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DESERTION AS A CONTINUING CAUSE OF ACTION FOR DIVORCE

I.

INTRODUCTORY

A comparative chart of the grounds alleged in the numerous divorce actions in New Jersey would clearly indicate that the jurisdiction of our Court of Chancery is more frequently invoked for the cause of desertion than for any other. Among those seeking redress are men and women who have been unjustifiably abandoned while dwelling in another state. It is common knowledge that the State of New York regards the matrimonial status as indissoluble except for the offense of adultery. In South Carolina the Constitution forbids divorces on any ground.

The New Jersey Court of Chancery has no common-law jurisdiction to decree divorces. Its authority emanates solely from statutory enactments. The power to decree divorces was first conferred upon the Court in 1794. At the present time the Court derives its jurisdiction from the Divorce Act of 1907. As a part of the Act of 1907 sections six and seven[1] prescribe the domiciliary requirements of parties to suits for divorce. By the novice in divorce law the significance of these sections cannot be understood in a single reading. The expert (if such there be) frequently is perplexed by the language when application to

[1] P. L. 1907, p. 476, Secs. 6, 7; C. S. 1910, p. 2030, Secs. 6, 7. These sections were adopted as a part of the Uniform Divorce Act recommended by the National Congress on Uniform Divorce Laws, see BIDDLE, N. J. DIVORCE (2nd ed.) p. 354. The Uniform Divorce Act of 1906 was adopted without substantial change by the States of New Jersey, Delaware and Wisconsin.

particular facts and circumstances is to be made. At the risk of unduly enlarging this article sections six and seven are herewith quoted for the convenience of the reader. The sections provide:

> "6. For purposes of divorce, either absolute or from bed and board, jurisdiction may be acquired by personal service of process upon the defendant within this State, under the following conditions:
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> "(a) When, at the time the cause of action arose, either party was a bona fide resident of this State, and has continued so to be down to the time of the commencement of the action, except that no action for absolute divorce shall be commenced for any cause other than adultery, unless one of the parties has been for the two years next preceding the commencement of the action a bona fide resident of this State.
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> "(b) When, since the cause of action arose, either party has become, and for at least two years next preceding the commencement of the action has continued to be, a bona fide resident of this State; *provided*, the cause of action alleged was recognized in the jurisdiction in which such party resided at the time the cause of action arose, as a ground for the same relief asked for in the action in this State."
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> "7. When the defendant cannot be served personally with process within this State, and when at the time of the commencement of the action the plaintiff is a bona fide resident of this State, jurisdiction for the purpose of divorce, whether absolute or from bed and board, may be acquired by publication, to be followed, where practicable, by service upon or notice to the defendant without this State, or by additional substituted service upon the defendant within this State, as prescribed by law or rules of court, under the following conditions:
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> "(a) When at the time the cause of action arose, the petitioner was a bona fide resident of this State, and has continued so to be down to the time of the com-

mencement of the action, except that no action for absolute divorce shall be commenced for any cause other than adultery, unless the petitioner has been for the two years next preceding the commencement of the action a bona fide resident of this State.

"(b). When, since the cause of action arose, the petitioner has become, and for at least two years next preceding the commencement of the action has continued to be, a bona fide resident of this State; *provided,* the cause of action alleged was recognized in the jurisdiction in which the petitioner resided at the time the cause of action arose, as a ground for the same relief asked for in the action in this State."

In desertion cases where the separation occurred while the parties were domiciled in a state not recognizing desertion as a ground for absolute divorce, and where one or both of the parties have since become domiciled in New Jersey, it is essential to determine when the cause of action can be said to have arisen in order to apply the jurisdictional tests prescribed by sections six and seven. No part of the Divorce Act has given rise to more uncertainty than the application of these provisions to such cases.

Until the decision in the *Stephenson*[2] case the rules appeared to have been fairly settled. That case as interpreted by the *Adler*[3] decision seemed to establish new rules. But with the recognition in the more recent *Rockefeller*[4] case of the principles established by the decisions prior to the *Stephenson* case, the whole subject has become doubtful and unsettled, and the door has been fairly opened to a reconsideration of the whole question

II.

Resume of Decisions

For a proper grasp of the problem involved a summary of the decisions in chronological order bearing on the question is

[2] Stephenson v. Stephenson, 102 N.J.Eq. 50, 139 Atl. 721 (E.&A. 1927).
[3] Adler v. Adler, 110 N.J.Eq. 381, 160 Atl. 346 (Ch. 1932).
[4] Rockefeller v. Rockefeller, 113 N.J.Eq. 274, 166 Atl. 474 (E.&A. 1933).

not inappropriate. In the *Koch*[5] case, which was the first reported case on the question under the Act,[6] the parties separated while living in New York, but both parties moved into this state before the expiration of the two years following the separation. The petition alleged the separation to have occurred in New York, but relied on a date subsequent to the beginning of the desertion, on which date the petitioner was residing in New Jersey and continued to reside here for two years thereafter and down to the filing of the petition. The Court assumed jurisdiction on the ground that the cause of action arose not at the beginning of the separation when the parties resided in New York, but at the termination of two years of desertion, at which time the petitioner was domiciled in this state. The only question decided was that a cause of action for desertion did not arise at the beginning of the separation, but arose *not before* the end of two years from the date of separation. The *Koch* case did not decide that after two years of desertion had elapsed while the petitioner was in New York, she might not set up a second two years of the same desertion which elapsed while the petitioner was domiciled here.

Two years later the Court of Chancery in the case of *Getz v. Getz*,[7] denied jurisdiction where it appeared that two years of desertion had elapsed while the parties were residing in New York. The petitioner sought to rely on a subsequent two year period of the desertion during which he had resided here, but the Court refused to uphold the contention that the desertion was a continuing injury so as to enable the petitioner to predicate his cause of action on the last two years of desertion. The Court was guided by what it conceived to be the rule laid down in the *Koch*[8] case although, as has been already emphasized, the

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[5] Koch v. Koch, 79 N.J.Eq. 24, 80 Atl. 113 (Ch. 1911). [Followed in Lederer v. Lederer, 95 N.J.Eq. 558, 123 Atl. 241 (Ch. 1924); Berger v. Berger, 89 N.J.Eq. 430, 105 Atl. 496 (Ch. 1918); Starkey v. Starkey, 2 N.J.Misc. 1123 (Ch. 1924).]

[6] See Gordon v. Gordon, 88 N.J.Eq. 436, 443, 103 Atl. 31 (Ch. 1917), *aff'd.*, 89 N.J.Eq. 535, 105 Atl. 242 (E.&A. 1918), wherein the Court stated that prior to the Koch case several unreported decisions of two vice-chancellors directly to the contrary had been rendered.

[7] Getz v. Getz, 81 N.J.Eq. 465, 88 Atl. 376 (Ch. 1913). The residence of the wife after the husband's removal to this state does not definitely appear.

[8] The Court also cites Sawtell v. Sawtell, 17 Conn. 284 (1845).

Koch case decided merely that the cause of action arose *not before* the end of two years of continuous desertion.

In the *Buckley*[9] and *Silbermuntz*[10] cases jurisdiction was refused on the authority of the *Koch* case where it appeared that the two years of desertion had elapsed before the petitioner resided here. In each of these cases the petitioner by an amended petition sought tc rely on a subsequent two-year period of desertion during which he or she was domiciled in this state. In the *Flynn*[11] case, wherein jurisdiction was denied after two years of desertion had elapsed while the parties were resident in New York, it does not definitely appear that the petitioner sought to rely on the continued period of desertion while she was residing here. Jurisdiction was refused in the *Slattery*[12] case where the petition charged a desertion from the time the parties separated while residing in New York and it appeared that two years had passed before the petitioner moved into this state.

At the time the *Stephenson*[13] case came before the Court of Errors and Appeals for determination, the settled rules in desertion cases were (1) that the cause of action for desertion arose not at the commencement, but at the termination, of the first two years of willful, continued and obstinate desertion and (2) that if the first two years of such desertion had elapsed at a time when the parties were domiciled in a jurisdiction which did not recognize desertion as a ground for absolute divorce, our Court of Chancery could not assume jurisdiction, notwithstanding that the petition relied on a subsequent two year period of the desertion during and at the end of which the petitioner had resided here.

In the *Stephenson* case the husband refused to consummate

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[9] Buckley v. Buckley, 124 Atl. 604 (Ch. 1924), *aff'd.*, by equally divided court 95 N.J.Eq. 783, 124 Atl. 608 (E.&A. 1924). The defendant wife continued to reside in New York. See Light v. Light, 124 Atl. 359 (Ch. 1924), *aff'd.*, by equally divided court 95 N.J.Eq. 779, 124 Atl. 448 (E.&A. 1924).

[10] Silbermuntz v. Silbermuntz, 97 N.J.Eq. 451, 129 Atl. 420 (Ch. 1925). The defendant's residence evidently remained outside the state.

[11] Flynn v. Flynn, 83 N.J.Eq. 690, 92 Atl. 645 (E.&A. 1914). The residence of the defendant did not definitely appear but presumably it remained in New York.

[12] Slattery v. Slattery, 87 N.J.Eq. 673, 102 Atl. 873 (E.&A. 1917). Defendant's residence probably remained in New York.

[13] Stephenson v. Stephenson, 102 N.J.Eq. 50, 139 Atl. 721 (E.&A. 1927), *reversing* Court of Chancery 9 to 4.

the marriage for a period of thirteen years while the parties resided in New York, and continued in his refusal for two years after both of the parties became domiciled in this state, and down to the time of the filing of the petition. For the commencement of the desertion the petition, as amended, relied on the date on which both parties moved into this state. It was decided that, inasmuch as neither party was domiciled in this state during the thirteen year period but were both domiciled in New York where desertion was not a ground for absolute divorce, no cause of action arose prior to the removal of both parties to this state. Since nonconsummation of the marriage by the husband continued after both parties became domiciled here, it was held that the cause of action arose while the parties were bona fide residents of this state. The *Adler*[14] case followed, which permitted the wife, as petitioner, to set up as the cause of action the last two years of desertion during which she was domiciled here.

In the *Rockefeller*[15] case the wife left her husband while both parties resided in New York. The husband petitioner remained in New York for more than two years after the initial separation and then moved into this state. The wife continued to live in New York. The Court found that no cause of action arose while the petitioner was in New York because he had acquiesced in the separation. Not until after his removal to this state was there a willful, continued and obstinate desertion on the part of the wife. Consequently the cause of action arose while the petitioner was domiciled here.

While in the *Stephenson* case both parties moved into this state after thirteen years of nonconsummation of the marriage,

[14] Adler v. Adler, 110 N.J.Eq. 381, 160 Atl. 346 (Ch. 1932). The parties resided in New Jersey as man and wife until 1908 when the husband left his wife and moved from the state. Until the filing of the petition no reconciliation occurred, nor does it appear that the husband ever returned to this state. Between 1917 and 1927 the wife resided outside of this state, but to what state she removed does not appear. Returning in 1927 she continued to reside here until she commenced the action in 1931. The petition, as amended, relied upon a desertion from 1927 to 1929. The decree was granted on the desertion from 1927 to 1929 on the ground that the petitioner could waive the earlier portion of the entire desertion and set up as the cause of action the last two years of desertion during which she had resided here.

[15] Rockefeller v. Rockefeller, 113 N.J.Eq. 274, 166 Atl. 474 (E.&A. 1933), *reversing* Court of Chancery 8 to 5. See also Glusker v. Glusker, 13 N.J.Misc. 105, 176 Atl. 567 (Ch. 1934) where the question was raised but left undecided.

and in the *Getz*[16] case the defendant wife presumably remained in New York, although such fact does not definitely appear, the *Stephenson* case in refusing to concede that a cause of action arose while the parties lived in New York in effect overruled the *Getz* case and cases subsequent thereto which recognized that a cause of action had arisen while the parties were residing in New York. Since in the *Koch*[17] case both parties arrived in this state before the end of the two years of separation and the petition relied on a two year period of desertion commencing and terminating while the petitioner resided here, it cannot be said that the *Stephenson* case directly overruled the *Koch* case.

In view of the foregoing decisions when in desertion cases does the cause of action arise? To attempt to formulate any certain and complete answer to this question is wellnigh impossible, but the following statement of existing rules on the subject may be ventured with some degree of confidence:

(1) Under the *Koch* case the cause of action for desertion arises *not before* the end of two years of willful, continued and obstinate desertion. Consequently, a petitioner from New York who becomes domiciled in New Jersey before the expiration of the two-year period of desertion may sue for a divorce after having fulfilled the two year residential requirement here. While the rule in the *Koch* case has not been overruled by the *Stephenson* decision, the rule is of little practical importance if the decision in that case is sound.

(2) Under the *Stephenson* case no cause of action for desertion may possibly arise while the parties are domiciled in a state not recognizing desertion as a ground for divorce. Irrespective of a two-year period of desertion in fact in such state, the petitioner may rely on a subsequent two-year period of desertion during and at the end of which both parties are domiciled in New Jersey.

(3) Under the *Adler* case, which was decided by the Court of Chancery, a petitioner, having a cause of action for desertion while domiciled in New Jersey may, on her return to this state after having in the interim established a domicile in another

[16] Getz v. Getz, 81 N.J.Eq. 465, 88 Atl. 376 (Ch. 1913).
[17] Koch v. Koch, 79 N.J.Eq. 24, 80 Atl. 113 (Ch. 1911).

state, rely on a two-year period of the same desertion subsequent to her return during and at the termination of which she was domiciled in this state.

III.

Criticism of Stephenson Case

The *Stephenson*[18] case, excellent as it is for its departure from the principle announced in the *Buckley*[19] and previous decisions, lacks the proper *rationale* to withstand analysis. Several steps in the reasoning of the case are open to serious criticisms. In the *Stephenson* case (at p. 56) Justice Kalisch said:

> "A careful and meditative reading of subdivision (a) makes it plain that the legislature in using the term, viz.: 'When, at the time the cause of action arose either party was a *bona fide* resident of this state,' &c., clearly refers to the time the *act of desertion* took place, and not to a time when such desertion became a cause of action for divorce, for the subdivision in continuing, provides that one of the parties must be a *bona fide* resident of the state at and from the time of desertion for two years next preceding the commencement of the action, and during which period of time such desertion must be willful, continuous and obstinate, and when all these elements are present, then only shall a cause of action accrue to the injured party."

But is this statement of the learned Justice sound? Does the cause of action arise at the time of the original separation? In the first place, the Legislature in express terms in subdivision (a) relates the residence of either party to the time when "the cause of action arose" and not to the time when the act of desertion or initial separation occurs.

In the second place, the requirement in section six (a) that, except for adultery, no action shall be commenced unless one of the parties has been for the two years next preceding the

[18] Stephenson v. Stephenson, 102 N.J.Eq. 50, 139 Atl. 721 (E.&A. 1927).
[19] Buckley v. Buckley, 95 N.J.Eq. 783, 124 Atl. 608 (E.&A. 1924).

commencement of the action a bona fide resident of this state is a residential requirement wholly dissociated from the earlier part of the section dealing with the residence of either party when the cause of action arose. It is true that when the period of desertion commences while the parties are domiciled in New Jersey the two-year residential requirement next preceding the commencement of the action may run concurrently with the accrual of the cause of action for desertion during the same two years. But the two years of desertion as the cause of action, and the two years of residence, while running concurrently, are two different requirements.[20] If instead of desertion the cause is cruelty, and prior to the last act of cruelty the petitioner has resided here for one year and six months, she or he, continuing to reside here, may in six months institute suit for an absolute divorce.[21]

The further conclusion in the *Stephenson* case (at p. 57), which the *Adler* case (at p. 390) terms *dictum,* that no cause of action for desertion could have arisen while the parties were residing in New York for the reason that New York did not recognize desertion as a cause for absolute divorce, is not convincing. Subdivision (b) anticipates by its very terms that a cause of action, cognizable under our statute, may arise while the parties are residing in a state which, under its statute, does not recognize the cause as a ground for divorce, for it reads *"When since the cause of action arose,* either party has become," etc., (and in the proviso) "provided the cause of action alleged was recognized in the jurisdiction in which *such party resided at the time the cause of action arose,* as a ground for the same relief asked for in the action in this state."

It is true that in the *Stephenson* case no cause of action arose in New York. The Divorce Act is not concerned with the place where the offense is committed. The domicile of the parties *when* the cause of action arose is the basis for jurisdiction. An act of adultery or acts of cruelty may occur in this state, but unless either party under section six, or the petitioner under section seven, is or becomes domiciled here, no jurisdiction is given to our Court. Similarly, the fact that an act of adultery

[20] See Orens v. Orens, 88 N.J.Eq. 29, 32, 102 Atl. 436 (Ch. 1917).

or acts of cruelty have occurred in a foreign state does not *per se* defeat jurisdiction in our Court if when they occurred one of the parties was domiciled here. The Court of Chancery decrees divorces for causes enumerated by our statute and not for grounds specified by the statute of the state in which the parties resided at the time the cause of action arose.[22] In adultery cases, in which the adultery occurs while the parties are domiciled in New York, the Court takes jurisdiction after a two years' residence here next preceding the action, not because a cause of action arises under the New York statute, but because adultery is a ground for divorce under our Act. The cause of action arising while the parties lived in New York may be asserted because it is not a migratory divorce within the prohibition of subdivision (b). If this state did not recognize adultery as a cause for divorce, it would be of no consequence that New York recognizes it and that the act of adultery was committed there and while the parties resided there.

The further observation in the *Stephenson* case (at p. 59) that the words "either party" used in subdivision (b) refer only to a case where one of the parties comes into this state since the cause of action arose and is inapplicable where both parties come here is not a correct interpretation of the section. It is sufficient to point out that section six (a) under which the *Stephenson* case was decided, contains the words "either party" and "one of the parties" so that to apply logically the Court's reasoning would be to deny a decree of divorce under section six (a) when at the time the cause of action arose both parties were bona fide residents of this state.

While the rule stated in the *Stephenson* case is applicable, strictly speaking, only to cases where the desertion arises from the nonconsummation of the marriage, it seems, if the *rationale* of the opinion were sound, that the rule should apply where both parties are domiciled in New Jersey, irrespective of the precise nature of the desertion. In addition, there is little reason to restrict the application of the rule to the situation where both parties become domiciled in this state. There is much

[22] See Gondas v. Gondas, 98 N.J.Eq. 107, 130 Atl. 600 (Ch. 1925), *citing* Carson v. Carson, Dk. 53-403 (Backes, A. M., May 8, 1923).

reason to suppose that the result would have been the same had the husband never become domiciled in New Jersey. A cause of action for desertion cannot possibly be conditioned on the domicile of both parties in this state during and at the end of the two-year period of desertion. Certainly, section six (a) indicates that the domicile of either party (or of the petitioner under section seven (a)) at the time the cause of action arose is sufficient.

IV.

The Effect of the Rockefeller Case

The *Rockefeller*[23] case expressly recognized the principle announced in the *Getz*[24] and *Buckley*[25] decisions, but the Court of Errors and Appeals found it unnecessary to apply that principle. The Court was relieved of the duty inasmuch as the two years of separation transpiring while the spouses dwelt in New York did not, on account of the husband's acquiesence, constitute a willful and obstinate desertion. Within the reasoning of the *Stephenson* case the Court might have entirely ignored the separation while the parties lived in New York on the theory that no cause of action could then have arisen, but that a cause of action did arise after the husband became domiciled here, notwithstanding the fact that the wife (and so the husband in the *Adler* case) was not living in this state. At any rate, it might have assumed that a cause of action arose while the parties resided in New York, but that under the reasoning of the *Adler* case the petitioner might rely on a second two-year period of desertion occurring while the petitioner was domiciled here. The Court of Errors and Appeals omitted any reference to the *Stephenson* and *Adler* cases, while it expressly recognized the principle of the *Getz* and subsequent cases. By expressly recognizing the principle in such cases and then proceeding on the facts to take the case out of the rule is little short of overruling the principles underlying the *Stephenson* and *Adler* decisions.

[22] See Jimenez v. Jimenez, 93 N.J.Eq. 257, 259, 116 Atl. 788 (Ch. 1922).
[23] Rockefeller v. Rockefeller, 113 N.J.Eq. 274, 166 Atl. 474 (E.&A. 1933).
[24] Getz v. Getz, 81 N.J.Eq. 465, 88 Atl. 376 (Ch. 1913).

V.

PURPOSE OF THE STATUTE

It has been repeatedly pointed out that the principal purpose intended to be accomplished by the adoption of the Divorce Act of 1907[26] was to remedy the evils of migratory divorces.[27] The fundamental concept of jurisdiction which the Act was intended to express, and to embody in a workable set of rules, is that no inhabitant of a foreign state, territory or country ought to be permitted to obtain a divorce in this state against a defendant who is not domiciled here, regardless of where the offense may have occurred.

Hence the Divorce Act requires that before New Jersey may grant a decree of divorce, one of the parties under section six, or the petitioner under section seven,[28] must have first acquired a *bona fide* residence (which means domicile)[29] in New Jersey, and that such domicile must be evidenced, in addition to other proofs, by an actual residence in this state for a continuous period of at least two years immediately prior to the time of the commencement of the action. In actions for absolute divorce only one exception to the two-year residential requirement is recognized, *viz.*, in the case of adultery committed while at least one of the parties is domiciled here.

The Court has recognized over a long period of time the principle that the inhabitant of each state or country, as long as he remains a citizen thereof, is and of right ought to be subject to the laws of such state or country governing his matrimonial status,[30]—a fundamental and universal principle of comity.[31] Where "the cause of action alleged" arises *when* the parties are domiciled outside of this state, the laws of their domicile should exclusively govern. Neither party, by there-

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[25] Buckley v. Buckley, 95 N.J.Eq. 783, 124 Atl. 608 (E.&A. 1924).

[26] P.L. 1907, p. 476, Secs. 6, 7; C.S. 1910, p. 2030, Secs. 6, 7, *supra* note 1.

[27] Koch v. Koch, 79 N.J.Eq. 24, 80 Atl. 113 (Ch. 1911); Stephenson v. Stephenson, 102 N.J.Eq. 50, 139 Atl. 721 (E.&A. 1927); Adler v. Adler, 110 N.J.Eq. 381, 160 Atl. 346 (Ch. 1932). See also *Report of New Jersey Delegates to Uniform Divorce Law Congress* in BIDDLE, N. J. DIVORCE (2nd ed.) pp. 354, 358.

[28] P.L. 1907, p. 476, Secs. 6, 7; C.S. 1910, p. 2030, Secs. 6, 7, *supra* note 1.

[29] Marsh v. Marsh, 86 N.J.Eq. 419, 99 Atl. 409 (E.&A. 1916).

[30] Coddington v. Coddington, 20 N.J.Eq. 263 (Ch. 1869).

after changing his domicile, should be permitted to secure an advantage which would have been denied to him under the laws of his prior domicile. Hence where the cause of action has arisen while the parties were domiciled elsewhere than in New Jersey, our statute[32] requires proof that the cause of action alleged was recognized as a ground for divorce by the laws of the jurisdiction in which the petitioner (section seven), or the party upon whose domicile in New Jersey jurisdiction is based (section six), was domiciled at the time the cause of action arose.

VI.

Anomalous Results Under the Statute

As the Divorce Act[33] has been construed by our decisions it fails in some cases to accomplish its purposes without unnecessary hardship, and its application sometimes leads to anomalous results. For example, the Court may grant a divorce to a litigant, who deserted in New York, continues thereafter to reside in New York for one day short of two years and then changes his or her domicile to New Jersey and continues to reside here for two years next preceding the commencement of the action;[34] yet the Court denies a decree of divorce to a petitioner, who, deserted in New York, continues thereafter to reside in New York for two years or more and then changes his or her domicile to New Jersey and continues to reside in this state for at least two years next preceding the commencement of the action.[35] The fact that in both cases the desertion had been willful, continued and obstinate during the whole period from the separation to the commencement of the action makes no difference. In the second case the petitioner might have been domiciled in New Jersey for many years prior to commencing the suit, yet under the *Getz*[36] and *Buckley*[37] decisions the decree

[31] 2 Bishop Marr. Div. & Sep. (1891) Sec. 42 *et seq.*
[32] P.L. 1907, p. 476, Secs. 6, 7; C.S. 1910, p. 2030, Secs. 6, 7, *supra* note 1.
[33] P.L. 1907, p. 476, Secs. 6, 7; C.S. 1910, p. 2030, Secs. 6, 7, *supra* note 1.
[34] See Koch v. Koch, 79 N.J.Eq. 24, 80 Atl. 113 (Ch. 1911).
[35] See Buckley v. Buckley, 95 N.J.Eq. 783, 124 Atl. 608 (E.&A. 1924).
[36] Getz v. Getz, 81 N.J.Eq. 465, 88 Atl. 376 (Ch. 1913).
[37] Buckley v. Buckley, 95 N.J.Eq. 783, 124 Atl. 608 (E.&A. 1924).

must be denied; whereas under the *Koch* and subsequent decisions[38] a decree may be granted to a petitioner who may have been domiciled in this state for only two years if during those two years the desertion has been willful, continued and obstinate.

It is not to be assumed that the Legislature intended an absurdity, or that unusual or inconsistent results should flow from the passage of the Divorce Act.[39]

VII.

Desertion Is a Continuing Cause of Action

If the conflicting authorities be disregarded and a fresh attempt made to construe the statute,[40] it seems to the writer that there should result a rule that any two-year period of a willful, continued and obstinate desertion, during which at least one of the parties is domiciled in this state, may be set up as a cause of action, provided, of course, that the desertion continues down to the time of the commencement of the action. No violence would be done to the spirit of the statute by granting decrees of divorce in cases where one or both of the parties remove to this state after two years of desertion have transpired as well as where the change of domicile is effected prior to the expiration of the first two years of desertion. Desertion should be legally regarded as a *continuing* cause of action, as in fact it is, so that any two-year period thereof may, at the petitioner's option, be used as a cause of action. If the petitioner is permitted to set up as the "'cause of action *alleged*" a two-year period of desertion transpiring while he or she is domiciled in New Jersey, then subdivision (a) of sections six and seven[41] is applicable.

In an adultery case it can hardly be questioned that where an act of adultery occurred while the parties resided in South Carolina, the petitioner may rely upon a subsequent act of

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[38] Koch v. Koch, 79 N.J.Eq. 24, 80 Atl. 113 (Ch. 1911), *supra* note 5.

[39] See Bourne v. Levine, 100 N.J.Eq. 141, 134 Atl. 660 (Ch. 1926). State v. Clark, 29 N.J.L. 96 (Sup. Ct. 1860); 59 C. J. p. 968, Sec. 574 n 81 *et seq.*

[40] P L. 1907, p. 476, Secs. 6, 7; C. S. 1910, p. 2030, Secs. 6, 7, *supra* note 1.

[41] *Ibid.*

adultery as the "cause of action *alleged*" committed while the petitioner or defendant was domiciled here so as to proceed under subdivision (a) of sections six and seven.[42]

In extreme cruelty cases the Court apparently has never declined to grant decrees of divorce when the complaint has been as to a course of conduct originating in a sister state in which cruelty is not a ground for divorce and continuing after the parties have become domiciled in New Jersey, although the acts of cruelty committed subsequent to the change of domicile did not of themselves and without reference to the earlier acts constitute a course of conduct amounting to extreme cruelty. The question does not seem to have been raised in extreme cruelty cases, possibly because decrees in such cases may be justified as preventive remedies on the theory of the *Bonardi*[43] case without determining whether a course of conduct amounting to extreme cruelty is a continuing injury in the same sense as desertion.

In desertion cases the Court would not hesitate to grant a decree of divorce to a petitioner who remained in New York for two years or more after the separation if the desertion period were interrupted by a temporary reconciliation, after which and within two years he became domiciled in New Jersey. In such a case the Court would regard the second separation as the beginning of a second and distinct period of desertion, although, since condonation is conditional, the petitioner might have selected as the cause of action the first two-year period of desertion.[44]

The confusion in the cases has been due to the efforts of the Courts to apply a reasonable rule covering desertion cases—to construe the Act liberally and broadly to carry out its spirit—and yet to be "within the general sense of the language employed" in subdivision (b) of sections six and seven.[45] In the *Getz*[46] case the Court (at p. 467) said that to allow a construc-

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[42] *Ibid.*

[43] Bonardi v. Bonardi, 113 N.J.Eq. 25, 166 Atl. 207 (E.&A. 1933).

[44] See McGovern v. McGovern, 111 N.J.Eq. 18, 160 Atl. 822 (Ch. 1932). If the first two year period were selected by the petitioner, relief would of course be denied.

[45] P.L. 1907, p. 476, Secs. 6, 7; C.S. 1910, p. 2030, Secs. 6, 7, *supra* note 1.

[46] Getz v. Getz, 81 N.J.Eq. 465, 88 Atl. 376 (Ch. 1913).

tion which would permit the petitioner to select any two years of willful, continued and obstinate desertion "would be to regard the provisions of subdivision 'b' a piece of legislative supererogation". This observation in the *Getz* decision seems to have gone unchallenged by subsequent decisions adhering to the rule announced in that case.

But is such conclusion in the *Getz* case sound? Let it be conceded that if the petitioner be free to elect as the cause of action any two-year period of a willful, continued and obstinate desertion, the last two years would invariably be selected since such two years would be synchronous with the two years of domicile required by the Act. In such cases the petitioner would proceed under subdivision (a) of section six or seven, and the *proviso* of subdivision (b) of these sections would be inapplicable. But because the *proviso* of subdivision (b) would no longer apply to desertion cases it does not follow that the *proviso* is "a piece of legislative supererogation," for it would still be applicable in other cases. In adultery cases, for instance, it would apply to defeat a suit where the act of adultery relied upon was committed when the parties were domiciled in South Carolina or in some other jurisdiction which does not recognize adultery as a ground for divorce. Likewise, it would remain operative in extreme cruelty cases.

The early case of *Sawtell v. Sawtell*,[47] cited in the *Getz* case as authority for the observation that to allow any two years of desertion, rather than the first two years, to constitute a cause of action "would be to regard the provisions of subdivision 'b' a piece of legislative supererogation," does not on examination appear to be at all in point. There the petition was for divorce on the ground of "habitual intemperance and intolerable cruelty". The parties had formerly lived in New York, where a separation took place, the petitioner changing her residence to Connecticut, where she continued to live for less than three years before filing her petition. It was proved that the defendant's intemperance had continued after the separation down to the time of the commencement of the suit. The statute then in effect authorized the granting of a divorce upon either

[47] Sawtell v. Sawtell, 17 Conn. 284 (1845).

of the grounds set up in the petition, provided that if the cause for divorce arose while the petitioner was domiciled elsewhere, the petition must have been filed not earlier than three years after the petitioner's change of residence to Connecticut. The Court held that neither ground could be considered a continuing cause of action, so as to take the case out of the operation of the proviso. The Court said:

> "A fair and reasonable construction must be given to this provision of the law. The legislature surely could never have intended that a woman living with her husband in another state might come into this state and by showing that her husband has been habitually intemperate, or committed adultery, since she removed to this state, at once obtain a divorce. Such a construction would open a wide door for applicants from abroad."

The Court in the *Sawtell* case was dealing with causes of action which by their very nature were complete upon the separation of the parties, just as with a single act of adultery. No injury upon which a divorce would be justified could result to the petitioner because of defendant's intemperance after the separation, and cruelty as an actionable wrong, in that case, ceased (as ordinarily it ceases) when the parties became separated.

Aside from the *Adler*[48] decision in this state, we are not without precedent that desertion is a continuing cause of action. In the Arkansas case of *Poe v. Poe*[49] it was held that a cause of action for divorce on the ground of desertion, where the desertion had continued for over five years before suit was brought, was not barred by a statute of limitation providing that the cause of action in divorce cases must have occurred or existed within five years next before the commencement of the suit. The Court said:

> "Wilful desertion is a continuing offense and 'exists' within the meaning of the statute as long as the

[48] Adler v. Adler, 110 N.J.Eq. 381, 160 Atl. 346 (Ch. 1932).
[49] Poe v. Poe, 125 Ark. 391, 188 S.W. 1190 (1916).

> desertion continues. Some of the grounds for divorce enumerated in the statute may consist of single acts, such as adultery, and others, such as wilful desertion, are continuing in their nature."

The Court in the *Poe* case cited the Kentucky case of *Davis v. Davis*[50] where under a similar statute of limitations "condemnation for felony" as a cause for divorce was not barred because suit had been brought thereon more than five years after a *conviction* for felony. The Court held that the "condemnation" continued as long as the judgment was in force.

In Delaware, where the divorce statute includes the same provisions of the Uniform Divorce Act as are contained in our sections six and seven[51] the identical question under discussion has arisen. In that state it has been held that where a previous desertion, no matter how long continued, persists during two years of the subsequent residence of the petitioner in Delaware, the Court has jurisdiction to decree a divorce on that ground under the statutory provision corresponding to our subdivision (a).[52]

Impotence has been considered by our Courts as a continuing injury. An earlier statute in this state provided that a divorce might be granted where one of the parties resided here "at the time of the injury" complained of. Under this statute the wife in the case of *A. B. v. C. B.*[53] sued for divorce (annulment under the present Divorce Act) on the ground of impotence. It appeared that the parties were married and lived together for many years in another state and thereafter acquired a domicile in New Jersey. The husband was impotent at the time of marriage. The decree was granted on the ground that impotence is a continuing injury. The Chancellor (at p. 44) said:

> "The question is, whether, seeing that the impotence existed at the time of the marriage, that time must

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[50] Davis v. Davis, 102 Ky. 440, 43 S.W. 168 (1897).
[51] P.L. 1907, p. 476, Secs. 6, 7; C.S. 1910, p. 2030, Secs. 6, 7, *supra* note 1.
[52] Doran v. Doran, 1 W. W. Harr. (Del.) 568, 117 Atl. 24. In Wisconsin the question does not seem to have arisen under the Uniform Divorce Act.
[53] A. B. v. C. B., 34 N.J.Eq. 43 (Ch. 1881).

> not be held to be 'the time of the injury,' within the meaning . . . of the statute. The parties were not, nor was either of them, inhabitants of this state then. . . . The injury from the incurable physical impotence of the defendant in this case has been a continuing one from the time of the marriage."

In respect to its continuity impotence is not unlike desertion. Impotence is not a single act or temporary condition, but persists without interruption or cessation as long as life continues.[54] While desertion as a cause of action under our statute must be shown to be willful, continued and obstinate for at least two years, it must also be shown to have been continued thereafter without interruption down to the time of suit.[55] Continuity is of the essence of both offenses.

In the early case of *Brett v. Brett*[56] the act of desertion occurred while the parties were domiciled in New Hampshire. The petitioner continued to live in New Hampshire, and thereafter removed to Massachusetts where she subsequently brought her suit. The statute then in effect provided that "no divorce shall be decreed for any cause, which shall have occurred in any other state or country, unless one of the parties was then living in this State." In denying a decree the Court said:

> "But *the original act* of desertion . . . by her husband was in New Hampshire, when this was their domicil, . . . This being so, the only possible mode of avoiding the provision of the revised statutes . . . is the position that inasmuch as more than five years have elapsed since the libellant came to reside in this State,

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[54] The result of the doctrine of triennial cohabitation is to create a rebuttable presumption of incurable physical impotence. Tompkins v. Tompkins, 92 N.J.Eq. 113, 111 Atl. 599 (Ch. 1921).

[55] Tremarco v. Tremarco, 117 N.J.Eq. 50, 174 Atl. 898 (E.&A. 1934). Upon showing continuity after the two years down to the time of suit, there is an irrebuttable legal presumption of continued willfulness and obstinacy. This presumption, of course, is applicable only after the two-year period of desertion complained of. If a subsequent two-year period of a long-continued desertion were permitted to be set up as a cause of action, the elements of willfulness and obstinacy during such actionable period would have to be established by the proofs.

[56] Brett v. Brett, 5 Metc. (Mass) 20 (1842).

> and as the desertion of the husband has been continued during the whole term, it may properly be held that the *cause of the divorce has its foundation wholly in the acts of the husband since the libellant came here to reside.* We do not think this ground tenable. The husband did not *desert* his wife *in Massachusetts.* Their domicil was in New Hampshire and he *deserted* her there. The desertion was not an act for which he was amenable to the courts of this State. . . . The removal of the wife to this State, subsequently to the desertion by the husband, could not give this court jurisdiction of a cause thus *originating* elsewhere." (Italics mine.)

Clearly, the *Brett* case is not in point. Under the peculiar phraseology of the statutory provision the question was as to where the "cause" (*i.e. ground*) for divorce "occurred", not (as in our statute) when the "cause of action arose", so that the *Brett* case is eliminated as authority on the question now under discussion by the *Koch* case and subsequent cases in New Jersey.

There seems to be nothing in the language of subdivision (b) or the context to preclude the Courts from holding that the statutory intention was to permit a selection of any two years of a long-continued desertion as "the cause of action alleged". The language employed is certainly not inconsistent with the view that the Legislature intended all cases of desertion to fall into subdivision (a). The omission of any express provision to that effect is without significance in view of the fact that the language of sections six and seven was not originated by our Legislature, but was adopted without change from the draft of the Uniform Divorce Law Congress. The Congress intended these sections to be adopted without change of language by states not recognizing desertion as well as by states which did recognize desertion as a ground for divorce. "The language of sections 6 and 7 was not framed with any idea that it applied only to a statute containing the identical sections 2 and 3 as they appear in our statute, but with the idea that it applied

equally to statutes containing additional or different grounds for divorce . . . "[57]

Bearing in mind the fundamental purposes of the act, the liberal rule of construction applicable to its interpretation, the obvious hardships and anomalous situations which result in a construction limiting the cause of action to the first two years of a long-continued desertion and the advantages to be gained in the accomplishment of justice by adopting the more liberal rule, it is not an unwarranted hope that the Courts will shortly brush aside the conflicting decisions and will hold it to be the law that desertion is a continuing cause of action, any two-year period of which may be selected as "the cause of action alleged".

DOUGAL A. HERR.

HOBOKEN, N. J.

[57] Adler v. Adler, 110 N.J.Eq. 381, 387, 160 Atl. 346 (Ch. 1932).