

# Five Years Voluntary Separation as New Ground for Absolute Divorce - Campbell v. Campbell

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# Comments and Casenotes

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## FIVE YEARS VOLUNTARY SEPARATION AS NEW GROUND FOR ABSOLUTE DIVORCE

### *Campbell v. Campbell*<sup>1</sup>

Plaintiff-appellee-husband and defendant-appellant-wife separated in 1925 under a formal separation agreement. On June 1, 1937, husband entered suit for absolute divorce under a statute<sup>2</sup> taking effect that day which added to the causes for divorce *a vinculo matrimonii* that the parties had voluntarily lived separate and apart for five years and that the separation was beyond reasonable expectation of reconciliation. The defense was that the statute was defectively titled, unconstitutional, and not retroactive; that the separation had not been voluntary; and that the plaintiff had been guilty of recriminatory misconduct (adultery). The Chancellor held the statute valid, constitutional, and retroactive, the separation to have been voluntary, and the plaintiff's misconduct to be no bar even if proven. On four appeals in one record, defendant appealed from the decree granting the divorce, the order overruling her demurrer, and the second order refusing to require plaintiff to pay her solicitor a counsel fee; and plaintiff appealed from the part of the second order requiring him to pay the cost of printing the record on appeal. *Held*: Decree affirmed, second order affirmed in part and reversed in part, to the end that appellee must pay both the solicitor's fee and the costs.

This case is the first to reach the Court of Appeals under the recent statute adding a third supervenient ground<sup>3</sup> for absolute divorce in Maryland of five years voluntary separation beyond hope of reconciliation. Increasingly in recent years the American states have been adding this type of ground to the causes for absolute divorce. The purpose of this step is to give legal recognition to the reality of terminated marital relations. Setting up of this type of divorce ground is a frank departure from the entrenched

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<sup>1</sup> 198 Atl. 414 (Md. 1938).

<sup>2</sup> Md. Acts 1937, Ch. 396, amending Md. Code, Art. 16, Sec. 38.

<sup>3</sup> The other two supervenient grounds for absolute divorce in Maryland are adultery and three years deliberate and final abandonment beyond reasonable expectation of reconciliation, Md. Code, Art. 16, Sec. 38. There are also the three pre-venient grounds for absolute divorce of impotence, the pre-marital unchastity of the wife, and that the marriage was null and void ab initio, *Ibid*.

“misconduct” theory of divorce toward a more realistic basis of what is for the best interests of the parties and of society. In effect, under this type of statute, the parties are permitted to divorce themselves by mutual agreement, in the event that the stated period and recourse to the courts follow their voluntary separation. The statutory period is usually provided to be of such length as to preclude any danger of the scandal of hasty or too-easy divorce.

Eleven other states<sup>4</sup> have this type of divorce ground with varying periods including nine<sup>5</sup> which go even farther (by requiring merely a “separation” regardless of fault or voluntariness) and permit the guilty party to an involuntary separation to obtain a divorce after the requisite period. This latter idea apparently proceeds on the eminently sound theory that if the innocent party does not choose to proceed against the other for the misconduct for the stated period, it is tantamount to a voluntary separation. Our statute does not go this far and, in the principal case, the Court said that a separation caused by the misconduct of the husband would not be voluntary as to the wife, although it found that eventually the separation in question became voluntary as to both.

Some states apply the ground to spouses living apart under a partial divorce.<sup>6</sup> It is doubtful that this would follow in Maryland under the recent statute, although it is arguable that the plaintiff in the partial divorce (or even the defendant) could obtain an absolute divorce five years after the partial one was granted on the plausible theory

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<sup>4</sup> These states are Wisconsin, the District of Columbia, and the nine states listed in the ensuing footnote. While the later North Carolina statute does not require, in so many words, that the separation be voluntary, the courts have so interpreted it. The Texas statute, to a certain extent, requires the separation to be voluntary, by the rule that it shall not apply if either of the spouses be insane.

<sup>5</sup> These are Arkansas, Arizona, Kentucky, Louisiana, Nevada, North Carolina, Rhode Island, Texas, and Washington. Such a statute was passed in Illinois but held by the courts to be defectively enacted and invalid. Alabama has such a ground in favor of the wife only but, as it requires that the husband shall also have failed to support the wife for the last two years of the five year period, this statute is better classified with the “misconduct” grounds.

<sup>6</sup> The statutes of the nine states listed *supra* note 5 are capable of being interpreted to cover separations under partial divorces. Louisiana, Wisconsin, and the District of Columbia have specific statutes providing for absolute divorce after partial divorce, in addition to statutes providing for absolute divorce after a stated period of separation. Minnesota and Virginia provide for absolute divorce after partial divorce without having general separation statutes. West Virginia formerly did likewise but has apparently now abolished partial divorce as Florida has long since. North Dakota grants partial divorces for a limited period only and they will be revoked if no reconciliation occurs by then.

that the defendant's original misconduct "consented" to plaintiff's leaving him and that plaintiff's seeking, obtaining, and being content for five years with the partial divorce decree indicated her willingness to live apart, so that there would be five years of voluntary separation on the part of both. This point may be largely moot, however, at least as to the plaintiff, who could, in many cases, obtain the absolute divorce after three years from the original misconduct on the ground that the desertion and abandonment (were that the cause) had continued for three years or that the cruelty or vicious conduct had worked a constructive abandonment for that period.<sup>7</sup>

This novel ground was projected into the divorce scene without containing any legislative solution of the myriad incidental problems in divorce procedure posed by it.<sup>8</sup> The *Campbell* case solved some, viz., the ephemeral ones of constitutionality and retroactivity, and the more permanent one of counsel fees, suit money and (inferentially) temporary alimony. Difficult questions of permanent alimony, recriminatory misconduct, and of the nature of the proof (including corroboration) remain.

The Court easily disposed of the constitutional objection that the title of the Act was defective, and almost as readily (from the wording) found a legislative intention to have the Act apply to separations begun before its effective date. The Court found it constitutional to make such a divorce ground retroactive, as divorce is concerned with remedies rather than with property rights, and it is within the power of the legislature to create new divorce grounds for the good of society.

The Court held that the usual rule that the husband must pay the fee of the wife's solicitor and the costs, including the printing of the appellate record, applies to litigation under this divorce ground as well as to that under the older "misconduct" grounds. It was not necessary to go into the question of alimony *pendente lite* as the wife was already receiving support under the separation agreement. But for this it would seem clear that the husband would have

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<sup>7</sup> The three causes for divorce *a mensa et thoro* in Maryland are cruelty of treatment, excessively vicious conduct, and abandonment and desertion, Md. Code, Art. 16, Sec. 39. Such cases are customarily litigated on the basis either of cruelty or desertion, as the Court of Appeals has not yet held any particular type of conduct to be "excessively vicious".

<sup>8</sup> No attempt will be made herein at citation of cases interpreting the statutes of other states creating similar divorce grounds. Cases from the other states are collected in the following annotations: 51 A. L. R. 763, 97 A. L. R. 985, and 111 A. L. R. 867. Such cases may also be located in the annotated codes of states having similar provisions.

to pay such temporary alimony, by analogy to the requirement of counsel fees and suit money. In fact, in this case the husband was forced to pay the fee in the face of the wife's disclaimer of it in the separation agreement. The Court avoided applying the disclaimer on the theory that the agreement ante-dated the enactment of the divorce ground and could not have contemplated litigation under it. Awarding a fee and suit money in the face of such an agreement indicates that the Court would surely award fee, costs, and temporary alimony were there no agreement.<sup>9</sup>

Permanent alimony under the statute presents a more difficult problem, unnecessary to be solved in the principal case because of the support by agreement. The question is, may a wife who proceeds as plaintiff under the statute be awarded permanent alimony if there is no agreement providing for her support? It is submitted that she should not be for several reasons. One is the historical argument that permanent alimony in Maryland has traditionally been awarded only to an innocent wife because of the misconduct of a guilty husband. The new statutory ground does not involve misconduct. Another argument is that the statute is mutual, permitting either spouse to divorce the other after the five year period. As a wife may not receive permanent alimony when she is divorced, it would be anomalous to grant it to her as plaintiff for this ground merely because she was first in the race to the court house upon the completion of the five year period.

But the best argument against permanent alimony under the statute is that, by hypothesis, when the wife sues (there being no contractual alimony) she has consented to a separation without exacting any provision for her support and, thereby, has waived any claim to compulsory support from the husband. She should either demand promised support when she consents to the separation, refuse such consent, or be deemed to have waived her rights. If the husband had committed recognized types of misconduct, she should seek the permanent alimony on such basis under the older practice.

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<sup>9</sup> Such cases would come, of course, under the 1935 statute, Md. Code Supp., Art. 16, Sec. 16A, which provides: "In all cases where alimony or alimony pendente lite and counsel fees are claimed, the court shall not award such alimony or counsel fees unless it shall appear from the evidence that the wife's income is insufficient to care for her needs." It is interesting to note that this statute does not include within its purview the costs of the case, including the printing of the appellate record. Presumably, the husband may, then, be compelled to pay such costs as before the statute.

Another important point left unanswered in the *Campbell* case is the effect of plaintiff's otherwise recriminatory misconduct on his right to an absolute divorce for the five year's separation. While the Court said if the separation was *caused* by plaintiff's misconduct it would not have been voluntary on the part of the defendant, yet it refused to decide whether *other* misconduct of plaintiff than that possibly causing the separation would debar him from divorce under the rule of recrimination which applies to the traditional misconduct grounds. The trial court opinion said that if defendant's allegations of plaintiff's adultery could be proven, such misconduct would, nevertheless, be no bar to relief under the statute. The Court of Appeals found the adultery not proven and refused to commit itself whether it would have been a bar had it been proven.

It is submitted that the statement in the trial court opinion is a correct interpretation of the rule under the new divorce ground and represents the view which ultimately should receive the approval of the Court of Appeals. That this is the correct view is shown by an analysis of the recrimination rule as usually applied to the misconduct grounds for divorce. The recrimination rule is a derivative of the "clean hands" doctrine of Equity which holds that a plaintiff who seeks a divorce for defendant's misconduct should have no cause to complain thereof if he himself had committed equal or greater misconduct.

But this logic fails of application to this novel ground for divorce which does not involve any misconduct of the defendant. The "clean hands" of the plaintiff are immaterial when the case is not concerned with the "unclean hands" of the defendant. The whole recrimination defense is tied up with the misconduct theory of divorce which has been totally departed from in this added ground. Hence it has no application.<sup>10</sup>

Perhaps the most difficult problem posed by the statute is that of proof—including the ever present one of corroboration. The key word "voluntary" suggests difficult legal and factual questions. The "beyond any reasonable expectation of reconciliation" element should not cause as much trouble as it has long been a part of the older three year abandonment ground. The Bar has apparently long

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<sup>10</sup> Of the other possibly applicable divorce defenses, collusion is mentioned in the text, *infra*; connivance is, by nature, inapplicable to this type of divorce ground; while condonation by marital relations would, of course, be a bar as the statute requires that the parties shall have lived apart "without any cohabitation" for the five years preceding the suit.

since mastered the technique of mustering sufficient proof of this element.

The Court had occasion in the principal case to go into the question of what makes for voluntariness, inasmuch as, nine years earlier, and after the separation had already continued three years, plaintiff had unsuccessfully sued defendant for absolute divorce for three years abandonment. The Court said that up to that time at least it was indicated that the separation was not voluntary on the part of the plaintiff. However the Court was able to find that for at least the five years next preceding the instant case the separation had been voluntary as to both parties, particularly as defendant's successful defence to the earlier case was predicated on the voluntariness of the separation, and she had since accepted the benefits of the agreement.

Thus we can take it that the case stands for the principle that a separation which was not voluntary as to both parties in its inception may become so after it has commenced and so, five years after the latter time, become ripe for a divorce. This is both a desirable rule and an accurate exposition of the statute which provides for divorce when for five years the spouses shall have "voluntarily lived separate and apart" and not "shall have voluntarily separated". This is analogous to the rule for abandonment which provides that a separation begun under circumstances whereby the defendant was not, then, a deserter may—by supervening circumstances—turn into one in which defendant does (constructively) abandon plaintiff.<sup>11</sup> The emphasis under the new statute is thus placed on the conduct of the parties toward each other for the statutory period preceding the divorce case and not on the confusing situation which may have existed at the more remote time of their original separation.

The requirement of corroboration of the plaintiff<sup>12</sup> would apply to divorces under this ground. While at first the danger usually believed to be avoided by the rule—that of collusion—would seem to be little likely of being present, yet it actually may arise. The new ground, itself, is a departure from the public policy against collusive divorces, but there is still some danger of collusion, i. e., that the parties might collusively attempt to persuade the court of the voluntariness of the separation or of its continuance for

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<sup>11</sup> As by defendant's unreasonable rejection of plaintiff's bona fide offer of reconciliation made after a separation begun earlier without defendant having been guilty of desertion, or by defendant's formation of the intent to abandon after a separation begun without such intent.

<sup>12</sup> Md. Code, Art. 35, Sec. 4.

five years when, in fact, it had not been both voluntary and continuous for five years. Then, too, the other danger sought to be avoided by the corroboration rule, i. e., that of plaintiff's perjury in an effort to obtain a divorce against the wishes of the defendant is as much present under this ground as under the misconduct type.<sup>13</sup>

The new statutory ground must be considered in connection with the earlier statute of 1931<sup>14</sup> which legalized separation agreements and provided that the spouses' executing one should not prevent the obtention of a divorce for grounds otherwise existent. The earlier statute made it possible to execute such an agreement without prejudicing the right to a divorce. The later one further provides that such an agreement, or any voluntary separation, shall lay the ground for a divorce itself.

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<sup>13</sup> On one aspect of the requirement of corroboration, see Note, *Need for Corroboration of Plaintiff in Suit for Alimony Without Divorce* (1937) 1 Md. L. Rev. 266.

<sup>14</sup> Md. Code Supp., Art. 16, Sec. 39A.