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Divorce–Desertion–Pendency of Suit as Affection Continuity of Desertion Period

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The court has held in a few instances that the absence of the accused was not reversible error, as where the accused was not in the courtroom when the clerk called the names of the jurors who had been selected, and where the court, having denied a motion for a new trial, asked counsel for the accused if he desired to make any further argument on the motion, the court holding in both instances that such matters were not part of the trial as contemplated by the statute. In the case of State v. McHaffa, where court and counsel discussed in the absence of the accused a motion to direct an acquittal of a first degree murder charge, it was not reversible error because clearly not prejudicial.

The Virginia court has held that where the accused was absent when motion for new trial was made and denied, but was afterwards given the opportunity to make the motion again when present, it was not reversible error. On similar facts, however, the West Virginia court has held that this was error.

In other jurisdictions the rule is generally not as strict as in West Virginia, some holding that the accused may waive his right to be present, and others that it is not reversible error to proceed in the absence of the accused unless actual prejudice is shown.

It would seem that the West Virginia rule is the better rule because, while it occasionally puts the state to the expense of a new trial, it assures the accused of a fairer and more impartial trial by eliminating the possibility of anything prejudicial happening while he is absent, where under the other rules it would be necessary to prove the prejudice or that he had waived his right to be present.

J. C. A.

**Divorce — Desertion — Pendency of Suit as Affecting Continuity of Desertion Period.** — W and H married in 1909. W left the family home March 29, 1934, because of alleged cruel treatment by H. On July 25, 1935, W sued H for separate maintenance. H filed a cross bill for absolute divorce on the ground of desertion. The court sustained a demurrer to the cross bill be-

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16 110 W. Va. 266, 157 S. E. 595 (1931).
17 Bond v. Commonwealth, 33 Va. 581, 3 S. E. 149 (1889).
18 State v. Grove, 74 W. Va. 702, 82 S. E. 1019 (1914).
19 Hill v. State, 17 Wis. 675 (1884).
20 State v. Pierce, 123 N. C. 745, 31 S. E. 847 (1898).
cause the statutory period of desertion was not complete, and upon full proof dismissed W's bill. On August 25, 1936, H sued W for divorce. Divorce granted. Held, that although the separate maintenance suit\(^1\) interrupted the running of the statutory two-year period,\(^2\) still after deducting the three months and seventeen days, during which the action was pending, there remained more than the necessary two years. Hewitt \textit{v. Hewitt.}\(^3\)

Earlier decisions of our court do not manifest such arithmetical clarity. In \textit{Martin \textit{v. Martin}}\(^4\) the court allowed as part of the statutory desertion period, the time in which the parties were involved in \textit{bona fide} litigation, as well as the time before filing of that litigation. Later, in \textit{Vickers \textit{v. Vickers}},\(^5\) without taking notice of the \textit{Martin} case, the court held not only that the time of the pendency of litigation between the parties cannot be counted as part of the desertion period, but also stated in broad terms that the period must have uninterrupted continuity,\(^6\) which apparently precludes counting the time prior to filing of suit.

As a general rule, courts have been unwilling to include in the desertion period the time occupied by litigation between the spouses.\(^7\) In this respect, the \textit{Vickers} case is in accord with the general rule, whereas \textit{Martin \textit{v. Martin}} is \textit{contra}. Most courts have also adopted the view that intervening litigation does not deprive the abandoned spouse of the benefit of time elapsing between the initial desertion and the institution of the litigation.\(^8\) Our court in the \textit{Martin} case recognized this proposition as sound, but seems to have taken the opposite view in \textit{Vickers \textit{v. Vickers}}.\(^9\)

\(^1\) It might be worth noting that most other cases speak of a suit for divorce as interrupting the desertion period. See cases \textit{infra}, n. 7. It is suggested that the reason for giving the maintenance suit the same effect as a suit for divorce is because the maintenance suit is one which affects the marital relation.


\(^3\) 197 S. E. 297 (W. Va. 1938).

\(^4\) 33 W. Va. 695, 11 S. E. 12 (1890).

\(^5\) 95 W. Va. 323, 122 S. E. 279, 41 A. L. R. 266 (1924).

\(^6\) Id. at 328.


\(^8\) Craig v. Craig, 118 Va. 284, 87 S. E. 727 (1915); Floberg v. Floberg, 358 Ill. 626, 193 N. E. 456 (1934); Woodward v. Woodward, 122 Fla. 300, 165 So. 46 (1935); Hartpence v. Hartpence, 121 Atl. 513 (N. J. Eq. 1923).

\(^9\) For a discussion of these contradictions see Colson, \textit{West Virginia Divorce Law} (1937) 43 W. Va. L. Q. 218.
In Hewitt v. Hewitt our court, by expressly limiting the rule of continuity in Vickers v. Vickers to apply in only those cases containing an element of reconciliation or condonation,10 and by overruling that part of the Martin case which allows pendency of litigation between the spouses to be counted, has adopted so much of each as is in accord with prevailing opinion. Thus, the result is a rule which is free from inconsistencies and easy to apply. As one court succinctly remarked, ‘It is like ‘time out’ in a football game, and if, after taking ‘time out’, there is at least two years left, the requirement of the statute is met.'\(^9\)

\[C.\ E.\ G.\]

**Trusts — Fiduciaries — Right of Fiduciary to Collect Extra Compensation for Legal Services.** — P, an attorney, performed legal services for decedent’s estate of which he was one of three co-executors, these services having been rendered with the consent of one of the other two. P petitioned for compensation for these services in addition to the fee of $750 allowed to him for his work as executor. The commissioner found the legal services worth $2,000, but the chancellor disallowed the claim. P appealed. Reversed. Held, that a liberal construction of the statute\(^1\) allowing a fiduciary any reasonable expenses incurred by him as such permits an executor rendering valuable legal services to the estate to be paid a reasonable compensation therefor as a part of his executor’s fee. Tyler v. Reynolds.\(^2\)

It has long been an established principle in equity that an executor or administrator who acts as attorney for the estate can receive no extra compensation for services rendered by him in that capacity.\(^3\) This view is predicated primarily on the fear held by courts that ‘the administrator in selecting himself to perform the duties of an attorney for the estate would become his own employer, and would be under temptation of self-interest which might lead him to act contrary to the duties of his trust.'\(^4\) Today, there is

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\(^{11}\) Hartpence v. Hartpence, 121 Atl. 513, 514 (N. J. Eq. 1923).


\(^{2}\) 197 S. E. 735 (W. Va. 1938).

\(^{3}\) Baldwin’s Ex’r v. Carleton, 15 La. 394 (1840); Willard v. Bassett, Adm’r, 27 Ill. 37, 79 Am. Dec. 393 (1861); Doss v. Stevens, 13 Colo. App. 535, 59 Pac. 67 (1899); Estate of Lankershim, 6 Cal. (2d) 568, 58 P. (2d) 1282 (1936).

\(^{4}\) Estate of Lankershim, 6 Cal. (2d) 568, 572, 58 P. (2d) 1282 (1936).