ment evident that the plaintiff has failed to plead the damages claimed with the requisite specificity and has, indeed, left the defendant "in the dark" as to the procedure followed in arriving at the "area" of damages claimed.

Since we have concluded that the defendant's motion for a more specific pleading of paragraph seven of plaintiff's complaint will be granted, it is unnecessary to consider his motion to strike. We do note that the defendant has included within his motion to strike paragraph seven the plaintiff's ad damnum clause on the grounds that that clause as well as paragraph seven claim unliquidated damages for items of special damages which must be specifically pleaded. The defendant failed to address the motion to strike the ad damnum clause in his brief, and we will consider that aspect of the motion abandoned.

Parenthetically, we note that the plaintiff's ad damnum clause demands judgment in excess of $10,000.00 plus interest and costs. A review of Pa. R.C.P. 1021 and 1044 (b) would be advisable.

ORDER OF COURT

NOW, this 29th day of July, 1980, the defendant's preliminary objection in the nature of a motion for a more specific pleading as to paragraph seven of the plaintiff's complaint is sustained. All other preliminary objections are overruled.

Exceptions are granted the parties.

NAUGLE AND WIFE v. TOWNSHIP OF WASHINGTON, C.P. Franklin County Branch, A.D. 1977 - 222

Preliminary Objections - Pa. R.C.P. 1030 - Municipal Law - Governmental Immunity

1. Pa. R.C.P. 1030 mandates that governmental immunity as an affirmative defense be raised in a responsive pleading.

2. Where one party objects to the other party's violation of Pa. R.C.P. 1030 and the substantive merit of the defense of immunity is not apparent on the face of the complaint the Court will sustain the party's motion to strike.

3. The date of accrual of a cause of action against a municipal body for approving conditions of a land development plan is when the party suffers actionable damages, not when the plan is approved.

4. The doors of the court room are open to negligent acts allegedly committed by municipal bodies prior to the abolition of governmental immunity by the Pennsylvania Supreme Court in *Ayala.*

John A. Ayres, Jr., Esq., Counsel for Plaintiffs.

Stephen E. Patterson, Esq., Counsel for Defendant.

OPINION AND ORDER

KELLER, J., February 19, 1980:

This action in trespass was commenced by the filing of a complaint on November 22, 1978, which inter alia alleged construction of an inground swimming pool by the plaintiffs on their real estate; the approval by the defendant of a developer's (Mar-Penn, Inc.) plot plan with conditions and stipulations as to drainage and the posting of a performance bond; the defendant's final approval of the subdivision plan of developer; the development and sale of lots by the developer; the increased flow of surface water on the lands of the plaintiffs, and the giving of notice of the same by the plaintiffs to the defendant; the bulging and ultimate collapse of plaintiffs' swimming pool as a result of flooding; and that the defendant negligently waived maximum grade drainage requirements and failed to compel the developer to comply with ordinances of the defendant. On December 12, 1978, and December 18, 1978, the defendant filed preliminary objections in the nature of demurrers, motions to strike complaint, and motions for a more specific complaint. The demurrer in the December 12, 1978 preliminary objections alleged the defendant to be governmentally immune from liability as a political subdivision of the Commonwealth. On January 2, 1979, the plaintiffs filed preliminary objections in the nature of a motion to strike to the defendant's demurrer alleging governmental immunity. The matter has been argued and counsel have submitted briefs, supplemental briefs and other authorities in support of their respective positions. The matter is now ripe for disposition.

Preliminarily, we note that the plaintiffs have agreed to amend paragraphs 25 and 26 of their complaint to meet defendant's preliminary objection 2(1). The plaintiffs have also agreed to amend paragraphs 5(A) and 26(A) to meet defendant's preliminary objection 2(2). Similar compliance has been agreed to by the parties to meet defendant's preliminary objections 2(5), 3, 5 and 6. The plaintiffs have withdrawn their preliminary objection No. 2 to the defendant's preliminary objections.

The preliminary objections remaining to be disposed of therefor are: Defendant's preliminary objections filed December 12, 1978, Nos. 1, 2(3), 2(4), 2(6), 2(7), 4, 7 and 8, and defendant's preliminary objection filed December 18, 1978 No. 2; and plaintiffs preliminary objection No. 1 to the defendant's preliminary objections.

The demand of the defendant that judgment be entered in its favor for plaintiffs' failure to state a cause of action on the basis of alleged deficiencies in complaint paragraphs 25(B)(4), 25(C)(1), and 26(C) is denied.

Defendant's preliminary objection No. 4 in the nature of a motion to strike is granted. The allegations of paragraph 25(C)(2) are impertinent to plaintiff's claim for damages.

The defendant's preliminary objections Nos. 7 and 8 in the nature of motions for a more specific complaint as to paragraphs 24 and 25(A) of the complaint are granted. The plaintiffs are directed under Pa. R.C.P. 1019(f) to aver with specificity the date of the collapse of their swimming pool, and under Pa. R.C.P. 1019(a) to aver the material fact of the grade approved which plaintiffs allege constituted an unreasonable or negligent grant of the variance.

The defendant's preliminary objection filed December 18, 1978 is captioned "Amended Preliminary Objections," and is in the nature of a demurrer demanding judgment in its favor on the grounds that the plaintiffs have failed to show "collection and diversion of surface water" from lands owned by Mar-Penn, Inc. onto the lands of plaintiffs. We fail to see the relevancy of this demurrer to the complaint against Washington Township, for the plaintiffs have complained of the negligent acts of the township in approval of an allegedly deficient or defective plan, failure to enforce township ordinances and failure to compel the developer to comply with the conditions and stipulations imposed by the defendant as a condition of plan approval.

The effect of the actions of the developer regarding drainage of surface waters from Mar-Penn Estates would involve a full consideration of the drainage law of the Commonwealth of Pennsylvania, and aspects of the negligence law relevant thereto. The case at bar, however, deals directly with the liability of a municipal body for approval and enforcement of approval conditions of a land development plan. The plaintiff's complaint, and specifically paragraph 17, aver that their injury resulted from a lack of an installed surface water drainage system adequate to divert and carry increased surface water away from their property. In our judgment the plaintiffs have averred

sufficient facts to state a cause of action against the defendant. The defendant's demurrer will be denied, and defendant's amended preliminary objection dismissed.

The plaintiffs have preliminarily objected to defendant's first preliminary objection on the grounds that the defense of governmental immunity may not be raised by way of a demurrer. Pa. R.C.P. 1030 provides:

> "All affirmative defenses, including but not being limited to . . . immunity from suit . . . shall be pleaded in a responsive pleading under the heading 'New Matter.'"

Extensive research indicates that numerous cases have been decided by the appellate courts of Pennsylvania where the opposing party has not objected to the improper use of preliminary objections in the nature of a demurrer to raise the issue of immunity; but it also appears those appellate courts have not condoned the disregard of the Rules of Civil Procedure. In *Freach v. Commonwealth*, 471 Pa. 558, 370 A. 2d 1163 (1977), the Supreme Court of Pennsylvania affirmed the action of the Commonwealth Court in sustaining preliminary objections of the Commonwealth and certain Commonwealth agencies or bodies based on the defense of governmental immunity where the plaintiffs had not objected to the procedure followed by the defendants. However, in a footnote to the opinion the Supreme Court stated:

> "It is to be noted that immunity from suit is an affirmative defense which should be pleaded under the heading 'New Matter' in a responsive pleading; it is not properly raised by preliminary objections. See Pa. R.C.P. 1030. Since, however, the plaintiffs-appellants did not object at any point in the proceedings before the Commonwealth Court to the manner in which the issue of immunity was raised and the Commonwealth Court decided the immunity questions on their merits, we will do likewise. By so doing we do not condone the disregard of the Pa. Rules of Civil Procedure by appellees. See also the dissenting opinion by Judge Crumlish in this case, 23 Pa. Cmwlth. 546 at 553, 354 A. 2d 908 at 912." (p. 564-5 n. 6; p. 1166-7 n. 6.)

In *Sharp v. Commonwealth, Secretary of Transportation*, 29 Pa. Cmwlth. 607, 608 n. 1, 372 A. 2d 59, 60 n. 1 (1977) and *McElwee v. Commonwealth, Department of Transportation*, 30 Pa. Cmwlth. 320, 321 n. 1, 373 A. 2d 1163, 1164 n. 1 (1977), the Commonwealth Court cited *Freach*, supra., quoting the footnote of that case and adding:

> "Since plaintiffs did not object to the manner in which the issue of immunity was raised, we will, in the interest of judicial economy, decide the issue on the merits."

In both of these cases the preliminary objections were sustained. The same result was achieved in *Sheppard v. Central Penn National Bank*, 31 Pa. Cmwlth. 90, 375 A. 2d 874 (1977) where, without objection, statutory immunity was asserted by way of demurrer. The Commonwealth Court again cited *Freach*, supra., and decided the merits of the preliminary objections "in the interest of judicial economy." Despite the decisions of the Supreme Court and Commonwealth Court to address the issue of immunity, each court has in each case clearly indicated that Pa. R.C.P. 1030 mandates that immunity as an affirmative defense be raised in a responsive pleading.

In another line of cases the appellate courts of Pennsylvania have reached the merits of immunity despite the fact that the issue was improperly raised by preliminary objections because the substantive merit of the defense was apparent on the face of the complaint. In *Iudicello v. Commonwealth, Department of Transportation and Jacob Kassab*, 34 Pa. Cmwlth. 361, 363, 383 A. 2d 1294, (1978), the Commonwealth Court held:

> "First, it is plaintiffs' position that immunity from suit is an affirmative defense and can be raised only by way of answer and new matter under Pa. R.C.P. 1031. They agree that this court has, in a number of recent cases, disposed of immunity matters on preliminary objections. . .However, plaintiffs distinguish these cases saying that no objections was made by the plaintiffs in those cases and objection is being raised here. Recognizing considerable merit in plaintiffs' position on this procedural point, we can see no possible benefit to anyone in dismissing these preliminary objections and requiring an answer to be filed and having this matter more appropriately raised as new matter. When it is transparently clear on the face of the complaint, as it is here from plaintiffs own allegations, that the Commonwealth is immune we will consider the matter in its present posture and thus expedite the disposition of the case. . ." (See also *Commonwealth ex rel. Milk Marketing Board v. Sunnybrook Dairires, Inc.*, 32 Pa. Cmwlth. 313, 379 A. 2d 330 (1977), *Harris v. Rundle*, 27 Pa. Cmwlth, 445, 366 A. 2d 970 (1976); *Schuman's Village Square Drugs, Inc. v. Stern*, 14 Pa. Cmwlth. 559, 322 A. 2d 431 (1974); *Beisel v. Zerbe Twp.*, 3 D&C 3d 355 (1977).

It is instructive to note that the majority in *Greenberg v. Aetna Insurance Co.*, 427 Pa. 511, 235 A. 2d 576 (1967), held

that under Pa. R.C.P. 1017(b) where plaintiffs' complaint or pleading shows on its face that the claim cannot be sustained, preliminary objections are an appropriate remedy, and that immunity can be raised under Pa. R.C.P. 1017(b) stating that:

> "If the law or the rule were otherwise, it would mean long and unnecessary delays in the law - delays which courts are strenuously trying to eliminate or reduce - and it could not aid plaintiff at the trial or affect the result." (p. 518)

In a dissenting opinion Mr. Justice Jones urged strict adherence to the Rules and observed that where the courts have decided the issue of immunity improperly raised by preliminary objections, the procedural question had not been raised. The dissenting opinion also observed that adherence to the Rules of Civil Procedure would not result in delay, "in view of Pa. R.C.P. 1035 which provides an efficient and expeditious method for determining the issues involved." (p. 521)

We can, therefore, conclude that the Pennsylvania Appellate Courts to not condone a disregard of the clear and precise language of the Rules of Civil Procedure. When the issue of immunity is raised by preliminary objection in violation of Pa. R.C.P. 1030, the appellate courts have decided the issue (1) where no objection to the procedural error has been made by the opposing party, or (2) where the substantive merit of the defense of immunity is patently apparent on the face of the pleadings.

In the case at bar, the plaintiffs have objected to the defendant's violation of Pa. R.C.P. 1030 and the substantive merit of the defense of immunity is not apparent on the face of the complaint. We, therefore, conclude that this Court must sustain the plaintiffs' motion to strike the defendant's preliminary objection No. 1 raising the defense of immunity.

Having disposed of all of the preliminary objections, it would at this stage be appropriate for the Court to conclude this matter by the entry of an Order. However, counsel for both sides have exhaustively researched the issue of immunity, and presented excellent briefs in support of their respective positions. In recognition of the efforts expended by counsel and the undoubted expenses incurred by the parties, we conclude that it would not be inappropriate for the Court at this stage to discuss its view of the immunity defense for the guidance of counsel.

As previously noted, the defendant contends via its preliminary objection that the plaintiffs' complaint fails to state a

cause of action against the defendant because the defendant is governmentally immune. The defendant bases its contention upon the factual time sequences of the case contending that plaintiffs' cause of action accrued prior to May 23, 1973, the date on which the doctrine of governmental immunity was abolished by the Pennsylvania Supreme Court in *Ayola v. Philadelphia Board of Public Education*, 453 Pa. 584, 305 A. 2d 877 (1973).

The plaintiffs seek redress for a loss sustained by them which they aver was caused by the negligent acts of the defendant. The loss was the deterioration and subsequent collapse of their swimming pool during the winter of 1974 (Complaint, paragraph 21) and spring of 1975 (Complaint, paragraphs 22, 24), which plaintiffs aver was due to an increased volume and rate of flow of surface water. The negligent acts of defendant which plaintiffs plead as the proximate cause of their injury are listed in paragraph 25 of the complaint, and deal with the defendant's approval of the subdivision plan known as Mar-Penn Estates (Franklin County Deed Book Vol. 288A, Page 259; Franklin County Deed Book Vol. 678, Page 611; Complaint, paragraph 6.); defendant's failure to enforce certain conditions and stipulations of the approval and defendant's failure to enforce its own ordinances. Final approval of the plan was granted on December 6, 1971. (Complaint, paragraph 10.)

Although the Supreme Court of Pennsylvania abolished governmental immunity of townships on May 23, 1973, in *Ayala*, supra., the Legislature of Pennsylvania by the Political Subdivision Tort Claims Act, Act of November 26, 1978, P.L. 1399, No. 330, Sec.101 et seq., 53 P.S. 5311.101 et seq. reinstated governmental immunity with certain specific exceptions effective January 26, 1979. The plaintiffs' complaint was filed on November 22, 1978 during the period between the announcement of the *Ayala* decision and the effective date of the Political Subdivision Tort Claims Act. Both parties have provided the Court with briefs exhaustively reviewing the issue of the time when an action "accrues" at law. However, in our opinion the basic effect of immunity upon tortious conduct is more germane to the resolution of the "retroactivity of *Ayala*" question presented in the instant case.

Even though a defendant has negligently or intentionally invaded the interests of another, the act may be prevented from being a tort by privilege or justification or excuse. *Prosser on Torts*, 4th ed., Chapter 4. The difference between the legal effect of privilege and immunity is described as:

> "Privilege avoids liability for tortious conduct only under particular circumstances, and because these circumstances make it just and reasonable that the liability shall not be imposed, and so go to defeat the existence of the tort itself. An immunity, on the other hand, avoids liability in tort under all circumstances, within the limits of the immunity itself; it is conferred, not because of the particular facts, but because of the status or position of the favored defendant; and it does not deny the tort, but the resulting liability." Prosser, Torts 4th ed. p. 970.

Thus, when governmental immunity is a viable defense the facts may establish that a party suffered damages from a negligent act of another, the actor would be liable to the damaged party for the losses sustained but for the availability of the legal shield of governmental immunity. Immunity, when applied, prevents the tortious actor from being sued by the injured party. The courtroom doors are closed to the plaintiff, even though he can demonstrate that actual damage was sustained by the wrongful conduct of the tortfeasor.

When the Supreme Court of Pennsylvania in *Ayala* abolished the defense of immunity upon which Washington Township presently relies, it opened the courtroom doors to plaintiffs who sustained injury by the negligent acts of townships. The Supreme Court stated at p. 885: "We closed our courtroom doors with legislative help, and we can likewise open them." In other words, when governmental immunity was abolished on May 23, 1973, the "shield" of immunity was removed from the defendant; the plaintiff was free to enter the courtroom to seek redress for damages sustained.

The tortious acts of the defendant school district in *Ayala* occurred prior to the accident in which the plaintiff was injured, and necessarily at a time when the school district was shielded from suit by governmental immunity. Suit was permitted by the Supreme Court, however, because "local government units. . .are no longer immune from tort liability." The Supreme Court in *Ayala* footnoted the United States Supreme Court on this point:

> "In *Great Northern Ry. Co. v. Sunburst Oil and Refining Co.*, 287 U.S. 358, 364, 53 S. Ct. 145, 148, 77 L. Ed. 360 (1932), the United States Supreme Court stated: 'A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward.'" *Ayala*, fn. 9.

The Pennsylvania Supreme Court opted to apply "our newly adopted rule" to the facts of the case before it. That court was

LEGAL NOTICES, cont.

forth in the Complaint filed in the office of the Prothonotary of Franklin County, Pennsylvania, you must take action within twenty (20) days after service has been completed by publication, by entering a written appearance personally or by an attorney and filing with the Court your defenses or objections to the claim set forth in the Complaint. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the Court without further notice for any money claimed in the Complaint or for any other claims or relief requested by the Plaintiffs. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER. IF YOU DO NOT HAVE A LAWYER OR CANNOT AFFORD ONE, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW TO FIND OUT WHERE YOU CAN GET LEGAL HELP.

Legal Reference Service
Franklin-Fulton Counties
Court House
Chambersburg, Pennsylvania 17201
Telephone No.: Chambersburg
1-717-264-4125, Ext. 13

This action concerns the real estate described, lying and being situate in Antrim Township, Franklin County, Pennsylvania, bounded and described as follows:

BOUNDED on the Northeast by lands of ALEC, a limited partnership, on the South by the Conococheague Creek and lands of Amos Martin and on the West by lands of Daniel Byers, containing 8 acres more or less.

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Attorneys for the Plaintiffs
Trust Company Building
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(9-19, 9-26, 10-3)

not explicit in stating whether its abolition of governmental immunity was retroactive to factual occurrences prior to the date of the decision, but we believe it apparent that the effect of that decision was to immediately open the doors to plaintiffs with claims against local governmental units; and that, as in *Ayala*, the tortious acts would, by necessity, predate the date of judicial abrogation of immunity.

Cases dealing with the abrogation of the immunity of charitable institutions are analagous to those dealing with the abrogation of governmental immunity. In *Nolan v. Tifereth Israel Synagogue of Mount Carmel*, 425 Pa. 106, 227 A. 2d 675 (1967), the Supreme Court applied the abrogation of the immunity of charitable institutions decided in *Flagiello v. Pa. Hospital*, 417 Pa. 486, 208 A. 2d 193 (1965), to a suit for injuries which occurred on March 9, 1963, and for which suit was filed prior to the filing of the *Flagiello* decision. The Supreme Court concluded: "We here hold unequivocally that the doctrine of immunity of charitable institutions from liability in tort no longer exists in the Commonwealth of Pennsylvania." In effect the *Nolan* court held that the shield (immunity) no longer existed, that, at the time the case came to the court's attention, the defendant had lost its common law protection and was liable in tort.

Therefore, it would appear that the timing of the occurrence of the tortious injury was not determinative.

In *Snyder v. Shamokin Area School District*, 226 Pa. Super. 369, 311 A. 2d 658 (1973), the Superior Court addressed the question of whether *Ayala* applied to a case which was filed prior to May 23, 1973 (date of *Ayala* decision), and for which appeal was taken subsequent to May 23, 1973. That court cited *Nolan* as "ample authority for deciding the question of retroactivity." (p. 659) Also cited were two Supreme Court cases in which pre-*Ayala* dismissals based on governmental immunity were reversed subsequent to *Ayala*: *Kitchen v. Wilkinsburg School District* et al., 455 Pa. 333, 306 A. 2d 294 (1973); *Hansen v. Wilkinsburg School District* et al., 453 Pa. 619, 306 A. 2d 294 (1973). The Superior Court concluded:

> "We believe that this action by our Supreme Court demonstrates the clear intent to apply *Ayala* to all cases which are, at the very least, pending or on appeal." (p. 659)

Here, again, no concern was expressed by the Superior Court as to the date the injury occurred, nor as to what immunity the defendant enjoyed at the time of the injury; but, rather, the concern was whether the plaintiff had a right to be heard at

LEGAL NOTICES, cont.

a minor, by her natural mother and guardian, Michele B. Ameigh, was filed in the Court of Common Pleas of the 39th Judicial District of Pennsylvania, Franklin County Branch, praying for a decree to change the name of Megan Louise Bowen to Megan Bowen Ameigh.

The Court has fixed the 20th day of October, 1980, at 1:30 o'clock P.M. in Court Room No. 2 as the time and place for hearing of said petition, when and where all persons interested may appear and show cause, if any they have, why the prayer of said petition should not be granted.

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(9-26)

the moment the case was presented to the court.

The defendant in the case at bar contends that the date of accrual of the cause of action should be the 1971 plan approval date. However, at that time the plaintiffs had suffered no actionable damage and there could have been no cause of action for wholely speculative future damages which might never have occurred. Consequently, the defendant's contention is without merit.

Without further analysis of existing case law, it appears to this Court that accepting as true the well-pleaded facts of the complaint, the plaintiffs did have a cause of action at the date of injury and did have access to the courts on the day they filed. Further, the Political Subdivision Tort Claims Act was specifically made prospective in effect by Section 803 which provides:

> "Nothing in this Act shall be construed to apply its provisions to any cause of action, which arose or which otherwise have arisen prior to such effective date had this Act been in effect at such time."

It would further appear that the rights of the defendant township are not violated by a judicial change in the status afforded under governmental immunity. The United States Supreme Court held in *Munn v. Illinois*, 94 U.S. 113 (1876) that "A person has no property, no vested interest, in any rule of common law." Consequently, it would appear the defendant township could not rely upon "the continued existence of an immutable body of negligence law." *Singer v. Sheppard*, 464 Pa. 387, 399, 346 A. 2d 897, 903 (1975), and cannot complain of a judicial alteration of their status through a removal of the common law bar of governmental immunity.

ORDER OF COURT

NOW, this 19th day of February, 1980:

Pursuant to agreement of the parties leave is granted the Plaintiffs to amend paragraphs 25(A), 26(A), 25(C) (2), 26(D), 10 and 21 of their complaint and to withdraw preliminary objection No. 2 to defendant's preliminary objections.

Defendant's preliminary objections Nos. 2(3), (4) and (6) in the nature of demurrers are overruled and the relief prayed for denied.

Defendant's preliminary objection No. 4 in the nature of a

motion to strike is granted.

Defendant's preliminary objections Nos. 7 and 8 in the nature of motions for a more specific complaint are granted, and the plaintiffs will amend their complaint accordingly.

Defendant's amended preliminary objection No. 2(7) in the nature of a demurrer is overruled and the relief prayed for denied.

Plaintiffs' preliminary objection No. 1 in the nature of a motion to strike defendant's preliminary objection No. 1 in the nature of a demurrer is granted, and the demurrer will be stricken.

Plaintiffs are granted twenty (20) days from the date of this Order to file an amended complaint.

Exceptions are granted plaintiffs and defendant.

KEMPLE v. KEMPLE, C. P. Franklin County Branch, No. F.R. 1979 - 517

Divorce - Master's Hearing - Exceptions to Master's Report - Continuance

1. Failure to file exceptions to the Master's Report in a timely fashion based on the long distance between Pennsylvania and California and because defendant's California lawyers were moving their offices are insufficient reasons to justify delay in holding a hearing.

J. Edward Beck, Jr., Esq., Attorney for Plaintiff

Donald L. Kornfield, Esq., Attorney for Defendant

OPINION AND ORDER

EPPINGER, P.J., June 17, 1980:

In this divorce action, the master filed his report on March 28, 1980. He recommended that a divorce be granted. On April 14, 1980 the defendant filed "Exceptions to Master's Report." This was three days subsequent to the final day permitted for filing exceptions to the master's report.

Exceptions to a master's report in divorce should be self-sustaining and should strike at specific findings of fact and conclusions of law. *Stoops v. Stoops*, 61 D&C 435 (Adams, 1947); *Gerlach v. Gerlach*, 70 Dauph. 229 (1957). The master

held a hearing in this case on September 11, 1980, after delays occasioned by a representation that defendant was to be represented in the case. When defendant's attorney received no authorization to proceed on her behalf, he notified the master to go ahead with the hearing. At the hearing it was shown that plaintiff and defendant lived together in Thailand; that the defendant left there in 1972 with her father, who was being cared for by plaintiff, because it was felt there were better medical facilities for her father in the United States; and that though the defendant was repeatedly requested to resume cohabitation with her husband after her father died, she refused to do so. By 1976, the plaintiff was living in Franklin County, Pennsylvania. He obtained travel authorization for the defendant to come here to live, but the most she did was to come for a short visit and then returned to Modesto, California. The master found that the original separation in 1972 was consentual but that the defendant's unjustifiable refusal to rejoin her husband at the marital home in Thailand terminated the original consent and ripened the separation into a desertion. No mention was made in the master's conclusions of law of the visit in 1976, but even considering that that might have involved cohabitation, the court finds that defendant's failure to continue to live with the plaintiff and her leaving him evidences desertion.

The exceptions to the master's report do not contest the correctness of the master's findings and conclusions, but complain that the master erred in not granting a continuance or a further hearing. The exceptions allege that at the time the hearing was held, defendant had not forwarded a power of attorney to her attorney and he did not appear, all because, as the exceptions allege, of the long distance between Pennsylvania and California and because defendant's California lawyers were moving their offices. This excuse is the only one apparent for the failure to file the exceptions in a timely fashion. We find it insufficient to justify delay in both instances. *DiGiovanni v. DiGiovanni*, 59 D&C 2d 237 (Philadelphia, 1972).

Generally when exceptions have been taken to a Master's Report the court must consider the evidence afresh and make an independent review of the evidence to determine whether the grounds alleged do exist. *Dominic v. Dominic*, 66 Schuylkill 3 (1970). We find from reviewing the record and the report that grounds do exist for the divorce.

In defendant's brief it is stated that California law would provide for support and maintenance for the defendant. It appears the defendant is contesting this action only to bring her own and obtain a more favorable financial settlement. That is improper. *Worobey v. Worobey*, 201 Pa. Super. 41, 190 A.2d