FAULT GROUNDS FOR DIVORCE

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I. HISTORY OF GROUNDS FOR DIVORCE IN NEW YORK

 Before the enactment of Alexander Hamilton's divorce law in 1787, nonjudicial divorces had been granted in New Netherlands, under the "Duke's Laws", and at different periods by the royal governor, sometimes on grounds other than adultery.

 During the period of the Dutch rule of New Netherlands an occasional divorce was granted. In 1655 John Hickes of Flushing presented a petition for divorce to the colonial council alleging that his wife had deserted him for nine years and had procreated five or six children by another man. The council granted him "letters of divorce" and authorized him to marry "some honest maid or widow." The records of Rhode Island show that in 1640 the wife, who had been married to Hickes at age thirteen, had obtained a divorce in Rhode Island. New Netherlands records show two other cases of absolute divorce, one in 1657 for a wife's adultery, and another in 1664 for a bigamous marriage of the husband while in Amsterdam.

 After the English conquest of New Netherlands in 1664, divorces continued to be granted sporadically for the next eleven years. The "Duke's Laws" provided that where a husband or wife had been traveling "into any forraigne Parts" and had not been heard from for five years such party might be presumed dead and the other was free to marry, and in another clause indirectly permitted divorce in cases of adultery. The early English governors apparently felt that they had authority to grant divorces. In 1669 a divorce was granted for a wife's adultery and in another case for the husband's impotence. Several other divorces were granted before 1675. In that year the governor apparently decided that assumption of divorce jurisdiction was of doubtful legality and there is no clear evidence of any further divorces being granted in New York for the rest of the colonial period. However, there are indications that governors were receiving divorce petitions as late as 1711. One colonial official writing in 1759 noted that governors had ceased granting divorces since 1688.[[1]](#endnote-1) On January 22, 1787, the New York legislature received a petition from Isaac Gouverneur, Jr., a member of a prominent New York City family, praying for a divorce on the ground of his wife's adultery. The request was referred to a special committee under the chairmanship of Alexander Hamilton. The committee brought in a bill providing for the first general divorce law in New York, limited to cases of adultery, and stipulating that it should not be lawful for the party convicted of adultery "to remarry any person whatsoever" but the innocent party might make another marriage "in like manner as if the party convicted was actually dead." Under the terms of the bill, the chancellor might provide for a jury trial. On March 19, 1787, Governor George Clinton, Chief Justice Richard Morris, and Justice John S. Hobart, members of the council of revision, objected to the bill "as inconsistent with the public good," because of its prohibition on the remarriage of the adulterous party. The realistic view of the council was rejected by the legislature which overrode the council's veto by a vote of 38 to 16 in the assembly and 10 to 4 in the senate.[[2]](#endnote-2) Not until 1879, was the prohibition against remarriage by the guilty party relaxed so as to permit the guilty spouse to remarry if the court modified its decree.[[3]](#endnote-3)

 The power to grant divorces was transferred from the legislature to the Court of Chancery by Chapter 69 of the Laws of 1787, in which the preamble recited that it was thought "more advisable for the legislature to make some general provision in such cases than to afford relief to individuals upon their partial representations, without a just and constitutional trial of the facts.[[4]](#endnote-4)

 The Council of Revision regarded the latter proviso as unrealistic and too harsh, but the legislature, aware that legislative divorce also was obtainable, overrode the veto. Until early in this century, when the state constitution was amended, legislative divorces were granted, sometimes on grounds other than adultery. In effect, New York made parliamentary divorce the model for judicial divorce, while legislative divorce on grounds other than adultery reflected the grounds for judicial divorce in other jurisdictions.

 The 1787 law, however, instead of following precedent or the lead of Protestant reformers in countries other than England, accepted the rule of parliamentary divorce. Reaction against the limitation of judicial divorce to the ground of adultery, while other states broadened their grounds, set in almost immediately in New York.

 Chancellor Kent, while objecting to legislative divorce, also decried migratory divorce.[[5]](#endnote-5) Nevertheless, the nineteenth century saw New Yorkers in increasing numbers resorting to migratory divorce since probably one-third to one-half of the total number of New York marriages dissolved each year were dissolved out of state.[[6]](#endnote-6) It also has been estimated that thirty-five per cent of divorces for New Yorkers were migratory divorces. Various states enjoyed popularity as divorce havens depending upon both grounds and residence requirements.[[7]](#endnote-7)

 Omnibus grounds plus short residence requirements accounted for their popularity. Later, other jurisdictions began to compete. Rhode Island, Iowa, the District of Columbia, Utah, and the Dakotas, enjoyed a substantial interstate trade in divorce, but after 1908 for several years only Idaho, Nebraska, Nevada,[[8]](#endnote-8) and Texas had short residence requirements. Since the 1930's, Arkansas, Idaho, Florida, and Wyoming and especially Nevada, have been the leading specialists in migratory divorce. In the 1950's Alabama became, and remained for a while, the favorite due to its residence requirements.[[9]](#endnote-9)

 During the twenties many Americans were divorced in France and Havana and after that the Virgin Islands and Mexico enjoyed considerable popularity. It is noteworthy that the divorce "mill" in Paris was created by American lawyers to cater to wealthy New Yorkers and clients from other states, and that the 'mill" collapsed after it became extremely difficult to get Paris courts to pass upon the American cases. Havana is also said to have been a wealthy divorce resort during the 1930's because only thirty days' residence was required.

 A few of the Mexican states became divorce havens after the Mexican constitution of 1917 permitted divorce. In 1933, Chihuahua amended its divorce laws to provide some twenty grounds for divorce, jurisdiction being based upon submission or legal residence acquired by the signing of the municipal register. It is estimated that in 1955, some 4,300 Mexican divorces were granted to Americans.[[10]](#endnote-10)

 The first important change in New York matrimonial law occurred in 1813. That year the legislature rejected its commission's recommendation that desertion be made a ground for divorce and instead enacted a judicial separation statute for the benefit of mistreated or deserted wives, which was not extended to husbands until 1880.

 In 1827, the legislature rejected a committee recommendation that habitual drunkenness be made a ground for divorce. In 1830 it enacted an annulment statute authorizing annulments for non-age, bigamy, insanity, fraud or force, and physical incapacity.

 As early as 1869 and 1970, the New York Times campaigned against fraud, corruption, and divorce rings in New York City. In 1934, the New York Mirror exposed the "unknown blonde" who had been the co-respondent in over a hundred divorce cases and during the daytime was employed as a legal secretary.

 Between 1900 and 1933, numerous bills were introduced to reform New York matrimonial law but the only significant enactment was the "Enoch Arden" act of 1922, authorizing decrees of presumed death where a spouse had not been heard of for five years. During the 1930's, Judge Cohalan's determined fight against collusive divorce actions was widely publicized in the New York press.

 It had been common knowledge for several years that the situation in New York had resulted in the appearance of a new remunerative occupation -- that of the professional co-respondent. These conditions were brought to public attention on November 30, 1948, when New York District Attorney Frank S. Hogan announced the arrest of members of a "divorce ring' on charges of perjury and subornation of perjury." All in all, the number of decrees dropped about one-third in New York City, but only one-tenth in the upstate counties." The investigation confirmed what had long been suspected, namely, that fraud, perjury, and collusion were rampant in all types of matrimonial actions -- including even those based on the so-called Enoch Arden Law.[[11]](#endnote-11)

 Between 1949 and 1956, Assemblywoman Janet Hill Gordon waged a continuous fight for the creation of a legislative commission to study the divorce laws, but when the commission was created in 1956 its mandate was circumscribed and it had no authority to make recommendations relating to grounds for divorce.

 Throughout this century, spokesmen for the New York State Catholic Welfare Conference, until the enactment of the Divorce Reform Law in 1966, succeeded in blocking divorce reform, and, usually, when the matter was at issue before the legislature, a majority of Democrats and a minority of Republicans have voted against reform, with most of the support for reform coming from up-state Republicans.[[12]](#endnote-12)

 The 1965 Court of Appeals decision in Rosenstiel v. Rosenstiel,[[13]](#endnote-13) made obvious the built-in discriminations of the divorce law of New York, including its policy of recognizing bilateral out-of-state divorces, and became a major factor in achieving divorce reform in 1966.

 The 1966 Divorce Reform Law grew out of the 219 page report of the Joint Legislative Committee on Matrimonial and Family Laws,[[14]](#endnote-14) commonly called the "Wilson Committee". The Joint Committee was itself established pursuant to a joint resolution dated June 8, 1965. Besides its report, the Committee sponsored legislation which was introduced at the 1966 legislative session known as the "Wilson-Sutton Bill." Alternative legislation, know as the "Leaders Bill" was proposed by Senators Travia, Hughes, and Brydges. It differed substantially from the Wilson-Sutton measure. Thereafter, compromises were effected between the sponsors of the competing bills and the law which finally was enacted contained features taken from both bills. The crux of the compromise was acceptance of the Conciliation Bureau device and a portion of the Uniform Divorce Recognition Act in return for the new grounds without defenses. The Conciliation Bureau provision in Domestic Relations Law article 11-B was repealed in 1973[[15]](#endnote-15) and New York's version of the Uniform Divorce Recognition Act was also repealed in 1973.[[16]](#endnote-16)

 The significant factors in gaining acceptance for divorce reform were the extensive hearings of the Wilson Committee and strong pubic support manifested throughout the state for divorce reform; the changes in legislative membership and the disestablishment of the establishment occasioned by the 1964 presidential election; the vocal support of liberal Catholics and leading churchmen of all faiths for reform of the old law; the detailed recommendations of bar association committees which were well reasoned and thoroughly documented; and public reaction to the economic and social discrimination between disgruntled spouses that resulted from New York's recognition of Mexican bilateral divorces secured by affluent New Yorkers, (the practical result being that although poor New Yorkers who wanted a divorce might have difficulty getting one at home). Those who could afford it readily obtained divorces in Mexico or some other convenient forum.[[17]](#endnote-17) Since all prior efforts to change New York's substantive law of divorce had met with repeated failure for over 150 years, it was the combination of the above factors that made for success in 1966.

 When the legislature in 1966 created additional grounds for divorce it selected from among the most popular American grounds for divorce and also considered the statute (Domestic Relations Law, 200) and case law which had evolved in New York regarding legal separation. It was logical to accept abandonment as a ground for divorce since "desertion" existed as a ground in every other state but North Carolina. In phrasing the abandonment ground the legislature omitted qualifying adjectives such as "wilful," "continued," or "obstinate," which are used in some states, and also left for judicial construction the problem of "constructive desertion."

 The legislature also selected "imprisonment" as a ground but instead of referring to felony conviction, or crimes involving moral turpitude, simply referred to the length of imprisonment. In the case of the new "cruel and inhuman treatment" ground, the legislature melded two different grounds for legal separation which had existed under the old law. It used a conjunctive "or" to indicate that either "physical" or "mental cruelty" could be the basis for "cruel and inhuman treatment." It was intended that conduct of the defendant which endangered the mental well being of the plaintiff so as to make it improper to continue cohabitation, as well as conduct endangering the physical well being that made it unsafe to continue cohabitation, should be a ground for divorce. "Adultery" as a divorce ground was redefined so as to include deviate sexual intercourse.

 In addition to the "fault" grounds for divorce, the legislative scheme was to add two "no-fault" grounds based upon separation or living apart. The legislative compromise was to accept the "no-fault" theory of separation as a ground for divorce but to add requirements which would vouch for its authenticity.

 The sponsors of divorce reform in 1966 made no effort to propose incompatibility as a ground for divorce in New York, although it is a ground in seven other American jurisdictions, because it was believed that it would be futile to do so. The same was true of "irremediable breakdown" which at that time had not been adopted in any jurisdiction in the Western world but later became a ground in many states. Prior experience in New York with reference to the collusion, fraud, and perjury which often accompanied the adultery ground, led a wary legislature to stipulate that the separation must be pursuant to a separation agreement or judgment of legal separation. Thus, there emerged an esoteric ground in Domestic Relations Law section 170(6), i.e., separation pursuant to a separation agreement and the so-called "conversion" ground in subsection (5).

 The Divorce Reform Law of 1966 became the source of controversy as adjustments were made to its new declaration of public policy. Almost from the beginning there was dispute as to whether or not the conciliation procedure was worth its cost and inconvenience.[[18]](#endnote-18) The automatic bar to alimony imposed upon a wife by Domestic Relations Law section 236[A] where she was guilty of such misconduct as would constitute grounds for legal separation or divorce, affected judicial construction of the new grounds. Before the Equitable Distribution Law of 1980, there was an improvised and delicate balance of economic justice as between husband and wife fashioned by statute and procedure. Formerly in statute[[19]](#endnote-19) and decision,[[20]](#endnote-20) the wife was favored by the imposition of a unilateral duty to support from the husband, in large measure regardless of their comparative economic circumstances. On the other hand, New York law made it difficult for that obligation to be enforced.

 There evolved a sense that even a poor wife deserved support and a share of the property acquired by either spouse during the marriage upon divorce unless she was egregiously unfit or guilty of heinous marital offenses. The Equitable Distribution Divorce Law of 1980 accomplished this.[[21]](#endnote-21)

 Where there is no contest, the statutory divorce grounds are mostly of academic interest. Statutory provisions and prior court decisions set parameters for negotiating a settlement. Statutory grounds for divorce and legal precedents have their most immediate impact in negotiation and settlement efforts of the divorce process, because bargaining leverage is very important New York where the dominant characteristic of its divorce law is that in operation it is consensual, and true no-fault divorce is unavailable.

II. GROUNDS FOR DIVORCE

 A. CRUEL AND INHUMAN TREATMENT

 The Domestic Relations Law, Section 170(1) 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."[[22]](#endnote-22)

 In Hessen v Hessen,[[23]](#endnote-23) a 1974 decision, the Court of Appeals in a unanimous opinion by Chief Judge Brietel, rejected a restrictive interpretation of the cruel and inhuman treatment ground, 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 also approved of an approach similar to that utilized in fixing alimony awards in the Phillips Case,[[24]](#endnote-24) and 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 a substantial misconduct, but only of transient discord, may in a newer marriage justify or even compel an inference of substantial misconduct."

 With regard to what had been a strict construction of Section 170(1), during the years since the enactment of the 1966 Divorce Reform Act, the Court of Appeals made it clear that such was unwarranted by statutory language and legislative history. It was 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.

 The Court noted that prior to the Divorce Reform Law of 1966, when adultery was the sole ground for divorce in New York, cruel and inhuman treatment had been a ground for separation, and legal separation was granted only where the petitioner proved both physical or mental injury and that the physical or mental injury made cohabitation unsafe.[[25]](#endnote-25) Judge Breitel made the point that 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 further that while the restrictive Appellate Division opinion in the 1970 Rios Case,[[26]](#endnote-26) relied on the old rather restrictive cases, "this court in affirming without opinion did not adopt precisely" its rationale. Therefore, said Judge Breitel, the correct view would seem to permit the court below "to exercise a broad discretion in balancing the several factors in each case."[[27]](#endnote-27)

 Judge Breitel, emphasized that "special weight must be given section 236 if a divorce is to be granted for cruel and inhuman treatment. Needless to say, the loss of support for the wife may be particularly inappropriate in the case of a dependent older woman. Indeed, unless the Legislature sees fit to limit the scope of section 236 to bar support only for grievous forms of misconduct, the effect on the right to support must continue to be an influential factor, as a matter of legislative interpretation, in determining the meaning of section 170."

 Brady v. Brady,[[28]](#endnote-28) decided by the Court of Appeals in 1984, ten years after Hessen v. Hessen,[[29]](#endnote-29) 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 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.[[30]](#endnote-30) In so doing, 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.

 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.[[31]](#endnote-31)

 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.[[32]](#endnote-32) Chief Judge Wachler, 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 long-term marriage.

 As to plaintiff's 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 common-sense 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.[[33]](#endnote-33) In affirming the order of the Appellate Division, 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. Id at 345, 476 NE2d at 293-94, 486 NYS2d at 894-95 (citing Echevarria v. Echevarria, 40 NY2d 262, 353 NE2d 565, 386 NYS2d 653 (1976); see Tripi v. Tripi, 94 AD2d 944, 463 NYS2d 958 (4th Dept., 1983)."

 Since Brady, our courts have strictly adhered to the Hessen-Brady standards and have denied divorces in long-term marriages when the pleadings or proof did not meet the high standards enunciated by the Court of Appeals.[[34]](#endnote-34)

 In a marriage of long term duration a party seeking a divorce on the grounds of cruel and inhuman treatment must show serious misconduct and not mere incompatibility.[[35]](#endnote-35) In a marriage of long duration, "a high degree of proof is required to establish cruel and inhuman treatment."[[36]](#endnote-36) The marital strife must be "extreme" and "of such character to effect or impair" the health of the party seeking the divorce.[[37]](#endnote-37) "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."[[38]](#endnote-38)

 Brady has been strictly followed, and the result is that where the marriage is of long duration and the testimony or evidence demonstrates that the parties only have irremedial or irreconcilable differences, a divorce on the grounds of cruel and inhuman treatment will be denied.[[39]](#endnote-39) 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.[[40]](#endnote-40)

 It is of moment that in Brady v. Brady,[[41]](#endnote-41) the Court of Appeals had occasion to review the policy of Hessen v. Hessen in the light of subsequent developments, such as the Supreme Court's decision in Orr v. Orr[[42]](#endnote-42) and the enactment of the 1980 Equitable Distribution Law.[[43]](#endnote-43) The Court recognized that the de facto double standard of Hessen posed an equal protection problem, so it reformulated the Hessen rule in gender neutral terms and granted the dispensation to long as distinguished from short-term marriages. The major beneficiaries were identical, namely dependent older women.[[44]](#endnote-44) In order to continue to protect them, however, the court found it was necessary to impose the same severe burden of proof where wives were plaintiffs, and it was a long-term marriage.

 The greatest significance of the decision in Brady was its perpetuation of the Hessen policy in a new form after the justification for the Hessen policy had been removed by the enactment of the Equitable Distribution Law. The automatic bar to alimony for a wife guilty of misconduct had been eliminated, and since July 19, 1980, wives were assured of an equitable share of marital property acquired during the marriage. The statutory guidelines in the Equitable Distribution Law[[45]](#endnote-45) specifically made age and duration of the marriage factors to be considered in distributing marital property and in setting maintenance. Thus, there was no economic justification for Brady. Knowingly or unknowingly, the practical consequences of Brady were to reinforce the bargaining leverage of parties to a long-term marriage where settlement was not reached and the matter became contested.[[46]](#endnote-46)

 B. ABANDONMENT

 The Domestic Relations Law provides, in Section 170(2), 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.[[47]](#endnote-47) Before this statute was enacted in 1966, abandonment was not a ground for divorce. However, it was and remains a ground for legal separation [[48]](#endnote-48) and for dissolution because of presumed death under the "Enoch Arden" law.[[49]](#endnote-49) No time period whatever is set for abandonment where the relief sought is legal separation.[[50]](#endnote-50) In addition, abandonment as a ground for legal separation is subject to the defense of "justification"[[51]](#endnote-51) which may consist of the "misconduct of the plaintiff" even though such does not amount to grounds for matrimonial relief, whereas abandonment as a divorce ground is not subject to the traditional divorce defenses[[52]](#endnote-52) nor to the statute of limitations which applies to the adultery, cruel and inhuman treatment, and imprisonment grounds.

 It generally is held that abandonment or desertion 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.[[53]](#endnote-53) It is of practical importance, however, that each of these four elements may involve subjective rather than objective criteria and in a confused and conflicting fact pattern of mutual recrimination (where there is that rare phenomenon, the contested case) the clarity and simplicity of the stated requirements becomes elusive. The New York cases construing abandonment as a ground for legal separation refer to some or all of the elements mentioned above. There must be a final departure without sufficient reason therefor and without the consent of the other party and with the intention not to return.[[54]](#endnote-54)

 The conduct of the defendant as stated previously must be unjustified and without the consent of the plaintiff.[[55]](#endnote-55) Where the conduct of both parties which forms the basis of the adverse party's cause of action for abandonment was done with the consent or condonation of the party alleging abandonment, the action must fall for our law does not yet recognize a mutual abandonment.[[56]](#endnote-56) It has been said that for a separation to constitute an abandonment, it "must be obstinate and hardened".[[57]](#endnote-57)

 1. Justification

 Phillips v. Phillips,[[58]](#endnote-58) held that the isolated and sporadic acts of a husband in a marriage of 35 years duration did not entitle his wife to a divorce on the ground of cruel and inhuman treatment. The Appellate Division affirmed Special Term's refusal to grant the wife a divorce on the ground of cruel and inhuman treatment. Special Term had granted defendant's motion made just prior to trial, to amend his answer to allege a counterclaim for abandonment, even though at the time the wife had instituted her action, she had only been gone from the marital home for four months. At the trial, proof of abandonment by the wife was received over objection of plaintiff wife's counsel. Special Term thereupon dismissed plaintiff's complaint and directed judgment for the husband on the ground of abandonment.

 Reversing the judgment in the husband's favor, the Appellate Division Second Department, noted that the statute requires a year's absence before an action for divorce on the ground of abandonment may be brought and that this is a jurisdictional prerequisite.[[59]](#endnote-59) More important, however, were the comments of the Second Department to the effect that "It is clear that her [the wife's] departure was the result of what she deemed to be the misconduct of the defendant. In this belief she was mistaken. Nevertheless, her departure and absence should not form the basis of a finding of abandonment under these circumstances." The court continued "We think a term of 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. Thus, in our view the evidence does not show that hardening of resolve, that irrevocable decision by the plaintiff not to live with the defendant, whether she was right or wrong in her claim that the defendant had been guilty of cruelty to her." A wife who leaves the home under the reasonable misapprehension that her husband has been guilty of adultery, may not be guilty of abandonment.[[60]](#endnote-60) The mistake, however, to serve as justification must be a reasonable one. Where a wife abandoned her husband because he had normal intercourse with her, and because, as she believed, he had caused her to become pregnant, he was entitled to a separation on the ground of her abandonment.[[61]](#endnote-61)

 The spouse remaining at home may be guilty of abandonment sufficient to form a basis for a divorce, as where the other spouse is justified in departing from the marital home or in terminating the marital relationship by the conduct of the former, such abandonment being termed "constructive abandonment".[[62]](#endnote-62)

 The element of justification has the same effect as proof of consent to the separation insofar as abandonment is concerned. One authority points out "In fact justification for leaving the home has a double effect. It causes the desertion not to be desertion, and, in those states which accept the doctrine of constructive desertion, it labels as desertion the conduct which justifies the departure. For example, when a husband by his cruelty forces his wife to leave their home, she is not a deserter, but he is a constructive deserter.[[63]](#endnote-63)

 2. Constructive Abandonment

 In Del Gado v. Del Gado[[64]](#endnote-64) the Appellate Division, Second Department, held that where a wife leaves the marital home because she fears for her safety due to her husband's conduct, she has justification for leaving the home, and the husband is barred from suing for divorce on the ground of her abandonment.

 In such cases, the wife who locks out the husband, or the husband whose abuse drives the wife from the home, is the deserter rather than the spouse who is absent from the home. The other meaning of "constructive desertion" refers to a cessation of sexual relations as constituting an abandonment or desertion even though the parties may continue to live under the same roof. Legend has it that the doctrine originally arose during the housing shortage. New York, at least for the purposes of legal separation, has recognized the doctrine of constructive desertion (or abandonment) in both senses. For a time, however, there was disagreement as to whether or not cessation of sexual relations could constitute constructive abandonment.[[65]](#endnote-65)

 In the well known case of Diemer v. Diemer,[[66]](#endnote-66) the Court of Appeals held that the wife's religious scruples did not justify her in refusing to have sexual relations with the husband when they had been married by a civil ceremony but not according to the rules of her church. Her refusal was deemed to constitute abandonment. Other New York cases have held that a denial of marital relations may constitute an abandonment, although not where both parties have agreed not to have marital relations.[[67]](#endnote-67)

 In Hammer v. Hammer,[[68]](#endnote-68) the husband filed suit for divorce on the ground of constructive abandonment, alleging that his wife had refused to have sexual intercourse with him for over four years. The Appellate Division, Second Department, reversing the Trial Court's judgment of divorce in favor of the husband, reviewed the evidence, and found that even crediting all the husband's testimony and rejecting the wife's allegations in refutation, "it is clear that plaintiff for 10 years did nothing by way of legal process to assert his marital rights but was apparently content to permit the situation to continue... It seems clear to us that under the circumstances it can be said that plaintiff consented to a sexless relationship. Before he can predicate a separation or divorce action on the ground of defendant's 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. This court will not sanction plaintiff's unilateral termination of a marital relationship predicated on a refusal to have sexual relations when he himself, in effect consented to such a relationship for the long period here involved."

 Hammer v. Hammer[[69]](#endnote-69) was affirmed in a memorandum decision by the Court of Appeals, handed down simultaneously with its decision in Hessen v. Hessen.[[70]](#endnote-70) The Court of Appeals said, "In the light of these facts of consent and condonation, and also in view of the age of the parties and the duration of the marriage, the Appellate Division acted within its discretion in determining that the wife was not chargeable with `constructive abandonment' under the Domestic Relations Law." We note that the reference to "condonation" is unfortunate because that defense applies only to the adultery ground. Presumably, what the Court meant was implied consent to the cessation of marital relations.

 In Zagarow v. Zagarow[[71]](#endnote-71) the Supreme Court, Suffolk County, granted a divorce to the wife for her husband's cruel and inhuman treatment, and denied the husband's counterclaim for a dual divorce on the ground of her constructive abandonment because she refused to have sexual intercourse unless he used contraceptives. The Court held that defendant "did not refuse to have intercourse because his wife insisted on his use of a contraceptive. His consent, however reluctant, negates the theory of abandonment."

 In George M. v. Mary Ann M.,[[72]](#endnote-72) the Appellate Division, Second Department reversed "on the law and the facts", a judgment of divorce granted to the husband on the ground of constructive abandonment. In its decision, it found that the wife's refusal to have sexual relations with the husband was justified and that the husband's unconventional sexual demands upon his wife were responsible for her general lack of desire for "conventional" sexual relations. It stated:

"Even assuming the truth of all of the husband's evidence, it is uncontroverted that his consistent and repeated demands for anal and oral sex, as well as his demands that his

wife retire in erotic nightwear, caused the parties' marriage to sour. The defendant accommodated the plaintiff's demands on occasion, but found that his favored forms of sex were either painful or unpleasant. The defendant's wife's justifiable refusals to indulge the plaintiff and his unwillingness to respect her objections caused repeated arguments which eventually quashed this marriage of 22 years and caused the acrimony which was responsible for the defendant's general lack of desire for conventional sexual relations. Notwithstanding this, the defendant expressed her wishes to continue in a loving marital relationship with the plaintiff, including normal sexual relations. Under these circumstances we are convinced that the defendant's spurning of sexual relations with her husband, in this atmosphere of coercion and lack of consideration, was not unjustified, and, accordingly, does not confer upon the plaintiff a cause of action for a divorce on the ground of constructive abandonment."

 In Caprise v. Caprise,[[73]](#endnote-73) the Appellate Division reversed the trial court's finding that there had been a constructive abandonment of the plaintiff husband because his proof did not permit a finding that for at least one year he, at least periodically, requested a resumption of marital sexual relations. In order to warrant a divorce, the abandonment must be proved to have continued for at least one year. A refusal or failure to engage in marital relations, to rise to the level of constructive abandonment, must be unjustified, wilful and continued, despite repeated requests from the other spouse for resumption of cohabitation.

 3. Proof of 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, provided such testimony is corroborated by the testimony of a third person.[[74]](#endnote-74)

 C. ADULTERY - DRL 170(4)

 The Domestic Relations Law, in Section 170(4), 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.

 1. Double Standard

 In Westervelt v Westervelt,[[75]](#endnote-75) a complaint was dismissed despite proof that the wife had lived in her alleged lover's home for four months during which time she took contraceptive pills. On the other hand, a husband who spends some time in a hotel or motel room with the "other woman" may be subject to the presumption that "he sayeth not his pater nosters there."[[76]](#endnote-76) In effect, a "double standard" may be inferred from the New York cases and it is easier to prove a husband's adultery from circumstantial evidence involving inclination and opportunity than it is to prove a wife's indiscretion. It may be more than coincidental that guilt of the latter formerly barred alimony whereas a husband's infidelity occasioned no comparable financial hardship except that unofficially it might enhance the alimony he had to pay.

 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.[[77]](#endnote-77)

 2. Definition.

 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.[[78]](#endnote-78) 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.[[79]](#endnote-79)

 3. Proof of Adultery

 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.[[80]](#endnote-80)

 The Court of Appeals, in an understandably divided opinion, held in Sackler v. Sackler that proof as to a wife's adultery was admissible in a divorce action even though it had been 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, the rule as to criminal cases having no application.[[81]](#endnote-81)

 The allegation that the defendant committed adultery with a certain specified person must be supported by testimony which identifies the person with whom the acts were committed as the person specified,[[82]](#endnote-82) and such an allegation is not supported by testimony establishing the fact that the plaintiff committed acts of adultery with persons other than the one named.[[83]](#endnote-83) But an allegation that the defendant committed adultery with a person whose name is unknown to the plaintiff is satisfactorily established by proof that the adultery alleged was committed with a person known as "May",[[84]](#endnote-84) or with a person called ....,[[85]](#endnote-85) or otherwise identified. Where the complaint contains an allegation of adultery with persons unknown to the plaintiff, the complaint will not be dismissed because the plaintiff does not establish by proof the former allegation, where he proves, under the latter allegation, that the defendant committed adultery with a certain person.[[86]](#endnote-86) The complaint will not be dismissed because the plaintiff did not establish by proof another allegation in his complaint that during the months of October, November and December, of a particular year, the defendant "committed adultery with a certain woman whose Christian name is `Julia', in the city of New York, and at various other places, which plaintiff is unable to state with more particularity.[[87]](#endnote-87)

 a. By Circumstantial Evidence

 In an action for a divorce on the ground of adultery, there need not be direct evidence of the actual commission of the offense charged,[[88]](#endnote-88) since adulterous acts are usually secret and clandestine, and proof thereof ordinarily can be made only by circumstantial and indirect evidence.[[89]](#endnote-89) There are facts and circumstances which, unexplained, and in the line of the common experience of mankind, justify reaching the conclusion that the defendant has been guilty of adultery.[[90]](#endnote-90)

 It has frequently held that in order to establish a charge of adultery by circumstantial evidence, the plaintiff must prove opportunity, inclination, and intent.[[91]](#endnote-91) There must be evidence of some relation between the parties and such 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;[[92]](#endnote-92) proof of opportunity alone to commit adultery is not sufficient;[[93]](#endnote-93) 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 was present.[[94]](#endnote-94) Where it is shown that the parties charged with wrongdoing had the lascivious desire and the opportunity to gratify it, the fact that they did gratify it may be inferred from other facts.[[95]](#endnote-95)

 It has also frequently been said that the evidence must be more consistent with guilt than with innocence in order to establish the charge of adultery by circumstantial evidence.[[96]](#endnote-96)

Where circumstances are as consistent with innocence as with guilt, or are reconcilable with innocence, a presumption of guilt is not justified and the plaintiff is not entitled to recover.[[97]](#endnote-97)

 The circumstantial evidence as to adultery need not be so strong as to admit of no other possible conclusion,[[98]](#endnote-98) or as to convince the court beyond all doubt,[[99]](#endnote-99) but it should point clearly to guilt.[[100]](#endnote-100)

 b. By Testimony of Third Persons - The Paramour, Prostitute and Private Eye

 In an action for divorce on the ground of adultery, the testimony of a correspondent as to intercourse with a spouse is said to be viewed with suspicion, and the courts will not generally grant a divorce based on such uncorroborated testimony.[[101]](#endnote-101) Because of the doubtful character and unreliability of testimony given by private detectives and prostitutes, such testimony is viewed with suspicion and is generally held to be insufficient to justify a judgment in favor of the party suing for a divorce because of defendant's adultery, without some corroboration.[[102]](#endnote-102) This does not apply to the testimony of a detective who obtained evidence without compensation through friendship to one of the parties,[[103]](#endnote-103) nor to the testimony of a person who was a witness to the sexual act, but not as a paid detective; in such instances there need be no corroboration to the testimony offered.[[104]](#endnote-104)

 The rule requiring corroboration in certain cases is not a rule of evidence, but merely one for the guidance of the judicial conscience in uncontested cases,[[105]](#endnote-105) and it is not followed as a matter of law in litigated cases where a jury is present to determine the issues of fact under proper instructions.[[106]](#endnote-106) In other words, the rule is not that, as matter of law, such evidence could not be considered by a justice or jury, but rather that in the consideration of the same, only such weight should be given to it as the conscience of the judge or jurors shall deem it is entitled to receive.[[107]](#endnote-107) Therefore, it is error to charge the jury that the evidence of a private detective must be corroborated; a correct charge should state that the jury should consider the evidence of a private detective for what it is worth, considering the fact that he is a mercenary whose success and reward depend upon producing evidence favorable to the one hiring him.[[108]](#endnote-108) The rule is not one which affects a judgment rendered upon some evidence and affirmed upon review by the Appellate Division;[[109]](#endnote-109) in such case, the judgment cannot be reversed by the Court of Appeals.[[110]](#endnote-110)

 Be that as it may, the courts, realizing the clandestine and secret nature of the offense sought to be proved in a case of this kind, have held very slight corroboration of the testimony of private detectives, or of prostitutes, to be sufficient to justify the granting of a divorce,[[111]](#endnote-111) and this is especially true where the party against whom the testimony is introduced fails to take the stand in his or her own behalf.[[112]](#endnote-112) 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.[[113]](#endnote-113)

Such corroboration may be found, for instance, in surrounding circumstances,[[114]](#endnote-114) or in letters of the defendant to the corespondent.[[115]](#endnote-115)

 c. By Proof of Divorce and Remarriage.

 In an action for divorce on the ground of adultery, proof of an invalid foreign divorce obtained by the defendant and a subsequent second marriage is insufficient to prove adultery, even though such proof is offered by the defendant.[[116]](#endnote-116) There must be proof of cohabitation with the second spouse in order to establish the adultery.[[117]](#endnote-117) Where the plaintiff proves the remarriage of the defendant subsequent to the 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.[[118]](#endnote-118)

 d. Confessions

 A judgment of divorce will not be granted based upon adultery solely upon the confessions of the parties. The policy reason for this rule is to avoid the danger of collusion, and to assure the courts that no imposition has been practiced upon them. The courts refuse to grant divorces upon a confession alone, but require some corroboration of the confession.[[119]](#endnote-119) This rule, requiring corroboration of testimony in a divorce action, is not a rule of evidence, but is said to be one for the guidance of the judicial conscience.[[120]](#endnote-120) It is not necessary that the corroboration should be sufficient, standing by itself, to prove the fact of adultery, or the other grounds upon which the divorce action is based;[[121]](#endnote-121) it is only required that it shall tend to corroborate the fact stated in the confession.[[122]](#endnote-122) Thus, if it is made to appear by evidence outside of his or her own confession that the defendant has done acts which it would be quite natural and probable that he or she would do if the facts stated in the confession were true, but quite unnatural and improbable if the confession were untrue, there is presented some corroboration of the truth of the confession.[[123]](#endnote-123)

 A confession of a party to a divorce action which is clear and distinct, sincere and not collusive, corroborated by the correspondence of the guilty party or other evidence, constitutes a sufficient basis for a judgment of divorce.[[124]](#endnote-124) An admission of adultery by a party to a divorce action is not corroborated by his or her testimony that he or she received certain letters from a correspondent indicating the acts of adultery, since it will constitute merely an admission to corroborate an admission.[[125]](#endnote-125)

 D. LIVING SEPARATE PURSUANT TO SEPARATION AGREEMENT

 The Domestic Relations Law provides, in Section 170(6), 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 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.[[126]](#endnote-126)

 The mere allegation that the parties have been living separate and apart for more than one year after execution of a separation agreement is not sufficient to automatically entitle a party to a conversion divorce where such party has not substantially complied with the agreement's terms and conditions.[[127]](#endnote-127) The word "substantially" as used in the statute[[128]](#endnote-128) 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 agreement or memorandum thereof must be filed with the county clerk.

 In 1970, the requisite period of separation for two or more years was changed to one or more years beginning September 1, 1972.[[129]](#endnote-129) Moreover, the cut-off date for agreements which might be filed to initiate the period of separation required, which had been April 27, 1966,[[130]](#endnote-130) and at one time was August 1, 1966,[[131]](#endnote-131) was eliminated in 1970 so that an agreement of whatever date might be filed and after the passage of the designated time the divorce action could be brought.[[132]](#endnote-132)

 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.[[133]](#endnote-133)

 It also has been held that 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, so as to provide the basis for an action for divorce under Domestic Relations Law 170(6), after the parties have lived apart for the requisite period.[[134]](#endnote-134)

 1. 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.[[135]](#endnote-135)

 E. IMPRISONMENT

 The Domestic Relations Law provides, in Section 170(3), 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.[[136]](#endnote-136)

 As originally enacted, Domestic Relations Law Section 170(3) was ambiguous[[137]](#endnote-137) and it may remain so despite a clarifying amendment. It is not clear from the language itself whether or not Section 170(3) refers to current imprisonment; that is, must the divorce be sought while the defendant is in prison rather than after his release. It is clear that 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]](#endnote-138)

 It has been held that 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.[[139]](#endnote-139) 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.[[140]](#endnote-140) However, where no prison time is served because sentence is suspended or the offender is placed on probation, there appears to be no "confinement in prison" and hence no basis for divorce on the grounds of imprisonment.

 1. 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 of course necessary to show that the defendant has been in prison for three or more years.[[141]](#endnote-141) Proof of mere sentencing to prison for a period to exceed three years is not sufficient.[[142]](#endnote-142)

 F. LIVING SEPARATE PURSUANT TO A SEPARATION JUDGMENT

 The Domestic Relations Law provides, in Section 170(5), 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.[[143]](#endnote-143) This is called "conversion divorce" because it converts a judgment of legal separation into a final judgment of divorce.

 The conversion ground is subject to two limitations: (1) the separation pursuant to the decree of legal separation must have been for the designated period[[144]](#endnote-144) (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. It should be noted that the traditional divorce defenses, such as recrimination, condonation, and connivance, do not apply to the conversion ground.

III. DEFENSES

 A. 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 defendant wife rather than the alleged cruel and inhuman treatment of the wife. (See Walden v. Walden, 41 AD2d 664).[[145]](#endnote-145)

 Insanity is not a defense to cruel and inhuman treatment.[[146]](#endnote-146)

 In an action for divorce on the ground of cruel and inhuman treatment, it must be shown that the conduct of the defendant was such that it affected the safety or propriety of cohabitation.[[147]](#endnote-147)

Although it should not be necessary to show actual physical violence to establish legal cruelty, but, if not, there must be either a reasonable apprehension of such violence or conduct of such character as seriously affects the health of a spouse and threatens permanently to impair it. Such is the view of a number of conservative decisions even though the sounder view is that conduct endangering the mental well being that makes continued cohabitation improper is obviously sufficient unless the court desires to rewrite the statute.[[148]](#endnote-148)

 B. ADULTERY - INSANITY AS A DEFENSE

 In an action based upon adultery, proof that a spouse was mentally incapable at that time of understanding the nature, quality, effect, and consequences of the adulterous act, is a complete defense to an action for divorce.[[149]](#endnote-149) There is no statute expressly making insanity on the part of the defendant at the time the adultery was committed a defense to the action, but insanity is involved in the main issue with respect to the adultery, since adultery within the spirit and intent of the statute implies consent or acquiescence, and consent must be regarded as lacking in the act of an insane person.[[150]](#endnote-150)

 C. 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.[[151]](#endnote-151) 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 is not commenced within five years after discovery by the plaintiff of the offense charged.[[152]](#endnote-152) Where the injured party acquiesces for five years after knowledge of adultery, he or she is presumed to have pardoned or forgiven the offense.[[153]](#endnote-153) Moreover, continuous adultery of the defendant, existing and known to the plaintiff for more than five years before the commencement of the action for divorce, is a bar even though the plaintiff produces evidence of adultery with the corespondent within the five-year period.[[154]](#endnote-154)

 Civil Practice Law and Rules, Section 207, which suspends the running of a statute of limitations during the absence of the defendant from the state[[155]](#endnote-155) applies to actions for divorce.[[156]](#endnote-156)

In other words, 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.[[157]](#endnote-157) This is so even though the plaintiff might have brought an action in rem for divorce by service by publication on the defendant.[[158]](#endnote-158)

IV. AFFIRMATIVE DEFENSES TO ADULTERY

 A. 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."[[159]](#endnote-159)

 The misconduct of the plaintiff, to bar recovery, must be such as could be made the basis of an action for divorce by the defendant.[[160]](#endnote-160) Thus, where the adultery of the plaintiff was committed with the connivance of the defendant, the defendant cannot use such adultery as a defense to a divorce action brought against him or her,[[161]](#endnote-161) since the defendant could not maintain an action for divorce against the plaintiff because of the defendant's connivance. Similarly, the commission of an act or acts of adultery by the plaintiff more than five years before the commencement of the action, and then known by the defendant to have been committed, does not bar the plaintiff's right to a judgment; since the defendant could not maintain an action for divorce against the plaintiff because of the lapse of time, it follows that the plaintiff's misconduct is not a defense.[[162]](#endnote-162) Moreover, the commission of an act or acts of adultery by the plaintiff does not operate as a defense to the plaintiff's action for a divorce where such misconduct has been forgiven or condoned by the defendant,[[163]](#endnote-163) since the defendant could not maintain an action for a divorce on the basis of a condoned offense. However, the commission of an act or acts of adultery by the plaintiff bars a judgment of divorce by him or her, even though the defendant, for want of ability to comply with residence requirements, could not have maintained an action for divorce based upon such misconduct.[[164]](#endnote-164)

 Where the defendant in an action for divorce sets forth the adultery of the plaintiff as a defense or counterclaim, that issue must be determined before the plaintiff is entitled to a divorce, even though it is shown that the defendant is guilty of adultery.[[165]](#endnote-165)

 B. CONDONATION - FORGIVENESS

 1. Generally

 Even though in a divorce action on the ground of adultery, the adultery of the defendant is established, the Domestic Relations Law provides that a divorce will not be granted where the offense charged has been forgiven by the plaintiff.[[166]](#endnote-166) Forgiveness, thus legally releasing the injury, is called "condonation."[[167]](#endnote-167)

 The defense of condonation or forgiveness may, in the words of the statute, be proved "either affirmatively[[168]](#endnote-168) or by the voluntary cohabitation of the parties with knowledge of the fact."

 Condonation is merely a conditional forgiveness of the offense, and a subsequent adultery revives the condoned adultery.

 2. By Voluntary Cohabitation

 Where the defendant in an action for a divorce based on adultery sets forth the defense that the offense of adultery has been forgiven by the plaintiff, the forgiveness may be proved by the voluntary cohabitation of the parties,[[169]](#endnote-169) provided it is with knowledge of the facts. Where the plaintiff has voluntarily cohabited with the defendant with full knowledge that the defendant has been unfaithful, it is presumed that the plaintiff has condoned or forgiven the injury, and the action for divorce is barred thereby.[[170]](#endnote-170)

 Cohabitation, and thus condonation, will be inferred from the fact of living together as husband and wife, where nothing appears to the contrary.[[171]](#endnote-171) However, in the absence of any other evidence tending to establish forgiveness, a single act of intercourse between the parties is not such a voluntary cohabitation of the parties as to prove forgiveness, particularly where the intercourse was committed while the plaintiff was emotionally upset and under the influence of liquor.[[172]](#endnote-172)

 a. Necessity of Knowledge of Offense

 For cohabitation to constitute forgiveness of the adultery, it must take place with full knowledge of the fact.[[173]](#endnote-173) This means that the cohabitation must be with knowledge that the defendant committed adultery.[[174]](#endnote-174) It must appear with reasonable clearness[[175]](#endnote-175) that the plaintiff had knowledge sufficiently substantial upon which to base a belief in the guilt of the defendant,[[176]](#endnote-176) not only of the particular act of adultery, but of all the then existing charges of adultery.[[177]](#endnote-177) The plaintiff must not only have some indication of the fact of adultery, but must believe the fact to be true.[[178]](#endnote-178) Mere circumstances of a suspicious nature, where the adultery is denied by the alleged guilty party, do not constitute such knowledge of the misconduct that subsequent cohabitation establishes forgiveness, for a husband or wife is justified in relying upon the other's denial so long as he or she is not in possession of substantial evidence of guilt.[[179]](#endnote-179) Moreover, the plaintiff may not be held to have condoned the adultery where his or her knowledge of the adultery lies entirely in the other's confession,[[180]](#endnote-180) but rather it must appear that the plaintiff has some proof in addition to the confession.[[181]](#endnote-181) This is a practical rule, since the confession alone is not sufficient as proof of adultery charged as a ground for divorce.

 b. Revival of Condoned Offense

 Condonation or forgiveness of the offense of adultery which constitutes a defense to an action for divorce is not absolute, but is conditioned upon the defendant's future good conduct.[[182]](#endnote-182)

Where the defendant commits adultery subsequent to the condonation, the condoned adultery is revived so that a divorce may be granted therefor.[[183]](#endnote-183) Moreover, the condonation will be nullified and the original offense of adultery revived by subsequent cruelty, abuse, or indignities amounting to marital misconduct or conjugal unkindness.[[184]](#endnote-184)

 c. Connivance and Collusion

 (i) Connivance or Procurement

 Even though in a divorce action the adultery of the defendant is established, there is a statutory bar if the offense was committed by the procurement or with the connivance of the plaintiff.[[185]](#endnote-185) "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.[[186]](#endnote-186) The basis of the defense of connivance is volenti non fit injuria, or that one is not legally injured if he or she has consented to the act complained of or was willing that it should occur,[[187]](#endnote-187) and it is closely associated in many cases with the defense of collusion. It may be established by declarations of the plaintiff and by evidence of his or her conduct and the surrounding circumstances.[[188]](#endnote-188)

 Where the plaintiff has conspired with another person to have the latter commit adultery with the defendant, the plaintiff connives at such adultery.[[189]](#endnote-189) The plaintiff, however, is not guilty of connivance merely because he or she failed to prevent or discourage the commission of the adultery by the defendant.[[190]](#endnote-190) Although there is some authority to the contrary,[[191]](#endnote-191) greater support is given the view that the fact that the plaintiff wilfully abandoned the defendant does not establish that the plaintiff consented to the commission of adultery by the defendant during the period of abandonment, and that the plaintiff was therefore guilty of connivance.[[192]](#endnote-192)

 Where one spouse suspects that the other is about to commit adultery, he or she may spy in person or through others to obtain evidence of the act without being guilty of connivance.[[193]](#endnote-193) However, where a spouse employs detectives or agents for the express purpose of committing adultery with the other spouse, there is a corrupt consent and a connivance at the adultery.[[194]](#endnote-194) An act of adultery, moreover, 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, albeit the agent was not hired for the purpose of committing adultery.[[195]](#endnote-195)

 (ii) Collusion

 Collusion between the parties to a divorce proceeding will bar the granting of a judgment of divorce,[[196]](#endnote-196) and may be a ground for vacating the judgment, since collusion is deemed to be a fraud on the court.[[197]](#endnote-197) The term "collusion" as applied to a divorce proceeding has been broadly defined to be an agreement between a husband and wife to procure a judgment dissolving the marriage contract, which judgment, if the facts were known, the court would not grant.[[198]](#endnote-198)

The term "collusion" 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 the matrimonial duty, for the purpose of enabling the other to obtain the legal remedy of divorce as for a real injury.[[199]](#endnote-199) It should be noted that the General Obligation Law was amended in 1966 to provide 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 grounds for divorce.[[200]](#endnote-200) Conduct that formerly might be regarded as "collusive" may not be so regarded under the new expression of public policy.

 The courts have not always been careful to distinguish between connivance and collusion. In one case it was said that the collusion which is fatal to a valid judgment of divorce is collusion in procuring or conniving at the act or acts of adultery.[[201]](#endnote-201) While connivance and collusion are closely related, the distinction between them is that connivance is a corrupt consenting, whereas collusion is a corrupt agreement. Thus, to constitute collusion there must be an agreement between husband and wife looking to the procuring of a divorce.[[202]](#endnote-202)

 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 arrangement to procure a divorce.[[203]](#endnote-203) Similarly, the mere furnishing of information to the plaintiff by the defendant of his past acts of adultery does not constitute collusion barring the plaintiff from a divorce; it is only a circumstance to be taken into consideration by the court in determining whether there actually has been collusion.[[204]](#endnote-204) The law contemplates collusion in the offense, not in furnishing evidence thereof.[[205]](#endnote-205) This is particularly true in view of the new provision of the General Obligation Law set forth above.

 The commission of an act of adultery, or the creation of the appearance of having committed it, with the consent or privity of the other party, or under an arrangement between the spouses, has been held to be collusion.[[206]](#endnote-206) However, the failure of the defendant to appear and defend an action of divorce is not of itself collusion, although it may, in connection with other circumstances, be evidence thereof.[[207]](#endnote-207)

 Any arrangement or plan between the parties whereby evidence of a valid defense to a divorce action is suppressed constitutes collusion, which bars a judgment of divorce.[[208]](#endnote-208) Clearly, an agreement between the parties to an action for a divorce that the defendant shall withdraw opposition to, or not defend the action, is collusive and bars a judgment of divorce.[[209]](#endnote-209) However, agreements relating to alimony, or the adjustment of property rights which do not directly induce the procurement of a divorce, do not constitute such collusion as will bar a divorce.[[210]](#endnote-210)

 (iii) Distinction Between Collusion and Settlement

 There is an exceedingly fine line drawn between collusion and proper settlement of differences preparatory to divorce and the distinction may depend upon verbal niceties, semantics, and assumptions as to motivation. If the term is given a broad definition, many, if not most, uncontested divorces accompanied by settlement agreements may be labeled "collusive."[[211]](#endnote-211) The proper definition of the term, however, should depend upon the legal and social consequences entailed, and since today it comports with public policy to amicably settle differences and to plan for the future, only a blatant "buying off" of a meritorious defense, a conspiracy to fabricate or suppress facts and to work serious fraud on the court, should be deemed "collusion."

1. .. See, Blake, The Road to Reno, 41-45 (1962). From the time New York became a province of England to when it became a state, there were but four divorces, and these were granted by Governor Lovelace; one in 1670 and the other three in 1672, Jones v. Jones, (1895) 90 Hun 414, 35 NYS 877 [↑](#endnote-ref-1)
2. .. See Blake, The Road to Reno, 64-65 [↑](#endnote-ref-2)
3. .. 102 Laws of New York, Ch. 321, May 19, 1879 [↑](#endnote-ref-3)
4. Moot v. Moot, (1915) 214 NY 204, 108 NE 424 [↑](#endnote-ref-4)
5. . Chancellor Kent concluded that migratory divorce was being occasioned by the severity of New York divorce laws. In objecting to legislative divorce he suggested that such statutes might not be valid outside the states where they were granted. See, 2 Kent, Commentaries on American Law 2d ed 117 [↑](#endnote-ref-5)
6. . See, Jacobson, American Marriage and Divorce, 109 [↑](#endnote-ref-6)
7. . See Blake, The Road to Reno, Ch. 11 [↑](#endnote-ref-7)
8. . See Blake, The Road to Reno, Ch. 11 [↑](#endnote-ref-8)
9. . The history of the migratory divorce of New Yorkers is discussed by Blake, The Road to Reno, Ch.11. The most notorious migratory divorce in the 19th Century was that procured by Abby Sage McFarland in Indiana in 1869. After she returned to New York with the intention of marrying Albert D. Richardson, a prominent newspaperman, her former husband shot and killed Richardson and was tried for murder and acquitted. This case, together with the Bleecher-Tlton scandal, led to a conservative reaction against divorce. States having residence requirements of less than one year preceding filing of complaint were the favorites for migratory divorce. Winston v. Winston (1964) 276 Ala 303, 161 So2d 588, which voided a collusive divorce decree obtained by New Yorkers, and the campaign for disbarment of unethical lawyers put an end to the migratory divorce business in Alabama. See Thorton and Scott, The

"Quickie Divorce" Scandal in Alabama, The Bench and Bar Act When the Legislature became Stymied, published in 1964 by the American Bar Association. At its peak in 1960, Alabama granted 17,328 divorces, (many of which were to New Yorkers), compared with 9,724 in Nevada. [↑](#endnote-ref-9)
10. . See, Jacobson, American Marriage and Divorce, 105 [↑](#endnote-ref-10)
11. . See, Jacobson, American Marriage and Divorce, 115-116 [↑](#endnote-ref-11)
12. . See Blake, The Road to Reno, Ch. 14 [↑](#endnote-ref-12)
13. . Rosensteil v. Rosensteil, (1965) 16 NY2d 64, 262 NYS2d 86, 209 NE2d 707, 13 ALR3d 1401, cert den 384 US 971, 16 LEd 682, 86 S Ct. 1861. [↑](#endnote-ref-13)
14. . It was dated March 31, 1966 [↑](#endnote-ref-14)
15. . Laws 1973, Ch. 1034, eff July 1, 1973 [↑](#endnote-ref-15)
16. . Laws 1973, Ch. 67, eff Sept. 1, 1973, repealed former Dom Rel L 250 [↑](#endnote-ref-16)
17. . Rosensteil v. Rosensteil (1965) 16 NY2d 64, 262 NYS2d 86, 209 NE2d 709, 13 ARL3d 1401, cert den 384 US 971, 16 L Ed 2d 682, 86 S Ct. 1861, settled the matter as to the recognition accorded Mexican bilateral divorces. Mail-order or ex parte Mexican divorces, however, may not be given direct recognition. As to New York's liberal policy of recognizing foreign bilateral divorces, see also Re Rinelander's Estate (1948) 192 Misc 777, 80 NYS2d 543. New York's policy is discussed in Foster, Recognition of Migratory Divorces: Rosensteil v. Section 250, 43 NYU L Rev 429 (1968). [↑](#endnote-ref-17)
18. . Laws 1973, Ch 1034, eff July 1, 1973. [↑](#endnote-ref-18)
19. . Former Gen Oblig Law 5-311, formerly Dom Rel L 51; Fam Ct Act 411 et seq; Soc Serv Law 101; Dom Rel L 236. [↑](#endnote-ref-19)
20. . For example, see McMains v. McMains (1965) 15 NY2d 283, 258 NYS2d 93 [↑](#endnote-ref-20)
21. . Laws of 1980, Ch 281, eff. July 19, 1980. Assemblymen Burrows and Blumenthal and Senator Barclay were the leading sponsors of the Bill. Professor Henry H. Foster and Julia Perles, Esq. worked closely with them. [↑](#endnote-ref-21)
22. . Dom Rel L 170, subd 1. [↑](#endnote-ref-22)
23. . (1974) 33 NY2d 406, 353 NYS2d 421, 308 NE2d 891. [↑](#endnote-ref-23)
24. . In Phillips v. Phillips (1956, 1st Dept) 1 App Div 2d 393, 150 NYS2d 646, affd 2 NY2d 742, 157 NYS2d 378, 138 NE2d 738 the court gave as the appropriate criteria for alimony awards, "the financial status of the respective parties, their age, health, necessities and obligations, their station in life, the duration of the marriage, and the conduct of the parties." [↑](#endnote-ref-24)
25. . Smith v. Smith (1937) 273 NY 380, 7 NE2d 272; Traylor v. Traylor (1957, 2d Dept) 3 App Div 2d 727, 159 NYS2d 818; Avdoyan v. Avdoyan (1943) 265 App Div 763, 40 NYS2d 665. [↑](#endnote-ref-25)
26. . Rios v. Rios (1970, 1st Dept) 34 App Div 2d 325, 311 NYS2d 664, affd 29 NY2d 840, 327 NYS2d 853, 277 NE2d 786. [↑](#endnote-ref-26)
27. . Citing Berlin v. Berlin (1970) 64 Misc 2d 352, 314 NYS2d 911, mod on other grounds (2d Dept) 36 App Div 2d 763, 321 NYS2d 511, app dismd 28 NY2d 986, 323 NYS2d 840, 272 NE2d 339.

 Mutual unwillingness to engage in sex (citing Hammer v. Hammer (1974) 34 NY2d 545, 354 NYS2d 105, 309 NE2d 874), quarrels among plaintiff wife, respondent husband and their daughters, in a marriage of 24 years duration, did not amount to cruel and inhuman treatment entitling wife to a divorce, since she at no time sought or received medical treatment after the quarrels and at no time was she put in fear for her safety. None of the incidents constituted actual violence or established a pattern of cruelty. (Citing Berlin v. Berlin (1970) 64 Misc 2d 352, 314 NYS2d 911, mod on other grounds (2d Dept) 36 App Div 2d 763, 321 NYS2d 511, app dismd 28 NY2d 986, 323 NYS2d 840, 272 NE2d 339); Filippi v. Filippi (1976, 2d Dept) 53 App Div 2d 658, 384 NYS2d 1010. [↑](#endnote-ref-27)
28. . 101 AD2d 797, 475 NYS2d 470 (2d Dept., 1984), aff'd 64 NY2d 339, 476 NE2d 290, 486 NYS2d 891 (1985) [↑](#endnote-ref-28)
29. . 33 NY2d 406, 353 NYS2d 421 [↑](#endnote-ref-29)
30. . 64 NY2d 339, 476 NE2d 290, 486 NYS2d 891 (1985) [↑](#endnote-ref-30)
31. . See Brady, 64 NY2d at 339, 476 NE2d at 290, 486 NYS2d at 891; 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). [↑](#endnote-ref-31)
32. . See Brady, 64 NY2d at 344, 476 NE2d at 292, 486 NYS2d at 893 (citing Hessen, 33 NY2d at 411, 308 NE2d at 895, 353 NYS2d at 426-27). [↑](#endnote-ref-32)
33. . See Brady, 64 NY2d at 344-45, 476 NE2d at 293, 486 NYS2d at 894 [↑](#endnote-ref-33)
34. . See e.g., Skala v. Skala, 111 AD2d 319, 489 NYS2d 303 (2d Dept., 1985) (affirming jury verdict denying divorce where plaintiff showed merely irreconcilable differences); Tsakis v. Tsakis, 110 AD2d 763, 488 NYS2d 51 (2d Dept., 1985) (reversing the judgment of divorce granted in favor of the wife under 170(1) of the Domestic Relations Law, as New York does not permit a "no-fault" basis of divorce; Miller v. Miller, 104 AD2d 1032, 480 NYS2d 947 (2d Dept., 1984) (reversing trial court judgment of divorce, in twenty-six year marriage, based on cruelty, because allegations of frequent absence from the marital residence and assault on two occasions do not constitute evidence of conduct that would so endanger the physical or mental well-being of the plaintiff spouse as to render it unsafe or improper to continue to cohabit with the defendant); Breckinridge v. Breckinridge, 103 AD2d 900, 478 NYS2d 135 (3d Dept., 1984) (affirming order dismissing wife's complaint for divorce on ground of cruelty, because in twenty-three year marriage, the lack of communication between the spouses did not permit a "no-fault" basis of divorce; Lamanna v. Lamanna, 193 NYLJ, May 13, 1985, at 14, Col.4 (Sup.Ct., Kings Co.) (denying husband's request for divorce on the ground of cruelty and his request for annulment on the grounds of fraud and non-consummation, as court found testimony of husband and his witness incredible and unbelievable, choosing instead to believe wife's testimony); Delgatto v. Delgatto, 142 AD2d 545, 530 NYS2d 584 (2d Dept., 1988) (Appellate Division affirmed a judgment which dismissed the husband's cause of action for divorce, awarded the wife maintenance, child support and exclusive occupancy of the marital residence. A plaintiff relying on the cruelty ground must show a course of conduct by the defendant which is harmful to the physical or mental health of the plaintiff and makes cohabitation unsafe or improper. Conduct presenting a picture of an unhappy, acrimonious and incompatible couple does not rise to that level. [↑](#endnote-ref-34)
35. . Hessen v. Hessen, 33 NY2d 406, 353 NYS2d 421; Brady v. Brady, 64 NY2d 339, 486 NYS2d 891 [↑](#endnote-ref-35)
36. . Green v. Green, 127 AD2d 983, 513 NYS2d 49 (4th Dept., 1987) [↑](#endnote-ref-36)
37. . Dunnells v. Dunnells, 117 AD2d 961, 499 NYS2d 271 (3d Dept., 1986). [↑](#endnote-ref-37)
38. . Kleindust v. Kleindust, 116 AD2d 988, 498 NYS2d 610 (4th Dept., 1986) (emphasis supplied) [↑](#endnote-ref-38)
39. . In Andritz v.Andritz (1987, 2d Dept) 131 App Div 2d 529, 516 NYS2d 262, Appellate Division held that in this marriage of long duration where the allegations of cruelty basically set forth that the parties have irreconcilable or irremedial differences and this marriage is dead are insufficient particularly where the marriage is of long duration.

 In Green v. Green (1987, 4th Dept) 127 App Div 2d 983, 513 NYS2d 49, Appellate Division held that trial court erred in granting plaintiff wife a divorce on cruel and inhuman treatment. In a marriage of long duration such as this where plaintiff testified that the marriage lacked communication and sexual intimacy, that defendant pushed her a few times causing minor bruises, that as a result of such conduct she gained excessive weight and offered no medical proof to establish that her health was adversely affected by defendant's alleged conduct. The divorce should not have been granted.

 In Stagliano v. Stagliano (1987, 4th Dept) 132 App Div 2d 975, 518 NYS2d 506, Appellate Division reversed judgment awarding the wife of 25 years a divorce based upon cruel and inhuman treatment. Plaintiff testified that defendant did not speak to her for days at a time; that the marriage lacked sexual intimacy; that defendant ridiculed her in the presence of others and refused marital counseling and as a result she suffered high blood pressure, nervousness and heart problems. She offered no medical proof, and acknowledged the lack of sexual intimacy was a combination of his choice and hers. Here, the record established only that relations between the parties have been strained and unpleasant and cannot support a cause of action for divorce.

 In Marrow v. Marrow (1986, 4th Dept) 124 App Div 2d 1000, 508 NYS2d 789, Appellate Division reversed on the law a judgment dismissing the complaint at the conclusion of plaintiff's case. Plaintiff placed into evidence a family court filiation order and defendant admitted at his examination before trial that he was paying support for said child. This is sufficient to support a prima facie case of adultery to defeat defendant's motion to dismiss. Here the trial court did not pass upon the sufficiency of plaintiff's proof, apparently in the belief that defendant established the defense of recrimination on plaintiff's direct case. Such finding had to have been based primarily on defendant's testimony, which violates CPLR 4502(a) and should have been disregarded. Plaintiff likewise established a prima facie case of cruelty based on defendant's adulterous conduct.

 In Pone v. Pone (1987, 3d Dept) 129 App Div 2d 957, 515 NYS2d 338, plaintiff's complaint alleged that during the past 4 years of their 25 year marriage, defendant has been "cold, calculating and loveless", and has shown plaintiff "no personal affection or emotion". The complaint further alleges that due to the "extreme tension" caused by defendant's behavior, plaintiff has been unable to engage in his occupation as a musical composer, conductor and professor. Appellate Division reversed on the law an order which failed to dismiss the complaint for failure to state a cause of action. The allegation falls far short of meeting the heavy burden imposed on plaintiff.

 In Mallin v. Mallin NYLJ, 2-2-88, p. 6, col. 6, Sup. Ct. NY Co. (Baer, J.), an action for divorce both parties appeared at the inquest and acknowledged that they signed a settlement agreement on June 24, 1987. The parties were married more than 28 years and the court found that the examples of marital discord the plaintiff testified to compelled it to dismiss the cause of action based on cruel and inhuman treatment. Here the plaintiff testified that defendant made derogatory remarks to her and behind her back at social and professional functions, embarrassed her, made malevolent grimaces like a gargoyle to plaintiff in public and in private and refused to make repairs to the house which constituted a safety hazard.

 In Del Gatto v. Del Gatto (1988, 2d Dept) 142 App Div 2d 545, 530 NYS2d 584, the Appellate Division affirmed a judgment which dismissed the husband's cause of action for divorce, awarded the wife maintenance, child support and exclusive occupancy of the marital residence. A plaintiff relying on the cruelty ground must show a course of conduct by the defendant which is harmful to the physical or mental health of the plaintiff and makes cohabitation unsafe or improper. Conduct presenting a picture of an unhappy, acrimonious and incompatible couple does not rise to that level.

 Chinnis v. Chinnis (1986, 3d Dept) 119 App Div 2d 965, 501 NYS2d 227, Appellate Division held that allegations of verbal abuse, religious harassment and refusal to engage in marital relations constituted a course of conduct, which if proven at trial, could conceivably be determined to endanger plaintiff's mental well-being so as to make the parties' continued cohabitation unsafe or improper. Thus special term did not err in declining to dismiss the complaint.

 Elkaim v. Elkaim (1986, 2d Dept) 123 App Div 2d 371, 506 NYS2d 450, Appellate Division reversed judgment of divorce to wife and dismissed complaint without prejudice to be institution of a new action for divorce on the grounds of abandonment. In her complaint, which was never amended, plaintiff sought a divorce on the ground of cruelty, although she alleged an abandonment in August 1982. At trial defendant did not admit the abandonment. The fact that he indicated in his post trial memo that he did not dispute the granting of a divorce on abandonment is insufficient to support the trial court's finding that he abandoned plaintiff. A judgment of divorce can be entered only on competent oral proof or upon written proof that may be considered on a motion for summary judgment. [DRL 211] Since plaintiff did not establish her entitlement to a divorce based upon her pleading or the evidence at trial the divorce and equitable distribution must be reversed.

 Breckinridge v. Breckinridge (1984, 3d Dept) 103 App Div 2d 900, 478 NYS2d 136, in affirming an order of the trial court which dismissed the wife's complaint for a divorce on the grounds of cruelty, the court noted that in this 23 year marriage, lack of communication and unpleasantness of the husband (excessive criticism of wife and children, beat dog, lack of attentiveness in social situations) failed to meet the high degree of proof of serious misconduct. Fact that the parties agreed they had no sexual relations since 1978 does not give rise to abandonment as they acquiesced in that relationship. Trial court has wide discretion.

 Johnson v. Johnson (1984, 2d Dept) 103 App Div 2d 820, 478 NYS2d 54. In a 26 year marriage the appellate division reversed, on the law, a judgment of divorce to the husband on the grounds of cruelty. "Allegations that defendant was frequently absent from the marital home during the last year of the marriage, and had assaulted him on two occasions, do not entitle him to a divorce where there was no evidence the conduct so endangered the physical or mental well being of the plaintiff as rendered it unsafe or improper for him to continue to cohabit with defendant. "High degree of proof required in long marriage. No proof that defendant deleteriously affected by the plaintiff.

 Kleindinst v. Kleindinst (1986, 4th Dept) 116 App Div 2d 988, 498 NYS2d 610. Appellate Division held that evidence established nothing more than relatively minor unpleasant incidents occurring periodically during 30-year marriage, but which did not indicate that wife engaged in conduct harmful to physical or mental health of husband and which did not show wife's conduct caused husband's weight loss of 30 pounds, was insufficient to establish cruel and inhuman treatment by wife. Consideration must also be given to the length of the marriage. In a marriage of long duration, a higher degree of proof is required. In any event, plaintiff offered no medical proof.

 Miller v. Miller (1984, 2d Dept) 104 App Div 2d 1032, 480 NYS2d 947. Appellate Division affirmed judgment which denied husband a divorce. To obtain a divorce must show conduct which "seriously affects the health of the spouse and threatens to impair it." (or a pattern of actual physical violence).

 O'Connell v. O'Connell (1986, 3d Dept) 116 App Div 2d 823, 497 NYS2d 211, Appellate Division affirmed judgment which denied wife a divorce for insufficient proof under DRL 170(1). While the trial court has broad discretion such a divorce cannot be granted where the court concludes there is a dead marriage. Further, a high degree of proof is required where there is a marriage of long duration (22 years here).

 Skala v. Skala (1985, 2d Dept) 111 App Div 2d 319, 489 NYS2d 303, Appellate Division affirmed jury verdict denying husband a divorce. It will not be granted where the plaintiff merely shows irreconcilable differences and incompatibility.

 Tsakis v. Tsakis (1985, 2d Dept) 110 App Div 2d 763, 488 NYS2d 51, Appellate Division reversed judgment of divorce to wife under DRL 170(1) and provision of judgment which directed the sale of marital residence. N.Y. does not permit divorce on a "no-fault" basis or merely because the marriage is dead.

 Volmer v. Volmer (1986, 3d Dept) 116 App Div 2d 960, 498 NYS2d 237. Where parties were married in 1961 Appellate Division held that wife failed to establish grounds for divorce under DRL 170(1). A high degree of proof is necessary to dissolve a marriage of long duration. Court held that defendant's late night absences from the marital home over a 4 month period were insufficient to establish cruelty and noted that plaintiff testified to minimal mental anguish.

 Wachtel v. Wachtel (1985, 2d Dept) 114 App Div 2d 952, 495 NYS2d 216, Appellate Division affirmed order which dismissed husbands cause of action under DRL 170[1]. Where the marriage is of a long duration a high degree of proof of cruel and inhuman treatment is required to be shown. Evidence that plaintiff's distressed mental state had been caused by factors other than marital difficulties would militate against dissolution. In addition he continually returned to the home after brief separations, which indicated it was not unsafe or improper to cohabit with defendant.

 Hage v. Hage (1985, 3d Dept) 112 App Div 2d 659, 492 NYS2d 172, the Appellate Division affirmed a judgment denying the wife a divorce based upon cruel and inhuman treatment. Whether conduct constitutes cruelty depends in part on the duration of the marriage with a greater showing required for a longer marriage. Although the parties are incompatible, a divorce cannot be granted because there is a dead marriage.

 In Marciano v. Marciano (1990, 4th Dept) 161 App Div 2d 1163, 555 NYS2d 518, app den 76 NY2d 707, 560 NYS2d 989, 561 NE2d 889, the Appellate Division reversed a judgment of divorce in this marriage of long duration, vacated the distribution of marital property and the award of exclusive occupancy to the wife. Plaintiff testified there were six occasions between 1982 and 1985 when the parties argued and defendant used obscene and vulgar language. On one occasion defendant pounded plaintiff's chest and grabbed his genitals. Plaintiff testified that as a result of such conduct he was upset and embarrassed, his ulcer was irritated and his work performance adversely affected. No medical proof was presented. A high degree of proof is required in a marriage of long duration. The awards of child support, spousal maintenance and counsel fees were affirmed.

 In Ostriker v. Ostriker, NYLJ, 6-6-90, p.29, col. 6, Sup.Ct., Nassau Col. (Winick, J.), an action for divorce commenced days prior to the enactment of the Equitable Distribution laws in 1980, the Supreme Court denied plaintiff-wife a divorce, for failure to establish cruel and inhuman treatment under DRL $ 170(1) or (constructive) abandonment under DRL 170(2). This was a thirty-year marriage, which the Court held to be practically "dead" and long dying when the action was commenced. However, plaintiff's claim of cruel and inhuman treatment was not established because there was no proof of physical abuse by the husband and no proof that continued cohabitation would endanger the wife's life or well being. The Court denied plaintiff's constructive abandonment claim because the blame for the long term cessation or marital relations was shared, "equally divided between the spouses it cannot be said that there was an unjustified refusal by the husband to have sex with a wife who was not about to let him anywhere near her." Defendant's two corresponding counterclaims were denied for the same reasons. The Court granted the husband's counterclaim for a declaration that the marital residence was held by the plaintiff as trustee for the benefit of both spouses. The transfer of the house to the wife alone, in 1972, to shield it from the husband's creditors, did not constitute a "gift" to the wife, as it was made at her request, to protect her own interests from the husband's creditors. The wife was denied alimony because she was able to be self-supporting. Counsel fees were also denied the plaintiff, for failure to show that her need was greater than the husband's "alleged superior ability to pay." [↑](#endnote-ref-39)
40. . In Rispoli v. Rispoli (1987, 2d Dept) 131 App Div 2d 556, 516 NYS2d 280, Appellate Division affirmed judgment which granted wife a divorce on cruelty grounds. The findings of the trial court on the issue of cruelty will not lightly be overturned on appeal. Corroboration is not required. While this is a marriage of long duration, the record supports the findings as to specific acts of substantial misconduct by the husband during the preceding 5 years which included 3 incidents of physical abuse.

 In Tortorello v. Tortorello (1987, 2d Dept) 133 App Div 2d 683, 519 NYS2d 853, Appellate Division affirmed judgment which granted wife a divorce on grounds of cruel and inhuman treatment after hearing the conflicting testimony of the parties. This determination, which necessarily involved crediting the plaintiff's testimony as to several incidents of violence by the defendant against her and necessarily rejecting the defendant's denial of those incidents was well within the domain of the Trial Court.

 Kern v. Kern (1985, 3d Dept) 115 App Div 2d 818, 495 NYS2d 776. In this 29 year marriage Appellate Division held that husband satisfied burden of high degree of proof of cruelty. Defendant denied plaintiff's charge of drunkenness but admitted the substance of most of the allegations explaining that severe depression accounted for her mood change. She did not deny experiencing repeated 4 month periods of depressed withdrawal from family life and responsibilities and constantly harassing and haranguing plaintiff. Assuming that the trial court credited plaintiff's testimony that defendant's ranting, raving, offensive language and threats were precipitated by her misuse of alcohol plaintiff was entitled to a fault based divorce.

 Ledesma v. Ledesma, NYLJ, 9-24-87, P.11, Col. 6, Sup Ct. NY Co, (Baer, J.), parties married in 1975 and plaintiff alleged that defendant locked her out of marital residence in September 1984, and permanently in November 1984; that he forbade the children to talk to her for a number of months, struck her on 2 occasions, constantly accused her of being "evil", "being the devil" and being a prostitute; that he refused to permit her to watch TV or listen to radio other than religious and news programs; forced her to attend his church; and refused to have sexual relations with her for over a year. Court awarded plaintiff a divorce on grounds of cruelty and constructive abandonment.

 Melnick v. Melnick (1985, 1st Dept) 115 App Div 2d 416, 496 NYS2d 221, Appellate Division reversed order which dismissed husbands complaint for divorce under DRL 170(1). It held that in a 20 year marriage, where the complaint set forth 4 allegations of physical abuse (throw objects; slammed door on arm) and there were allegations of mental abuse (obscenities) it set forth a cause of action for divorce based on cruelty.

 Flynn v. Flynn, NYLJ, 3/20/89, P.26, Col.3, Sup. Ct., Nassau Co. (Winick, J.), in this action for divorce where the parties were married 30 years the Supreme Court found that the husband's admissions to his wife that for 14 years of those years he had another woman as a girlfriend and lover, even without concrete proof of an adulterous relationship other than telephone calls to the woman and the purchase of an airplane ticket for a return trip to New York from Florida with the woman, constituted a sufficient basis to grant the wife a divorce on the grounds of cruel and inhuman treatment.

 McKilligan v McKilligan (1989, 3d Dept) 156 App Div 2d 904, 550 NYS2d 121, in this marriage of more than 25 years, the Appellate Division affirmed the judgment which granted the wife a divorce on the grounds of cruelty. It found that the complaint alleged that over the prior five years, defendant (1) absented himself from plaintiff and children, and completely removed himself from social intercourse with the family, (2) did not converse with plaintiff and directed her to write notes to him, (3) permitted the household heating and plumbing system to fall into disrepair, creating health hazards for household members, (4) refused to talk about family finances or defendant's corporation, (5) showed no affection or caring toward plaintiff and had ended sexual contact with plaintiff, (6) was cold and uncaring, causing the children to suffer emotionally and one child to develop severe migraine headaches, (7) made it impossible and unsafe for plaintiff to continue to cohabit with defendant in the marital home. Plaintiff's claims of long-term cruelty and her testimony that she so feared defendant that she became physically and mentally debilitated were corroborated by testimony of other family members, outsiders and medical experts. Supreme Court allowed testimony as to incidents prior to the five-year Statute of Limitations and which were not specifically mentioned in the pleadings. This testimony was not beyond the parameters of pleadings and did not prejudice defendant, as these were further instances of humiliation alleged by plaintiff and established a continuing course of conduct which extended beyond five year Statute of Limitations. A doctor who based his testimony upon his treatment of plaintiff over the course of 30 sessions, plaintiff's history of otherwise being free of psychological problems and treatment before her marriage, and her improvement after separation from defendant, were properly permitted to testify.

 In Cutson v. Cutson (1990, 3d Dept) 161 App Div 2d 996, 557 NYS2d 568, the Appellate Division modified the judgment of divorce, on the law, by vacating those provisions relating to resolution of separate and marital property issues and remitted the matter to Supreme Court for further proceedings not inconsistent with its decision. The parties were married in 1975, each for the second time, and had two sons. The Appellate Court held that acts of cruelty constituting grounds for divorce do not require corroboration. Since much of the alleged cruelty occurred in private, plaintiff's testimony, by itself, was sufficient to give grounds for the divorce.

 In Thom v. Thom (1990, App Div, 3d Dept) 558 NYS2d 219, the Appellate Division affirmed a judgment of divorce granted to the plaintiff-wife which awarded the parties joint custody of their one child with physical custody to plaintiff; directed that the marital home be sold for no less than $145,000 and the proceeds divided equally and awarded plaintiff $3,000 for legal fees. The parties were married 6 years. It held that the trial Court did not abuse its discretion in granting the divorce, considering the length of the marriage, and plaintiff's testimony that defendant struck her many times, threatened to hit her and hurt her after he moved out of the house, threatened her life with a rifle in the presence of the parties' child, called her vulgar names and threatened her with violence.

 In Krishnan v. Krishnan (1990, 1st Dept) 166 App Div 2d 357, 561 NYS2d 162, the Appellate Division affirmed a divorce judgment granted to the wife on the grounds of cruel and inhuman treatment which consisted of physical evidence testified by the wife. Such physical evidence included slapping, choking and beating her with a shoe. The Court held that such acts of physical violence were not trivial, but were sufficient to constitute a pattern of grievous misconduct which presented an actual threat to the wife's health and safety. The Court held that no negative inference can arise as a result of the wife's failure to call witnesses because the witnesses to the beatings in this case were all members of the husband's immediate family, were not within the wife's control and could be deemed hostile to the wife's cause.

 In Reiss v. Reiss (1991, 2d Dept) 170 App Div 2d 589, 566 NYS2d 365, app dismd without op 78 NY2d 908, 573 NYS2d 469, 577 NE2d 1061, the Appellate Division granted the husband a divorce on his counterclaim based on cruelty, affirmed the award of custody to the wife and remitted the case to the Supreme Court for a new determination with respect to child support, visitation, equitable distribution and financial issues. The record supported defendant's assertion in this marriage of short duration that the wife's compulsive gambling and its deleterious impact on the parties' relationship, together with certain other acts committed by the plaintiff, created an oppressive and unsafe marital environment, causing the husband to suffer from and seek professional treatment for stress, depression and certain physical ailments.

 In Hird v. Hird (1991, 4th Dept) 170 App Div 2d 1049, 566 NYS2d 117, the Appellate Division affirmed judgment of divorce granted by the Supreme Court on the ground of cruel and inhuman treatment. The Court stated that although the Supreme Court should have stated "the facts it deems essential", a reversal was not required because the record on appeal was complete and permitted the Court to make the proper findings. The testimony established that the husband physically and verbally abused and threatened the wife and that the husband was involved in a extra marital relationship during the marriage. Corroboration of the wife's testimony was not required.

 In Wilbourne v. Wilbourne (1991, 1st Dept) 173 App Div 2d 289, 569 NYS2d 680, the Appellate Division affirmed a judgment of divorce granted to the husband, on the grounds of cruel and inhuman treatment. The husband's testimony at trial revealed a pattern of quarrelling initiated by the wife, which led to physical altercations, including the throwing of plates, fruits and other objects, scratching and hair pulling. These disputes escalated to a point where they were occurring on a nightly basis, causing the husband to become depressed. The wife also repeatedly accused the husband of infidelity. These accusations were repeated to the parties' daughter and to a partner in the architectural firm with which the husband was associated. The Appellate Division agreed with the findings of the trial court that the wife failed to demonstrate that her suspicions or accusations were justified or had a reasonable basis, especially with respect to the period in question subsequent to 1980. The Court held that based upon the wife's repeated accusations of infidelity, which in this case so undermined the marital relationship as to make continued cohabitation improper, and in light of the constant fighting between the parties which went well beyond any mere incompatibility or strained relations, the trial Court did not abuse its broad discretion in granting a divorce to the husband on the grounds of cruel and inhuman treatment. [↑](#endnote-ref-40)
41. . (1985) 64 NY2d 339, 486 NYS2d 891, 476 NE2d 290. [↑](#endnote-ref-41)
42. . (1979) 440 US 268, 59 L Ed 2d 306, 99 S Ct 1102, on remand (Ala App) 374 So 2d 895, cert den (Ala) 374 So 2d 898 and cert den and app dismd 444 US 1060, 62 L Ed 2d 738, 100 S Ct 993 [↑](#endnote-ref-42)
43. . Laws 1980, Ch 281, eff July 19, 1980. See Dom Rel L 236(B). [↑](#endnote-ref-43)
44. . See Foster and Freed, Brady v. Brady, Ghost of Hessen Stalks Again, NYLJ, Mar 18, 1985, p. 1, col. 1. [↑](#endnote-ref-44)
45. . See Dom Rel L. 236(B) subd 5 and subd 6 [↑](#endnote-ref-45)
46. . However, the bargaining leverage of parties to a short-term marriage was reduced since in a contested case a lesser degree of proof was required to establish grounds for divorce. [↑](#endnote-ref-46)
47. . Dom Rel Law 170, subd 2. [↑](#endnote-ref-47)
48. . Dom Rel Law 200, subd. 2 [↑](#endnote-ref-48)
49. . Dom Rel Law, 220 [↑](#endnote-ref-49)
50. . See Dom Rel Law 200, subdiv. 2 [↑](#endnote-ref-50)
51. . See Dom Rel Law, 202 [↑](#endnote-ref-51)
52. . Where a husband sues for a divorce on the ground of abandonment in an uncontested action, and makes out a prima facie case, he is entitled to a judgment of divorce if defendant wife fails to plead and prove justification for her leaving him. Maryon v. Maryon (1977, 2d Dept) 60 App Div 2d 623, 400 NYS2d 160. Although the Appellate Division, Second Dept., speaks of defendant wife's failure "to plead or prove the defense of justification" it must be noted that there are no defenses under Dom Rel Law 170 to any other ground for divorce except adultery. When abandonment is alleged, if the defendant can show justification for the alleged abandonment then the plaintiff's case has not been made out, since a justified leaving by a spouse does not constitute abandonment. In an uncontested matrimonial action based on abandonment plaintiff need not raise and rebut any inference of justification. [↑](#endnote-ref-52)
53. . Phoenix v. Phoenix (1973, 3d Dept) 41 App Div 2d 683, 340 NYS2d 977, app dismd 33 NY2d 691, 349 NYS2d 672, 304 NE2d 369, the Appellate Division held that the evidence established that defendant wife had abandoned her husband without justification for a period of one year so as to entitle him to a divorce pursuant to Dom Rel Law 170, subd 2. (Citing Kaplan v. Kaplan (1969, 2d Dept.) 31 App Div 2d 247, 297 NYS2d 881). [↑](#endnote-ref-53)
54. . Uhlmann v. Uhlmann, 17 Abb NC 236 [↑](#endnote-ref-54)
55. . Schine v. Schine (1972) 31 NY2d 113, 335 NYS2d 58, 286 NE2d 449 [↑](#endnote-ref-55)
56. . Henderson v. Henderson (1978, 4th Dept) 63 App Div 2d 853, 405 NYS2d 857; Belandres v. Belandres (1977, 1st Dept) 58 App Div 2d 63, 395 NYS2d 458; Butts v. Butts (1975, 2d Dept) 50 App Div 2d 584, 375 NYS2d 31). [↑](#endnote-ref-56)
57. . Morris v. Morris, (1943) 267 App Div 147, 44 NYS2d 724, revd on other ground 293 NY 709, 56 NE2d 589 [↑](#endnote-ref-57)
58. . (1979, 2d Dept.) 70 App Div 2d 30, 419 NYS2d 573 [↑](#endnote-ref-58)
59. . Citing Cavallo v. Cavallo (1974) 79 Misc 2d 195, 359 NYS2d 628; Dudzick v. Dudzick (1975) 84 Misc 2d 731, 378 NYS2d 234; Rossiter v. Rossiter (1977) 92 Misc 2d 342, 399 NYS2d 596 [↑](#endnote-ref-59)
60. . Fischel v. Fischel (1955) 286 App Div 842, 142 NYS2d 236 [↑](#endnote-ref-60)
61. . Saminos v. Saminos (1955) 285 App Div 1020, 139 NYS2d 454 [↑](#endnote-ref-61)
62. . Cavallo v. Cavallo (1974) 79 Misc. 2d 195, 359 NYS2d 628; Francati v. Francati (1977, 4th Dept.) 57 App Div 2d 694, 395 NYS2d 547 [↑](#endnote-ref-62)
63. . Clark, Law of Domestic Relations 337 (1968) [↑](#endnote-ref-63)
64. . (1976, 2d Dept) 51 App Div 2d 741, 379 NYS2d 479; See also Casale v. Casale 111 AD2d 737, 489 NYS2d 775 [↑](#endnote-ref-64)
65. . At one time the various departments were in disagreement

as to whether or not an action for judicial separation for abandonment could be brought when the parties were living under the same roof but not as husband and wife. Compare Berman v. Berman (1950) 277 App Div 560, 101 NYS2d 206; Lowenfish v. Lowenfish (1951) 278 App Div 716, 103 NYS2d 357; and List v. List (1946) 186 Misc 261, 61 NYS2d 809, mod 276 App Div 998, 95 NYS2d 604. [↑](#endnote-ref-65)
66. . Diemer v. Diemer (1960) 8 NY2d 206, 203 NYS2d 829, 168

NE2d 654. See also Mirizio v. Mirizio (1926) 242 NY 74, 150 NE 605, 44 ALR 714; 35 Yale LJ 758 (1926). [↑](#endnote-ref-66)
67. . Devon v. Devon (1961, Sup) 214 NYS2d 109. Wood v. Wood (1963) 41 Misc 2d 95, 41 Misc 2d 112, 245 NYS2d 800, mod on other grounds (1st Dept) 22 App Div 2d 660, 253 NYS2d 204, affd 16 NY2d 64, 262 NYS2d 86, 209 NE2d 709, 13 ALR3d 1401, cert den 383 US 943, 17 L Ed 2d 206, 86 S Ct. 1197. [↑](#endnote-ref-67)
68. . (1973, 2d Dept) 41 App Div 2d 831, 342 NYS2d 9, affd 34 NY2d 545, 354 NYS2d 105, 309 NE2d 874 [↑](#endnote-ref-68)
69. . (1974) 34 NY2d 545, 354 NYS2d 105, 309 NE2d 874 [↑](#endnote-ref-69)
70. . (1974) 33 NY2d 406, 353 NYS2d 421, 308 NE2d 891 [↑](#endnote-ref-70)
71. . (1980) 105 Misc 2d 1054, 430 NYS2d 247 [↑](#endnote-ref-71)
72. . \_\_\_AD2d\_\_\_, 567 NYS2d 132, (2d Dept., 1991) [↑](#endnote-ref-72)
73. . \_\_\_AD2d\_\_\_, 533 NYS2d 622 (2d Dept., 1988) [↑](#endnote-ref-73)
74. . Giella v Giella (1968) 55 Misc 2d 727, 286 NYS2d 621. [↑](#endnote-ref-74)
75. . (1970) 26 NY2d 865, 309 NYS2d 604, 258 NE2d 98.

 George v. George (1970, 4th Dept) 34 App Div 2d 888, 313 NYS2d 85, held that the trial court had erred in finding that the defendant wife had committed adultery. The only testimony submitted was that a man visited the wife on various occasions while plaintiff was not at home. The court held that although such evidence might be considered on the issue of cruel and inhuman treatment, it was insufficient to support a finding of adultery. [↑](#endnote-ref-75)
76. . Kerr v. Kerr (1909) 134 App Div 141, 118 NYS 801.

 In Pepe v. Pepe, 160 NYLJ No 104, Nov. 29, 1968, p. 17, the court presumed that adultery must have occurred between professional colleagues who frequented hotel rooms for private lunches that lasted three or four hours. Compare Hess v. Hess (1966, 2d Dept) 25 App Div 2d 548, 267 NYS2d 537, where a "lucky Pierre" was found in the same hotel but not the same room with the allegedly unfaithful wife, and divorce was denied. [↑](#endnote-ref-76)
77. . See Dom Rel Law 171 as to the defenses to a divorce action based upon adultery, and see Dom Rel Law 200(4), with reference to defenses to a separation action based upon adultery. [↑](#endnote-ref-77)
78. . Dom L 170, subd 4. [↑](#endnote-ref-78)
79. . Dom Rel L 170, subd 4.

 The Penal Law 130.00 says 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."

 In New York, as in most states, adultery is rarely prosecuted. In 1948, there were over 6,000 divorce cases based upon adultery but not a single prosecution for that offense. Between June 1959 and June 1960, there were 1700 divorce cases based on the adultery ground in New York City but no prosecutions. See Ploscowe, Sex And The Law, Ch 5 (1962 rev ed). [↑](#endnote-ref-79)
80. . Dom Rel L 211

 Plaintiff must satisfactorily prove adultery even though defendant fails to deny factual allegations in complaint that he has been living with another woman from 1955 to present time. Kirshner v. Kirshner, (1959, 2d Dept.) 7 App Div 2d 202, 182 NYS2d 286.

 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. Taylor v. Taylor, (1908) 123 App Div 220, 108 NYS 428 [↑](#endnote-ref-80)
81. . Sackler v. Sackler, (1964) 15 NY2d 40, 255 NYS2d 83, 203 NE2d 481, 5 ALR3d 664. [↑](#endnote-ref-81)
82. . Mondano v. Mondano, (1910, Sup) 122 NYS 731 [↑](#endnote-ref-82)
83. . Kane v. Kane, 3 Edw Ch. 389; Mondano v. Mondano, (1910, Sup. 122 NYS 731 [↑](#endnote-ref-83)
84. . Miller v. Miller, (1920) 194 App Div 183, 185 NYS 313 [↑](#endnote-ref-84)
85. . Mitchell v. Mitchell, (1875) 61 NY 398 [↑](#endnote-ref-85)
86. . Miller v. Miller, supra.

 The following allegation:

 "Upon information and belief that since the 1st day of October, 1917, the defendant has committed adultery with certain women, whose names are unknown to plaintiff, in the city of New York, and at various other times and places, which times and places plaintiff is unable to state with more particularity," is satisfactorily established by proof that the defendant was living in adultery in the month of November, 1917, at 212 \_\_\_\_\_\_\_ Street, in the City of New York, with a woman known as "Mary", whom he introduced as his wife. Miller v. Miller, supra. [↑](#endnote-ref-86)
87. . Miller v. Miller, supra. [↑](#endnote-ref-87)
88. . Davidson v. Davidson (1909) 134 App Div 958, 119 NYS 141; Harris v. Harris (1903) 83 App Div 123, 82 NYS 568. [↑](#endnote-ref-88)
89. . Yates v. Yates (1914) 211 NY 163, 105 NE 195; Mattison v. Mattison (1911) 203 NY 79, 96 NE 359; Cullen v. Cullen (1923) 205 App Div 276, 199 NYS 598; Cottrell v. Cottrell (1915) 165 App Div 693, 151 NYS 289; Shaw v. Shaw (1913) 155 App Div 252, 140 NYS 109. It is said the court "must take such evidence as the nature of the case permits, circumstantial, direct, or positive, and bringing to bear upon it the experiences and observations of life, and thus weighing it with prudence and care, give effect to its just preponderance." Moller v. Moller (1889) 115 NY 466, 22 NE 169. [↑](#endnote-ref-89)
90. . Harris v. Harris (1903) 83 App Div 123, 82 NYS 568.

 As to proof of nonaccess of plaintiff and subsequent birth of child, see Taylor v. Taylor (1908) 123 App Div 220, 108 NYS 428; Mayer v. Davis (1907) 122 App Div 393, 106 NYS 1041.

 As to entries in hotel registers, and as to testimony upon which decree of divorce against the corespondent was granted, as evidence of act of adultery, see Mattison v. Mattison (1911) 203 NY 79, 96 NE 359. [↑](#endnote-ref-90)
91. . Trumpet v. Trumpet (1961, Sup) 215 NYS2d 921; Fleck v. Fleck (1957) 6 Misc 2d 202, 163 NYS2d 218; Brooks v. Brooks (1953, Sup) 120 NYS2d 335.

 The following charge of the court was said to be able and instructive: "The burden is upon the plaintiff from first to last in the case. He must satisfy you by a fair preponderance of credible evidence of the two propositions which I have heretofore indicated to you: First, that these parties had the lascivious desire; and second, that they had the opportunity to gratify it, and third, that they did gratify it. That, however, you may find as an inference; that is to say, you are not called upon to receive direct proof of the fact, but, given the desire and intent and opportunity, you may if you are satisfied by a fair preponderance of credible evidence if you can say it is likely and probable, and necessarily followed from the preceding circumstances that they did commit the act you may find it, although no one saw it." Roth v. Roth (1904) 90 App Div 87, 85 NYS 640, affd 183 NY 520, 76 NE 1107. [↑](#endnote-ref-91)
92. . Brooks v. Brooks (1953, Sup) 120 NYS2d 335.

 Where the circumstances shown by the evidence were many, the opportunities frequent, and positive evidence of affection was openly shown, a finding of the court that the defendant was not guilty of adultery as charged was held to be against the weight of evidence. Cullen v. Cullen (1923) 205 App Div 276, 199 NYS 598. [↑](#endnote-ref-92)
93. . Pollock v. Pollock (1877) 71 NY 137; Bosch v. Bosch (1949) 275 App Div 1046, 91 NYS2d 841; Nottingham v. Nottingham (1924) 209 App Div 459, 204 NYS 750; Cottrell v. Cottrell (1915) 165 App Div 693, 151 NYS 289; Graham v. Graham (1913) 157 App Div 52, 141 NYS 766; Keville v. Keville (1907) 122 App Div 388, 106 NYS 993; Brooks v. Brooks (1953, Sup) 120 NYS2d 335.

 The mere fact that the defendant and the corespondent were alone in the kitchen of the defendant's home from about 9:30 p.m. until midnight, at which time the plaintiff appeared, and that for the most of the time at least they were without a light, is not proof that the wrong has been done. Graham v. Graham (1913) 157 App Div 52, 141 NYS 766. [↑](#endnote-ref-93)
94. . Brooks v. Brooks (1953, Sup) 120 NYS2d 335. [↑](#endnote-ref-94)
95. . Kay v. Kay (1932) 235 App Div 25, 256 NYS 147; Rathje v. Rathje (1931) 232 App Div 664, 247 NYS 880; Roth v. Roth (1904) 90 App Div 87, 85 NYS 640, affd 183 NY 520, 76 NE 1107.

 Evidence that the defendant met a woman who was not his wife at a railroad station, took her to a hotel where he registered both her and himself under an assumed name as husband and wife, had a room assigned to them upstairs in the hotel, ascended with her in the lift as if to the room, taking their baggage with him, and that neither of them was seen to come down, although the witness waited in the hotel until midnight, was held sufficient to justify an interlocutory decree of divorce, the court observing, "We have it of old that 'it is presumed he saith not a pater noster' there." Kerr v. Kerr (1909) 134 App Div 141, 118 NYS 801.

 Since one act of adultery is sufficient grounds for divorce (Kay v. Kay (1932) 235 App Div 25, 256 NYS 147; Rathje v. Rathje (1931) 232 App Div 664, 247 NYS 880), and since the evidence of wife's adultery was "clear and convincing," the husband was entitled to a summary judgment for divorce. The defendant wife's own testimony clearly indicates that she committed adultery with one Ralph Nathan, and she does not deny this allegation in her reply affidavit, therefore plaintiff husband's motion for summary judgment is granted on his cause of action "adultery with a man or men whose name or names are unknown as well." Salomon v. Salomon (1979) 102 Misc 2d 427, 423 NYS2d 605. [↑](#endnote-ref-95)
96. . Trumpet v. Trumpet (1961, Sup) 215 NYS2d 921; Fleck v. Fleck (1957) 6 Misc 2d 202, 163 NYS2d 218.

 Where the evidence showed that the defendant and a woman not his wife registered at a hotel as man and wife, and later in the evening of the day on which they registered, were discovered in a room of the hotel partially disrobed, it was held error for the trial court to dismiss the complaint on the ground that the acts were as consistent with innocence as with guilt; such a conclusion was held not to be compatible with the acts of the parties. Miller v. Miller (1925) 212 App Div 114, 208 NYS 113. [↑](#endnote-ref-96)
97. . Allen v. Allen (1886) 101 NY 658, 5 NE 341; Pollock v. Pollock (1877) 71 NY 137; Rolfe v. Rolfe (1935) 244 App Div 863, 279 NYS 796; Cottrell v. Cottrell (1915) 165 App Div 693, 151 NYS 289; Roth v. Roth (1904) 90 App Div 87, 85 NYS 640, affd 183 NY 520, 76 NE 1107; Brooks v. Brooks (1953, Sup) 120 NYS2d 335. [↑](#endnote-ref-97)
98. . Allen v. Allen (1886) 101 NY 658, 5 NE 341.

 Where the action for divorce was based on the adultery of the defendant with his mother-in-law, direct testimony of the offense was given by the son of the corespondent, and there was no denial under oath by either the defendant or the corespondent, it was held error to dismiss the complaint on the ground that the testimony was so inherently improbable as to be beyond belief. Gelbman v. Gelbman (1920) 194 App Div 137, 184 NYS 902. [↑](#endnote-ref-98)
99. . Fleck v. Fleck (1957) 6 Misc 2d 202, 163 NYS2d 218. [↑](#endnote-ref-99)
100. . Braun v. Braun (1935) 245 App Div 194, 281 NYS 25.

 Circumstantial evidence was insufficient where it merely established that the wife was in another man's hotel room in a "shortie" nightgown and lucky Pierre was never placed in the room. Hess v. Hess (1966, 2d Dept) 25 App Div 2d 548, 267 NYS2d 537. [↑](#endnote-ref-100)
101. . Glaser v. Glaser (1901) 36 Misc 231, 73 NYS 284; Delling v. Delling (1901) 34 Misc 122, 69 NYS 479; Fawcett v. Fawcett (1899) 29 Misc 673, 61 NYS 108. [↑](#endnote-ref-101)
102. . Winston v. Winston (1901) 165 NY 553, 59 NE 273, affd 189 US 506, 47 L Ed 922, 23 S Ct 852.

 Regarding detectives, see Yates v. Yates (1914) 211 NY 163, 105 NE 195; Kruczek v. Kruczek (1942) 264 App Div 242, 35 NYS2d 289, affd 289 NY 826, 47 NE2d 434; Cottrell v. Cottrell (1915) 165 App Div 693, 151 NYS 289; Shaw v. Shaw (1913) 155 App Div 252, 140 NYS 109; Steele v. Steele (1918, Sup) 170 NYS 454. Regarding prostitutes, see McCarthy v. McCarthy (1894) 143 NY 235, 38 NE 288; Moller v. Moller (1889) 115 NY 466, 22 NE 169. [↑](#endnote-ref-102)
103. . Yates v. Yates (1914) 211 NY 163, 105 NE 195. Sed quaere. [↑](#endnote-ref-103)
104. . Filocco v. Filocco (1942) 263 App Div 296, 32 NYS2d 552. [↑](#endnote-ref-104)
105. . 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. [↑](#endnote-ref-105)
106. . Simons v. Simons (1945) 270 App Div 88, 58 NYS2d 558. [↑](#endnote-ref-106)
107. . Yates v. Yates (1914) 211 NY 163, 105 NE 195. [↑](#endnote-ref-107)
108. . Braun v. Braun (1935) 245 App Div 194, 281 NYS 25. [↑](#endnote-ref-108)
109. . Shaftan v. Shaftan (1932) 259 NY 527, 182 NE 166; Winston v. Winston (1901) 165 NY 553, 59 NE 273, affd 189 US 506, 47 L Ed 922, 23 S Ct 852. [↑](#endnote-ref-109)
110. . Winston v. Winston, supra, where the court stated: "However the evidence may be criticized, with respect to its character, or to its weight, if it was such as to support the conclusions of the trial judge, or referee, and the judgment recovered is subsequently affirmed, the controversy should be deemed closed in this court." [↑](#endnote-ref-110)
111. . See Yates v Yates (1914) 211 NY 163, 105 NE 195. [↑](#endnote-ref-111)
112. . 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. [↑](#endnote-ref-112)
113. . Winston v. Winston, supra; Moller v. Moller (1889) 115 NY 466, 22 NE 169. [↑](#endnote-ref-113)
114. . Winston v. Winston (1901) 165 NY 553, 59 NE 273, affd 189 US 506, 47 L Ed 922, 23 S Ct 852. [↑](#endnote-ref-114)
115. . McCarthy v. McCarthy (1894) 143 NY 235, 38 NE 288; Moller v. Moller (1889) 115 NY 466, 22 NE 169. [↑](#endnote-ref-115)
116. . Taylor v. Taylor (1908) 123 App Div 220, 108 NYS 428. [↑](#endnote-ref-116)
117. . Taylor v. Taylor, supra; Fox v. Fox (1960) 23 Misc 2d 504, 206 NYS2d 317. [↑](#endnote-ref-117)
118. . Hoyt v. Hoyt (1955) 286 App Div 580, 146 NYS2d 133. [↑](#endnote-ref-118)
119. . Betts v. Betts, 1 Johns Ch 197; Rivett v. Rivett (1946) 270 App Div 878, 61 NYS2d 7; Buchanan v. Buchanan (1930) 229 App Div 631, 243 NYS 436; Monypeny v. Monypeny (1916) 171 App Div 134, 157 NYS 11; Irwin v. Irwin (1946, Sup) 69 NYS2d 780; Feraco v. Feraco (1946, Sup) 69 NYS2d 652; Madge v. Madge (1886, NY) 42 Hun 524; Anonymous, 17 Abb Pr 48; Lyon v. Lyon, 62 Barb 138. [↑](#endnote-ref-119)
120. . Barbara v. Barbara (1945, Sup) 57 NYS2d 156. [↑](#endnote-ref-120)
121. . Monypeny v. Monypeny (1916) 171 App Div 134, 157 NYS 11; Lake v. Lake (1946, Sup) 60 NYS2d 105. [↑](#endnote-ref-121)
122. . Monypeny v. Monypeny, supra.

 It is said: "It is a rule of policy ....... not to found a sentence of divorce upon confession alone. Yet when it is full, confidential, reluctant, free from suspicion of collusion, and corroborated by circumstances, it is ranked with the safest proofs." Madge v. Madge (1886, NY) 42 Hun 524. [↑](#endnote-ref-122)
123. . Monypeny v. Monypeny, supra. [↑](#endnote-ref-123)
124. . Madge v. Madge (1886, NY) 42 Hun 524.

 The testimony of a policeman that he had seen plaintiff chasing defendant, that he intercepted plaintiff who accused defendant of having illicit relations with a doctor at his office, that all three of them went to the doctor's office where the doctor and defendant admitted their guilt 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 against defendant. Crowley v. Crowley (1959) 18 Misc 2d 586, 186 NYS2d 60.

 It was held in Stetson v. Stetson (1914, Sup) 146 NYS 245, that an admission by a defendant in an action for divorce is not sufficiently corroborated to justify the granting of the divorce, by a record of criminal prosecution against the defendant, showing that he had transported the corespondent to another city for the purpose of committing adultery with her, since there was no allegation in the criminal prosecution of cohabitation or unlawful intercourse, the conviction proved only an intent to commit adultery and some steps taken to carry out that intent. [↑](#endnote-ref-124)
125. . Lake v. Lake (1946, Sup) 60 NYS2d 105. [↑](#endnote-ref-125)
126. . A separation agreement which has not been acknowledged, cannot form the basis of a divorce pursuant to Domestic Relations L 170(6). Cicerale v. Cicerale, (1976) 85 Misc.2d 1071, 382 NYS2d 430, affd (2d Dept.) 54 App Div 2d 921, 387 NYS2d 1022.

 In Londin v. Londin, (1979) 100 Misc.2d 965, 420 NYS2d 326, the Supreme Court, New York County, held defective a separation agreement which was to be used as a basis for a Dom Rel L 170(6) divorce, since it was not "subscribed by the parties and acknowledged or proved in the form required to entitle a deed to be recorded."

 The separation agreement was not verified by each party, since the only signature was that of the notary public who was the attorney for both parties and who had drafted the agreement.

 This defect cannot be cured by the annexation of an affidavit by the attorney notary that each party had made an oral acknowledgement at the agreement's execution, which by inadvertence was not reduced to writing.

 However, since there was a subscribing witness to the execution, proof may be submitted by an affidavit of the subscribing witness so as so conform to the requirements of recording a deed.

 That affidavit, having now been submitted to the court, the defect will be deemed cured, since there "appears to be no time requirement as to when such proof need be taken." [↑](#endnote-ref-126)
127. . Berman v.Berman (1980) 52 NY2d 723, 436 NYS2d 274, 417 NE2d 568, affg (1st Dept) 72 App Div 2d 425, 424 NYS2d 899. The plaintiff husband had moved for summary judgment, the defendant wife opposed the motion, claiming that he had not "substantially complied" with the agreement's terms regarding support. The husband did not dispute the wife's allegations, so the motion was denied. [↑](#endnote-ref-127)
128. . Dom Rel L 170(6). [↑](#endnote-ref-128)
129. . Laws 1971 Ch 801 was enacted to make it clear that the date of a separation agreement filed as a ground for a divorce pursuant to 170, subd 6 of the Dom Rel L is immaterial. Agreements need not be dated on or after Sept. 1, 1971 in order to qualify Dom Rel L 170, subd 6. [↑](#endnote-ref-129)
130. . Laws 1968, ch 700, in an attempt to preclude retroactive application of section 170(6), provided that the separation agreement that was filed must be one subscribed and acknowledged after August 1, 1966. The date was changed to April 27, 1966 (the date the Divorce Reform Law was enacted) by Laws 1969, ch 964, eff May 26, 1969. After the decision in Gleason v Gleason (1970) 26 NY2d 28, 308 NYS2d 347, 256 NE2d 513, when it became clear that section 170(5) could be given retroactive application to living apart pursuant to separation decrees, the April 27, 1966 cut-off for separation agreements was eliminated by Laws 1970, ch 867, eff May 18, 1970. However, Laws 1970, ch 835 requires that there be at least a year's living separate and apart after September 1, 1971, in order to obtain a divorce on a one year's separation after September 1, 1972. Laws 1970, ch 835, 4 provides: "This act shall take effect September first, nineteen hundred seventy-two and apply to all actions or proceedings undertaken on or after that date, provided that the one year period specified in section one hundred seventy of the domestic relations law shall not be computed to include any period prior to September first, nineteen hundred seventy-one."

 Laws 1971 Ch 801 (eff Sept 1, 1972) amended Laws 1970 Ch 835 and Ch 867 to strike out the reference to April 27, 1966, and the filing within 30 days of execution requirement. Hence, since Sept. 1, 1972, a separation agreement of any date may be filed (or the prescribed memorandum in lieu thereof) at any time before commencement of the action and there no longer are time limitations either as to date of the agreement or its filing.

 "Laws 1971 Ch 801, was enacted to make it clear that the date of a separation agreement filed as a ground for a divorce pursuant to 170, subdiv 6 of the Dom Rel L is immaterial. Agreements need not be dated on or after Sept. 1, 1971 in order to qualify under Dom Rel L $ 170, subd 6." [↑](#endnote-ref-130)
131. . Laws 1968, ch 700. [↑](#endnote-ref-131)
132. . Laws 1969, ch 964, eff May 26, 1969, moved the cut-off date back from August 1, 1966 to April 27, 1966, because a number of attorneys had their clients execute and file separation agreements after the enactment of the Divorce Reform Law on April 27, 1966, but before August 1, 1966. [↑](#endnote-ref-132)
133. . Trachtenberg v.Trachtenberg (1970) 66 Misc 2d 140, 320 NYS2d 412. [↑](#endnote-ref-133)
134. . It has been held that a stipulation made in open court partakes of the nature of a contract, Bond v. Bond (1940) 260 App Div 781, 24 NYS2d 169, reh and app den 261 App Div 835, 25 NYS2d 1001. In the instant case, the stipulation was made in open court in the presence of a Supreme Court Justice. A written transcript was made and witnessed by the Justice before whom the stipulation was made. Thereafter the stipulation was reduced to the form of a judgment and entered by the County Clerk. Under these facts, should the wife be any less entitled to maintain an action for divorce than if the parties subscribed and acknowledged a written separation agreement? In the court's opinion, she should not. ".... [F]or the court to fail to recognize it as a basis for a divorce would do violence to the recognition in the statutory scheme 'that it is socially and morally undesirable to compel a couple whose marriage is dead to remain subject to its bonds.'" (Citing Gleason v. Gleason (1970) 26 NY2d 28, 308 NYS2d 347, 256 NE2d 513.) Martin v. Martin (1970) 63 Misc 2d 530, 312 NYS2d 520.

 In Stone v. Stone (1974, 2d Dept) 45 App Div 2d 967, 359 NYS2d 351, a stipulation had been made by the parties in open court in the Family Court, wherein the husband agreed to vacate the marital premises. The Appellate Division, 2d Dept held, in wife's action for separation, that the Supreme Court had committed error by granting defendant husband's counterclaim for divorce pursuant to Dom Rel L 170(6). The Appellate Division distinguished this stipulation from that in Martin v. Martin (63 Misc 2d 530, 312 NYS2d 520), which had been held to be tantamount to a separation agreement, and therefore a sufficient basis for granting a divorce. The Appellate Division also stated that even "were the stipulation to be regarded as a separation agreement, no divorce could be granted as no record of the stipulation was filed in the office of the county clerk." (cf Becker v. Becker (1974, 2d Dept) 44 App Div 2d 676, 353 NYS2d 796, affd 36 NY2d 787, 369 NYS2d 697, 330 NE2d 646; Liebling v. Liebling (1973) 76 Misc 2d 465, 352 NYS2d 758). [↑](#endnote-ref-134)
135. . Seldin v. Seldin, (1967) 55 Misc.2d 187, 284 NYS2d 679 [↑](#endnote-ref-135)
136. . Dom Rel L 170, subd.3 [↑](#endnote-ref-136)
137. . The original language of Dom Rel L 170, subd 3, was "confinement to prison." Laws, 1968, Ch 700, changed the phrase to read "confinement in prison". [↑](#endnote-ref-137)
138. . Dom Rel L 210 [↑](#endnote-ref-138)
139. . Short v. Short, (1968) 57 Misc.2d 762, 293 NYS2d 590

 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: 1) 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 and 2) 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 statute.

 The Court 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.

 The Court further held that even disregarding the period of defendant's "commitment to and confinement in Matteawan, plaintiff is entitled to a divorce on the basis of the period of over three consecutive years of confinement of the defendant between March 4, 1970 and August 1, 1974. The time which defendant was incarcerated in Auburn State Prison and in the Monroe County Jail after December 27, 1973, constituted time defendant was confined in prison within the meaning of Dom. Rel L 170(3). This statute, ... clearly is not limited in its application to the incarcerated spouse sentenced to a prescribed minimum period of imprisonment and incarcerated for a shorter statutory period

`pursuant to such sentencing.'"

 Colascione v. Colascione, (1968) 57 Misc.2d 199, 291 NYS2d 559, 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. See also Pergolizzi v. P ergolizzi, (1969) 59 Misc.2d 1027, 301 NYS2d 366, for the proposition that a spouse's past sentencing incarceration in a Dept. of Correction facility is to be counted as part of the requisite three year period entitling the other spouse to a divorce. [↑](#endnote-ref-139)
140. . Colascione v. Colascione, (1968) 57 Misc.2d 199, 291 NYS2d 559 [↑](#endnote-ref-140)
141. . Short v. Short (1968) 57 Misc 2d 762, 293 NYS2d 590. [↑](#endnote-ref-141)
142. . Short v. Short, supra. [↑](#endnote-ref-142)
143. . Dom Rel L 170, subd. 5, as amended, effective September 1, 1972 [↑](#endnote-ref-143)
144. . The original period of time provided in Dom Rel L 170(5) and (6) was two years. However, Laws 1970, Ch. 335, effective September 1, 1972, reduced the period to one or more years. [↑](#endnote-ref-144)
145. . Bloom v. Bloom, 52 AD2d 1030 (4th Dept., 1976) [↑](#endnote-ref-145)
146. . Pajak v. Pajak, 56 NY2d 394, 452 NYS2d 381 [↑](#endnote-ref-146)
147. . Note that Dom Rel L 170(1) provides that conduct which endangers "the physical or mental being" of the plaintiff as renders it "unsafe or improper" for cohabitation to continue. Pierone v. Pierone (1968) 57 Misc 2d 516, 293 NYS2d 256, held that the plaintiff's testimony that as a result of his wife's acts he suffered loss of sleep, a general declination of health, nervousness and tension, unsupported by any competent evidence to that effect, falls short of the proof required in a cause based on cruelty.

 In Broglio v. Broglio (1974, 2d Dept) 44 App Div 2d 705, 354 NYS2d 688, the Appellate Division held that "the law in New York does not require corroboration for proof of acts of cruel and inhuman treatment as a ground for divorce."

 In Bruno v. Bruno (1974, 2d Dept) 45 App Div 2d 707, 355 NYS2d 817, the husband sued for annulment or divorce, and the wife sued for a separation. The husband was granted an annulment, and the wife appealed. The court held that although the record revealed that plaintiff had no grounds for annulment, he would, however, be entitled to a divorce on the ground of defendant wife's cruel and inhuman treatment. The Appellate Division, 2d Dept, agreed, holding the evidence to be sufficient to establish that the wife had acted in a manner rendering it improper for the parties to cohabit. The Appellate Court held, however, that it was unable to grant the husband a divorce since he was not before it on appeal as an appellant. [↑](#endnote-ref-147)
148. . For example, Pierone v Pierone, supra, held that an intoxicated and lazy wife may be a liability to her husband, but such shortcomings do not ipso facto make her cruel and inhuman. [↑](#endnote-ref-148)
149. . Laudo v. Laudo (1919) 188 App Div 699, 177 NYS 396; Horn v Horn (1911) 142 App Div 848, 127 NYS 448; Rathbun v. Rathbun, 40 How Pr 328.

 Pajak v. Pajak (1981, 4th Dept) 85 App Div 2d 923, 446 NYS2d 765, motion gr 55 NY2d 1035, 449 NYS2d 712, 434 NE2d 1079 and affd 56 NY2d 394, 452 NYS2d 381, 437 NE2d 1138, held that since there is no statutory defense to a divorce action in New York based on defendant's cruel and inhuman treatment (citing Biamonte v. Biamonte (1977, 4th Dept) 57 App Div 2d 1052, 395 NYS2d 839), and that an attempt to explain or excuse conduct, which would otherwise constitute actionable cruelty, by reason of a defendant's mental illness, cannot be justified.

 The Court said that the statutory test is the effect of the conduct upon the plaintiff and that it must make it unsafe or improper for the plaintiff to cohabit with the defendant and the burden of such proof is on the plaintiff.

 The defendant's argument was that the defendant's conduct must be intentional and that her mental illness renders her incapable of the required intent. The Third Department held that there is nothing in the statute to indicate a requirement of intent and the Courts should not interpose a test lacking in the statute.

 The Court overruled its earlier decision in Tobin v. Tobin (1966, 4th Dept) 25 App Div 2d 948, 270 NYS2d 532 (ovrld Pajak v. Pajak (4th Dept) 85 App Div 2d 923, 446 NYS2d 765, motion gr 55 NY2d 1035, 449 NYS2d 712, 434 NE2d 1079 and affd 56 NY2d 394, 452 NYS2d 381, 437 NE2d 1138), insofar as it might have application to the instant case. [↑](#endnote-ref-149)
150. . Laudo v. Laudo (1919) 188 App Div 699, 177 NYS 396; Cook v. Cook 53 Barb 180. [↑](#endnote-ref-150)
151. . Dom Rel L 210. [↑](#endnote-ref-151)
152. . Dom Rel L 171, subd (3). This provision was first incorporated in the Revised Statutes of 1829. [↑](#endnote-ref-152)
153. . Ackerman v. Ackerman (1910) 200 NY 72, 93 NE 192; Gouch v Gouch (1910) 69 Misc 436, 127 NYS 476. [↑](#endnote-ref-153)
154. . Ackerman v. Ackerman (1910) 200 NY 72, 93 NE 192; Valleau v. Valleau, 6 Paige 207; Coyne v. Coyne (1946) 271 App Div 895, 67 NYS2d 488, affd 297 NY 927, 79 NE2d 748; Rosenbaum v. Rosenbaum (1968) 56 Misc 2d 221, 288 NYS2d 285.

 Plaintiff husband who sued for divorce for adultery committed more than five years before commencement of the action may not amend complaint to allege cruel and inhuman treatment based upon same act of adultery. Garelick v. Garelick (1968) 56 Misc 2d 76, 287 NYS 2d 815. [↑](#endnote-ref-154)
155. . CPLR 207. [↑](#endnote-ref-155)
156. . Ackerman v. Ackerman (1910) 200 NY 72, 93 NE 192; Gouch v. Gouch (1910) 69 Misc 436, 127 NYS 476. [↑](#endnote-ref-156)
157. . 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. [↑](#endnote-ref-157)
158. . Simonson v. Nafis (1899) 36 App Div 473, 55 NYS 449. [↑](#endnote-ref-158)
159. . Dom Rel L 171(4). [↑](#endnote-ref-159)
160. . Weiger v. Weiger (1946) 270 App Div 770, 59 NYS2d 444; Kapitola v. Kapitola (1919) 189 App Div 459, 178 NYS 734; Ryan v Ryan (1928) 132 Misc 339, 229 NYS 511. [↑](#endnote-ref-160)
161. . Bleck v Bleck (1882, NY) 27 Hun 296. [↑](#endnote-ref-161)
162. . Fleischer v Fleischer (1947) 188 Misc 402, 68 NYS2d 6; Mays v. Mays 18 (1940, Sup) 22 NYS2d 702, affd 261 App Div 984, 27 NYS2d 436; Ryan v. Ryan (1928) 132 Misc 339, 229 NYS 511. [↑](#endnote-ref-162)
163. . Ryan v. Ryan, supra. [↑](#endnote-ref-163)
164. . Leseuer v. Leseuer, 31 Barb 330. [↑](#endnote-ref-164)
165. . Paul v. Paul (Sup) 11 NYSR 71.

 "If the marriage contract is to be destroyed for adultery, then that issue must be alleged, joined and squarely met and not raised collaterally or urged as justification for an invalid and wrongfully procured foreign decree of divorce." Pszczola v. Pszczola (1957) 8 Misc 2d 924, 167 NYS2d 695.

 Where actions for divorce by the wife against the husband and by the husband against the wife were consolidated, the Appellate Division affirmed the trial court's finding of adultery by the husband, but reversed the trial court's finding that the wife's adultery had not been proven. The Appellate Court stated further that "recrimination is established ....... We now do what the trial court should have done ....... , and we make appropriate substitute findings, and correct both judgments accordingly, denying divorce to both parties, stripping the wife of the award of alimony and leaving intact the provisions for custody support and visitation of the child." Recht v. Recht (1971, 1st Dept) 36 App Div 2d 939, 321 NYS2d 398. [↑](#endnote-ref-165)
166. . Dom Rel L 171(2). [↑](#endnote-ref-166)
167. . 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." This is a word of a more popular kind than "condonation" Anglo-Saxon instead of Latin but with the same general meaning. [↑](#endnote-ref-167)
168. . Dom Rel L 171(2). [↑](#endnote-ref-168)
169. . Dom Rel L 171(2). [↑](#endnote-ref-169)
170. . Wood v. Wood, 2 Paige 108. The court said that the inference of condonation on the part of a wife who cohabits with her husband after knowledge of his adultery should not be as strictly drawn as in the case of the husband, inasmuch as the wife is to a certain extent under the control of her husband.

 Brown v. Brown (1940, Dom Rel Ct) 21 NYS2d 325. [↑](#endnote-ref-170)
171. . Karger v. Karger (1897) 19 Misc 236, 44 NYS 219.

 In a divorce action, it was held that testimony by the defendant to sustain a claim of condonation, to the effect that, although she was living apart from the plaintiff, cohabitation was a monthly occurrence, did not establish the defense of condonation, since the story showed an unusual, if not improbable, condition of affairs. Abbott v. Abbott (1928) 132 Misc 11, 228 NYS 611. [↑](#endnote-ref-171)
172. . Kinley v. Kinley (1952, Sup) 115 NYS2d 341. [↑](#endnote-ref-172)
173. . Dom Rel L 171(2). [↑](#endnote-ref-173)
174. . Donnelly v Donnelly (1947) 272 App Div 779, 69 NYS2d 651; Uhlmann v Uhlmann, 17 Abb NC 236. [↑](#endnote-ref-174)
175. . Merrill v. Merrill (1899) 41 App Div 347, 58 NYS 503. [↑](#endnote-ref-175)
176. . Diggs v. Diggs (1919) 187 App Div 859, 175 NYS 791; Harris v. Harris (1903) 83 App Div 123, 82 NYS 568; Deisler v. Deisler (1901) 59 App Div 207, 69 NYS 326; Abbott v Abbott (1928) 132 Misc 11, 228 NYS 611.

 Uhlmann v. Uhlmann, 17 Abb NC 236, held in reference to the requirement that the plaintiff have "knowledge of the fact": "It is to be observed that the Code does not use the word 'facts,' but 'fact.' The expression used is, 'the knowledge of the fact.' What fact? There is only one fact that can possibly be referred to, and that is the fact of adultery. In construction that word may be substituted, and then the section would read, 'with the knowledge of the adultery.' In this respect the Code differs from the Revised Statutes, where the word 'facts' is used (2 RS 145, 42)." [↑](#endnote-ref-176)
177. . Uhlmann v. Uhlmann, supra. [↑](#endnote-ref-177)
178. . Abbott v Abbott (1928) 132 Misc 11, 228 NYS 611. Evidence that the husband, while his wife was living apart from him, received a letter from her landlord, complaining of her conduct, but apparently did not believe the charges therein, as he threatened to prosecute the landlord for sending such a letter through the mail, was held to be insufficient to show condonation by subsequent cohabitation.

 In an action by a wife for divorce on the ground of adultery, evidence that the husband of the woman with whom defendant had the adulterous relations came to defendant's house and in the presence of the plaintiff charged defendant to his face with the improper relations was held insufficient to sustain a finding of condonation, in view of the additional circumstance that defendant, when so accused, protested his innocence and at that time convinced both the plaintiff and the accuser that some other man was the guilty party and volunteered his aid in discovering the identity of the culprit. Merrill v. Merrill (1899) 41 App Div 347, 58 NYS 503. [↑](#endnote-ref-178)
179. . Harris v. Harris (1903) 83 App Div 123, 82 NYS 568; Deisler v. Deisler (1901) 59 App Div 207, 69 NYS 326; Merrill v. Merrill (1899) 41 App Div 347, 58 NYS 503; Uhlmann v. Uhlmann, 17 Abb NC 236. [↑](#endnote-ref-179)
180. . Merrill v. Merrill, supra. Uhlmann v. Uhlmann, 17 Abb NC 236. [↑](#endnote-ref-180)
181. . Merrill v. Merrill (1899) 41 App Div 347, 58 NYS 503. [↑](#endnote-ref-181)
182. . Ohms v. Ohms (1955) 285 App Div 839, 137 NYS2d 397; Kreighbaum v. Kreighbaum (1922) 118 Misc 100, 192 NYS 516. [↑](#endnote-ref-182)
183. . Smith v Smith, 4 Paige 432. Clark v. Clark (1867) 30 NY Super Ct 276. [↑](#endnote-ref-183)
184. . Johnson v Johnson, 14 Wend 637; Ohms v. Ohms (1955) 285 App Div 839, 137 NYS2d 397; Timerson v. Timerson, 2 How Pr NS 526.

 Where the defendant's offense of adultery was condoned, but subsequent thereto his misconduct caused him to be convicted of a felony and sentenced to prison, it was held that the defendant by his own act put it out of his own power to provide for the plaintiff, and that such conjugal unkindness revived the condoned offense. Hoffmire v Hoffmire, 3 Edw Ch 173, affd 7 Page 60.

 Where the wife with full knowledge of the husband's adultery continued to cohabit with him until he was convicted of an assault upon her and sentenced to the penitentiary for one year, the original adultery was revived and she might secure a divorce. Kreighbaum v Kreighbaum (1922) 118 Misc 100, 192 NYS 516. [↑](#endnote-ref-184)
185. . Dom Rel L 171(1). [↑](#endnote-ref-185)
186. . Santoro v. Santoro (1945, Sup) 55 NYS2d 294, affd 269 App Div 859, 56 NYS2d 539. [↑](#endnote-ref-186)
187. . Myers v Myers, 41 Barb 114. [↑](#endnote-ref-187)
188. . Santoro v. Santoro (1945, Sup) 55 NYS2d 294, affd 269 App Div 859, 56 NYS2d 539; Myers v. Myers, 41 Barb 114. [↑](#endnote-ref-188)
189. . Fisher v. Fisher (1917) 220 NY 710, 116 NE 1044.

 In Armstrong v. Armstrong (1904) 45 Misc 260, 92 NYS 165, the husband induced the corespondent to try to seduce his wife in 1901. The corespondent accomplished his mission in 1903 and 1904. The court held that it could assume, in the absence of evidence to the contrary, that the husband's original connivance set in motion the acts finally resulting in the adultery complained of. [↑](#endnote-ref-189)
190. . Reiersen v. Reiersen (1898) 32 App Div 62, 52 NYS 509; Pettee v Pettee (1894) 77 Hun 595, 28 NYS 1067, affd 148 NY 735, 42 NE 725.

 Where a husband believes that his wife has already committed adultery and intends to persist in her adulterous practices whenever she has the opportunity, and he, desiring to obtain evidence thereof, does not actively interfere to prevent the commission of the offense, where had he desired to do so, he could have prevented it, he is not by reason of that fact guilty of such connivance in her act as will preclude his taking advantage of it as a ground for divorce (Reiersen v Reiersen (1898) 32 App Div 62, 52 NYS 509. [↑](#endnote-ref-190)
191. . Richardson v. Richardson (1906, Sup App T) 114 NYS 912, held that where a wife unjustifiably abandoned her husband she connived at his subsequent adultery. Sed quaere. [↑](#endnote-ref-191)
192. . McNeir v. McNeir (1911) 76 Misc 661, 129 NYS 481, affd 151 App Div 889, 135 NYS 1126; Mattison v. Mattison (1908) 60 Misc 573, 113 NYS 1024, revd 203 NY 79, 96 NE 359; Griffin v Griffin, 23 How Pr 183. [↑](#endnote-ref-192)
193. . Reiersen v. Reiersen (1898) 32 App Div 62, 52 NYS 509. Pettee v. Pettee (1894) 77 Hun 595, 28 NYS 1067, affd 148 NY 735, 42 NE 725. [↑](#endnote-ref-193)
194. . Helmes v. Helmes (1898) 24 Misc 125, 52 NYS 734. [↑](#endnote-ref-194)
195. . In McAllister v. McAllister (1912, Sup) 137 NYS 833, the court held that a husband was charged with responsibility for his detective's act where he employed the detective to obtain evidence of his wife's adultery, and the detective employed an assistant who spent money on different occasions in taking the wife to theatre and to dinner and later induced her to accompany him to the place where the alleged adultery occurred.

 The court distinguished Tuck v. Tuck, infra, saying that in the Tuck Case the agent employed was of the same sex as the defendant and that the agent merely suggested that he and the husband should visit a house of prostitution.

 In Tuck v. Tuck (1907) 117 App Div 421, 102 NYS 688, it was held that a wife had not connived where she employed a detective to obtain evidence of her husband's adultery in another state and the detective became acquainted with the husband and suggested that they visit a house of prostitution. The husband readily agreed and did commit adultery in that place. The appellate court, reversing the judgment of the trial court and itself granting a divorce, found that the husband understood what he was doing and acted on his own volition, that the wife did not employ the detective to aid or connive at the commission of the offense, and that neither she nor her attorneys were in any way responsible for her husband's acts. [↑](#endnote-ref-195)
196. . Hanks v. Hanks, 3 Edw Ch 469; Dodge v. Dodge (1904) 98 App Div 85, 90 NYS 438; Galloway v. Galloway (1904) 92 App Div 300, 86 NYS 1078; Goldner v. Goldner (1900) 49 App Div 395, 63 NYS 431; Bowe v. Bowe (1907) 55 Misc 403, 106 NYS 608; Cowan v. Cowan (1898) 23 Misc 754, 53 NYS 93; Huntley v. Huntley (1893) 73 Hun 261, 26 NYS 266. [↑](#endnote-ref-196)
197. . Crowley v. Crowley (1959) 18 Misc 2d 586, 186 NYS2d 60. [↑](#endnote-ref-197)
198. . Doeme v. Doeme (1904) 96 App Div 284, 89 NYS 215. [↑](#endnote-ref-198)
199. . Fuchs v. Fuchs (1946, Sup) 64 NYS2d 487; McIntyre v. McIntyre (1894) 9 Misc 252, 30 NYS 200. [↑](#endnote-ref-199)
200. . Gen Oblig L 5-311. [↑](#endnote-ref-200)
201. . Dodge v. Dodge (1904) 98 App Div 85, 90 NYS 438. [↑](#endnote-ref-201)
202. . Doeme v. Doeme (1904) 96 App Div 284, 89 NYS 215; Bowe v. Bowe (1907) 55 Misc 403, 106 NYS 608; McIntyre v. McIntyre (1894) 9 Misc 252, 30 NYS 200. [↑](#endnote-ref-202)
203. . Dodge v. Dodge (1904) 98 App Div 85, 90 NYS 438. [↑](#endnote-ref-203)
204. . Rosenzweig v. Rosenzweig (1931) 231 App Div 13, 246 NYS 231; Lake v. Lake (1946, Sup) 60 NYS2d 105.

 In a divorce action brought by the first wife on the ground of adultery, the mere fact of the appearance of the second wife, who married defendant after he had procured an illegal mail-order Mexican divorce, as a witness for the first wife, did not establish collusion. Maroth v. Maroth (1946, Sup) 64 NYS2d 260. [↑](#endnote-ref-204)
205. . Rosenzweig v. Rosenzweig (1931) 231 App Div 13, 246 NYS 231. [↑](#endnote-ref-205)
206. . Dodge v. Dodge (1904) 98 App Div 85, 90 NYS 438; Goldner v. Goldner (1900) 49 App Div 395, 63 NYS 431; Huntley v. Huntley (1893) 73 Hun 261, 26 NYS 266.

 In Cowan v. Cowan (1898) 23 Misc 754, 53 NYS 93, a divorce was refused a wife, it appearing that the husband committed adultery for the avowed purpose of furnishing grounds for a divorce, and in collusion with her son, who informed her of the facts. [↑](#endnote-ref-206)
207. . In Galloway v. Galloway (1904) 92 App Div 300, 86 NYS 1078, the defendant in a divorce action interposed an answer denying the allegations of the complaint with respect to the commission of adultery. It was unverified, and on the trial no cross-examination of witnesses was made by the defendant's attorney save in slight particulars which tended to strengthen the plaintiff's case rather than to show a defense and the defendant offered no testimony. The court held that the circumstances were sufficiently strong to show collusion and to justify the court in refusing to grant a decree of divorce. [↑](#endnote-ref-207)
208. . Peck v. Peck (1887, NY) 44 Hun 290. The court said that it is not the policy of the law to allow judgments of divorce to be taken where a valid defense exists, and courts on their own motion interfere to prevent such result where the facts are brought to their knowledge. [↑](#endnote-ref-208)
209. . McIntyre v. McIntyre (1894) 9 Misc 252, 30 NYS 200. [↑](#endnote-ref-209)
210. . Daggett v.Daggett, 5 Paige 509; Doeme v Doeme (1904) 96 App Div 284, 89 NYS 215.

 In Doeme v. Doeme, supra, the court said that it has never before been claimed that the settlement of financial transactions between a husband and wife at or about the time a divorce is granted is a badge of fraud or collusion, or even a suspicious circumstance requiring investigation. The court, by its decree, in a majority of actions where a divorce is granted, makes some provision for the support of the wife, but that a husband voluntarily does so, of itself, no more constitutes evidence of collusion than does the court's decree. There is a moral as well as a legal obligation resting upon a husband to support his wife, and even if she errs, the fact that he sees fit to make provision for her support, at the time a divorce is granted, cannot deprive him of the right which the statutes give him, to dissolve the marriage contract, nor does it furnish ground of suspicion that the judgment is the result of collusion and conspiracy between the parties, or that the court, had that fact been known, would not have granted the judgment. The same rule is equally applicable to the wife. If she has means and the husband has none, there is no impropriety on her part in making some provision for his future support and maintenance, however indelicate it may be for him to accept it. [↑](#endnote-ref-210)
211. . Between 1946-50, 96 per cent of New York divorces were uncontested. Jacobson, American Marriage and Divorce 115. One New York judge has claimed that 75 per cent of the uncontested divorces are "collusive." Greenberg, "New York's Perjury Mill," American Magazine, CXIV (Oct. 1947) 46. The accuracy of the estimate, of course, depends upon the definition of "collusion." [↑](#endnote-ref-211)