MEMORANDUM OF CONCLUSIONS.

(September 16, 1918.)

In Chancery of New Jersey

Between

HENRY HYER,
Petitioner,

and

SOPHIE HYER,
Defendant.

} Memorandum of Conclusions.

On petition for divorce on the ground of desertion, answer denying desertion, and cross-petition (counterclaim) charging desertion, abandonment and non-support, and praying not for divorce, but for a decree for maintenance under §26 of the Divorce Act.

MR. SIDNEY ADLMAN and MR. ADDISON P. ROSENKRANS, for Petitioner.

MR. JOHN F. KERR, for the Defendant.

STEVENSON, *V. C.:*

This memorandum, although it will be necessarily somewhat voluminous, will not attempt to make an

exhaustive discussion of the extensive and somewhat confused mass of evidence and exhibits presented in this cause. It will primarily undertake to present the analysis of the case which I have made, with such reference to the testimony as seem to illustrate and support such analysis.

Counsel for the defendant has ignored the allegation in the cross-petition charging the petitioner with wilful, continued and obstinate desertion of the defendant for two years. His entire elaborate and protracted argument was directed toward establishing the right of the defendant to a decree for maintenance under §26 of the Divorce Act. It would seem that a woman may not combine in one matrimonial suit a cause of action for maintenance under §26 and a cause of action for divorce, one proceeding being by bill and the other by petition. Assuming, however, that under Chapter 57 of the Laws of 1916 (Laws 1916, p. 102) a woman who is made a defendant in any suit under the Divorce Act may join as many countersuits as she may have under that act, and in a case like this may set forth all the facts and pray in the alternative for an absolute divorce, or in case she be found not entitled to such remedy then for a decree for maintenance, I think that the failure to pray in any form, in the alternative or otherwise, for a divorce, leaves a decree for maintenance the only remedy which could be allowed to the defendant in this case. That the defendant is not asking for a divorce is apparent from her testimony elicited by her own counsel to the effect that she wants to go back to her husband, and if he will not receive her then to obtain support away from him.

1. It will, I think, be a convenient method of dealing with this case if consideration is first given to the suit of the wife for maintenance on the ground of abandonment and non-support.

The petitioner was and is the cashier of the First National Bank of Little Falls, New Jersey. Both parties are upwards of fifty years of age. It was the second marriage of the petitioner and the third marriage of the defendant. Each has an adult daughter by a former marriage, and the defendant also had an adult son living in Bridgeport, Connecticut. The couple were living together harmoniously as man and wife in a house in Little Falls belonging to the husband. The family also included the two daughters, and it is proved without dispute that the petitioner, the husband, was very kind to his stepdaughter, and that their relations were affectionate. There is no evidence, excepting what is given by the stepdaughter Helen, that the husband ever struck or threatened to strike the wife or treated her in their home in any but a kind manner. On December 10th, 1912, the wife and her daughter voluntarily left the husband's house and left Little Falls, and for about three months resided, I believe, in Paterson and possibly elsewhere. We may take the account which the stepdaughter Helen gives as the cause of this separation as substantially correct. If her story is true, or partly true, the husband may have used violent language and even threatened to strike his wife. He did not, however, strike his wife, and there is no pretense that the next day, when the wife and her daughter left the house, either of them was under any fear or apprehension of any cruelty that the husband might practice upon them. No shadow of support appears in the testimony for any claim on the part of the wife that the husband was guilty of a constructive desertion or a constructive abandonment on account of this incident in December, 1912. The couple quarreled. The husband may have used offensive language, and the wife the next day, when everything had quieted down, saw fit to leave her husband's home. She

had separated herself temporarily from her husband on two former occasions, and in each instance the husband had induced the wife to return.

The cause of the quarrel was the visits of a young man at the house upon the stepdaughter Helen. The petitioner had expressed his disapproval of this young man and had forbidden his wife and daughter to allow his visits to be continued. Returning unexpectedly in the evening to his house, the petitioner found this objectionable young man sitting with the stepdaughter in the kitchen. The young couple were engaged, but the engagement had not been announced. It may be stated here that after the stepdaughter and her mother had removed to Bridgeport, Conn., the daughter's engagement was broken and she subsequently married another man, and in January, 1915, wrote a letter to the petitioner, beginning with "Dear Dad," in which she said:

> "Now, that I am married to a good man I want to thank you for bringing this about for me. I see now that you did the right thing and I am sure mother will think the same. * * * I also want to thank you for your kindness to me in giving me a musical education. I see now where you meant everything for the best. * * * I would love to have Lulu or both of you write me a few lines to let me know that you forgive me for anything which I in my ignorance may have done."

The letter concludes:

> "I am, with love to both, Your daughter Helen Neubauer."

It is a somewhat significant fact that while in her pleadings the defendant alleges that she was

driven from her home by the petitioner on December 10th, 1912, and in her amended cross-petition sets forth in detail the violent conduct of the petitioner, she gives no testimony on this subject when on the stand. Her only reference to this important transaction, which was in one sense the cause of the separation, appears to be in the incidental remark, which she makes twice, "I went away in 1912." The indications are that the defendant's daughter, who naturally sympathizes greatly with her mother, exaggerates in her testimony the incidents of violence and abuse on the part of the petitioner which characterized the quarrel between the petitioner and the defendant on the day before the defendant and her daughter voluntarily left the petitioner's home.

On or about February 28th, 1913, the defendant, who apparently was still residing out of Little Falls, wrote a letter to Mr. Stanley, the Overseer of the Poor at Little Falls, making a complaint against her husband for non-support, evidently with a view to the institution of the usual proceedings in such cases. The defendant then established a temporary residence for herself and her daughter in a flat on Maple St., in Little Falls. Mrs. Hill, one of the defendant's witnesses, occupied the other flat in the same building. On March 3rd, 1913, Mr. Stanley, after receiving the letter from the defendant, called on the petitioner at the bank in relation to the defendant's complaint, and later, on March 3rd or 4th, Mr. Hart, the petitioner's brother-in-law, and Mr. Stanley had an interview with the defendant at her home on Maple St. At the suggestion of the defendant Mr. Stanley went to the bank and brought the petitioner, and negotiations were conducted for the settlement of the defendant's claim upon her husband for support. Mr. Stanley, an

absolutely disinterested and unimpeached witness, testifies positively that the petitioner said:

> "Now, Sophie, you have left me before; why don't you come back?"

and that the defendant replied that she would never come back to him. Mr. Hart also testified that on that occasion she told him that she would never go back to her husband. At the request of defendant the negotiations were adjourned to the office of her counsel, Messrs. Ward & McGinnis, in the City of Paterson, where they were concluded in the afternoon of the same day. The petitioner, the defendant and Mr. Stanley and the defendant's counsel were present. The result was that the parties agreed that the petitioner should pay the defendant for her support six dollars a week. Mr. Stanley swears that this "was agreed upon." There is no evidence that the defendant demanded any larger sum or that she was not satisfied with this sum. It does not appear that any written agreement of separation was made, and petitioner's counsel was not put upon the stand. This stipend ($6.00 a week or $26 per month) was paid as a general thing apparently with regularity down to the time of the commencement of this suit. The order for temporary alimony fixed the stipend at $30 per month—only four dollars per month more than the amount voluntarily agreed upon by the husband and wife in March, 1913, when the cost of living was much less than when the order for alimony was made. The evidence is ample to show that from the wife's voluntary departure from her husband's house in December, 1912, she took the position that she would not live with her husband in Little Falls. I shall not undertake to cite the testimony of witnesses which establishes this proposition to my satisfac-

tion. Even the defendant's partisan witness, Anna Keind, after apparently undertaking to suppress the fact, was obliged to admit that she heard her brother tell the defendant many times that she ought to go back to her husband, and thereupon the defendant said she would not go to Little Falls with him. The witness does not give the dates or the period when these declarations were made, but it appears from the testimony of Mr. Kramer, her brother, that the declarations were made in the year 1916.

In the spring of 1913, March or April, the petitioner and the defendant, as the defendant testifies, "made up," and made an agreement which she says was satisfactory to her, that they should remain apart at least for two years and then live together in a bungalow somewhere away from Little Falls. The defendant does not intimate in any way that the provision for her separate support made in the month of March preceding was in any way disturbed. Shortly after the time when the defendant says this arrangement was made she (the defendant) removed with her daughter to Bridgeport, Conn., where they resided with the defendant's son. A number of letters from the husband to the wife, written to her at Bridgeport, are produced in evidence, and all indicate an entirely friendly spirit. About July 3rd or 4th, 1914, the petitioner and his daughter Lulu went up to Milford Beach, Conn., where the defendant was temporarily engaged in letting out rooms at a summer resort, and while there the petitioner took his wife and daughter to a hotel in New Haven. Without examining the details in regard to this visit, it is for present purposes sufficient to point out that the relations of the petitioner and the defendant were entirely friendly. The petitioner testifies, and he in part

is corroborated by his daughter, that he went up with his automobile to Milford Beach with the hope of inducing his wife to return with him, and he took his daughter along with the idea that she might be of use in persuading the defendant to return. The daughter testifies that she took occasion to ask the defendant why she would not come back with them "this time on this trip," and the defendant said:

> "No, she would not. She did not care for Little Falls and she would not come back."

On September 6th, 1913, the petitioner wrote the defendant stating that he might be up some Sunday to see her. The defendant had returned to Bridgeport and the petitioner visited her there at her son's house, remaining over night and occupying the same room with her. The petitioner testifies that he endeavored to persuade his wife to return with him, and that at first she promised to do so, but subsequently pleaded that she must have time to pack up, but promised to join him at Little Falls in a few days. On September 30th the petitioner wrote to his wife that he had got home the Sunday previous and enclosing a check for $25.

This seems to be the last letter that the petitioner wrote to the defendant until February 12th, 1914, unless the impression of the defendant is correct that she received a letter from the petitioner in October, 1913. The important point to notice is that this is the last *friendly* letter that the husband wrote of which we have any proof. For some reason he became angry with his wife and did not communicate with her or answer her letters. On November 5th, 1913, the defendant wrote a letter to the petitioner stating that she had written on October first, and had received no answer, and referring to the fact that they had "parted the best of

friends" when the petitioner had made the Bridgeport visit. A postscript expresses the hope that the petitioner was not "angry at anything."

The probabilities, I think, all favor the story which the husband tells about his sudden cessation of friendly relations with his wife. He visited her in the summer of 1913 and a complete condonation of matrimonial offenses on either side was effected. The husband returned to Little Falls, wrote a friendly letter to his wife the second day after his return, enclosing a check for twenty-five dollars, and then refrained from further communicating with her because he says she had promised to come back with him, then had pleaded that she required a few days for packing, etc., and promised to join him later at Little Falls. The petitioner says that he was angry with his wife because she had "fooled him," and he did not think that it was worth while to make further efforts to secure her return. The defendant, on the other hand, would make it appear that there was some mystery about this sudden change in the petitioner's sentiments toward her. She could not suggest any explanation except that the discovery by the petitioner that the defendant was giving her old mother five dollars a month may have excited the petitioner's anger. The petitioner, however, appears to have continued paying to his wife the monthly stipend in discharge of an obligation to support his wife which he understood still rested upon him.

At a later time, in 1913, or the early part of 1914, the petitioner received information to the effect that the defendant was charging that he (the petitioner) was going with other women, and also that she was paying the five dollars per month to her mother, and thereupon he wrote to her the following letter:

"Feb 12/14

Sophie

Enclosed find check for the balance that I owe you. you say you can't live if you don't get money. go out and work for it the same as I do. I think you don't need it very bad as I found out you are giving your mother five dollars a month, and I have to pay for it, and as for not having time to send you money on account of making dates with other women you want to see it and not hear it. you can come up to Little Falls as much as you like for all I give a dam for you have made one dam fool out of yourself and you dont care whether you put me on the bum or not but I got so I dont care either.

HENRY."

This was the last letter which the petitioner ever wrote to the defendant. For nearly a year no communication passed between the couple, with the exception of three or four letters which the defendant wrote to the petitioner relating mainly to the payment of the monthly stipend. The state of mind of each of these parties in November and December, 1914, and afterwards until January 6th, 1915, is indicated, I think, distinctly from the evidence. The petitioner being disgusted and angry with his wife because, as he said, she had "fooled" him and thwarted his effort to bring her back to his home in Little Falls, stopped all correspondence with her until he received a letter from her demanding money, and thereupon, under the exasperation of the charges which he heard his wife was making against him, wrote the offensive letter of February 12th, 1914, which evinces a condition of mind on

his part which would render him, for the time being at least, entirely satisfied with the absence of his wife from his home.

On the other hand, I think the evidence shows that the defendant's dominant wish was to obtain support, the support agreed upon, regularly from her husband while she remained away from Little Falls. It may be that if the petitioner had again endeavored to effect a reconciliation with his wife by leaving Little Falls and joining her in Bridgeport or some other place she would have received him. Both parties appear to have been under the impression, probably derived from the Poor Master, that whether the defendant was willing to return to her husband's home or not he (the husband) was obliged to support her. It was upon this view of the law undoubtedly that the agreement for the payment of $26 per month was made when there was no negotiation pending between the parties for a reconcilation. The agreement was made at arm's length, the Poor Master and counsel for the defendant being at hand to enforce their views of the law and the petitioner having no legal advice whatever. The defendant went to live temporarily in the Maple street house, having in view possible legal proceedings to obtain support from her husband, and within a short period after this arrangement for her support was made she abandoned the Maple street home in Little Falls and with her daughter established herself at Bridgeport and Milford Beach, Connecticut.

On December 15th, 1914, the defendant wrote the petitioner a letter from Bridgeport, Conn., with reference to her check for her "November money," which apparently had not been paid. Receiving no reply on December 22nd, the defendant wrote the petitioner the following letter:

"Bridgeport Dec 22nd 1914.

Henry

I cannot understand what your object is in keeping back my check for my November money. nor why you dont answer my letter which I sent you a week ago.

I will wait the rest of this week and unless I hear from you, I am coming down to Little Falls, and will not rest untill the question of my support is decided one way or the other. It seems you are not satisfied to have our troubles hushed up.

I have kept out of your way and minded my own business as long as you did something for my support, but you dont seem to want it that way.

If you feel that you would like our troubles brought before the public again, why do as you are doing now, if not, send me my check by return mail.

You have had plenty of time to think this thing over and no doubt know what is best to do.

Your wife

SOPHIE."

There is nothing to show that the petitioner intentionally refrained from sending the November installment to the defendant. The petitioner accounts for his default by stating that he was suffering from illness. This letter of December 22nd, 1914, indicates distinctly the dominant sentiment in the defendant's mind at that time. She does not speak of any reconciliation. She does not exhibit any desire to re-establish affectionate relations with her husband or live with her husband at Little Falls

or anywhere else. She demands her money and threatens that she will wait the rest of the week and then come down to Little Falls and bring the question of her support to a settlement. Her statement that she has kept out of her husband's way and minded her own business as long as he did something for her support is certainly significant.

Failing to receive a check for her November money within the time limited in her letter, the defendant left Bridgeport and came to Paterson and then went to Little Falls and undertook to engage the services of the Poor Master. It can hardly be supposed that this was the first step in an effort to effect a reconciliation.

Mr. Stanley sent the defendant to a lawyer in Paterson, Mr. MacDonald, and he in turn sent the defendant on January 6th, 1915, to a justice of the peace, who took a criminal complaint from the defendant against the petitioner for desertion or non-support. Can it be supposed that the governing motive inspiring this conduct on the part of the defendant was to effect a reconcilation with her husband? At a later day the petitioner appeared before the justice of the peace and gave bail, and after the arrears were paid by checks sent by the petitioner to Bridgeport, whether before or after he was notified of the complaint does not appear, the defendant, with the advice of counsel, went before the grand jury and procured the dismissal of the complaint against her husband. The justice of the peace having taken this criminal complaint on December 6th, 1915, sent the defendant with a note of introduction bearing that date to her present solicitor and counsel, to whom she evidently made a somewhat extensive disclosure of her troubles with her husband. There is nothing in the evidence to suggest that the defendant went to counsel from any other motive than a desire to compel the pay-

ment of the money from her husband which was then overdue. But here, for the first time, the defendant had an opportunity of learning from counsel expert in divorce law precisely where she stood. The inference is unavoidable that she learned that she and her husband were both under a mistaken impression in regard to the extent of her husband's liability to furnish support to her when she was living in a state of voluntary separation from him. Before undertaking to enforce any obligation of the husband to furnish support it was manifest that the first thing to be done was to put the husband in the wrong. I think the evidence in this case leads plainly to the conclusion that if, on January 7th, 1915, the defendant's counsel instead of writing the somewhat extraordinary letter to the petitioner which he testifies he wrote and mailed at that time, had filed a bill alleging abandonment and non-support under §26 of the Divorce Act, the suit would have failed on both points and the bill would have been dismissed.

According to the story which the defendant tells on the stand and presumably must have stated to her counsel, she was living separate from her husband under an agreement between herself and her husband which she says was satisfactory to her at the time it was made, and this agreement expressly provided that the couple should live apart for at least two years, the understanding, of course, being that the provision for the wife's support should be continued. There is not a particle of evidence that from the summer of 1913, when this perfectly plain agreement is alleged by the defendant to have been made, until January 7th, 1915, the defendant in any way notified the petitioner that she was not consenting any longer to the separation or that she wanted to return to her husband's home. The incident at the bank when, according to the allegations

of the cross-bill and the testimony of Mrs. Hill, the defendant asked the petitioner for the keys of his house, and stated that she desired to go home, and was informed that there was no home for her, if reported correctly, occurred, according to Mrs. Hill, in January, 1913, but, according to the allegation of the cross-bill two weeks before the complaint to the Poor Master was made, which fixes the date some time in February. Any declaration by the defendant of her desire to return home at this time, however, is of little importance because of the condonation in the summer of 1913 and the agreement satisfactory to the defendant that the couple should remain living apart for two years.

The petitioner, although not very satisfactorily questioned in regard to the matter, appears to deny that any such agreement to live apart for at least two years was made by himself and his wife. He admits, however, that there was some talk between them about their living together in a bungalow, but states that this was upon the occasion of the second separation in 1908. It is not necessary to find that the defendant's testimony in regard to this alleged agreement made in 1913 is without substantial foundation, or to find that the defendant does not believe that such an agreement was made. The point is that the defendant now testifies in this cause that the agreement which she describes was made, and that the same was satisfactory to her, and the inference is that she stated to her counsel on January 6th or 7th, 1915, that she had been living apart from her husband under the terms of such an agreement.

Counsel for the defendant, we must assume, knew the law applicable to the situation which his client disclosed to him. He must have known and advised his client that the agreement of this couple to live apart for two years while the husband paid a

monthly stipend, which the wife with the advice of counsel had accepted, would defeat any suit for divorce or for maintenance under §26 of the Divorce Act which at that time the wife could bring. It was plainly necessary that the wife should make a radical change of front and offer, or pretend to offer, to her husband terms of reconciliation.

The agreement for the monthly stipend of $26, presumably not in writing, was manifestly a doubtful assurance of the defendant's future support. If the monthly payments should be discontinued or be made irregularly and at long intervals, it is plain that the defendant would have no legal remedy, and the question would naturally arise in any lawyer's mind whether the agreement would be enforcible in a court of equity. However that might be determined in the mind of counsel, it would plainly appear, I think, that the thing to attempt to accomplish on behalf of the defendant would be to place her in a position, if it was possible to do so, in which she could maintain an action for maintenance under §26, or after two years an action for an absolute divorce, which would include alimony.

Accordingly we find that counsel for the defendant, after hearing her story, wrote the letter to the petitioner above referred to. This remarkable letter from counsel opens with the statement that the defendant had retained him "in the first instance for an endeavor to bring about a consummation of the agreement" made by the couple "to resume marital relations." It is somewhat difficult to understand what "agreement" made by the couple is referred to. Was it an agreement that they should live apart for at least two years while the husband should from time to time visit the wife at her residence, as he had twice done in the summer of 1913? The letter continues:

"She has been willing, she tells me, ever since the night that you broke up the family, and is now ready and willing that you should return to her. I see from all your letters that there was the most friendly and affectionate relations existing between you and your wife during this long separation, and I understand that the letters that you have received from her are as affectionate and loving, if not more so, than are yours."

This is a somewhat singular statement, if the defendant showed her counsel the last letter from her husband, dated February 12th, 1914, and also exhibited to him her carefully preserved copies of her letters to her husband of December 15th and December 2nd, 1914.

This letter from counsel to the petitioner requested a meeting at counsel's office, and a meeting was held the following Saturday, at which the defendant's counsel, the petitioner and his brother-in-law, Mr. Hart, were present. I shall not discuss the contradictory evidence in regard to what took place—what was talked about at this meeting. The defendant's counsel was sworn as a witness on her behalf and testified at considerable length in regard to this interview, and from his testimony it would appear that the main theme discussed was the reconciliation which counsel was endeavoring to effect. The defendant and Mr. Hart, on the other hand, desire to have it understood that the main subject of negotiation was the payment of the installments.

The next important matter to be considered is the letter alleged to have been written by the defendant to the petitioner on January 28th, 1913, which letter is as follows:

"Paterson, Jan. 28 1915.

"Dear Henry.

Thought I would let you know that I am living at 370 Ellison St. Paterson.

I hope you are not so bitter against me any more. I want to ask you to forgive me, if you can, for everything which I have done. I am truly sorry for everything, and I am willing to forget the past and be friends again.

I feel very despondent and downhearted to night so I am writing this to you hoping that it will soften your heart, and that you will come to see me and talk things over. life is short, Henry, and we are here to-day and gone to-morrow, and I still care as much for you as I ever did. please come and see me Sunday night and lets have a talk, wont you?

Will you answer this and let me know if I can expect you Sun?

with love

from your wife

SOPHIE.

370 Ellison St.

Get transfer to Park Ave car and get off at Carroll St. and walk over 3 short blocks."

The defendant testifies that she kept a copy of this letter, which copy was offered in evidence on her behalf, but no certificate of registry from the post office was produced and no evidence presented to show that the letter in fact was registered. The significance of this fact I think will appear later. This letter certainly indicates a remarkable and

sudden change of sentiment on the part of the defendant toward the petitioner. A month before the defendant had come back to Paterson in accordance with her threat expressed in her letter to her husband of December 22nd, 1914, to effect a legal settlement of his obligation to support her in respect of which he was in arrear. She made no effort to effect a reconciliation with her husband. She started criminal proceedings against him. Her state of mind on January 6th, 1915, when she made a criminal complaint against her husband before a justice of the peace, which would lead to his arrest and an investigation before the grand jury, is, in my judgment, amply disclosed by her conduct. And yet, when she goes from the office of the justice of the peace to the office of a lawyer who could properly advise her as to her rights and remedies against her husband, we find a most marvelous and sudden change of sentiment. The lawyer is retained, it seems, in the "first instance" not to collect any arrears of the monthly allowance, not to complete any satisfactory arrangement for the regular and permanent support of this wife who is living in a state of separation from her husband, but for the purpose of effecting a reconciliation and causing the petitioner and the defendant to resume cohabitation. This, it would seem, was somewhat unusual professional service for a lawyer to undertake on behalf of a married woman who had just called upon him for the first time, both husband and wife having theretofore been strangers to him. It is to be observed that for three weeks the defendant made no effort on her own behalf. The criminal complaint upon which the husband was to stand charged before the grand jury had been made the day before the lawyer's letter was written. The installments in arrear had not been paid and the presumption is that the defendant did not know

that the check or checks for these installments had been sent to Bridgeport. There is a great deal in this case to indicate that the apparent change of attitude on the part of the wife evinced by the letter of her counsel of January 7th and her own letter of January 28th was apparent only and not real. It is not suggested that the letter from counsel was not written in good faith. After the defendant had learned what the condition precedent was to her enforcement of any obligation on the part of the petitioner to support her, no doubt she assumed the new attitude so distinctly indicated by herself in her letter of January 28th, 1915. This letter, it will be observed, shows that the defendant felt that she had done wrong to the petitioner and asks for forgiveness. It suggests that she and her husband "be friends again." It invites the husband to call on the wife in Paterson Sunday night so that the couple could have a talk. It professes that the defendant still cared as much as ever for the petitioner. With all the expressions of sorrow for the defendant's wrong-doing and desire for forgiveness and for the re-establishment of friendly relations, it does not say or intimate that the writer, the defendant, was willing to go back and live with her husband in Little Falls. There is no evidence in this cause that the defendant, orally or in writing, ever expressed a willingness to return and live with her husband at Little Falls after she had secured the agreement for separate maintenance in March, 1913, until the year 1917, and as has been stated above, in 1916 she positively declared more than once to Mr. Kramer in the presence of her friend Anna Keind that she would not go back to her husband at Little Falls. After the letter from counsel of January 7th, 1915, and the interview in his office which followed on January 9th, and this penitential letter from the defendant to

the petitioner dated January 28th, 1915, the whole effort to effect a reconciliation appears to have ceased. Counsel apparently regarded his effort by letter and by interview as having exhausted the opportunities and chances of securing the desired result. It may be surmised that these letters, of which copies were kept for convenience of proof, were deemed as a sufficient basis in any possible future matrimonial litigation between this couple to establish the claims of the wife to support in the absence of declarations and offers from the husband which were perhaps not expected from him. However that may be, there seems to have been no communication between the petitioner and the defendant for nearly two years, during which period the petitioner was remitting the monthly allowance to the defendant by check unaccompanied by any letter. The indications are that the defendant was satisfied with the condition of affairs between herself and her husband. She was receiving the support which she had agreed to accept without any complaint of its inadequacy, only desiring and insisting that it should be paid promptly.

The defendant testifies that on January 5th, 1917, less than three weeks before this suit was commenced, having learned from a newspaper that her husband was ill, took her friend Miss Anna Keind as a witness and went to the petitioner's residence in Little Falls at night and demanded admittance, or sought an interview, which she says was refused by her husband, and that the door was practically shut in her face and the porch light extinguished. Anna Keind corroborates this story. Louise Hyer has no recollection of the affair. The physician from Little Falls testifies that he visited the petitioner on the afternoon of January 5th, 1917, and found him confined to his bed suffering from a

severe attack of bronchitis and grip and that he had been confined to his bed for over nine days.

The next day the defendant testifies she wrote a letter to her husband, of which she kept a copy, which was put in evidence. This letter, or alleged letter, is as follows:

"Jan. 6th, 1917.

My dear husband

Am very sorry that you closed the door in my face last night, as I was very anxious to see you and have a talk with you and ask you to let me come back to you and take care of you, and let the past be buried. I only heard yesterday that you were sick, so please let me come to you.

Please answer

Your wife

SOPHIE."

The petitioner declares positively that he never received this letter and no registry certificate is produced.

I do not think that it is necessary to determine whether this letter was sent or not or whether or not the night before Mrs. Hyer with her friend Anna Keind tried to get into her husband's house with intent to take care of him in his illness. The defendant is contradicted a great many times, frequently by unimpeached and unimpeachable witnesses, and it is difficult to believe that she is not mistaken. She certainly had learned the value of being able to prove a *bona fide* offer on her part to return to her husband's home followed by neglect or refusal on his part to take her back. I am not

satisfied that any letter of January 6th, 1917, of which a copy is in evidence, was ever sent to or received by the petitioner. The fact of sending such a letter rests solely upon the testimony of the defendant herself, and I think that that testimony is counter-balanced and neutralized by the testimony of the petitioner. It may be conceded for present purposes that the testimony of the petitioner on several points of importance is unreliable. There are indications that this letter was written in order to manufacture evidence in favor of the defendant. Several of the defendant's letters to the petitioner were registered and the registry receipts were carefully preserved and produced in evidence, and yet the defendant does not pretend to have registered this last letter to the petitioner—the only letter or communication of any kind from the defendant to her husband since the separation of 1913 in which there is the slightest intimation that the defendant desired to go back and live with her husband in his home at Little Falls.

I am not, however, obliged to determine the difficult questions in regard to this alleged call of the defendant at her husband's house on January 5th, 1917, or this alleged letter from her to him dated January 6th, 1917, because it is plain from all the evidence in this case that the petitioner at that time thought that he had a complete cause of divorce from his wife on the ground of desertion. It is not surprising that seventeen days before the petitioner filed his petition for divorce on the ground of desertion, continuously since December 10th, 1912, he would decline to allow the wife whom he was about to sue for a divorce come back to his home and take care of him in his illness and "let the past be buried."

The petitioner never wrote to the defendant after his offensive letter of February 12th, 1914, and after that date the defendant kept copies of all the letters which she wrote to the petitioner, which letters were not very numerous. There are only two letters from the defendant to the petitioner which apparently indicate a desire on her part to resume cohabitation with the petitioner at his home in Little Falls, viz., the alleged letter of January 28th, 1915, and the alleged letter of January 6th, 1917. I use the word "alleged" because the fact that these two letters were actually sent to the petitioner rests upon the uncorroborated testimony of the defendant and that fact is positively denied by the petitioner. It is to be observed also that the defendant not only kept a copy of her letter of December 22nd, 1914, but had the letter registered and produced the certificate from the post office signed by the petitioner. The next two letters which she says she sent, the most important of all—the only letters which afford any evidence that the defendant no longer consented to the separation, were not registered. A letter from the defendant to the petitioner was offered in evidence but not received, dated November 17th, 1917, about ten months after this suit was commenced. This letter was registered and the return receipt signed by the petitioner was produced. Thus it appears the two most important letters alleged to have been written by the defendant to the petitioner were unregistered, although they follow a similar letter which was duly registered and precede a fourth letter which was also registered. In the face of the positive denial of the petitioner I do not consider that these letters are proved to have been sent to or received by him, and this conclusion, I think, is correct, even admitting that the petitioner's testimony, as well as the defendant's, is to some extent unsatisfactory and to be received with caution.

It must be borne in mind that the burden is upon the defendant, the cross-petitioner, to show that the agreement with her husband, which she alleges was made in the summer of 1913, was terminated by one party or the other. In my opinion she cannot effect such proof by her uncorroborated testimony that she sent certain letters of which she says she produces copies when the husband swears positively that he never received the letters, and the cross-petitioner refrained from having the alleged letters registered, although she presumably must have known that these letters were far more important than the preceding letter which she had taken the pains to have registered.

On the whole case made out on behalf of the defendant upon her cross-petition, I am of opinion that she has failed to establish by sufficient evidence the first proposition necessary to make out her case, viz., that the petitioner without justifiable cause abandoned her or separated himself from her.

If, however, in the mass of obscure and conflicting testimony which in many places is difficult to understand, evidence can be extracted upon which the petitioner should be adjudged guilty of abandoning his wife, in my judgment the proofs entirely fail to make out the second necessary proposition in the wife's case, viz., that the petitioner has without any justifiable cause refused or neglected to maintain and provide for her.

With respect to the stipend of $26 per month agreed upon and accepted by the defendant, she, the defendant, has never made any complaint excepting that it was not punctually paid. After the transactions of January, 1915, the parties appear to have acquiesced in living in a state of separation while the petitioner, so far as appears, with promptness paid the monthly stipend to the defend-

ant for her support. There is no evidence that the defendant ever requested that this monthly stipend be increased or claimed that it was inadequate to provide her with suitable support, or that she made any mistake when she agreed to the amount which was to be paid to her.

No wife, in my judgment, can, under such circumstances as appear in this case, maintain an action in the Court of Chancery under § 26 of the Divorce Act, based upon the proposition that her husband without any "justifiable cause has refused or neglected to maintain and provide for her." If support for a wife separated from her husband is agreed upon between them orally, or in writing, and the husband proceeds in good faith to pay the amount which the wife with the approbation of the Poor Master and of her own counsel has accepted as satisfactory, ordinarily the wife could not establish a case under § 26 without giving the husband notice that she has found the stipulated amount inadequate or that the same had become inadequate by change of circumstances, at least in the absence of notice to the husband of the original inadequacy or the change of conditions.

2. The suit by the petitioner against the defendant, his wife, for divorce on the ground of desertion, in my judgment, fails because the evidence does not satisfactorily show that the defendant was guilty of obstinate desertion for any period of two years prior to January 23rd, 1917, when the petitioner's petition was filed.

We may assume that the defendant initiated a period of wilful desertion on December 10th, 1912, and the fact that the petitioner shortly after the separation made a voluntary arrangement by which he agreed to support his wife, even though she refused to return to his home, would not affect the character of the wife's matrimonial offense, so that

if nothing further occurred between the parties the petitioner would be entitled to a divorce after December 10th, 1914. The mere furnishing of support by a husband does not prevent the separation of the wife from being a wilful and obstinate desertion, and in this case, as we have seen, the petitioner seems to have acted upon the misinformation which he received to the effect that he was obliged to support his wife whether she lived with him or separated herself from him against his will, and without fault on his part. The difficulty to my mind about the husband's case arises from his conduct after his return from Bridgeport in September, 1913. It was the duty of the petitioner at all times to have the defendant understand that the door of his home was perpetually open to her and that the petitioner desired her to return. The petitioner, in my opinion, had no right to adjudge that after he and his wife had become reconciled and had resumed cohabitation at Bridgeport that her failure to present herself in accordance with her promise at her husband's home within a few days rendered all further invitations and efforts on his part useless. A "just" man in the situation of the petitioner, who honestly desired to have his wife return to him—was not entirely willing that she should stay away—would not have remained silent, refraining from answering letters from the wife which still indicated a friendly spirit.

If, however, some excuse can be found for the silence of the husband after he was disappointed with respect to the return of his wife in September, 1913—if that silence did not indicate to the defendant that the petitioner no longer wished to have anything to do with her—I think it is plain that the coarse and offensive letter from the petitioner to the defendant, written February 12, 1914, disclosed an attitude of mind toward the defendant

which rendered the continuance thereafter of desertion by her no longer obstinate. The defendant, I think, had a right to infer from this letter that the petitioner did not desire her to return to his home, but acquiesced in her remaining away from that home. This letter, it will be observed, was written fourteen months after the original separation and five months after the reconciliation and condonation in the summer of 1913. The suit, as we have seen, was commenced by the petitioner on January 23rd, 1917, and there is no evidence of any change in the petitioner's attitude toward his wife after he wrote the letter of February 12th, 1914, until after January 23rd, 1915. There is no satisfactory evidence of any invitation by the petitioner to the defendant, his wife, to return to his home in Little Falls until within the period of two years preceding the commencement of this suit. The direct testimony of invitations on the part of the husband to the wife through third parties to return to him, and her rejection of those invitations, is all confined, I think, to the year 1916. While this evidence, if true, might prevent the wife from obtaining a divorce on the ground of desertion, and might also prevent her from establishing the charge of abandonment under § 26 at any time prior to the rejection by her of the last invitation, it could only show that the defendant's desertion became obstinate from the date when the first invitation was transmitted to her. Of course, the original invitation of the petitioner to the defendant established, I think, beyond question by the testimony of Mr. Stanley, and the defendant's rejection of that invitation while cogent as evidence in the case, cannot characterize as obstinate the period of desertion upon which a decree on behalf of the petitioner must rest. The petitioner's petition charges the defendant with wilful, continued and obstinate

desertion ever since the 10th day of December, 1912, but it is manifest that the complete condonation which both parties concede occurred in the summer of 1913 makes all the prior separations of the parties valuable merely as evidence of character and disposition and tendency in the light of which the character of the separation after that condonation may be determined.

3. A decree will be advised dismissing both the original petition and the cross-petition.

New Jersey Court of Errors and Appeals

Between HENRY HYER, Petitioner-Appellant, and SOPHIE HYER, Defendant-Respondent.	On Appeal from Chancery.

BRIEF FOR PETITIONER-APPELLANT.

Abstract of Case.

This is an appeal from so much of a final decree of the Court of Chancery, dated October 19, 1918, as adjudged that the petitioner-appellant was not entitled to the divorce prayed for in his petition, and as dismissed his petition and allowed costs and counsel fee to the defendant in the cause. The petition for divorce was filed on January 23, 1917, and sought a divorce on the ground of desertion (Case, p. 9, etc.). The defendant-respondent filed, on May 22, 1917, an amended answer, denying desertion, which pleading was accompanied by a cross petition alleging desertion, abandonment and refusal and neglect by the original petitioner properly to maintain and provide for her (Case, p. 12,

etc.). An amended answer to the cross petition was duly filed, denying the allegations thereof (Case, p. 22, etc.). The cause was heard by Vice-Chancellor Stevenson, who advised the final decree above mentioned, dismissing both the original petition and the cross petition (Case, p. 239, lines 3-10). The defendant has taken no appeal from the dismissal of her cross petition.

Specifications of Grounds of Appeal.

1. The decree is erroneous in that it adjudges that petitioner-appellant was not entitled to a divorce from defendant-respondent.

2. The decree is erroneous because it did not find and adjudge that the several allegations of the petitioner's petition had been proved, and that the defendant-respondent had been guilty of wilful, continued and obstinate desertion for the term alleged in the petition, and in that it did not decree that petitioner-appellant be divorced from defendant-respondent.

Argument.

The opinion of the Vice-Chancellor is divided into two parts, the first of which deals at great length with the case made by the defendant on her cross petition; the second, which is extremely brief, is concerned with the case of the petitioner upon the original petition. The Vice-Chancellor seems to have arrived at the conclusion that the original petition should be dismissed, first, because of a supposed condonation on the part of the petitioner in September, 1913, at Bridgeport, Connecticut, and, secondly, because of his finding that the defendant

was not guilty of obstinate, continued and wilful desertion for *any period* of two years prior to the filing of the original petition. Both of these conclusions of the Vice-Chancellor we think erroneous; and those conclusions will furnish the main headings of our argument.

There are certain undisputed facts which have an important bearing on both points and which we proceed to point out at once.

The parties were married in October, 1904 (Case, p. 2, lines 9-10). Both parties had been previously married; the petitioner was a widower at the time of his marriage with defendant, and the defendant was then a divorcee (Case, p. 2, lines 20-30). Upon their marriage the parties lived in Brooklyn until May, 1906, when they removed to Little Falls, N. J. (Case, p. 2, lines 30-34). The petitioner has ever since resided there (Case, p. 1, lines 33-34). With the exception of two periods of temporary separation, the defendant lived there with the petitioner until December 10, 1912, when she left his home, to which she has never since returned (Case, p. 3, lines 13-14). Between May, 1906, and December 10, 1912, defendant twice left the petitioner, once in 1906, for a day or two only (Case, p. 3, line 17, etc.), and again in 1908 for over two months (Case, p. 3, lines 22-28).

In both instances, the petitioner took the affirmative step, resulting in reunion. In the first instance, he gave her a check for $200, without which she would not return to him (Case, p. 3, lines 28-32). In the instance of 1908, he found her in Brooklyn, and by persisting finally induced her to return to him; it required several visits on his part to achieve that result (Case, p. 3, line 33, etc., and p. 4, lines 1-11). These facts were challenged neither by the defendant nor by anyone on her be-

half. Nor did she attempt to justify the leaving of petitioner on either of these occasions.

We think these temporary separations to be of importance, partly as explanatory of the conduct of the petitioner after the final separation of December 10, 1912, and partly as affecting the measure of his duty to take steps to effect a subsequent reconciliation.

The Vice-Chancellor found as a fact that the separation of December 10, 1912, was entirely unjustified on the part of the defendant. A brief review of the testimony will show his conclusion on that point to have been sound.

It was conceded that the petitioner objected to the calling at his home of a certain young man upon his step-daughter (defendant's daughter by a prior marriage), and it is admitted that he had made known his objections to his wife, and through his wife to his step-daughter (Case, p. 4, line 13, etc., p. 5, line 1, and also p. 149, lines 32-34, and p. 151, lines 1-15, and bottom of p. 151 and p. 152, lines 1-4, 13-17, 27-32). This objection was for the protection of his step-daughter (Case, p. 4, last 3 lines and top of p. 5), and afterwards was admitted by her to have been for her good (Exhibit P-1, p. 218 of Case).

Defendant and her daughter were apparently respecting this objection; but after leaving his home in the early evening of December 9, 1912, petitioner unexpectedly returned and found the objectionable young man there (Case, p. 5, lines 10-20).

As to what then occurred the defendant is strangely silent; there is nothing anywhere in her testimony in regard to the cause or the circumstances of her final withdrawal from petitioner's home on this occasion. Her daughter (now Helen Newbauer) undoubtedly tells an exaggerated story of what was said and done by petitioner at that

time (Case, p. 141, line 28, etc., and p. 142). Her version is wholly unsupported; not even her mother, the defendant, attempts to support it. It is contradicted by the petitioner (Case, p. 5, line 27, etc., and p. 6) and by his daughter, Louise Hyer (Case, p. 67, line 15, etc., and p. 68).

Helen Newbauer's version of the affair is not only contradicted, but is incredible in itself. She says that petitioner struck her to the floor by a blow with his open hand on her shoulder (Case, p. 154, line 30, etc., and pp. 155-157). Notwithstanding that she admits that this alleged assault stood alone, and that petitioner had never before struck or offered to strike her since her childhood (Case, p. 149, lines 20-29), she failed to recall whether, when this alleged physical insult was offered to her, she was seated or standing (Case, p. 155, line 31, etc., and p. 156, lines 1-11). We submit that if it had happened at all she would have been in no uncertainty as to its details.

Moreover, it is difficult to conceive that a blow struck with the open hand, with the parties facing one another, as she repeatedly describes it (Case, p. 157, lines 4-9, etc.), could have had the result of knocking her down.

If any such assault was made, then we submit that she is discredited generally.

Petitioner's daughter, Louise Hyer, says that after her father had gone out again on this evening, defendant and her daughter were in a gay and ironic mood, and danced and kissed her and said "they were going to get out" (Case, p. 67, lines 28-31), and that defendant, contrary to her custom, slept that night in her daughter's room (Case, p. 68, lines 8-15). To the same effect is the testimony of defendant's daughter (Case, p. 144, lines 1-12).

On the following morning, petitioner got breakfast for his daughter and himself (Case, p. 6, lines

19-30). Upon his return to his home about noon of that day, his wife and step-daughter, with their clothes and household furniture, were gone (Case, p. 7, lines 1-10, and pp. 69-70).

These, then, were the circumstances under which the defendant separated herself from the petitioner on December 10, 1912. She and her daughter had disobeyed the petitioner in a matter in which he had a right to legislate, and she left him without justification or right.

Her leaving was not only unjustified, but was obstinately persisted in. A few days later there was an accidental meeting between the parties in Paterson on the street; Miss Hyer corroborates her father that the defendant refused to give them audience (Case, p. 7, lines 10-20).

Annie Hart, a sister of the petitioner, says that the defendant called upon her in Brooklyn in the early part of 1913 (Case, p. 81, lines 22-25), and that upon her urging defendant to return to her home defendant flatly refused, and although asked for a reason gave none (Case, p. 82, lines 10-18). Mrs. Hart says that a day or two later she told petitioner what his wife had said during her call upon her (Case, p. 82, lines 18-24).

Louise Hyer says that she asked the defendant to return to the petitioner, in 1913, on the street in Little Falls, N. J. (Case, p. 211, lines 21-25, and also p. 72, line 24, to bottom of page). She says that she reported to her father how her mother had received her overtures (Case, p. 73, lines 3-4).

In March, 1913, defendant applied for support to Mr. Stanley, Overseer of the Poor of Little Falls, N. J. (Case, p. 8, lines 4-18). At this time petitioner had sent for his brother-in-law, Joseph Hart, who was friendly to both parties, and asked him to smooth out his affairs with his wife (Case, p. 8, lines 12-28, and also p. 54, lines 19-30). Mr. Hart

accompanied Mr. Stanley to the then home of the defendant; the petitioner was sent for on the suggestion of Mr. Stanley or Mr. Hart, after defendant had already told Mr. Hart, "I will never go back to him" (Case, p. 55, lines 33-34). Upon his arrival, petitioner undertook to persuade his wife to reunite with him; he testifies (Case, p. 9, line 25, etc.), "I told her I had a good home there yet, and why don't she come back home. She refused; she would not listen to it at all; all she wanted was support." Mr. Stanley says (Case, p. 60, line 4, etc.) that petitioner said to his wife, "Now, Sophie, you have left me before, why don't you come back?" "She made a remark that she would never come back to him." Mr. Hart says (Case, p. 57, lines 9-19) that, in reply to petitioner's request that she come back to him, she said that she "would not go back under no circumstances."

Nothing came out of this effort but an arrangement made at the office of her attorneys that the petitioner should contribute $6 a week toward the support of his wife (Case, p. 61, lines 10-30).

Without notice to petitioner, defendant removed to Milford Beach, Connecticut, about June 1, 1913, but first learned of her change of residence by a letter from her instructing him where to send her checks for her support (Case, p. 10, lines 1-20).

About the 4th of July of that year petitioner made another unsuccessful effort to induce the return of his wife; with his daughter, Louise, he motored to Connecticut and invited his wife to go with them to New Haven, where they all stayed together for a day or two (Case, p. 10, line 27, etc., and p. 11, lines 1-10). He asked her to come back to him, and she replied by asking him to go up to Bridgeport to live; he told her that he had a life job at the bank in Little Falls, and she rejoined that she "didn't care about coming back to Little

Falls." He says that he spoke to her repeatedly on the subject (Case, p. 11, lines 18-21). This is not denied by defendant.

Petitioner communicated to his daughter, Louise, the object of this Connecticut trip and asked her to aid him (Case, p. 73, lines 10-20). Louise testifies that she asked the defendant to go back with them, and that she said, "No, she would not, she did not care for Little Falls, and she would not come back" (Case, p. 73, lines 25-30). This testimony the defendant does not deny.

It appears to us to be incontestable that the above review of the evidence shows that from December 10, 1912, to the midsummer of 1913, the husband was anxious at all times that his wife should return to him, and that the wife continuously, with obstinate persistency, refused to return.

The foregoing is the history of the case down to a point where the Vice-Chancellor finds that, at a subsequent meeting of the parties at Bridgeport, Connecticut, in September, 1913, the petitioner condoned the matrimonial offense of desertion.

I.

We contend that there was no condonation, in law, on the part of the petitioner in September, 1913, at Bridgeport, Connecticut.

What is the evidence as to what took place at that time?

In the early fall of 1913, petitioner learned that his wife had changed her residence from the summer resort at Milford Beach to the City of Bridgeport, Connecticut (Case, p. 11, lines 21-28). In September, he visited her there "to see what I could

do to get her back again" (Case, p. 11, line 30). He had written her that he would like to come up there, and she wrote him directions for going (Case, p. 12, lines 9-13). "I met her in her flat in Bridgeport on a Saturday afternoon" (Case, p. 12, lines 21-30). He says, "I told her, 'What is the good of living up here, why didn't you come back to Little Falls and live there?' and *she said she would come back, and, of course, I took it for granted she would come back, and she asked me to stay over night and come back next day, so I stayed there that night until the next day*" (Case, p. 12, line 33, etc., and p. 13, lines 1-12). As to the time of her return, she said that "she would come back the next Sunday afternoon, when I was going home" (Case, p. 13, lines 20-23), and that she would go back with me (Case, p. 13, lines 24-25). An arrangement was made for the disposition of her furniture, which was to be left with her daughter (Case, p. 13, lines 26-35). On Sunday, after dinner, they were alone for about two hours, when she changed the programme. In petitioner's words, *"She changed her mind and wanted a couple of days to pack up;* I told her there was nothing to pack up, and she says she wanted a couple of days' time, and I went home without her" (Case, p. 14, lines 3-8). She did not return to Little Falls "in two or three days" or at all (Case, p. 14, lines 16-19). He did not hear from her again until he "received a letter and she stated that she wanted money. I should send her money up there, that she did not care to come back to Little Falls, or didn't care about living in Little Falls" (Case, p. 14, line 20, etc.).

Although the defendant was sworn in her own behalf and alluded to this Bridgeport trip, saying that her husband had "a pleasant visit" (Case, p. 165, lines 3-4), *she did not deny that she had prom-*

ised on Saturday to return to Little Falls, N. J., with him on Sunday and had disappointed him at the last moment.

On the other hand, the circumstances powerfully corroborate his story.

In *Foote* v. *Foote,* 65 *Atl.,* p. 205, it was decided by this Court that:

> "Under the statute requiring corroborative evidence of desertion in order to obtain a divorce, testimony of other witnesses is not required; but it is sufficient if the circumstances, as shown by the expressions and conduct of the defendant, together with the letters of the parties, corroborate the testimony of the complainant."

If the petitioner's object in visiting his wife on this occasion was not to win her back, what possible object could have induced him to make the trip? The harmonious testimony of his daughter, his sister, his brother-in-law and of the Overseer of the Poor of Little Falls show that, throughout this period, the petitioner had tried to persuade his wife to resume residence with him; this evidence is contradicted by no one, not even by the defendant herself.

Moreover, two of her letters furnish some corroboration of his report of the object and incidents of this trip. We refer to Exhibit P-4 (Case, p. 219, line 23, etc., and p. 220, lines 1-20), ending with her postscript, "Hope you're not angry at anything"; and Exhibit P-2 (Case, p. 219, lines 1-19), in which she says, "Hope you are not angry any more," which letter was written about May 11, 1914 (Case, p. 184, line 30, etc.; pp. 185, 186 and 187, lines 1-15).

Defendant was examined at length as to what she had in mind in writing, "Hope you're not angry at

anything," in her letter of November 5, 1913, and, "Hope you are not angry any more," in her letter of May, 1914. Her first suggestion as to the cause of his anger was something about her giving her mother $5 a month (Case, p. 187, lines 27-36). Upon the fact being called to her attention that the only reference ever made by him to her giving money to her mother is found in his letter to her of February 12, 1914, Exhibit D-5 (Case, p. 224, line 30, etc.), she withdrew her former and only suggestion as to the cause of his anger (Case, p. 189, lines 3-20). She says that between his Bridgeport trip of September, 1913, and the following May, he wrote her twice only, first on September 30, 1913, Exhibit D-6 (Case, p. 226, lines 1-20), and the other on February 12, 1914, Exhibit D-5 (Case, p. 224). He explains why his correspondence with her practically ceased after this Bridgeport trip; the explanation she first ventured she shortly withdrew, as we have seen, and offered no other.

Keeping in mind his repeated invitations and efforts hereinabove pointed out, on what reasonable theory can his sudden silence after his Bridgeport trip be accounted for, if his own story be rejected that he had been "fooled" by his wife, "by telling me she would come back and making me stay there over night and next day, and not coming with me" (Case, p. 15, line 28, etc.).

The wife's uncontradicted assurance to her husband in Bridgeport, Conn., in September, 1913, that she would come home with petitioner, connected with her request at that time that he stay over night and they would return together the next day, above set forth, was purposely a delusion and snare to her husband, was prompted by hypocrisy and deceit on her part, by a feigned repentance, and for the evident purpose of fooling him, and, in law, inducing him to stay with her that night by fraud.

Condonation cannot be effected in this way.

14 *Cyc.*, p. 637.

"Condonation in the law of divorce is the forgiveness of an antecedent matrimonial offense *on condition that it shall not be repeated, and that the offender shall thereafter treat the injured party with conjugal kindness. So long as the offender complies with the condition there can be no divorce, but a breach of the condition works a revival of the original offense and allows a divorce therefor.*"

"*Condonation to be effectual, must be the voluntary act of the injured party, and not induced by fraud*, force, or fear."

Bishop on Marriage, Divorce and Separation, Vol. 2, paragraph 269.

"Condonation is the remission, by one of the married parties, of an offense which he knows the other has committed against the marriage, *on the condition of being continually afterward treated by the other with conjugal kindness—resulting in the rule that while the condition remains unbroken there can be no divorce, but a breach of it revives the original remedy.*"

Idem., paragraph 308:

"All condonation, especially the implied, is upon the condition both that the offence shall not be repeated, and likewise that continually afterward the party forgiven shall treat the other with conjugal kindness, whereupon a breach of the condition revives the original right of divorce."

Idem., paragraph 309:

> "Why? Though in some degree this doctrine is technical, there are plainly for it various reasons. *One is that the condoning party almost certainly proceeded on the assurances from the other, or a belief otherwise induced, of repentance. Then if the latter's conduct shows that the repentance was either feigned or ineffectual, the condonation was a result of fraud or mistake—two impediments either of which, on well recognized principles of law, invalidate every undertaking.* So likewise is the law of executive pardon; a pardon procured by fraud is void, and any suppression of material facts is deemed a fraud. *Another reason is that the law, like him from whom it primarily proceeds, loves contrition and reformation, and hates hypocrisy and deceit.* And the conditional condonation, whereby one may safely forgive, being remitted to his original rights, if the apparent repentance turns out to have been false, is the law's expression of this, its combined love and hate. But for this doctrine, a husband seeing tears of a delinquent wife, and not knowing whether the sorrow which produced them was for her sin or for its discovery, would be compelled in self protection to refer it to the latter, and withhold forgiveness, though in truth there was repentance, to the overthrow of the high policy of the law."

We have found neither in the text books nor the reports a single instance in which, by means of the wife's fraud and imposition upon the husband, he has been induced to resume the marital relation for

a solitary night only, where his act has been held to amount to condonation.

Furthermore, the defendant's consistent attitude of refusal to yield to the petitioner's invitations and entreaties was not only unbroken by the episode of September, 1913; but since that time she has been guilty of wilful, continued and obstinate desertion for the statutory period prior to the filing of the petitioner's petition. This brings us to our second point.

II.

We contend that the defendant was guilty of obstinate, continued and wilful desertion for the statutory period.

Conceding for the purpose of the argument that the Vice Chancellor's view is correct in regard to the alleged condonation in September, 1913, the defendant is still guilty of statutory desertion.

It is needless to restate here the evidence exhibiting the defendant's state of mind from December 10, 1912, to the Bridgeport incident of September, 1913. It abundantly shows, however, that she stubbornly resisted every attempt to induce her to resume marital relations with the petitioner. It also shows that she duped him in September, 1913.

In the face of that evidence, and in consideration also of the fact that the defendant was then no temperamental young wife, yielding to the impulse of some wild moment, but a middle-aged matron doubly schooled by two experiences in the field of matrimony, and that two apparently causeless separations had already been brought about by her, and that she left her husband's home in December, 1912, without any sufficient justification, we think that he

was discharged in law from making any further overtures to her whatever.

In *Purnell* v. *Purnell,* 70 *Atl.,* p. 187, this Court said:

> "Where a husband has, by his conduct toward his wife, contributed in any degree to her original desertion, he must make such advances or concessions to the wife as may be reasonable to induce her to return to him; but, where it is manifest from the circumstances under which the desertion took place, or from the wife's temper and disposition, that an honest effort on the husband's part to terminate the separation will be unavailing, or if successful in bringing the desertion to an end, would be so only temporarily, the duty of making advances or concessions does not exist."

Again in *Rogers* v. *Rogers,* 86 *Atl.,* 938, this Court again said:

> "The learned Vice Chancellor in the court below lays considerable stress upon the want of proper approaches by the husband to the wife and the absence of sincere effort on his part to induce a reconciliation and her return. We, however, think that the case falls within that class of adjudicated cases which excuse the husband from making an effort in the direction just mentioned, her actual desertion of her husband, the imposition of unlawful and unreasonable conditions before she would return, her removing her furniture and belongings from his house, in his absence, bringing a suit for alimony shortly after her separation—that any overtures or efforts made by her husband to induce her to return would have been entirely futile."

The elements in the case last quoted are parallel by the elements in the case at bar. Here, too, the wife actually deserted her husband; here, too, she imposed unlawful and unreasonable conditions before she would rejoin him (namely, that he should move from Little Falls and his fixed position in a bank there to a summer resort on the Connecticut seacoast); here, too, she removed her furniture and belongings from his house, in his absence; here, too, she took steps of a legal nature to enforce contributions from him to her support (by her resort to the Little Falls Overseer of the Poor).

Nevertheless, although, as we think, under no legal duty to pursue her further, he made, as the evidence convincingly shows, yet other efforts to induce her return. Within the first three months after the Bridgeport trip he felt that there was no use of making further effort; when asked if he thought during that period that there was still hope, he answered, "Not after she had fooled me that night, I didn't think so" (Case, p. 16, lines 8-21). Afterwards, however, he asked a mutual friend, Mr. Kramer, of Little Falls, and his daughter, to speak to her (Case, p. 16, lines 1-3). He says, when asked why he chose Mr. Kramer as his spokesman, "Because he was very friendly with her and she was visiting in his house all the time and I thought it was a good chance for him to speak to her" (Case, p. 17, lines 20-25). He asked Mr. Kramer "To see what he could do to get her back," and asked him on two occasions (Case, p. 17, bottom of page, and p. 18). Mr. Kramer reported back that she told him "She would not have anything to do with Little Falls, that she would not have anything to do with the people in it, that they were all hypocrites, and no good, church-goers, and she didn't want to come back and live in Little Falls" (Case, p. 18, lines 16-23). Mr. Kramer corroborates this evidence (Case,

p. 85, and also p. 84, line 18, etc.). He adds that he reported to the petitioner what the defendant said to him (Case, p. 85, line 30, etc.). Failing on the first occasion, he says that the petitioner told him, "Try her again, talk to her again" (Case, p. 85, lines 30-33). Anna Keind, a sister of Mr. Kramer, called as a witness for the defendant, corroborates Mr. Kramer. She says that she heard her brother tell her "Many times, I do not know how many times" that she should go back to her husband, and that the defendant replied, "She said she would not go to Little Falls with him, that is what she said" (Case, p. 125, lines 18-28).

Even after these repulses, the petitioner did not abandon all effort. In the summer of 1916, Louise Hyer happened to observe that the defendant was employed at the Y. W. C. A. in Paterson (Case, p. 73, line 30, etc.), and reported the fact to the petitioner, who told her to go back to the Y. W. C. A. and tell his wife that he did not care to have her working there, "That there was a nice home waiting for her in Little Falls, and he asked me to go up and try to get her back" (Case, p. 74, lines 13-25). Defendant's answer to the girl's approaches was, "She said she would not go back to him; she said she had spoken many times to me and not to speak to her about it again, that she would not go back to him at Little Falls" (Case, p. 74, lines 27-35).

This attitude of the defendant toward a reconciliation with her husband, as reported by all these witnesses, is corroborated by her own letters to her husband. Until she consulted counsel (her present solicitor), her letters contained no suggestion of a reunion; *their theme is money.*

There are two claims in the defendant's case which may require some notice. The one is that she was content to live apart from her husband under his alleged promise that "We would keep

separated about two years and then, after the girls got married, *he would give up his position in the bank* and sell the house, and build a bungalow some place else" (Case, p. 175, lines 28-36). This arrangement she alleges was made in the spring of 1913, prior to her removal to Midland Beach.

This story is entirely uncorroborated; and, on cross-examination, she conceded that she never alluded in any of her letters to the bungalow programme (Case, p. 203, lines 15-20). Even after her own daughter (who was one of the girls to be married) was married in the early part of 1914, she seems not to have written to him any reminder of this alleged promise.

She appears not to have mentioned it to Mr. Kramer or to any other person approaching her on her husband's behalf.

In answer to a question by the Vice Chancellor, the petitioner showed the slender foundation on which this bungalow story rests. He said, "I told her when we were—the second time she came back I said one day, *the house was too big a place, and we would have a small bungalow for the two of us.* That was in 1908, when I took her back the second time" (Case, p. 44, line 28 to bottom of page).

It is hardly conceivable that she would have been satisfied with an arrangement so indefinite as to time. When being cross-examined as to such an indefinite alleged arrangement and being shown that it might be ten years until the girls were married, she first clings to her story; she says, "I understood that we were to keep apart two years or until the girls got married." She afterwards shifts her position by saying, "Well, to keep apart two years whether they were married or not, then" (Case, p. 196, lines 1-20).

Not only did the absurdity of such a proposition cause defendant to shift her ground on cross-

examination and change her story, but its absurdity is further shown and the entire story refuted; first, by the fact that when she was importuned by different mutual friends of herself and husband, at different times, to return and live with him, she never even intimated to them or any one of them that she had such an arrangement with her husband and could not return to him; secondly, by the fact that her husband was endeavoring and wishing always that she would immediately return to him and reside in his home in Little Falls; and, thirdly, by the fact that such an alleged arrangement contained the abandonment by the husband, a man well along in years, of a life position in the bank at Little Falls. The story is without any corroboration whatsoever, is utterly inconsistent with both petitioner's and defendant's conduct, and seems to have had its birth at the time defendant's solicitor claims he composed his remarkable letter addressed to petitioner as of date of January 7, 1917. We refer to Exhibit D-1, Case, p. 220.

We will now consider that letter and the said solicitor's testimony in the case, in the light of the conduct of defendant toward petitioner just before she consulted counsel.

In December, 1914, or January, 1915, she had come on from Bridgeport to Paterson (Case, p. 196, line 30, etc.). Her object in coming to Paterson was to see about "Some back support" (Case, p. 197, lines 4-5). She subsequently established her residence in Paterson, but not until after her first interview with her present counsel (Case, p. 203, lines 1-3). On coming to Paterson, she first talked with the counsel for Little Falls Township, who sent her to a Justice of the Peace by the name of Keys (Case, p. 197, lines 16-20). She was in Paterson "A day or two" before she went to Judge Keys' office (Case, p. 197, lines 14-17). She kept away

from her husband (Case, p. 198, line 20 to bottom of page). Justice Keys issued a warrant for the petitioner on his wife's complaint in the latter part of December, 1914 (Case, p. 28, line 20 to bottom of page and top of p. 29). The object of that warrant was, of course, as defendant's present counsel testified, "To try to have him indicted" (Case, p. 102, lines 23-27).

This was the situation when John F. Kerr (defendant's present counsel) says he wrote to petitioner the letter marked D-1 (Case, p. 220, etc.).

Petitioner denies that he ever received such a letter (Case, p. 23, lines 13-18). He says that he did receive a letter notifying him that his wife would have him locked up (Case, p. 23, lines 26-32).

If John F. Kerr did, in fact, send to petitioner the original of D-1 (Case, p. 220), it is apparent that it was written with a design of building up a case in her favor, where none before existed. So far as it attempts to recite the history of the separation of the parties, it is wholly untrue. Notwithstanding that it is alleged in its opening sentence that the defendant "has retained me *in the first instance* for an endeavor to bring about a consummation of the agreement made by you and your wife to resume marital relations," there is no further reference in it to any such agreement. It contains some evidence that he was not, in fact, retained for any such purpose at all. He says therein (Case, p. 222, lines 17-21), "It should not be necessary, I think, to undertake any legal proceedings. *I for one would not entertain* the idea of any legal proceedings in regard to the affairs of you and Mrs. Hyer, unless it is made a necessity by either your or *her* actions."

Petitioner, with his brother-in-law, Mr. Hart, called a few days later at Judge Kerr's office. The petitioner says that Judge Kerr did not ask him,

when there, to reunite with his wife (Case, p. 27, lines 36-37 and top of 28).

While Judge Kerr first undertakes to say that he had a half an hour's interview with the petitioner and Mr. Hart on this occasion, in which he tried to effect a reconciliation between the parties, and they opposed it, he subsequently admitted, in effect, that without first learning the date of their call upon him, he would recollect the theme of the interview (Case, p. 103, lines 30 to bottom of page and p. 104, lines 1-4). This testimony, it will be noted, was in answer to the following question, "Was not the main topic of conversation between you on that occasion, the topic of the support of Mrs. Hyer by her husband?"

It is conceded that there was no other interview between Judge Kerr and the petitioner. If, without having the date of it precisely fixed for him, he could not recall, as he himself said, whether the theme of that interview was not the wife's support by the husband, what weight may be given to his story that the whole interview was devoted to an unsuccessful effort on his part to get the parties together again?

In that part of the Vice Chancellor's opinion which deals with the case made by the petitioner, he dwells upon a letter, Exhibit D-5 (Case, p. 224), dated February 12, 1914, written by petitioner to defendant. The cause of his exasperation at the time of the composition of that letter is evident from the content thereof. When shown the letter, he said that he represented his temporary and not his real feeling toward his wife (Case, p. 51, lines 1-5). In view of the testimony of his daughter, Louise, and of Mr. Kramer and his sister, Miss Keind, as to his subsequent efforts through them to win his wife back, it must be true that this letter expressed only a passing mood; and it must be

equally true that that fact was brought home to the defendant.

We think that the body of the evidence shows that the petitioner exerted himself to induce the return of the defendant when the law did not cast upon him any such obligation; that he renewed and continued such efforts long after a reasonably hopeful man would have abandoned all hope of success; and that from the 10th day of December, 1912, to January, 1917, when the petition was filed in this suit, the wife never had anything in view but the securing of money from her husband, and that she has been guilty throughout all that period of the statutory offense of wilful, continued and obstinate desertion.

We respectfully submit that the decree of the Court of Chancery should be reversed.

ADDISON P. ROSENKRANS,
Solicitor for and of counsel
with Petitioner-Appellant.