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1870

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# In Chancery of New Jersey.

Between

WILLIAM R. GORDON,  
Petitioner,

and

FRANCES E. GORDON,  
Defendant.

On Petition,  
&c.

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## Notice of Appeal.

(Filed Feb. 16th, 1918.)

20

William R. Gordon, the above named petitioner, hereby appeals from the decree of dismissal filed in this cause and dated 13th day of February, 1918, to the Court of Errors and Appeals in the last resort in all causes.

Dated February 13th, 1918.

QUEEN & STOUT,  
Solicitors for and of  
Counsel with Petitioner.

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I conceive there is good cause for appeal in the above stated cause.

EDWARD P. STOUT,  
Of Counsel.

(Service acknowledged Feb. 13th, 1918.)

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**Petition of Appeal.**

Filed Feb. 25th, 1918.)

To the Honorable, the Court of Errors and Appeals, in the last resort in all causes:

10 The petition of William R. Gordon, appellant, respectfully shows that your petitioner finds himself aggrieved by a decree final made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, on the thirteenth day of February, Nineteen Hundred and Eighteen, in that the said decree recites and adjudges that the respondent was not guilty of wilful, continued and obstinate desertion of your petitioner for the period of two years immediately preceding the filing of his petition for divorce in this cause and, therefore, your petitioner is not entitled to the relief prayed for in his said petition; And doth decree that your petitioner's said petition be dismissed. And your petitioner appeals from said decree on the ground that the same is erroneous and that the Chancellor should have found and adjudged the several allegations of your petitioner's petition to have been proved, and the respondent, Frances E. Gordon, to have been guilty of wilful, continued and obstinate desertion by her of your petitioner for the term alleged in your petitioner's petition, and should have ordered, adjudged and decreed that your petitioner be divorced from the bonds of matrimony with the respondent, for the cause aforesaid, and that your petitioner should have the other relief prayed in and by his said petition.

30 Your petitioner therefore prays that the said

*Answer to Petition of Appeal.*

decree may be reversed, rescinded and for nothing holden, and that your petitioner may have such further relief as shall be meet.

QUEEN & STOUT,  
Solicitors for and of  
Counsel with Appellant. 10

(Service acknowledged Feb. 13th, 1918.)

**Answer to Petition of Appeal.**

(Filed Feb. 25th, 1918.)

The answer of the respondent to the petition of the appellant.

The respondent admits it to be true that a certain decree final was, on the Thirteenth day of February, 1918, made and entered in the Court of Chancery, as in the petition of appeal is stated; but as to the substance and form thereof this respondent prays to refer thereto when the same shall be produced. And this respondent is advised and believes that said decree is agreeable to law and equity and she prays that the same may be affirmed with costs to be adjudged to this respondent. 20

EDWARD MAXSON,  
Solicitor for and of  
Counsel with Respondent. 30

**Petition for Divorce.**

(Filed Nov. 25th, 1916.)

## IN CHANCERY OF NEW JERSEY.

To his Honor Edwin Robert Walker, Chancellor  
of the State of New Jersey:

10       The petition of William R. Gordon, of the  
City of Newark, in the County of Essex and  
State of New Jersey, respectfully shows that:

1. Your petitioner was lawfully joined in the  
bonds of matrimony to his present wife, Frances  
E. Gordon, the defendant in this suit, on the  
15th day of April, 1895, by Rev. Dr. Richardson,  
a Minister of the Gospel, at Hoboken, in the  
State of New Jersey.

20       2. The defendant deserted petitioner in the  
month of November, 1909; ever since which time,  
and for more than two years last past, said de-  
fendant has wilfully, continuedly and obstinately  
deserted your petitioner.

30       3. Your petitioner has been a *bona fide* resi-  
dent of the State of New Jersey, continuedly  
since the said marriage, residing at Newark,  
New Jersey; and the defendant has been a *bona*  
*fide* resident of the State of New Jersey, contin-  
uedly since the month of November, 1911, re-  
siding at Lake Hopatcong, New Jersey, until  
November, 1912, at which time she was com-  
mitted to the New Jersey State Hospital at Morris  
Plains, where she has since resided.

4. Two children were born of the marriage  
aforesaid, to wit: Frances M. Gordon, a  
daughter, twenty years of age, who resides with

*Petition for Divorce.*

her aunt, Manuela Brown of New York City, New York; and Helen A. Gordon, a daughter, eighteen years of age, who resides with her grandfather, William R. Gordon, Sr., at Lake Hopatcong, New Jersey.

5. Your petitioner prays that the marriage between your petitioner and the defendant may be dissolved for the cause aforesaid, according to the statute in such case made and provided; and that your petitioner may have such further relief as may be just.

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And your petitioner will ever pray, etc.,

QUEEN & STOUT,  
Solicitors for Petitioner.

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State of New Jersey, }  
County of Hudson, } ss.:

William R. Gordon, being duly sworn according to law, upon his oath, deposes and says that he is the petitioner named in the foregoing petition; and that his said petition is not made by any collusion between him and the defendant, but in truth and good faith for the causes set forth in the petition.

WILLIAM R. GORDON.

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Sworn and subscribed to before me }  
at Jersey City, New Jersey, this }  
24th day of November, 1916. }

Riply Watson,  
Master in Chancery of New Jersey,

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**Answer.**

(Filed March 13, 1917.)

The answer of Frances E. Gordon, a lunatic, by Robert H. McAdams, her guardian, to the petition in the above entitled cause shows:

10 That the defendant denies the allegations in the petition contained.

EDWARD MAXSON,  
Solicitor for Defendant,  
Office & P. O. Address,  
No. 1 Montgomery Street,  
Jersey City, N. J.

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**Stipulation to Abridge State of Case by  
Omitting Testimony Therefrom.**

20 (Filed March 9th, 1918.)

Whereas the facts upon which the appeal in the above stated cause is based are found in the memorandum of conclusions of the Court of Chancery, it is hereby stipulated and agreed that the state of case be and the same is hereby abridged, by omitting therefrom the testimony.

30 QUEEN & STOUT,  
Solicitors for Appellant.  
EDWARD MAXSON,  
Solicitor for Respondent.

Dated February 13th, 1918.

**Memorandum of Conclusions.**

(Filed February 11th, 1918.)

On petition for divorce on the ground of desertion.

Heard on bill, answer and proofs taken in open court.

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MR. EDWARD P. STOUT, for Petitioner.

MR. EDWARD MAXSON, for Defendant.

STEVENSON, V. C.

1. In this case I find that the defendant was guilty of wilful, continued and obstinate desertion of her husband for a period of two years and over. Petitioner, however, did not promptly commence his suit after the defendant had been guilty of the complete matrimonial offense of desertion which would have entitled him to an absolute divorce if he had filed his petition in time. Some months passed by when without any break in the continuity of the desertion of the defendant with the characteristics necessary to make such desertion a cause of divorce, she (the defendant) became insane to such an extent as to be irresponsible for her actions, and was by due course of law committed as an involuntary patient to an insane asylum, where she remained insane and confined without regard to her will, continuously, until this suit was brought. Conditions had not changed when the cause came to a final hearing.

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2. It is conceded that the mental condition of the defendant and her confinement without regard to her will, in a lunatic asylum, arrested the period of wilful, continued and obstinate desertion, which she had formerly initiated. She

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*Memorandum of Conclusions.*

10 was not wilfully absenting herself from her husband. She no longer had an opportunity to repent and become reconciled with her husband, and if she had the will to return to him she was physically restrained from carrying out such a purpose. A spouse in the situation of the defendant after she becomes a lunatic and is involuntarily confined to an asylum, cannot be guilty of desertion within the definition of our Divorce Act. *Porter v. Porter*, 82 N. J. Eq., 400, See, 1 Bishop on M. D. & S. Section 1761.

20 3. In the case of *Myles v. Myles*, 77 N. J. Eq., 265 (Court of Errors and Appeals, 1910), there is a very distinct and positive dictum in which the entire court apparently concur, to the effect that, "the two years contemplated by the statute are, of course, those immediately preceding the filing of the petition." An examination of the opinion of Vice-Chancellor Emery, filed in the cause, but not reported, and of the brief *per curiam* opinion of the Court of Errors and Appeals above cited, which affirmed the decree advised by Vice-Chancellor Emery, shows distinctly, I think, that the only matter before either court for decision was whether or not it was established by the proofs, that the separation of the spouses, which had lasted for a period of twelve or thirteen years, was characterized by obstinacy on the part of the defendant. The Appellate Court agreed with the Court of Chancery that the petitioner had failed to show this necessary fact. The particular period of desertion with respect to the commencement of the suit for divorce was not before either court for consideration. The deliverance of the Court of Errors and Appeals above quoted was made merely because it was

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*Memorandum of Conclusions.*

deemed possible that the Vice-Chancellor "regarded the first two years of the separation as the period to be examined," and the Appellate Court proceeded to express its dissent from such proposition in order "to avoid any misunderstanding" of the "affirmance of the decree."

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There can be no doubt, I think, that the Court of Errors and Appeals intended by their well considered dictum to correct what possibly might be construed as a statement of divorce law made by way of dictum in the opinion of Vice-Chancellor Emery, which opinion in all other respects the higher court adopted.

It follows from the application of this novel principle of divorce law, promulgated in the Myles case, for which no authority is cited, that a spouse can never in New Jersey acquire an absolute right to a divorce on the ground of desertion until his petition is filed. The guilty spouse (the deserter) after three or four years of wilful, continued and obstinate desertion, may, the day before the petition is filed against him, by repentance and *bona fide* offers of reconciliation, etc., destroy what would have been a right of the deserted spouse to an absolute divorce if he could only have got his petition on file two days earlier.

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I see no escape from the conclusion that if the dictum in the Myles case is to be logically applied, the continuity of the wilful and obstinate desertion during the necessary period of two years is broken if the defendant becomes insane and irresponsible and is committed to an asylum before the suit for divorce is commenced, even though when insanity supervened, there had been a completed period of two years of wilful, continued and obstinate desertion.

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*Memorandum of Conclusions.*

In *Hall v. Hall*, 53 Atl. Rep., 455, 459, affirmed, 65 N. J. Eq., 709, 710, Vice-Chancellor Pitney, in dealing with an offer of reconciliation made by the deserting wife, after two years of wilful, continued and obstinate desertion, says (p. 459):

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“With regard to the writing of the love-letter in May, 1900, that was two years after her desertion, and after the petitioner’s right to a divorce on the ground of desertion had matured and become vested.”

The decree advised by Vice-Chancellor Pitney, was unanimously affirmed by the Court of Errors and Appeals, and in the brief opinion of Mr. Chief Justice Gummere we find the following statement:

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“We concur not only in the conclusion reached by the Vice-Chancellor, but in the opinion rendered by him, except that we find therein a somewhat inaccurate statement of a rule of divorce law which, we think, should not be passed without notice.”

The opinion then proceeds to correct a statement of Vice-Chancellor Pitney, which has no bearing upon the matter now in hand.

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Thus, the Court of Errors and Appeals expressly adopts the opinion of Vice-Chancellor Pitney, with a single exception, which need not be noticed, and thus approves the doctrine which until the decision of the Myles case, I think, was regarded as settled beyond question, *viz.*, that after two years of wilful, continued and obstinate desertion, the deserted spouse has a vested right to a divorce, can reject all offers of reconciliation, however sincere they may be, and notwith-

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*Memorandum of Conclusions.*

standing that the deserting spouse after the two years of desertion became insane and was permanently confined in an asylum, file his petition and procure an absolute divorce.

4. I am unable to perceive any way by which the dictum of the Court of Errors and Appeals in the Myles case can be reconciled with the opinion adopted by the Court of Errors and Appeals in the Hall case. If the principle stated by Vice-Chancellor Pitney in the Hall case, and carefully endorsed by the Court of Errors and Appeals, is correct, then it would seem to follow that in the case at bar, the defendant committed a complete matrimonial offense prior to her insanity, and that the petitioner has a vested right to a divorce, although he has brought his suit some months after insanity and incarceration of the defendant in an asylum have made it impossible that she could be continuously guilty of wilful desertion for two years preceding the filing of the petition.

If the principle carefully announced, although by way of dictum, in the Myles case is correct, I see no escape from the conclusion that the defendant never committed any matrimonial offense which under the laws of New Jersey at the present time entitles the petitioner to a divorce.

5. Assuming that both propositions laid down or adopted by the Court of Errors and Appeals, which we are considering are mere *dicta*, and that they are in conflict with each other, I am embarrassed in endeavoring to determine which is authoritative and final because of the fact that the later deliverance does not in any way refer to the earlier. In view of what I think is the unanimous opinion of text writers of repute and

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10 courts in other jurisdictions, I incline to think that, if this case were to be decided without the aid of any further authority in New Jersey, subsequent to the Myles case, the Court of Chancery might properly apply the principle laid down in the Hall case, until the Court of Errors and Appeals should be further heard from. It may be well to state some of the reasons for this view.

(1) It will be observed that our Divorce Act makes no distinction between the two matrimonial offenses which constitute causes of absolute divorce. The statute declares that, "divorces from the bond of matrimony may be decreed for the following causes:

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"I. Adultery by either of the parties.

"II. Wilful, continued and obstinate desertion for the term of two years."

The statute does not prescribe that the period of two years of desertion must be the two years immediately preceding the filing of the petition: this proviso is added by the rule laid down in the Myles case. The provision in Section 6 pertaining to jurisdiction that in desertion cases one of the parties must be resident in New Jersey for two years next preceding the commencement of the action, plainly does not warrant the inference that the term of two years of desertion, which constitutes the ground of divorce, may not have ended long before the commencement of the suit.

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As will appear hereafter in considering the Koch case, *infra*, Sections 6 and 7 of the Divorce Act refer in terms to causes of action for divorce upon both grounds, desertion and adultery,

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*Memorandum of Conclusions.*

as arising not only before suit is brought in New Jersey, but before the petitioner became a resident of the State of New Jersey.

(2) The statute, it seems to me, makes no distinction as to the remedy between the offense of adultery and the offense of wilful, continued and obstinate desertion for two years. The offenses of course are quite different in their nature. Condonation may be more easily obtained in one case than in the other. The moral duty to condone may more frequently exist in one case than in the other. The statute, however, as I read it, seems to place these two complete matrimonial offenses on a par in respect of the rights and remedies which are accorded to the injured spouse.

(3) The text writers, I think, all agree that after the statutory period of desertion is completed, the deserter cannot by any course of conduct indicating repentance and desire to terminate the desertion, impair in any way the legal effect of the matrimonial offense which he has committed. Mr. Bishop says: (1 M. D. & S. Sec. 775): "When the desertion has continued the statutory number of years, the deserted party may rely on his acquired right and refuse to renew cohabitation. The refusal will not bar the divorce to which he has already become entitled." The authorities in this country and Great Britain are cited in a note.

In 1 Nelson on Divorce and Separation, Sections 73 to 75, the authorities are cited for the doctrine that an offer to return "must be made within the statutory period." In Section 75 the author says: "The door of repentance and return must be kept open during that period [the

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10 statutory period], but after the statutory time has elapsed the injured party has a cause for divorce. If such party refuses to renew cohabitation it is not desertion. For to renew cohabitation is to condone the offense and the law does not enforce condonation. This refusal of an offer to return will not bar a divorce to which the party is already entitled." The American and English cases sustaining these propositions are cited in a note.

The same principles are announced in 9 Am. & Eng. Ency., page 775 (see cases cited in Note 3), and 14 Cyc., page 620 (see cases cited in Note 91).

20 (4) I have found no authority earlier than the Myles case in this country or in England contained in any judicial opinion or text book, which makes the slightest distinction in respect of remedies between the matrimonial offense of adultery and the matrimonial offense of desertion, after the desertion has continued for the period prescribed by statute. I find no intimation that statutes similar to ours not only prescribe the period of desertion but prescribe its continuance up to the time of commencing the suit for divorce on account thereof. The two offenses of course differ: In the case of desertion two years of continuous misconduct on the part of the deserting spouse (which period is liable at any time to be arrested by a variety of causes) are necessary to constitute the complete offense, but after the offense of desertion has been once completed I have not discovered any suggestion prior to the Myles case that the injured spouse has not the same vested right to a divorce which he would have had if the matri-

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monial offense had been adultery. If it may be said that the foregoing statements contain a *petitio principii* because they assume that the matrimonial offense of desertion as defined by our statute may be completed before the suit is commenced, the propositions may be recast so as to make them affirm that there is no such matrimonial offense defined by our statute as wilful, continued and obstinate desertion for two years immediately preceding the commencement of a suit for divorce on account of such offense. Our statute in the same section and in one sentence names the two offenses which are grounds for divorce. One of these offenses is fully defined by a single word, and the other by a single word with four qualifications. If the Legislature had intended to add a fifth qualification which has been added by the dictum in the Myles case, it would seem probable that it would have done so especially in view of the far reaching effects of adding this qualification in large numbers of cases.

(5) The dictum in the Myles case does not seem to fit very accurately into our system of divorce law so far expounded by our courts. In 1911, over three years after our present Divorce Act went into effect, Vice Chancellor Emery in the case of Koch *v.* Koch, 79 Eq., 24, decided that where the period of desertion began in New York, but, before the expiration of two years, the injured spouse became a resident of New Jersey, and, the desertion continuing, subsequently after two years commenced a suit for divorce in this State, no cause of action for desertion arose until the entire two years from the origin of the desertion had elapsed, and that

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10 the only cause of action for desertion therefore  
arose in New Jersey. The soundness of this  
view has never been questioned. But the Vice-  
Chancellor proceeded in his reasoning upon the  
assumption that if there had been two years of  
desertion while the petitioner remained domiciled  
in New York, the continuance of the desertion  
in New Jersey for two years would not consti-  
tute a separate cause of action for divorce aris-  
ing in New Jersey. No period of desertion is a  
cause of action for absolute divorce in New York.  
A cause of action for a limited divorce therefore  
arising in New York, prevents a cause of action  
for absolute divorce from subsequently arising  
in New Jersey. Several decisions (unreported)  
20 of two Vice-Chancellors directly contrary to this  
view had been rendered, of which decisions,  
however, Vice-Chancellor Emery was not aware.  
The Vice-Chancellor's dictum, however, has been  
accepted as law by the Court of Chancery in  
subsequent cases, and has recently been ap-  
proved by the Court of Errors and Appeals.  
Flynn *v.* Flynn, 83 N. J. Eq., 690.

30 Thus it would seem that if a spouse deserted  
in another state remains a resident there two  
years, and then becomes a resident of New Jersey  
and remains such resident for two years, and  
then commences a suit for divorce, the two  
years to be examined are not "those immediately  
preceding the filing of the petition," but those  
which immediately followed the separation in the  
foreign state, or immediately preceded the depart-  
ure of the deserted spouse from the foreign state.  
If during the whole period of separation the  
injured spouse (the petitioner) has been a resi-  
40 dent of New Jersey, according to the dictum in  
the Myles case, the two years to be examined

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are "those immediately preceding the filing of the petition," and no cause of action arises on the ground of desertion until the petitioner gets her petition on file. If, however, during the first two years of the separation the petitioner was domiciled in a foreign state, he or she may after two years residence in New Jersey, obtain a divorce in this State of such a character as would be obtained in case the petitioner had remained in her former domicile and had brought suit there. In the case put the spouse emigrating from Pennsylvania would be entitled to an absolute divorce, while the spouse emigrating from New York would be entitled only to a limited divorce. If, after two years of separation at the matrimonial domicile in a foreign state, one of the spouses becomes a resident of New Jersey, and after two years of such residence files a petition for divorce, the first period for examination manifestly is the period of years of separation in the foreign state immediately preceding the establishment of the residence in New Jersey. If this examination discloses two years of wilful, continued and obstinate desertion, then the Court of Chancery of New Jersey may grant only such divorce as the foreign state could grant under its laws. If, however, the separation at the start was not a wilful or an obstinate desertion by the defendant, but became such after the emigration to New Jersey or within two years prior to such emigration, then no cause of action arose in the foreign state, and the period to be examined under the Myles case is the two years immediately preceding the filing of the petition, and the divorce obtained will be such as is defined by the New Jersey law.

In case the deserted spouse remained resident in the foreign state for the period of two years

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10 from the date of the desertion, and then moved to New Jersey, the question arises whether *bona fide* offers of reconciliation on the part of the guilty spouse or his insanity could possibly have any effect upon the right which the injured spouse acquired to obtain a divorce, absolute or limited, as the case might be, on account of the complete matrimonial offense which arose in the foreign state.

20 The dictum in the Myles case cannot, I think, be reconciled with the doctrine of the Koch case which the Court of Errors and Appeals apparently approved in the Flynn case four years after the Myles case was decided. While the doctrine of the Koch case has not been discussed in any opinion by a judge of our court of last resort, and possibly that court has not considered its peculiar application to certain cases, and may hereafter strictly limit its authority as a precedent, nevertheless it now stands as law in this court, and it seems to follow that as between the conflicting dicta in the Hall and Myles cases this court should accept and apply that dictum which is not inconsistent with the law of the Koch and Flynn cases.

30 (6) It is, I think, the settled practice to permit a defendant in a divorce suit to file a cross petition praying for an absolute divorce on the ground of desertion, although the period of two years had not expired when the original petition was filed, the cross petition being considered in many respects an independent suit (see Laws of 1916, Chap. 57, p. 102). Suppose a wife after two years of separation from her husband is about to sue him for an absolute divorce on the ground of desertion, but before she gets her peti-

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tion on file she is sued by her husband in good faith for a divorce on the ground of adultery. The commencement of the husband's suit makes it improper that the parties should live together and suspends the period of desertion. Recognizing the dictum in the Myles case can the wife succeed in her cross suit on the theory "that the two years contemplated by the statute are \* \* \* those immediately preceding the filing of the petition" of the husband, and not those immediately preceding the filing of the cross petition? A logical application of the principle laid down in the Myles dictum would seem to abolish all cross suits for divorce on the ground of desertion where the original suit was brought in good faith.

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6. The fact that in some cases the original status can be more completely restored after the offense of desertion for two years has been committed, than where the offense of adultery has been committed, seems to my mind to bear only upon the moral obligation to condone. The Legislature has defined with accuracy two distinct matrimonial offenses, either of which is a ground for absolute divorce. Under the statute the two offenses seem to be equally heinous, giving grounds to the injured party for precisely the same remedies. There are strong grounds for arguing, as in fact it has often been argued, that two years of desertion effect a more complete disruption of the marriage state in scores of cases than is affected by a single act of adultery. A husband who wilfully deserts his wife and leaves her for two years to support herself and her children by her labor, has committed, it seems to me, about the highest possible crime affecting the marriage relation.

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7. It has been suggested that the form of allegation charging desertion which has usually been employed in divorce cases, indicates what has been generally thought as the particular two years under investigation. Petitions for divorce on the ground of desertion usually allege the date when the separation occurred, and in the great majority of cases the parties in fact have not come together since this final separation, the date of which may have been two years, three years or ten years before the commencement of the suit. The natural method of charging the defendant with desertion is to allege that he deserted the petitioner at the date named, and then proceed: "ever since which time and for more than two years last past said defendant has wilfully, continuedly and obstinately deserted" the petitioner. (Biddle's N. J. Div. Pr., p. 186, *et seq.*). Under this form of allegation prior to the Myles opinion the case was established when desertion having the necessary characteristics was proved to have existed during any period of two years included in the allegation—the offense not having been condoned. In many, perhaps in most cases, the last two years prior to the filing of the petition are more readily than any earlier period proved to have been years of wilful and obstinate desertion. The separation at the start in many cases cannot be shown to have the elements of wilfulness and obstinacy. A separation, innocent in its origin, at a later time, which sometimes cannot be definitely fixed except within limits, often becomes a wilful desertion. If, as the matter was understood prior to the Myles case, the guilty spouse after the complete offense of desertion for two years had been committed, repented and desired to return, or became insane, and it

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thus appeared that sometime prior to the commencement of the suit he had ceased to be a wilful and obstinate deserter, most accurate pleaders, I think, would vary the phraseology so as to make it conform with the truth. If a spouse domiciled in Pennsylvania after two years of wilful, continued and obstinate desertion by the other spouse, becomes a resident of New Jersey, and after a further period of two years of such residence brings a suit for an absolute divorce on the ground of desertion, having in view the doctrine of the Koch case, it would plainly be improper to follow the form of allegation above quoted. In such case, as we have seen, "the two years contemplated by the statute" are not "those immediately preceding the filing of the petition," but those ending at least two years before the petition was filed. Koch *v.* Koch, *supra*; Flynn *v.* Flynn, *supra*. In such case the petition alleges that the petitioner was resident in the foreign State when the cause of action arose on account of which he brings his suit for a divorce, and alleges the removal of the petitioner to the State of New Jersey and residence there for two years next preceding the commencement of the action. The petition also sets forth the foreign law and prays for a divorce on account of the two years of desertion in the foreign State (see Biddle's N. J. Div. Prac., p. 193, form 13).

8. Thus it seems to me to be beyond question that in an important class of desertion cases our statute expressly recognizes that a complete cause of action may arise on account of two years of wilful, continued and obstinate desertion, which period of desertion terminated at least two years before the petition for divorce

*Memorandum of Conclusions.*

10 was filed. It seems somewhat incongruous that if a petitioner for divorce proves wilful, continued and obstinate desertion for a period of four or five years, whether the earlier half or the later half of the period constitute the subject matter of investigation as the matrimonial offense warranting a divorce under New Jersey law, depends on whether the petitioner became a resident of New Jersey before or after the first two years of the period expired.

20 9. As to the suggestion that after two years of wilful, continued and obstinate desertion reconciliation may intervene before suit is commenced, and destroy any rights to a divorce founded upon the prior desertion, it would seem to be sufficient to point out that this is merely condonation, and that condonation is always possible after a complete matrimonial offense entitling the injured spouse to a divorce has been committed. Petitions in adultery cases often allege the act at a time, months or even years prior to the commencement of the suit. Cases have occurred where a husband has been shown to have been cohabitating with his wife while he was prosecuting a suit for a divorce against her. Whether the complete matrimonial offense be adultery or desertion for two years, some period of time always intervenes between the commission of the offense and the institution of a suit for divorce, and during that period condonation is always possible. The possibility practically in all cases, and the high degree of probability in some cases, that the matrimonial offense, whether it be adultery or desertion, has been condoned, has no relation, it seems to me, 40 to the ascertainment of the nature and definition

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of either of these two offenses which constitute causes for absolute divorce at the election of the injured party. It may be noted that the form of petition uniformly employed in adultery cases does not deny condonation. Condonation is a defence to be set up in the defendant's answer and proved by him.

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10. If the question to be decided in this case were to be decided solely with reference to the authority of the conflicting dicta in the Hall and Myles cases, this Court, it seems to me, would be at liberty to adopt the earlier dictum, supported, as I think it is by all prior authorities, rather than the later dictum, which so far as I know is supported by no prior authority. The principle, however, laid down in the Myles case has been recognized as a correct statement of the law by Vice-Chancellor Backes in the case of *Getz v. Getz*, 81 N. J. Eq., 465, and has been applied by Vice-Chancellor Leaming in *Lake v. Lake*, 89 Atl. Rep., 534. In the last mentioned case the principle enunciated in the Myles case is accepted as the established law of the State. Two years of wilful, continued and obstinate desertion having been established by a former decree between the parties, the Vice-Chancellor, following the rule enunciated in the dictum in the Myles case, examined the character of the separation for the two years immediately preceding the commencement of the suit, and finding that there had been no change in the character of such separation, advised a decree *nisi*. Of course, it is the duty of the Court of Chancery to apply the law as distinctly laid down by the Court of Errors and Appeals without hesitation or criticism. Only our court of last resort may correct its authoritative statement of the law. The

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*Memorandum of Conclusions.*

10 difficulty in this case arises from the fact that we have two conflicting statements coming from our court of last resort, and the later statement in no way referring to or recognizing the former statement. Although in such a situation, this Court might, as I have intimated, elect to be guided by the earlier statement of the law, such a course at present does not seem to be proper in view of the decisions and declarations of the Court of Chancery since the Myles case was decided.

20 I conclude, therefore, that it is my duty to follow and apply to this case the latest statement of the law coming from our court of last resort, such statement having been recognized and accepted as a part of our divorce law in the decisions of the Court of Chancery above cited. As between the petitioner in this case and the defendant who defends by a guardian appointed by the Chancellor, if the petitioner is to obtain an absolute divorce, I think it should be after a decision to that effect by the Court of Errors and Appeals.

A decree dismissing the petition will be advised.

30 The foregoing opinion will be filed, because I am notified that the petitioner is about to take an appeal. The substance of the opinion was stated orally to counsel, and the opinion was written before the case of *Orens v. Orens*, 102 Atl. Rep., 436, was reported. If the opinion in the *Orens* case had been before me at the hearing, this opinion would have consisted of a few lines citing the authorities. After some hesitation I have concluded to file my opinion in its present form inasmuch as I think counsel have a right to have it accord with my oral deliverance.

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**Decree Dismissing Petition.**

(Filed February 15th, 1918.)

This cause coming on to be heard in the presence of Edward P. Stout, of counsel with the petitioner, and Edward Maxson, of counsel with the defendant, on petition, answer and oral proofs taken in open court, and the pleadings having been read and the said pleadings and proofs having been duly considered as well as the arguments of counsel;

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And it appearing to the Court that the defendant was not guilty of wilful, continued and obstinate desertion of the petitioner for the period of two years immediately preceding the filing of the petition in this cause and, therefore, the petitioner is not entitled to the relief prayed for in his said petition;

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It is, thereupon, on this thirteenth day of February, nineteen hundred and eighteen, ordered, adjudged and decreed that the petitioner's petition be and the same is hereby dismissed.

And it is further ordered, that the petitioner pay to the defendant's solicitor the costs of this suit to be taxed, and that the defendant have execution therefor, according to the practice of this Court.

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E. R. WALKER,

C.

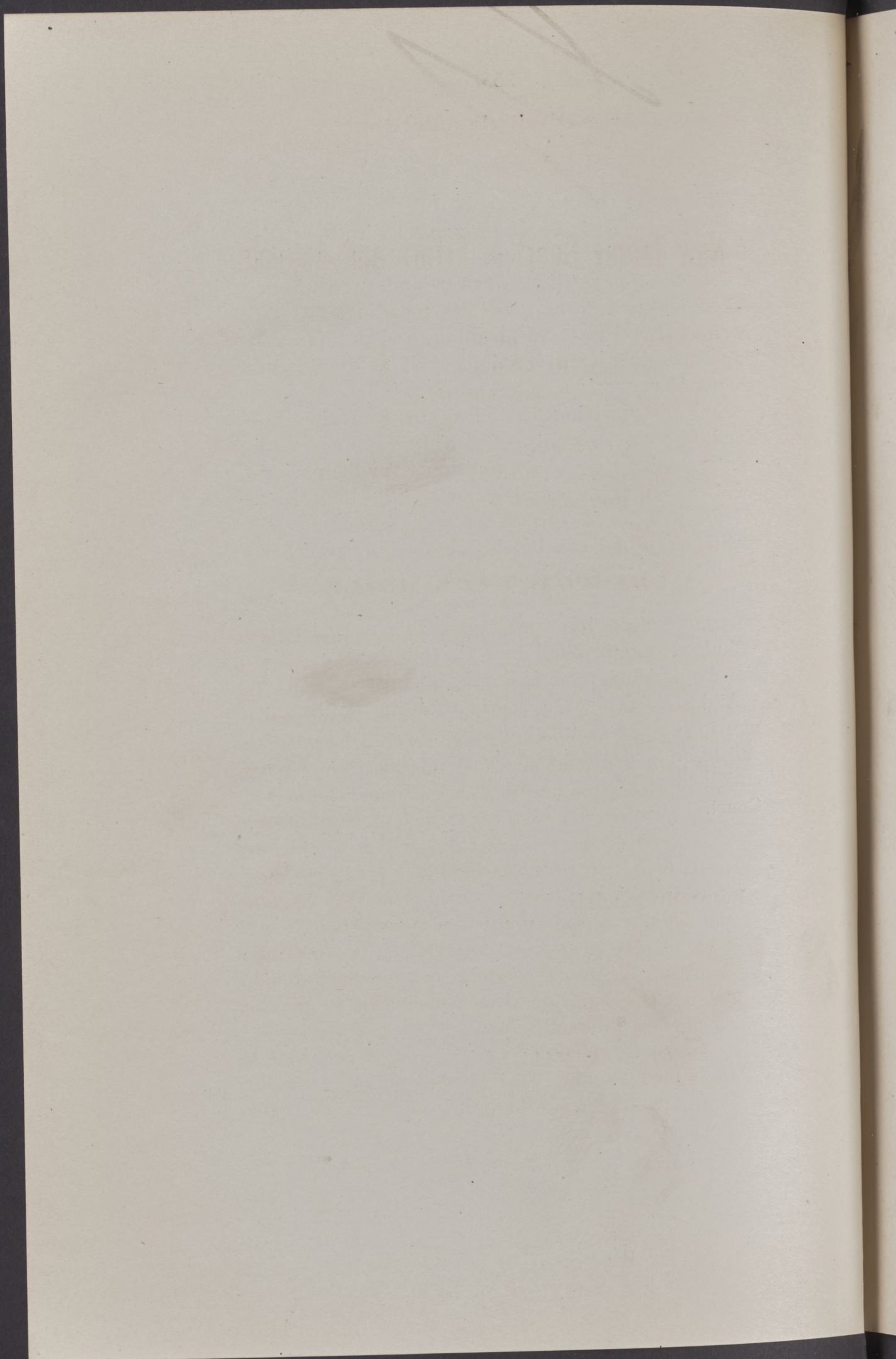
Respectfully advised.

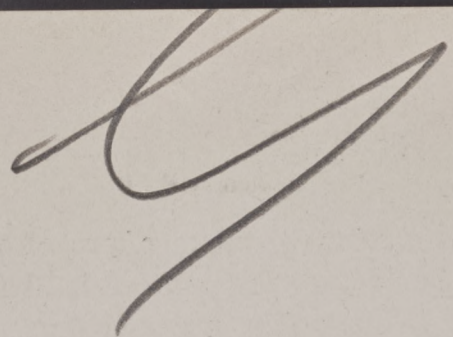
EUGENE STEVENSON,

V. C.

[1141]

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## New Jersey Court of Errors and Appeals.

Between

WILLIAM R. GORDON,  
*Petitioner-Appellant,*

*and*

FRANCES E. GORDON,  
*Defendant-Respondent.*

### **RESPONDENT'S BRIEF.**

The respondent conceives it unnecessary to submit an extended discussion of the question involved on this appeal for two reasons; first, because the Court below, in its learned opinion, reviewed all the leading authorities; and second, because the appellant is a poor man and the question of printing expenses is a matter of importance to him.

It must be conceded that the appellant proved a cause of action for desertion, which would have entitled him to a decree in the Court below, provided his petition had been filed before the respondent became insane and was committed to the asylum. He neglected, however, to do this until such time as the respondent was incapacitated by her mental condition from considering or making an offer of reconciliation.

It clearly appears from the recent decisions of this Court, that it is the present policy of the law of this State to permit either party in an action

for divorce for desertion to make offers of reconciliation at any time before the petition is filed, and that such offers, if *bona fide*, are a defense.

The respondent relies upon the case of

*Myles v. Myles*, 77 N. J. Eq., 265,

followed by the cases of

*Getz v. Getz*, 81 N. J. Eq., 465, and

*Lake v. Lake*, 89 Atl. Rep., 534.

It is submitted on the authority of these cases, and on the opinion of the Court below, that the Decree should be affirmed.

Respectfully submitted,

EDWARD MAXON,  
*Sol'r and of Counsel*  
*for Defendant-Respondent.*

[1932]

# New Jersey Court of Errors and Appeals,

Between

WILLIAM R. GORDON,  
Appellant,

and

FRANCES E. GORDON,  
Respondent.

On Petition for  
Divorce.

On Appeal from  
the Court of  
Chancery.

## BRIEF FOR APPELLANT.

William R. Gordon brought suit for absolute divorce on the ground of desertion against his wife, Frances E. Gordon.

The Court of Chancery said that the defendant was guilty of wilful, continued and obstinate desertion of her husband for more than two years, but dismissed the petitioner's petition because the period of two years did not immediately precede the filing of the petition.

### Statement of the Case.

The petitioner and defendant were married on April 15th, 1895, and lived together as husband and wife until November, 1909, when the defendant deserted the petitioner. In November, 1912, the defendant became insane and was committed to an insane asylum where she has since been confined as an insanity patient. The desertion continued uninterrupted from November 9th, 1909, the time of the overt act of desertion,

to November, 1912, the time defendant became insane. On November 25th, 1916, the petitioner filed his petition for divorce. In substance, these facts are found in the memorandum of conclusions of the Court of Chancery (Case, p. 7).

The court below said:

1. If the petitioner had filed his petition after the first two years of the desertion had run and prior to defendant's insanity, he would have been entitled to a decree in his favor.

2. The insanity of the defendant and her confinement in an insane asylum arrested the further running of the statutory offense of desertion.

3. All of the authorities, as well as the dictum of this Court in the case of *Hall v. Hall*, 65 N. J. Eq., 709, lay down the rule that after the statutory period of desertion is complete, the deserted spouse has a vested cause of action for divorce.

4. The dictum of this Court in the case of *Myles v. Myles*, 77 N. J. Eq., 265, that the two years of wilful, continued and obstinate desertion must be those immediately preceding the filing of the petition was unsupported by any authority.

5. It was constrained to apply the dictum in the *Myles* case to the instant case, because it had been followed by the Court of Chancery in the *Getz* case, 81 N. J. Eq., 465, the *Lake* case, 89 Atl. (N. J.), 534, and the *Orens* case, 102 Atl. (N. J.), 436, although this dictum was contrary to the dictum in the *Hall* case, *supra*, and all the authorities on this subject.

The questions involved are:

1. Whether wilful, continued and obstinate desertion, for the term of two years, gives the

deserted spouse a vested cause of action for divorce.

2. Whether the period of desertion must be the two years immediately preceding the filing of the petition for divorce, in a case where the deserted spouse has a complete cause of action, at the time the deserting spouse becomes insane.

The grounds of appeal are:

1. The Court below erred in that it did not decree that the defendant was guilty of wilful, continued and obstinate desertion of the petitioner for the statutory period.

2. The Court erred in decreeing that the petitioner was not entitled to the relief prayed for in his petition.

3. The Court below erred in dismissing the petitioner's petition.

## A R G U M E N T .

### P O I N T I .

**Two years of wilful, continued and obstinate desertion gives the deserted spouse a vested cause of action for divorce.**

Vice-Chancellor Stevenson, in his memorandum of conclusions, says that all the authorities in this country and in Great Britain, including the text books, lay down the principle that desertion for the statutory period, vests in the deserted party a cause of action for divorce. He also cites the dictum in *Hall v. Hall*, *supra*, in support of this principle.

After a careful consideration of all these authorities and of our Divorce Act, the learned Vice-Chancellor presents, in a most logical and

convincing manner, his conclusions that the dictum in the Myles case is untenable.

He emphasizes the fact that the dicta of this Court in the Myles and Hall cases, are in direct conflict. He further points out that the dictum in the Myles case cannot be reconciled with the dictum of the Court of Chancery in the Koch case, 79 N. J. Eq., 24, which was approved by this Court in the Flynn case, 83 N. J. Eq., 690. In other words, the Myles case is an anomaly in the jurisprudence of our divorce law.

It would be vain to attempt to elaborate upon the full and complete discussion of this question made by the eminent Vice-Chancellor.

We submit that an examination of the authorities cited by the Vice-Chancellor, and a perusal of his conclusions, will lead this Court to reconsider what it said in the Myles case, and hold that the petitioner had a vested cause of action for divorce at the time the defendant became insane and is, therefore, entitled to an absolute divorce.

## POINT II.

**A deserted spouse, who has a complete cause of action for divorce at the time the deserting spouse becomes insane, is not thereby deprived of the right to a divorce.**

It is to be noted that the Court below found that at the time the defendant became insane, the petitioner had a complete cause of action for divorce (Case, p. 7).

The reasoning of this Court in the Myles case, *supra*, is "that the period of desertion must be that immediately preceding the petition is plain, from the fact that if the petition left a hiatus

between such period and the date of filing of the petition, such hiatus might readily represent a complete reconciliation and reunion of the parties that would entirely destroy any right to a divorce arising out of a previous desertion." To the same effect, are the Getz, Lake and Orens cases, *supra*.

This reasoning cannot be applied to the instant case, for there could be no reconciliation and reunion of the petitioner with his insane wife. Since the petitioner had a complete cause of action for divorce at the time the defendant became insane, then that cause of action must have existed at the time the petitioner filed his petition, for nothing could intervene since defendant's insanity, to destroy the petitioner's right to a divorce.

Manifestly, the dictum in the Myles case has no application to the case at bar, and the Court below should have granted a decree for divorce in favor of the petitioner.

It is respectfully submitted that the petitioner is entitled to an absolute divorce, and that the decree under review should be reversed.

QUEEN & STOUT,  
Solicitors for Appellant.

EDWARD P. STOUT,  
Of Counsel.

March Term, 1918.





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