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CONSTRUCTIVE DESERTION IN MARYLAND

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The aim of this article is to explore the development in Maryland of the legal fiction of constructive desertion¹ and to attempt to delineate the legitimate boundaries of its application.

Certain elementary principles pertaining to the divorce law of this State must be borne in mind from the outset. In Maryland, jurisdiction of the court to grant divorce is purely statutory, and in granting relief the court is con-

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¹ The fictional character of the doctrine is obvious. In most cases where it applies, the injured spouse is the one who initiates the actual physical separation and the offending spouse is held to have "deserted". Thus by employing the mystic adjective "constructive" the legal imagination spells out the fiction whereby "that which has not the character assigned to it in its own essential nature, acquires such character . . ." BLACK, LAW DICTIONARY (2nd Ed. 1910) 255.

For all the harsh animadversion on the subject of legal fictions (see, BENTHAM'S WORKS, Vol. 1, 243, Vol. 10, 75; JONES, HISTORICAL INTRODUCTION TO THE THEORY OF LAW, 164, *et seq.*; Stearne, *Fiction* (1932), 81 U. of Pa. L. Rev. 1; Fuller, *Legal Fictions* (1930), 25 Ill. L. Rev. 363); and in spite of the atmosphere of unreality which surrounds them, they have contributed much to the growth and development of the law; and those which our jurisprudence still retains embody a hard core of equity which has done substantial justice in particular cases. (For example, consider the equitable maxim—"Equity looks upon that as done which ought to be done", which finds specific application in such doctrines as "Equitable Assignments", "Equitable Conversion", "Resulting Trusts", "Constructive Trusts", etc.). Inherent in the application of legal fictions, however, is the ever present danger of judicial usurpation of the legislative function. The reality of this danger finds illustration in the subject of this paper and is the principal reason which prompted the writer to present it. As will be seen from subsequent pages of the text, a misapplication of the doctrine of constructive desertion can very easily result in the granting of a divorce *a vinculo matrimonii* for cruelty, which the Legislature has declared to be a ground only for a divorce *a mensa et thoro*. The inference to be drawn from the language in a number of recent decisions of our Court of Appeals where the doctrine was applied might lead some practitioners to the conclusion that the Court has finally responded to the ever-growing public clamor for relaxation of the divorce laws. This, of course, the express

fined to the causes specified in the statute.² In one^{2a} section of the statute the Legislature has set forth the causes entitling a party to an absolute (*a vinculo*) divorce.³ The causes entitling a party to a partial (*a mensa*) divorce are specified in a separate section.⁴ Applications for partial divorce and absolute divorce "proceed upon different sections of the statute, are founded upon a different state of facts and aim at entirely different results".⁵ Thus a cause which is exclusively a ground for an absolute divorce, such as adultery, cannot be made the basis for a partial divorce. In such a case, the party complaining may be required to take more than he desires because the court is without power to grant any other relief.⁶ On the other hand, where the cause is an overlapping one, such as desertion,⁷ the court has authority to grant a partial divorce even though the desertion was of the character and dura-

language of the decisions emphatically denies. In general statements of policy the Court continues to adhere to the established Maryland rule that a divorce will not be granted except for "grave and weighty causes" as prescribed by the Legislature. *Levering v. Levering*, 16 Md. 213 (1860); *Gellar v. Gellar*, 159 Md. 236, 150 A. 717 (1930); *Miller v. Miller*, 185 Md. 79, 42 A. 915 (1945); *Kidwell v. Kidwell*, 59 A. 2d 204 (Md. 1948). See the opinion in *Miller v. Miller*, *infra*, 82, where Judge Delaplaine said: "In more recent years, as the attitude of the public has become more liberal toward divorced persons, we have recognized in Maryland that the difficulty and the responsibility of the duty cast upon equity courts to adjudge applications for divorce has increased, rather than diminished, because the law of this State remains substantially the same as it was enacted in 1842, while the people often overlook what the courts are bound to recognize, that the State, representing society as a whole, has a real and vital interest in avoiding dissolution of the marital relation except for grave and weighty causes." See also *Crumlick v. Crumlick*, 164 Md. 381, 384, 165 A. 189 (1933), where Judge Digges said: "There is a modern school of thought, including in its members people of great refinement, unquestioned integrity, and the highest educational advantages, which contends that a policy different than the one adopted and adhered to in this State is the correct one, more particularly as applied to married couples whose union has not resulted in the production of offspring. If there should be and is to be a change of policy on this subject, it is a legislative and not a judicial function. The Courts are bound only to pass divorce decrees when the evidence produced establishes a legally recognized cause."

² *Stewart v. Stewart*, 105 Md. 297, 66 A. 16 (1907); *Etheridge v. Etheridge*, 120 Md. 11, 87 A. 497 (1913); *Miller v. Miller*, 153 Md. 213, 138 A. 22 (1927).

^{2a} Md. Code Supp. (1947), Art. 16, Sec. 40 as amended. Md. Laws (1949) Ch. 520.

³ Md. Code Supp. (1947), Art. 16, Sec. 41A, a separate section providing for insanity as a ground for absolute divorce.

⁴ *Ibid.*, Sec. 41.

⁵ *Schwab v. Schwab*, 93 Md. 382, 385, 49 A. 331 (1901).

⁶ *Stewart v. Stewart*, *supra*, n. 2.

⁷ As pointed out in a note in Note, *The Amending of Alimony Cases in Maryland* (1948), 9 Md. L. Rev. 184, 189, desertion is the "only overlapping point of the grounds for partial and absolute divorce". (Italics supplied.)

tion specified as a ground for an absolute divorce. But in such case it is possible the injured spouse may be forever precluded from obtaining an absolute divorce on the same ground.⁸ In cases where the party complaining seeks an absolute divorce but the proof measures up only to a cause which is specified as a ground for partial divorce, the statute authorizes the court to decree a partial divorce.⁹ It is also provided by statute that the court shall have jurisdiction to decree a divorce *a vinculo matrimonii* although the parties have previously been divorced *a mensa et thoro*, and that a prior *a mensa* decree for abandonment which was not of the character and duration required for an absolute divorce shall not estop the party from subsequently obtaining an *a vinculo* decree for abandonment proved to be of the requisite character and duration.^{9a} The practice has grown up under this provision of following up an *a mensa* decree as a matter of course with an application for divorce *a vinculo matrimonii*, after the expiration of the statutory period, with little or no attention being given to the question of whether the *a mensa* decree was based on abandonment or some other ground which is a cause for partial divorce only.

The specific grounds for divorce with which we are primarily concerned here are cruelty of treatment and abandonment and desertion.¹⁰ As already indicated, deser-

⁸ Dictum in *Miller v. Miller*, *supra*, n. 2. Cf. *Kruse v. Kruse*, 183 Md. 369, 373, 37 A. 2d 898 (1944), where the Court said: "This is reading positive language into the statute in lieu of the negative language contained therein. It is unnecessary for us, in this case, to either affirm or reverse the dictum of the *Miller* case." See also the *nisi prius* opinion of Dawkins, J. in *Miller v. Miller*, Cir. Ct. of Baltimore City, filed Apr. 26, 1930, *Daily Rec.*, Apr. 28, 1930, where the Chancellor granted an *a vinculo* divorce for abandonment although a prior *a mensa* decree had been granted on the same testimony. Some weight was placed on the fact that the first decree was the result of a mistake, but the Court added: "This Court is satisfied that the decree in the first case was the result of a mistake. The decision of the case of *Miller v. Miller* [153 Md. 213] was not meant to nullify the effect of Article 16, Section 41 . . . which reads in part as follows: 'When a bill prays for a divorce *a vinculo matrimonii*, the fact that the parties have been divorced *a mensa et thoro* shall not be taken to interfere with the jurisdiction of the Court over the subject . . .'"

⁹ *Supra*, n. 4.

^{9a} Md. Code (1939) Art. 16, Sec. 44.

¹⁰ The terms "abandonment" and "desertion" will be used interchangeably in this Article as they are substantial equivalents and embody substantially the same elements. 1 BISHOP, MARRIAGE, DIVORCE AND SEPARATION, sec. 1665; *Muller v. Muller*, 125 Md. 72, 93 A. 404 (1915).

tion as a matrimonial offense, is a ground for both a partial and an absolute divorce, depending upon the character and duration of the offense. Cruelty, however, is a ground for a partial divorce only. The statute provides:

"Divorces *a mensa et thoro* may be decreed for the following causes, to wit:

"First, cruelty of treatment; . . . Thirdly, abandonment and desertion. . . ."¹¹

". . . the Court may decree a divorce *a vinculo matrimonii* for the following causes, to wit: . . . fourthly, when . . . the party complained against has abandoned the party complaining, and that such abandonment has continued uninterruptedly for at least eighteen months, and is deliberate and final, and the separation of the parties is beyond any reasonable expectation of reconciliation; . . ."¹²

Abandonment and desertion as a ground for either a partial or absolute divorce, must embody two distinct elements: first, the ending of cohabitation, and second, an intent on the part of the offending spouse to desert. It must be the deliberate act of the party complained of, done with the intent that the marriage relation should no longer exist. Although separation and intent must concur, the two elements need not begin together. Desertion becomes complete whenever to either one the other is added.¹³

Cruelty, as a ground for divorce, has been defined by the Court of Appeals on innumerable occasions. The formula for legal cruelty is thus stated by Judge Henderson in *Sensabaugh v. Sensabaugh*: "* * * a single act of violence will not justify a divorce on the grounds of cruelty nor do sallies of passion, harshness, rudeness, and use of profane language. Only danger to life, limb or health will constitute such cruelty."¹⁴ Sometimes the formula is otherwise stated to require such a "course of conduct which would make cohabitation inconsistent with the self respect of the in-

¹¹ *Supra*, n. 4.

¹² *Supra*, n. 3.

¹³ *Etheridge v. Etheridge*, *supra*, n. 2; *Dunnigan v. Dunnigan*, 182 Md. 47, 31 A. 2d 634 (1943).

¹⁴ 186 Md. 348, 351, 46 A. 2d 635 (1945). It is in reality a description rather than a formula or definition.

jured party or a serious menace to his or her physical or mental health".¹⁵

The fiction of constructive desertion is basically a simple and reasonable concept which does relatively little violence to actual fact. It finds justification, perhaps, in the common sense view that there is, in substance, no difference between the conduct of the man who leaves his wife and that of a man who forces his wife to leave him. Let us consider a few simple examples, without regard to intent and other technical requirements. If W leaves the matrimonial domicile she is guilty of actual desertion. If W leaves the matrimonial domicile because H beats her and she is in fear of her life and limb, H is guilty of constructive desertion. Although in the case supposed, H has not left the matrimonial domicile and the actual separation was initiated by W, H's conduct impelled W to leave and in contemplation of law H has deserted. A physical departure from the matrimonial domicile is not required to make the doctrine operative. Thus where H without cause refuses to have marital relations with W, he is guilty of constructive desertion although the parties continue to reside under the same roof. It may be wondered why such a simple and seemingly innocuous doctrine should arrest our attention in a special study. When we consider, however, its potentiality as an instrument for judicially legislating absolute divorces on the ground of cruelty, the effort seems justified. In 1870, the Court of Appeals in *Lynch v. Lynch*¹⁶ admonished that, in the absence of proof that the offending spouse by his or her conduct intended a final separation and termination of the marriage relation, "Cruelty of treatment, which is only ground for a qualified divorce, must not be allowed, when used as a justification for living separate from the offending party, to be made the ground for a final

¹⁵ Offutt, J., in *Abrahams v. Abrahams*, Cir. Ct. for Baltimore County, Daily Record, January 6, 1937. See also *Cullota v. Cullota*, 66 A. 2d 919 (Md. 1949).

¹⁶ 33 Md. 328 (1870). And see *Hoffman v. Hoffman*, 1 B. C. R. 327 (1893), where Judge Wickes, sitting in the Cir. Ct. No. 2 of Baltimore City, said: "Not one of these acts [of cruelty] on his part is cause for anything but a qualified divorce, but taken together, after a lapse of the statutory period, they are practically made, what the law never intended, a ground for the final and absolute divorcement of the parties."

decree." Intent is the crux of the matter. Thus if H beats and mistreats W on several occasions, but invariably repents and offers reconciliation, he is guilty of cruelty and W has the right to leave; but there is no intent to bring about a termination of the marriage relation, and there can be no constructive desertion. In such a case, W's only remedy is a partial divorce for cruelty. The flux of time cannot change the situation. A final divorce would not be justified whether W waited eighteen months from the last act of cruelty before filing the bill or immediately procured a partial divorce and after the expiration of eighteen months filed for an absolute divorce in accordance with the usual practice. If, as appears to be the present tendency of the Court of Appeals, the case is treated as one of constructive desertion merely because H is guilty of cruelty, without any effort to search for and find the requisite intent to terminate the marriage relation, evasion of the divorce statute is apparent. A number of recent decisions¹⁷ not only seem to make too easy a transition from "cruelty" to "constructive desertion" but also have fallen into the habit of quoting the misleading headnote to *Harding v. Harding*¹⁸ to the effect that the offending spouse can be guilty of constructive desertion although his conduct did not amount to legal cruelty, which is a proposition wholly without foundation in the law of this State.

The only categories of marital misconduct to which the doctrine of constructive desertion properly applies are as follows:

1. Legal cruelty accompanied by the requisite intent to terminate the marriage relation.
2. Cessation of marital intercourse without just cause.
3. Refusal of a *bona fide* offer of reconciliation.
4. Unjustified refusal to maintain a home separate and apart from parents or other relatives.

¹⁷ *Kruse v. Kruse*, 179 Md. 657, 22 A. 2d 475 (1941); *Miller v. Miller*, *infra*, n. 82; *Nicodemus v. Nicodemus*, 186 Md. 659, 48 A. 2d 442 (1946); *Robertson v. Robertson*, 187 Md. 560, 51 A. 2d 73 (1947); *Geisey v. Geisey*, 59 A. 2d 319 (Md. 1948); *Smith v. Smith*, 63 A. 2d 628 (Md. 1949); *Eberwein v. Eberwein*, 65 A. 2d 792 (Md. 1949). *Cf. contra*, *Collins v. Collins*, 184 Md. 655, 42 A. 2d 680 (1945). For discussion of these cases, see text, *post*.

¹⁸ 22 Md. 337 (1864) as reported in Perkins Anno. Ed. See text; *post*, for discussion of this error.

1. *Legal cruelty accompanied by the requisite intent to terminate the marriage relation*

It was not until approximately twenty years after the enactment of the first divorce statute in Maryland that the Court of Appeals was called on to consider the doctrine of constructive desertion. In 1860, the Court had before it the case of *Levering v. Levering*,¹⁹ wherein the wife filed a bill for an absolute divorce on the ground of desertion of more than three years' duration. The evidence showed that the husband had inflicted physical violence upon his wife and had otherwise ill-treated her. The wife left and took up residence with her father. Following the separation the husband earnestly sought without success to effect a reconciliation. The Court refused to grant an absolute divorce for desertion because it was unable to find in the husband's conduct the essential element of intent to bring about a final termination of the marriage relation. The Court recognized the propriety of applying the doctrine of constructive desertion in a proper case, but it could not do so in the instant case because the husband's efforts to become reconciled clearly negated the fatal intent. Nevertheless, the Court concluded that the husband's acts of cruelty remained as a distinct matrimonial offense for which the Court could, and did, grant the wife a partial divorce. The Court did not consider whether the wife might have been guilty of desertion by reason of her refusal to accept her repentant husband's offers of reconciliation. Although this question of the obligation to accept an offer of reconciliation where the offending spouse has been guilty of cruelty will be referred to later, it is proper to interpose here that the law of this State appears to impose a more stringent burden upon the offending spouse in such cases than in the common variety of desertion cases free of cruelty or other complications, where a mere showing of the *bona fides* of an unqualified offer will compel acceptance.²⁰ Aside from the problem posed, the *Levering* deci-

¹⁹ *Supra*, n. 1.

²⁰ See *Wise v. Wise*, 159 Md. 596, 152 A. 230 (1930); *Zuckerberg v. Zuckerberg*, 53 A. 2d 20 (Md. 1947); *Slavinsky v. Slavinsky*, 287 Mass. 28, 190 N. E. 826 (1934); and text at n. 123a and n. 123b, *post*.

sion conclusively establishes the principle that in a cruelty case a *bona fide* offer of reconciliation dissipates the element of intent to terminate the marriage relation and eliminates the factual basis upon which the fiction of constructive desertion depends. It is interesting to examine the reasoning of the Court in arriving at this sound conclusion. Judge Bartol said:

"Here the complainant was not abandoned by the defendant; she left his home and society . . . The argument of the appellee is, that the appellant's failure to support her, his intemperate habits and violence committed upon her person, justified her in leaving him, and was, in law, an abandonment of her by him. We can very well imagine a case in which this argument would apply. If a man fails to supply his wife with such necessities and comforts of life as are within his reach, and by cruelty compels her to quit him, and seek shelter and protection elsewhere, we should have no hesitancy in saying it would be as much an abandonment of her by him, as if he had deserted her and gone away himself.²¹ In this case, the evidence does not sustain the charge that Levering failed, or was unwilling, to support his wife, or share with her the fruits of his scanty and meager earnings.²² There is evidence to prove that, on one occasion, forgetful of his duty and obligation to cherish and protect her, or, what is more probable, impelled by the madness of intoxication, he inflicted violence upon her person. Such conduct, when

²¹ This last sentence might be considered a contradiction of the ultimate decision in that it implies that intent to terminate the marriage relation is not essential where the husband drives the wife away by his cruelty. Yet the Court goes on to hold that Levering was guilty of legal cruelty which justified his wife in leaving but that he was not guilty of desertion because of the absence of the requisite intent. Thirty-three years after this decision, a *nisi prius* court criticized this sentence in the following language: "This doctrine . . . has furnished the pretext for a great many improvident divorces in this State. . . . It is not to be wondered at that the same Court in a subsequent case introduced a new element into the rule to which we have just referred." (Wickes, J., in *Hoffman v. Hoffman*, *supra*, n. 16). The subsequent case referred to was *Lynch v. Lynch*, *supra*, n. 16, discussed, *post*, in the text. The "new element" referred to was that mere cruelty will not support an action based on constructive desertion unless coupled with the intent to terminate the marriage. The *Lynch* case did not introduce this "element" as something new. Whether recognized or not, it was implicit in the decision in the *Levering* case, although the Court's opinion in that case did not once use the word "intent".

²² Failure to support, except in so far as it was a circumstance reflecting upon the husband's intent, would seem to be immaterial, as mere failure to support is not desertion. *Brunner v. Brunner*, 70 Md. 105 (1889); *Sause v. Sause*, 63 A. 2d 632, (Md. 1949).

taken in connection with other facts and circumstances of the case, showing his ill-treatment of his wife, in the eye of humanity and the law, would justify her in leaving his society; but it does not warrant a Court to pronounce a decree of final separation between them. The statute requires that the abandonment shall continue uninterruptedly for at least three years. The proof in this case is, that the appellant has earnestly and anxiously sought to have his wife restored to him, and to renew their marital relations. In such a case, we think it would be a perversion of the meaning of the law, to declare that there exists cause for a divorce *a vinculo matrimonii*. It does not come within either the letter or the spirit of the Acts of Assembly.

“By the Act of 1841, the Court is authorized to decree a divorce *a mensa et thoro* for cruelty of treatment. We have said that in this case there is evidence of such cruelty as justified the complainant in leaving the society of her husband. Such evidence, under the law, authorizes us to sanction that separation by pronouncing a decree *a mensa et thoro*, and this relief we are warranted in granting by the evidence in this cause . . .”^{22a}

Four years later, in 1864, the Court was presented with the converse of the situation in the *Levering* case. In *Harding v. Harding*,²³ the wife filed her bill for a partial divorce based on cruelty and desertion. The evidence disclosed that shortly after the marriage, while the wife was confined to bed following child-birth, the husband impeached her chastity prior to marriage, denied the paternity of the child and repeatedly told her that he would not permit her to remain in the house and that she must leave as soon as her confinement was over. The husband admitted in his answer that he would have removed his wife from the home by force if she had not left. The Court held that although the husband's conduct did not amount to legal cruelty,²⁴ he was guilty of desertion in the technical sense

^{22a} *Levering v. Levering*, *supra*, n. 1, 218.

²³ *Supra*, n. 18.

²⁴ The trend of recent decisions would seem to brand *Harding's* reflection upon his wife's chastity as legal cruelty. See *Silverberg v. Silverberg*, 148 Md. 682, 130 A. 325 (1925). *Poole v. Poole*, 176 Md. 696, reported in 6 A. 2d 243 (1939), noted in Note, *Is Mental Cruelty a Ground for Partial Divorce?* (1940), 5 Md. L. Rev. 111. *Cf. Stevens v. Stevens*, 183 Md. 599,

just as if he had forcibly evicted his wife. The decision was clearly based on a finding of "actual desertion" as opposed to "constructive desertion". The husband's conduct was the exact equivalent of a forcible ejection from the home. In addition, the husband's intent to terminate the marriage relationship was apparent. Judge Bartol again spoke for the Court and said:

"But the evidence establishes the fact that the appellant was compelled to leave the house of the appellee and seek a home with her parents. It is true that she was not ejected from his dwelling by personal violence. . . . in his answer he admits that he would have removed her from his house if she had not gone. The testimony further shows that after she had left, he stated repeatedly that she should not return * * *. Under these circumstances, he told her to leave his house; her expulsion was as much compulsory as if he had employed force to eject her. And being, according to the proof in the record, without sufficient cause, we must consider it as an unjustifiable abandonment and desertion on his part. So it was decided in *Levering v. Levering*, 16 Md. 213."²⁵

In 1870, the Court of Appeals clearly and unequivocally rejected an attempt to convert cruelty into desertion so as to authorize an absolute divorce after the flux of the statutory period, there being a total absence of the requisite intent to terminate the marriage relation. In *Lynch v. Lynch*,²⁶ the husband was forced to leave the wife because of her cruelty. The separation having continued for over three years, the husband sued for an absolute divorce. The Court refused this relief but awarded a partial divorce on the specific ground of cruelty. Judge Alvey, speaking for the Court, said:

39 A. 2d 690 (1944) where the wife's charge of adultery against her husband was not made publicly and the Court rejected it as a basis for a finding of cruelty on the part of the wife. It should be noted that in the Harding case there was no specific evidence to indicate that the charge of unchastity was made publicly prior to the filing of the answer by the husband.

²⁵ This last sentence was obviously an inadvertence on the part of Judge Bartol because in the *Levering* case, as we have already seen, he held there was no desertion but cruelty only. His reference was probably to the *dictum* referred to at n. 21, *supra*.

²⁶ *Supra*, n. 16.

"The proof shows a lamentable state of domestic discord to have existed, and unbearable persecution of the husband by the wife . . . but there is no sufficient proof to establish the fact . . . that the wife . . . ever deliberately designed, by her conduct, to effect a final separation of herself and husband, beyond reconciliation, however naturally that conduct may have tended to alienate the husband from his home, and finally determined him to desert it. The evidence shows that the unhappy relations between the parties, was mainly owing to the wife's ungovernable and vicious temper, and a morbid jealousy of her husband; but so far from having a deliberate design of producing an abandonment, it appears that, after her paroxysms of passion had subsided, she was always ready to admit her fault, and willing to become reconciled, promising not to repeat her offensive conduct. The desertion of the common home was the act of the husband, the party complaining, and although he may have been fully justified in so doing, still he is not in a position to be divorced, on the ground of abandonment by the wife. *Cruelty of treatment, which is only ground for a qualified divorce, must not be allowed, when used as a justification for living separate from the offending party, to be made the ground for a final divorce.*^{26a} Abandonment to constitute ground for a final divorce, must be the deliberate act of the party complained of, done with the intent that the marriage relation should no longer exist. And with this there is nothing decided in the case of *Levering v. Levering*, 16 Md. 213, at all in conflict, as seems to be supposed by the counsel for the appellant; nor does the case of *Harding v. Harding*, 22 Md. 337, tend to support a different principle. . . .

"But, although a divorce *a vinculo matrimonii* cannot be granted, the facts of the case show ample cause for a divorce *a mensa et thoro*. According to the most restricted definition of cruelty of treatment, as ground to decree separation, this case falls within it. The wife's conduct towards the husband is shown to be violent and outrageous, and such as to render impossible the proper discharge of the duties of married life."^{26b}

^{26a} Italics supplied.

^{26b} *Supra*, n. 1, 329.

In spite of this clear analysis of the elixir without which there can be no transmutation of "cruelty" into "desertion", parties seeking a permanent dissolution of the marriage ties continued to try their hand at this alchemy although they could not distill from the ingredients of their marital strife the essential elixir of intent. In 1893, a *nisi prius* court in a strongly worded opinion cautioned litigants against such experiments. Judge Wickes, sitting in the Circuit Court No. 2 of Baltimore City, said in *Hoffman v. Hoffman*:

"The question we have to deal with in the case in hand is whether a wife who leaves her husband because of his cruelty, intemperance and non-support, and remains away from him for three years is entitled to a divorce *ex vinculo* on the ground that his conduct was in law, an abandonment of her by him.

"In *Levering v. Levering*, 16 Md. 218, a case always relied upon by those who seek to make of cruel treatment a ground of divorce a vinculo by simply waiting three years after the separation commences and then converting it into a case of abandonment, the facts were very similar to those in this case."²⁷

Quoting from the *Levering* case, Judge Wickes continued:

" 'If a man fails to supply his wife with such necessities and comforts of life as are within his reach, and by cruelty compels her to quit him and seek shelter and protection elsewhere, we would have no hesitation in saying it would be as much an abandonment of her by him as if he had deserted her and gone away.' This dictum of the judge who delivered the opinion has furnished the pretext for a great many improvident divorces in this State. Standing alone, it simply means, that if a husband is intemperate, fails to support his wife and is guilty of cruelty toward her, she may leave his house, wait until three years have expired and then procure an absolute divorce, and that too, whether the evidence discloses any purpose on his part that the marriage relation shall cease or not. And yet not one of these acts on his part is cause for anything but a qualified divorce, but taken together, after a lapse of

²⁷ *Supra*, n. 16, 327.

the statutory period, they are practically made, what the law never intended, a ground for the final and absolute divorcement of the parties.

"It is not to be wondered at that the same Court in a subsequent case introduced a new element²⁸ into the rule to which we have just referred."

Judge Wickes then quoted from the *Lynch* case for the proposition that to constitute abandonment there must be an intent to terminate the marriage relation and concluded as follows:

"To say that this intent can be inferred from the acts of intemperance or cruelty, or both, is simply to pervert the law, which provides a suitable remedy for such a grievance. There must be some affirmative proof that the motive lying at the foundation of such conduct is the dissolution of the marriage tie, something that would satisfy the Court that there was a deliberate purpose on the part of the person complained of, that the marriage relation should cease. . . .

"The evidence discloses what the bill alleges that the defendant is worthless, intemperate and has threatened to do violence to his wife's person. Under such circumstances she left him as she was fully justified in doing.

"But there is not a scintilla of proof that his purpose was to destroy the relation he bore to his wife, unless it be inferred from the facts complained of, which cannot be done."^{28a}

Judge Wickes therefore held that the complainant was entitled to nothing more than a partial divorce for cruelty.

Judge Wickes' opinion was an accurate restatement of the law of Maryland as announced in the *Lynch* case except so far as he concluded that the requisite intent to desert could not under any circumstances be inferred as a natural consequence of the offending party's cruelty. This conclusion may have been drawn from the following language in the *Lynch* case:²⁹

²⁸ *Ibid.*, 327. See also *supra*, n. 21.

^{28a} *Ibid.*, 328.

²⁹ *Supra*, n. 16, 329.

“ . . . there is no sufficient proof to establish the fact . . . that the wife . . . ever deliberately designed by her conduct, to effect a final separation of herself and husband, beyond reconciliation, *however naturally that conduct may have tended to alienate the husband from his home, and finally determined him to desert it.*”^{29a}

It must be remembered, however, that in the *Lynch* case the offending wife “was always ready to admit her fault, and willing to become reconciled, promising not to repeat her offensive conduct”—thereby rebutting any inference of intent to terminate the marriage which might otherwise have been inferred from her misconduct.

The true rule, supported by the weight of authority in this country, is that intent to terminate the marriage relation may be inferred, *prima facie*, as the natural consequence of the offending spouse’s misconduct.³⁰ As pointed out by Mr. Bishop,³¹ the requisite intent “must be an actual purpose of the mind, not a mere fiction of the law. Yet in matter of evidence, one is presumed to intend the natural and probable consequences of his acts.” The English rule in constructive desertion cases is the same.³² This rule, however, is merely procedural, and where the offending spouse adduces affirmative evidence to the effect that he did not intend a dissolution of the relationship and sought reconciliation “the *prima facie* desertion is re-

^{29a} Italics supplied.

³⁰ 1 BISHOP, MARRIAGE, DIVORCE AND SEPARATION, SECS. 1721, 1723, 1727, 1730; KEEZER, MARRIAGE AND DIVORCE, sec. 334; 9 R.C.L. 362, sec. 1498; 17 Am. Jur. 202, sec. 101. See also *dicta* in *Ritz v. Ritz*, 52 A. 2d 729 (Md. 1947), quoted at n. 36, *post*.

³¹ *Ibid.*, Sec. 1723.

³² See 92 Sol. J. 147 (1948), where the writer says: “In essence it is clear now that the law has once again come to rest on the bedrock of the reasonable man—or rather reasonable spouse—that excellent person upon whose continued existence so much of the law of England depends. . . . We are back to the reasonable spouse, for what the natural consequences of any particular conduct are must depend on how a reasonable spouse might be expected to act in the face of that conduct. Once again the reasonable man provides the convenient means for the law to keep pace with public opinion, for the reasonable spouse is subject to the same evolutionary process as are other humans, and the rough treatment which was the lot of Elizabeth Paston and other wives of her time, and which nevertheless never caused her to leave the matrimonial home, might now cause the 20th century reasonable wife to leave her husband—at the double.”

butted".³³ As stated above, this was precisely the situation in the *Lynch* case, although the rationale of the Court's conclusion was not discussed. The original papers in the *Hoffman* case³⁴ disclose that it was an uncontested proceeding which went to the Court on the report of the Master. The wife's testimony, which was fully corroborated, was to the effect that she had left the home because her husband's cruel conduct put her in fear of her life and that "ever since we have been separated he has refused to do anything for me or our baby, and in no way has he ever tried to have me live with him or done anything for me. There can never be any reconciliation between us now." This testimony was clearly sufficient to raise a *prima facie* case of desertion based upon the natural consequences which flowed from the acts complained of. There being no testimony offered by the husband, who had allowed a decree *pro confesso* to be entered against him, the wife had made out a case of constructive desertion entitling her to an absolute divorce. It would appear, therefore, that Judge Wickes' ultimate decision in this particular case was incorrect.³⁵

It is strange that in spite of the ever increasing reliance upon constructive desertion as a basis for divorce the Court of Appeals has never found it necessary to pass upon or even to discuss (except by way of the most casual *dictum*)³⁶

³³ BISHOP, *supra*, n. 30, sec. 1727, 1731. See also *Crumlick v. Crumlick*, *supra*, n. 1 and *Schwartz v. Schwartz*, 158 Md. 80, 148 A. 259 (1929).

³⁴ Cir. Ct. No. 2 of Baltimore City, Dkt. 2, #A 1584.

³⁵ It is one of the paradoxes involved in the exercise of judicial discretion and the phrasing employed in judicial opinions that a sound statement of the law is sometimes followed by an incorrect conclusion whereas an unsound statement of the law is sometimes followed by a correct conclusion. See for example *Maguire v. State*, 65 A. 2d 299 (Md. 1949), involving a problem in statutory construction, where the Court of Appeals agreed with the lower court's statement of the law but not with its application.

³⁶ The Court said, without citation of authority, in *Ritz v. Ritz*, *supra*, n. 30, 732: "If the cruelty of the wife is so extreme that it drives her husband away from her, the law presumes that she intended such effect of her cruelty." This was clearly *dictum* as the Court found in the wife's conduct no justification for the husband's departure since his life and health "were not sufficiently endangered" by the wife's conduct.

It is possible that the recent Maryland decisions take the "natural consequences" theory for granted and assume the existence of the requisite intent in cases where legal cruelty is established. If such is the case, then the Court, in its silent application of the theory, has failed to give effect to that portion of the procedural rule which holds the presumption of intent to desert rebutted by a proper offer of reconciliation. This is amply illustrated by the *Kruse* case, discussed in the text, *post*.

the procedural rule of *prima facie* desertion based upon the "natural consequences" theory.³⁷ The recent decisions involving cruelty as constructive desertion are content to restrict the inquiry to the simple question of whether the injured spouse was justified in leaving the matrimonial domicile. Having once concluded this in the affirmative, the transmutation to constructive desertion is complete without any attempt to find the requisite intent through the procedural method of the "natural consequences" theory or otherwise. The point is simply ignored.³⁸ This is a fundamental departure from the *Lynch* case and has led practitioners, frequently to the detriment of their clients, to concede that a charge of desertion is made out in every case where legal cruelty is established.

Every case of constructive desertion based on cruelty presents a challenge to the legislative will which has declared cruelty to be cause for a partial divorce only.³⁹ Our

³⁷ The nearest approach to the problem appears to have been in *Schwartz v. Schwartz*, *supra* n. 33, a case involving actual desertion, wherein the defendant-husband contended that his departure was not with intent to desert but was based on a desire to establish a home apart from the wife's children by a former marriage. Referring to the wife's testimony that her husband left without excuse or explanation and afterwards asked her for a separation and to the testimony of a corroborating witness who also testified that the husband had declared after the separation that he never intended to live with his wife, Judge Offutt said: "While that evidence is not entirely satisfactory, it is at least sufficient to raise a *prima facie* presumption that in leaving her home Schwartz intended to desert his wife, and to cast upon him the burden of showing that he had no such intent. Schwartz himself did not in so many words deny that he had deserted his wife, or that when he left her he did not intend to finally separate from her, but he attempted to show that he had repeatedly invited her to live with him in his home. Such conduct, if proved, was sufficient to negative the presumption that in leaving her home he had intended to desert the appellee."

³⁸ See cases cited *supra*, n. 17. And analysis at n. 54, *infra*, *Nicodemus v. Nicodemus*, *supra*, n. 17, 666: "The conduct of the husband was such, in our opinion, as to justify the wife in leaving him . . . We therefore hold the husband guilty of constructive abandonment." *Smith v. Smith*, *supra*, n. 19, 631: "We believe there was ample evidence . . . that the husband's conduct justified the wife in leaving him, and therefore that his conduct amounted to constructive desertion." *Maranto v. Maranto*, 64 A. 2d 144 (Md. 1944): "It [defendant's conduct] justified plaintiff in terminating marital relations and constitutes constructive desertion on defendant's part."

³⁹ In *Pidge v. Pidge*, 3 Met. 257 (1841), the Massachusetts Court met the challenge by a virtual rejection of the doctrine of constructive desertion. The statute there under consideration—somewhat like the Maryland statute—made desertion a ground for both a partial and an absolute divorce but cruelty was specified as a ground for a partial divorce only. The wife in this case sought an absolute divorce, basing her claim to relief on a constructive desertion resulting from the husband's cruel and abusive con-

Legislature has not seen fit to attach the penalty of an absolute divorce to such marital misconduct. The Court, as the guardian and expositor of the Legislature's mandate, cannot prevent its subversion unless there is ever present in the judicial mind the necessity for finding the requisite intent to desert and a consciousness of the evidentiary or procedural techniques which aid in the search. The two cases which arose out of the marital strife of Mr. and Mrs. Kruse⁴⁰ illustrate perfectly the dangers inherent in the doctrine of constructive desertion and the ease with which the Court can unwittingly legislate an absolute divorce for cruelty, although there was clearly no intent to desert on the part of the offending wife, who was ever anxious for a reconciliation. In the first *Kruse* case, the husband sought an absolute divorce based on constructive desertion due to the wife's cruelty, the separation having endured for the statutory period at the time of the filing of the husband's cross-bill claiming affirmative relief. The Chancellor refused an absolute divorce but granted the husband a par-

duct which compelled her to leave him. In refusing this relief the Court said: "Had it been the purpose of the legislature to authorize a divorce from the bond of matrimony for extreme cruelty, or gross neglect to provide suitable maintenance for the wife, we must suppose that these cases would have been specified in the statute of 1838; and the fact that they are not so specified seems conclusive on the point of the intention of the legislature . . . To hold otherwise would be adding to the provisions of this statute and opening the door for the greatest latitude in granting divorces. . . . The legislature has annexed no such penalty, as a divorce from the bond of matrimony for causes like those just enumerated. Yet such would be the practical construction of the statute, if it be admitted, that in cases where the wife leaves her husband for justifiable cause arising out of his misconduct, such separation is legally and technically a desertion by the husband." This decision appears entirely too narrow in its failure to recognize the "natural consequences" theory. Mr. Bishop criticizes the case, saying: "The Court seems not to have had its attention directed to the question whether in matter of evidence, the husband should be presumed to have intended the separation which his ill-conduct made necessary for the safety of the wife. In this view, evidently the result arrived at by the majority of the court is a departure from correct principle." 1 BISHOP, MARRIAGE, DIVORCE AND SEPARATION, Sec. 1730. At Sec. 1729, n. 3, Mr. Bishop, in referring to the Pidge case, somewhat inaccurately, says: "Something like this was likewise held in a Maryland case. *Lynch v. Lynch*, 33 Md. 328." While it is true that the ultimate decision in the *Lynch* case was the same as in *Pidge v. Pidge*, *supra*, there was no "departure from correct principle" since the *prima facie* presumption of desertion had been rebutted by the repeated efforts at reconciliation. Although there was no discussion by the Court of the procedural aspects of the "natural consequences" theory, the *Lynch* case arrived at a correct result upon correct principle.

⁴⁰ *Kruse v. Kruse*, *supra*, n. 17, first case; 183 Md. 369; 37 A. 2d 898 (1944), second case.

tial divorce on the express authority of the *Lynch* case. The clear implication of the Chancellor's opinion was that an absolute divorce could not be granted because desertion was not proved due to the wife's efforts to become reconciled but that the wife's cruelty remained as a separate ground to support an *a mensa* decree. The Court of Appeals affirmed the decree on the theory that the wife was guilty of constructive desertion. Approximately two years later the husband filed a bill for an absolute divorce based on his wife's continued desertion and the Court of Appeals held him entitled to the relief prayed. As will be shown in the subsequent analysis of the *Kruse* case, the Court completely ignored the question of intent, and in addition lent color to the unfounded proposition that a case of constructive desertion can be made out by a showing of ill-conduct short of legal cruelty.

Until the first *Kruse* case in 1941, the decisions of the Court of Appeals dealing with cruelty as constructive desertion appear to have been kept within the proper confines of the doctrine. Thus in *Taylor v. Taylor*,⁴¹ constructive abandonment was held not to have been established where the husband's conduct did not mount up to legal cruelty, and he had repeatedly requested his wife to return to him. In *Pattison v. Pattison*⁴² we find a repetition of the factual situation involved in the *Harding* case, the husband charging the wife with adultery, denying the paternity of two of her children and ordering her out of the house. As in the *Harding* case, the Court does not ground its decision upon constructive desertion but virtually finds an actual desertion coupled with the requisite intent. The Court said:

"Where a wife is forced to leave her husband under such circumstances, with the evident purpose to put an end to the marriage relation, he must be held to have abandoned and deserted her. This case is so strikingly like the case of *Harding v. Harding*, 22 Md. 337, it is not necessary to cite other authorities . . . Forcing her to leave his home under the circumstances stated and then placing upon record a formal charge

⁴¹ 108 Md. 129, 69 A. 632 (1908).

⁴² 132 Md. 362, 103 A. 977 (1918).

of adultery against her, shows that the abandonment of the appellant in this case was 'the deliberate act' of the husband, 'done with the intent that the marriage relation should no longer exist . . . and entitled the appellee to the relief sought in her cross-bill'.^{42a}

In *Wald v. Wald*⁴³, *Schilling v. Schilling*,⁴⁴ and *Bonwit v. Bonwit*,^{44a} the Court denied relief for alleged constructive desertion because legal cruelty had not been shown. Judge Parker in the *Wald* case so far recognized the principle inherent in the *Lynch* case that he felt compelled to say that:

"even if the version of the husband were held to be established, the behavior of the wife could not be considered a constructive abandonment and desertion by the wife, who was ever anxious for a reconciliation."⁴⁵

In *Silverberg v. Silverberg*⁴⁶ the Court recognized as legal cruelty, in its most intolerable form, public accusations of infidelity.⁴⁷ In this case the charge was coupled with other acts and conduct over a period of years which indicated a studied effort on the part of the husband to humiliate and degrade his wife and drive her away by every type of aggravating conduct short of physical violence. The husband's intent to terminate the marital relation was manifest. As pointed out by the Court:

"The quality of premeditation and deliberation in these studied insults was reflected in their repetition in the husband's testimony. . . . The husband's continued misconduct naturally caused the marital relation to become intolerable, and no particular importance is attached to the fact that the husband did not

^{42a} *Ibid.*, 368.

⁴³ 161 Md. 493, 159 A. 97 (1932).

⁴⁴ 167 Md. 151, 173 A. 10 (1934).

^{44a} 169 Md. 189, 181 A. 237 (1935). In this case the Court said, 193: ". . . Unless the wife has met the burden undertaken by her of establishing . . . that the husband is guilty of *legal cruelty*, by which is meant such conduct on his part as will endanger her life, her person, or health, or will cause reasonable apprehension of bodily suffering, then she is not justified in law in refusing to continue the marital relation and there would be no desertion on the part of the husband." (Italics supplied.)

⁴⁵ *Supra*, n. 43, 497.

⁴⁶ *Supra*, n. 24.

⁴⁷ For a similar case see *Poole v. Poole*, *supra*, n. 24. *Of.*, *Stevens v. Stevens*, *supra*, n. 24, where the rule of the *Silverberg* case was not applied in favor of the husband, it appearing that the wife's accusations were not made publicly.

drive the wife from his home by force. If artifice and craft succeed, they are quite as reprehensible, while not so obvious and crude, as open compulsion. And the actor in either case is responsible for the contemplated result. The Court is satisfied that the husband contrived the departure of the wife and accept it with complacency.^{747a}

Returning now to an analysis of the *Kruse*⁴⁸ cases, we find that the original proceedings were commenced by a bill for partial divorce filed by Mrs. Kruse on February 5, 1937, alleging separation of the parties on February 29, 1936. On February 6, 1939, Mrs. Kruse amended her bill to one for alimony only, and on January 12, 1940, Mr. Kruse filed a cross-bill for an absolute divorce based on his wife's alleged constructive desertion on February 29, 1936, which was more than three years prior to the filing of the cross-bill. The evidence showed that Mrs. Kruse was a high-strung, emotional woman whose conduct at times bordered on insanity. She had an ungovernable temper and frequently created unnecessary disturbances and embarrassment to Mr. Kruse by going to his place of business and charging him with familiarity with certain female employees. Since the final separation, Mrs. Kruse earnestly sought reconciliation with her husband; but he rejected her advances, declaring that he would rather be dead than live with his wife. The facts in this case were almost an exact counterpart of the *Lynch* case. Indeed this was recognized by Chief Judge Bond, who wrote the opinion in the first case, when he said: "The case here seems to the Court, finally, to be in a class with that of *Lynch v. Lynch*, supra, in which the reasons for the separation were the wife's 'ungovernable . . . temper and . . . morbid jealousy', less than insanity."^{48a} The Chancellor who decided the case below⁴⁹ relied solely upon the *Lynch* case in denying relief to the wife, rejecting the husband's prayer for an absolute divorce and granting him an *a mensa* decree for

^{47a} *Supra*, n. 16, 691.

⁴⁸ *Supra*, n. 40.

^{48a} *Supra*, n. 16, 664.

⁴⁹ Ulman, J. His opinion, which was very short, appears only at p. 3 of Appellee's brief on the first appeal, 179 Md. 657. See reference at p. 26 of Record on second appeal, 183 Md. 369.

cruelty only.⁵⁰ This is precisely what was done in the *Lynch* case. Nevertheless, Chief Judge Bond went off on the theory that the wife was guilty of constructive desertion, and, in affirming the decree below, said:

"It is settled that conduct of one spouse which compels the other to leave may justify a divorce to that other on the ground of desertion, even though the conduct may not justify a divorce on the ground of cruelty.^{50a} *Harding v. Harding, supra; Singewald v. Singewald*, 165 Md. 136. It must, however, render impossible the continuation of matrimonial cohabitation with safety, health and self respect. *Schwartz v. Schwartz*, 158 Md. 80. . . . this Court, concurring with the chancellor, concludes that her actions did render it practically impossible for the husband to continue living with her longer than he did. . . . His work and livelihood would have been jeopardized if he had continued, and peaceful living seems to have been impossible."^{50b}

The contradiction inherent in this part of the opinion is obvious. How is it possible for ill-conduct to reach a point of intensity where it renders "impossible the continuation of matrimonial cohabitation with safety, health and self respect" and, at the same time, fall short of the quality of ill-conduct necessary to "justify a divorce on the ground of cruelty"? Inability to continue "matrimonial cohabitation with safety, health and self respect" is the very definition, or more accurately, the description, of legal cruelty consistently adhered to by the Maryland decisions.⁵¹ The standard for determining legal cruelty and for measuring conduct which amounts to constructive desertion though it "may not justify a divorce on the ground of cruelty" is thus identical—which is the practical equivalent of saying that "cruelty is not cruelty". This contradiction is traceable directly to a misleading syllabus of the opinion in *Harding v. Harding* where the decision of the Court is summarized as follows:

⁵⁰ See colloquy between counsel and the Chancellor who heard the second case, Record 21, 183 Md. 369, quoted in the text at *post*, n. 64.

^{50a} Italics supplied.

^{50b} *Supra*, n. 16, 663.

⁵¹ See text at *supra*, n. 14 and 15.

"Conduct of a husband by which he compels the wife to leave him and justifies her being awarded a divorce on the ground of abandonment need not be such conduct as would justify a divorce for cruelty of treatment."^{51a}

The syllabus of the official report does not contain this statement nor does the opinion of the Court itself. That portion of Chief Judge Bond's opinion which has been italicized above is a still further misleading paraphrase of the syllabus quoted above. As we have already seen, the *Harding* case proceeded on the theory that the husband's conduct did not amount to cruelty but was the equivalent of "actual desertion". "Constructive desertion" was not relied upon. This unfortunate phrasing in Chief Judge Bond's opinion left the impression that "cruelty that is not cruelty" might still amount to constructive desertion. Judge Markell in *Collins v. Collins* sought to put the matter to rest by defining cruelty and declaring:

" . . . This measure is applicable to cruelty, either as a ground for divorce or as constituting constructive desertion. Cruelty is not the only equivalent of constructive desertion. Constructive desertion may consist of conduct, other than cruelty, which makes life unbearable.⁵² . . . But when it consists only of cruelty, the measure of cruelty is the same as when cruelty *eo nomine* is the ground for divorce."⁵³

^{51a} Perkins Anno. Ed. of 22 Md. 337.

⁵² The Court does not say what this other conduct might be, although it cites for this proposition in addition to the Kruse case, *Schwartz v. Schwartz*, 158 Md. 80, 148 A. 259 (1929) and *Fischer v. Fischer*, 182 Md. 281, 34 A. 2d 455 (1943). The *Schwartz* case did not involve "constructive desertion". There the husband actually departed from the home and sought to justify his leaving by showing ill-conduct on the part of the wife. *Dicta* in the case indicated that conduct which may not amount to such cruelty as to warrant affirmative relief may nevertheless be set up as a defense to a charge of desertion. The *Fischer* case, which cites the *Kruse* case for the proposition that the conduct of one spouse may justify the other in leaving and obtaining affirmative relief "even though it may not amount to cruelty", involved failure of the husband to provide a home for his wife apart from his parents, there being no evidence of cruelty in the physical sense. This is one of the four categories of conduct which the writer believes constitute the only equivalents of constructive desertion. It is submitted that Judge Markell, in referring to "conduct other than cruelty" as an equivalent of constructive desertion, could only have meant the other three categories of conduct set forth in the text, *supra*.

⁵³ *Supra*, n. 17, 663. In this case there was considerable testimony of physical violence on the part of the husband, culminating in an attack upon the wife with a clothes prop, and the Court held the husband guilty

In spite of this clear statement of the law, other members of the Court, in subsequent decisions (one at the same term of Court), continued to quote the language of the *Kruse* case (which, as we have seen, was based on the misleading syllabus to the *Harding* case) and in at least two instances actually held that cruelty which is not legal cruelty is nevertheless constructive desertion.⁵⁴ Such hold-

of legal cruelty and awarded the wife an *a mensa* divorce for constructive abandonment.

⁵⁴ See *Miller v. Miller*, *supra*, n. 17, which was decided at the same term of Court as the *Collins* case. In the *Miller* case, however, the Court held the husband's conduct did not amount to either legal cruelty or constructive abandonment and the wife was denied relief. See also the following: *Nicodemus v. Nicodemus*, *supra*, n. 17, where there was evidence of physical violence against the wife and over-indulgence in liquor by both parties and the Court said: "It is not necessary to determine whether the evidence shows cruelty, as that term has been defined by this Court. . . . The conduct of the husband was such, in our opinion, as to justify the wife in leaving him under the decisions summarized in the recent case of *Miller v. Miller*, 185 Md. 79, 42 A. 2d 915 . . . We therefore hold the husband guilty of constructive abandonment." *Ritz v. Ritz*, *supra*, n. 30, where the Court quoted the *Kruse* case but held that the husband's life and health "were not sufficiently endangered to justify him in leaving his wife." *Robertson v. Robertson*, *supra*, n. 17, where the language of the *Kruse* case is quoted, but it appeared that the Court found legal cruelty (although not expressly), saying with respect to the husband's conduct that it was "well calculated to put her in fear [and] . . . indicative of his desire to terminate the marital relationship without regard to fault." *Geisey v. Geisey*, *supra*, n. 17, where the language of the *Kruse* case is paraphrased. This, however, was a clear case of legal cruelty, although the Court did not expressly say so. The husband had forbidden the wife to go to the grocery, to visit department stores except under stringent conditions, forbade her to go to motion pictures; and when he took her out to dinner compelled her to sit facing the wall, and objected to her association with relatives and friends. The Court said: "It is difficult to see how a woman could maintain her health, self respect and reasonable comfort under such conditions." *Smith v. Smith*, *supra*, n. 17, 630, quotes the language of the *Kruse* case and also that portion of the *Collins* opinion which says that "Cruelty is not the only equivalent of constructive desertion", and demonstrates the ridiculous end to which the erroneous language of the *Kruse* case can lead the Court. The wife's suit for partial divorce was based on cruelty. Her bill of complaint did not charge abandonment. There were various acts of violence relied upon by the wife which the Chancellor apparently felt were sufficient to make out a case of cruelty. On appeal from an *a mensa* decree in her favor, the Court of Appeals said: "We do not believe, therefore, that the conduct of the husband in this case was so violent, or constituted such a threat to life, limb or health of the wife, as to amount to 'cruelty' in the legal sense. However, even though the conduct of the husband did not amount to legal 'cruelty', we do not think that he is to be excused . . . the husband's conduct justified the wife in leaving him, and therefore . . . his conduct amounted to constructive desertion." The Court then found itself confronted with a procedural problem which arose from the fact that the wife's bill of complaint had not charged abandonment but only cruelty, and "her proof made out only a case of abandonment." The Court quickly jumped this hurdle by declaring that since it had power to remand the case for an amendment of the bill to include an allegation of abandonment after which a decree would follow as of course, it would simply affirm the decree and thus avoid the expense of further litigation.

ings cannot be justified by Judge Markell's statement that "cruelty is not the only equivalent of constructive desertion [which] may consist of conduct other than cruelty, which makes life unbearable." Although he does not say what this other conduct might be, the only reasonable inference is that he had reference to the other three categories of conduct hereinbefore set forth; namely, (1) cessation of marital intercourse, (2) refusal of a *bona fide* offer of reconciliation, (3) unjustified refusal to maintain a home separate and apart from parents or other relatives.⁵⁵

It is thus apparent that constructive desertion in this case was based solely and exclusively on the husband's alleged acts of physical cruelty, and the decision went directly in the teeth of Judge Markell's opinion in the Collins case, wherein he stated that "when [constructive desertion] consists only of cruelty, the measure of cruelty is the same as when cruelty *eo nomine* is the ground for divorce." *Eberwein v. Eberwein*, *supra*, n. 17, where the language of the Kruse case is quoted at length. This case was clearly one of cruelty on the part of the wife, although the Court did not expressly so hold. The Court did say, however, that "the husband could not with safety to his health and with self-respect continue to live with his wife."

Cf. Brault v. Brault, 55 A. 2d, 497 (Md. 1947), where the wife, a solitary, escapist drinker, was guilty of a variety of excesses in her conduct toward her husband yet the Court held it was not sufficient to establish either legal cruelty or a justification for the husband's departure. The Kruse and Ritz cases were distinguished. The Court laid great stress upon the fact that the husband's claim that his wife was dangerously irresponsible was inconsistent with his allowing the infant children of the parties to remain with her for more than six months prior to institution of divorce proceedings.

⁵⁵ This conclusion finds support in *Fischer v. Fischer*, *supra*, n. 53, 282, where the Court said: "There is no evidence . . . of cruelty of treatment in any physical sense. . . . In order to entitle the wife to a divorce, it must appear from the evidence that she had sufficient cause to leave her husband. His conduct may give such cause, even though it may not amount to cruelty. *Kruse v. Kruse*, 179 Md. 657." The Court then went on to hold the husband guilty of constructive desertion because of his failure to furnish the wife a home apart from his relatives. See also *supra*, n. 53.

A *dictum* in *Meeks v. Meeks*, 54 A. 2d 334 (Md. 1947), indicates that a man's attentions to another woman (though not criminal) may be so marked as to justify his wife in leaving him and thus amount to constructive desertion. The authorities which recognize this principle place the offense in the category of legal cruelty. See annotation in 157 A. L. R. 636; 19 C. J. 62, Sec. 117; 27 C. J. S. 558, Sec. 28. It is generally held, however, that clandestine (as opposed to open and notorious) adultery, although it justifies a wife in separating from her husband, is neither cruelty nor a ground for inferring a constructive desertion by him. *Lake v. Lake*, 65 N. J. Eq., 56 A. 296 (1903); *Tracey v. Tracey*, 43 A. 713 (N. J. 1899); *Stiles v. Stiles*, 52 N. J. Eq. 446, 29 A. 162 (1894); and see 157 A. L. R. 636. It is submitted that under the doctrine of *Stewart v. Stewart*, 105 Md. 297, 66 A. 16 (1907), (see text at n. 6) adultery may not be treated as either cruelty or desertion so as to form the basis for a partial divorce. Except to this limited extent, the question is not too important as in almost all cases the misconduct would be relied upon by the injured spouse as a ground for permanent alimony without divorce or as a ground for an absolute divorce.

Although Judge Markell has never noted a dissent from the decisions referred to in the footnote⁵⁶, he took occasion to say in the recent case of *Gambrill v. Gambrill*,⁵⁷ where the wife's charge of constructive desertion based on alleged acts of cruelty was held not to have been sustained:

"Cruelty that is not cruelty is not constructive desertion . . . In Maryland the policy of the law has always been not to grant divorces for light and trivial causes. 'Constructive desertion' is not an equivalent of any of the catch-alls which in some states help to attract a nationwide market for a local industry."^{57a}

Aside from perpetuating the error of the *Harding* case headnote, it is important to observe that the *Kruse* case found constructive desertion although the testimony was wholly devoid of any intent on the part of the wife to bring about a termination of the marriage relation. With respect to the wife's efforts to effect a reconciliation, Chief Judge Bond said:

"The advances were rejected by the husband, he saying he would rather be dead than live with his wife. After a long trial of it, cohabitation appears to be impracticable, because of this aversion created by the wife's actions, and there is no sufficient promise of the removal of the cause."⁵⁸

Under these circumstances, the husband was clearly entitled to a partial divorce for cruelty, but it is equally clear under the *Lynch* case that the wife was not guilty of constructive desertion because her efforts to effect a reconciliation refuted the fatal intent to desert.^{58a} The Court of

⁵⁶ *Supra*, n. 54.

⁵⁷ 66 A. 2d 387 (Md. 1949).

^{57a} *Ibid.*, 391.

⁵⁸ *Supra*, n. 17, 661.

^{58a} *Supra*, n. 33. In cases involving actual desertion, the Court does not seem to have any difficulty in holding that intent to desert is refuted by a *bona fide* offer of reconciliation. See *Crumlick v. Crumlick*, *supra*, n. 1. Where the Court said that "the intention on the part of the husband to desert his wife is refuted by" his sincere efforts to effect a reconciliation. In *Pitts v. Pitts*, 181 Md. 182, 189, 29 A. 2d 300 (1942), the Court said, citing the first *Kruse* case: "It is true where after a long trial, cohabitation appears impracticable, created by the wife's actions, and there is no sufficient promise of the removal of the cause, the wife

Appeals, by holding the wife guilty of constructive desertion, subjected her to a greater penalty than the statute prescribes for bare cruelty without intent to terminate the marriage. If the Court had followed the doctrine of the *Lynch* case, the wife would have been exposed to no other penalty and the husband would have been entitled to no other relief (regardless of the flux of time) than a partial divorce. But in allowing its reasoning to flow over into the category of constructive desertion, the Court improperly opened the door for the procurement of an absolute divorce by the husband. In effect the Court made bare cruelty, when coupled with the passage of the statutory period, a ground for absolute divorce.

The husband in the *Kruse* case took diligent advantage of the loop-hole which the Court thus afforded him for complete escape from his matrimonial burden. Pursuing the usual procedure in this State of following up a partial divorce with an application for absolute divorce after the expiration of the statutory period,⁵⁹ Kruse filed his bill for absolute divorce on September 28, 1943, which was three years and eight months after the filing of the cross-bill on which the partial divorce was granted. His bill referred to the original decree and alleged that it was based on abandonment and desertion. The Chancellor dismissed the bill on the ground that the husband had exhausted his remedies in the first case wherein his cross-bill prayed for an absolute divorce based on a separation for more than three years prior to the filing of the cross-bill.⁶⁰ This was the only point involved on appeal in the second *Kruse* case. The Court of Appeals, in reversing the Chancellor, said:

“ . . . in view of the fact that the husband throughout the proceedings in the lower court [in the first case]

cannot urge the husband's rejection of her offers of reconciliation.” But however impracticable cohabitation may be, the cause of this situation in the *Kruse* case just as in the *Lynch* case, was cruelty without intent to desert; and although the offer of reconciliation need not be accepted because of the wife's tried and proved uncontrollable temper [see *post*, n. 123] the offer was none the less a sincere and *bona fide* one, which is the determining factor in rebutting the fatal intent and preventing a conversion of cruelty into constructive desertion.

⁵⁹ Text *circa* n. 9a.

⁶⁰ See text *circa* n. 8.

insisted that he was entitled to a divorce *a vinculo matrimonii*, we are of the opinion that the decree of December 13, 1940, affirmed by this Court on appeal is res adjudicata and that it is now improper to examine the record in that case to determine whether or not the testimony warranted a decree for divorce *a vinculo matrimonii* . . . One of the questions decided by the decree of December 13, 1940, was that the husband, for some reason appearing to the Chancellor, but now immaterial, was not entitled to a divorce *a vinculo matrimonii* on the ground of abandonment and desertion, either because of its character or of its duration, but that he was entitled to a divorce *a mensa et thoro* because of said abandonment and desertion."⁶¹

This portion of the opinion demonstrates a consistent misconstruction both of the decree of December 13, 1940, and of the decision in the *Lynch* case, which was relied upon both by the Chancellor and the Court of Appeals in the first *Kruse* case. The Court assumes that the decree was based on abandonment and desertion; but it is apparent that the "reason appearing to the Chancellor" for denying an absolute divorce to *Kruse* in the first case was the same as in the *Lynch* case where, as we have seen,⁶² the Court awarded only a partial divorce because the wife's repeated efforts to become reconciled rebutted the inference of intent to sever the marriage relation, leaving nothing but cruelty for which the sole relief provided by the statute is a divorce *a mensa et thoro*. The same result was reached in the earlier *Levering* case⁶³ and would have been reached in the *Kruse* case were it not for the improper application of the doctrine of constructive desertion on the first appeal. This is apparent from the following colloquy between counsel and the Chancellor in the second *Kruse* case:

"The Court: Did Judge Ulman base his decree [in the first case] on the cruelty of treatment?

"Mr. Sokol: Yes, he only cited one case. [*Lynch v. Lynch*]

⁶¹ *Supra*, n. 40, 375.

⁶² Text *circa* n. 26.

⁶³ Text *circa* n. 19.

"The Court: The Court of Appeals took a different view and said it was constructive abandonment."⁶⁴

Under the doctrine of the *Levering* and *Lynch* cases, the inescapable conclusion is that in such cases the injured spouse is forever barred from obtaining complete release from the bonds of matrimony in the absence of a subsequently developed intent to desert on the part of the offending spouse, continuing for the statutory period, or some other marital misconduct or occurrence specified by the statute as a ground for an absolute divorce. However great the hardship which this doctrine may work in a particular case, the remedy is to be found at the Legislature and not in the Courts.^{64a}

Under the decision in the second *Kruse* case, on an application for a divorce *a vinculo matrimonii*, a prior decree of divorce *a mensa et thoro* in favor of the plaintiff is *res adjudicata* at least to the extent that the Court will not "examine the record in [the first] case to determine whether or not the testimony warranted a decree for divorce *a vinculo matrimonii*". It is not clear whether the Court is also precluded from the essential inquiry as to whether the *a mensa* decree was based on cruelty or on desertion (actual or constructive). Under the practice in this State,⁶⁵ when a party has once obtained an *a mensa* decree the obtention of the final divorce is a relatively simple and perfunctory matter, requiring little more than the patience to wait for the expiration of the statutory period. The form of the decree *a mensa et thoro* in almost universal use throughout the State⁶⁶ gives no clue as to the specific ground on which it is based. In the opinion of the writer, the basis of the *a mensa* decree is a most perti-

⁶⁴ *Supra*, n. 50.

^{64a} The Court of Appeals has frequently called attention to its inherent lack of power to enlarge the grounds for divorce or to do more than follow the statute. See for example the quotation from *Crumlick v. Crumlick*, *supra*, n. 1, and *Crouch v. Crouch*, *post*, n. 72.

⁶⁵ Text *circa*, n. 9a.

⁶⁶ The vital portion of the decree merely provides as follows: "It is thereupon, this.....day of....., 19....; by the Circuit Court . . . , Adjudged, Ordered and Decreed that the said..... the above named complainant be, and he is hereby DIVORCED A MENSA ET THORO from the defendant,"

ment inquiry, particularly in view of the statute which authorizes an absolute divorce for abandonment of the specified character and duration after an *a mensa* decree has been obtained for abandonment of a lesser duration.⁶⁷ How, except by such an inquiry, can the Court find the statutory requirement that the complainant "has obtained a divorce *a mensa et thoro* on the ground of abandonment"? Statistics are not available to demonstrate the number of cases in which decrees *a vinculo matrimonii* followed as a matter of course after the expiration of the statutory period where the prior *a mensa* decrees were granted solely for cruelty which did not amount to constructive desertion because of the absence of intent to terminate the marriage relation.^{67a} However small the number of such cases may be, the evasion of the divorce statute is obvious; for (as has already been demonstrated) cruelty, which does not amount to constructive desertion is a ground for partial divorce only and cannot be converted into a ground for absolute divorce by the mere passage of time. This evasion is facilitated by the form of divorce decree now in use and the possible construction of the decision in the second *Kruse* case to preclude inquiry as to the basis of the prior *a mensa* decree. This situation could be easily remedied by a new General Equity Rule, which might provide:

Every decree granting a divorce *a mensa et thoro* or alimony without a divorce^{67b} shall specifically state the grounds on which the same is based.

⁶⁷ Md. Code (1939), Art. 16, Sec. 44: ". . . a party who has obtained a divorce *a mensa et thoro* on the ground of abandonment, which at the time of obtaining said divorce was not of the character and duration specified in Section 40 of this article, shall not be estopped thereby from subsequently obtaining a divorce *a vinculo matrimonii* on the ground of abandonment proved to be of the character and duration specified in said Section 40."

^{67a} The only available statistics show a very small percentage of partial divorces in this State. In 1945, there was a total of 6430 absolute divorces granted as against 191 partial divorces. In the period between 1929 and 1945 the percentage of partial divorces dropped from 13% of the total number of divorce and annulment cases to 2.9%. See Evershine, *Divorce in Maryland*, Research Report No. 25, pp. 17, 18, 20. These statistics might indicate the reasonableness of the proposal that *a mensa* divorces be abolished and cruelty be made a ground for absolute divorce. See *ibid.*, pp. 9, 41. Such a change would eliminate most of the problems discussed in this Article.

^{67b} The writer feels that alimony decrees should be included because in subsequent divorce proceedings the Court treats the prior alimony decree

If such a rule had been in effect at the time the *a mensa* decree was passed by the Chancellor in the *Kruse* case there might never have been a second case.

Although "cruelty that is not cruelty is not constructive desertion" and cannot be made the basis for affirmative relief, ill-conduct not in itself a sufficient ground for divorce may, in a proper case, justify a departure from the matrimonial domicile and constitute a defense to a charge of desertion.⁶⁸ It has been stated that this rule is necessary to subserve the interests of public policy and the sacredness of the marriage tie⁶⁹ and to prevent a party from taking advantage of a condition brought about by his own misconduct.⁷⁰ In Maryland, little consistency is

as conclusive of fault in the original separation, *Mann v. Mann*, 144 Md. 518, 523, 125 A. 74 (1924); *Wise v. Wise*, *supra*, n. 20; *Zuckerberg v. Zuckerberg*, *supra*, n. 20; and it is therefore important to know whether the alimony decree was based on cruelty or desertion or some other ground, particularly when one of the questions involved in the subsequent divorce proceeding is whether the wife was obligated to accept an offer of reconciliation made after the passage of the alimony decree. See text, *post* at n. 123a, n. 123b, n. 135 and n. 136.

⁶⁸ 9 R. C. L. 364, Sec. 150; 17 Am. Jur. 200, Sec. 100; 27 C. J. S. 603, Sec. 56. See 1 BISHOP, MARRIAGE, DIVORCE AND SEPARATION, SECS. 1748-1753 for criticism of this rule.

⁶⁹ *Polley v. Polley*, 128 Md. 60, 97 A. 526 (1916).

⁷⁰ *McKane v. McKane*, 152 Md. 515, 137 A. 288 (1927), citing *Childs v. Childs*, 49 Md. 509 (1878). See also 17 Am. Jur., *supra*, n. 68, 201. The same principle is applied in cases where cessation of marital intercourse is relied upon as a constructive desertion (discussed in text, *post*). In such cases, it is a good defense to the charge that the complainant brought about the cessation of the normal intimacy of the marriage relation by his own harsh conduct (short of cruelty). *Owings v. Owings*, 148 Md. 124, 128 A. 748 (1925); *Kline v. Kline*, 169 Md. 708, unreported except in 182 A. 329 (1936); *Timanus v. Timanus*, 177 Md. 686, 178 Md. 640, 10 A. 2d 322 (1940). (For a strange application of the maxim of "*Volenti non fit injuria*" to this type of case see *Wysocki v. Wysocki*, 185 Md. 38, 45, 42 A. 2d 909 (1945). See n. 106, *post*.) But the fact that the husband does not give his wife as much of his wages as she desired is no sufficient cause for her persistent refusal of marital intercourse. *Fries v. Fries*, 166 Md. 604, 171 A. 703 (1934). Nor is it a sufficient defense that the wife has religious scruples against sexual relations so long as a former wife of the husband, though divorced, is alive. *Jesse v. Jesse*, Cir. Ct. of Baltimore City, Dennis, C. J.; Balto. *Daily Record*, Jan. 22, 1938.

This principle as applied in divorce cases, although analogous to the equitable doctrine of "clean hands", has a different origin, having been first applied in the Ecclesiastical Courts. *Childs v. Childs*, *supra*. As to the applicability of the equitable doctrine of "clean hands" in divorce cases, see *Green v. Green*, 125 Md. 141, 93 A. 400 (1915), where the hand-note states that the maxim applies, but the opinion is not conclusive on the point. *Cf.*, *Meeks v. Meeks*, *supra*, n. 55, 337, where the Court said: "We may assume, however, that the equitable doctrine of 'clean hands' is applicable in a divorce court and is not restricted to the defense of recrimination." And *Berman v. Berman*, 62 A. 2d 787, (Md. 1948), where the Court said: ". . . it is unnecessary to decide whether the doctrine

found either in the statement or application of the rule.⁷¹ The basic, and perhaps justifiable, reason for the seeming inconsistency in applying the rule is that no definite standard can be devised to determine the degree of ill-conduct, short of what is required for a divorce, which will constitute a defense to a charge of desertion. As the Court has said:

“In cases of this character it is inadvisable, if not impossible, to lay down any save the broadest general rules, because each case must be determined largely on its own peculiar facts and circumstances.”⁷²

In other words, the matter is left to the Court's discretion.⁷³ The wisdom of applying the rule under the broad and

[of clean hands] is applicable in a divorce proceeding, a question expressly left open in *Meeks v. Meeks* . . . Assuming, without deciding, that it is applicable and broader than the doctrine of recrimination . . . we think the rule could not be applied under the facts of this case.” Application of the doctrine of “clean hands” was denied in an action for annulment of a bigamous marriage. *Towsend v. Morgan*, 63 A. 2d 743 (Md. 1949), noted in Note, “*Clean Hands*” Not Required For Bigamy Annulment (1949) 10 Md., L. Rev. 84. See also text, *post*, at n. 91; also n. 85, *post*.

⁷¹The author of the text in 17 Am. Jur., *supra*, n. 68 and n. 70, was apparently so confused by the Maryland decisions on this question that he cited *Schwartz v. Schwartz*, *supra*, n. 53, as sustaining the minority view that only conduct which authorizes a divorce will justify a separation and also for the “prevailing view” that a separation might be justified by ill-conduct less than is required for a divorce.

⁷²*Crouch v. Crouch*, 150 Md. 608, 618, 133 A. 725 (1926). See also *Schwartz v. Schwartz*, *supra*, n. 53. Both of these cases cite *Buchner v. Buchner*, 118 Md. 101, 84 A. 156 (1912).

⁷³This is the basis of Mr. Bishop's criticism of the rule. At Sec. 1750 of his work, *ibid.*, n. 68, he says: “. . . we have not a particle of enlightenment as to what is the rule to determine the nature and sufficiency of the ill-conduct justifying a desertion. How much less than is required for a divorce, or what less, will suffice? Or is there no rule, and is each case to be governed by the private opinion of the judge or one of the parties? . . . There must be a rule or the possibility of framing one. Now if the ‘experience’ of one judge enables him to pronounce that the ‘female relatives of the husband’ are apt to disquiet the mind of the wife to the extent of justifying her deserting him should he live in the same town with them, another judge may have had no wife, or may have had a different experience with his wife, so this sort of holding could not be extended to constitute a rule. Some will deem the same thing of smoking by the husband, especially if he buys cheap cigars, yet others will dissent.” And in Sec. 1751: “. . . In principle, therefore, as a judicial tribunal is to administer the law which it finds, not the individual opinions of the incumbents of the bench, if it finds specified by legislation certain causes and none other as adequate for a judicial separation, it cannot act from private views of favoring other causes, and declare a separation for them justifiable.”

The writer, for reasons hereafter stated in the text, cannot agree with Mr. Bishop's view. The Court in these cases exercises a “judicial discretion”, which is something well understood in the law and quite different from an expression of the judge's individual and personal opinion. It cannot be denied, however, that the reason for Mr. Bishop's opposition to leaving the matter to the Court's discretion has considerable force. The danger of substituting the judge's individual opinion for the requirements

flexible guidance of a sound judicial discretion is apparent when we consider the untold ramifications of human conduct, particularly in the intimate relationship between husband and wife. In this realm, as in most other human affairs, conduct cannot always be pigeon-holed. Without the right to exercise a judicial discretion, there would be no way to handle that class of matrimonial dispute where the complaining spouse has inspired the offense charged by conduct short of cause for divorce or where a spouse's justification for living apart arises out of circumstances and conditions temporary in nature and remedial by the other spouse. In such cases, the Court must possess the power to deny relief to either or both of the parties unless it is shown by one of them that ample opportunity for correcting the situation has been afforded and rejected or that the spouse originally justified in living apart persists in a refusal to resume cohabitation although the conditions complained of have been corrected.⁷⁴

The inconsistency to be found in the statement of the rule is traceable to the same unfortunate phrasing heretofore discussed in connection with those decisions which apply the same test in spelling out constructive desertion from conduct less than legal cruelty as they do for legal cruelty itself.⁷⁵ Thus in *Polley v. Polley*,⁷⁶ where the husband successfully defended a charge of deserting his wife with whom he had lived for twelve years notwithstanding a syphilitic condition contracted by her prior to marriage and who had involved him in financial difficulties as a result of a theft of money from a certain organization, the Court said, quoting from Cyc.:

of the law are entirely real and were recognized in *Crumlick v. Crumlick*, *supra*, n. 1, where Judge Digges said: "The results consequent upon decisions of the courts in many divorce cases are far from satisfactory, when viewed from the standpoint of the future welfare and happiness of the parties directly concerned, or from the broader viewpoint of society as a whole. This being true, there is frequently present the temptation on the part of the chancellor to make the decree in a particular case conform to his individual view of what would be most conducive to the contentment and happiness of the persons directly concerned, or the common welfare."

⁷⁴ See *Crouch v. Crouch*, *supra*, n. 72, hereafter discussed in the text, as an illustration of this type of case.

⁷⁵ See text following n. 50.

⁷⁶ *Supra*, n. 69.

“It would seem to subserve the interests of public policy and the sacredness of the marriage tie, however, to permit a spouse to set up in defense of his or her desertion such misconduct on the part of the other as would render it impossible to continue the matrimonial cohabitation with safety, health and self respect, although the misconduct is not in itself a sufficient ground for divorce . . . his refusal to live longer with the appellee has been caused by such misconduct on the part of the wife, as renders it impossible to continue the matrimonial cohabitation with safety to his health and self respect.”

The case of *Schwartz v. Schwartz*,⁷⁷ where the rule was similarly stated but not applied, demonstrates the confusion of thought and phrasing involved in the difficult task of determining what degree of ill-conduct (short of what is required for divorce) is adequate as a defense to a charge of desertion. In this case, the wife filed a bill for a partial divorce on the ground of desertion, and the husband filed a cross-bill on the same ground. The parties were a middle aged couple, both with grown children by a former marriage. They established their domicile in the wife's home, and the children of each spouse resided with them. There were frequently quarrels between the members of these ill-assorted families. Schwartz's children resented his second wife and were markedly disrespectful to her. At his wife's request, Schwartz established his children in another home, but shortly thereafter he left his wife and went to live with his children. Schwartz contended that he had invited his wife to join him in his new home and that he had left her home because of her mistreatment of his children, her nagging and abusive conduct. The Court found that Schwartz had not in good faith sought to have his wife join him in the home to which he had moved and that she was therefore not guilty of desertion. The Court further found that her quarrels with his children did not constitute such misconduct on her part as justified his leaving and defending against the charge of desertion. With respect to the

⁷⁷ *Supra*, n. 53.

husband's claim of justification in leaving his wife, Judge Offutt said:

"... it is said in 9 R. C. L. page 364:⁷⁸ 'Though the authorities are not in accord, some cases holding that to justify one spouse in leaving the other on account of the latter's ill-treatment or misconduct, and to deprive the latter of the right to a divorce on the ground of desertion, the ill-treatment or misconduct must be such as to entitle the former to a divorce, yet according to the prevailing view, especially in this country, 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.' And while that conclusion, in so far as it speaks of the 'prevailing view', goes too far, it is at least the law of this State, subject, however, to the qualification that no conduct will justify a separation unless it is such 'as would render it impossible to continue the matrimonial cohabitation with safety, health and self respect'. 19 C. J. S. 80, secs. 181, 116-117."

This is the equivalent of saying that the misconduct must amount to legal cruelty justifying a divorce. There is, of course, no way of determining what Judge Offutt had in mind when he concluded the quotation (from 19 C. J. S. 80, Sec. 181), without adding the last clause of the sentence, which reads: "although the misconduct is not in itself a sufficient ground for divorce"—citing as authority *Polley v. Polley*, discussed above.

In *Singewald v. Singewald*,⁷⁹ where the wife was denied affirmative relief because the defendant's conduct did not measure up to the requirements of legal cruelty, Judge Offutt, again speaking for the Court, cited, among others, the same authorities relied upon in the *Schwartz* case and said:

"... we have intentionally refrained from deciding that the act of the wife in leaving the husband was an act of desertion, since that question is not directly

⁷⁸ Reference is made to Sec. 150, see *supra*, n. 68.

⁷⁹ 165 Md. 136, 166 A. 441 (1933).

presented by the appeal, and there may be cases in which, while the conduct of the erring party would not constitute cruelty, it might nevertheless excuse the act of the injured party in leaving the common home. Nelson on Marriage & Divorce, sec. 89; 19 C. J. 80; Polley v. Polley, 128 Md. 66, 97 A. 526; 9 R. C. L. 150."

Perhaps the Court here had in mind such cases as *Crouch v. Crouch*,⁸⁰ *McKane v. McKane*⁸¹ and *Nickel v. Nickel*,⁸² although no reference was made to them. Indeed, the decision in these cases cannot be explained or justified on any other ground.

In *Crouch v. Crouch*, the Court in effect held that the husband was not entitled to a divorce for his wife's desertion because she was justified in leaving his home; but that notwithstanding such justification, she was not entitled to a divorce against him. Crouch had living with him in the household an insane brother, who on one occasion had become violent and had severely frightened the wife. Medical testimony was to the effect that the brother might again become violent, and the wife requested that the brother be removed from the home. The husband was not opposed to removing the brother and in fact was making arrangements to do so. In the meantime, relations between the parties became strained as a result of quarrels concerning collateral matters, and the wife left the home without warning to her husband. At the time of her departure, arrangements for removing the brother had not yet been completed but there had been no fresh outbreak by the brother to justify the wife's sudden departure. Within two days of her departure the wife filed a suit for partial divorce on the ground of cruelty. The husband filed a cross-bill for desertion. The Court indicated that although the keeping of an insane brother in the house would ordinarily amount to cruelty justifying a divorce, the evidence showed that the husband had arranged to remove the brother; and the wife's sudden departure did not give the husband adequate opportunity to consummate the arrange-

⁸⁰ *Supra*, n. 72.

⁸¹ *Supra*, n. 70.

⁸² 150 Md. 702, 137 A. 915 (1926).

ments. Accordingly, the Court held, the wife was not entitled to a divorce. On the other hand, the Court denied relief to the husband because the presence of the insane brother in the home justified the wife's leaving until the brother was removed. The struggle which the Court had in deciding this difficult case is reflected in the following language of the opinion:

“. . . the appellant . . . could not require his wife to live in the same house with [the insane brother] and we accordingly cannot treat the wife's leaving as being sufficiently unjustified to constitute desertion on her part. The case is a difficult one to decide, but taking into consideration the interest which the State has in the maintenance of the marriage relation, and looking at the evidence as a whole, we are convinced that neither of these parties is entitled to a divorce.

* * * * *

“In cases of this character it is inadvisable, if not impossible, to lay down any save the broadest general rules, because each case must be determined largely on its own peculiar facts and circumstances. . . . In the present case, it can be strongly urged that the presence of the brother for four months in the husband's home justified the wife in breaking off the marriage and suing for a divorce, but against this the record shows that during this time the brother did nothing offensive or dangerous . . . that the wife gave no definite warning of her intention to leave . . . and finally . . . that at the time the wife left the husband was making arrangements to have his brother removed. Under these circumstances we do not think the wife is entitled to a divorce. On the other hand, it can also be urged that if she is not entitled to a divorce then her leaving constituted desertion on her part entitling the husband to a divorce. This latter contention, however, loses sight of her right to decline to live with her husband as long as his brother remained in their home. It is not every separation of husband and wife that entitles one or the other to a divorce. ‘There must be an actual breaking off of the matrimonial cohabitation, coupled with an intent in the mind of the offender to desert or abandon the other.’ 19 C. J. 58. In the present case, however, the wife can hardly be said to be the offender, because she had a right to decline to live in

the same house with the husband's afflicted brother, and hence, since her leaving was justified, her intention in doing so is immaterial, and will remain so until the brother is removed. It accordingly follows that under the testimony now before us the husband has failed to show any desertion by the wife entitling him to any relief."⁸³

In *McKane v. McKane*,⁸⁴ the wife sued for a partial divorce on the ground of excessively vicious conduct and cruelty, allegedly manifested by the husband's disposition to get drunk and call her vile names. The husband filed a cross-bill for desertion because of the wife's refusal to admit him to her bedroom. The Court denied the wife relief because the husband's conduct did not amount to legal cruelty. The husband was denied relief because his misconduct, although not a ground for divorce, was serious enough to justify the wife's taking a separate bedroom.⁸⁵

In *Nickel v. Nickel*,⁸⁶ where the parties lived with the husband's family under uncongenial conditions, the Court denied the wife a divorce because it did not appear that she had demanded a home separate and apart from the husband's family or that the husband could have afforded to comply with such a demand. Nevertheless, the Court further held that the wife, in leaving the husband under such circumstances, was not guilty of desertion so as to

⁸³ *Supra*, n. 72, 617. Recognizing the anomalous situation in which the parties were left, the Court said, *supra*, n. 72, p. 619: "It appears from the record that both of these parties now refuse to live together, and the situation in which they find themselves is undoubtedly regrettable, but the Court is not responsible for their errors of omission or commission, and we cannot grant either or both of their relief simply because their matrimonial affairs have gotten into an unfortunate tangle."

⁸⁴ *Supra*, n. 70.

⁸⁵ The Court said, *ibid.*, 520: "It was held in *Childs v. Childs*, [49 Md. 514], that where a husband by his misconduct induces such behavior on the part of the wife as would be just cause for complaint, but for his own misconduct, and, without first seeking a remedy in the reform of his own conduct, separates from his wife, and after the separation is forbidden by her to return again to her, such act of the wife forbidding the husband to return will not entitle him to a divorce on the ground of abandonment." The principle here announced originated in the Ecclesiastical Courts; and although it has some analogy to the equitable doctrine of "clean hands", it is not the same thing. See *Ohilds v. Childs*, *supra*, n. 70, 513. See also n. 70, *supra*.

In *Childs v. Childs*, *supra*, n. 70, the wife was permitted to defend a charge of desertion on the ground that the husband had utterly failed to support her. (It is to be observed that the Court has held mere failure to support not to amount to desertion. *Sause v. Sause*, *supra*, n. 22).

⁸⁶ *Supra*, n. 82.

entitle the husband to a divorce against her, it appearing that she had been treated as an outcast by his family, that the husband did not resent this and spent much of his time with his family in that part of the house occupied by them, leaving her neglected and alone.

In *Simmont v. Simmont*,⁸⁷ the Court held that although the wife's attention to another man who lived in the same house was not in itself "sufficient cause to justify him in abandoning her, . . . [it was] sufficient to justify him in leaving the house which [the other man] occupied, and his action in so doing cannot be characterized as desertion, if he offered to provide another home"^{87a} for his wife.

The decision in *Crumlick v. Crumlick*⁸⁸ applied the rule of "sufficient for defense but not for affirmative relief" to a situation in which the wife clearly appeared guilty of desertion. There was no express reference made to the rule, but (like the decision in the *Crouch* case) there is no other basis for explaining the Court's conclusion. Both parties charged the other with desertion. The evidence showed that after some unpleasantness between the parties due to the presence of the wife's parents in the home, the husband moved to a hotel which the parties owned and managed, declaring that he would stay there until the wife's parents left. Thereafter, the husband earnestly sought reconciliation and returned to the home. The wife refused to resume relations and left the home. Four days later she filed her bill. The Court denied relief to the wife because the husband's actions lacked the necessary intent to desert. Relief was also denied to the husband because "under the circumstances of this case the action of the wife in leaving home under the conditions here shown, with the belief that she had a legal ground for divorce against her husband, as shown by the filing of her bill four days after leaving, does not constitute desertion by her."⁸⁹

⁸⁷ 160 Md. 422, 153 A. 665 (1931).

^{87a} *Ibid.*, 430.

⁸⁸ *Supra*, n. 1.

⁸⁹ *Ibid.*, 387. Compare, however, the ruling in *McClees v. McClees*, 162 Md. 70, 74, 158 A. 349 (1932), where under somewhat different circumstances the Court said: "Since the wife left the husband without the commission by him of some *distinct matrimonial offense upon which a decree of judicial*

It is settled that a charge of desertion cannot be defended by a showing of a quarrelsome disposition on the part of the complainant⁹⁰ or that the complainant was cold, indifferent and uncooperative in according the defendant his marital rights.⁹¹

In any case where a party asserts the affirmative defense of justification for leaving the home, he or she carries the burden of establishing it.⁹²

The recent case of *Hyatt v. Hyatt*,⁹³ creates considerable uncertainty about the rule that conduct not in itself ground for a divorce may yet justify one spouse in leaving and afford a defense to an action for divorce. In that case the wife sued for a divorce on the ground of desertion. The husband attempted to justify his departure by showing that shortly after the marriage the wife became extravagant and spent most of his earnings, that she incessantly cursed and nagged him, and that "the only way to avoid it was to leave". The Court, however, rejected this defense and stated that the wife was entitled to a decree, unless the defendant-husband could—

“. . . show that the plaintiff was guilty of adultery . . . or that she was guilty of such excessively vicious conduct or such cruelty as to justify his leaving her. In other words, if he defends on either of the two latter grounds he must show such facts as would entitle him to a decree had he filed the bill.”^{93a}

This language ignores the rule under discussion and applies the technical defense of recrimination.⁹⁴ In the subsequent

separation could have been granted, her desertion began when she left, and was not intercepted by the divorce proceeding which she later unsuccessfully began.” (Italics supplied.) Aside from the nugatory effect of prompt institution of divorce proceedings, the language, italicized, appears in direct conflict with the rule of “sufficient for defense but not for affirmative relief”. See text, *post*.

⁹⁰ *Bounds v. Bounds*, 135 Md. 220, 108 A. 870 (1919).

⁹¹ *Wilson v. Wilson*, 152 Md. 632, 137 A. 354 (1927); *Kline v. Kline*, *supra*, n. 70.

⁹² *Roberts v. Roberts*, 160 Md. 513, 154 A. 95 (1931).

⁹³ 173 Md. 693, unreported except in 196 A. 317 (1938).

^{93a} *Ibid.*, 317.

⁹⁴ Sec 19 C. J. 77, 94, Secs. 171, 220. “Misconduct of complainant constituting a defense on the ground of provocation, justification or excuse, need not be such as in itself would entitle defendant to a divorce, thus distinguishing it from misconduct constituting the defense of recrimination, which must of itself be sufficient as a ground for divorce.” *Ibid.*, Sec. 171.

case of *Meeks v. Meeks*,⁹⁵ where the rule of "sufficient for defense but not for affirmative relief" was not strictly applicable because the plaintiff-husband's alleged misconduct (association with other women)⁹⁶ originated subsequent to the wife's desertion, the Court discussed the relation of the equitable doctrine of "clean hands" to the defense of recrimination without either adopting the doctrine for divorce cases or considering the extent to which it impinged upon the rule under discussion, saying:

"The defense of recrimination can be sustained only by proof of a marital offense which would constitute ground for divorce. We may assume, however, that the equitable doctrine of 'clean hands' is applicable in a divorce court and is not restricted to the defense of recrimination. But 'equity does not demand that its suitors shall have led blameless lives'. . . . This Court has repeatedly held (and now holds) that divorces should not be granted for light or trivial causes; but few opinions in divorce cases indicate that the conduct of either of the parties has been exemplary."⁹⁷

The most recent cases,⁹⁸ in which the rule under discussion could properly have been applied, make no reference to it and appear to proceed on the assumption that no ill-conduct will constitute a defense to a charge of desertion unless it mounts up to a ground for divorce—in other words, technical recrimination. It may be that such cases as *Crouch v. Crouch* and *Crumlick v. Crumlick* have been relegated to the limbo of forgotten decisions. The writer, however, ventures an opinion that the Court will not hesitate to disinter them when confronted with a hard case in which it feels the parties ought not to be divorced.

See also, *supra*, n. 70. For the requirements of technical recrimination see *Green v. Green*, *supra*, n. 70; *Martin v. Martin*, 141 Md. 182, 118 A. 410 (1922); *Pryor v. Pryor*, 146 Md. 683 (1924); *Appeltofft v. Appeltofft*, 147 Md. 603, 128 A. 273 (1925); *Meeks v. Meeks*, *supra*, n. 55, quoted in text, *post*.

⁹⁵ *Supra*, n. 55.

⁹⁶ See n. 55, *supra*.

⁹⁷ *Supra*, n. 55, 337. See n. 70 and n. 85, *supra*, where it is shown that the rule under discussion is not grounded on the equitable doctrine of "clean hands."

⁹⁸ See *Stevens v. Stevens*, *supra*, n. 24; *Ritz v. Ritz*, *supra*, n. 30; *Brault v. Brault*, *supra*, n. 54.

2. Cessation of marital intercourse without just cause

In the marriage relation, sexual intercourse between the parties is a reciprocal privilege and obligation of the most sacred character. The law recognizes and protects it by declaring the spouse who unjustifiably withdraws from this normal intimacy guilty of matrimonial desertion. This has been the settled law on the subject in this State since the decision in *Fleegle v. Fleegle*.⁹⁹ The Court of Appeals has expressly declared this type of marital misconduct to be a constructive desertion.¹⁰⁰ This seems an entirely reasonable classification as the offense does not involve an actual desertion in the sense of a departure from the matrimonial domicile, although to a certain extent there is a partial physical withdrawal.

To make out a case of constructive desertion it must be shown that the withdrawal from marital relations was permanent and irrevocable with intent to sever the marriage relation.¹⁰¹ Thus where the husband moved to a separate room merely to avoid the wife's nagging and to get a night's sleep or because the wife complained of noise from the husband's alarm clock, there was no desertion.¹⁰² The mere fact that the parties occupy separate bedrooms is not evidence of cessation of intercourse nor of intent

⁹⁹ 136 Md. 630, 110 A. 889 (1920), *Martin v. Martin*, *supra*, n. 89; *Ruckle v. Ruckle*, 141 Md. 207, 118 A. 472 (1922); *Roth v. Roth*, 145 Md. 74, 145 A. 556 (1924); *Klein v. Klein*, 146 Md. 27, 125 A. 728 (1924); *Owings v. Owings*, *supra*, n. 70; *Irr v. Irr*, 150 Md. 313, 133 A. 56 (1926); *McKane v. McKane*, *supra*, n. 70; *Wilson v. Wilson*, *supra*, n. 91; *Beach v. Beach*, 159 Md. 647; 152 A. 365 (1930); *Crumlick v. Crumlick*, *supra*, n. 1; *Fries v. Fries*, *supra*, n. 70; *Wagner v. Wagner*, 166 Md. 705, unreported, *per curiam* opinion in 172 A. 927 (1934); *Kline v. Kline*, *supra*, n. 70; *Shpritz v. Shpritz*, 174 Md. 695, unreported except in 200 A. 363 (1938); *Dotterweich v. Dotterweich*, 174 Md. 697, unreported except in 200 A. 523 (1938); *Faulkner v. Faulkner*, 176 Md. 692, 4 A. 2d 117 (1939); *Timanus v. Timanus*, *supra*, n. 70; *Wysocki v. Wysocki*, *supra*, n. 70; *Jones v. Jones*, 186 Md. 312, 46 A. 2d 617 (1946).

¹⁰⁰ *Kline v. Kline*, *ibid.*; *Shpritz v. Shpritz*, *ibid.*; *Dotterweich v. Dotterweich*, *ibid.*; *Faulkner v. Faulkner*, *ibid.* See also *Jessa v. Jessa*, *supra*, n. 70. *Cf.*, however, *NELSON, DIVORCE AND ANNULMENT*, Sec. 4.14, where the author regards such misconduct as an actual desertion.

¹⁰¹ *Fleegle v. Fleegle*, *supra*, n. 99; *Ruckle v. Ruckle*, *supra*, n. 99; *Irr v. Irr*, *supra*, n. 99; *Wysocki v. Wysocki*, *supra*, n. 70; *Jones v. Jones*, *supra*, n. 99. See also opinion of Frank, J., in *Lissey v. Lissey*, Circuit Court No. 2 of Baltimore City, *Daily Rec.*, Apr. 11, 1941, affirmed 180 Md. 689, unreported except in 23 A. 2d 39 (1941).

¹⁰² Cases cited *ibid.*

to desert as this is not necessarily a withdrawal of the marital right, "for that right may continue and be exercised thereafter under the changed conditions, with the full understanding and approval of both."¹⁰³ Nothing short of an actual request and persistent refusal will constitute constructive desertion.¹⁰⁴ Mere coolness, indifference and failure to cooperate in the act is not sufficient.¹⁰⁵ Under the principle that a party cannot complain of a condition brought about by his own misconduct,¹⁰⁶ where the cessation of marital relations is attributable to the husband's persistently harsh treatment of his wife, relief will not be granted.¹⁰⁷ But a wife is not justified in withdrawing the privilege merely because her husband does not give her as much of his wages as she desires,¹⁰⁸ or because she has religious scruples against sexual relations so long as a former wife of the husband, though divorced, is alive,¹⁰⁹ or because she has an unfounded fear of contracting a venereal disease.¹¹⁰ The Court has declared that the marital obligation includes not only the wife's duty of submission upon reasonable request of the husband, but also the husband's duty of forbearance upon reasonable request of the wife; and not only is the wife justified in refusing demands which are excessive in nature or made at times when intercourse may cause her serious injury, but such conduct on the part

¹⁰³ Ruckle v. Ruckle, *ibid.*; Roth v. Roth, *supra*, n. 99; Owings v. Owings, *supra*, n. 70; Beach v. Beach, *supra*, n. 99; Wysocki v. Wysocki, *supra*, n. 70; Jones v. Jones, *supra*, n. 99. See also Fischer v. Fischer (Md. 1949). No. 2 Oct. Term 1949 (Daily Record, Nov. 15, 1949), where the Court made the following critical comment on this factual situation: "This is one of those all too frequent divorce cases where parties request a legal separation because of cessation of marital activities while continuing to live in the same house."

¹⁰⁴ Kline v. Kline, *supra*, n. 70.

¹⁰⁵ Wilson v. Wilson, *supra*, n. 99; Kline v. Kline, *ibid.*

¹⁰⁶ See text at n. 70 and n. 91. See Wysocki v. Wysocki, *supra*, n. 70, 45, for a somewhat strange application of the maxim of "*Volenti non fit injuria*" in holding that the wife could not obtain relief for her husband's refusal to have intercourse where she was afraid to engage in the act because of an unfounded fear of contracting a venereal disease. The Court said: "She thus brings herself within the scope of this maxim that a person who is willingly injured is not injured, as a matter of law."

¹⁰⁷ Owings v. Owings, *supra*, n. 70; Kline v. Kline, *supra*, n. 70; Timanus v. Timanus, *supra*, n. 70.

¹⁰⁸ Fries v. Fries, *supra*, n. 70.

¹⁰⁹ Jessa v. Jessa, *supra*, n. 70.

¹¹⁰ Wysocki v. Wysocki, *supra*, n. 70, quoted at n. 106, *supra*.

of the husband may amount to cruelty, entitling the wife to a divorce.¹¹¹

The dual problem presented in every divorce action of meeting the ordinary burden of proof and satisfying the statutory requirement of corroboration is particularly difficult in cases of the character under discussion.¹¹² As the Court said in *Jones v. Jones*:¹¹³

“The case presents a situation where the claimed abandonment was the refusal to continue marital relations while the parties were living in the same house. In some jurisdictions it is required that such abandonment be notorious and known to the community in which the parties lived. That is not the law of this State, but the fact that it is the law elsewhere emphasizes the difficulties of the ordinary proof in such cases. It is very easy to set up such a claim if the parties are in collusion, and where there is no defense the testimony must be carefully scrutinized to see if the facts are clearly proved. Where the case is contested as in the proceedings before us, the inherent difficulty of establishing the facts, does not relieve the complainant from furnishing the corroboration required by the statute. . . . It is true that where there is no possibility of collusion, only slight corroboration is necessary. . . . However, the corroboration must be present.”

We have already seen that a mere showing that the parties occupied separate rooms is not sufficient to establish the offense under discussion. In some of the cases which state this proposition, both sides admitted the cessation of intercourse, and the necessity for corroboration was in reality limited to the issue of who was responsible for the condition.¹¹⁴ Of course, in the face of a denial by the party

¹¹¹ *Griest v. Griest*, 154 Md. 696, unreported, 140 A. 590 (1928); *Hockman v. Hockman*, 184 Md. 473, 41 A. 2d 510 (1945).

¹¹² Md. Code, Art. 35, Sec. 4; *Owings v. Owings*, *supra*, n. 99; *Shpritz v. Shpritz*, *supra*, n. 99; *Dotterweich v. Dotterweich*, *supra*, n. 99; *Jones v. Jones*, *supra*, n. 99.

¹¹³ *Ibid.*, 313.

¹¹⁴ See for example *Owings v. Owings*, *supra*, n. 70, where the divorce was denied because there was no corroboration of the husband's charge that the admitted cessation of intercourse was due to the wife's fault. In *Faulkner v. Faulkner*, *supra*, n. 99, the relief was granted where the Court accepted testimony of a son of the parties as corroborating the wife's claim that the husband was responsible for the admitted cessation of intercourse. The Court also referred to certain entries in the wife's diary as supporting her claim that her husband refused to have relations with her.

charged, it is a virtual impossibility (except, perhaps, in a case of virginity) to obtain corroboration of the bare, isolated fact of nonintercourse. Indeed, none of the cases turn on such a narrow question but involve the more complicated issues of responsibility for the cessation of intercourse, whether there was a refusal in the legal sense, whether it was a mere temporary withdrawal lacking the requisite intent to desert, whether the refusal was justified, etc.¹¹⁵

¹¹⁵ In addition to the cases cited, *ibid.*, see the following cases where the divorce was granted: *Roth v. Roth*, *supra*, n. 99, corroboration of husband's claim of refusal being found in wife's declarations to third persons that she wanted her husband to get out and live elsewhere and let her alone; that she would never be his wife; and that she had refused a reconciliation because it was too late. Further corroboration was found in the wife's inconsistent defense. In a prior suit for divorce instituted against the husband she had charged him with cruelty necessitating her leaving his bed; whereas in the instant case, wherein the husband was plaintiff, she denied the alleged refusal of relations and asserted that she left her husband's room in order to sleep with her youngest son, and that it was understood that the plaintiff could "visit there whenever he got good and ready". *Klein v. Klein*, *supra*, n. 99, where the wife took a separate room and corroboration was apparently found in the fact that she put locks on the doors of her room and nailed the doors to the floor. *Fries v. Fries*, *supra*, n. 70, where the cessation of intercourse was due to the wife's dissatisfaction with the amount of allowance furnished by the husband, and the Court did not specifically discuss the question of corroboration. *Dotterweich v. Dotterweich*, *supra*, n. 99, where the Court merely said: ". . . there is . . . enough of admissions of the husband's complaints as to justify the conclusion of the Chancellor that there had been a constructive desertion and abandonment of the plaintiff by the defendant on the ground and for the reasons stated in *Fleegle v. Fleegle*, 136 Md. 630 and *Klein v. Klein*, 146 Md. 27."

In the following cases the divorce was denied: *Ruckle v. Ruckle*, *supra*, n. 99, where no question of corroboration was involved. There was no intent to desert, it appearing that the husband took a separate room merely for the purpose of avoiding a quarrel and getting a night's sleep. *Irr v. Irr*, *supra*, n. 99, was a similar case. *McKane v. McKane*, *supra*, n. 70, corroboration not involved. The husband's conduct in coming home drunk and using vile epithets was held to justify the wife's withdrawal. *Beach v. Beach*, *supra*, n. 99, where the wife's refusal was held not established by occupancy of a separate room, particularly since there was testimony that the parties slept together within two weeks of the plaintiff-husband's departure. *Wagner v. Wagner*, *supra*, n. 99, where cessation of relations was admitted, but the defendant wife asserted that it was the plaintiff-husband himself who had ceased relations, entirely of his own initiative and preference. The Court said: "There were no other witnesses to the fact, and incidents to which counsel on one side and the other refer for corroboration do not in the opinion of this Court afford sufficient ground for differing from the lower Court." *Shpritz v. Shpritz*, *supra*, n. 99, where the Court said that the husband's testimony "is not sufficiently corroborated and does not gain belief". *Wysocki v. Wysocki*, *supra*, n. 70, quoted at n. 106, *supra*, where non-intercourse was admitted but the Court held there was no corroboration of the husband's refusal in the legal sense. Defendant-husband denied he had "refused" relations, and the Court found that the wife, who had an unfounded fear of contracting a venereal disease, was a willing party to the discontinuance of relations. *Jones v. Jones*, *supra*, n. 99, where non-intercourse was admitted, but the evidence showed that the defendant-

As a practical matter, it is to these broader issues that the corroborative evidence must be directed.¹¹⁶

3. Refusal of a bona fide offer of reconciliation

A. *In general*—If one spouse leaves the other without cause and repents and proposes to renew the cohabitation, and that other refuses, it constitutes desertion by the one refusing from the time of the refusal; provided the offer to return is made in good faith, is free from improper qualifications and conditions, and is really intended to be carried out in accordance with the duties and obligations of the marital relation.¹¹⁷ The duty to make an overture is upon the erring spouse. The innocent spouse is under no obligation to seek out the other and urge a resumption of relations.¹¹⁸ However, where the spouses are living apart without fault for the separation being chargeable to either, or without legal grounds for separation, each is under a duty to make reasonable efforts to effect a reconciliation and neither can charge the other with desertion unless he or she has earnestly and in good faith made such an effort.¹¹⁹ The voluntary character of a separation which

wife sought resumption of relations. With respect to the plaintiff husband's charge and the evidence in support thereof, the Court said: "So far from corroborating it, it is, in effect, a denial. It tends to support the position of the wife that it was he, and not she, who was guilty of the abandonment." *Fischer v. Fischer*, *supra*, n. 103, where non-intercourse was admitted but the Court accepted the Chancellor's conclusion that "The up-shot of the whole story is that the Court is convinced it is practically a cessation of hostilities by mutual consent".

¹¹⁶The Court has recently declared that the "corroboration required by the Statute to support the testimony of the plaintiff in a divorce suit need not go to every particular of the case. It is considered sufficient if it gives substantial support to the plaintiff's testimony of material and controlling facts". *Hahn v. Hahn*, 64 A. 2d 739, 743 (Md. 1949).

¹¹⁷*Downs v. Downs*, 154 Md. 430, 140 A. 831 (1928); *Simmont v. Simmont*, *supra*, n. 87; *McClees v. McClees*, *supra*, n. 89; *Kirkwood v. Kirkwood*, 165 Md. 547, 170 A. 180 (1934); *Kline v. Kline*, *supra*, n. 70; *Pitts v. Pitts*, 181 Md. 182, 29 A. 2d 300 (1942); *Geisey v. Geisey*, *supra*, n. 17; *Miller v. Miller*, 62 A. 2d 293 (Md. 1948); *Schofer v. Schofer*, 62 A. 2d 565 (Md. 1948). If the offer is inadequate because lacking the requisites stated in the text, the offeree is not guilty of desertion by accepting it conditionally. As stated in *Wise v. Wise*, *supra*, n. 20, 600: "But an unqualified refusal by her of the indirect and inadequate overtures made in this case would not seem to us so unjustified as to convict her of abandonment, and certainly her conditional acceptance should not affect her more unfavorably than a definite declination."

¹¹⁸*Miller v. Miller*, 178 Md. 12, 11 A. 2d 630 (1940); *Diamond v. Diamond*, 182 Md. 103, 32 A. 2d 376 (1943); *Miller v. Miller*, *supra*, n. 1.

¹¹⁹*Dearholt v. Dearholt*, 178 Md. 405, 13 A. 2d 538 (1940); *Wysocki v. Wysocki*, *supra*, n. 70.

originated in the mutual consent of the parties is terminated by a proper overture of reconciliation by one of the parties.¹²⁰ The spouse to whom the overture for reconciliation is made is entitled to a reasonable time to consider it before a charge of desertion can be brought against the offeror.¹²¹ The duty to accept a *bona fide* offer of reconciliation is clear where it appears with reasonable certainty that such offer may be accepted without any reasonable sacrifice of self-respect, health, safety or comfort.¹²² But where after a long trial, cohabitation appears impracticable because of the repentant spouse's conduct, and there is no sufficient promise of removal of the cause, it seems that even a *bona fide* offer of reconciliation need not be accepted.¹²³ In cases where the original separation was due to the offeror's cruelty, the mere *bona fides* of the offer is not enough to require acceptance. As the Court said in *Wise v. Wise*:^{123a}

"The determination of the question as to whether the appellant was wrong in her refusal to live again with the appellee depends on the kind and degree of mistreatment to which she was previously subjected. It was incumbent upon him to prove that the causes and circumstances of the separation were not such as to prevent his wife, with due regard to her safety, comfort and self respect, from accepting his proposal for a reunion."^{123b}

¹²⁰ *Downs v. Downs*, *supra*, n. 117; *Riland v. Riland*, Cir. Ct. No. 2 of Baltimore City, Frank J., *Daily Record*, Apr. 10, 1941, where the offer of reconciliation was held a good defense to a divorce on the ground of voluntary separation. See also, *post*, n. 145.

¹²¹ *Kline v. Kline*, 179 Md. 10, 15, 16 A. 2d 924 (1940).

¹²² *Simmont v. Simmont*, *supra*, n. 87, 432; *Brault v. Brault*, *supra*, n. 54.

¹²³ *Kruse v. Kruse*, *supra*, n. 17; *Pitts v. Pitts*, *supra*, n. 117. See also *Kline v. Kline*, *supra*, n. 70, where aside from the fact that the husband's offer was not sincere, the Court indicated its disfavor of reconciliation in this case because of the unlikelihood of its permanency.

See *supra*, n. 58a, for discussion of the effect of a rejection of an offer in such cases on the question of rebuttal of intent to desert on the part of the offeror.

^{123a} *Supra*, n. 20, 599.

^{123b} In this case the offer was made through a third party and the Court found it was not sincere. There was a further complicating factor in that the parties were living apart under a separate maintenance decree in favor of the wife, but this circumstance does not, in the writer's opinion, alter the rule as stated in the text. See also *Zuckerberg v. Zuckerberg*, *supra*, n. 20, which was a similar case of parties living apart under a separate maintenance decree, and in which the Court held the husband's offer of reconciliation was not sincere. In the Massachusetts case of *Slavinsky v. Slavinsky*, *supra*, n. 20, 828, the rule was stated as follows: "If it [the

There is no inflexible rule for determining whether an offer of reconciliation meets the requirements of *bona fides*, freedom from unwarranted conditions and compatibility with the safety and self respect of the offeree. Each case is controlled by its own particular facts and circumstances. A safe *indicium* of bad faith, however, may be found in the fact that the offeror has retained copies of letters in which the overtures were made.^{123c}

B. *Offer made subsequent to filing bill of complaint or after flux of statutory period.*

The general rule is settled that a divorce decree must be based upon acts, conduct and transactions occurring before the institution of suit.¹²⁴ On principle, therefore, an offer of reconciliation made after the filing of the complaint is too late and need not be accepted, although evidence of the belated overture may be received in corroboration of the *bona fides* of prior offers or as reflecting upon intent or the fault of the parties with respect to their separation.¹²⁵ The Maryland cases which deal with this subject

wife's separate maintenance decree] was in truth granted on the ground of cruel and abusive treatment, manifestly the offer of the husband to furnish a home and live with his wife would be unavailing regardless of his 'good faith' without proof that the wife, if she accepted his offer, would be free from reasonable apprehension for her bodily safety and was otherwise required to accept the offer."

^{123c} Pitts v. Pitts, *supra*, n. 117; Nicodemus v. Nicodemus, *supra*, n. 17; Zuckerberg v. Zuckerberg, *ibid.* See also cases discussed in text, *post*, involving offers made *post litem motem*.

¹²⁴ Simmont v. Simmont, *supra*, n. 87; McClees v. McClees, *supra*, n. 89; Kirkwood v. Kirkwood, *supra*, n. 117; Dearholt v. Dearholt, *supra*, n. 119. For statement and application of this rule in cases involving adultery, see Schwab v. Schwab, 96 Md. 592, 54 A. 653 (1903); Wagner v. Wagner, 130 Md. 346, 100 A. 364 (1917); Carter v. Carter, 139 Md. 265, 114 A. 902 (1921); Sterling v. Sterling, 145 Md. 63, 125 A. 809 (1924); Williams v. Williams, 156 Md. 10, 142 A. 510 (1925).

¹²⁵ Cases cited *ibid.* See also Backus v. Backus, 167 Md. 19, 172 A. 270 (1934), where the plaintiff-wife had made numerous offers prior to suit and her affirmative reply to the Chancellor's question at the trial as to her willingness to return to her husband appears to have been regarded as corroborative of wife's good faith in making the prior offers; Coleman v. Coleman, 51 A. 2d 673 (1947). In this case the wife had left the husband, taking certain items of furniture and returning from time to time to get articles of clothing. During these visits the husband made no effort to persuade her to remain; and on the last visit, which was the day on which he filed the complaint, she declared that she had come home to stay; but he refused her offer and ejected her from the house. The Court held that the husband had not clearly shown intent to desert on the part of the wife and said: ". . . evidence of conduct . . . after the filing of the bill or the cross-bill respectively, is admissible only as reflecting on intent—or on revival of condoned offenses." The evidence was in conflict as to whether the offer to return was made on the day the suit was filed or a month later.

do not categorically state that an offer made after suit is filed need not be accepted. The issue is invariably complicated by such other factors as the *bona fides* of the belated offer, its affect on *ante-litem* offers, the fact that the offer was neither made nor refused directly but consisted of a mere affirmative or negative answer to the prodding of counsel or of the Chancellor seeking to effect a reconciliation. Thus in *Simmont v. Simmont*,¹²⁶ the Court said:

“And while at the trial he said that, because she refused his offers to resume cohabitation, he never intended to live with her again, it cannot be said, in the absence of any evidence sufficient to support the inference that she would accept an offer to resume the suspended cohabitation, that his mere statement, made in answer to a question by counsel, was sufficient to change the status of the parties as it existed at the institution of the suit. . . . But that rule [requiring acceptance of a *bona fide* offer] has no application unless such an offer has been actually made by one party and refused by the other. And, in the opinion of a majority of the Court, a declaration such as that made by Simmont is a mere hypothetical statement of a future course of action predicated upon facts which may never exist, and not the refusal of an offer within the meaning of the rule.”

*Kirkwood v. Kirkwood*¹²⁷ presented a similar situation. Prior to suit the wife had called the husband on the telephone to discuss reconciliation, but he had refused to talk about it in this way. At the trial, following an adjournment for two weeks to see if reconciliation could be effected, the wife, in answer to a question by the Chancellor as to her willingness to return to the home where the husband's mother also resided, replied: “I think I would.” The husband, in reply to the Chancellor's inquiry as to his willingness to take the wife back, declared that his wife's repeated departures from the home left him without confidence in her and that he did not want her back. The Court held the husband not guilty of desertion, and said:

¹²⁶ *Supra*, n. 87, 432.

¹²⁷ *Supra*, n. 117.

"The answer related to the reasons why he would not desire to resume cohabitation and, so, was not a refusal to permit her to return. Nor, in the absence of a proper offer of the wife to return, could the husband be thus put to an election. The wife must recover upon a cause of action subsisting at the time of her suit, although the subsequent conduct and declarations of the parties may, subject to applicable limitations imposed upon its admissibility, be received in evidence in corroboration or as reflecting upon the fault of the parties with respect to their separation.

* * * * *

"There is, moreover, not much weight to be given to the answer of the wronged spouse in reply to the question whether he would renew cohabitation with the erring spouse upon her equivocal declaration that she might be willing to return, which she had, a few minutes before, freshly made in the course of her testimony in open Court, since time for consideration, reflection, and decision was necessary to a conclusive reply. . . . The rights of the wronged spouse, however, cannot be made to depend upon the nature of his answer as to what he would do in imaginary circumstances, which had not assumed any definite form."

In the first appeal in *Dearholt v. Dearholt*¹²⁸, the Court said:

"To a question of the Chancellor during the hearing below the husband answered that he was not willing to live with the wife now, but that avowal does not constitute the desertion upon which permanent alimony might be decreed."

In *Dunnigan v. Dunnigan*, where the husband had desert the wife without cause, the Court said:¹²⁹

". . . the husband's offer of reconciliation made at the final hearing in this case comes too late, and is also lacking in the elements necessary to show good faith. Moreover, his testimony on that point is, at best, an implied offer to provide for them through his own mother and father in the latter's home, rather than on the husband's own obligation and responsibility. This belated and insufficient offer aggravates,

¹²⁸ *Supra*, n. 119.

¹²⁹ *Supra*, n. 13.

rather than justifies, his continued failure to discharge his obligations as husband and father prior to that time."

In *Fischer v. Fischer*, the Court said:^{129a}

"His belated statement at the trial that he was prepared to offer his wife a separate home means nothing, in view of his previous actions. What he suggests now, after the case has been brought, after the separation has occurred, and the case is being heard, comes too late to prevent an adverse decision of the Court."

In *McClees v. McClees*,¹³⁰ the wife had originally sued for an *a mensa* divorce on the ground of the husband's cruelty. Denial of this relief was affirmed.^{130a} The difficulty between the parties appeared to stem from the fact that the husband kept his dependent mother in the household. Four months after the affirmance in the first case, the wife filed a bill for permanent alimony based on the husband's alleged constructive desertion in refusing her offer of reconciliation subsequent to the affirmance of the first case. The husband contended that the wife's offer was improperly conditioned upon a home apart from his mother. Accordingly, the husband declared in his answer that the wife had in effect made no offer to return to his home, which at all times was open to her. After the filing of this answer, the wife placed a few belongings in her hat box and, accompanied by two witnesses, presented herself for admittance to the defendant's home with an unconditional offer to resume cohabitation. This overture the defendant rejected. In denying the wife relief the Court said that her attempted reconciliation after filing of the suit was—

"... so manifestly a self-serving maneuver made *post litem motem* that it has no evidential value in determining the question whether or not the wife's offer to return before suit brought was a conditional one, as maintained by the husband . . ."

In the second appeal in the *Dearholt* case,¹³¹ the wife sued for an *a mensa* divorce based upon the husband's

^{129a} *Supra*, n. 53, 292.

¹³⁰ *Supra*, n. 89.

^{130a} 160 Md. 115, 152 A. 901 (1931).

¹³¹ *Supra*, n. 119.

rejection of her offers of reconciliation made both pending the first case and subsequent to its termination. The Court pointed out that the first case had left the parties living apart without fault for the original separation chargeable to either so that each was under a duty to seek reconciliation. The evidence showed that the wife had made several attempts to become reconciled by visiting her husband and writing to him. On one occasion when she went to his home, he had her arrested and his lawyer threatened her with appropriate proceedings unless she desisted. Much of the testimony in the case related to matters that transpired both prior to and pending the first suit. With respect to this evidence, the Court said, referring to the first case:

“Because of that adjudication the Court is precluded in this suit from the consideration of anything as a ground for the relief prayed except the conduct of the parties after that suit was instituted. . . . Since any decree in that case must have been based upon acts, conduct and transactions occurring before the institution of the suit, such matters are not relevant to the present inquiry. On the other hand, events occurring during the pendency of that suit and subsequent to its final determination are relevant.”^{131a}

This language necessarily excluded from consideration as a basis for a decree in the second case conduct and transactions occurring subsequent to the filing of the second case. Nevertheless, in arriving at the conclusion that the wife was entitled to relief because she did “all she could reasonably be expected to do to effect a reconciliation; he did all that he could do to prevent it”, the Court referred at length to the evidence of what transpired after the filing of the second suit and during a period when the parties undertook to live together under the same roof pursuant to a suggestion of the Chancellor, who had postponed the case to determine whether a reconciliation could be effected. It appears, however, that the Court’s consideration of these *post litem* occurrences was merely by way of corroboration of the *bona fides* of the wife’s *ante litem* overtures and the husband’s unjustified resistance to them.

^{131a} *Ibid.*, 408.

It is apparent from the Maryland decisions that no hard and fast rule can be laid down as to the possible affect of a *post litem* offer of reconciliation in a particular case. The ultimate decision must depend upon all the preceding circumstances involved and the definiteness and sincerity of purpose with which the belated offer is made. Suffice it to say that such overtures cannot be summarily dismissed but must be carefully weighed and considered, particularly with respect to their bearing upon the offeror's intent to desert.¹³²

Although there is only supporting *dictum* in Maryland,¹³³ the rule is well settled elsewhere that an offer of reconciliation made after the flux of the statutory period has ripened the desertion into a complete cause for divorce need not be accepted; and it is ineffective to deprive the deserted spouse of his or her right to a divorce.¹³⁴

¹³² See *Coleman v. Coleman*, *supra*, n. 125.

¹³³ *Simmont v. Simmont*, *supra*, n. 87, which was a suit for permanent alimony where the Court said: "Desertion is a continuing offense, and ordinarily, until it has by the flux of the statutory period ripened into a complete cause for divorce, the duty rests upon each party to the marriage to accept any offer made in good faith . . ." (Italics supplied.) See also *Dunnigan v. Dunnigan*, *circa*, n. 129, where the wife sought an absolute divorce for desertion and the Court declared categorically that "the husband's offer of reconciliation made at the hearing in this case comes too late." But the Court added that the offer was not in good faith. It is to be observed that in this case the offer was not only made after the flux of the statutory period but after the filing of the suit, which thus created a double hurdle to jump.

¹³⁴ Note in 18 A. L. R. 630; 19 C. J. 67, Sec. 125; 27 C. J. S. 578, Sec. 38; 17 Amer. Jur. 211, Sec. 114; *KEEZER, MARRIAGE AND DIVORCE* (3rd Ed.), Sec. 396; 2 *SCHOULER, MARR., DIV., SEPAR. AND DOM. REL.*, Sec. 1632. 1 *NELSON, DIVORCE AND ANNULMENT*, Sec. 4.29. The writer is of the opinion that little support can be found for a different conclusion in the Maryland statute. Md. Code (1939), Art. 16, Sec. 40, as amended, Acts 1949, Ch. 520. It may conceivably be argued that since the statute not only requires a continuous, deliberate and final desertion for at least eighteen months but also that it "is beyond any reasonable expectation of reconciliation", the latter requirement is not fulfilled where an offer of reconciliation has been made even after the eighteen months has expired. Such an argument would apply with equal force even though the offer were made after suit, for the requirement is expressed in the present tense and would be binding on the Chancellor until the final decision is made. (But *Cf. Dunnigan v. Dunnigan*, *supra*, n. 13.) It is submitted, however, that such an interpretation would disrupt the orderly administration of justice which requires that the time of accrual of actions be determinable and that suitors stand or fall upon the cause of action as it existed at the time of suit.

Cf. Green v. Green, *supra*, n. 70, where the technical defense of recrimination was allowed against the plaintiff-husband notwithstanding his act of adultery was committed after the wife's desertion had continued for the statutory period.

C. Offer made while parties are living apart under a decree for alimony or partial divorce.

There is strong *dicta* in two Maryland cases to the effect that a proper offer of reconciliation made by the offending spouse while the parties are living apart under a decree for alimony, as distinguished from a partial divorce, must be accepted.¹³⁵ We have already seen¹³⁶ that both of these cases are authority for the proposition that where the alimony decree is based on the defendant's cruelty, the offer of reconciliation must pass a higher test than mere "good faith". In both of these cases the offers were found inadequate and insincere, so that the question now under discussion was not directly involved. It is clear, however, from the extensive inquiry which the Court made into the *bona fides* of the offers in these cases that the generally accepted distinction between cases involving offers of reconciliation where the parties are living apart under a separate maintenance decree and those where there has been a partial divorce¹³⁷ will be followed in this State when the question is directly presented. Indeed, in the latest case of *Zuckerberg v. Zuckerberg*,¹³⁸ which quoted at length from *Wise v. Wise*,¹³⁹ the Court declared in so many words that the case turned upon the good faith of the husband's offer, which was made while a separate maintenance decree was in force in favor of the wife. This would hardly have been considered the pivotal point in the case if the alimony decree constituted an insuperable barrier. In the *Wise* case, which also involved an offer made while a separate maintenance decree was in effect, the Court said:

"It would be difficult, and, on this appeal it is unnecessary, to attempt to formulate a general rule as to the duties of separated spouses in regard to opportunities for reconciliation after a decree for alimony, as distinguished from a decree for partial divorce, has

¹³⁵ *Wise v. Wise*, *supra*, n. 20; *Zuckerberg v. Zuckerberg*, *supra*, n. 20.

¹³⁶ Text *circa*, n. 123a and n. 123b.

¹³⁷ See note 61 A. L. R. 1268; 17 Amer. Jur. 209, Sec. 111; *Slavinsky v. Slavinsky*, *supra*, n. 20.

¹³⁸ *Supra*, n. 20.

¹³⁹ *Supra*, n. 20.

been rendered. The decision of every case must be governed by its own facts."

No Maryland case has considered the effect of an offer of reconciliation made while the parties are living apart under a decree *a mensa et thoro*. The law is well settled elsewhere, however, that a spouse living apart under an *a mensa* decree need not accept an offer of reconciliation and that a charge of desertion cannot be predicated upon a refusal of such an overture.¹⁴⁰ There are sound reasons for applying a different rule in cases where an *a mensa* decree is involved. As stated in the Arizona case of *Williams v. Williams*:¹⁴¹

"The action for separate maintenance and the action for divorce *a mensa et thoro* are not the same. The former has for its object the compelling of a husband, who has wilfully deserted or abandoned his wife or who has committed acts that would give cause for an action for an absolute divorce, to provide a support for his wife.¹⁴² . . . It more directly involves property rights. The judgment does not expressly authorize the wife to live separate and apart from the husband. That is probably what happens, but if so not under the sanction of a court decree, whereas under a decree for separation from bed and board the refusal of the wife to cohabit with the husband is so sanctioned and authorized. When a decree from bed and board is once entered the statute provides how it may be revoked. . . . No such provision is contained in the statute providing for the action for separate maintenance."¹⁴³

¹⁴⁰ See authorities cited *supra*, n. 137.

¹⁴¹ 33 Ariz. 367, 265 P. 87 (1928).

¹⁴² This same view of an alimony decree was taken by the Maryland Court of Appeals in *Strezgowski v. Strezgowski*, 175 Md. 53, 59, 199 A. 809 (1938). The question under discussion in the text was not involved, but the Court said: "As has been seen, the decree from which the appeal is taken is not one for divorce; its design is to enforce a recalcitrant husband to meet his own legal responsibility." See also *Slavinsky v. Slavinsky*, *supra*, n. 20, 828, where the Court said: "A libel for divorce is a proceeding different in its nature from a petition for separate maintenance. Since a decree on a petition for separate support does not create a status but adjudicates concerning that which may be a temporary situation, a Court of competent jurisdiction has power to determine upon issues properly raised whether that situation in fact exists at a later date. . . ."

¹⁴³ The statutory provision referred to authorizes the Court to revoke an *a mensa* decree upon application of the wife and a showing of reconciliation. It is similar to the provision of the Maryland Statute (Md. Code (1939) Art. 16, Sec. 41, as amended Acts 1949, Ch. 370) which authorizes the

On principle, however, it would seem that the rejection of a proper offer of reconciliation after an *a mensa* decree would break the continuity of the desertion and prevent the offeree from obtaining an *a vinculo* decree after the passage of the statutory period. And although the offeror would also be precluded from obtaining a final divorce based on the offeree's desertion, either party should be entitled to a final divorce for any of the other statutory causes,¹⁴⁴ except, perhaps, for voluntary separation.¹⁴⁵

4. *Unjustified refusal to maintain a home separate and apart from parents or other relatives*

The law is well settled that the husband, as head of the family, has the right to determine where the matrimonial domicile shall be, and it is the duty of the wife to accompany him.^{145a} It is also within the husband's power to determine, within reasonable limits, who shall reside in or even visit in the home.¹⁴⁶ However, the husband's right to select

Court to revoke an *a mensa* decree upon joint application of the parties. There is no statute in Maryland which provides for the revocation of an alimony decree. However, the Court has indicated that the husband can secure the revocation of an alimony decree "by compliance with the solemn vows he took when he was married". *Strezgowski v. Strezgowski, ibid.* This would seem to contemplate not only a provision for maintenance but also a *bona fide* offer to resume cohabitation.

¹⁴⁴ See the second appeal in *Williams v. Williams*, 37 Ariz. 176, 291 P. at 994 (1930).

¹⁴⁵ See *Krause v. Krause*, 177 Wis. 165, 187 N. W. 1019 (1922), where the parties were living apart under an *a mensa* decree in favor of the husband when the wife offered to become reconciled. The husband rejected the offer. The wife thereafter sued for an absolute divorce based on voluntary separation for the statutory period. Relief was denied the wife because her offer of reconciliation made the separation involuntary as to her. See also *Riland v. Riland, supra*, n. 120.

^{145a} *Hoffhines v. Hoffhines*, 146 Md. 350, 126 A. 112 (1924); *Foeller v. Foeller*, 171 Md. 660, 190 A. 221 (1937); *Fischer v. Fischer, supra*, n. 53.

¹⁴⁶ *Jacobs v. Jacobs*, 170 Md. 405, 185 A. 109 (1936); *Fischer v. Fischer, ibid.* In the *Miller* case, 178 Md. 12, 19, the Court said: "Within reasonable limits, the husband, as head of the family, has the right to say who shall or who shall not visit the home . . . , and while the absolute quality of that right has been much modified since *Eyans v. Eyans*, 1 Hagg. Con. 36, 161, Eng. Reprint 466, nevertheless the right of the husband to exclude from his home persons who are offensive or obnoxious to him ought not to be doubted. It does not follow, however, that the right is so peremptory and imperative that the temporary presence of a visitor who enters the home with the wife's implied permission, but not at her request or invitation, to visit another member of the household, will justify the husband in deserting his wife, even though the visitor is unwelcome to him. He was head of the family and if he objected to Brown's presence he himself should have told Brown so; he had no right to impose upon his wife the unwelcome and humiliating duty of informing either Brown, or her son Oliver, who invited

the home and determine who shall be its inmates and visitors is not an arbitrary power and must be exercised in a reasonable manner and with due regard for the wife's health, comfort and peace of mind.¹⁴⁷ The husband's prerogative finds its basis in the duty which rests upon him to provide a home for his wife; and this duty extends not only to the furnishing of material comforts in accordance with his means, but also requires that the home be one where the wife is free from unwarranted interference from members of the household.¹⁴⁸ Where the husband, being financially able to do so, fails to provide such a home for his wife, she is justified in leaving and charging him with constructive desertion.¹⁴⁹ *Hoffhines v. Hoffhines*¹⁵⁰ was the first decision in this State to grant affirmative relief by applying this principle to a case where the husband insisted upon maintaining the matrimonial domicile at the home of his parents, although in *Young v. Young*¹⁵¹ a wife was permitted to defend a charge of desertion on the ground of the husband's failure to provide a home apart from the home of his parents which was uncongenial and caused her much unhappiness. The general rule was recognized in the early case of *Buckner v. Buckner*¹⁵², where the husband's daughters by a former marriage resided in the household; but the rule was not applied because the Court found that the petty quarrels between the wife and the daughters were not serious enough to entitle her to demand a separation of them from their father as a condition of her resump-

Brown to the home, that he must not come there because her husband thought there was some impropriety in the relationship between her and Brown. . . . and while the wife's rights in the regulation of the household were subordinate to those of the husband, she was neither a menial nor a servant, and he had no right to require her to insult an inoffensive guest by telling him that he must not enter the home."

In the Jacobs case the Court declared that the husband had the right to insist that adult sons of the parties live apart from them, and the wife had no right to demand that they be permitted to remain in the home as a condition of her continuing to live with her husband.

¹⁴⁷ Cases cited *supra*, n. 145a, n. 146; and see *Crouch v. Crouch*, *supra*, n. 72.

¹⁴⁸ *Ibid.*

¹⁴⁹ *Hoffhines v. Hoffhines*, *supra*, n. 145a; *McClees v. McClees*, *supra*, n. 89; *Fischer v. Fischer*, *supra*, n. 53.

¹⁵⁰ *Ibid.*

¹⁵¹ 136 Md. 84, 110 A. 207 (1920).

¹⁵² 118 Md. 101, 84 A. 156 (1912).

tion of cohabitation. Most of the cases on the subject under discussion involved parties living with the husband's parents, either in homes owned by the parents or the husband. A few of the cases involved children by a former marriage of one of the parties, adult sons of the parties or a brother. Basically, the same principle is applied in all of these cases without any distinction being made because of the class of relative involved or the actual ownership of the home. The determining factors are, primarily, whether the wife's proper sphere of control in the home has been unreasonably and unwarrantedly invaded by the inmates, and, secondarily, whether the husband is financially able to provide an independent home for the wife.¹⁵³

In this class of cases, involving the wife's demand for an independent home, the Court refuses to be bound by or even formulate an inflexible rule of general application. Here again each case must be determined on its own peculiar facts and circumstances.¹⁵⁴ There are, however, certain considerations to which the Court attaches varying

¹⁵³ *Buckner v. Buckner, ibid.*, involved two unmarried daughters of the husband by a prior marriage; *Young v. Young, supra*, n. 151, where the parties resided in the home of the husband's parents; *Hoffhines v. Hoffhines, supra*, n. 145a, where the parties resided in the home of the husband's parents; *Nickel v. Nickel*, 150 Md. 702, unreported, where it appeared that the parties lived in separate parts of the same house with husband's parents, but it was not clear who owned the property; *Crouch v. Crouch, supra*, n. 72, where the husband's insane brother resided in the home owned by the husband; *Ewing v. Ewing*, 154 Md. 84, 140 A. 37 (1928), where the parties resided in the home of the husband's parents, but the latter were dependent upon him for support; *Schwartz v. Schwartz, supra*, n. 33, where the household was an ill-assorted mixture of children of both parties by prior marriages; *McClees v. McClees, supra*, n. 89, where husband's dependent mother resided in the home owned by husband; *Ayares v. Ayares*, 163 Md. 388, 163 A. 707 (1933), where husband's self-supporting mother resided in the home owned by husband; *Kirkwood v. Kirkwood*, 165 Md. 547, where the parties resided in home of the husband's parents; *Jacobs v. Jacobs, supra*, n. 146, where adult sons of the parties resided in home owned by husband-father; *Foeller v. Foeller, supra*, n. 145a, where mother resided in home owned by husband; *Lorea v. Lorea*, 181 Md. 666, unreported, except in 30 A. 2d 73 (1943), where wife insisted that parties reside with her daughter by a former marriage and an aunt of the wife; *Fischer v. Fischer, supra*, n. 145a, where parties resided in home of husband's mother; *Miller v. Miller*, 62 A. 2d 293 (Md. 1948), where the parties resided in the home of the husband's parents.

¹⁵⁴ *Buckner v. Buckner, ibid.*; *Hoffhines v. Hoffhines, ibid.*; *Foeller v. Foeller, ibid.*; *Fischer v. Fischer, ibid.*, 287, where following a statement of the husband's duty to furnish the wife a home free from unwarranted interference from members of the household, the Court said: "These statements are not absolute, and no rule of general application can be formulated, each case being based largely on its own circumstances."

weight in support of what it deems a proper conclusion in a particular case. Thus in the *Hoffhines* case, the Court declared:

“One of the strong incentives for marriage is the prospect and expectation by the newly married parties of establishing an independent home in which the husband and wife, each in their proper sphere, are supreme. This instinctive desire of home building should be encouraged and fostered, as upon the foundation of independent and happy homes the stability and prosperity of a nation largely depends.”¹⁵⁵

In this case the parties appeared to be a young married couple living in the home of the husband's parents. Conditions there were extremely unpleasant. The wife was required to do housework, washing and ironing for the entire household. She had no freedom of action and was at the beck and call of the husband's parents. The husband agreed that it would be better to live away from the parents, and he rented an apartment where the parties resided for four months in comparative harmony. He refused to renew the lease and insisted that his wife return with him to the home of his parents. The Court held that her refusal was justified; and that since the husband was financially able to provide an independent home, he was guilty of constructive desertion. In addition to the incentive of home-building, the Court laid stress on the fact that the parties had attempted without success to live with the husband's parents.¹⁵⁶

Another consideration upon which the Court will rely in support of its conclusion is the fact that the wife had knowledge prior to the marriage of the conditions under which she would have to live. This was the case in *Buckner v. Buckner*, referred to above, where in denying the wife

¹⁵⁵ This consideration would not seem to carry much weight in a case involving parties of middle age or beyond with prior marital experience and adult children. In the *Hoffhines* case the age of the parties was not given, but it appeared that they were a young couple without prior marital experience.

¹⁵⁶ “If these young married people had not already made the experiment of living with the husband's parents and found it unsatisfactory and uncongenial . . . or if, as a matter of fact, it was the only place which the husband could have provided as a home for himself and wife, this case would present a different aspect.” *Supra*, n. 145a, 360.

relief for the husband's failure to establish a home apart from his daughters by a prior marriage, the Court leaned heavily on the fact that the wife knew in advance of the marriage that she would have to live with these daughters, who were sensitive to her taking the place of their mother who had died less than a year before the second marriage. However, in *Fischer v. Fischer*,¹⁵⁷ the Court glossed over this consideration in holding the wife entitled to an independent home notwithstanding her prior knowledge of the conditions under which she would have to live, and said: ". . . the wife is in general entitled to a separate home, or at least one in which she is mistress and has the control. If circumstances make it necessary for her to live in the home of her husband [*sic*, should read 'husband's parents'], and she is aware of this when she is married, she cannot complain of it, if her husband is unable to provide for her elsewhere, but if he can, he must do so. The right to a separate home under ordinary circumstances is the right upon which a wife is entitled to insist." With respect to the restraints placed upon the wife and her subordinate position in the household, the *Fischer* case was analogous to the *Hoffhines* case.¹⁵⁸ At the time of the marriage Fischer was 40 years old and his wife was 25. He had been married before. She had not. He took her to reside with his widowed mother. The wife testified that she knew when she was married that she would have to live with her mother-in-law. The latter continued to be mistress of the household, and the wife was to all intents and purposes relegated to the position of a boarder. In addition the mother-in-law frequently interfered with the wife's disciplining of the infant child of the parties. The husband disregarded his wife's complaints concerning her treatment

¹⁵⁷ *Supra*, n. 145a.

¹⁵⁸ See also *Nickel v. Nickel*, *supra*, n. 153 for similar restraints placed upon the wife. In that case the Court held the wife was not guilty of desertion because she was justified in leaving the home where she lived under the same roof with husband's family, it appearing that she had been treated as an outcast by his family, who used her kitchen for their convenience but denied her access to their part of house, that the husband did not resent this, and spent much of his time with his family, leaving her alone and neglected. But the wife was denied affirmative relief because it did not appear that she had demanded a separate home or that her husband could have afforded to furnish her one.

in the household; and although he was financially able to establish an independent home for her, he refused to do so. The Court reviewed all the earlier decisions on the subject and concluded that the husband was guilty of constructive desertion. The Court's unfavorable impression of the husband's attitude toward his wife seems to have gone far in tipping the scales against him. The Court said: "It seems to be his desire to remain where he has been all his life, in the home run by his mother, and he treats the wife's complaints about it and her distaste for it as if they were unjustified complaints of a child, who has no rights at all." The Court also quoted the incentive of home-building from the *Hoffhines* case. In *Miller v. Miller*,¹⁵⁹ which is the most recent case on the subject, the Court, in rejecting the wife's charge of constructive desertion, distinguished the *Fischer* case on the two-fold ground that Mrs. Miller was admittedly well treated in the home of her husband's parents and that her husband was financially unable to provide a separate home for her.¹⁶⁰

The Court has also attached importance in this class of cases to the fact that the husband was under an obligation to support the relative whose presence in the home was objectionable to the wife. This consideration is particularly relevant on the question of the husband's ability to maintain a separate home for his wife. In *Ewing v. Ewing*,¹⁶¹ the parties lived in the home of the husband's parents who were solely dependent upon him for their support. The wife was denied relief primarily because it was shown that her difficulties with her husband's parents were trivial and that her husband was not financially able to provide a separate home for her. The case was distinguished from the *Hoffhines* case on the ground that Mrs. Ewing was entirely free from the restraints under which Mrs. Hoffhines was required to live. However, the Court

¹⁵⁹ *Supra*, n. 117.

¹⁶⁰ This case arose during the post-war housing shortage, and the Court took judicial notice of the fact that it was then very difficult to rent any suitable habitation at a reasonable price. The Court said: "A husband is not required to maintain a home elsewhere if it is not practical for him to do so. The difficulties must be grave if the wife, without sufficient justification, leaves a home properly maintained by him with his parents."

¹⁶¹ *Supra*, n. 153.

also referred to the criminal statutes on non-support and declared that these statutes compel the husband to contribute to the support of his parents as well as to the support of his wife. A fuller discussion of this point is found in *McClees v. McClees*,¹⁶² where the aged and dependent mother of the husband resided in the household. In denying the wife relief, the Court held that the case was governed by *Ewing v. Ewing* and not *Hoffhines v. Hoffhines*. Mrs. McClees was found to be in complete charge of the household, with a corps of servants under her control and direction and with ample funds to be expended as she might decide. The Court could find no interference by the husband's mother. The Court, after commenting on the foregoing, added:

"While it is true that a husband owed the duty to his wife of doing those things conducive to her happiness and comfort, yet this does not mean that he should disregard the duty of caring for and protecting others of his immediate family who are dependent upon him. Common sense does not suggest, and the law does not require it. . . . Persons having natural or legal duties and obligations before marriage should not be required to entirely relinquish or disregard them upon assuming the marital status."¹⁶³

However, in *Ayares v. Ayares*,¹⁶⁴ a case involving a different set of facts, the Court declared: "His wife should have been his first thought and consideration. If need be, he should have forsaken all others for her." This language was clearly appropriate to the situation which the Court found in that case. The parties had lived congenially for a number of years until the husband brought his mother, who was self-supporting, to live in the home.¹⁶⁵ It was shown that the mother-in-law was of a combative disposi-

¹⁶² *Supra*, n. 145a.

¹⁶³ There was no doubt that McClees was financially able to provide for his mother elsewhere; and the decision demonstrates that just as the husband cannot arbitrarily compel his wife to live with his relatives, she cannot arbitrarily compel him to provide a separate home for her even though he is financially able to do so.

¹⁶⁴ *Supra*, n. 153.

¹⁶⁵ The mother was shown to have been self-supporting prior to a recent illness. The Court said that even if she was not now self-supporting, the husband and his brother were financially able to support her in an independent establishment.

tion and told the wife that she was ready for either peace or war. The entire aspect of the case was not one of a son undertaking to care for an aged and dependent mother, but rather one of a strong-willed mother-in-law who had always had her own home, coming on a protracted visit and wearing out her welcome by unwarranted interference in the management of the household. In the later case of *Foeller v. Foeller*,¹⁶⁶ the Court again recognized by implication the obligation of a married man to his aged and dependent mother and denied the wife relief because "the testimony convinces us that the husband's mother has not been uncongenial to appellant and moreover that it is a physical impossibility for appellee to provide a separate home for the mother."

CONCLUSION

Constructive desertion is a salutary and useful fiction in the law of divorce. When properly confined and applied it synthesizes the realities of an otherwise non-conforming situation with the requirements of technical terminology and definition. When indiscriminately applied, however, it is capable of much mischief. As Judge Markell has said—it "is not an equivalent of any of the catch-alls which in some States help to attract a nationwide market for a local industry." The facility with which cruelty may be twisted and manipulated into constructive desertion,¹⁶⁷ with the consequent granting in some cases of an absolute divorce for a cause which the Legislature has declared to be ground for a partial divorce only, lends a modicum of justification to Bentham's acidulous definition of a legal fiction as "a wilful falsehood, having for its object the stealing of legislative power".¹⁶⁸ If our Courts intend (as they have often declared¹⁶⁹) to continue to resist the pressure of modern society for an easy escape from the bonds of matrimony, a more conscious effort must be made to keep the fiction of constructive desertion within the legitimate boundaries of its application.

¹⁶⁶ *Supra*, n. 145a.

¹⁶⁷ See Walker, *Our Present Divorce Muddle* (1949), 35 A. B. A. J. 457, 460.

¹⁶⁸ *Supra*, n. 1.

¹⁶⁹ *Supra*, n. 1.