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Further on Five Years Voluntary Separation as Ground for Absolute Divorce - Beck v. Beck Nichols v. Nichols

Comments and Casenotes

FURTHER ON FIVE YEARS VOLUNTARY SEPARATION AS GROUND FOR ABSOLUTE DIVORCE

***Beck v. Beck*[1]**
***Nichols v. Nichols*[2]**

In the first principal case the spouses had lived together for 17 years when, in 1930, differences arose between them as to the education of their son. The husband "left the bed of his wife" and for the next six months slept in the room of the son. At the end of the six months the wife "left the house" and took up quarters elsewhere. Nine years later she sued for absolute divorce on the ground of five years' voluntary separation. The trial court dismissed the bill and the Court of Appeals affirmed, saying: "The first abandonment was by the husband; the second was the act of the wife. There is no evidence in the record that the parties mutually agreed to live apart at any time . . ."

In the second principal case the parties were both "about seventy years old" when they were married in 1933, the husband was then a widower with eight adult children living, and the wife was a spinster. Incompatibility soon was made manifest and, in June, 1936, a separation was discussed, and apparently agreed upon, to begin as soon as the wife could be admitted to "the old ladies' home" (the wife had sold the house she had occupied prior to marriage). They continued to live in the same house during the Summer of 1936 and neither did anything about getting the wife into the home. On October 18th, 1936, the husband left the common home, leaving the wife with very little fuel or food and no means of support. He had told her in August that he was going to leave in October. On December 17, 1936, the wife sued the husband for partial divorce, alleging abandonment and desertion, and asking alimony pendente lite, which latter (for some unexplained reason) was denied her. That case is still pending. On October 22, 1941, the husband filed the present suit for absolute divorce, alleging five

[1] 24 A. (2d) 295 (Md., 1942).
[2] 30 A. (2d) 446 (Md., 1943).

years' voluntary separation. The trial court granted the divorce, the wife appealed, and the Court of Appeals reversed and ordered the bill to be dismissed.

I

These two cases are the most recent pronouncements of the Court of Appeals under the five years' voluntary separation ground for absolute divorce, enacted in 1937, and first dealt with in the *Campbell* case,[3] which case was noted in an earlier treatment of the matter in the REVIEW.[4] Since the *Campbell* case and prior to the two cases under review, the ground has had occasion to be involved in four other cases in the Court of Appeals. These will be discussed presently. Further treatment of the *Campbell* case will be reserved until specific discussion of the two cases under review, for they are best to be treated against the background of that, the first and the most thoroughly reasoned of the opinions handed down about this divorce ground.

In *Dotterweich v. Dotterweich*[5] the Court of Appeals affirmed granting the husband an absolute divorce under his bill which, as finally amended, alleged in the alternative[6] that the wife had abandoned him more than three years before (the statutory period is now eighteen months) and that they had voluntarily lived apart for five years. The Court of Appeals opinion put the granting of the divorce on the ground of "constructive desertion and abandonment" by refusal to cohabit, and the brief opinion gave no treatment at all to the five years' separation aspect of the case.

The case of *France v. Safe Deposit and Trust Co.*[7] contains the most thorough treatment of the five year separation ground since that of the *Campbell* case. The trial court granted the husband the divorce on the five year ground, but the Court of Appeals reversed (after the hus-

[3] Md. Code (1939) Art. 16, Sec. 40; Campbell v. Campbell, 174 Md. 229, 198 A. 414, 116 A. L. R. 939 (1938).

[4] Note, *Five Years Voluntary Separation as New Ground for Absolute Divorce* (1938) 2 Md. L. Rev. 357.

[5] 174 Md. 697, 200 A. 523 (1938).

[6] While the case did not go into it, yet it suggests the question whether a plaintiff can allege in the alternative abandonment and voluntary separation. On the other hand, if a plaintiff alleges one of these but not both, and the bill is dismissed on the merits, may he later file a new suit on the other ground, or is the dismissal of a bill for absolute divorce on one ground *res judicata* that the plaintiff had no grounds for such divorce at the time?

[7] 176 Md. 306, 4 A.(2d) 717 (1939).

band's death at the time the case was to be argued in the Court of Appeals) finding both that the separation was not voluntary as to the wife and that there had been hope of reconciliation. The Court pointed out that the plaintiff had the burden of proving his allegations by a preponderance of the evidence, no more, since the ground for divorce involved no question of moral turpitude. In this case the husband had procured passage for his wife to Europe, to travel, and he, the husband, had apparently hoped that the separation would be final. But the wife had not so hoped, and had expected to return, although she found it impossible to do so until later, inasmuch as the husband did not furnish her the wherewithal.

The Court reiterated the doctrine, first expressed in the *Campbell* case, that the separation need not be voluntary as to both from the very beginning of the physical separation, but merely must be found to have been voluntary as to both for five consecutive years. It was said that ". . . it may begin at any time after the physical separation, when the parties manifest agreement in a common intent of not living together again, but in that case it must continue without interruption for five years from the time of the agreement before either spouse is entitled to a divorce under the statute."[8] However, it was found that the separation had never been voluntary as to the wife.

In *Miller v. Miller*[9] the wife sued the husband for absolute divorce, alleging more than three years' desertion and abandonment, and the husband filed a cross-bill seeking an absolute divorce on the ground of more than five years' voluntary separation. The Court of Appeals affirmed the trial court's granting the wife the divorce, finding that the separation was not voluntary as to her but that the husband had wilfully deserted the wife for more than the statutory period. The Court stated the problem to be merely that whether the separation was voluntary as to both, in which case the husband was entitled to the divorce, or involuntary as to the wife, in which case (a clear case of desertion by him being otherwise made out) she was entitled to the divorce.

The Court found on the facts that the separation was involuntary as to the wife, the husband having left for trivial causes found not sufficient to justify his leaving. The statement by the wife upon his threat to leave: "Well

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[8] *Ibid*, 176 Md. 326.
[9] 178 Md. 12, 11 A. (2d) 630 (1940).

if you want to go, go on and go, but you are going to have take care of these children" was said to be not sufficient to make the separation voluntary as to her. Most of the discussion was as to the matter of desertion by the husband (on which the wife's voluntariness is, of course, significant) and in its brief treatment of the five year separation ground, in the course of affirming the dismissal of the husband's cross-bill, the Court said: ". . . if the original separation was involuntary as to her, and so remained throughout its duration, that statute has no application."[10] It might be here remarked, particularly because a citation of the *Campbell* case followed the quoted language, that the Court was impliedly reiterating that case's ruling that a separation not voluntary as to both at its beginning may later become voluntary as to both so as to entitle to a divorce after five years' continuance of that voluntariness. It might also be stated that the quoted matter possesses negative implications to the effect that, when a separation begins as voluntary on the part of one and involuntary on the part of the other, all that is required for its later becoming voluntary as to both is that the latter spouse shall manifest willingness in some fashion, not necessarily requiring concerted action with the former one.

In *Kline v. Kline*,[11] somewhat the same clash was involved as in the *Miller* case. The husband sued, alleging five years' voluntary separation, the wife cross-billed alleging desertion by the husband, the trial court granted the wife the divorce, and the Court of Appeals affirmed, finding the separation not voluntary as to the wife, thus precluding the separation statute from applying, but finding that the husband had deserted the wife, against her will, thus entitling her to the divorce for that reason. The Court gave but little treatment to the separation ground, but found that the wife had "begged him a million times" to live with her again and that this indicated that the separation was involuntary as to her. The Court stated that the word "voluntary" signifies willingness, so that the statute requires an agreement of the parties to live apart. When used with reference to a common act of two or more persons affecting their common relationship, it means that they acted in willing concert in the doing of the act.

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[10] *Ibid*, 178 Md. 23.

[11] 179 Md. 10, 16 A. (2d) 924 (1940).

II

Turning now to the two cases under review, it might be stated as the opinion of the present writer that the *Nichols* case is much the sounder of the two, while the *Beck* case is dubious, both in its language and in its conclusion.[12] Mentioning the *Nichols* case first at the moment, it would seem obvious, for two different reasons, that the separation was not voluntary as to the wife at any time more than five years prior to the filing of the husband's suit. The only possible external act of hers indicative of voluntariness was the alleged agreement in June to separate in the future. But that agreement itself was upon a condition not performed, her admission to the old ladies' home. In effect, that was an agreement to separate if provision were made for her care and support. We can generalize from the case to the effect that voluntariness cannot be spelled out from an agreement to separate if it is conditioned upon provision for the support of the wife, and if that condition be breached. There would seem to be no reason why a "voluntariness" cannot be conditional, particularly since our Court interprets the word "voluntary" to import agreement, and the law is long familiar with conditional agreements.

On the other hand, had the condition been performed, then the conclusion should have been that the separation was voluntary. While agreements of spouses to separate in the future may have had some trouble at common law as to their validity because of public policy, yet the broad terms of the 1931 Maryland statute[13] about separation agreements would probably render them generally valid so that, if any conditions be performed, they could be the source of voluntariness, under the divorce statute.

But, if a condition be unperformed, then, as the *Nichols* case indicates, such an agreement loses significance on the matter of the voluntariness of the spouse in whose favor the condition operates, and such voluntariness must be sought elsewhere to be superimposed upon any separation of the spouses which may be alleged as ground for divorce. And no such other source of voluntariness was

[12] Over and above the points to be made herein, *infra*, concerning the *Beck* case, it might be observed here that the opinion is overly brief considering the importance of the point and the impact of the ruling on the losing party; and that it contains an erroneous statement of fact, 24 A. (2d) 296, as to where the son obtained his legal education. This was correctly stated in the trial court opinion.

[13] Md. Code (1939) Art. 16, Sec. 42.

to be found in the *Nichols* case. But for their tentative agreement to separate, immaterial because of failure of condition precedent, the circumstances of his leaving in October were such as to make him a deserter, against her will (her laying out his clothes was held insufficient to show her agreement to his leaving), particularly as he made no provision for an otherwise destitute wife.

Not only was there absent anything indicative of voluntariness on the part of the wife, but there was present (and within the five year period prior to suit) a positive factor indicative of involuntariness on her part, i. e., her filing a suit in December, 1936, for a divorce *a mensa et thoro.* Both in this case and in the *Campbell* case it is recognized that filing a divorce suit alleging the other's desertion indicates that, as to the then plaintiff, the separation is (not yet) voluntary. Of course, it might be argued that seeking (at least an absolute) divorce for desertion indicates that the plaintiff is now willing to live separate, but the theory of the desertion ground is that the separation is against the will of the plaintiff, at least up to the time of filing suit, or up to the end of the statutory period.

Whereas in the *Campbell* case it was found that the separation later became voluntary as to the erstwhile plaintiff, that was out of the question in the *Nichols* case because, even if it had so become (there was nothing so to indicate) the time would have been too recent, as the abortive *a mensa* case itself had been filed by Mrs. Nichols within five years of the husband's suit.

With reference to the problem whether a separation originally not voluntary as to both parties may later become so, as was decided in the *Campbell* case and reiterated in others, certain language in the *Nichols* opinion must be read carefully in the light of the actual facts. There is the statement that the plaintiff "must prove that the separation between him and the defendant, which took place on October 18th, 1936, was mutually voluntary as of that date." This merely means that, *on the facts of this particular case,* it was necessary that the separation should have been voluntary as to both on the very day it occurred (or really within four days thereafter), as the husband's bill was filed five years and four days after the date of the separation. In fact, a later part of the *Nichols* opinion, in properly distinguishing the *Campbell* case, reiterated the doctrine of that case that a separation originally involuntary as to one may become voluntary as to both later so that, five years after the beginning of the volun-

tariness, a divorce may be secured. The rule thus still stands that the separation need not be voluntary as to both from the first moment of the physical separation. Because of the time factor in the *Nichols* case, *that* separation had to be voluntary when it occurred, or never, as the facts indicated. There was no time for subsequent acquiescence.

III

But this proposition, so well established, and reiterated in the latest *Nichols* case, that the voluntariness may begin after the separation begins, seems impliedly to have been overlooked in the earlier *Beck* case, the other one here under review, which case is best described as *sui generis*. For its conclusion seems to be based upon the paradoxical principle that a deserted wife herself becomes a deserter by moving further away from the erstwhile deserting husband, despite that he does nothing overt to terminate his desertion of her.

That is the only conclusion one can draw from the dogmatic statement: "The first abandonment was by the husband; the second was the act of the wife." This referred, respectively, to the husband's moving to the bedroom of the son, and the wife's moving to other quarters six months later. Under the Maryland law of desertion and abandonment, which recognizes that denial of sexual intercourse is a constructive abandonment,[14] if the husband was a deserter when he moved to the separate bedroom, it was because he then intentionally (voluntarily) wished to cease living with his wife, although, if he was in law a deserter, the theory is that his thus leaving was against the wishes of the wife. Thus the Court indicates that the separation, at least for the six months she remained under the same roof, was involuntary as to her.

But, why did not the separation become voluntary as to her when, six months after he moved to a separate bedroom, himself a deserter, she accepted the situation and completely removed herself from the premises. If she did "abandon" him by leaving the house, as the Court said, does she not *ipso facto* assent to separation. Part and parcel of abandonment as it has been spelled out under the older divorce ground of that name is that the separa-

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[14] As decided in Fleegle v. Fleegle, 136 Md. 630, 110 A. 889 (1920); Ruckle v. Ruckle, 141 Md. 207, 118 A. 472 (1922); and many cases since those.

tion shall be voluntary as to the abandoning spouse.[15] There are *dicta*, at least, to the effect that insanity or imprisonment stops the running of a period of desertion not yet complete because it then can no longer be wilful (voluntary) as to the defendant.[16]

Nothing overt on the part of the husband occurred to put an end to his (voluntary) abandonment of her which he committed by moving to a separate room. Disregarding the anomaly of the word 'abandonment' as used by the Court of Appeals in this connection,[17] could this be other than a "husband and wife [who] have voluntarily lived separate and apart."[18] Can one spouse do acts which would otherwise amount to desertion, which are acquiesced in by the other, and be heard in a court of equity and conscience to plead that the separation was not voluntary? Clearly, a plaintiff who brings suit under this statute admits consent. Clearly, a defendant can defeat the action by proving lack of consent on his part.[19] But may the defendant, guilty of desertion, defend the suit by proving that the separation was forced on the plaintiff *without contractual consent?* Is the statute designed thus to assist a wrong-doer? The Maryland courts, both trial and appellate, until the present case, have held that it was not. In a lower court case, *Mooyer v. Mooyer*[20] the only finding which the court deemed necessary was that the separation be voluntary as to the defendant, and beyond reasonable expectation of reconciliation. So finding, it granted the divorce. In *Campbell v. Campbell*[21] the Court ruled that whereas the original act of separation may have been involuntary on the part of the defendant, that nevertheless, *she* had subsequently consented (by a *tacit* recognition of a prior agreement) to the living apart, and the divorce

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[15] See *infra*, n. 17.

[16] See Noellert v. Noellert, 169 Md. 559, 182 A. 427 (1935).

[17] It is well established that desertion and abandonment require that the act be done *voluntarily* and against the consent of the other spouse. Taylor v. Taylor, 112 Md. 666, 77 A. 133 (1910); Buckner v. Buckner, 118 Md. 101, 84 A. 156, Ann. Cas. 1914B 628 (1912); Klein v. Klein, 146 Md. 27, 125 A. 728 (1924); Irr v. Irr, 150 Md. 313, 133 A. 56 (1926); Daiger v. Daiger, 154 Md. 501, 140 A. 717 (1928); Sheehan v. Sheehan, 156 Md. 656, 145 A. 180 (1929); Boyd v. Boyd, 177 Md. 687; 11 A. (2d) 461 (1940).

[18] Md. Code (1939) Art. 16, Sec. 40.

[19] As in France v. Safe Deposit and Trust Co., *supra*, n. 7; Miller v. Miller, *supra*, n. 9; Kline v. Kline, *supra*, n. 11; Riland v. Riland, Baltimore Daily Record, April 10, 1941 (Ct. Ct. No. 2, Balto. City, per Frank, J.).

[20] Baltimore Daily Record, March 9, 1939 (Ct. Ct. Balto. County, per Lawrence, J.).

[21] *Supra*, n. 3.

was granted. In *France v. Safe Deposit and Trust Co.*[22] the decision was that there never had been a consent *by the defendant* to living apart as contemplated by the statute and accordingly there was no divorce granted. In *Miller v. Miller*[23] and *Kline v. Kline*[24] the findings were that *the defendants* had not consented. So it was in the lower court case of *Riland v. Riland.*[25] Relief was refused in these cases.

This interpretation, consistently followed since the inception of the statute, has given remedy to the social and economic situation which the legislature desired to alleviate. However, this policy would seem to be completely overridden by the opinion in the *Beck* case. It states that a *voluntary separation* is a prerequisite, *necessitating contractual consent.*[26] This conclusion is contrary to the words of the statute, and to the interpretation thereof, as expressed in the leading cases.

The statute provides relief where the parties have "voluntarily *lived* separate and apart . . ." The adverb "voluntarily", here in dispute, is in modification of the verb "lived".[27] By the literal interpretation, the only requirement is the voluntary *living* apart for the requisite time, irrespective of fault at the time of separation. The purpose of the statute was to remedy a social evil, *a fait accompli,* and not to provide a contractual ground for divorce. The leading case of *Campbell v. Campbell* clearly held that a separation, originating under duress, may subsequently become voluntary, not necessarily when the parties agree by contract, *but when the party wronged is deemed to have withdrawn the objection.* A recent case, *Parks v. Parks,*[28]

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[22] *Supra,* n. 7.

[23] *Supra,* n. 9.

[24] *Supra,* n. 11.

[25] *Supra,* n. 19.

[26] "The separation to be voluntary, so as to entitle either party after five years' separation to a divorce, *must be founded on an agreement to separate and live apart.*" 24 A. (2d) 296 (italics supplied).

Compare this with the statement in Campbell v. Campbell, *supra,* n. 3, which concerns itself *only* with the volition of the *defendant:* "While the plaintiff was responsible for the original separation, . . . we are unable to hold, in view of the *defendant's long continued recognition and dependence* upon the agreement, that the separation therein referred to was *involuntary during the whole of the twelve-year period* which has elapsed since it was executed." 174 Md. 229, 239 (italics supplied).

[27] See (1938) 2 Md. L. Rev. 357, 362, discussing the Campbell case along the line that the statute merely requires that the parties shall have "voluntarily lived separate and apart" and does not require that they shall have "voluntarily separated".

[28] 116 F. (2d) 556 (C. A. D. C., 1940).

predicated on a similar statute in the District of Columbia[29] supports this interpretation of the *Campbell* case and very succinctly states the reasons therefor:

> "The separation was not at first voluntary on the defendant's part; when the plaintiff deserted her, she begged him not to go. But from that time on she neither asked him to return nor made any other attempt to bring about a reconciliation. It is perhaps a fair inference that she reconciled herself to separation. But that, we think, is not the question. Even if she did, in fact, wish her husband to return, in the course of time *her silent acquiescence in the separation made it voluntary in the statutory sense.* . . . The liberal purpose of the 1935 amendment points to this construction. That purpose was to permit termination in law of certain marriages which have ceased to exist in fact. This is such a marriage. *We think the defendant's silent acquiescence made the separation voluntary,* in the statutory sense, within less than a year after it began, and therefor more than five years before the plaintiff filed this suit. . . .
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> "The fact that the separation resulted from the husband's fault is no defense, *since the statute does not require* that the separation originate in any particular way. [Citing Campbell v. Campbell, *supra,* among other cases.] *It requires only that for five consecutive years the separation be voluntary*" (italics supplied).

The cases, and the statute itself, should have precluded the Court of Appeals from injecting the requirement of a contract into the divorce statute. The Court has translated the statutory "voluntarily" so as to make it mean "agreement" in the sense of "making a contract" when, at most, it should mean the state of being agreeable to the situation.

In the instant case, the Court, in quoting from *France v. Safe Deposit & Trust Co.* to the effect that " 'voluntary' connotes an agreement", has entirely misplaced the emphasis of that statement. It was there used to vindicate the rights of a defendant who was contending that the separation was, as to her, involuntary. If a defendant spouse has committed no wrong, any permanent separation is involuntary, unless there is "agreement" to it. But

[29] D. C. Code, Supp. V, Title 14, Sec. 63, providing as ground for absolute divorce: "voluntary separation from bed and board for five consecutive years without cohabitation".

certainly it is not necessary that there be a "meeting of the minds" or contractual undertaking. There may be a tacit "consent" (which would seem more proper in this connection than "agreement") or the failure to pursue the erring spouse with offers of reconciliation, which, in some cases, might conceivably imply consent.[30]

There are two possible arguments in opposition; that divorces may be promiscuously granted at the desire of the parties; or if not at the desire of both, then there is an adequate remedy under the "misconduct" provisions. The first argument is completely answered by the *raison d'etre* of the statute. In the interest of social benefit, a husband and wife, separated for five consecutive years, without other ground for divorce in favor of either one should be relieved of their marital burden. As prerequisites, the court must find the five years of voluntary separation and the futility of reconciliation. If we accept, as we must, the premise upon which the statute is founded, we serve only to defeat its purpose by limiting it to contractual separation.

Nor is there sound reason to refuse relief under this statute simply because there may be other grounds for divorce based on misconduct. Where a spouse has two different grounds for divorce, either one may be relied upon. There are also sound reasons why a plaintiff, who has been deserted or otherwise wronged, should be allowed to sustain suit under this statute, without inquiry as to the plaintiff's state of mind at the time of separation or during its continuance. Obviously, the social status is dissolved which the legislature intended should be dissolved, viz., one where a husband and wife have for five years lived separate and apart and without reasonable hope of reconciliation. Secondly, the plaintiff in bringing the action *admits* consent. If relief were refused on the ground that the defendant had deserted, would not the defendant be able to defend an action charging that desertion by the admission of consent? The question is at least debatable. Thirdly, proof is always a difficult burden in a divorce case. Should not the plaintiff be allowed to choose that ground for divorce which can best be proven? And further, is it not in the social interest to allow suit for divorce to be

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[30] See Mooyer v. Mooyer, *supra*, n. 20; Parks v. Parks, *supra*, n. 28; and Chabeaux v. Chabeaux, 164 Md. 370, 165 A. 301 (1933) which regarded the failure to make offer of reconciliation after a separation by mutual consent as indicative of the continuance of that consent so as to debar a divorce for desertion and abandonment.

maintained upon the ground which will result in the minimum of scandal and publicity?

The instant case has presented us with an amazing *dual* desertion. Resolving this to the realm of possibility, if the Court had found that the plaintiff was a deserter, the result, refusal of the divorce, would unquestionably be correct. If the defendant is found to be a deserter, it is submitted that a divorce should have been granted, since the plaintiff has admitted her consent not only by bringing the action, but also by allowing the separation to continue for such a long period (9 years) with her apparent approval.

This idea of tacit consent without any contractual agreement is not a new one under our statute, even though it would seem to be overruled here. As a matter of fact it is the very crux of the holding in *Campbell v. Campbell,* the leading case. For in that case, disregarding the separation agreement, the wife *successfully* defended an action for divorce in 1928 based on the charge of desertion by contending that the separation was voluntary as to the husband.

After 9 years, the husband again sued, this time under the "voluntary separation" statute, and without apparent difficulty reversed his position from that assumed in 1928. The wife, defending, reversed her prior position. There had been no agreement or understanding of any sort reached after the 1928 suit. But the Court held that the mere *tacit recognition of, and acquiescence in,* the situation as it was known to exist constituted a voluntary living apart within the statute.

In the *Beck* case, if the Court finds that the defendant had deserted his wife in 1930, and that the separation was recognized by the wife, without any attempted reconciliation or overtures thereto for over ten years, is there not the very same tacit consent upon which the *Campbell* case was based, and more especially if we view the "second desertion", not as a desertion, which it cannot be (the husband still assenting to separation) but as a physical recognition of the state of separation as it existed, and a physical manifestation of assent thereto.

Legislative intent and expression, and subsequent construction and interpretation by the courts make it incumbent upon the courts to find three facts present in order to grant a divorce under this statute. They must find that the separation has continued for the five years preceding

the filing of the bill, that there is no reasonable expectation of reconciliation, and that the separation is voluntary. To further impose the necessity of a "contractual" living apart is an unwarranted attempt at judicial legislation, contrary to the whole purpose of the statute, and also a clear departure from the rule of the much better reasoned *Campbell* case (itself reiterated by dictum in the latest *Nichols* case) that tacit acquiescence after separation otherwise begun is all that is necessary for the statute to apply.

It is not consonant with the realities to say that the voluntariness need not coincide with the beginning of the separation, but may come later, and still to require contractual agreement by way of a separation agreement or other contractual activity in order to spell out that subsequently arising voluntariness. Spouses who have drifted apart do not gather around a table much later to put their affairs in order for a divorce five years thence.

It is submitted that the unfortunate implications of the *Beck* case should either be overruled or forgotten by the Court of Appeals, to the end that the legislative intent in passing the statute and the proper interpretation of it in the *Campbell* case may be carried out. To do otherwise would be to pervert the meaning of the statute.

IV

Those who delight to speculate concerning the "secret equities" and "off the record" aspects of decided cases have an interesting opportunity to apply their techniques to the series of seven cases in which the Maryland Court of Appeals has had occasion to deal with the five-year separation ground. Only in the *Campbell* case was a divorce granted for that ground. In all the other six cases the ground was held inapplicable. Let us approach these seven cases first from the standpoint of the impact of the rulings on the personal interests of the parties (capacity to marry others), and then from the angle of the impact on the economic standing of the respective wives (alimony and support).

Looking at them from the standpoint of the personal interests of the parties, we see that the *Campbell* case alone granted the divorce on this ground. Of the six where the five-year ground was held inapplicable, however, the parties were divorced *a vinculo* for other reasons in the *Dotterweich, Miller,* and *Kline* cases. Of the remaining three, the personal aspects had become moot through divorce by the Grim Reaper himself in the *France* case, pending the

legal divorce case. One suspects that personal interests were the less significant consideration at stake in the *Nichols* case, where the spouses were both due to reach the age of eighty in the same year as the Court of Appeals ruling. Finally, even in the *Beck* case, the Court intimated that one or the other of the parties might be entitled to an *a vinculo* divorce for abandonment if properly sought and pleaded. What all this proves is left to the reader's speculation.

Let us now consider the impact of these seven rulings on the economic status of the respective wives. Let it be remembered by way of introduction that it is not yet clear under the statute whether a wife is entitled to permanent alimony when a divorce is granted for the five year ground and that the Court of Appeals has never had to face that issue squarely[31] (contractual support in the *Campbell* case; question moot by death of husband in *France* case; also moot in that case and in all the others by denial of divorce on the particular ground).

In the *Campbell* case, where the divorce was granted for this ground, support for the wife nevertheless resulted because of an agreement worded to survive divorce. In the *Miller* and *Kline* cases the husbands obtained personal relief from the chains of matrimony, but at the price of being ordered to pay permanent alimony to their wives, awarded on the stabler basis of the orthodox abandonment ground, without having to go into the question, does alimony follow for separation as a ground. Denying the divorce in the *France* case guaranteed the wife (thus reinstated as widow) her statutory portion and dower in the (already) deceased husband's (considerable) property. Denying it in the *Nichols* case not only preserves the wife's inchoate claims to his property should she survive him, but permits her to seek support *inter vivos* for his desertion of her which the Court (in the abstract) declared to have happened. In the *Dotterweich* case, the wife's own misconduct precluded her from being entitled to support by her husband; and in the *Beck* case the wife was not seeking it, was in fact self supporting, and sought to be divorced without support from the husband. Here, too, the reader is left to speculate as to the particular coincidences which seem to be involved.

[31] See (1938) 2 Md. L. Rev. 357, 360, marshalling the arguments pro and con on the alimony point. See *Ibid*, 361 concerning another point, still undecided under the separation ground, whether the plaintiff's recriminatory misconduct will bar him from a divorce.