143 Domestic Relations Law §210.

144 Domestic Relations Law §170 (5).

145 The original period of time provided in Domestic Relations Law §§170(5) and (6) was two years. However, Laws 1970, Ch. 335, effective September 1, 1972, reduced the period to one or more years.

146 Domestic Relations Law §170(6)

one or more years after the execution of such agreement and satisfactory proof has been submitted by the plaintiff that he or she has substantially performed all the terms and conditions of such agreement.[147]

The word "substantially" as used in Domestic Relations Law §170(6) was intended to avoid the need to prove literal compliance but did not eliminate the need to prove compliance with the essentials of the agreement's provisions as a predicate to conversion divorce. The mere allegation and proof that parties have been living separate and apart for more than one year after entering into a separation agreement does not automatically entitle one party, who has not otherwise substantially complied with the terms and conditions of the agreement, to a conversion divorce. Substantial compliance means that the major mandatory decretal duties imposed upon the parties by the agreement as conditions of the separation must be complied with. It is with these major provisions, such as alimony and child support, that the statute requires substantial compliance for at least one year.[148]

Where parties have lived separate and apart pursuant to a separation agreement for the requisite period, the husband is entitled to a divorce and the wife's contention that he had not told her he would use the agreement as a basis for a divorce is without merit, since nothing in the statute requires either party to declare his intention to use or not use the agreement as a ground for divorce.[149]

A stipulation agreement made in open court and read on the record, to the effect that the parties are to live separate and apart in the future, is tantamount to a separation agreement, and provides the basis for an action for divorce under Domestic Relations Law §170(6), after the parties have lived apart for the requisite period. A stipulation made in open court partakes of the nature of a contract and therefore is tantamount to a separation agreement and a sufficient basis for granting a divorce.[150]

The agreement or a memorandum of it must be filed with the county clerk before a divorce may be granted.[151]

6-33. Burden of Proof - Proof of Living Separate

In an action for a divorce based upon the ground that the plaintiff and the defendant have lived separate and apart for the requisite period either pursuant to a judgment of separation or a written separation agreement, substantial compliance by the plaintiff with the terms and conditions of the judgment or agreement must be shown, as well as the fact that the living apart has been uninterrupted for the requisite statutory period.[152]

6-34. Irretrievable Breakdown for a Period of At Least 6 Months

The Domestic Relations Law provides that a husband or wife may be granted a judgment or divorce on the ground that: "The relationship between husband and wife has broken down irretrievably for a period of at least six

147 A separation agreement which has not been acknowledged, cannot form the basis of a divorce pursuant to Domestic Relations Law § 170(6). Cicerale v. Cicerale, 85 Misc.2d 1071, 382 NYS2d 430 (1976), affd (2d Dept.) 54 App Div 2d 921, 387 NYS2d 1022.

148 Berman v. Berman, 52 NY2d 723, 436 NYS2d 274, 417 NE2d 568 (1980), affirmed for reasons stated in opinion by Justice Arnold at the Appellate Division, 72 AD2d 425, 424 NYS2d 899.

149 Trachtenberg v. Trachtenberg, 66 Misc 2d 140, 320 NYS2d 412 (1970).

150 Martin v. Martin, 63 Misc 2d 530, 312 NYS2d 520.

In Stone v. Stone, 45 App Div 2d 967, 359 NYS2d 351 (2d Dept 1974) the court held that a stipulation made by the parties in open court in the Family Court, in which the husband agreed to vacate the marital premises, was not a separation agreement and not sufficient to warrant a divorce.

151 Domestic Relations Law §170(6).

152 Seldin v. Seldin, 55 Misc.2d 187, 284 NYS2d 679 (1967).

months, provided that one party has so stated under oath. No judgment of divorce shall be granted under this subdivision unless and until the economic issues of equitable distribution of marital property, the payment or waiver of spousal support, the payment of child support, the payment of counsel and experts' fees and expenses as well as the custody and visitation with the infant children of the marriage have been resolved by the parties, or determined by the court and incorporated into the judgment of divorce." [153]

This provision became effective on October 12, 2010, and the legislation enacting it specifically provides that it shall apply to matrimonial actions commenced on or after its effective date. [154]

In order to establish a cause of action and obtain a divorce under Domestic Relations Law §170 (7) the party seeking the divorce on irretrievable breakdown grounds, must, in addition to satisfying the residence requirements of Domestic Relations Law § 230, establish that: (1) the relationship between husband and wife is irretrievably broken; (2) for a period of at least six months; and (3) the plaintiff or defendant must state under oath that the relationship between husband and wife is irretrievably broken. [155]

However, no judgment of divorce may be granted upon a finding of irretrievable breakdown unless and until the economic issues of equitable distribution of marital property, the payment or waiver of spousal support, the payment of child support, the payment of counsel and experts' fees and expenses as well as the custody and visitation with the infant children of the marriage have been resolved by the parties, or determined by the court and incorporated into the judgment of divorce. [156]

Where the parties to a contested action for a divorce have agreed that the divorce will be uncontested it has been the practice of New York courts to permit them to submit the matter to the court for determination upon affidavits and the required papers, or to hold an inquest on a fault ground. Where the papers were submitted, the court would reserve decision until the resolution of the ancillary issues. Where the court held an inquest, the court would grant a judgment of divorce, but hold the entry of the judgment in abeyance pending the resolution of the ancillary issues. The practice of granting the judgment and holding its entry into abeyance pending the resolution of the ancillary issues is not permitted under this section which prohibits the granting of a judgment of divorce until all of the ancillary issues are resolved by the parties, or determined by the court and incorporated into the judgment of divorce. However, the court can still hear the testimony and reserve decision.[157]

6-35. Irretrievable Breakdown - Defined

The term "irretrievably broken" is not defined in the Domestic Relations Law, nor has it been defined yet by case law.

153 Domestic Relations Law §170 (7), effective October 12, 2010. Laws of 2010, Ch 384, (August 13, 2010).

154 Id. In G.C v G.C., 35 Misc. 3d 1211(A), 951 N.Y.S.2d 85 (Sup. Ct., 2012)) Supreme Court, inter alia, permitted an amendment to a divorce complaint to add a cause of action under Domestic Relations Law § 170(7) which arose after the filing of the complaint, even though the plaintiff brought a divorce action prior to October 10, 2010, the effective date of the statute and the statutory amendment states that the "act ... shall apply to matrimonial actions commenced after the effective date. It was undisputed that the effective date was October 12, 2010.

155 Domestic Relations Law §170 (7) as added by Laws of 2010, Ch 384

156 Domestic Relations Law §170 (7) as added by Laws of 2010, Ch 384

157 Domestic Relations Law §170 (7) as added by Laws of 2010, Ch 384