# MARGARET S. HILL, Petitioner, e. SAMUEL D.

HILL, Respondent.

MOTION FOR REARGUM BNT•

Argued March 11, 12, 1959. Decided April 24, 1959.

1. On a motion for reargument the Supreme Court is required to consider only such points of law as were raised on the original argument and overlooked by the Court.
2. Under a statute authorizing the granting of a decree of divorce for wilful desertion for a specified period of time, a divorce may be granted where the statutorily specified period of time elapsed at the time of the hearing, although the suit was instituted prior to the expiration of such period of time.
3. Where an action of divorce for wilful desertion was instituted before the ex- piration of the statutorily prescribed period of time, but was withdrawn and subsequently reinstated after the expiration of such period of time, a decree of divorce was properly granted.

On motion for reargument of a decision of this Court

affi rming a decree of divorce against the petitioner, no-

/to n *den red.*

*R. F. D. Smallwood law Association* for petitioner.

*Mom olu S. Goo p er* for respondent.

MR. J USTICE HARRIS delivered the opinion of the

## Court.\*

The above-entitled case was disposed of during the October, '9f 8, term of this Court, with judgment in favor of the present respondent. The present petitioner (de-

fendant in an action of divorce for desertion in the court below) , feeling that some important points of law had been inadvertently overlooked, filed a petition in the of- fice of the clerk of this Court for a reargument of the case. Mr. Justice M itchell, one of the concurring Justices in- dicated his desire to have said case reargued. Although the petition for reargument contains five counts, the only

* + Alr. J ustice Pierre was absent because of illness and took no part in this case.

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one stressed by counsel for the appellant was Count “3›” which reads as follows:

“That our statute on desertion makes it mandatory that a period of twelve calendar months of wilf ul desertion expire before a party would be entitled to a divorce on this ground. Appellant submits that there is no show- ing that she refused to live with appellee any time be-

fore June, '9s\*, according to appellee’s own witnesses, and that, taking for argument's sake that she did refuse in June, August or October, as alleged by ap pellee, nevertheless the period of time from June, '9s°, to

February 2°› 957› the date of appellee’s complaint

would not be one calendar year, in which case the

statutory time would not have expired.”

The petitioner, in arguing the said count of his petition before this bar, contended that the first action of divorce for desertion was filed on September zo, '9s°› and with-

drawn and refiled on February •°› 9s7 establishing as

the date of the commencement of the desertion, February

°. 9s ; that the time from the date when the desertion is alleged to have commenced to the time of the with-

drawal and refiling being approximately seven months, the plaintiff should have waited a period of approximately five months longer before refiling his action, which would have completed the twelve calendar months of desertion before the cause of action would have accrued ; for, in Iact, from the filing of the action to its withd rawal, all avenues for the negotiation of peace and for the wife to return to her marital duties were closed and therefore could not be computed as a portion of the twelve ca len- dar months, or one calendar year, and hence the statutory time had not expired ; and therefore plaintiff was not en- titled to his divorce. This Court has said in Syllabus “i” of *I lark e* v. *Barbour,* z **L.L.R.** i$ ( 9O9) :

“Courts will only decide upon issues joined between

the parties specially set forth in their pleadings.” Upon the authority of the decision cited, *su pra,* let us have

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recourse to the pleadings in the case itself and see if such an issue was ever raised.

The pleadings ended with the reply of the plaintiff. In Count “3” of defendant's answer we have the following: “3. And also because defendant says that plaintiff, during the September, 936, term of this court, in- stituted an action of divorce for desertion against defendant. Defendant appeared and answered.

The cause was called for hearing during the De- cember, 936, term of this court. The plaintiff rested evidence; but before the defendant could produce witnesses, the Judge disbanded the jury and awarded a new trial. Thereupon the plaintiff unreservedly withdrew his entire action, and since that time, that is, about fifteen days ago, the plain- tiff has not asked his wife to return to her marital vows, neither has he shown her a place where she could live with him. Defendant submits that plaintiff could not bring another action of divorce until a year had expired after he withdrew his en- tire previous action. Defendant prays the court to take judicial notice of its record. And this the defendant is ready to prove.”

The plaintiff in replying to the above count of the de- fendant's answer, alleged the following in Count “ ” of his reply:

“ . And also because, further, to Count ‘S' Of the an- swer, plaintiff says that the law governing the filing, withdrawal and amendment of complaints permits the plaintiff to withdraw his action and

amend or file a new one at any time before the cause is ready for trial, and there is no requirement that he wait for another period of time to elapse before he files his new complaint, once the cause of action has accrued. Wherefore plaintiff prays that Count ‘3’ of the answer be dismissed. And this plaintiff is ready to prove.”

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I t would be well to mention that, during the argument of the matter before this Court, we inquired as to whether the plaintiff actually withdrew his action without reserva- tion ; but the notice of withdrawal itself proved that the cause was withdrawn with reservation. From Count “4” of defendant’s answer, it can be clearly seen that the only issue raised by defendants as to a time element was: “De- fendant submits that plaintiff could not bring another ac- tion of divorce until a year had expired after he withdrew his entire previous action. ”

N owhere in the answer of the defendant (which was the only pleading filed by her, pleadings having rested with the reply of the plaintiff) is it contended that the period of time intervening between the filing of the first action and its withdrawal and refiling could not be com- puted as a portion of the calendar year required by statute to elapse before a cause of actlon for divorce on the ground of desertion could accrue. I t then necessarily and logically follows that this Court has made no mistake by inadvertently overlooking any Iact or point of law raised in the pleading, brief or argument of defend ant-appell ant in this case. But for argument’s sake, supposing such a

contention had been raised, as presented in Count “3” Of the petition for reargument, it is the opinion of this Court that it would be untenable.

“Desertion is not only a specific act but a continuing course of conduct. Hence it is a general rule that desertion in order to constitute a cause for divorce must have continued for the time specified by the stat- ute, next before the commencement of the proceedings for the divorce. There are, however, decisions to the effect that, under a statute authorizing a divorce for wilful desertion for a specified time, a divorce may be granted where the time specified had elapsed at the time of the hearing though the libel was filed before such time.” i 4 R.C.L. 36i —62 *Dtzorce and Se para-*

*fion* § id.8.

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I t is clear from the citation of law quoted, *su pra,* that the time specified by statute to elapse before an action of divorce can be granted need not necessarily elapse before the filing of the action, but must have elapsed before or at the time of the hearing of the cause. In the instant case, the date of the commencement of the desertion is al- leged to have been on February i 2, 95\*; the action was

### withdrawn and refiled on February 26, 957. a little over

one calendar year or twelve months thereaf ter, which

makes the petition for reargument unmeritorious.

### The motion for reargument is therefore denied, and it is so ordered. Costs to be paid by the appellant- petitioner.

*Motion denied.*