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WEST VIRGINIA DIVORCE LAW*

CLYDE L. COLSON**

II. GROUNDS FOR DIVORCE

2. Sentence to imprisonment for felony. That no West Virginia case dealing with this ground for divorce could be found is due primarily to the clarity of our statute. Litigation concerning similar statutes has usually centered around such problems as whether conviction in another state is sufficient; if so, whether the crime for which the defendant was convicted must be a felony according to the law of that state or according to the law of the state where the divorce is sought; and whether pardon has any effect on the right to a divorce. All these questions are expressly covered by the West Virginia statute in language so clear as to make comment unnecessary:

"A divorce . . . may be decreed:

"(b) When either of the parties subsequent to the marriage has, in or out of this state, been sentenced to imprisonment for the commission of a crime which under the laws of this state is a felony, and such sentence has become final, if the suit for divorce be commenced while such party is actually imprisoned under such sentence, or before the parties have again cohabited; and no pardon granted to the party so sentenced, if suit for divorce shall have been commenced before the granting of such pardon, shall restore such party to his or her conjugal rights. . . ."

3. Desertion. Although abandonment or desertion for two years is made ground for divorce, the statute does not define these terms. It is therefore necessary to examine the cases in some detail in order to determine what constitutes the offense. Prior to the 1935 revision of our divorce laws desertion alone was a ground for divorce from bed and board, but if the desertion was continued for a period of three years, the deserted party was entitled to an absolute divorce. In 1935, when limited divorces were abolished, the desertion period was shortened to two years. It will be noted that

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* Continued from the February, 1937, issue.
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70 For citation of authorities and discussion of these problems, see MADDEN, PERSONS AND DOMESTIC RELATIONS (1931) 290-291.
81 "A divorce . . . may be decreed: (c) To the party abandoned, when either party wilfully abandons or deserts the other for two years. . . ." Id. § 4(c).
this change in no way affected the offense of desertion itself. The decisions dealing with abandonment as ground for a limited divorce are therefore good authority today insofar as the elements of desertion are concerned.

Probably as good a short definition of desertion as may be found is that given by Madden:

"Desertion is withdrawal from cohabitation by one of the parties, with intent to abandon the other, without the other's consent, and without justification. . . ."82

In a recent case the West Virginia decisions were said to be in accord with Madden's definition.83 This, like other definitions, however, is of little value unless one is familiar with all that it purports to summarize. This being true, it is worth while to make a careful examination of the elements involved in the offense of desertion. According to Madden's analysis, these elements are five: (a) the cessation of cohabitation; (b) the intent to abandon; (c) the lack of consent by the abandoned party; (d) the lack of justification for the abandonment; and (e) the continuity of the separation.84 All the cases may conveniently be dealt with in the separate treatment of these various elements.

(a) The cessation of cohabitation.

Desertion was the ground alleged in the first reported divorce case in this state. The court's statement there that desertion "is composed first, of the breaking of the matrimonial cohabitation,"85 has not been questioned in subsequent cases. The only difficulty concerning this element of desertion has been the determination of what constitutes cessation of cohabitation. In the normal case of desertion, where one of the parties has left, the cessation of cohabitation is clear and the court is interested solely in whether the other elements of desertion are present. Occasionally, however, the decision turns on whether there has been a cessation of cohabitation under the circumstances of the particular case.

It is well established in this state that refusal of sexual intercourse is not such a cessation of cohabitation as to make the offender

82 Madden, op. cit. supra n. 79, at 276.
84 Madden, op. cit. supra n. 79, at 276-277. It will be noted that Madden's language has been paraphrased and that the elements have been stated in slightly different order.
guilty of desertion.88 Although there is some authority to the contrary, most courts are in accord with this view.87 It is equally well settled, on the other hand, that denial of sexual intercourse together with a refusal to perform all other marital duties does constitute desertion even though the parties continue to reside in the same home.88 It should be noted, however, that the court shows no inclination to extend this last rule and will apply it only when it appears that "one spouse withholds from the other all marital duty of every kind."89 The converse problem was raised in Burke v. Burk,90 where although living in different homes, the parties continued to have intercourse. It was quite properly held that no desertion had occurred because there had been no cessation of cohabitation.

Not only is denial of intercourse not desertion itself, but as will be seen later it is also no justification for desertion.91 On the basis of the large number of cases in which one or the other of these claims has been made only to be overruled, it may fairly be inferred that the public and the bar generally have little sympathy with the view which the court has taken. The court's reluctance to hold otherwise is simply evidence of its desire to protect the family as a social institution. In its discussion of this problem in Wills v. Wills, the court said:

"The soundness of the ruling . . . is questioned and it conflicts with some decisions in other jurisdictions. But it is clearly sustained by the weight of authority and the reasons of public policy entering into and underlying the marital relation. The policy of the law opposes and denies the allowance of divorces except for weighty and very substantial reasons. To make this a cause for divorce would render the procurement of divorces easy and afford a means of separation to all who desire it, whatever the motive might be."92

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87 MADDER, op. cit. supra n. 78, at 278 and authorities there cited.
89 Smith v. Smith, 116 W. Va. 271, 273, 180 S. E. 185 (1935) (in addition to denying intercourse the wife made the husband forego the use of the living room on Sunday morning while she slept and also made him prepare his own breakfast); Wills v. Wills, 74 W. Va. 709, 82 S. E. 1092 (1914) (although the wife refused all social and sexual intercourse, she continued to manage the home and care for the children).
90 Infra at 214.
91 Infra at 214.
92 74 W. Va. 709, 711, 82 S. E. 1092 (1914).
One may be entirely in accord with the court's effort to prevent free divorce in this state, and yet may well question whether that result would follow the adoption of the rule that a denial of intercourse is desertion.

In the first place, even if it were ground for divorce, the plaintiff would normally have serious difficulty in proving the denial. Remember that under our statute the case must be tried and heard independently of the admissions of the parties and that no divorce may be granted on their uncorroborated testimony.\(^9\) It is certainly true that normally the parties themselves are the only ones who would know there had been a denial and it is equally certain that there would not often be any corroborative evidence. The cases are few in which statements of intent to deny intercourse are made to third parties, as in Croll v. Croll,\(^9\) or in which the offending spouse renders access impossible by occupying at all times a separate locked bedroom, as in Perine v. Perine.\(^9\) This being true, it is probable that the statute was disregarded in the many West Virginia cases where refusal of intercourse was one of the accepted facts.\(^9\)

In the second place, assuming that this practical difficulty of proof may be overcome, it would appear in light of the 1935 revision that there is no more danger of collusion in this than in the ordinary case of desertion. So long as a limited divorce could be granted for desertion or abandonment alone, there was some force in the argument that through collusion a divorce might be too easily obtained because of a refusal of intercourse; but now that it would be necessary to show that this refusal had continued for two years, the danger of collusion appears to be negligible.

The case of Fuller v. Fuller,\(^9\) though somewhat unusual on its facts, may well be analogized to the cases holding that the wife had caused the cessation of cohabitation and had become the deserter by refusing to perform any of her marital duties. In

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\(^9\) W. Va. Rev. Code (1931) c. 48, art. 2, § 11. It may be well to point out that there would probably be no difficulty of proof insofar as W. Va. Rev. Code (1931) c. 57, art. 3, § 4, dealing with confidential communications between husband and wife, is concerned. This would appear to be a communication "in disregard of the marriage relation" and hence not privileged. Cf. Fuller v. Fuller, 100 W. Va. 309, 312-313, 130 S. E. 270 (1925).

\(^9\) 106 W. Va. 691, 692, 146 S. E. 880 (1929).

\(^9\) 92 W. Va. 530, 531, 114 S. E. 871 (1922).

\(^9\) In addition to the cases already cited, see those in which it was claimed that the refusal was a justification, cited infra n. 141.

\(^9\) 100 W. Va. 309, 130 S. E. 270 (1925).
Fuller v. Fuller the wife after childbirth had temporarily left home to be cared for by her sister, the husband having refused her any domestic help. Pursuant to his threat not to let her return if she left, he sought to deprive her of maintenance for herself and child and to deprive her of property which he had given her before the marriage. The holding that the husband was guilty of desertion may be explained on the theory that he terminated the cohabitation by complete abandonment of and refusal to perform his marital obligations.

It is well settled that the husband as head of the family has the right to choose the family domicile, that it is the duty of the wife to live at the domicile selected, and that her refusal to do so amounts to desertion. She is clearly guilty of desertion when she wrongfully leaves a domicile already established, but she is equally guilty when without justification she refuses to follow her husband to a new domicile. As was said by our court,

"A husband has the legal right to determine the place of abode of his family, and it is desertion for the wife to refuse to follow the husband in his change of domicile if the husband requests her to follow him. . . . The power to change the abode, however, cannot be arbitrarily exercised . . ."

The effect of the husband's arbitrary exercise of this right will be dealt with in the discussion of constructive desertion. The husband may of course forego his right to select the domicile and allow the wife to do so. In Hale v. Hale the wife took the husband with her when she went to live at her father's home. The husband subsequently left but did not offer to provide a new home nor did he request his wife to follow him. Under the circumstances he was correctly held guilty of desertion.

The case of Castilow v. Castilow presents the anomaly of a cessation of cohabitation before it ever began. The wife left her husband at the altar and after three years was charged with desertion. Despite the fact that technically there may have been no cessation of cohabitation, the husband was very properly granted a divorce.

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98 Madden, op. cit. supra n. 79, § 49.
101 supra at 216.
103 60 W. Va. 586, 55 S. E. 592 (1906).
(b) The intent to abandon.

Although it is clear that there can be no desertion without a cessation of cohabitation, it is equally clear that desertion is not established by proving merely that the parties are separated or no longer cohabit, it being also necessary to prove the intent to abandon or, as it was put in one case, "the intent to terminate the marriage relation." Thus the absence of one of the parties for business purposes is not desertion because the requisite intent is lacking. The right to be away temporarily, however, may not be used as a cloak for what is in fact desertion. In its discussion of the question, our court said:

"A husband's right to absent himself from the home temporarily, in the conduct of his business, is clear and incontrovertible, but it can no more be made a shelter and cover for bad faith than any other legal principle can be perverted to a wrong use."  

Even if the intent to abandon does not exist at the time of the separation, desertion occurs whenever the intent is subsequently formed and acted upon. Thus, if the separation is by mutual consent, an offer of reconciliation terminates the offeror's consent and a refusal by the offeree, evidencing his intent to abandon, makes him guilty of desertion from the date of the refusal. Or again, an offer to resume cohabitation, made by the one who was previously a deserter, shows that his intent to abandon has ended, and a rejection of this offer by the other party constitutes desertion. In order to have this effect, however, the offer must have been bona fide. Discussing the point, our court said:

"But to entitle a person to a divorce under such circumstances, the offer to renew the marital relation must be made in good faith, it must be free from improper qualifications and conditions, and it must be really intended to be carried out in its spirit if accepted."  


Cf. Burk v. Burk, 21 W. Va. 445, 450 (1883). It does not appear whether the husband had originally consented to the separation. However, upon the wife's rejection of his offer of reconciliation she clearly became a deserter.  


It necessarily follows that the refusal of an offer which was not made in good faith does not amount to desertion.\(^{110}\) The offer of reconciliation must also be timely, and it comes too late if made after the other party has acquired a cause of action for divorce.\(^{111}\) Note, however, that the innocent party is under no duty to seek a reconciliation.\(^{112}\)

As is true in most cases where proof of intent is necessary, the intent to abandon not only may but usually must be inferred from the circumstances. Thus, the husband’s absence coupled with his failure to contribute to the support of the family,\(^{113}\) or the wife’s refusal to perform any of her marital duties though she continues to live in the same house with her husband,\(^{114}\) may be sufficient basis for inferring an intent to desert. Further, on the theory that actions speak louder than words, the intent may be inferred from continued refusal to resume cohabitation, even though express declarations of a lack of intent to abandon accompany the refusals.\(^{115}\)

The intent to desert, once shown, is presumed to continue until the contrary appears,\(^{116}\) as by resumption of cohabitation or \textit{bona fide} offer of reconciliation. In \textit{Fisher v. Fisher},\(^{117}\) where a divorce for desertion was decreed against an insane person who had, however, been of sound mind during the whole desertion period, the intimation is clear that had the insanity occurred before the end of the period, no divorce would have been granted. That result would of course be correct. Obviously it would be impossible for an insane person to entertain the necessary intent, which must be shown to have continued for the statutory period.

The case of \textit{Tillis v. Tillis}\(^{118}\) is unique in that despite the statutory requirement that divorce cases be tried independently


\(^{111}\) \textit{Madden, op. cit. supra} n. 79, at 279; (1922) 18 A. L. R. 690. In \textit{Vickers v. Vickers}, 95 W. Va. 323, 328, 122 S. E. 279 (1924), the court intimates that this would be the rule in this state if the offense had ground for an absolute divorce. Actually, however, since the offense had ground only for a limited divorce, it was held that the rejection amounted to desertion. The soundness of this conclusion is doubtful, but with the abolition of limited divorces, the question is now solely one of academic interest. For a case reaching the opposite result, see \textit{Bohmert v. Bohmert}, 241 N. Y. 150 N. E. 511 (1926).

\(^{112}\) \textit{McKinney v. McKinney}, 77 W. Va. 58, 87 S. E. 928 (1915).

\(^{113}\) \textit{Tuning v. Tuning}, 90 W. Va. 457, 461-462, 111 S. E. 139 (1922).


\(^{117}\) 54 W. Va. 146, 148 S. E. 118 (1903).

\(^{118}\) 55 W. Va. 198, 46 S. E. 926 (1904).
of the admissions of the parties, the court based its finding that the husband was a deserter on his admissions that he intended to abandon his wife. The husband sued for divorce, alleging that the wife had deserted him, but the court, finding that he was in fact the deserter, dismissed the bill. It is of course clear that, had the wife filed a cross bill for divorce on the ground of his desertion, the court could not properly have allowed proof of these admissions.

Although the court has not again expressly applied this rule concerning the admissibility of admissions for the purpose of defeating divorce, the decision seems eminently sound in view of the purpose of the statute to prevent procurement of divorces through collusion. The court was simply violating the letter of the statute in order to give effect to its spirit.

(c) The lack of consent.

In order to constitute desertion the cessation of cohabitation must not only be with intent to abandon but must also be "against the consent of the complaining party". Hence it is clear that neither party is a deserter if the separation was by mutual agreement. It is equally clear that no desertion occurs when without any such agreement one of the parties wrongfully leaves if in fact the other consents to the separation.

As in other cases where it is necessary to prove a state of mind, so here the consent of the abandoned party may be inferred from his conduct. Occasionally there is direct evidence of his consent, as where the parties have executed a written separation agreement. In by far the majority of cases, however, it is necessary to resort to proof by circumstantial evidence. Thus the complainant may well be found to have consented to a separation which was induced by his conduct or encouraged by him. Mere

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119 However, although the court did not discuss the matter of admissibility, it does seem to have given effect to such an admission of intent to desert in Crouch v. Crouch, 78 W. Va. 705, 711-712, 90 S. E. 235 (1916).
120 Bacon v. Bacon, 68 W. Va. 747, 749, 70 S. E. 762 (1911).
121 Alkire v. Alkire, 33 W. Va. 517, 518, 11 S. E. 11 (1890); Wass v. Wass, 41 W. Va. 126, 130, 23 S. E. 557 (1895); Bacon v. Bacon, 68 W. Va. 747, 70 S. E. 762 (1911); McCoy v. McCoy, 74 W. Va. 64, 81 S. E. 562 (1914).
123 MabDEN, op. cit. supra n. 79, at 283-285.
124 Bacon v. Bacon, 68 W. Va. 747, 751, 70 S. E. 762 (1911); McCoy v. McCoy, 74 W. Va. 64, 81 S. E. 562 (1914).
125 See Crouch v. Crouch, 78 W. Va. 705, 712, 90 S. E. 235 (1916); Nunn v. Nunn, 101 W. Va. 636, 638, 133 S. E. 363 (1926). Although the court did not deny relief on the ground of the complainant's consent, that would seem
failure to protest, however, is not consent, but failure to protest with other circumstances, may be sufficient basis for inferring consent.

It should be kept clearly in mind that consent is not technically a defense. On the contrary, it is part of the plaintiff's case to prove lack of consent. Although the burden of going forward with evidence of consent is on the defendant, the burden of proof is on the plaintiff. As was said in one case,

"To succeed on the ground of desertion, a plaintiff must prove it. He must make out a clear case. He must overcome and remove by proof all doubt as to separation by consent, when the defendant makes a prima facie case thereof in proof."

Aside from the fact that the court here seems to require more than proof by a preponderance of evidence which is generally said to be all that is necessary, this is a correct statement of the law. Consent prevents separation from being desertion. Hence, lack of consent which is an essential element of the plaintiff's cause of action must be proved affirmatively.

(d) The lack of justification.

Even though there has been a cessation of cohabitation with intent to abandon and without the consent of the abandoned party, there is no desertion unless it also appears that the abandonment was without justifiable cause. Note that there again the plaintiff is required to prove a negative. Existence of justification is not properly a defense; rather, lack of justification, like lack of consent, is part of the plaintiff's case. This being true, the burden of proof is on him to show that the separation was not justified by

to be a proper explanation of these cases. Another reasonable explanation is that such conduct amounts to justification.

129 Perine v. Perine, 92 W. Va. 530, syl. 3, 114 S. E. 871 (1922) (finding by trial court not to be disturbed unless against a preponderance of evidence); Nunn v. Nunn, 101 W. Va. 636, syl. 2, 133 S. E. 363 (1926) (same); Croll v. Croll, 106 W. Va. 691, 693, 146 S. E. 880 (1929) (same); Harwood v. Harwood, 118 W. Va. 344, 347, 164 S. E. 290 (1932) (finding not disturbed "unless the error be palpable"). In older cases, however, the court used language which seems to demand a higher degree of proof. Reynolds v. Reynolds, 68 W. Va. 15, 18, 69 S. E. 381 (1910) (evidence must be full and clear); Dawkins v. Dawkins, 72 W. Va. 789, 794, 79 S. E. 828 (1913) (clear and convincing).
any misconduct on his part.\footnote{Crouch v. Crouch, 78 W. Va. 703, 90 S. E. 235 (1916).} It would seem, however, that the duty of going forward with evidence of justification should be on the defendant.

All courts hold that a separation which is justified is not desertion. There is, however, a substantial difference of opinion as to what constitutes justification. It is well settled in this state that the only conduct on the part of one spouse which will justify the other in leaving is such conduct as would itself be ground for divorce.\footnote{Alkire v. Alkire, 33 W. Va. 517, 11 S. E. 11 (1890); Martin v. Martin, 33 W. Va. 695, 11 S. E. 12 (1890); Reynolds v. Reynolds, 68 W. Va. 15, 69 S. E. 381 (1910); Dawkins v. Dawkins, 72 W. Va. 789, 792, 79 S. E. 822 (1913); McKinney v. McKinney, 77 W. Va. 58, 60, 87 S. E. 928 (1915); Kittle v. Kittle, 86 W. Va. 46, 52, 102 S. E. 799 (1920); Perine v. Perine, 92 W. Va. 530, 532, 114 S. E. 871 (1922). Note that in most of the cases it is stated that the conduct must at least be ground for a divorce from bed and board. However, since what was formerly ground only for a limited divorce is now ground for an absolute divorce, there is no longer any need to draw this distinction.}

Many courts, however, have taken the view that misconduct not ground for divorce may justify abandonment. Discussing this question, the Massachusetts court said:

""It has accordingly been declared by a great weight of American authority that ill treatment or misconduct of the husband, of such a degree or under such circumstances as not to amount to cruelty for which the wife would be entitled to sue for a divorce against him, might yet justify her in leaving his house, and prevent his obtaining a divorce for her desertion if she did so."

In his treatment of this problem Madden intimates that West Virginia, by applying the clean hands doctrine, has in fact indirectly adopted the rule stated by the Massachusetts court.\footnote{Lyster v. Lyster, 111 Mass. 327, 330 (1873).} In leaving this impression he would seem to be in error. While it is true that our court has to some extent used the doctrine of unclean hands as a cover for its retreat from the position that only misconduct which is itself ground for divorce will justify abandon-

\footnote{MADDEN, op. cit. supra \textit{n. 79}, at 287. "Some courts have simply asserted the 'clean hands' doctrine to reach the same result", citing West Virginia cases.}
ment, it is apparent from an examination of the cases that this application of the doctrine is comparatively limited.

_Hall v. Hall_ was the first case in which the court held that inequitable conduct on the part of one spouse, though not a ground for divorce and therefore no justification for the other’s desertion, might yet be a bar to his suit for divorce. It was there said:

"To obtain relief in a court of equity, the plaintiff must come with clean hands, and this maxim applies in divorce cases as well as in others of equitable cognizance... Inequitable conduct on the part of the plaintiff, though it does not amount to cause for divorce, suffices to defeat his application for relief. A different conclusion would be violative of the fundamental principle just stated."

In _Hamilton v. Hamilton_, where this doctrine was again applied, it was pointed out that the party who leaves because of misconduct less than ground for divorce has no justification and hence is guilty of desertion. Consequently, the burden of proof is on him to show as a defense that the plaintiff was guilty of such inequitable conduct as to bar his right to relief. Note how this differs from the rule that the burden is on the one alleging desertion to prove lack of justification affirmatively.

In _Perine v. Perine_, the only other desertion case in which the doctrine of unclean hands was discussed, the court refused to apply it because the plaintiff’s conduct was not "of sufficient gravity to deny him relief". Thus it is seen that even when the doctrine is mentioned it will not be applied unless the plaintiff has been guilty of serious misconduct. In most other cases, several of them decided after _Hall v. Hall_, the court has made no mention of the doctrine, but has simply applied the rule that nothing short of a ground for divorce will justify separation. In view of these considerations, it seems inaccurate to say that West Virginia has indirectly adopted the Massachusetts rule that misconduct by one spouse, not ground for divorce, will yet justify the other’s abandonment.

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134 69 W. Va. 175, 71 S. E. 103 (1911).
135 Id. at 179.
136 87 W. Va. 534, 105 S. E. 771 (1921). In _Walker v. Walker_, 109 W. Va. 662, 155 S. E. 903 (1930), where there was in fact a justification, it was said by way of dictum that the doctrine of unclean hands would have been a bar to relief.
138 92 W. Va. 530, 532, 114 S. E. 871 (1922).
139 See cases cited _supra_ n. 131.
Disagreement with Madden's conclusion that West Virginia is substantially in accord with the Massachusetts view is by no means an endorsement of the position actually taken by our court. On the contrary, the court's attitude concerning what constitutes justification seems entirely too strict. Madden's criticism of this strict view is convincing:

"It would seem that unless the courts are very generous in allowing mental cruelty as a ground for divorce, there are a good many situations, such as association with persons of the other sex in relations short of adultery, shiftless neglect to support, etc., in which a self-respecting spouse would in fact leave the other and ought to be legally justified in doing so." 140

To the situations here mentioned might be added two others which our court has held to be no justification for abandonment: denial of sexual intercourse and unnatural or indecent conduct by one of the parties. 141

A court is open to merited criticism whenever it gets so far out of touch with reality as to fail to take into account and give validity to the normal reactions of reasonable men, unless it is impossible to do so without violating some strong policy to the contrary. It seems that the West Virginia court deserves criticism on this score for its failure to recognize as justification for abandonment those situations in which any "self-respecting spouse" would not only leave but would feel himself justified in doing so. Far from violating any countervailing policy, such recognition by defeating the action for divorce would in fact further the court's oft-avowed policy against too great freedom in the granting of divorces. By the same token the present rule defeats that policy by making it possible for one of the parties to bring about a separation and thus obtain a divorce provided only that he be not guilty of misconduct which is itself ground for divorce or which is so inequitable as to call for the application of the unclean hands doctrine.

The problem of justification should not be confused with that of constructive desertion which, as will be seen shortly, is an en-

140 Madden, op. cit. supra n. 79, at 287.
tirely different question. The only point here under discussion is whether the party who leaves because of misconduct which does not entitle him to a divorce is himself so far in the wrong as to be guilty of desertion and thus subject to a suit for divorce by the other party. It may be argued that the legislative abolition of limited divorces evidences a change in the policy of this state in favor of greater liberality toward divorce. Conceding this point, it does not necessarily follow that our court should continue to apply its strict rule as to what will justify a separation. This liberalized policy may be given full effect under the doctrine of constructive desertion without stigmatizing as a deserter the innocent party who is compelled to leave because of the other’s misconduct. This being true, it seems clear that the court should either change its rule by recognizing as justification any situation in which a reasonable person would feel himself justified in leaving, or should extend materially its application of the unclean hands doctrine.

The question of constructive desertion though closely allied to is entirely distinct from that of justification. In the ordinary case of desertion the one who leaves is of course the deserter, whereas in the case of constructive desertion the party who was in fact abandoned is in law said to be guilty of desertion. Before the abandoned party will be held to have constructively deserted the other, however, it must appear that the one who left was the innocent party and that his cause for leaving was one deemed sufficient in law. As it was put in one West Virginia case:

"Under some circumstances, the innocent party may, by leaving the other, put the latter in the position of having abandoned him in the legal sense of the term. In other words, the conduct of one of the parties may justify separation from him by the other and confer right upon the leaving party to obtain a divorce upon the ground of wilful desertion. But, to justify such separation, the conduct of the guilty party must be such as to afford ground for a divorce a mensa et thoro."

This language admirably illustrates the difficulty of discussing constructive desertion except in terms of justification and the consequent tendency to confuse these quite distinct problems. The essential difference is that justification is a shield, whereas

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constructive desertion is a sword. In a case involving justification the only question before the court is whether the misconduct of the plaintiff was sufficiently serious to bar his relief; in other words, whether his misconduct constitutes a shield or defense. This does not overlook the rule that lack of justification must be proved affirmatively—that justification is not technically a defense. This rule is merely another way of saying that the burden of proof concerning justification is on the plaintiff instead of on the defendant. The fact that one of the parties was justified in leaving is in reality a defense in that it prevents the other from obtaining a divorce because of the separation. On the other hand, there is an entirely different question before the court when, instead of shielding himself behind the misconduct which justified his departure, the one who left wishes to use that misconduct as basis for affirmative relief on the theory of constructive desertion. The answer to this question should depend upon whether the court has adopted a strict or a liberal policy in granting divorces. If the policy is strict, the court should require that the misconduct be quite serious before the doctrine of constructive desertion will apply. If on the contrary it is the policy of the court to grant divorces freely, it should require very little misconduct as basis for constructive desertion. It seems clear that in mechanically applying the same standard of measurement to the misconduct without regard to whether it is used as a shield or as basis for affirmative relief, our court has failed to appreciate the essential difference between justification and constructive desertion.\textsuperscript{148}

The doctrine of constructive desertion has been used most commonly in this state in cases involving an arbitrary exercise by the husband of his admitted right to determine the family domicil. It is well settled that it is unreasonable for him to compel the wife to live with his relatives against her consent.\textsuperscript{144} If he does so, not only will she be justified in leaving,\textsuperscript{145} but she will also be

\textsuperscript{148} If all other considerations be disregarded, a purely logical scheme would involve an inverse standard of measurement. If the court's policy toward divorce is strict, it should require serious misconduct as basis for constructive desertion but should correspondingly allow slight misconduct as justification. If the policy is liberal, however, slight misconduct should be basis for constructive desertion, whereas only serious misconduct should be a justification. But see supra at 215, where it was argued that the court may fully effectuate a liberal divorce policy without placing the stigma of deserter on an innocent party who was compelled to leave because of the other's misconduct short of ground for divorce.

\textsuperscript{144} Hall v. Hall, 69 W. Va. 175, 178-179, 71 S. E. 103 (1911).

\textsuperscript{145} Thompson v. Thompson, 115 W. Va. 391, 176 S. E. 421 (1934).
entitled to a divorce on the ground of constructive desertion.\textsuperscript{146} Of course, if the husband is financially unable to provide a separate home, he would not be acting unreasonably in requiring her to live with his relatives. This would seem to be a fair inference from Judge Hatcher’s statement that

"The law entitles a wife to a home over which she alone may preside. When there is no serious obstacle in the way of the husband providing such a home, she is not required to live in the home of his parents under their domination."\textsuperscript{147}

Constructive desertion on the part of the husband also occurs when the wife refuses to follow him to a new domicil, if he has been guilty of such misconduct as would have justified her in leaving had no change in domicil been made.\textsuperscript{148}

The rule as originally established in this state that the misconduct must itself constitute ground for a limited divorce before it may be made basis for a charge of constructive desertion, would in light of the 1935 revision now appear to require that the misconduct be ground for an absolute divorce. This seems to be the natural consequence of the revision which abolished limited divorces and, with one exception which does not affect this rule,\textsuperscript{149} made ground for an absolute divorce what was formerly ground only for a divorce from bed and board. Note, however, that if the conclusion is sound that no misconduct may now be made basis for constructive desertion unless it is itself ground for an absolute divorce, it necessarily follows that the doctrine of constructive desertion is of no further importance. It obviously would be absurd to take what is already ground for an absolute divorce and turn it into constructive desertion, particularly when one would have to wait two years in order to comply with the requirement that the desertion continue for the statutory period.

Thus the question is presented whether the court should change its rule and allow constructive desertion to be predicated upon misconduct which is not ground for divorce. As has already


\textsuperscript{147}Horkheimer v. Horkheimer, 106 W. Va. 634, 639, 146 S. E. 614 (1929). In this case, however, the husband was financially able to maintain a separate home.


\textsuperscript{149}This exception was desertion or abandonment alone, without regard to the continuity of the desertion. Actual desertion can of course not be used as basis for constructive desertion.
been seen, the answer to this question depends upon whether the policy of the state in respect to divorce is strict or liberal. The determination of this policy was for the court so long as the legislature had not evidenced its will in the matter. The court was therefore entirely justified in its original strict position that divorces would not be freely granted. In view of the 1935 revision, however, which shows the legislative intent to liberalize our divorce policy, it would seem that whatever the personal opinion of the judges may be, the court should give effect to this change in policy by allowing constructive desertion to be based on conduct not ground for divorce.

(e) The continuity of the separation.

Prior to 1935 a limited divorce could be obtained in this state on the ground of desertion merely by showing that there had been a cessation of cohabitation with intent to abandon, without the consent of the abandoned party and without justification. In order to constitute ground for an absolute divorce, however, it must further appear that the separation has continued for the full statutory period, which was formerly three but is now two years. 150 In view of this requirement of continuity, it is clear that periods of desertion before and after an interruption may not be added. 151 West Virginia follows the general view that the period of desertion is interrupted by a renewal of cohabitation. 152

In Vickers v. Vickers, 153 where the husband left and shortly thereafter in good faith instituted suit for divorce, it was held that the time prior to the filing and during the pendency of this suit could not be counted in a subsequent action by the wife for a divorce on the ground of desertion, even though the husband had no ground for divorce and hence no justification for leaving. Discussing this rule, the court said:

"But upon what theory can this period be deducted? That his living separate and apart from her during this time was not wilful, but was justified. It would have been highly improper for them to have lived together while the divorce suit was pending. It would have necessarily resulted in the

dismission of that suit on the ground of condonation. While courts encourage condonation; they will not compel it. But that condonation would not necessarily result appears from a later case in which the parties resided in the same home during the trial, it being clear, however, that there was no resumption of cohabitation.

With the rule of the Vickers case should be compared the earlier decision in Martin v. Martin. In that case the wife left the husband and shortly before the end of the three year desertion period sued for a divorce on the ground of alleged adulteries committed prior to the separation. At the end of the three year period the husband filed a cross bill for divorce on the ground of her desertion. Upon the wife’s failure to sustain her charge of adultery, the court granted the husband a divorce thus allowing him to count as part of the three years the time prior to the filing of the suit and the time during which it was pending. There was no evidence that the wife’s action was filed in bad faith. It would appear, then, that in neither case did the party who left have ground for divorce and hence justification for leaving; that in both cases his suit for divorce, which was subsequently filed in good faith, was lost; that whereas in the Vickers case the abandoned party was not allowed to count the pendency of the suit as part of the period of desertion, in the Martin case he was allowed to do so. The only point of differentiation is that in one case suit was filed during the early part of the desertion period, whereas in the other it was filed near the end of that period. There is some doubt whether this difference is of sufficient importance to make the cases logically consistent.

One basis on which the cases may possibly be reconciled is the practical consideration that the abandoned party is not seriously prejudiced if he is required to wait a few months longer when suit is filed against him reasonably soon after the separation; whereas, it would be much more prejudicial to require him to wait almost twice the statutory period, which would be necessary if the court should apply the same rule when suit is filed near the end of the desertion period. If this distinction is sound a suggested rule with which both cases would be consistent is that when one of the parties leaves and within a reasonable time thereafter files

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154 Id. at 328. Accord: Criser v. Criser, 109 W. Va. 696, 156 S. E. 84 (1930).
156 33 W. Va. 695, 11 S. E. 12 (1890).
suit for divorce, the other party may not count the time prior to or during the pendency of the suit as part of the desertion period even though it subsequently appears that there was no justification for the separation.

An attempt to reconcile these cases is necessary because in the Vickers case the court did not mention Martin v. Martin despite its apparent inconsistency. This alone would not preclude the conclusion that the Martin case had been overruled, but that conclusion becomes more questionable in view of the further fact that after the decision in the Vickers case, Martin v. Martin was cited as authority for the admittedly sound proposition that when one has been sued for divorce he may allege in a cross bill as basis for affirmative relief a ground for divorce which arose during the pendency of the suit.\(^{157}\) Note, however, that in citing the Martin case the court expressed no opinion on the important question whether in that case a cause of action had arisen during the pendency of the suit. In still a later case the rule of Vickers v. Vickers was again applied.\(^{158}\) All of this simply shows that until the court clarifies its position it is impossible to determine the extent to which reliance may safely be placed on Martin v. Martin.

*(To be concluded.)*

\(^{157}\) Roberts v. Roberts, 99 W. Va. 204, 205, 128 S. E. 144 (1925).

\(^{158}\) Criser v. Criser, 109 W. Va. 696, 156 S. E. 84 (1930).