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Domestic Relations: Commencement of a Divorce Action as Interrupting the Statutory Period of Desertion

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In *Allen v. Mendelsohn & Son*,[14] where a draft payable to plaintiff's order and mailed to him was stolen en route, and the thief, having forged plaintiff's endorsement, sold the draft to defendant who in good faith collected the money from the drawee, the Court held that an action for money had and received lay against the defendant even though there was no privity between the parties. The basis for the decision was to avoid circuity of action. To invoke this doctrine in the principal case it should appear that the payee (plaintiff) has an action against the drawer on his engagement, and that the drawer has a cause of action against the drawee (defendant) for the purchase price of the cattle. If these two causes exist, then the payee might sue the drawee directly, but in such an action the drawee should be permitted to assert his defenses against the drawer, as well as the drawer's defenses against the payee.[15] Such recovery against the drawee in quasi contract has been accepted in some cases,[16] and affords the only legitimate remedy of the payee of a draft against the drawee when the latter has orally promised to accept.

RAY ECKSTEIN

Domestic Relations — Commencement of a Divorce Action as Interrupting the Statutory Period of Desertion — Plaintiff in 1945, brought a divorce action and the defendant filed a cross-complaint alleging grounds for a divorce. On October 16, 1947 the complaint and cross-complaint were dismissed for want of equity. On October 17, 1947 the plaintiff in the dismissed case filed suit for a divorce, alleging desertion since 1945. The lower court found the defendant guilty of desertion for the required one year period and granted the plaintiff a divorce. *Held:* where a suit for divorce is brought and the same is pending between the parties to the marriage contract, the parties are not only justified in living apart but must necessarily do so. Such living separate and apart does not constitute wilful desertion within the meaning of the Divorce Act. The time so consumed by the litigation cannot be reckoned in the calculation of the statutory period of desertion. Wilful desertion for the space of one year during the pendency of the divorce action was legally impossible. *Borin v. Borin, 82 N.E. (2d) 70 (Illinois, 1948).*

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or upon the estoppel, the effect is to compel the bank to make good its oral promise to pay the bill, and, under the provisions of sec. 132 of the Negotiable Instruments Law this cannot be done."

[14] 207 Ala. 527, 93 So. 416 (1922).

[15] Midland Sav. & Loan Co. v. Tradesmen's National Bank, 57 F. (2d) 868 (1932), where the Court said: "The drawee bank when sued by its customer for paying checks on forged indorsements, could set up as a defense that the payee had been duly paid." To the same effect: Beeson-Moore Stave Co. v. Clark County Bank, 160 Ark. 385, 254 S.W. 667 (1923).

[16] For a collection of these cases, see 31 A.L.R. 1063, and 67 A.L.R. 1535.

This case is typical of the majority rule that the time of the pendency of a prior divorce action between the parties cannot be counted as a part of the statutory period of desertion.[1] The problem can arise in several ways and varying decisions have been reached in the application of the rule. The first instance is illustrated by the principal case where a divorce action grounded on desertion is brought after having a previous suit for divorce dismissed within the statutory period required for desertion. Another situation arises where the deserting spouse creates by her conduct possible grounds for an immediate divorce, as in adultery, and the statutory period of desertion has not elapsed. Here the courts will not allow the dismissal of the action brought on adultery to prejudice a subsequent suit grounded on desertion as the conduct has occasioned the suit and the parties are already apart.[2] Where the deserting spouse brings a libel for divorce on frivolous or insufficient grounds, the courts will allow the subsequent desertion suit, on the theory that a groundless divorce suit is none at all.[3]

The problem is one essentially of good faith. The elements of desertion include a voluntary separation of one party from the other without justification, for the required period, with the intention of not renewing cohabitation or returning to the marital domicile.[4] Although it is possible to secure a divorce on the ground of desertion without the absence of either spouse, the risk of an adverse decision on the basis of collusion, connivance, or condonation is always present.[5]

In line with the general rule, but illustrative of the mathematical trend of mind of some courts, is the case of *Hewitt v. Hewitt*[6] where during the statutory period the deserting spouse, in good faith, brought a separate maintenance action on July 25, 1935 alleging cruel and inhuman treatment. The action was dismissed on November 12, 1935, and when the statutory period had run, the husband sued for divorce alleging desertion from March 29, 1934 to August 25, 1936, the date of the action. The court subtracted the time consumed in the intervening maintenance suit and granted the divorce. It limited the requirement for continuous desertion to those cases where a reconciliation which condones the prior period has taken place. That this result could not have been reached in Wisconsin can be seen upon examination of the statutes which provide as a ground for divorce, "The wilful desertion of one party by the other for the term of one year next preceding the

[1] Hopkins v. Hopkins, 309 Ill. 160, 77 N.E.(2d) 43 (1948); Palmer v. Palmer, 36 Fla. 385, 18 So. 720 (1895); McLaughlin v. McLaughlin, 90 N.J.Eq. 322, 107 Atl. 260 (1919).
[2] Wagner v. Wagner, 39 Minn. 394, 40 N.W. 360 (1888).
[3] Heinemann v. Heinemann, 202 Wis. 639, 233 N.W. 552 (1930).
[4] KEEZER, MARRIAGE AND DIVORCE, p. 243.
[5] Graves v. Graves, 88 Miss. 677, 41 So. 384 (1906).
[6] 120 W.Va. 151, 197 S.E. 297 (1938).

commencement of the action".[7] In pertinent language on the subject the New Hampshire court in *Easter v. Easter*[8] said, "One honestly prosecuting a supposedly sound suit for divorce cannot be guilty of desertion while so engaged; and one charged with offenses which imply the consent of the other to a separation cannot be charged with desertion within the meaning of the statute for refraining from he matrimonial relation, both because the absence is justifiable and consented to. One who has caused a separation by a groundless suit cannot charge the other spouse with desertion." The time so consumed has been quite appropriately termed "time out."[9]

The requirement of good faith as a necessary limitation to the rule is best calculated to insure justice to both spouses. As was stated by the New Jersey court in *Weigel v. Weigel*,[10] "In all the cases which state the proposition in general terms there is an assumption that the case which relieves from the duty of cohabitation is one brought in good faith in order to submit to the courts a condition of facts which the complainant really believes entitles her to the relief sought. It is undoubtedly the injured spouse's right to have a judicial determination of the action unembarrassed by the adverse presumptions raised by her continued cohabitation with the other party." Conversely, if the action is not brought in good faith, it is a fraud on the court which justifies it in refusing to give any effect to the action.

RICHARD C. GORMLEY

Domestic Relations — The Presumption of the Validity of the Second Marriage — The deceased married Mabel Von Pilcher in Lyon county, Kansas, in 1901. They lived as husband and wife until their separation in 1925. Sometime thereafter the deceased told his wife that he had divorced her and, in 1926, relying on the deceased's statement, Mabel began living with one Hal F. Showers as his wife. On June 21, 1941, the deceased married Mildred Pilcher at Logan county, Utah. One month later Mildred learned of his prior marriage. During the years 1942 and 1943, Mildred and the deceased lived in California where Mabel and Hal Showers, holding themselves out as husband and wife, also lived. The two families became quite well acquainted, and Mabel claimed that during this time the deceased came to her and told her that he had never divorced her, and further that she had never divorced him, nor had she ever been served with divorce papers. Upon his death, Mildred was appointed administratrix of his estate. Mabel filed suit to have Mildred removed as administratrix and herself substituted.

[7] WIS. STAT. (1947) 247.07(4).
[8] 75 N.H. 270, 73 Atl. 30 (1909).
[9] Holmstedt v. Holmstedt, 383 Ill. 290, 49 N.E.(2d) 25 (1943).
[10] 63 N.J.Eq. 677, 52 Atl. 1123 (1902).