

# INDEX

	PAGE
Citation .....	1
Affidavit of Rose S. Tremarco .....	2
Affidavit of Samuel Kalisch, Jr. ....	3
Petition for Divorce .....	5
Order of Reference .....	7

## DEPOSITIONS.

Oath of Stenographer .....	9
Mrs. Rose S. Tremarco, direct examination .....	10
Mr. Samuel Satonofsky, direct examination .....	14
Alice Kaplan, direct examination .....	16
Mr. S. Albert Lowenstein, direct examination .....	18
Joseph Tremarco, direct examination .....	19
Master's Certificate .....	21
Conclusions of Advisory Master .....	22
Decree of Dismissal .....	30
Notice of Appeal .....	32
Petition of Appeal .....	33
Exhibit P. 2. Proceedings in New York Supreme Court .....off'd p. 14	35

# INDEX

1	Introduction
2	Abstract of Annual Report of the Board of Directors
3	Report of the Board of Directors
4	Report of the Board of Directors
5	Report of the Board of Directors
6	Report of the Board of Directors
7	Report of the Board of Directors
8	Report of the Board of Directors
9	Report of the Board of Directors
10	Report of the Board of Directors
11	Report of the Board of Directors
12	Report of the Board of Directors
13	Report of the Board of Directors
14	Report of the Board of Directors
15	Report of the Board of Directors
16	Report of the Board of Directors
17	Report of the Board of Directors
18	Report of the Board of Directors
19	Report of the Board of Directors
20	Report of the Board of Directors
21	Report of the Board of Directors
22	Report of the Board of Directors
23	Report of the Board of Directors
24	Report of the Board of Directors
25	Report of the Board of Directors
26	Report of the Board of Directors
27	Report of the Board of Directors
28	Report of the Board of Directors
29	Report of the Board of Directors
30	Report of the Board of Directors
31	Report of the Board of Directors
32	Report of the Board of Directors
33	Report of the Board of Directors
34	Report of the Board of Directors
35	Report of the Board of Directors
36	Report of the Board of Directors
37	Report of the Board of Directors
38	Report of the Board of Directors
39	Report of the Board of Directors
40	Report of the Board of Directors
41	Report of the Board of Directors
42	Report of the Board of Directors
43	Report of the Board of Directors
44	Report of the Board of Directors
45	Report of the Board of Directors
46	Report of the Board of Directors
47	Report of the Board of Directors
48	Report of the Board of Directors
49	Report of the Board of Directors
50	Report of the Board of Directors

*Citation.*

**CITATION.**

NEW JERSEY, to wit:

The State of New Jersey to Marty  
Tremarco,

(SEAL) GREETING: You are hereby cited to  
answer the petition of Rose S. Tre- 10

marco a copy of which petition is here-  
with served upon you, by filing your answer in  
writing in the office of the Clerk of the Court of  
Chancery of Trenton, within twenty days after  
the 8th day of August, 1933; and in default of  
your so doing such order or decree will be made  
against you as the Court shall think equitable  
and just.

WITNESS, his Honor LUTHER A. CAMPBELL,  
Chancellor of our said State, at Trenton, the 8th 20  
day of August, 1933.

FERD GARRETSON,  
Clerk.

KALISCH & KALISCH,  
Solicitors.

Served the defendant on the 25th day of Au-  
gust, 1933.

LOUIS BATCHELOR, 30  
Sheriff.

By WARREN F. CONNOLLY,  
Special Deputy.

*Affidavit of Rose S. Tremarco.*

**Affidavit of Rose S. Tremarco.**

## In Chancery of New Jersey

10	<p><i>Between</i></p> <p>ROSE S. TREMARCO, <i>Petitioner,</i></p> <p style="text-align: center;"><i>and</i></p> <p>MARTY TREMARCO, <i>Defendant.</i></p>	}	<p><i>On Petition for Divorce. Affidavit.</i></p>
----	--	---	---

STATE OF NEW JERSEY, }  
COUNTY OF ESSEX. }SS.:

20 ROSE S. TREMARCO, being duly sworn according to law, upon her oath deposes and says that:

1. I am the petitioner in the above-entitled cause. The present age, residence and occupation of the defendant are known to me. His age is 34 years. His residence is 24 Warwick street, Newark, N. J. He has no occupation.

30 2. The source of my knowledge respecting the defendant's residence is that after the defendant deserted me as alleged in my petition for divorce, I called at the said address, namely 24 Warwick street, Newark, N. J., which is the residence of defendant's parents and with whom he was living, and on that visit I saw him there and spoke to him. He told me that he was living at that address with his parents. I also spoke to defendant's parents and they informed me that defendant was living at that address with them ever since he left me.

40

ROSE S. TREMARCO.

*Affidavit of Samuel Kalisch, Jr.*

Sworn and subscribed to before me  
this 14th day of November, 1933.

DAVID L. LUSTIG,  
Attorney at Law of N. J.

10

**Affidavit of Samuel Kalisch, Jr.**

IN CHANCERY OF NEW JERSEY.

*Between*

ROSE S. TREMARCO,  
*Petitioner,*  
*and*  
MARTY TREMARCO,  
*Defendant.*

*On Petition  
for Divorce.  
Affidavit.*

20

STATE OF NEW JERSEY, }  
COUNTY OF ESSEX. } ss.:

SAMUEL KALISCH, Jr., being duly sworn according to law, upon his oath deposes and says:

1. I am the solicitor of the petitioner, and am actually entrusted with the conduct and management of the above suit. 30

2. Before delivery of process in this cause to the Sheriff, I made careful and diligent inquiry in good faith to ascertain the defendant's age, residence and occupation, a copy of which description is hereto annexed.

3. Such inquiry was made by me personally of the petitioner whom, I am satisfied, had full

40

*Affidavit of Samuel Kalisch, Jr.*

knowledge of the facts as by her affidavit, which is hereto annexed, is shown.

SAMUEL KALISCH, JR.

10 Sworn and subscribed to before  
me this 14th day of November,  
1933.

LILLY M. KOSS,  
A Notary Public of New Jersey.

20

30

40

*Petition for Divorce.*

**PETITION FOR DIVORCE.**

IN CHANCERY OF NEW JERSEY.

To His Honor, Luther A. Campbell, Chancellor  
of the State of New Jersey.

The petition of Rose S. Tremarco, of No. 874  
Clarkson avenue, Brooklyn, New York, respect-  
fully shows that: 10

1. She was lawfully married to Marty Tre-  
marco, the defendant in this cause on the thirty-  
first day of August, 1927, by the City Clerk in  
the Municipal Building in New York City.

2. Defendant deserted her in the month of  
July, 1929, ever since which time, and for more  
than two years last past, the said defendant has  
wilfully, continuedly and obstinately deserted  
her. 20

3. At the date of the said desertion she and  
the defendant were residents of the State of New  
York, residing at Brooklyn, New York. When  
the cause of action arose, the defendant was a  
bona fide resident of the State of New Jersey,  
and has been a bona fide resident of the State of  
New Jersey ever since July, 1929, and for more  
than two years next preceding the commencement  
of this action has continued to be such bona fide  
resident, residing at 24 Warwick street, Newark,  
New Jersey. 30

4. She has no means of support except from  
her own exertions.

5. Her maiden name was Rose Satanofsky.

6. She prays that the marriage existing be-  
tween her and the defendant may be dissolved 40

*Petition for Divorce.*

for the cause aforesaid, according the statute in such case made and provided; that she may resume her maiden name and that she may have such further relief as may be just.

And your petitioner will ever pray, etc.,

10

KALISCH & KALISCH,  
Solicitors of Petitioner.

STATE OF NEW JERSEY, }  
COUNTY OF ESSEX. } ss.:

Rose Tremarco being duly sworn according to law, upon her oath deposes and says:

20

I am the petitioner named in the foregoing petition. My said petition is not made by any collusion between me and the defendant, but in truth and good faith, for the causes set forth in the petition. That the facts, matters and things set forth in the said petition, so far as they relate to the acts of the petitioner, are true, and so far as they relate to the acts of others, she believes them to be true.

ROSE TREMARCO,

30

Sworn and subscribed to before  
me this 21st day of July, 1933.

DAVID L. LUSTIG,  
Attorney at Law of N. J.

40

*Order of Reference.*

**ORDER OF REFERENCE.**

Filed November 28, 1933.

IN CHANCERY OF NEW JERSEY.

*Between*

ROSE S. TREMARCO,

*Petitioner,*

*and*

MARTY TREMARCO,

*Defendant.*

10

*On Petition,  
etc.*

*Order of  
Reference.*

On motion of Kalisch & Kalisch solicitor of petitioner:

IT IS on this twenty-fifth day of November, 1933, ORDERED that the above entitled cause be and the same is hereby referred to the Honorable Francis Child, one of the Advisory Masters of this Court, to hear the same for the Chancellor, and report thereon to him, and advise what order or decree should be made therein.

20

D. C.

N. T. R.

A. M.

LUTHER A. CAMPBELL,

*C.*

Consent is hereby given to the making of the above order.

30

40

*Depositions.*

**DEPOSITIONS.**

IN CHANCERY OF NEW JERSEY.

No. 97-470.

10 *Between*

ROSE S. TREMARCO,  
*Petitioner,*

*and*

MARTY TREMARCO,  
*Defendant.*

*On Petition  
for Divorce.*

*Depositions.*

20 Depositions taken before me, Francis Child,  
Advisory Master, at Chancery Chambers, No.  
1060 Broad street, Newark, New Jersey, on De-  
cember 29th, 1933, pursuant to an order designat-  
ing said time and place.

Appearances:

Kalisch & Kalisch, solicitors of petitioner,  
Samuel Kalisch, Esq., appearing, Lefcourt Bldg.,  
Newark, New Jersey.

30

40

*Oath of Stenographer.*

IN CHANCERY OF NEW JERSEY.

No. 97-470.

*Between*

ROSE S. TREMARCO,

*Petitioner,*

*and*

MARTY TREMARCO,

*Defendant.*

*On Petition  
for Divorce.* 10

*Stenog-  
rapher's  
Oath.*

STATE OF NEW JERSEY, }  
COUNTY OF ESSEX. } SS.:

I, ANNE M. HEGER, of Newark, New Jersey, do solemnly swear that I will, as stenographer, carefully, faithfully and truly take stenographically, the evidence of the witnesses produced and examined before Francis Child, Advisory Master in Chancery of New Jersey, in the above-entitled cause, and that I will make a true and correct transcript of the said evidence to the best of my skill and understanding. 20

ANNE M. HEGER.

Subscribed and sworn to before me this 29th day of Dec. 1933. 30

FRANCIS CHILD,

A Master in Chancery of New Jersey.

*Mrs. Rose S. Tremarco, Direct.*

MRS. ROSE S. TREMARCO, petitioner. Duly sworn.

*Direct examination by Mr. Samuel Kalisch.*

Q Mrs. Tremarco, where do you reside? A  
10 No. 550 Saratoga avenue, Brooklyn, New York.

Q With whom? A With my mother and brother.

Q How long have you lived there? A Five months.

Q Before that where did you live? A No. 874 Clarkson avenue, Brooklyn, New York.

Q How long did you live there? A About two years.

Q With whom did you live there? A With  
20 my mother and brother.

Q You married the defendant when? A August 31st, 1927.

Q Where? A In Brooklyn, New York.

Q By whom? A The County Clerk. (Marriage certificate offered in evidence and marked Exhibit P. 1.)

Q After your marriage, where did you go to live? A At No. 320 Reid avenue, Brooklyn, New York.

Q How long did you live there? A About  
30 seven or eight months.

Q How old were you when you were married? A I was twenty-two.

Q How old was your husband? A Twenty-six.

Q What kind of business was he in? A Automobile salesman.

Q When did he leave you? A He left me in July, 1929.

Q Where were you living then? A At No.  
40 122 Bainbridge street, Brooklyn, New York.

*Mrs. Rose S. Tremarco, Direct.*

Q Did you have a room there? A Yes, on the top floor. I rented it from Mrs. Kaplan.

Q Do you remember what rent you paid? A Ten dollars a month.

Q How did you get along there? A Not very well. I had to work all the time. He never had a penny to pay the rent with. There was always arguments as to food and clothes, so every morning he would say, "You have got to get some money." Sometimes I didn't have the money and he said, "You've got to get some," and if I didn't, I got a good beating. He would abuse me, call me names and then just hit me any way he wanted to, and kick me. 10

The Court: Did you have any marks on your body? 20

Witness: Several times.

Q You were married in 1927 and he left in 1929? A Yes.

Q Did he buy your clothes? A Never even a pair of garters.

Q Who bought the food? A I had to pay for mine and his.

Q What did this lead up to? A To the fact that I was out of a job and couldn't pay any more rent and our rent fell back, and the landlady wanted the rent and she came up and asked us for it and he said "My wife will pay it to you," and I said I didn't have the money, and he said, "You will have to go out and get it." The landlady said, "If you cannot pay the rent, you will have to get out. For your wife's sake I would like to be lenient, but there is only one thing to do." He said, "What are you going to do?" I told him I didn't have any money 30 40

*Mrs. Rose S. Tremarco, Direct.*

and he said, "You will have to get it. I am going out, and I don't care what happens to you."

Q What did the landlady say? A She said she would have to put us out.

10 Q What did he do? A He slammed the door and said he didn't care what happened to me and never came back.

Q This was in July, 1929, and he has never come back? A No. I went to live with my parents.

The Court: Ever see him.

Witness: No.

The Court: Ever hear from him?

20 Witness: No.

Q Didn't you see him once after that? A In 1932.

The Court: Where?

Witness: I had some friends who had a moving picture house around the neighborhood where his folks lived, and I went to visit my friends there and they said, "We see your husband quite often and it looks as if he is living with his people." I went over to his folks and I spoke to his mother.

30

The Court: Did you see him?

Witness: Yes.

The Court: Did you speak to him?

Witness: Not very much. Just said, "Hello!" He said, "What are you doing here?" I said, "I came to see my friends and while I was around the neighborhood, I thought I would come here." He said,

40

*Mrs. Rose S. Tremarco, Direct.*

“What do you want.” I said, “What are you going to do?” He said, “Nothing—I don’t care about you.”

Q Where was it you saw him? A No. 24 Warwick street, Newark.

Q What year was that? A 1932.

10

The Court: Did his people live in Newark before you married him?

Witness: Yes, maybe a few years or so.

The Court: Have there ever been any other suits between you and your husband?

Witness: Yes, I had an order for support in the year 1931.

The Court: Where?

Witness: New York.

20

The Court: What court?

Witness: In Brooklyn. Domestic Relations Court.

The Court: Did you make a criminal complaint?

Witness: Yes.

The Court: What did the Judge do?

Witness: They awarded me \$15.00 a week support.

30

The Court: Did you ever get it?

Witness: I never got a penny.

Mr. Kalisch: It was in the Supreme Court, Kings County.

The Court: Do you remember when you brought this action in New York for support?

Witness: November, 1931.

The Court: Did you know where he was living at that time?

40

*Mr. Samuel Satonofsky, Direct.*

Witness: I didn't know exactly. I saw him in New York and was under the impression that he was living in New York.

The Court: Was he served in New York?

Witness: He was served in New York.

10 The Court: Where?

Witness: At Herzer street.

The Court: Who served him?

Witness: My brother.

The Court: Is your brother here?

Witness: Yes.

(Exhibit P. 2—proceedings in New York Supreme Court, Part Five, offered in evidence by solicitor.)

20

---

MR. SAMUEL SATONOFSKY, duly sworn.

*Direct examination by Mr. Samuel Kalisch.*

Q Where do you live Mr. Satonofsky? A No. 550 Saratoga avenue, Brooklyn, New York.

Q How long have you lived there? A About five months.

30 Q Where did you live before that? A No. 874 Clarkson avenue, Brooklyn, New York.

Q With your parents? A Yes.

Q Has your sister been living with you? A Yes.

Q How long? A Since 1929—July.

Q Do you know why she came to live with you in July? A I came home one night and I see she is home and she is crying, and I asked my mother what's the matter. My mother told me her husband left her. She told me after,

40

*Mr. Samuel Satonofsky, Direct.*

that he left her, and she was crying and she said, "I have to live with you."

Q Do you know whether or not she felt bad because he left her? A She did.

Q How long has she lived with you? A Since July, 1929.

Q Have you seen her husband since then? 10  
A Never seen him.

Q Do you know her husband? A Yes. I used to go to see them.

Q Where? A When they lived at No. 122 Bainbridge street, Brooklyn, N. Y. I went there several times.

Q How many rooms did they have? A One room.

Q Was it furnished? A It was a furnished room house. 20

Q Did you serve a paper on Tremarco in New York? A Yes.

Q How long ago? A In 1931.

Q Where did you serve him? A I think it was No. 225 Herzer street, Brooklyn, New York.

Q Have you seen him since then? A No.

Q Have you seen him anywhere? A After I served him the summons I did.

Q Where? A In Newark.

Q When? A In 1932. 30

Q Do you remember what month it was? A About June.

Q What business are you in? A In peddling.

The Court: In what?

Mr. Kalisch: Canvassing.

Q Do you come to Newark often? A Two or three days a week.

Q What do you do? A Peddle from door to door. 40

*Alice Kaplan, Direct.*

Q Where do you usually peddle? A At Port Newark.

Q How did you happen to see Tremarco? A I knocked at the door of one of the houses and when the door opened I see Marty standing there and I was surprised and I said, "What are you doing here?" And he said, "I am living here since I am not with your sister."

Q Did you say anything else to him? A I talked to him a little while.

Q Is the place where they were living around the Port Newark District? A Around down-neck.

---

20 ALICE KAPLAN, duly sworn.

*Direct examination by Mr. Kalisch.*

Q Where do you live? A No. 122 Bainbridge street, Brooklyn, New York.

Q Did your mother own the house in Brooklyn where Mrs. Tremarco lived? A Yes.

Q Did she rent it to them? A I did. I rented the room.

30 Q Who came to you? A Mr. and Mrs. Tremarco.

Q Did he introduce her? A Yes, he said, "This is my wife."

Q Did he say what he wanted? A He said he wanted a room. I showed them a room. It was \$10.00 a month.

Q Do you remember what floor it was on? A Top floor.

Q Do you remember what year it was? A 1928 or 1929—1928.

40 Q Did they occupy that room? A Yes.

*Alice Kaplan, Direct.*

Q Did you put a sign out on the door that they occupied that room? A No.

Q Did they use the furniture in the room? A Yes.

Q Were they known in the neighborhood as Mr. and Mrs. Tremarco? A Yes.

Q Now, did you notice any trouble between them after they were there awhile? A After a while we heard quarrels very frequently. 10

Q Did you hear quarrels? A Yes.

Q What about? A I am in the habit of cleaning the rooms and renting them, and I was next door to their room and I heard them arguing, and she said that he never bought her a thing, and that it was about time that he would go to work and give her some money.

Q What did he say? A He said he couldn't find any work; that she would have to get the money. 20

Q Did you ever ask Mr. Tremarco for the rent? A Yes.

Q Did you tell him what would happen if they didn't pay the rent? A Yes, I did.

Q What did he say? A He said Mrs. Tremarco would give it to me in the evening. When we asked her she said she didn't have it. We never got it on time. 30

Q Did you tell him what you would do? A We were quite lenient at first.

Q Did you tell him what you would be compelled to do? A We said, "If you don't pay by tonight, we will have to have the room."

Q Did you ever see Mrs. Tremarco cry? A All the time.

Q Did she ever tell you why she was crying? A Yes, she told me how much he abused her. Her eyes were always swollen. 40

*Mr. S. Albert Lowenstein, Direct.*

The Court: Did you ever notice any marks on her body?

Witness: Not that I noticed.

Q Do you remember when Mrs. Tremarco went out of the house the last time? A It was  
10 in the summer time.

Q Of what year? A Of July, 1929.

Q Do you remember what time of the day he went out? A Before noon.

Q Do you remember when Mrs. Tremarco went out? A She didn't go out; she came downstairs about two hours later, crying, and told us that her husband left her, and that she will have to go to her mother, and that's all.

Q Did she leave? A Yes.

Q Have they ever been back to your apartment? A No.  
20

---

MR. S. ALBERT LOWENSTEIN, duly sworn.

*Direct examination by Mr. Kalisch.*

Q Where do you live, Mr. Lowenstein? A  
30 No. 32 S. Munn avenue, East Orange, New Jersey.

Q Mr. Lowenstein, you are a practicing lawyer in New York? A I am.

Q How long have you been practicing? A Since 1902.

Q You are familiar with divorce law in New York? A I am.

Q Is there a ground for absolute divorce in New York on the ground of desertion? A There is not.

Q Is there a ground for divorce in New York for non-support? A There is not.  
40

*Joseph Tremarco, Direct.*

Q In order for a person to get support, what is she obliged to do? A There is no proceeding in New York, and there was none in 1931 or 1932, excepting a judgment, other than an action for divorce.

Q In order for a woman to obtain support, what is she to do? A To either bring an action for separation which results in a judgment, or she can go to the Domestic Relations Court. 10

Q Was there in the years 1931, 1932 or 1933, any ground for absolute divorce in New York, other than adultery or maybe insanity? A That's all.

Q Not for desertion or non-support? A There is not today.

---

JOSEPH TREMARCO, duly sworn. 20

*Direct examination by Mr. Kalisch.*

Q Where do you live? A No. 24 Warwick street, Newark, N. J.

Q How long have you lived in Newark? A All my life, twenty-five years.

Q Is Marty Tremarco your brother, the defendant in this suit? A Yes. 30

Q Where does he live? A At home.

Q Where's that? A No. 24 Warwick street, Newark, New Jersey.

Q How long has he lived there? A He has lived there I imagine, all his life.

Q Is he living there now? A Yes.

Q How long has he lived there? After he was married didn't he come back? A I don't know how long he has been married. I know he has been living there three or four years.

Q Is he still living there today? A Yes. 40

*Joseph Tremarco, Direct.*

The Court: Do you remember when he came there this last time?

Witness: I don't know when he came there. I have seen him around so often.

The Court: Do you know his wife?

Witness: Yes.

10

The Court: Do you know when he and his wife separated?

Witness: No, I don't.

The Court: About how many years?

Witness: I don't know when they separated.

20

Q Don't you know after he got married he went away didn't he, for a time? A I know that the last four or five years he has been living at home.

Q Continuously? A Yes.

Q You see him every night don't you? A Except for the nights I get home late or he gets home late.

Q Do your mother and father live there? A Yes.

Q Do they own the house they live in? A Yes.

30

Q How many are there in the family? A Three sisters and a brother besides myself.

The Court: Where does your brother work, in what city?

Witness: He works in New York.

The Court: How long has he been working in New York, to your knowledge?

Witness: About ten years.

The Court: Do you remember how long he has been married?

40

Witness: No, I don't.

*Master's Certificate.*

IN CHANCERY OF NEW JERSEY.

*Between*

ROSE S. TREMARCO,  
*Petitioner,*

*and*

MARTY TREMARCO,  
*Defendant.*

*On Petition  
for Divorce.*

*Master's  
Certificate.*

10

I certify that the foregoing depositions were taken by Anne M. Heger, a stenographer selected by me, and by me duly sworn faithfully and truly to take stenographically and reproduce in typewriting the testimony given, and that such depositions were taken in my immediate presence and hearing by said stenographer, sworn as above stated, and I believe that they accurately state the said evidence.

20

FRANCIS CHILD,  
*A. M.*

30

40

*Conclusions of Advisory Master.***CONCLUSIONS OF ADVISORY MASTER.**

IN CHANCERY OF NEW JERSEY.

97/470.

10	<i>Between</i> ROSE S. TREMARCO, <div style="text-align: right;"><i>Petitioner,</i></div> <div style="text-align: center;"><i>and</i></div> MARTY TREMARCO, <div style="text-align: right;"><i>Defendant.</i></div>	}	<i>On Petition for Divorce. Conclusions of Advisory Master.  (Not to be printed at all.)</i>
----	--	---	--

Samuel Kalisch, Jr., solicitor of petitioner.

20 FRANCIS CHILD, A. M.

This is an uncontested divorce suit brought by the wife against her husband, on the ground of desertion.

The parties were married on the 31st of August, 1927 and lived together until the month of July, 1929, when the defendant husband left his wife without justification and within two years from the month of July 1929, took up his residence in New Jersey, where he has since resided. At the time of the separation, these parties were living together in the Borough of Brooklyn, in the State of New York.

The petitioner charges that the defendant has been guilty of wilful, continued and obstinate desertion since the month of July, 1929, a period of more than two years.

The marriage of the parties and the residence of the defendant, are sufficiently proved and corroborated, as is the fact that the defendant left

40

*Conclusions of Advisory Master.*

the petitioner without justification, and has made no efforts to effect a reconciliation.

The petitioner in the year 1932 instituted a suit in the Supreme Court of the State of New York for a divorce *a mensa et thoro*. The defendant husband was personally served with process in that suit within the State of New York and on the 26th of April 1932 a judgment was entered in the Supreme Court of the State of New York which, after providing for the support of the petitioner, contained this clause:

10

“ORDERED, ADJUDGED and DECREED that the plaintiff be and hereby is separated from the defendant, his bed and board forever.”

This decree admittedly remains open of record, and in full effect.

20

The Divorce Act of this state provides that:

“Divorces from the bond of matrimony may be decreed for the following causes:  
\* \* \*wilful, continued and obstinate desertion for the term of two years.”

The desertion, in order to justify a decree, must be shown to have been wilful, continued and obstinate and all three of these elements must be present.

30

The question to be decided is what effect, if any, has the decree *a mensa et thoro* entered in the Supreme Court in the State of New York, on the obstinacy and continuity of the desertion, and whether such decree, while it is in effect, bars the petitioner's right to a decree for absolute divorce for desertion in this state.

In the case of *Kyle v. Kyle*, 52 N. J. Equity 710, Vice-Chancellor Pitney held that where a decree *a mensa et thoro* had been entered in the

40

*Conclusions of Advisory Master.*

courts of another state, that while such decree is in effect, the petitioner was not entitled to a decree in this state for desertion.

10 The facts in the Kyle case were identical with those in the present case, except that in that case the decree *a mensa* was entered *within two years from the date of the separation* and in the present case, the decree was entered *more than two years after the separation*.

Vice-Chancellor Pitney in the Kyle case, at page 712, in considering the effect of a New York decree *a mensa et thoro* on the petitioner's right to an absolute divorce for desertion, said:

20 "The petitioner, at the time of the injury complained of, being a resident of the State of New York, availed herself there of such remedies as the laws of that state afforded her. Before the two years of statutory desertion had elapsed, she procured a decree of a court of that state, which made it absolutely unlawful for the defendant to mend his ways and return, or offer to return to live with her. And this is fatal to her case. For, granting that the defendant's conduct at and prior to 1880 (the time of the desertion) was such as to render it improper for her to live with him and to make him guilty of constructive desertion, still that constructive desertion did not ripen into a right to a divorce on her part, until the statutory period of desertion had elapsed. Before that period had elapsed she adopted a remedy which prevented it from ever elapsing."

30

In the case of *Lake v. Lake*, 80 N. J. Equity 350, Vice-Chancellor Stevenson, at page 352, said:

40 "The sharp question presented for decision in this present case is whether the petition-

*Conclusions of Advisory Master.*

er's pending suit for limited divorce in the State of New York prevents her from maintaining this subsequent divorce suit in New Jersey, that the separation, which was the basis of her New York action, constituted obstinate desertion within the meaning of our Divorce Act. The ruling of the master is, I think, sustained by the decision of this court in the case of *Kyle v. Kyle*, 52 N. J. Equity 710. \* \* \* I do not think any important distinction can be drawn for use in this present case between the effect of a decree of limited divorce obtained in New York, and the effect of a suit brought by the wife, one necessary object—in fact the main object of which is to procure such decree. In the one case the wife has actually obtained the decree legalizing and establishing the status of separation, while in the other she is prosecuting the suit for the purpose of obtaining such decree.”

In the *Lake* case, counsel for the wife undertook, as in the present case, to avoid the bar of the New York decree by showing that aside from a complaint in a criminal court for non-support, there was no other remedy available to the wife than in an action for separation, there being in the State of New York no separate action for maintenance, as is provided for in our Divorce Act.

The answer to this argument seems to me to be that while it may be unfortunate for the petitioner in this case that the laws of the State of New York are as they are, in the present case we are dealing with the construction of a New Jersey statute, which has been construed as requiring, among other things, that the desertion

*Conclusions of Advisory Master.*

be both continued from its inception, and obstinate from its inception down to the date of the filing of the petition. It is difficult to see by what process of reasoning it can be held that, where there is in existence a decree of a competent court making it unlawful for the defendant to  
 10 live with the petitioner, that obedience of that decree by the defendant can be construed to make him guilty of *continued* and *obstinate desertion* under our Divorce Act.

In the case of *Reibesehl v. Reibesehl*, 106 N. J. Equity 32, where the facts were identical with those in the present case, Chancellor Walker at page 27 said:

20 “As the same persons were parties to the suit in New York whose decree was separation for abandonment, that is desertion, and the same persons are parties to the suit here for divorce from the bond of matrimony for desertion, that is, abandonment, the decree in the New York Supreme Court separating the parties from bed and board works an estoppel by judgment so long as that judgment lasts; it may well be that if it were now to be vacated on application of the proper  
 30 parties, apparently two years would have to run after the parties were capable in law of reuniting and resuming their matrimonial domicile before the husband would be entitled to a decree of divorce on the ground of desertion.”

In the *Reibesehl* case the New York decree was obtained by the wife and was held to be a bar to the right of the husband's suit for divorce on the ground of desertion in New Jersey, but  
 40 it would seem that in deciding this case Chan-

*Conclusions of Advisory Master.*

cellor Walker considered the bar of the decree and not who obtained it.

Counsel urge in this case that the decree of separation was obtained in New York more than two years after the separation, which commenced the alleged desertion, and that the doctrine laid down in the cases of *Kyle v. Kyle* and *Lake v. Lake*, *supra*, does not apply, because in those cases two years of desertion had not elapsed. 10

The case of *Orens v. Orens*, 88 N. J. Equity 29 holds, in construing our Divorce Act, that there are two periods of two years each during which the desertion must have been wilful, continued and obstinate; the first that immediately succeeding the desertion, at the expiration of which the cause of action arises and accrues and which vests jurisdiction in the court to *entertain the suit*; and the second that immediately prior to the filing of the petition, which vests jurisdiction in the court to *decree a divorce*. These periods may run concurrently and overlap each other in whole or in part; but if they do not, legal proof must nevertheless be made of the desertion for the whole period between its commencement and the filing of the petition. 20

In the case of *Myles v. Myles*, 77 N. J. Equity 264, the Court of Errors and Appeals held that the term of two years wilful, continued and obstinate desertion described in our Divorce Act as entitling the injured party to a divorce *a vinculo* is, or embraces, the two years next preceding the filing of the petition for divorce, and the same court in the case of *Gordon v. Gordon*, 89 N. J. Equity 535, at page 537, said: 30

“Assuming that the wife’s abnormal mental condition as observed by the petitioner in June 1910 was not of such a character as 40

*Conclusions of Advisory Master.*

to destroy her free agency, it cannot be doubted, we think that when she was taken to the insane asylum at Center Islip and confined there, her separation from her husband ceased to be 'wilful, continued and obstinate' within the meaning of our Divorce Act." Citing *Porter v. Porter*, 82 N. J. Equity 400.

The Court of Errors, by its decisions, having held that desertion in order to justify the entry of a decree for divorce must have been wilful, continued and obstinate for the two years next preceding the filing of the petition, and having further held that if the offending party is unable, by reason of incarceration, to return during that period, that is, the two years next preceding the filing of the petition, there can be no wilful, continued and obstinate desertion. I am unable to distinguish, in principle, the difference between the offending party being unable to return by reason of the existence of a decree of a court of competent jurisdiction forbidding him to do so, and his incarceration, for in either case, he is not a free agent.

The petition will, therefore, be dismissed because of the petitioner's failure to prove that the defendant's desertion for the period of two years next preceding the filing of the petition, has been wilful, continued and obstinate.

I have not overlooked the insistent of the solicitor of the petitioner, that where the separation is not caused or continued by the legal action taken by the wife, but is caused by the defendant's wrongful act, that it should not be held that a decree for divorce *a mensa et thoro* caused a continuation of the desertion. The cases cited,

*Conclusions of Advisory Master.*

Cook *v.* Cook, 97 N. J. Equity 267; Power *v.* Power, 66 N. J. Equity 320; Easter *v.* Easter, 73 Atlantic Reporter page 30, do not, in my opinion, apply to the present case.

The first two cases apply to separation agreements and the Easter case to previous or pending proceedings in which no decree had been entered. The rule of law laid down in these cases does not, in my opinion, apply to a case in which there is a valid decree of separation existing which, in effect, if not in terms, makes it unlawful for the parties to live together. 10

FRANCIS CHILD,  
A. M.

Dated: March 31, 1934.

20

30

40

*Decree of Dismissal.***DECREE OF DISMISSAL.**

Filed April 2, 1934.

IN CHANCERY OF NEW JERSEY.

97/470.

10

*Between*

ROSE S. TREMARCO,

*Petitioner,**and*

MARTY TREMARCO,

*Defendant.**On Petition  
for Divorce.**Decree of  
Dismissal.*

20

This cause coming on to be heard in the presence of Samuel Kalisch, Jr., of Kalisch & Kalisch, solicitors of the petitioner, and no one appearing for the defendant, on the petition and oral proofs taken in open court, whereupon and upon duly considering the said pleadings and proofs and hearing and considering the arguments of counsel, and it appearing to the court that the petitioner has not sustained the truth of the allegations of the petition and is not entitled to relief therein

30

prayed, because of her failure to prove the continuity and obstinacy of the desertion, such failure being due to the fact that the petitioner obtained a judgment of separation from the defendant in the courts of the State of New York, which judgment at the date of the hearing, was in full force;

It is, thereupon, on this 2nd day of April 1934,  
ORDERED, ADJUDGED and DECREED that the peti-

40

*Decree of Dismissal.*

tioner's petition be and the same is hereby dismissed.

LUTHER A. CAMPBELL,  
C.

Respectfully advised,

FRANCIS CHILD,  
A. M.

10

20

30

40

*Notice of Appeal.*

**NOTICE OF APPEAL.**

IN CHANCERY OF NEW JERSEY.

10	ROSE S. TREMARCO, <i>Petitioner-Appellant.</i> <i>and</i> MARTY TREMARCO, <i>Defendant-Respondent.</i>	}	<i>On Petition for Divorce.  Notice of Appeal.</i>
----	--	---	--

20 The petitioner hereby appeals from so much of the final decree made in this court, in the above entitled cause, on the second day of April, 1934, as orders, adjudges and decrees that the petitioner's petition be and the same is hereby dismissed to the Court of Errors and Appeals in the last resort in all causes.

SAMUEL KALISCH, JR.,  
Solicitor of Petitioner.

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

30 SAMUEL KALISCH, JR.,  
Solicitor of Petitioner.

40

*Petition of Appeal.*

**PETITION OF APPEAL.**

IN CHANCERY OF NEW JERSEY.

97/470.

<i>Between</i> ROSE S. TREMARCO, <i>Petitioner-Appellant.</i>  <i>and</i> MARTY TREMARCO, <i>Defendant-Respondent.</i>	}	<i>On Petition for Divorce.</i> 10  <i>On Appeal from Chancery.</i>  <i>Petition of Appeal.</i>
--	---	---

To the Honorable, the Court of Errors and Appeals, in the last resort in all causes: 20

The petition of Rose S. Tremarco, appellant, shows that:

1. Your petitioner finds herself aggrieved by a decree final made in the Court of Chancery by his Honor, Luther A. Campbell, Chancellor of the State of New Jersey, on the second day of April, 1934, in that said decree recites and adjudges that your petitioner has not sustained the allegations of her petition, and is not entitled to the relief therein prayed, because of her failure to prove the continuity and obstinacy of the desertion, such failure being due to the fact that the petitioner obtained a judgment of separation from the defendant in the courts of the State of New York, which judgment at the date of the hearing, was in full force; and decreed that petitioner's said petition be dismissed. 30

2. Your petitioner appeals from the said decree and from every part thereof on the 40

*Petition of Appeal.*

ground that the same is erroneous, and that the Chancellor should have found and adjudged that the several allegations of petitioner's petition had been proved, and that the respondent, Marty Tremarco, had been guilty of wilful, continued and obstinate desertion as alleged in the  
10 petitioner's petition, and should have ordered, adjudged and decreed that petitioner be divorced from the bonds of matrimony with the respondent for the cause aforesaid, and that petitioner should have the other relief prayed for in and by her said petition.

Your petitioner therefore prays that said decree may be reversed, rescinded and for nothing holden, and that she may have such  
20 further relief as shall be just.

SAMUEL KALISCH, JR.  
Solicitor of Petitioner.

30

40

*Exhibit P. 2.***Exhibit P. 2.**

THE PEOPLE OF THE STATE  
OF NEW YORK.

BY THE GRACE OF GOD FREE AND INDEPENDENT,  
To all to whom these Presents may  
come, GREETING: 10

(SEAL) KNOW YE: That we have inspected  
the files and records in the office of  
the Clerk of the County of Kings, the  
Borough of Brooklyn, in said County, do find a  
certain Judgment of Separation remaining there  
on file of record in the words and figures follow-  
ing, to wit:

At a Special Term for Trials, Part 5 of  
the New York Supreme Court, held in and  
for the County of Kings, at the Kings 20  
County Court House, in the Borough of  
Brooklyn, City of New York, on the 26th  
day of April, 1932.

Present: Hon. George H. Furman, Justice.

ROSE TREMARCO,	}	<i>Plaintiff,</i>	30
against			
MARTY TREMARCO,	}	<i>Defendant.</i>	

The above entitled action having been duly  
tried at Special Term for Trials, Part V of the  
Supreme Court, Kings County, held at the Kings  
County Court House on the 4th day of April,  
1932, before Hon. George H. Furman, one of the  
Justices of this Court, without a jury, and the 40

*Exhibit P. 2.*

10 plaintiff and her attorney having been duly heard, and the defendant having defaulted herein and having failed to answer the complaint herein, and the Court having duly made its Findings of Fact and Conclusions of Law, and duly rendered a decision in favor of the plaintiff, and against the defendnt,

Now, on motion of IRVING LEVINSON, attorney for the plaintiff, and after due deliberation, it is

ORDERED, ADJUDGED AND DECREED, that the plaintiff be and hereby is separated from the defendant, his bed and board forever; and it is further

20 ORDERED, ADJUDGED AND DECREED that the defendant pay to the plaintiff for her maintenance and support the sum of Fifteen (\$15.00) Dollars per week, in every week, commencing the 12th day of January, 1932, and continuing from week to week until the further order of this Court, and it is further

ORDERED, ADJUDGED AND DECREED that the plaintiff recover from the defendant the sum of \$..... her costs and disbursements of this action, to be taxed by the Clerk of this Court, pursuant to statute, and that the plaintiff have execution therefor.

30

ENTER,

GEO. H. FURMAN,  
J. S. C.

JOHN N. HARMAN,  
Clerk.

Granted April 26, 1932

JOHN N. HARMAN,  
Clerk.

40

*Exhibit P. 2.*

38204

Feb. 21, 1934.

## CERTIFICATION.

STATE OF NEW YORK, }  
 COUNTY OF KINGS. } ss.:

I, JOHN N. HARMAN, Clerk of the 10  
 County of Kings and Clerk of the  
 (SEAL) Supreme Court of the State of New  
 York in and for said County (said  
 Court being a Court of Record) Do  
 HEREBY CERTIFY that I have compared the an-  
 nexed with the original Judg. filed in my office  
 4/28/32 and that the same is a true transcript  
 thereof and of the whole of such original.

In Testimony Whereof, I have hereunder set 20  
 my hand and affixed the seal of said County and  
 Court, this 21 day of Feb. 1934.

JOHN N. HARMAN,  
 Clerk.

Pay CASHIER...2 and no/100 (2 no/100) DOLLARS  
 BARRY,  
 Comparer.

Received.....Two and no/100 (\$2.00) Dollars 30  
 R. C.  
 Cashier.

All which we have caused by these Presents  
 to be exemplified, and the Seal of our said Court  
 for said County to be hereunto affixed.

WITNESS, HON. EDWARD LAZANSKY, Presiding  
 Judge of our Supreme Court in and for the  
 Second Judicial Department of said State, this  
 21st day of February 1934, and in the 158th year  
 of the Independence of the United States. 40

(SEAL) JOHN N. HARMAN,  
 Clerk.

*Exhibit P. 2.*

I, EDWARD LAZANSKY, Presiding Justice of the Supreme Court of the State of New York in and for the Second Judicial Department thereof, do hereby certify, that JOHN N. HARMAN, whose name is subscribed to the preceding exemplification, is the Clerk of the County of Kings, and Clerk of the Supreme Court in and for said County, and that full faith and credit are due to his official acts.

I Further Certify that the Seal affixed to said exemplification is the proper Seal of said Court for said County, and that the attestation thereof is in due form of law and by the proper officer.

WITNESS my hand at the Borough of Brooklyn, this 21st day of February in the year 1934.

EDWARD LAZANSKY,  
Presiding Justice of the Supreme  
Court of the State of New York  
in and for the Second Judicial  
Department.

JOHN N. HARMAN,  
Clerk.

(SEAL)

30

40

*Exhibit P. 2.*

STATE OF NEW YORK, }  
 COUNTY OF KINGS. } ss.:

I, JOHN N. HARMAN, Clerk of the County of Kings, and also Clerk of the Supreme Court of said County in and for the Second Judicial Department of said State (said Court being a Court of Record), do hereby certify, that Hon. Edward Lazansky, whose name is subscribed to the foregoing certificate, is Presiding Justice of the Supreme Court of said State in and for the Second Judicial Department, duly elected and sworn, and that the signature of said Justice to said Certificate is genuine.

10

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of said County and Court, this 21st day of February in the year 1934.

20

JOHN N. HARMAN,  
 (SEAL) Clerk.

30

40

THE  
[Faint, illegible text]

[Faint, illegible text]

[Faint, illegible text]

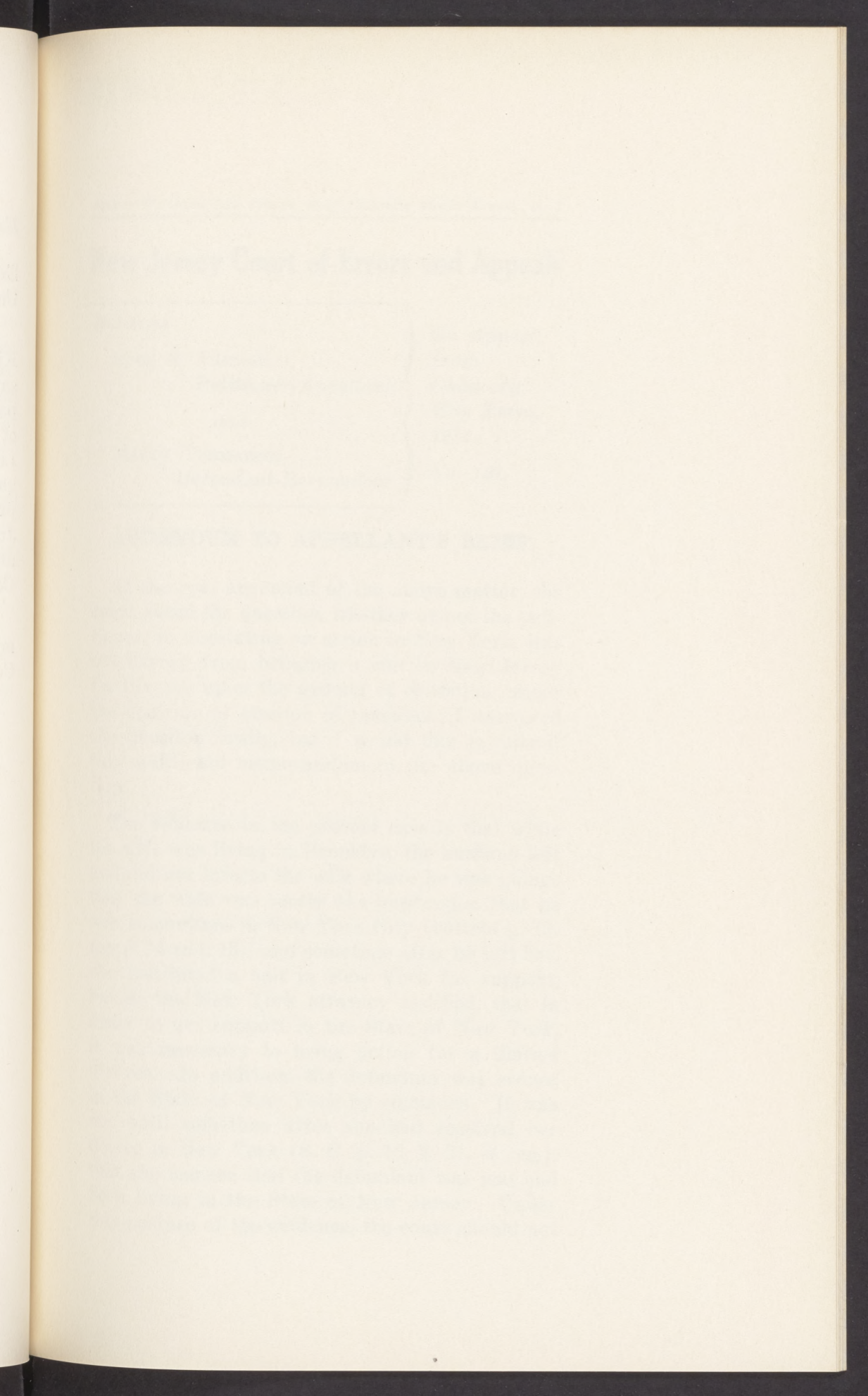
[Faint, illegible text]

[Faint, illegible text]

[Faint, illegible text]

[Faint, illegible text]

[Faint, illegible text]





121 MAY. T. 1934

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

## New Jersey Court of Errors and Appeals

Between

ROSE S. TREMARCO,  
*Petitioner-Appellant,*  
and

MARTY TREMARCO,  
*Defendant-Respondent.*

On Appeal  
from  
Chancery,  
May Term,  
1934.

No. 121.

### ADDENDUM TO APPELLANT'S BRIEF.

At the oral argument of the above matter, the court asked the question, whether or not the petitioner, in instituting an action in New York, was not barred from bringing a suit in New Jersey for divorce upon the ground of desertion, under the doctrine of election of remedies; I answered the question orally, but I would like to submit this additional memorandum to the above question.

The evidence in the present case is that while the wife was living in Brooklyn, the husband left and did not inform the wife where he was going; that the wife was *under the impression* that he was somewhere in New York City (bottom p. 13-top p. 14 to l. 15), and sometime after he left her, she instituted a suit in New York for support, but as the New York attorney testified, that in order to get support in the State of New York, it was necessary to bring action for a limited divorce. In addition, the defendant was *served* in the State of New York by summons. It was not until sometime after she had received her decree in New York (S. C. p. 12, ll. 21, *et seq.*), that she learned that the defendant was and had been living in the State of New Jersey. Under this posture of the evidence, the court should not

hold that she is barred from maintaining a suit in New Jersey under the doctrine that she had elected her remedy for relief, and was bound by it, because, even if at the time she secured her separation decree in New York, she had had a right to sue in New Jersey for absolute divorce, ~~it~~ was her *ignorance of the fact* that the defendant resided in New Jersey <sup>that</sup> prevented her New York action from being construed as an election of remedies.

Corpus Juris, Vol. 20, at page 35, has this to say as to the validity and finality of election. Paragraph 28 is as follows:

“In order to constitute a binding election, the party must at the time the election is alleged to have been made, have had *knowledge of the facts* from which the co-existing inconsistent remedial rights arise and refers to New Jersey case of *Titus v. Philips*, 18 N. J. Eq. 541. Since any position taken by a party before knowing all the facts should be classed as a mistake and not as an election.”

~~As to the question, whether or not Mrs. Tremarco could have secured support by criminal proceedings in the Domestic Relations Court gave her a substantial remedy, the same certainly would not be an inconsistent remedy with her action for separation, and therefore the bringing of the separation action was not an election of inconsistent remedies, and the definition of an election as expressed in 20 Corpus Juris, page 21, is:~~

~~“An election can exist only where there is a choice between two or more inconsistent remedies actually existing at the time the election is made.”~~

Respectfully submitted,

SAMUEL KALISCH, JR.,  
Solicitor for Petitioner-Appellant.

it  
ad  
py  
er  
a  
e,  
nt  
rk  
of

co  
n.

n,  
is  
7-  
g  
s  
8  
y  
d  
c-

e-  
nt  
ct  
X  
X  
X  
H  
E

S  
t  
E

The first of these is the fact that the  
of the United States is the only one  
which has a permanent population  
of more than 100 million people.  
This is due to the fact that the  
United States is the only country  
in the world which has a large  
and growing population of  
white people.

The second of these is the fact that  
the United States is the only country  
in the world which has a large  
and growing population of  
black people.

The third of these is the fact that  
the United States is the only country  
in the world which has a large  
and growing population of  
Hispanic people.

The fourth of these is the fact that  
the United States is the only country  
in the world which has a large  
and growing population of  
Asian people.

The fifth of these is the fact that  
the United States is the only country  
in the world which has a large  
and growing population of  
Native American people.

The sixth of these is the fact that  
the United States is the only country  
in the world which has a large  
and growing population of  
Pacific Islander people.

121 MAY. T. 1934

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

## New Jersey Court of Errors and Appeals

Between

ROSE S. TREMARCO,  
*Petitioner-Appellant,*

and

MARTY TREMARCO,  
*Defendant-Respondent.*

*On Appeal  
from the  
Court of  
Chancery.*

### BRIEF OF APPELLANT-PETITIONER.

#### Facts.

In the month of July, 1933, petitioner, Rose S. Tremarco, the present appellant, filed a petition in the Court of Chancery of New Jersey for a divorce from her husband on the ground of desertion. The petition charged the defendant with having deserted the petitioner in the month of July, 1929, ever since which time and for more than two years last past the said defendant had wilfully, continuedly and obstinately deserted the petitioner. The petition was served upon the defendant on August 25th, 1933, and he filed no answer and entered no appearance.

The Advisory Master to whom the case was referred took proofs and found that the marriage of the parties and the residence of the defendant were sufficiently proved and corroborated, and also the fact that the defendant left the petitioner without justification and has made no effort to effect a reconciliation (C. p. 22, bottom, p. 23 top), *but dismissed the petition because of the failure to prove the continuity and obstinacy of the desertion, by reason of the fact that the petitioner obtained a judgment of separation from*

*the defendant in the Supreme Court of New York, which judgment at the date of the hearing was in full force (C. p. 30, ll. 20 to 40).*

It appears from the testimony that at the time of the desertion charged in the petition the parties were living in Bainbridge street, Brooklyn, N. Y. (C. p. 10 bottom). That defendant left petitioner in July, 1929 and that from that date to the present time he never resided with petitioner again (C. p. 12, ll. 10 to 13). It further appears from the testimony that the defendant has been living at 24 Warwick street, Newark, N. J., for the last four or five years with his parents (C. p. 20, ll. 17 to 20), and that he has been working in New York City continuously for about ten years (C. p. 21, ll. 31 to 35).

It also appears that the petitioner brought a suit in the Supreme Court, Kings County, New York, in November, 1931, for support and for a limited divorce, and that she was under the impression that the defendant was living in New York City; that he was served in New York by petitioner's brother (C. p. 31, l. 10 to bottom; top p. 14 to l. 15). That petitioner's only desire when she received the decree of judicial separation was for support (C. p. 13, ll. 15 to 29). That she was awarded a decree from the defendant from bed and board forever, on April 26, 1932, (C. p. 36, l. 10 to bottom), and as the Court will see from the decree (C. p. 36) petitioner was awarded the sum of \$15 a week which she never received (C. p. 13, l. 26).

The testimony of Mr. Lowenstein, an attorney at law of the State of New York, was to the effect that he had been practicing in the City of New York ever since 1902; that he was familiar with the divorce laws in New York and that there

was no cause for absolute divorce in New York on the ground of desertion; and further that in order for a deserted wife in New York to secure support from her husband, it is necessary to bring an action for judicial separation, which results in a judgment (C. p. 18, top of p. 19).

### ARGUMENT.

The question to be decided is did the fact that the petitioner after the two-year desertion period, in procuring a divorce from bed and board or limited divorce in New York, which New York decree is in full effect, constitute an act by her which stopped the legal continuity of such desertion?

The Court evidently felt that although the McGovern case, 111 N. J. Eq. 18, held that the desertion need not be *wilful and obstinate* after the two-year period, that such judgment being open of record and in full effect, prevents the same from being continuous. In other words, that the defendant cannot be said to be deserting petitioner during such time as he is under court order to keep away from the petitioner. That this is so is plain from the following excerpts from the Court's decision.

"This decree (meaning the New York decree) admittedly remains open of record, and in full effect" (C. p. 23, ll. 18 to 19).

and again,

"The question to be decided is what effect, if any, has the decree *a mensa et thoro* entered in the Supreme Court in the State of New York, on the obstinancy and continuity of the desertion, and whether such decree, while it is in effect, bars the petitioner's right to a decree for absolute divorce for desertion in this state \* \* \*" (C. p. 23, ll. 31 to 37).

and further on,

“It is difficult to see by what process of reasoning it can be held that, where there is in existence a decree of a competent court making it unlawful for the defendant to live with the petitioner, that obedience of that decree by the defendant can be construed to make him guilty of *continued and obstinate* desertion under our Divorce Act” (C. p. 26, ll. 6-13).

The Court evidently felt that the defendant's desertion lacked continuity to the time the divorce petition was filed because of the New York judgment, although agreeing with the McGovern case, that the desertion need not be wilful and obstinate after two years from its inception. In the Court's decision it quotes as a basis from the case of *Reibesehl v. Reibesehl*, 106 N. J. Eq. 32, and states in reference thereto the following:

“In the *Reibesehl* case the New York decree was obtained by the wife and was held to be a bar to the right of the husband's suit for divorce on the ground of desertion in New Jersey, but it would seem that in deciding this case Chancellor Walker considered the bar of the decree and not who obtained it.”

and further quotes from the case of *Gordon v. Gordon*, 89 N. J. Eq. 545, and states in regard thereto as follows:

“The Court of Errors, by its decisions, having held \* \* \* that if the offending party is unable, by reason of incarceration, to return during that period, that is, the *two years next preceding the filing of the petition*, there can be no wilful, continued and obstinate desertion. I am unable to distinguish, in principle, the difference between the offending party being unable to return by reason of the existence of a decree of a court of competent jurisdiction forbid-

ing him to do so, and his incarceration, for in either case, he is not a free agent.”

Both of the Court's statements are clearly without merit, as an examination of the Reibesehl case shows that the Court merely decided that the New York judgment which adjudicated that the husband, defendant therein, deserted the wife, plaintiff therein, was *stare decisis* in the subsequent suit brought by the husband petitioner against the wife defendant in New Jersey, viz.: the New York action having adjudicated that the husband left the wife is *stare decisis* of the husband's subsequent claim in the New Jersey action that the wife was the offending party, and an examination of the Gordon case shows that the Court's quotation therefrom (C. p. 27, bottom, top p. 28 to l. 10), and its decision has reference *merely* to the Court of Errors' expressed finding therein that the insanity actually took place *before the expiration of two years from the commencement of the desertion.*

In view of the fact that this quotation from the Gordon case has reference merely to insanity *during* the two-year period, and the Chief Justice in writing the opinion for the Court of Errors and Appeals having specifically stated therein that insanity *after* the two-year period *would not conflict with the requisite continuity thereafter* as follows: *Gordon v. Gordon*, 89 N. J. Eq., p. 538.

“But if he or she declines to take advantage of the opportunity to repent offered by the statute, and persists in the desertion for the full period of two years, the right to return is gone, the hour of repentance has passed, the benefit given by the statute to the spouse offended against has become vested and he or she can never thereafter be deprived of that benefit—of his or her

right to a divorce—except by his or her own act. Repentance by the sinner, offers of return by him or her, are then of no avail. Not even the fact that the offending spouse, after the termination of the two years' period, has ceased to be a *free agent* by reason of *mental aberration, or from any other cause, can deprive the injured spouse of that vested right. It is absolute and unassailable.*”

and there being no question, but that the petitioner in the case at bar procured the New York decree *after the two-year desertion period had elapsed*, it is difficult to comprehend why the Court saw fit to rely on the matter covered by its quotation from the Gordon case dealing with a situation during the two-year period, rather than the matter from which I have above quoted therefrom dealing with a situation after the two-year period. Had it relied upon the matter quoted by me as aforesaid, rather than the matter covered by its own quotation its conclusion (C. p. 28, ll. 20 to 30), to wit;

“I am unable to distinguish, in principle, the difference between the offending party being unable to return by reason of the existence of a decree of a court of competent jurisdiction forbidding him to do so, and his incarceration, for in either case, he is not a free agent.”

would clearly have been in favor of granting a decree to the petitioner, rather than of refusing it. The Court evidently felt that because of the requirement that the separation must continue up to the time of the suit to avoid a hiatus of possible reconciliation or condonation between the end of the two-year period and the filing of the petition *Myles v. Myles*, 77 N. J. Eq. 264, that such requisite continuity was lacking in view of the fact that the defendant was not a free

agent because of the New York decree's directing that the parties live separate and apart. That there is, however, no justification in law for such a conclusion is plain, not alone from the opinion of Chief Justice Gummere in *Gordon v. Gordon*, *supra*, but also from the following language in the case of *McGovern v. McGovern*, 111 N. J. Eq., p. 18, to wit:

"The view expressed in the Mikecz case that the two-year desertion period required to constitute ground for divorce must be the two years immediately preceding the commencement of suit, was of course, based upon the express statement to that effect in *Myles v. Myles*, 77 N. J. Eq. 265. That this is no longer the law is of course evidence from the unanimous opinion of the Court of Errors and Appeals in *Remond v. Remond*, 95 N. J. Eq. 650, holding that *the desertion period specified by the statute is not required to be, or to include the two years next preceding suit*; that where a two-year desertion has been completed, the subsequent pendency of other divorce proceedings between the parties during the two years next preceding the suit *sub judice* does not affect the prior completed desertion."

and continuing on page 21,

"And it follows logically that if *it is not necessary to prove a continuation of wilful desertion during the period between the completion of two years' statutory desertion and the commencement of suit*, it is equally unnecessary to prove that during that interim the separation was obstinate—that *during that interim the offended spouse was willing to have the offender return.*"

And again quoting from the above case:

"The same thing is of course true as to the interim after the vesting of the right to divorce on any other ground. If the husband has been guilty of adultery, or of such

cruelty as constitutes ground for divorce, *the wife has the right thereafter to insist on living separate and apart notwithstanding the husband's desire and offer to return. It would scarcely be contended that in such a case such insistence by the wife, continued for two years, would render her guilty of desertion and hence deprive her of her right to divorce for the adultery. Her separation is justifiable.*

Of course the separation (though it need not thereafter be wilful and obstinate) must continue after the arising of the cause for divorce up to the time of suit. A resumption of cohabitation would constitute condonation: a waiver and *termination of the prior right to divorce.*"

Surely if the petitioner had an absolute right to live separate and apart from the defendant after she acquired a vested right to a divorce because of his wilful, continuous and obstinate desertion for two years as indicated in the above McGovern and Gordon cases, then obviously such right to a divorce was not lessened by reason of the fact, that after she acquired such vested right, to wit, that after such two-year period, she was granted a judgment in the New York court which merely judicially declared that she had such right to live separate and apart from the defendant.

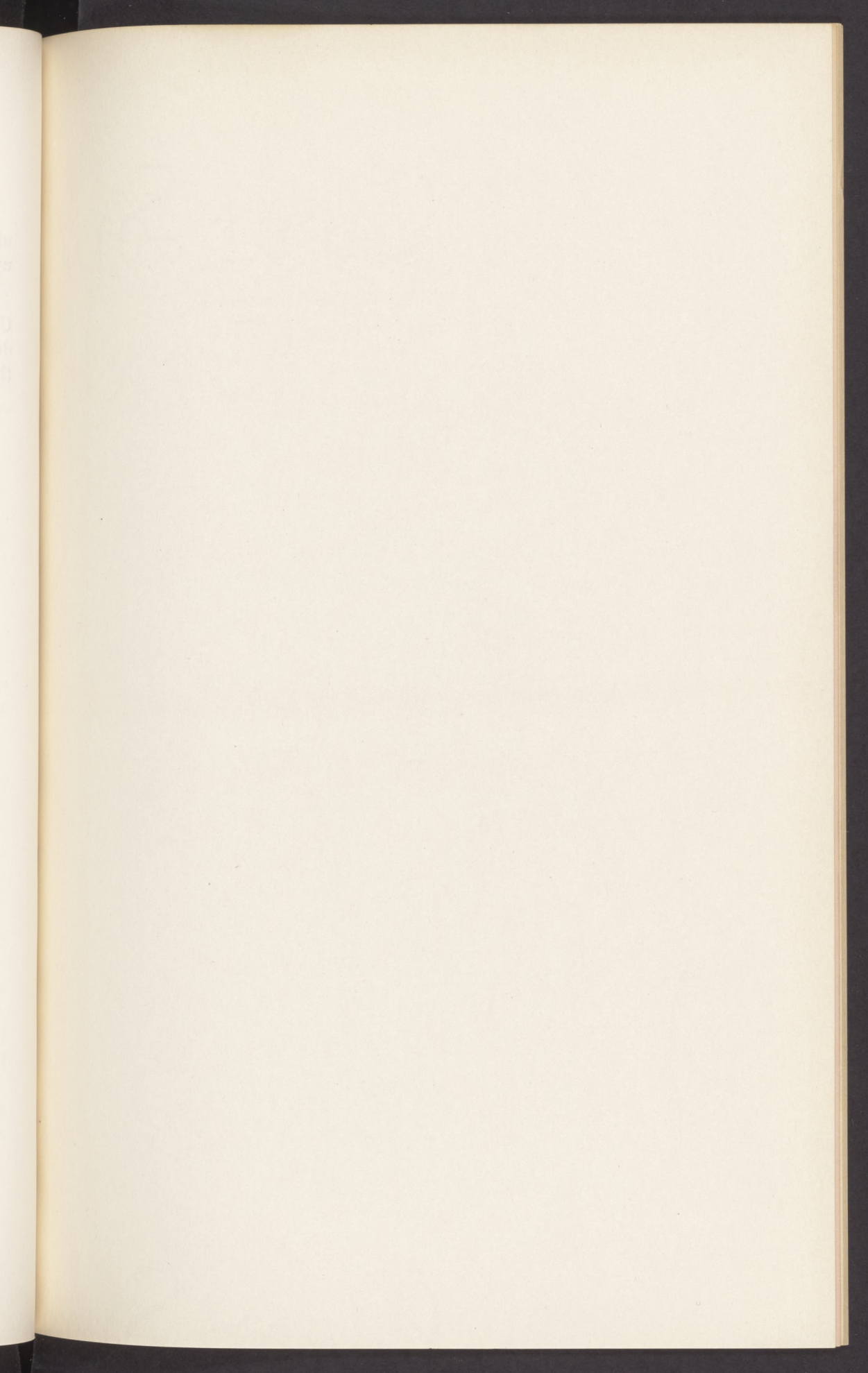
It is plain, therefore, that the petitioner plainly had a perfect right to continue to live separate and apart from the defendant after his two-year wilful, continuous and obstinate desertion of her, that such desertion was not required to be wilful and obstinate after said two-year period, and that the fact that she procured a New York judgment declaring that she had a right to continue such separation did not add to or lessen such right to a divorce or interfere with the contin-

uity of such separation, which actually continued up to the filing of the petition.

I respectfully contend that the decree of the Court of Chancery should be reversed and a decree for divorce issued to the petitioner on the ground of desertion.

SAMUEL KALISCH, JR.,  
Attorney for Plaintiff-Appellant.

ity of such operation which actually continued  
up to the time of the petition for  
I respectfully submit that the honor of the  
Court of Chancery should be preserved and a  
decent for its own name to the petition on  
the ground of desecration  
WALTER RAYBURN, JR.  
Attorney for Plaintiff





## INDEX.

	PAGE
INTRODUCTION .....	1
Complaint .....	5
Schedule 1, Form of demand .....	15
Schedule 2, List of stockholders .....	16
Notice of Motion by Defendant, The Hobden Company, to Strike Out Complaint .....	19
Notice of Motion to Strike Out Complaint .....	21
Witness .....	22
Order .....	33
Judgment .....	36
Notice of Appeal and Grounds of Appeal .....	40

