INDEX.

	PAGE
Petition	1
Affidavit of Carl O. Carlson	6
Notice of Motion for Alimony *Pendente Lite*	7
Affidavit of Amy Rogers Carlson	8
Order Continuing Cause to Other Vicinage Under the Vicinage Rule	12
Answering Affidavit of Carl O. Carlson	13
Affidavit of Samuel T. Markoff	19
Affidavit of Chas. Gordon Heyd	21
Affidavit of Esther Carlson Strom	22
Order	23
Answer and Counterclaim	24
Order	33
Special Replication and Answer to Counterclaim	34
Replication to Answer to Counterclaim	39
Order of Reference	41
Notice of Taking Testimony	42
Notice	43
Order	44
Notice to Produce	45, 46
Stipulation	47
Notice of Motion	56

PAGE

Order 57

Final Decree 58

Notice of Appeal..... 60

Petition of Appeal 62

Testimony 65

WITNESSES FOR PETITIONER.

Carl O. Carlson,
Direct 65
Cross 93, 174
Re-direct 189
Re-cross 201

Blake F. Donaldson,
Direct 156
Cross 164
Re-direct 169, 174
Re-cross 170, 174

Esther Elizabeth Strom,
Direct 207
Cross 222
Re-direct 236, 250
Re-cross 239, 251

Samuel T. Markoff,
Direct 270
Cross 282
Re-direct 295, 305, 306
Re-cross 304, 306

DEFENDANT'S CASE ON SEPARATE MAINTENANCE.

Carl O. Carlson,
Direct 310

EXHIBITS.

	Admitted at Page	Printed at Page
P-1—Record by Dr. Markoff.....	298	321
D-1—Series of Nine Letters.....	177	322
D-2—Letter to Grace.....	187	341, 371
D-3—Letter, May 7, 1942.....	187	..
D-4—Letter, December 20, 21, 1941.	256	..
P-1—Series of Seven Letters.....	81	346, 352
P-2—Series of Three Letters.....	81	348, 368, 371
P-3—Report by Dr. Heyd.....	256	372

Petition.

(Filed September 2, 1943.)

In Chancery of New Jersey

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

The petition of Carl O. Carlson, residing at 225 Franklin Avenue in the Borough of Cliffside Park, Bergen County, New Jersey, respectfully shows unto your Honor that:

First Cause of Action

1. Petitioner was married to Amy Rogers on June 20, 1942, in the City, County and State of New York by the Reverend Dr. William Ward Ayer, a Minister of the Gospel.

2. At the time of said marriage, defendant Amy Rogers was physically and incurably impotent to consummate said marriage by reason of some cause or causes, the exact nature of which is unknown to petitioner, but petitioner is informed and believes that among said causes are physical abnormality, chronic illness and inhibitions or fears, grounded in whole or in part upon psychophysical conditions.

3. Petitioner was ignorant of the said impotence at the time of said marriage, and has not subsequently ratified said marriage.

4. Petitioner is a bona fide resident of the State of New Jersey, and was such resident at the time this cause of action arose and when this cause of action was commenced. The particular

residence of petitioner is 225 Franklin Avenue, Borough of Cliffside Park, Bergen County, New Jersey.

5. The particular residence of the defendant is 504 Signal Mountain Boulevard, Signal Mountain, Tenn., and defendant's present temporary particular address is Ozark Sanitorium, Hot Springs, Arkansas.

6. Petitioner prays that the said marriage between petitioner and defendant may be adjudged and decreed to be null and void for the cause aforesaid, according to the statute in such case made and provided, and that such other relief may be granted as may be just.

SECOND CAUSE OF ACTION.

1. Paragraph No. 1 of the first cause of action is alleged as though here repeated at length.

2. At the time of said marriage, defendant had formed in her mind a definite decision that she would not accord to petitioner the right of sexual intercourse, that she would not consummate sexual intercourse with petitioner, and that she would not normally submit to or perform the ordinary acts contemplated in and normally essential to the marital relationship, and the bearing and rearing of issue of said marriage. Said defendant entered into said contract of marriage with petitioner having fixed mental reservations that she would not accord to petitioner said rights due to him as a part of the marriage contract. Said decisions and said mental reservations were not communicated to petitioner by defendant, or oth-

erwise, before or at the time of said marriage, and petitioner entered said marriage contract with defendant in good faith, believing that defendant intended to fulfill all obligations implicit in said contract of marriage, including the obligation to submit to and consummate sexual intercourse with petitioner, and otherwise perform her marital obligations and duties. Neither was petitioner informed by defendant or otherwise, before or at the time of said marriage, that defendant had resolved not to comply with or perform her said obligations. Defendant at all times refused to fulfill her bounden duty and to perform her obligations to petitioner in the respects above alleged, although petitioner earnestly entreated her so to do, and defendant has never permitted said marriage to be consummated as she should have done. Had petitioner known of said decision, resolution or reservations of the defendant, he would not have entered into said marriage with her.

3. Petitioner alleges as though here repeated at length paragraphs 4 and 5 of the first cause of action.

4. Petitioner prays that the said marriage between petitioner and defendant may be adjudged and decreed to be null and void for the cause aforesaid, and that such other relief may be granted as may be just.

THIRD CAUSE OF ACTION.

1. Paragraph No. 1 of the first cause of action is alleged as though here repeated at length.

2. Said marriage between petitioner and defendant was entered into by petitioner upon representations made to him by defendant that:

(a) Defendant was in good health and normal physically and mentally, with the sole exception that she had then recently suffered an attack of rheumatic fever, from which her recovery was not yet complete;

(b) Defendant could and would perform her marital duties and could and would enter into normal family life, including the birth and rearing of children. Said representations were false and were made by the defendant fraudulently to induce petitioner to enter into a contract of marriage with her. Defendant likewise fraudulently suppressed and concealed the facts known to her, that at and prior to the time of said marriage she had suffered and was then suffering from one or more chronic diseases and from abnormalities in her genital organs, and that psychophysical conditions existed which materially interfered with an prevented the performance of the marital relations. Said suppression and concealment of facts by the defendant was fraudulent and for the purpose of inducing petitioner to enter into said contract of marriage. Petitioner would not have entered into said contract of marriage with defendant had he known that said representations were false, and that said facts had been suppressed and concealed by defendant. It was the duty of defendant to have informed petitioner respecting said matters in good faith before said marriage contract was entered into, and her failure and neglect so to

inform petitioner was with fraudulent intent to induce him to marry her upon the assumption that she was capable of fully performing the marriage contract, and to bear children as would a normal woman.

3. Petitioner learned of defendant's true condition on various days in the month of May, 1943, prior to which time defendant had left petitioner's home, to wit in the month of April, 1943, from which last mentioned date petitioner and defendant have been separated, and petitioner has not in any wise ratified and confirmed said marriage.

4. Petitioner alleges as though here repeated at length paragraphs No. 4 and 5 of the first cause of action.

5. Petitioner prays that the said marriage between petitioner and defendant may be adjudged and decreed to be null and void for the cause aforesaid, and that such other relief may be granted as may be just.

CARL O. CARLSON, Petitioner.

W. HOWARD DEMAREST, Solicitor for and of Counsel with petitioner.

Affidavit of Carl O. Carlson.

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

CARL O. CARLSON, of full age, being duly sworn, according to law, upon his oath deposes and says:

I am the petitioner named in the foregoing petition, and I have read the same. 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 said petition; that the facts, matters and things set forth in said petition, so far as they relate to the acts of petitioner, are true, and so far as they relate to the acts of others, I believe them to be true.

CARL O. CARLSON.

Subscribed and sworn to before me }
this 31st day of August, 1943. }

BEATRICE BOLTIN,
A Notary Public of the State of New Jersey.

Notice of Motion for Alimony *Pendente Lite.*

IN CHANCERY OF NEW JERSEY.

150–569.

Between

CARL O. CARLSON,
Petitioner,

and

AMY ROGERS, falsely called
AMY ROGERS CARLSON,
Defendant.

On Petition, &c.
Notice of Motion for Alimony *Pendente Lite.*

To Howard Demarest, Esq., Solicitor of Petitioner, 744 Broad Street, Newark, 2, New Jersey.

Sir:

TAKE NOTICE that, on the 11th day of January, 1944, at the hour of ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, I shall apply to the Chancellor at the Chancery Chambers, in the City of Newark, for an order requiring the petitioner to pay to his wife, the above named defendant, a proper allowance for her support and maintenance, pending this suit, and for a reasonable sum for counsel fees and suit moneys to enable her to defend the said suit. That annexed hereto and served upon you herewith are true copies of the affidavits upon which said application will be made.

Dated: December 31, 1943.

SIMON J. GRIFFINGER,
Solicitor for and of Counsel with Wife.

Affidavit of Amy Rogers Carlson.

IN CHANCERY OF NEW JERSEY.

150–569.

Between

CARL O. CARLSON,
Petitioner,

and

AMY ROGERS, falsely called
AMY ROGERS CARLSON,
Defendant.

On Petition, &c.
Affidavit.

STATE OF TENNESSEE,
COUNTY OF HAMILTON. } ss.:

AMY ROGERS CARLSON, of full age, being duly sworn, according to law, upon her oath, deposes and says:

1. I am the defendant and counterclaimant in the above entitled cause of action.

2. I was married to the petitioner, Carl O. Carlson, on June 20, 1942, at the Calvary Baptist Church in New York, New York, by the Reverend Dr. William Ward Ayer, a Minister of the Gospel.

3. My husband and I cohabited as man and wife from the day of our marriage up to and including June 16, 1943, when my husband abandoned me. In September, 1942, I became pregnant and upon the insistence and demands of my husband I went to a physician who administered medicine locally on a series of occasions and

brought about a miscarriage to avoid giving birth to a child. I did not recover from this but instead my condition became such that soon thereafter, at the insistence of my husband, I went to another physician, a personal friend of his, for diagnosis of my condition as a result of which I entered the Post Graduate Hospital, located in New York City on December 27, 1942, and underwent a serious operation at which time certain of my sexual organs were removed. All arrangements for this operation were made by my husband. I was discharged on or about January 10, 1943, when I returned to our home at 225 Franklin Avenue, Cliffside, New Jersey, where we had resided from the time of our marriage.

4. My husband and I cohabited at all times that he desired and wished to have sexual intercourse and I never refused to accord to him his marital rights and was always ready, willing and able to fulfill my marital obligations to him.

5. In June, 1943, while visiting my sister in Signal Mountain, Tennessee, and accompanied by my husband, arrangements were made by him for my admittance to the Ozark Sanatorium for further treatment required and my husband agreed to pay the charges of $5.00 a day, which includes room, 3 meals and nurse's service, and also agreed to pay for the baths prescribed at an agreed price of $18.00 for 21 such baths and in addition he agreed to pay the physicians bills and incidental charges such as X-rays and medicines.

6. My husband abandoned me on the 16th day of June, 1943, after making arrangements for my

admission into the Ozark Sanatorium, since which time he has not contributed to my support and has left me destitute of monies to support myself.

7. In addition, he has failed to pay the hospital fees and medical bills and I have been compelled to make loans from relatives and friends in order to maintain myself.

8. My husband just before his departure from Signal Mountain, Tennessee, where I was visiting my sister, and where he had been with me on the visit and after he had made arrangements for my stay at the Sanitorium to be relieved of my illness, stated to me that he was desirous of obtaining a divorce from me and pleaded with me to willingly consent to such an arrangement and that he would pay me a large sum of money so that I should not be in want. I resented such a suggestion and told him that I would not agree to any such arrangement by which the marriage ties between us could be dissolved; that I had been a loyal and devoted wife to him. He stated that whether or not I would consent to the arrangement voluntarily, he would certainly see that he managed to obtain his freedom and would leave me absolutely penniless.

9. My husband's means are amply sufficient for him to pay such sums as are necessary at this time. He is associated with the Fifth Avenue Bank in New York City at a substantial salary; he owns the property located at No. 225 Franklin Avenue, Cliffside, New Jersey, has a savings account; war bonds; and has received the sum of $16,000.00 as a legacy from the Estate of Mary

Affidavit of Amy Rogers Carlson.

Hodges, and I am credibly informed that he is worth approximately $35,000.00.

AMY ROGERS CARLSON.

Sworn and subscribed to before me, A Notary Public in and for the State of Tennessee, County of Hamilton, this 18th day of December, 1943.

J. HAMILTON CUNNINGHAM,
A Notary Public in and for the State of Tennessee, County of Hamilton.
My commission expires July 30, 1947.

Due and legal service of a true copy of the within notice and affidavit is hereby acknowledged this 3rd day of January, 1944.

W. HOWARD DEMAREST,
Solicitor for Petitioner.

Order Continuing Cause to Other Vicinage Under the Vicinage Rule.

IN CHANCERY OF NEW JERSEY.

150–569.

Between

CARL O. CARLSON,
Petitioner,

and

AMY ROGERS, falsely called
AMY ROGERS CARLSON,
Defendant.

On Petition, &c.
Order Continuing Cause to Other Vicinage Under the Vicinage Rule.

This matter being opened to the court by Simon J. Griffinger, solicitor of the defendant-counter-claimant, and W. Howard Demarest, solicitor of the petitioner, on the day fixed on an application for alimony pendente lite and counsel fee, dated the 31st day of December, 1943; and the solicitor of the petitioner objecting that under the rules of this court the said application should have been made returnable in the Bergen County vicinage, and not in the Essex County vicinage, and requesting a transfer of said application to the Bergen County vicinage;

It is, on this 11th day of January, 1944, ordered that the return day of said application be, and the same is hereby extended so as to be returnable on the 1st day of February, 1944, before the Chancellor, at the Court House, in the City of Hackensack, at 10 o'clock in the forenoon, or as soon thereafter as counsel can be heard.

It is further ordered that defendant may file reply affidavits on or before the said adjourned day.

Respectfully advised,

JOHN A. MATTHEWS, A. M. LUTHER A. CAMPBELL, C.

Answering Affidavit of Carl O. Carlson.

IN CHANCERY OF NEW JERSEY.

150–569.

Between

CARL O. CARLSON,
Petitioner,

and

AMY ROGERS, falsely called
AMY ROGERS CARLSON,
Defendant.

On Petition, &c.
Answering Affidavit.

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

CARL O. CARLSON, of full age, being duly sworn according to law, upon his oath deposes and says:

I am the petitioner in the above entitled cause and make this affidavit in answer to the affidavit of the defendant sworn to December 18, 1943, which I have read.

Answering Affidavit of Carl O. Carlson.

I admit the performance of the marriage ceremony, and that I visited the defendant at her sister's home in Signal Mountain, Tennessee, in June, 1943, and my employment, but in all other particulars of said affidavit I make categorical denial.

In support of said denial, I relate the pertinent facts, as follows:

The petition filed by me in this cause fairly and substantially states the existing cause of action, and I reiterate its allegations as true.

I deny cohabiting with the defendant from the day of our marriage ceremony up to and including June 16, 1943, as alleged in said affidavit, but I admit that we lived in the same quarters.

I deny that I abandoned the defendant. In April, 1943, the defendant repeated her prior statements to the effect that our marriage was distasteful to her, that it would never be satisfactory, and became insistent that I furnish her with money for transportation to her sister's home in Tennessee. Upon her insistence, I purchased her railroad ticket and furnished her with incidental cash for the trip, which I understood was to be a temporary and not a final leaving. The ticket was accordingly purchased for a round trip. I knew at the time that defendant did not prefer to live in New Jersey, or in the east. I also knew of what I believed to be inhibitions in the matter of sex relationships, but I did not know the full particulars of her physical, mental and psychological condition, which came to my attention shortly before the commencement of this suit.

I deny that the defendant became pregnant in September, 1942, or at any other time. I deny that in September, 1942, or at any other time, the defendant or anyone else ever mentioned her sup-

posed pregnancy to me, or that I participated directly or indirectly in any treatment to bring about miscarriage, or to avoid child birth.

In September, 1942, I accompanied defendant on a visit to Dr. Samuel T. Markoff, because of a certain condition of defendant's knee. Dr. Markoff made a thorough examination of defendant, and prescribed for the knee condition and for a fibroid growth in defendant's uterus. Thereafter, because of defendant's condition of health, I secured the attention of other highly recommended specialists in a conscientious attempt to restore defendant's health.

I emphatically deny the inference in defendant's affidavit to the effect that through one or more physicians I procured the performance of unnecessary operations, resulting in the removal of defendant's sexual organs.

I also emphatically deny the inference, suggested by the language of defendant's affidavit, that there was any conspiracy to commit an abortion, or any other crime, between myself and any physician, or any other person. This denial is intended to be complete and inclusive of all inferences of whatever impropriety which might be drawn from the language of defendant's affidavit.

Defendant was fully aware of my sincerity of purpose in seeking the best possible medical attention for her, and she consented to all such medical and surgical attention. Defendant, however, maintained and expressed a constant revulsion and fear that normal sex relationships might be demanded of her upon her recovery from corrective surgery, and had maintained and expressed this constant revulsion and fear of the normal sex relationship from the time of the marriage ceremony. Such relationships she had always objected

to and denied. I did not know either the details or the probable results of this medical and surgical attention at the time, except in a general way. It was my hope and belief that with proper professional treatment, her condition, which I believed to be acute, rather than chronic, or of long standing, and which had been concealed from me and represented by defendant to be the temporary results of an attack of rheumatic fever, would be cleared up and result in normalcy. Instead, I found that there had been long standing or chronic disabilities and misrepresentations by defendant, which are the subject matter upon which my present action is based.

I deny explicitly the whole of paragraph No. 4 of defendant's affidavit.

I deny that I made arrangements for the admission of defendant to the Ozark Sanitorium. Defendant went to her sister's home in Signal Mountain, Tennessee, in April, 1943, as heretofore stated, and I visited her there in June, 1943, to find out all I could about her condition and her plans. Before I arrived, arrangements had already been made by defendant or her sister, and the following Thursday had been fixed as the date when they would go to Hot Springs National Park and probably enter Ozark Sanitorium. I admit that I was willing to pay for the proposed treatments at the Sanitorium, and for necessary medical and housing expenses there, and I believed that it was my moral obligation so to do. Accordingly, I paid bills of the Sanitorium and of doctors, and also furnished defendant with funds until a time shortly before the commencement of this suit, when upon the ascertainment of facts, which I was advised constituted proof of this cause of action, I discontinued all such payments.

Answering Affidavit of Carl O. Carlson.

Before defendant went to her sister's home in Tennessee she knew the limits of my financial resources, and that her care had drawn heavily upon them. It was my understanding that her sister, Mrs. Grace Bowers, was able and willing if defendant went to Tennessee, to provide for her maintenance and assist in meeting the necessary expense. This understanding appeared to have been carried out until about September 1st, when I received a letter from Mrs. Bowers' husband, asking me to pay $100 for defendant's care at their home. This request was declined.

I deny paragraph 8 of defendant's affidavit in its entirety. Shortly after the marriage ceremony, and because of defendant's revulsion in respect to sexual relationships, and as a result of our discussion of our marital affairs, defendant frequently stated that our marriage was a mistake, a failure, that it would not last and that she thought we should be divorced. I attributed her attitude to the fact that she had not recovered from her attack of rheumatic fever, and that she was not thinking clearly of casting aside a deep affection, which I believe was mutual. I endeavored by extreme kindness and consideration, and by refraining to insist upon marital rights, to change her attitude, believing that when her health improved she would feel differently about all these matters. This attempt on my part continued, even after defendant insisted upon leaving my home to go to Tennessee. I later discovered the facts, as stated in my petition, which explained her continued opposition and inability to accept and perform her duties as my wife.

It was defendant and not I who, at her sister's home in Tennessee, proposed a divorce and said that we could be freed from each other by such

divorce, provided I turned over to her the entire legacy which I was to receive, together with bank accounts and other assets. This proposal was a great surprise, but defendant at the time was in such weakened condition and suffering such pain that I did not pursue the suggestion to great length. I told her that such a proposal could not possibly be considered. Defendant continued to argue the matter, asserting that I could well pay her. if not all then a substantial part of the legacy, and I objected that she had no reason to make any such demand. At that time, I had not yet learned of many essential facts, and consequently did not continue the argument on the divorce angle, which defendant had brought up. On the contrary, I pointed out that she, as my wife, would indirectly benefit by the legacy in the form of care and attention until she was able to return, the discussion being as encouraging as I could possibly make it because of my sincere concern about her apparently very serious condition of health.

Prior to this time, and in the fall of 1942, defendant specifically proposed to me that if I would pay her a substantial sum she would go to Florida and procure a divorce. This was the first intimation of defendant's desire to procure money from me in connection with the divorce which she proposed. I declined to accede to the proposal. This demand was far less than the demand made in Tennessee, and was made before defendant had knowledge of my legacy, of which I had informed her in the spring of 1943.

I deny that I own the property on Franklin Avenue, Cliffside, New Jersey. This property is owned by my mother. I have never had any title thereto.

I deny that I have received the aforementioned legacy, because the estate is still in process of ad-

ministration and I cannot say when payment of the legacy will be made.

My financial assets approximate $1,500.00. My bank salary is $3,500.

CARL O. CARLSON.

Subscribed and sworn to before me this 10th day of January, 1944.

BEATRICE BOLTIN,
A Notary Public of New Jersey.

(SEAL)

Affidavit of Samuel T. Markoff.

STATE OF NEW YORK }
COUNTY OF } ss.:

SAMUEL T. MARKOFF, of full age, being duly sworn according to law, upon his oath deposes and says:

I am a physician duly licensed to practice in the State of New York.

My attention has been called to the following language in an affidavit made by Amy Rogers Carlson:

> "In September, 1942, I became pregnant and upon the insistence and demands of my husband I went to a physician who administered medicine locally on a series of occasions and brought about a miscarriage to avoid giving birth to a child."

In reply to this statement, I say that I am the physician who treated Mrs. Carlson from September 23, 1942, until November 28, 1942. There were seven visits during that period.

Affidavit of Samuel T. Markoff.

On September 23, 1942, I gave this patient a thorough examination and I rechecked and re-examined her on subsequent visits. Neither in September, 1942, nor on any other date was she pregnant, and on no occasion did I prescribe or administer medicine, locally or otherwise, to bring about a miscarriage or to avoid giving birth to a child. There was no reason for any such conduct or treatment, even if I were willing to so violate the law, which I was not. This patient, beyond question, could not have conceived or become pregnant, and could not have done so for a period of several years preceding the time of my examination. I found her to have a fibroid growth, so located and of such size as to make her alleged condition impossible. I also found a pathological condition which, in my considered opinion, had existed for ten years. I found anemic condition and the left knee considerably swollen from hypertrophic arthritis of long standing.

Until the above quoted language was disclosed to me I had never heard of a claim of pregnancy, nor of the expression of any supposed results of a pregnant condition of this patient.

At no time did Carl O. Carlson directly or through others attempt to influence, direct or advise me with respect to my professional treatment of this patient in any way.

This affidavit is restricted to the specific point in issue and is intended as a categorical denial of the assertion and the inference contained in the above quoted language.

SAMUEL T. MARKOFF.

Subscribed and sworn to before me this 8th day of January, 1944.

LAZARUS GREENBLATT,
A Notary Public of New York.

Affidavit of Chas. Gordon Heyd.

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

CHAS. GORDON HEYD, of full age, being duly sworn according to law, upon his oath deposes and says:

I am a practicing physician and surgeon in the City of New York.

I attended Amy Rogers Carlson and operated upon her in December, 1942, the visits continuing thereafter until February 26, 1943.

I am informed that it is claimed by this patient that she was in a pregnant condition in September, 1942, and that I found a pregnant condition to exist in December, 1942. This is not the fact. At operation on December 28, 1942, I found a fibromyoma of the uterus which I described in my report and records as "representing a gross bulk of approximately the size of a three months' pregnancy." This description refers only to the size of the tumor. The patient was positively not pregnant, as the pathological report showed a fibromyoma of the uterus and no evidence of pregnancy.

CHAS. GORDON HEYD.

Sworn to before me this 11th day }
of January, 1944. }

CAROLINE PAULUS,
A Notary Public of New York.
My commission expires March 30, 1944.

Affidavit of Esther Carlson Strom.

State of New York, }
County of Kings, } ss.:

Esther Carlson Strom, of full age, being duly sworn according to law, upon her oath deposes and says:

I am the sister of Carl O. Carlson, and have had many conversations with the defendant, Amy Rogers (Carlson). We discussed, among other things, her marital relationships with my brother Carl, including her views on sexual matters. The defendant told me that my brother was extremely considerate and kind in that he respected her unwillingness to permit sexual relationships, and that while he expected her to perform her marital duties she was glad that he was not the kind of man who would force her to do so. Defendant also engaged in general self condemnation because of her opposition to such relationships and her denial of her husband's marital rights.

Esther Carlson Strom.

Subscribed and sworn to before me }
this 8th day of January, 1944. }

Harry B. Palser,
A Notary Public of New York.

Order.

IN CHANCERY OF NEW JERSEY.

150–569.

Between

CARL O. CARLSON,
Petitioner,

and

AMY ROGERS, falsely called
AMY ROGERS CARLSON,
Defendant.

On Petition, &c.
Order.

This matter being opened to the court by Simon J. Griffinger, solicitor and of counsel with Amy Rogers Carlson, defendant, and in the presence of W. Howard Demarest, solicitor and of counsel with petitioner, and it appearing that due notice of this application has been given to the said Carl O. Carlson or his solicitor, and that service of affidavits were duly served herein upon solicitor of the petitioner, and good cause being shown:

It is on this 1st day of February, 1944,

ORDERED that Carl O. Carlson, the above named petitioner be ordered to pay to his wife, Amy Rogers Carlson, above named, the sum of Thirty ($30.00) Dollars per week, each week, from the date of the filing of the petition herein, viz: September 1, 1943, the said alimony and maintenance relating back to the said date of the filing of petition herein and said payments be made at the office of the solicitor of the defendant, at 810 Broad Street, City of Newark, County of Essex

and State of New Jersey, each and every week, until the further order of this court for the support and maintenance of Amy Rogers Carlson, and it is further

ORDERED that the said Carl O. Carlson pay to the said Simon J. Griffinger, solicitor and of counsel with defendant, a counsel fee of $500.00 and the costs of this application to be taxed.

Respectfully advised,

N. DEMAREST CAMPBELL, A. M.

LUTHER A. CAMPBELL, C.

Answer and Counterclaim.

(Filed January 13, 1944.)

IN CHANCERY OF NEW JERSEY.

150–569.

Between

CARL O. CARLSON,
Petitioner,

and

AMY ROGERS, falsely called
AMY ROGERS CARLSON,
Defendant.

On Petition, &c.
Answer and Counterclaim.

The answer of Amy Rogers Carlson, defendant, to the petition of Carl O. Carlson, petitioner.

1. This defendant admits that petitioner and defendant were married as is alleged in the first

paragraph of the first cause of action of the petition.

2. Defendant denies the allegations of paragraph 2 of the first cause of action of the petition.

3. Defendant denies the allegations of paragraph 3 of the first cause of action of the petition.

4. Defendant admits the allegations of paragraph 4 of the first cause of action of the petition.

5. Defendant denies that her particular residence is 504 Signal Mountain Boulevard, Signal Mountain, Tennessee, but admits that she is temporarily residing at that address with her sister. Defendant states that her permanent address is the same as that of the petitioner.

6. Defendant denies the allegations of paragraph 6 of the first cause of action of the petition.

SECOND CAUSE OF ACTION.

1. Defendant admits that petitioner and defendant were married as in the first paragraph of the second cause of action of the petition is alleged.

2. Defendant denies the allegations of paragraph 2 of the second cause of action of the petition.

3. Defendant admits the allegations of paragraph 3 of the second cause of action of the petition.

4. Defendant answers as though here repeated at length her answer to paragraph 5 of the first cause of action of the petition.

5. Defendant denies the allegations of paragraph 5 of the second cause of action of the petition.

THIRD CAUSE OF ACTION

1. Defendant admits that petitioner and defendant were married as is in the first paragraph of the third cause of action of the petition, alleged.

2. Defendant denies the allegations of paragraph 2 of the third cause of action of the petition in their entirety.

3. Defendant denies the allegations of paragraph 3 of the third cause of action of the petition.

4. Defendant admits the allegations of paragraph 4 of the third cause of action of the petition.

5. Defendant states as though here repeated at length her answer to paragraph 5 of the first cause of action of the petition.

Defendant prays that the petitioner's petition may be dismissed, with costs.

FIRST SEPARATE DEFENSE.

Petitioner and defendant were married in New York City on June 20, 1942, in the Calvary Baptist Church, by the Reverend Dr. William Ward Ayer, a Minister of the Gospel, and immediately upon their marriage, commenced their honeymoon at the Hotel New Yorker, New York City and thereafter continued on their honeymoon at Washington, D. C., and Philadelphia, Pennsylvania and concluding their honeymoon in Atlantic City, New

Jersey, during which time the petitioner and defendant consummated their marriage in every respect and had sexual intercourse repeatedly thereafter according to the desires and wishes of the petitioner, which took place on an average of three and four times weekly until the month of June, 1943.

SECOND SEPARATE DEFENSE.

The petitioner and defendant returned from the honeymoon and took up residence at 225 Franklin Avenue, Cliffside, Park, New Jersey, where the petitioner and defendant lived as man and wife until April, 1943, and during which time the petitioner and defendant continued to have sexual relations and at no time did the defendant refuse to accord to the petitioner the right of sexual intercourse, but was a dutiful and respectful wife at all times, respecting their marriage relations.

THIRD SEPARATE DEFENSE.

Petitioner and defendant continued to have sexual intercourse, without any mental reservation on the part of the defendant as alleged by the petitioner and in the month of September, 1942, defendant became pregnant, and at the request and insistence of the petitioner and in order not to offend her said husband, but much against her wishes, the defendant visited a physician in Brooklyn, New York, selected by the petitioner and to whom she was directed by the petitioner, to prevent child birth, the petitioner demanding that the defendant submit to an operation. The defendant was attended by said physician to prevent the birth of a child and at the time of some visits to the said doctor, defendant was accompanied by

the petitioner. In the presence of the petitioner on the occasion of one of said visits to the physician, defendant inquired of the physician as to whether the treatment she had undergone to avoid her pregnant condition would affect future child bearing and the defendant was informed by the physician that the operation performed on her and that the treatment given to the defendant to avoid her present pregnant condition would in no wise affect her giving birth to children in the future.

FOURTH SEPARATE DEFENSE.

Prior to the visit to the said physician, selected by the petitioner, the defendant informed the petitioner that she was pregnant and the petitioner purchased a bottle of castor oil and insisted that the defendant drink all of the castor oil to avoid child birth. The defendant consumed all of the castor oil furnished by the petitioner and the pregnant condition of the defendant remained unchanged, and thereafter, the petitioner demanded that the defendant go to a doctor to avoid the pregnancy because the petitioner stated he did not want defendant to give birth to a child at that time, as he wanted to continue to be childless for the early period of their married life.

FIFTH SEPARATE DEFENSE.

The petitioner and defendant resumed sexual relationship shortly after the pregnancy of defendant was aborted, and they continued such relationship thereafter until the defendant was compelled to have an operation performed as a result of the treatment received by defendant because

of the abortion performed upon her as hereinabove stated. The defendant, as a result, was confined to the Post Graduate Hospital, New York City, for two weeks. Petitioner and defendant resumed sexual relationship shortly after the return of the defendant from the hospital and continued such relationship until April, 1943, at which time the defendant with the approval and consent of the petitioner visited with her sister at Signal Mountain, Tennessee. In June, 1943, the petitioner and defendant remained together at Signal Mountain, Tennessee, and continued such relationship until the petitioner returned to his place of employment in New York, having had sexual intercourse with the defendant in the afternoon, before his departure from the South.

SIXTH SEPARATE DEFENSE.

The defendant was compelled to have medical attention as a result of an infection causing excruciating pain resulting in arthritic condition to the defendant and such arrangements for admission to the hospital being made by the petitioner, the defendant was then admitted to the Ozark Sanatorium at Hot Springs, Arkansas, where she was treated for this malady.

SEVENTH SEPARATE DEFENSE.

Defendant entered into the marriage contract in every respect and in good faith and has fulfilled all the obligations of her marriage vows and the marriage was consummated between the petitioner and defendant, and she has performed all her marital obligations and duties, and at no time has the defendant refused to consummate the

marriage by sexual intercourse with petitioner or refused to bear and rear the issue of said marriage, and defendant has not at any time had any fixed mental reservation that she would not accord to the petitioner his rights due him as part of the marriage contract and the defendant is ready, willing and able to fulfill her marital obligations to the petitioner and tenders herself ready and willing so to do as she has done during the time petitioner and defendant lived together as man and wife, and she believes that the entire proceedings herein instituted have not been brought in good faith for the causes set forth in the petition but is being used as a subterfuge for the petitioner to escape the responsibilities of his marital obligations.

This defendant, by way of counterclaim exhibited against the petitioner says that:

1. Complainant was lawfully married to Carl O. Carlson, the defendant in said complaint, on the 20th day of June, 1942, at the Calvary Baptist Church at New York City, and said marriage still subsists.

2. Following said marriage, complainant and defendant cohabited with each other until on or about the 16th day of June, 1943, at which time defendant abandoned complainant. Since said date, defendant has refused and neglected and still refuses and neglects to maintain and provide for complainant, contrary to the statute in such case made and provided.

3. Complainant is in poor health and unable to work or to support herself by her own effort and

has been, until the latter part of December, 1943, a patient at the Ozark Sanatorium, Hot Springs, Arkansas. The defendant in this counterclaim arranged with the Sanatorium for treatments to the complainant at a charge of $5.00 a day which included room, three meals, nurse's services and in addition to the hospital charges, the complainant required baths for which there was a charge of $18.00 for 21 of said baths. The medical and physicians charges were in addition. Defendant has failed to make payments to the Sanatorium for complainant's treatment and complainant at the present time, is utterly destitute and completely dependent upon the charity of relatives and friends for the maintenance of herself.

4. Defendant resides at 225 Franklin Avenue, Cliffside Park, New Jersey. He is now 39 years of age, his occupation is that of trust officer of the Fifth Avenue Bank in New York City and his salary is approximately $5,000.00, annually, as complainant is informed and believes. He owns the following property as complainant is credibly informed: 225 Franklin Avenue, Cliffside Park, New Jersey, valued at approximately $10,000.00; maintains a savings account in a banking institution of approximately $5,000.00; and has recently received a legacy of $16,000.00 from the Estate of Mary Hodges, who died in April, 1943; and also is possessed of $1,000.00 in bonds, consisting of joint savings of complainant and defendant, and is amply able to maintain and provide for complainant in a manner suitable to her position and station in life.

She therefore prays that the said Carl O. Carlson, petitioner, who is defendant herein, may answer this counter-claim; that he may be ordered

and decreed to provide such suitable support and maintenance to be paid by him or made out of his property for the support of the counter-claimant as the circumstances of the case render suitable and proper; that he may be compelled to give reasonable security therefor, and to pay the same from time to time under the compulsory orders of this court, as provided by statute; that he may be compelled to pay to her a suitable amount as counsel fee and suit money, and that she may receive such further and other relief as may be proper.

SIMON J. GRIFFINGER,
Solicitor for and
of Counsel with
Counterclaimant.

Order.

(Filed February 11, 1944)

IN CHANCERY OF NEW JERSEY.

150–569.

Between

CARL O. CARLSON,
Petitioner,

and

AMY ROGERS, falsely called
AMY ROGERS CARLSON,
Defendant.

On Petition, &c.
Order.

This matter being opened to the court by W. Howard Demarest, Solicitor for the Petitioner, and it appearing that the defendant has filed an answer and counter-claim and has therein alleged seven separate defenses to the petitioner's cause of action, and an alleged cause for separate maintenance based upon abandonment of defendant by petitioner, and it further appearing that said separate defenses allege new matter;

It is thereupon, on the 11th day of February, 1944, ORDERED that petitioner have leave to file a special replication to the defendant's answer, and that such special replication and the answer to defendant's counterclaim may be filed as of time within ten days from the date hereof.

Respectfully advised,

N. DEMAREST CAMPBELL, A. M.

LUTHER A. CAMPBELL, C.

Special Replication and Answer to Counterclaim.

(Filed February 17, 1944)

IN CHANCERY OF NEW JERSEY.

150–569.

Between CARL O. CARLSON, Petitioner, *and* AMY ROGERS, falsely called AMY ROGERS CARLSON, Defendant.	On Petition, &c. Special Replication and Answer to Counterclaim.

The petitioner joins issue on the answer of the defendant to the causes of action set forth in the petition.

In reply to the numbered separate defenses of the answer, and not anticipated in the petition, petitioner, by leave of the court, says that:

1. As to the First Separate Defense, the petitioner joins issue.

2. As to the Second Separate Defense, the petitioner joins issue.

3. As to the Third Separate Defense, the petitioner says that neither in the month of September 1942, nor at any other time, did defendant become pregnant, nor did defendant undergo, by direction or arrangement of the petitioner, or otherwise, any abortion or any treatment by any

physician to prevent childbirth, nor did she submit to any operation for any such purpose. On the contrary defendant, suffering from conditions and maladies theretofore concealed by defendant, the exact nature and extent of which was then unknown to petitioner, was afforded, at great expense, medical care and attention for such conditions and maladies, but not for any of the purposes alleged by defendant. All parts of the Third Separate Defense not herein specifically replied to are denied, and petitioner joins issue on said defense.

4. As to the Fourth Separate Defense, the petitioner says that at no time did he furnish to the defendant or insist that she take castor oil to avoid childbirth. On the contrary, until a time subsequent to the commencement of this action, no condition of pregnancy or supposed pregnancy was claimed to have existed by defendant, nor did any such claim come to petitioner's attention either through the defendant or otherwise. All parts of the Fourth Separate Defense not herein specifically replied to are denied, and petitioner joins issue on said defense.

5. As to the Fifth Separate Defense, the petitioner says that due to defendant's various ailments, conditions and diseases, and upon expert professional advice, she entered a hospital for medical and surgical treatment. Defendant's condition was of long standing, and the true and exact nature and extent thereof was unknown to petitioner and was concealed from him by the defendant at all times. Defendant's condition, as petitioner is informed and verily believes, preceded

the date of the marriage ceremony between him and the defendant, and the concealment thereof by defendant was a fraud upon petitioner. Petitioner expressly denies that any operation performed upon defendant was made necessary because of any treatment for pregnancy, or any supposed abortion was performed. All parts of the Fifth Separate Defense not herein specifically referred to are denied, and petitioner joins issue on said defense.

6. As to the Sixth Separate Defense, petitioner joins issue.

7. As to the Seventh Separate Defense petitioner joins issue.

Petitioner reserves the right to move at or before the time of final hearing to strike out the defendant's answer and separate defenses set up therein upon any and all legal grounds, including that the same are defective in form and substance, scandalous, argumentative, prolix, repetitious, a pleading of evidence and constitute no defense to the cause of action set forth in the petition.

ANSWER TO COUNTERCLAIM.

Petitioner, as defendant in the counterclaim, by way of answer thereto says:

1. He admits the performance of the marriage ceremony at the time and place alleged in paragraph 1 of the counterclaim, but denies that there was a lawful marriage and that it still subsists.

Special Replication and Answer to Counterclaim.

2. He denies paragraph 2 and says that there was no legal consummation of the marriage. In the month of April 1943, the counterclaimant voluntarily and upon her own insistance left him to return to her former place of residence and to take up her residence with her sister at Signal Mountain, Tenn.; that thereafter she entered Ozark Sanitorium at Hot Springs, Arkansas, for treatment. Upon her discharge from the Sanitorium she returned to her sister's home in Signal Mountain, Tenn., and has at all times from the date of her leaving, in April 1943, failed and refused to return to the former residence of the parties in New Jersey.

3. He denies paragraph 3 and says that any arrangements for admission to Ozark Sanitorium or for the payment of resulting charges were not made by him.

4. He denies paragraph 4 and says that he is thirty-eight years of age; his position is that of assistant with the title Acting Manager of the Real Estate Department of the bank in which he is employed; and that his annual salary is now $4,000, having recently been increased from $3,500; that he is not the owner of the property in Cliffside Park, New Jersey; that he has no savings account approximating $5,000; that he has not received a legacy of $16,000 or any other sum, as alleged; that he is not possessed of $1,000 in bonds, or any asset consisting of joint savings of the parties, but says that his financial worth is approximately $1,500. He denies that he is liable for the support and maintenance of the counterclaimant.

Special Replication and Answer to Counterclaim.

First Separate Defense to Counterclaim.

1. He denies that he was ever legally married to counterclaimant and says that the ceremony of marriage performed was procured by fraud, and was and is otherwise a nullity, as stated in his petition in this cause, which he hereby repeats as though here set forth in full.

2. He denies that he is under any legal obligation arising out of marriage to support the counterclaimant and denies that the court has jurisdiction in the premises.

Second Separate Defense to Counterclaim.

1. He says that counterclaimant voluntarily and upon her own insistence left him without justifiable cause on or about April 4, 1943, and at all times up to the time of the commencement of this original suit she has refused to return.

Petitioner, as defendant under the counterclaim, prays that said counterclaim be dismissed with costs.

W. Howard Demarest,
W. Howard Demarest.
Solicitor for and of counsel with Petitioner, as defendant in counterclaim.

Replication to Answer to Counterclaim.

IN CHANCERY OF NEW JERSEY.

150–569.

Between

CARL O. CARLSON,
Petitioner,

and

AMY ROGERS, falsely called
AMY ROGERS CARLSON,
Defendant.

On Petition, &c.
Replication to Answer to Counterclaim.

Amy Rogers Carlson, complainant on the counterclaim filed in the above cause of action, in reply to the answer of Carl O. Carlson to the counterclaim, says that:

1. Complainant joints issue with the defendant in the counterclaim as to paragraph 1 of the answer to counterclaim.

2. Complainant denies the allegations contained in paragraph 2 of the answer to counterclaim and says by way of reply that complainant, Amy Rogers Carlson and defendant Carl O. Carlson, cohabited from the 20th day of June, 1942, when the marriage took place, up to and including the month of April, 1943, when the said Carl O. Carlson deserted and abandoned complainant, Amy Rogers Carlson, and that the complainant did not leave the defendant, Carl O. Carlson and has never refused to return to the former residence of the parties in New Jersey.

Replication to Answer to Counterclaim.

3. Complainant joins issue with the defendant, Carl O. Carlson, as to the allegations contained in paragraph 3 of the answer to counterclaim and says that the arrangements for admission and payment of the hospital charges were made and agreed to by the defendant, Carl O. Carlson.

4. Complainant joins issue with the defendant, Carl O. Carlson, as to the allegations of paragraph 4 of the answer to counterclaim.

5. Complainant denies each and every allegation of paragraph one of the first separate defense to counterclaim.

6. Complainant joins issue with defendant, Carl O. Carlson, as to the allegations of paragraph two of the first separate defense to the counterclaim.

7. Complainant denies each and every allegation of paragraph one of the second separate defense to the counterclaim.

SIMON J. GRIFFINGER,
Solicitor of Defendant, Amy Rogers Carlson.

Order of Reference.

(Filed March 31, 1944).

IN CHANCERY OF NEW JERSEY.

150–569.

Between CARL O. CARLSON, Petitioner, *and* AMY ROGERS, falsely called AMY ROGERS CARLSON, Defendant.	On Petition, &c. Order of Reference.

This matter being opened to the Court by W. Howard Demarest, Esq., Solicitor of the petitioner, and it appearing that Simon J. Griffinger, Esq., Solicitor for the defendant has consented hereto,

It is on this 31st day of March, Nineteen hundred and fourty-four, on motion of W. Howard Demarest, Solicitor for the Petitioner.

ORDERED that the above entitled cause be referred to Honorable N. Demarest Campbell, one of the Advisory Masters of this Court, to hear the same for the Chancellor, and to report thereon to him and to advise what order or decree should be made therein.

LUTHER A. CAMPBELL,
C.

We hereby consent to the entry of the foregoing order.

W. HOWARD DEMAREST,
Solicitor for Petitioner.

SIMON J. GRIFFINGER,
Solicitor for the Defendant.

Notice of Taking Testimony.

IN CHANCERY OF NEW JERSEY.

150–569.

Between

CARL O. CARLSON,
Petitioner,

and

AMY ROGERS, falsely called
AMY ROGERS CARLSON,
Defendant.

Notice of Petition &c.

Notice of Taking Testimony.

To Simon J. Griffinger, Esq.,
Solicitor for Defendant:

PLEASE TAKE NOTICE that the deposition of Dr. Samuel T. Markoff will be taken before Abraham M. Siegel, a Master in Chancery of New Jersey, at the following time and place and at such adjourned time and place as may be fixed, to wit: The testimony of Dr. Markoff will be taken on the 2nd day of August, 1944, at 10 A. M., at his office, No. 1481 President Street, Brooklyn, New York.

You are hereby notified to be present at said time, at the taking of said deposition and to put interrogatories and cross-examine, as you shall see fit.

Yours respectfully,

W. HOWARD DEMAREST,
Solicitor for Petitioner.

Notice.

IN CHANCERY OF NEW JERSEY.

150–569.

Between

CARL O. CARLSON,
Petitioner,

and

AMY ROGERS, falsely called
AMY ROGERS CARLSON,
Defendant.

On Petition, &c.
Notice.

To W. Howard Demarest, Esq.,
Solicitor for Petitioner,
744 Broad Street,
Newark, 2, New Jersey.

Sir:

PLEASE TAKE NOTICE that on Thursday, July 27, 1944, at ten o'clock in the forenoon (E. W. T.) or as soon thereafter as counsel may be heard, I shall make application to the Chancellor, at the Chancery Chambers, Court House, Hackensack, New Jersey, for an order to stay the taking of testimony as set forth in Notice served upon the solicitor for defendant, on the grounds that said proceedings are improvident and untimely, and are not made in good faith, and are illegal and invalid under the statute in such case made and provided.

SIMON J. GRIFFINGER,
Solicitor for Defendant.

Due and legal service of the within is hereby acknowledged this 20th day of July, 1944.

W. HOWARD DEMAREST,
Solicitor for Petitioner.

Order.

(Filed July 27, 1944.)

IN CHANCERY OF NEW JERSEY.

150–569.

Between

CARL O. CARLSON,
Petitioner,

and

AMY ROGERS, falsely called
AMY ROGERS CARLSON,
Defendant.

On Petition, &c.
Order.

This matter coming on to be heard on the return of a notice of motion by the defendant to stay the taking of testimony *de bene esse,* pursuant to a notice given by the petitioner, and the argument of counsel on both sides having been heard and considered;

It is, on this 27th day of July, A. D. 1944 ORDERED that the motion of the defendant be and the same is hereby denied with costs to abide the event.

Respectfully advised,

N. DEMAREST CAMPBELL,
A. M.

LUTHER A. CAMPBELL,
C.

Notice to Produce.

IN CHANCERY OF NEW JERSEY.

150–569.

Between

CARL O. CARLSON,
Petitioner,

and

AMY ROGERS, falsely called
AMY ROGERS CARLSON,
Defendant.

On Petition, &c.
Notice to Produce.

To Simon J. Griffinger, Esq.
Solicitor for Defendant:

TAKE NOTICE that the petitioner requires the defendant to produce at the final hearing of the above stated cause, on August 14, 1944, the following letters, viz., letters from the petitioner to defendant, dated April 10, April 13, April 21, April 23, May 8, May 10, May 17, May 19, June 2, July 15, August 9, all in the year 1943.

If said letters are not produced, secondary evidence will be introduced in proof of same or of the contents thereof.

Yours respectfully,

W. HOWARD DEMAREST,
Solicitor for Petitioner.

Dated: August 11, 1944.

Service acknowledged by defendant's solicitor August 11, 1944.

Notice to Produce.

IN CHANCERY OF NEW JERSEY.

150–569.

Between

CARL O. CARLSON,
Petitioner,

and

AMY ROGERS, falsely called
AMY ROGERS CARLSON,
Defendant.

On Petition, &c.
Notice to Produce.

To: W. Howard Demarest, Esq.
Solicitor for Petitioner,
744 Broad Street,
Newark, 2, New Jersey.

Sir:

PLEASE TAKE NOTICE that the defendant requires the petitioner to produce at the final hearing of the above stated cause, on August 14, 1944, all letters written by the petitioner to defendant, which are now in the possession of the petitioner, during the period from November 2, 1941, to June 20, 1942, and all other letters written by defendant to petitioner during the period from November 2, 1941, to June 20, 1942.

If said letters are not produced, secondary evidence will be introduced in proof of same or of the contents thereof.

Dated: August 11, 1944.

Yours, etc.,

SIMON J. GRIFFINGER,
Solicitor for Defendant.

Stipulation.

(Filed September 29, 1944).

IN CHANCERY OF NEW JERSEY.

150–569.

Between

CARL O. CARLSON,
Petitioner,
and
AMY ROGERS, falsely called
AMY ROGERS CARLSON,
Defendant.

On Petition for Annulment.

Stipulation.

August
twenty-first
forty-four.

Hon. N. Demarest Campbell,
128 Main St.,
Hackensack, N. J.

Re: *Carlson* v. *Rogers.*

My dear Advisory Master:

This letter is written as a result of a conversation by phone with Mr. Griffinger this morning.

It occurred to me that we had forgotten to review with your Honor the testimony of Dr. Markoff, which was presented in the case and which was the subject of comment and referred to in the examination of witnesses and the arguments before the court. There are several objections noted in the record of this testimony by counsel on both sides, and I suggested to Mr. Griffinger that we appear and argue these objections to certain ques-

tions, particularly since he did not state his grounds for objection in the record.

We have now agreed that the court shall make rulings without our appearances and argument on these objections. Several of them disappear as a practical matter because the answers given do not contain positive information.

May I suggest that in order that the record may be clear that Mr. Griffinger's objections will be considered as advancing every appropriate legal ground and that mine be considered upon the basis as stated by me in the record, and a simple notation be made by the Court sustaining or overruling the objections by reference to the pages so that copies in the possession of both counsel can be appropriately marked.

A copy of this letter is going to Mr. Griffinger according to my agreement with him.

Yours respectfully,

(Signed) W. Howard Demarest.

August 21, 1944.

Honorable N. Demarest Campbell,
128 Main Street,
Hackensack, New Jersey.

Re: *Carlson* vs. *Carlson*—150-569.

My dear Advisory Master:

I have this day discussed with W. Howard Demarest, solicitor of petitioner in the above entitled matter, the matter of the deposition of Dr. Samuel T. Markoff, on August 10, 1944.

It is agreed between us that the transcript of the testimony is to be made part of the evidence without oral argument before the court in respect to the objections noted in this transcript.

Stipulation.

It is the intention of the solicitor of the petitioner and solicitor of the defendant that this testimony be made part of the final hearing, which took place August 14, 1944, to August 16, 1944, inclusive.

Respectfully yours,

(Signed) SIMON J. GRIFFINGER.

CAMPBELL, *A. M.*

In accordance with the foregoing, I dispose herein of the 48 objections raised in the taking of testimony *de bene esse,* under the provisions of R. S. 2:100-26, of Doctor Samuel T. Markoff, a witness on behalf of petitioner, at Brooklyn, N. Y., on August 10, 1944.

Not having had benefit of personal observation of the witness, nor opportunity to suggest to counsel during progress of the examination that they examine further into phases thereof that were obscure or concerning which the court desired to be more fully informed, has rendered the instant undertaking a most difficult one to fairly dispose of.

Preliminary examination of the witness as to his qualifications discloses that he is not an experienced surgeon; that he practices to a large extent as a pediatrist; that he styles himself as a diagnostician. In medical parlance a diagnostician is "One skilled in making diagnosis." Gould's Medical Dictionary, 4th Ed. The witness' right to hold himself out as such is not supported, however, either by history of special training or of practical experience. Qualification of a witness as an expert is for the court to determine as a question of fact. *Holden* v. *Rolff,* 110 N. J. Law, 499, 166 Atl. 201 (E. & A.); *State Highway* v. *National,* 127 N. J. Law, 346, 22 Atl. 2d 268 (E. &

A.). From what the transcript of testimony presents, I feel justified in ruling that the witness is not qualified as an expert; that his classification is that of a general practitioner of 18 years' experience.

Such being the situation, many of the objections have been difficult to satisfactorily dispose of for the reason that the disputed questions appear to have been projected to the witness upon the assumption that he was expert. I have therefore endeavored to confine my conclusion as to each objection to the situation as it was or should have been subjectively and objectively observed by the witness, to the exclusion of whatever diagnosis and conclusion of his were predicated solely upon general medical facts.

NOTE: References are (1) to page number of transcript and (2) to sequence of questions thereon. i. e., 4-1 refers to page 4 and first question appearing thereon.

(4-1) Immaterial. Objection sustained.

(6-2) The purpose of this question was, I presume, to show whether there was variance between defendant's case history and what her physical examination disclosed. Objection overruled.

(7-1) I presume that this question was objected to on the ground that it was leading. Testimony of the witness up to this point does not appear to make reference to rheumatic fever. For at least that reason it was leading. The better practice would have been to reframe the question. However, merely because it is leading does not make it objectionable *per se*. Objection overruled.

(7-2) (7-3) These questions, with their respective objections, are predicated upon question

7-1, *supra.* The objections are overruled for the reasons stated in 7-1, *supra.*

(7-5) (8-1) I am considering these as one question and one objection for the reason that the witness' answer to 7-5 appears to be a repetition of the question. It is somewhat difficult to dispose of this objection because there is nothing to indicate whether the witness was being called upon to predicate his answer upon defendant's case history and physical examination or upon his opinion as a diagnostician. The question should have been more plainly framed; it should have called for an answer based solely upon the subjective and objective factors. Objection sustained.

(8-2) This question presupposes that defendant was capable of diagnosing her own physical condition. While it is true that she may have been conscious of her symptoms it is obvious that, being medically unskilled, she was not competent to associate such symptoms with their underlying cause. Objection sustained.

(9-1) This question appears to have been projected to the witness as an examining physician as distinguished from an expert. Objection overruled.

(9-2) Objection overruled for same reason as in 9-1, *supra.*

(10-1) Objection overruled for same reason as in 9-1, *supra.*

(10-2) Objection overruled for same reason as in 9-1, *supra.*

(10-3) As suggested in one of the preceding questions, nothing appears to indicate that defend-

ant was capable, of her own accord, of diagnosing her physical condition. The objection will be sustained.

(11-4) If use of the word "indication" was intended to impute knowledge by defendant, the objection will be sustained for the reason assigned in 10-3, *supra.*

(12-1) This question is duplex. Furthermore, it lays no foundation upon which an answer may be fairly predicated; it is too general in its scope. Objection sustained.

(12-2) Though leading, this question is not objectionable.

(12-3) I know of no reason why this question is objectionable except, perhaps, that it is a followup of the preceding question, which was objected to.

(13-9) No reason presents itself as to why this question is objectionable.

(16-1) No reason presents itself as to why this question is objectionable.

(16-4) This question does not impute to defendant knowledge of her premarital unfitness, it calls merely for the opinion of the witness, as examining physician, upon what his examination of her disclosed. Objection overruled.

(17-1) This question is, I think, based upon conflicting premises, that is, upon "examination" and "diagnosis." Because it relates back to a condition approximately three months preceding the time witness examined defendant, it is impossible to determine whether the question anticipated answer from the witness as a diagnostician (expert) or as the result of his subjective and objective examination of her. His preceding testi-

mony does not disclose that reference to this subject was made by defendant in giving her case history. Because of the uncertainty of purpose of this question, the objection thereto will be sustained.

(17-2) This question, though leading, is not objectionable because, after all, defendant's alleged purpose in consulting witness concerned her menstrual cycle.

(18-2) This question is leading but not harmful because its purpose was to direct the witness' attention to defendant's case history. Objection overruled.

(20-2) This question is not objectionable because witness testified on direct that Mrs. Strom accompanied defendant to witness's office; that he could not recall whether Mrs. Strom was present when he examined defendant. Objection overruled.

(20-6) This question is irrelevant. Objection sustained.

(21-1) This question is irrelevant. Objection sustained.

(21-2) This question is irrelevant. Objection sustained.

(22-3) The witness' direct testimony is substantially to the effect that defendant related, as part of her case history, that "since her marriage her periods were every three weeks." Furthermore, it is not only a medical fact but a matter of common knowledge that cessation of or delay in the normal menstrual cycle of a married woman presupposes pregnancy. Objection overruled.

(25-2) This question is not objectionable because the witness, having been given defendant's case

history, should have been in position to make a prognosis. Obviously, that is the very purpose case history is intended to serve. Objection overruled.

(29-3) This question is irrelevant. Objection sustained.

(29-4) This question appears to be plainly stated; its form does not anticipate an inferential answer. Objection overruled.

(32-4) Upon what source of knowledge the witness could, with certainty, predicate an answer to this question does not appear. The presumption is, of course, defendant's marriage having been made known to witness and his physical examination of her having disclosed that penetration had taken place, that she had sexually cohabited with petitioner. That presumption, however, is a question of law rather than a medical observation or statement of fact. Objection sustained.

(37-1) (38-1) It is elementary that use by a physician of his office records is permitted for the purpose of refreshing his recollection. However, when that purpose has been served the use of such records ceases and they are not admissible in evidence. See *Crothers* v. *Caroselli,* 126 N. J. Law, 590, 20 Atl. 2d 77 (E. & A.) and cases cited. The witness' office record was improperly admitted in evidence. The objection thereto is sustained.

(40-2) This question, while propounded in a different form on both direct and cross-examination, presents nothing to support its relevancy, or, more plainly, its helpfulness in settling the instant issue. The objection will therefore be sustained.

Stipulation.

(41-3) This objection will be sustained for the reason that the preceding question answers it without qualification.

(42-1) Objection sustained for the reasons stated in 32-4, *supra*. As to the request by petitioner's solicitor to have the Master refer back to the cross-examination and find the place where the question of defendant's solicitor appeared so that the question may be read and accuracy thus assured: The Master's observations were correct; the witness should have first given his answer to the question propounded and then, if necessity required, reference to the previous question asked on cross-examination could have been properly had.

(45-2) While defendant's solicitor interposed an objection, his subsequent statement, "You can answer the question now," indicates that he withdrew it.

(46-1) (46-2) Both questions call for a "yes" or "no" answer and therefore are not objectionable.

(48-3) This question was directed on cross-examination to an intelligent witness. If it misstated a fact the witness should have been capable of basing his answer on the facts as he knew them. Objection overruled.

Notice of Motion.

IN CHANCERY OF NEW JERSEY.
150–569.

Between

CARL O. CARLSON,
Petitioner,

and

AMY ROGERS, falsely called
AMY ROGERS CARLSON,
Defendant.

On Petition, &c.
Notice of Motion.

To: Simon J. Griffinger, Esq.,
Solicitor for Defendant,
810 Broad Street,
Newark 2, N. J.

Sir:

PLEASE TAKE NOTICE that on Tuesday, October 3, 1944, at 10:30 A. M. at the Court House, Hackensack, New Jersey, I shall apply before Hon. N. Demarest Campbell, Advisory Master, to whom the above cause was referred for a ruling on the objections appearing in the testimony of Dr. Samuel T. Markoff; for the striking from the record of all exhibits offered for identification or marking in evidence as defendant's exhibits; for the fixing of counsel fee for defendant's solicitor, and for the consideration of such matters as shall be necessary to the fixing of the status of the cause for decree.

Yours etc.,

W. HOWARD DEMAREST,
W. Howard Demarest,
Solicitor for Petitioner.

Dated: September 26, 1944.

Order.

(Filed November 11, 1944.)

IN CHANCERY OF NEW JERSEY.

150–569.

Between

CARL O. CARLSON,
Petitioner,

and

AMY ROGERS, falsely called
AMY ROGERS CARLSON,
Defendant.

On Petition, &c.
Order.

This matter being opened to the court by W. Howard Demarest, solicitor for the petitioner, in the presence of Simon J. Griffinger, solicitor for the defendant, upon the return of notice of motion for the striking out of all exhibits offered for identification or marking in evidence as defendant's exhibits, and for the fixing of counsel fees and the consideration of other matters, as stated in the notice;

It is, upon this 11th day of November, A. D. 1944, ORDERED that the motion be denied.

Respectfully advised,

N. DEMAREST CAMPBELL, A. M.

LUTHER A. CAMPBELL, C.

Final Decree.

(Filed November 21, 1944)

IN CHANCERY OF NEW JERSEY.

150–569.

Between

CARL O. CARLSON,
Petitioner,

and

AMY ROGERS, falsely called
AMY ROGERS CARLSON,
Defendant.

On Petition, &c.
Final Decree.

This cause coming on to be heard in the presence of W. Howard Demarest, Esq., solicitor for and of counsel with petitioner, and Simon J. Griffinger, Esq., solicitor for and of counsel with defendant and counter-claimant, upon petition, answer, counter-claim and proofs taken in open court, and the Court having heard and considered the proofs in the cause and the argument of counsel, and it appearing to the court that the petitioner has not sustained the truth of the allegations of the petition, in that there was no proof that the defendant is impotent nor was there any proof, that there was any fraud in the marriage contract, and there was no proof that there was mental reservation or inhibition respecting the consummation of the marriage, and therefore the petitioner is not entitled to the relief prayed; and it further appearing that the defendant has sustained the allega-

tions contained in her counter-claim filed herein and is entitled to the relief prayed for,

It is, thereupon, on this 21st day of November, 1944, by his Honor, Luther A. Campbell, Chancellor of the State of New Jersey, ordered, adjudged and decreed, and the said Chancellor does, by virtue of the power and authority of this court, hereby order, adjudge and decree that the petition be and is hereby dismissed.

And it is further ordered, adjudged and decreed that the petitioner do pay to the defendant or her solicitor, the annual sum of $1,560.00 in equal weekly installments of $30.00 per week, commencing upon the date of this decree, for her support and maintenance, and

It is further ordered that the petitioner pay to the solicitor of the defendant and counterclaimant, the costs of this suit to be taxed and also the sum of $1,500.00 which is hereby adjudged and ordered to be a reasonable counsel fee for the solicitor of defendant-counterclaimant, and that the said solicitor for defendant-counterclaimant have execution for said costs and counsel fee according to the practice of this court.

Respectfully advised,

N. DEMAREST CAMPBELL, A. M.

LUTHER A. CAMPBELL, C.

Notice of Appeal.

IN CHANCERY OF NEW JERSEY.

150–569.

Between CARL O. CARLSON, Petitioner-Appellant. *and* AMY ROGERS, falsely called AMY ROGERS CARLSON, Defendant-Respondent.	On Petition for Nullity and Counterclaim for Separate Maintenance. Notice of Appeal.

Petitioner hereby appeals to the Court of Errors and Appeals in the last resort in all causes from the whole of the decree made in this court in the above entitled cause on the 21st day of November, 1944, by the Chancellor on the advice of N. Demarest Campbell, Advisory Master, which orders, adjudges and decrees that the petitioner's petition for nullity herein be dismissed.

The petitioner, as defendant in the counterclaim for separate maintenance, also appeals from the whole of the decree aforesaid relating to the alleged cause of action of the defendant counterclaimant, which decree recited that said defendant had sustained the allegations contained in her counterclaim and was entitled to the relief prayed for, and adjudged and decreed that petitioner pay to the defendant, or her solicitor, the annual sum of $1,560.00, at the rate of $30 weekly, commencing November 21, 1944, and that petitioner pay to the

solicitor for defendant and counterclaimant costs of suit and a counsel fee of $1,500.00.

W. Howard Demarest,
Solicitor for and of Counsel
with Petitioner-Appellant.

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

W. Howard Demarest,
Of Counsel with Petitioner.

Due and legal service of copy of the within Notice of Appeal is hereby acknowledged this 27th day of November, 1944.

Simon J. Griffinger,
Solicitor of Defendant-Respondent.

Petition of Appeal.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

CARL O. CARLSON,
Petitioner-Appellant,

and

AMY ROGERS, falsely called
AMY ROGERS CARLSON,
Defendant-Respondent.

On Appeal from Chancery. Petition of Appeal.

Sat Below: Campbell, *C.*; N. D. Campbell, *A.M.*

The petition of Carl O. Carlson, petitioner-appellant in the above entitled cause and as defendant-appellant in the counterclaim herein, respectfully shows:

Petitioner finds himself aggrieved by and appeals from, the whole of a decree made in the Court of Chancery by his Honor, Luther A. Campbell, Chancellor on the advice of his Honor, N. Demarest Campbell, Advisory Master, dated November 21, 1944 in the cause above entitled, wherein he, Carl O. Carlson is petitioner in an action for nullity of marriage, and is defendant in a counterclaim for separate maintenance, and wherein Amy Rogers (Carlson) is respectively defendant and complainant, for the following reasons:

1. The court erroneously adjudged and decreed that petitioner had not sustained the truth of the allegations in any cause of action alleged in his petition against the defendant and decreed

its dismissal; whereas upon the proofs submitted to it the court should have adjudged and decreed that the several causes of action so alleged, or one or more of them had been proved and the marriage of the parties annulled.

2. The court erroneously ruled and based conclusions upon the admission and exclusion of certain evidence.

3. The court erroneously considered letters marked as defendant's exhibits, and erroneously refused to exclude them from the record, notwithstanding defendant's motion to dismiss prevailed and no defense was interposed.

4. The court erroneously adjudged and recited in said decree that the defendant (counterclaimant) had sustained the allegations contained in her counterclaim and was entitled to the relief prayed, whereas the defendant (counterclaimant) offered no testimony and the court should have dismissed defendant's counterclaim for separate maintenance.

5. The court erroneously failed to give proper weight, consideration, legal effect and credence to uncontradicted evidence offered by petitioner.

6. The court erroneously adjudged and decreed that petitioner pay to defendant or her solicitor the annual sum of $1,560.00 in weekly installments of $30.00 whereas defendant should have had nothing under her counterclaim and such award, or any award was unjust, unreasonable and unwarranted.

7. The court erroneously adjudged and decreed that petitioner pay to the solicitor of defendant

counterclaimant, costs of suit and a counsel fee of $1,500.00 which award being in addition to a preliminary allowance of $500. is excessive and unreasonable.

Your petitioner therefore appeals from the whole of said decree of the Chancellor and from each portion thereof which decrees as aforesaid.

Your petitioner therefore prays that the said decree of the Chancellor may be reversed, set aside and for nothing holden, and that the record may be remitted to the Court of Chancery with direction to enter a decree for nullity of marriage in accordance with the prayer of said petition and with direction to dismiss the counterclaim filed by the defendant against petitioner, and that your petitioner may have such other and further relief in the premises as to this Honorable Court shall seem meet.

W. Howard Demarest,
Solicitor for and of Counsel with
Petitioner-Appellant.

Service of the within copy of Petition of Appeal is hereby acknowledged and filing thereof consented to as within time this 4th day of April, 1945.

Simon J. Griffinger,
Solicitor for Defendant-Appellee.

Testimony.

COURT OF CHANCERY OF NEW JERSEY.

Between CARL O. CARLSON, Petitioner, *and* AMY ROGERS, falsely called AMY ROGERS CARLSON, Defendant.	On Petition, etc. Docket No. 150-569. Testimony.

Heard at Chancery Chambers, Hackensack, N. J., before HON. N. DEMAREST CAMPBELL, Advisory Master.

Aug. 14, 1944.
Aug. 15, 1944.
Aug. 16, 1944.

Appearances:

W. HOWARD DEMAREST, 744 Broad Street, Newark, N. J., Solicitor of Petitioner.

SIMON J. GRIFFINGER, 810 Broad Street, Newark, N. J., Solicitor of Defendant.

AUGUST 14, 1944.

CARL O. CARLSON, 225 Franklin Avenue, Grantwood, Borough of Cliffside Park, N. J., the petitioner, on his oath testifies as follows:

Direct examination by Mr. Demarest:

Q. You are the petitioner in this action? A. I am.

Q. You live, as you have testified, as stated on the record, at 225 Franklin Avenue, Grantwood, Borough of Cliffside Park, New Jersey? A. I do.

Q. When and by whom was the marriage ceremony performed between you and the defendant? A. The marriage ceremony was performed Saturday, June 20, 1942, by Dr. William Ward Ayer at the Calvery Baptist Church, West 57th Street, New York City.

Q. For how long prior to that time had you known the defendant? A. For approximately seven months.

Q. Where and under what circumstances did you meet her? A. I met her in the Baptist Church in Miami, Florida, in November 1941.

Q. Were you there on a vacation or visit? A. I was there on a vacation.

Q. What is your work? A. My work is that of an assistant in the Real Estate Department of the Fifth Avenue Bank in New York, with the title of Acting Manager.

Q. After your meeting with the defendant, did you see her frequently? A. I saw her during the time of my vacation, for a period of about ten days in November 1941, and I subsequently saw her in the following April of 1942 for a period of another ten to twelve days. Probably twelve days.

Q. During the first ten day contact in November, about how frequently did you see her? A. I saw her every day.

Q. Then you returned to your home and work? A. I did.

Q. She did not come with you? A. She did not.

Q. From that time down to April 1942 had you seen her anywhere? A. I had not seen her anywhere.

Q. When you next saw her in April 1942, what was the status of your relationship so far as marriage was concerned? A. One of great endearment that had developed in that period.

Q. Were arrangements made for a marriage in April? A. Yes, they were.

Q. And a date fixed? A. And a date fixed, tentatively.

Q. Was that tentative date carried out? A. Yes, it was decided to be in the month of June, the early part.

Q. Did the defendant come to New York later? A. The defendant came to New York the Sunday preceding the Saturday of our marriage.

Q. Did she also come to New Jersey? A. She visited at my home.

Q. Had she met your people before? A. She had not.

Q. When you first met the defendant, was there any appearance that was visible to you of any ill health? A. There was not.

Q. When did you first find there was some such evidence?

Mr. Griffinger: If your Honor please, I object as to "When did you find there was such evidence".

The Court: The question suggests the answer. Reframe your question.

Mr. Demarest (continues):

Q. Was the defendant's knee in apparently normal condition when you first met her?

Mr. Griffinger: I object. There is nothing in the pleadings that refers to any injury or condition of the knee which is the basis of the petition for annulment.

Mr. Demarest: I'll withdraw the question.

Mr. Demarest (Continues):

Q. Did you and the defendant discuss her physical condition at the time of that first ten day contract? A. No, sir.

Q. Was there ever a discussion? A. In our second visit; my second visit.

Q. What was the subject matter of the discussion? A. I noticed a slowness of gait.

Mr. Griffinger: I object and ask that it be struck from the record. I am confined and so is the Court to the allegations of the complaint. We are concerned with an impotency charge. Unless counsel can convince the Court that he intends to show that any hesitancy of gait is co-related to impotency I submit it is not part of the pleading.

Mr. Demarest: The third cause of action covers other things than impotency. It goes into the question of her having concealed various other physical disorders.

The Court: I'll permit it. The question was answered.

Mr. Demarest (continues):

Q. What was said on the subject? A. I inquired about it and she stated that she was recovering from an attack of rheumatic fever.

Q. Was there anything said about the length of time during which she had had this ailment? A. No, there was not.

Q. Was there any representation as to when it started? A. No, no representation, but she did mention she had had a fall, apparently at her place of business.

Q. Were there other matters discussed having to do with your proposed marriage and your relationship? A. We discussed very briefly the future; the expressed wish that we have a family and there was no hesitancy on her part to agree with me that we hoped we would be blessed with youngsters.

Q. How old were you at the time? A. At that time I was thirty-six.

Q. How old was the defendant? A. She was thirty-four.

Q. You are testifying as to what she told you, I suppose? A. I am.

Mr. Griffinger: I ask that that be struck. This man wasn't told his age by the defendant.

Mr. Demarest: I mean, of course, by that her age.

The Court: Yes.

Mr. Demarest (continues):

Q. Had there been up to that time or at any other time prior to the marriage any physical contact of an intimate nature between the two of you? A. Nothing whatever.

Q. From her conduct would you say she exhibited affection or not? A. At the time I courted her, I would say "yes".

Q. What inquiry, if any, did you make with respect to any matters concerning her health prior to your marriage? A. I made no inquiry.

Q. I think you said you asked her, did you not? A. I understood your question to mean elsewhere. I made no inquiry elsewhere.

Q. Only from her? A. Only from her.

Q. Besides what you have already said, what did she say, if anything, about her condition of

health? A. She represented herself as being in normal, good health.

Q. Excepting this supposed rheumatic fever? A. Excepting that.

Q. When you were married you went on a wedding trip? A. We did.

Q. And the first night of your marriage did you make any discoveries with respect to her physical and mental condition? A. Yes, I did.

Q. What did you find? A. I found, though—I found the fact that the girl had deceived me as regards her physical development. However the profound shock of that discovery, I was too much in love with the girl to in any way let that be a factor——

Mr. Griffinger: I ask that that last be struck. We are not concerned at this point as to his reason for overlooking it. I think the Court's deductions along those lines would be best.

Mr. Demarest: We haven't a jury here. I know your Honor will comb the wheat from the chaff in the usual fashion.

The Court: No harm has been done. As you say, there is no jury here.

Mr. Demarest (continues):

Q. Can you give us particulars in which you found there had been deception? A. Yes. She dressed for the evening in her night clothes in the bathroom of the room at the hotel, and came in and we went to bed.

Q. What were the night clothes you just mentioned? A. An ensemble; a nightgown with pajama pants to them and a jacket, and she at the same time, as I subsequently discovered, had worn

under her jacket a brassiere form of artificial breasts.

Q. You had never seen or discovered that before? A. I had not.

Q. What happened to them? A. Well, they were removed in the course of our embrace, and nothing was said.

Q. Did you have intercourse with her then? A. I did not.

Q. Why? A. She would not permit it.

Q. Can you tell us the story of that first night? A. There was a great deal of embracing and effort on my part, and I was repulsed, and that summarizes it.

Q. But no discussion as to why you were not permitted—? A. No. there was not.

Q. The wedding trip continued, I presume? A. It did.

Q. Did you have intercourse during the remainder of it? A. I did not.

Q. What occurred? A. The several times I endeavored I was repulsed again.

Q. Was there any discussion about it then? A. There was. The expressed hope on her part that she would change her attitude.

Q. Did she express any attitude to be changed? A. There was a repulsiveness that she acknowledged.

Q. Was it explained by her any further than that it was repulsive? A. Repulsive and repugnant. No desire.

Q. Did she say anything about any prior experience of that sort? A. No, she did not.

Q. Prior to the marriage had there been some literature provided on the subject of married life? A. I sent her a book to her Florida address.

Q. Do you know what happened to it? A. I don't know what happened to it. I do know it didn't come back.

Q. Do you know whether she read it? A. No, she did not.

Q. How do you know that? A. She told me so.

Q. Did you discover any other bodily ailment during the honeymoon? A. The swollen knee.

Q. Was there any discussion had about that? A. Yes, the informed me that that had resulted from a fall and that she had been assured that there was nothing to it and that it would disappear with time.

Q. I understand you to say that prior to that you had not seen this knee? A. That is true.

Q. What, if anything, was done about her physical condition by you? A. Within ten days after our honeymoon I took her to a local doctor in Cliffside Park and he suggested that I take her to another physician and she was admitted to St. Mary's Hospital in Hoboken the day after. It was about ten days after my return from the wedding trip.

Q. From then on was there further medical attention? A. Yes, there was considerable medical attention.

Q. Resulting in what? A. Resulting in a visit to another doctor and eventually culminating in yet a third and fourth doctor towards the end of the year for an operation.

Q. What doctors do you refer to? A. Dr. Markoff in September 1942. Dr. Donaldson in December 1942. Dr. Heyd in December 1942.

Q. There was an operation in December 1942? A. There was that.

Q. After that operation did the defendant return and live together with you? A. She returned and lived in the same house with me.

Q. Until when? A. Until the early part of April, 1943. April fourth.

Q. What happened then? A. Upon her insistence I had purchased a round trip ticket for her to go to Chattanooga.

Q. Did she have friends or family there? A. She had family.

Q. I want to go back for a moment to the Florida meetings prior to the marriage and ask you whether you and the defendant corresponded during that period? A. We did.

Q. You wrote to her? A. I wrote to her.

Q. Did she write to you? A. Yes, she did.

Q. I'll bring in the correspondence later. After the honeymoon or wedding trip was over, I would like you to tell the Court of your family life from then until April when the defendant went to Chattanooga as to this: Her condition; her conduct. Suppose we start with that and then I'll ask questions. A. Her condition: She was in poor health and that continued. Her conduct was one of strangeness with no endearment that I had anticipated and hoped for from a young bride. There was no responsiveness in the girl to anything I did for her. It was to me a cross to bear and I resolved to make the best of it.

Q. When you say there was no endearment, you mean she would not kiss and fondle you? A. Yes, I was repulsed when I tried to make love to her in the way I did.

Q. Was she at that time, in your opinion, too sick to engage in the ordinary marks of affection? A. I don't think so. No, sir.

Q. She was getting around from place to place? A. She was.

Q. Did she kiss you when you went away in the morning? A. No, she did not.

Q. Or when you came back at night? A. No, sir.

Q. Were there any acts, during this period, of intercourse between you and her in the normal fashion? A. No, sir.

Q. Just tell us what your experience was in connection with this. I take it there were attempts on your part to have intercourse? A. There were.

Q. Tell us about it. A. I attempted to have relationship with her and was repulsed on the occasions that I tried. Several times I was shunted right aside and the light went on and she resumed reading.

Q. In what manner were you and she clothed at the time of these attempts? A. I would be undressed. She would have a pajama outfit on.

Q. Did you have any on? A. I would not. Not at that time.

Q. Did your body touch hers? A. As we laid there, side to side.

Q. I am speaking of bareness, now. A. My bare body touched hers.

Q. Her bare body? A. She was not completely nude.

Q. When you say she shunted you aside, was there any discussion as to why? A. Yes, she didn't care for it.

Q. I don't like to lead, but you set up in your petition that there were certain things and decisions she made. I am trying to find out what she didn't want done. Give us that. A. She did not want intercourse. I was living with the woman. I know that.

Q. You mean by that that you did not insert your organ into hers? A. That is right.

Q. That is what you mean? A. That is what I mean.

Q. You mentioned a certain word to me about that in our discussions. Do you remember what It was? A. Unless you have in mind that I never penetrated the girl.

Q. You told me that? A. I did.

Q. You so testify? A. I so do.

Q. When you made these attempts, did she require any other preparation on your part? A. Yes. She instructed me to have two contraceptives ready.

Q. Then would you do that? A. I would.

Q. Would she then permit intercourse? A. No, sir.

Q. Tell us about it. A. I would be on the side with her. I was never astride the girl—

Q. So—? A. Well, it would end ineffectually. There was no betrayal of emotion on the girl's part whatever.

Q. When the requirement was mentioned that you use contraceptives, was that, to you, an invitation from her to have intercourse? A. No, I will always feel that it was not.

Q. At any rate, notwithstanding your conforming to her desire, intercourse did not take place? A. That is right.

Q. When the defendant was preparing to go to Chattanooga, did you have a discussion with her as to why she was going? A. She was—

Mr. Griffinger: Your Honor please, I would like that question confined to a date; at least to a month.

Mr. Demarest (continues):

Q. In the month prior to April 1943 when she went? A. She was continually persisting that I buy the ticket. She wanted to go back. She had many times expressed dissatisfaction with the east

New Jersey State Library

and north and with marriage itself, which she said was distasteful to her and she said she felt if she returned to Tennessee she would be a lot happier and probably improve in her health.

Q. Was divorce ever mentioned between you and her prior to that time? A. Yes, it was.

Q. When? A. In July 1942, within a month after our marriage.

Q. How did the subject come up? A. It came out of a clear sky. The girl said she was unhappy and had made a mistake and that she would be willing to go to Florida if I would agree to pay the legal expenses and her maintenance at the time.

Q. Was there any such agreement? A. There was not.

Q. When, if ever, was the subject raised again? A. It was raised intermittently several times during those five or six months ensuing.

Q. Up to the time when the defendant left in April to go to Chattanooga, had there been any claim made by her to you with respect to a supposed pregnancy? A. There had not.

Q. When did you first hear of any such claim on her part? A. In her reply, through your office.

Q. When with respect to the time this suit was started? A. After the suit was commenced.

Mr. Griffinger: May I insist that the date of that reply that the witness refers to be put on the record so we know that the first information he had was when the reply—which I believe he means to be the answer of the defendant and counterclaim—

Mr. Demarest: You know you don't mean that.

Mr. Griffinger: Then I mean the reply.

Mr. Demarest: I'll ask a question and clear it all up.

(Continues) Q. Do you remember having seen in my office an affidavit by Amy Rogers Carlson sworn to December 18, 1943? A. Yes, sir.

Q. Is that what you refer to as a "reply"? A. Yes, sir.

Mr. Demarest: I am referring to an affidavit made on application for alimony pendente lite.

Mr. Griffinger: Yes. That date I would like to have in respect to when it was served. The date of the affidavit was not the date it was in Mr. Demarest's hands.

Mr. Demarest: The record will show that was served on me January 3, 1944 and therefore it was after that date that Mr. Carlson saw it.

Mr. Griffinger: That's right.

Mr. Demarest (continues):

Q. Can you tell what date you saw it on? A. No. The early part of January.

Q. That affidavit was your first knowledge of that supposed pregnancy? A. It was.

Q. Had there been on the sheets or bedclothing of any of the places you stayed during your honeymoon any evidence of blood or stain? A. There had not.

Q. Had the defendant ever said anything to you about there having ever been any blood or stains resulting from contact?

Mr. Griffinger: I object to this question concerning blood and stains during the

honeymoon. There is nothing in the pleading that refers to what counsel has in mind. I don't think that is proper now.

Mr. Demarest: We claim there was no intercourse and that is one way of arriving at some conclusion, although I confess it is not an indisputable conclusion, but I think it is some evidence.

Mr. Griffinger: I think that would be more or less secondary, to rely on the possibility of blood stains.

The Court: It might be part of the circumstances. I'll permit it. (To stenographer) Repeat the question.

Stenographer: "Has the defendant ever said anything to you about there having ever been any blood or stains resulting from contact?"

A. There was no evidence of it.

Mr. Demarest (continues):

Q. Was there any claim by her that there had been such? A. I didn't hear the question.

Q. I asked you whether the defendant had made any claim that such stains and evidence had existed? A. She had not.

Q. After the defendant had gone to Chattanooga in April 1943 did you commence any inquiries about here condition? A. Yes, I did.

Q. Whom did you confer with about such things? A. I spoke to the doctors who had attended her just prior to that time.

Q. They told you things about her condition they had found? A. Yes, they did.

Q. Did you have any information prior to that time as to the length of time a certain condition

in the uterus had existed as found by the doctors? That is, until they told you what they had found? A. No, sir.

Q. Did you have, until the time you so investigated, any information as to how long the joint or knee condition—we will call it arthritis—had existed? A. I had no information.

Q. The information you had as a result of your inquiry resulted in this suit A. Yes, it did.

Q. After the defendant had gone to Tennessee did you continue a course of correspondence with her? A. Yes, I did.

Mr. Demarest: I have asked the other side to produce certain letters——

Mr. Griffinger: I have them.

Mr. Demarest: —by notice to produce.

Mr. Griffinger: Yes, sir. I think I have them all here.

Mr. Demarest: The letter of April tenth?

Mr. Griffinger: April tenth. Yes.

Mr. Demarest: April thirteenth?

Mr. Griffinger: I have that someplace. What is the next date?

Mr. Demarest: April twenty-first. April twenty-third.

Mr. Griffinger: April twenty-first. Here it is. What is the next date?

Mr. Demarest: April twenty-third.

Mr. Griffinger: Here is April twenty-third. Here is May eighth.

Mr. Demarest: May eighth. Yes.

Mr. Griffinger: May tenth is next.

Mr. Demarest: Right.

Mr. Griffinger: May seventeenth the next one?

Mr. Demarest: May seventeenth.

Mr. Griffinger: May nineteenth.

Mr. Demarest: Nineteenth.

Mr. Griffinger: June second.

Mr. Demarest: June second.

Mr. Griffinger: I'll have to find those others.

Mr. Demarest: Have you got July fifteenth and August ninth and April thirteenth?

Mr. Griffinger: I'll look for them. I haven't got the July fifteenth or August ninth letters.

Mr. Demarest: What about April thirteenth?

Mr. Griffinger: I am looking for that.

Mr. Demarest: I have copies of July fifteenth and August ninth.

Mr. Griffinger: I have April thirteenth checked on your notice, so I must have had it yesterday. Do you want to go ahead and I'll look for it.

Mr. Demarest (continues):

Q. I ask you to look at these letters. Do you identify those as letters sent by you to the defendant? Maybe we had better look at them. I offer in evidence the following letters: Letters from the petitioner to the defendant dated April tenth, April twenty-first, April twenty-third, May eighth, May tenth, May seventeenth, May nineteenth and June second, all in the year 1943. Your Honor, I have copies. Mr. Griffinger is producing the originals. I wonder if he will want copies of these made. They are your exhibits. You can have them back. I have copies.

Mr. Griffinger: They go before the Court. That is all I am interested in.

Mr. Demarest: Of course.

Mr. Griffinger: They are being offered in evidence in the petitioner's case?

Mr. Demarest: Yes.

(Seven letters, Exhibit P-1.)

Mr. Demarest: I also offer in evidence my copies, subject to their being replaced by the originals if they are found. The copies are of letters dated April 13, 1943——

Mr. Griffinger: That isn't April 14th by any chance, is it?

Mr. Demarest: No, I have April 14th, too. This is April 13th. That is two pages. Also a two page letter of July 15, 1943 and a letter of August 9, 1943.

(Copies of three letters, Exhibit P-2.)

Mr. Demarest: I have the letters you noticed to be produced.

Mr. Griffinger: Yes.

Mr. Demarest: I don't know whether they should be introduced at this stage of the case——

Mr. Griffinger: Well, as long as I look them over, but I would like to see those copies of April 13th and July 15th and August 9th. I am familiar with the other letters but I would like to see those three copies.

Mr. Demarest (continues):

Q. In reply to any of the letters in evidence that you sent the defendant, did you ever receive from her either by letter or any other means of communication a denial of the fact that certain conditions and reactions existed in her that you mentioned in these letters? A. I don't recall.

Q. To your knowledge you didn't, you mean? Let me put it in another way. When you said that she must have understood by now what her reactions were to married life, did she ever contest that matter in any communication she sent? A. I don't recall.

Q. After the defendant had been out there for some time did you make a trip out to Chattanooga? A. Yes, I did.

Q. When did that take place? A. That took place in the middle of June, 1943.

Q. How long were you there? A. I was there approximately three days.

Q. Did you see the defendant? A. I did.

Q. Did you stay at her sister's house? A. The first night I stayed in a hotel in the City of Chattanooga and the remaining three nights I stayed at her sister's home.

Q. What condition was the defendant in when you arrived there insofar as her health was concerned? A. In very poor health.

Q. What did you find? A. I found that she was in poor health; that she kept herself to the house; she had been to the hospital in Chattanooga and she had apparently been to another doctor in Chattanooga, several doctors, and had returned to her sister's home where she was then staying.

Q. Why did you go out? A. I went out with the hope that I could find out what the girl intended to do.

Q. About what, for instance? A. Principally about her future; what her intentions were about returning to her home.

Q. Did you discuss that situation? A. I did.

Q. Give us the discussion; what you and she had to say to each other about it. A. There was no intention on her part to return north. She was very definite in that statement to me.

Q. Let's have what she said and what you said about it. A. When I came down there I saw her the first time on a Saturday afternoon and late in the afternoon we had a general discussion and she stated that she—that they were making plans and was going to Hot Springs, Arkansas, and when I inquired about that, the arrangements and expenses which I feared might be prohibitive, she explained it would cost more to go to the Mayo Brothers and she explained that she was going to take a series of treatments. We discussed our future and she gave no evidence that it meant anything to her whatever nor did she care what it meant to me and I explained we couldn't go along that way and she brought up the question of the legacy that I had been bequeathed several months prior and she felt I would have ample funds to take care of all her needs there. I knew she didn't want to come back north. She so stated she wouldn't come back north. She gave no concern about me. When I met the girl in her sister's living room I hadn't seen her in two and a half months, but there was no spontaneity or enthusiasm. I was brought up there about noontime and we sat in the yard until late afternoon.

Q. What did she want you to do about the legacy? A. She wanted me to arrange to give it to her.

Q. Did you agree? A. I did not.

Q. How much was the legacy? A. $16,000.

Q. At that time had you received it? A. I had not.

Q. If she got the legacy, then what did she propose? A. She stated that when her health had returned she would then go to Florida and start divorce proceedings, provided I would take care of her legal expenses there. I recall her

informing me she wouldn't do anything legal until I deposited in the Hamilton National Bank in Chattanooga a cashier's check to her order or instructions that would be convincing to her that I intended to give her the money.

Q. Were you with her that Saturday night you arrived there? A. When you say "with her" what do you mean?

Q. Did you go to her room that Saturday night you arrived there? A. I was in her room. Yes, sir.

Q. What happened? A. We had separate rooms, separated with a bath, and I went in there prior to my retiring, as was my custom at home, with my Bible. Amy knows the Bible. I sat on the bedside and read at random several verses and I got on my knees and I prayed.

Q. Did you stay there with her that night? A. I did not.

Q. Was there any intercourse between you that night? A. None whatsoever. There was nothing. No thought of it.

Q. During the rest of your stay there, was there any time you had intercourse with her A. No, nothing at all.

Q. Were you at any time alone with her in the house? A. Alone with her in the house?

Q. On that visit? A. On the afternoon of my departure.

Q. Tell us what occurred. A. We had a light lunch. Her sister was leaving for a church function and shopping and we sat in the living room for a while where it was coolest and we talked about our problem and what we could work out in the way of a solution. I made no progress. I went out in the backyard with the girl, where she had apparently been taking sun treatments, and

we talked a while and I just didn't get into first base. I took a walk around the top of that mountain—I don't know the name—and I was gone about an hour and a half. I returned about six o'clock and Amy had then returned from the yard to the house proper.

Q. Were you then alone again? A. Yes, we were for that interim period before her brother-in-law and sister returned from downtown.

Q. How long would that be? A. About a half hour or so, I estimate.

Q. Was there intercourse or attempted intercourse during that time? A. There was not.

Q. After you returned did you discuss this matter with the doctors to ascertain anything about her physical and mental condition? A. Yes, I did.

Q. Did you discuss with the defendant these points of illness of hers as well as your marital plans, hers or yours, while you were out there? A. Yes, I did.

Q. What did she say about it? A. She said she couldn't help because she was sick. Her attitude was one of, "Well, as long as you have the money to pay my doctor bills I'll incur them."

Q. Was anything said between you as to the letters you had sent saying that she had been ill for a long time and must have known it? Was that subject discussed? A. I do not recall.

Q. Were any of these discussions you had with respect to the defendant and her health and plans in the presence of her sister, Mrs. Bowers? A. No, they were not. She asked me not to bring the family into it.

Q. Referring to the defendant's affidavit of December 18, 1943, served on me in this cause January 3, 1944, there was reference there to an

alleged abandonment by you of the defendant on June 16, 1943. Was there any act on your part on any such date? Was there any act on your part on that date excepting that you returned to the east from Chattanooga? A. Why, yes. When I left—just prior to my leaving I gave her fifty dollars in cash.

Q. Did you after that supply her with any money for her maintenance? A. Yes, I did.

Q. Until when? A. Until probably the middle of August, 1943.

Q. How much? A. I would estimate I must have sent to the girl or the sanitarium approximately $250.

Q. Did you make arrangements for the sanitarium to take care of her? A. I made no arrangements whatsoever.

Q. What did you find when you got to Tennessee about arrangements, if any, that had been made? A. I concluded they had already been made. Mrs. Bowers showed me and the girl gave me a catalogue from the City of Hot Springs, Arkansas which advertised the numerous medical places. They called my attention particularly to the Ozark Sanitarium. Friends evidentally had been patients there. It was a cut and dried trip, whether I approved of it or objected to it.

Q. In your investigation of your wife's condition and your conferences with the doctors, tell us what the doctors reported to you which lead you to this present action.

Mr. Griffinger: I object to it unless this discussion with the doctors took place in the presence of the defendant.

Mr. Demarest: My object in asking the question is not to prove the truth of what the doctors said. So far as we can pro-

duce, medical testimony can testify to that. I am more concerned with refuting by this testimony any claim that this petitioner knew, waived and condoned a prior condition, and that upon his having what we believe may be the complete or nearly complete story, he took action.

The Court: Nevertheless, would it be hearsay?

Mr. Demarest: It might be. I am trying to meet the affidavits on the other side which say not precisely but which infer that the man might have known of this situation. I am asking this question to try and avoid that.

The Court: The objection is good. Sustained.

Mr. Demarest (continues): Did you, during the time the defendant was in Tennessee, and at her request, send her a copy of the report of Dr. Charles Gordon Heyd as to the operation performed by him December 28, 1942?

Mr. Griffinger: I object. This is a back door attempt to get in this discussion. A copy of a letter is the same as a discussion.

Mr. Demarest: I think that if a doctor's report is sent to the other side, as was done and indicated by my question, showing what the doctor found, the other side has information so furnished and the Court should have it, too.

Mr. Griffinger: The best evidence is the doctor.

The Court: (To stenographer) Repeat the question.

Stenographer: "Did you, during the time the defendant was in Tennessee, and

at her request, send her a copy of the report of Dr. Charles Gordon Heyd as to the operation performed by him December 28, 1942."

The Court: You may answer that question yes or no.

A. Yes.

Mr. Demarest (continues):

Q. I ask you to look at this paper and tell me whether that is one of the duplicates that were made up for the purpose of sending to the defendant?

Mr. Griffinger: I object, even to his looking at it to refresh his memory, because counsel will state to the Court that he intends to offer it. I think counsel is attempting to put that in evidence.

The Court: I don't think Mr. Demarest's question went to inquiring whether that was sent to the defendant.

Mr. Demarest: I asked whether this was a copy of what he sent to the defendant.

The Court: That question is permissible. You may answer.

A. Yes, it is a copy.

Mr. Demarest: I ask that it be marked for identification.

(Copy of report of Dr. Heyd—Identification P-1.)

Mr. Demarest: Have you any objection to its going into evidence?

Mr. Griffinger: I won't even look at it, and I object. It is definitely hearsay.

Mr. Demarest: All right. I'll ask one more question.

Mr. Demarest (continues):

Q. Where did you get that copy? A. From Dr. Heyd.

Q. Did you get another one, just like it? A. I had photostatic copies made.

Q. What did you send to the defendant, one like this or a photostatic copy? A. I sent her a photostatic copy.

Q. Of this? A. Yes. As I recall, I sent a photostat.

The Court: Was there a demand for the photostat?

Mr. Griffinger: No, sir.

Mr. Demarest: I have a letter that will indicate what I want.

Mr. Griffinger: Is the offer withdrawn now to put it into evidence?

Mr. Demarest: I won't offer it now. I'll offer it at a future time when I offer something else about it. If the Court please, in view of the original objection made by my adversary as to references as to the defendant's swollen knee and arthritic condition: I attempted in the petition to charge that there was a fraudulent concealment by the defendant of her physical and mental condition; that he was induced to enter into this marriage because of concealment of facts known to her, that she was suffering from one or more chronic diseases and from abnormalities, etc. That is Paragraph 2 at the bottom of page 3 and top of page 4 in the third cause of action. Now, there has been in the testimony an occasional refer-

ence to arthritis, and if the contention is going to be made that I have not charged the concealment of a disease in the proper manner, I shall have to ask, since both sides know exactly what the complaint is here, to amend to include specifically the concealment of arthritis, or shall the Court rule that my language is sufficiently broad to cover the concealment of one or more chronic diseases or abnormalities, so I may bring in the proof I am contemplating offering here.

Mr. Griffinger: First of all, the application for such an amendment is not timely. Secondly, would the Court consider that counsel charges at this point that the possibility or probability of arthritic knee is grounds for annullment of marriage?

The Court: Don't go into that now. That wasn't Mr. Demarest's statement. It is a question, as I understand it, as to whether or not in your general charge, arthritis was considered to be one of the chronic diseases, etc.?

Mr. Demarest: Yes, if I am within my rights to refer to arthritis in this hearing, having charged general chronic diseases. I didn't think there was any question about it, because we have discussed that throughout.

The Court: Whether or not arthritis is included, rather than whether arthritis is that type of physical disorder which would warrant an annullment of the marriage.

Mr. Griffinger: If your Honor will refer to the third cause of action, you will find under "2": "Said marriage was entered

into by petitioner upon representations made to him by defendant that: (a) Defendant was in good health and normal physically and mentally, with the sole exception that she had then recently suffered an attack of rheumatic fever, from which her recovery was not yet complete." Counsel in his pleadings, sustained by the testimony of the petitioner, sets forth an exception there. I think counsel said, "We will refer to it as arthritis." Counsel now asks to amend that cause of action to include arthritis so that the last statement made by him, "chronic diseases and abnormalities" should cover arthritis. I don't think it is proper at this time for counsel to inject into his pleadings his translation of this. We will have medical testimony showing that arthritis is a constitutional disorder and has no relationship on performing the marital duties.

Mr. Demarest: Mr. Griffinger is confusing the issue. I brought this up for one purpose, since there was a suggestion on his part early in the hearing that he objected to testimony which tended to show that an arthritic condition existed. I wanted to be sure that I would not be faced with a ruling which I did not expect to the effect that my language was not sufficiently broad to cover any illness, including arthritis. I framed my count so that I could plead it and since the odd objection was made that I should not discuss arthritis I am taking the position that this girl told this man, "I am in good health. I am a fit subject for marriage. The only thing I have had is a recent attack of rheumatic fever," which is not arth-

ritis. If the only thing she had is rheumatic fever, I would have no case on that subject; but if she said, "I have rheumatic fever" and she turned out to have something entirely different, which is arthritis, it is within my reach to say she said she was in good health physically and mentally except for rheumatic fever and that she had surpressed one or more chronic diseases and abnormalities. I wouldn't have raised this question now except that I want that question raised so that it will not be glossed over and then have them come out and say that they couldn't meet it.

The Court: The term "arthritis" came out before this, didn't it? It came out either on motions or sometime before this morning?

Mr. Demarest: Yes. My contention is that my language would allow me to prove that she had any one of a dozen diseases and concealed them. The mere fact that we are talking about arthritis now——

The Court: Would that inclusion of arthritis act by way of surprise?

Mr. Griffinger: Certainly. There is a pleading I prepared this case upon and now at the last moment counsel wants at this last fifty-ninth second to inject this arthritis. I could have been prepared to bring in a full discourse on arthritis, with specialists. Mr. Demarest comes in now and says he wants to amend the pleadings because he found something flying around in the air. There has been five or six month's opportunity to make application to your Honor to make any amendments, not now

when direct examination is finished. I challenge counsel to say that he relies on arthritis in the same class as consumption or tuberculosis. My cross examination will be directed to direct examination.

The Court: I'll withhold a ruling on that and if there is an amendment it will be permitted on terms so as to remove the element of surprise.

Mr. Demarest: On the question of surprise: We have already examined Dr. Markoff and the other side knows what that testimony is and that arthritis is one of the principal subjects of Dr. Markoff's testimony. However——

Mr. Griffinger: Such an application could be made ten o'clock this morning before examination was commenced, then I would be in a position to answer.

Mr. Demarest: Very well, then let us consider that I have made no application to amend. I only wish to say that I can prove under this any diseases that would interfere with the normal progress of the marriage.

Cross examination by Mr. Griffinger:

Q. You live in Grantwood, you say? A. Yes, sir.

Q. With whom do you live there? A. In my mother's house.

Q. Who lives there besides you? A. Mother.

Q. Who else? A. And she has had several individuals there—roomers.

Q. In 1942 were you residing at your mother's? A. I was residing in 1942 until June 19th with my mother.

Q. June 19th is the day before your marriage? A. Yes.

Q. What was your selective service classification in 1942?

Mr. Demarest: I object. It is not material or cross examination.

The Court: Cross examination is unlimited when the witness is a party to the action. I'll permit it.

A. 3A.

Mr. Griffinger (continues):

Q. That was at the time of your marriage? A. Yes.

Q. At that time you were working at the bank, weren't you? A. Yes, sir.

Q. In November 1941 you were on vacation in Florida. That right? A. Yes.

Q. You met Mrs. Carlson, didn't you? A. Yes.

Q. In order to overcome one thought in my mind: You married Amy Rogers in June 1942? A. Yes.

Q. And throughout your testimony you refer to her as "the girl". "The girl". She was your wife in June 1942, wasn't she?

Mr. Demarest: If that question has any implication beyond the use of the word, I object to it.

Mr. Griffinger: I am on cross examination.

The Court: Go on.

Mr. Griffinger (continues):

Q. You referred to your wife as "the girl". "The girl" did this and that. You were talking

about your wife, weren't you? A. I was talking about—yes.

Q. Your wife? A. Yes. I was talking about her.

Q. The day you met her, did you immediately fall in love with your wife? A. I did.

Q. During your entire time in Florida, you saw her every day? A. I did.

Q. And every night? A. I saw her at the close of her working hours.

Q. After seeing her all day and in the evening, you went to the place where you were staying and wrote her letters, didn't you? A. I didn't see her every day.

Q. You wrote her letters every day during the courtship? A. I don't recall that.

Q. Did you write her one letter? A. I think I did.

Mr. Griffinger: May I have the letters I demand—

Mr. Demarest: The first letter I have is January 27, 1942.

Mr. Griffinger: You haven't got letters commencing November 1941?

Mr. Demarest: The first one I have is—I mislead you, not intentionally. The letters I am referring to now are from the defendant to the petitioner. I have no letters in my file from the petitioner to the defendant. Only the ones he received from her.

Mr. Griffinger: All right. (Continues) During your courtship, beginning in November, you wrote your wife, your future wife, at the time Amy Rogers—you wrote a letter or letters at that time at the beginning of the courtship. Isn't that so?

A. I did.

Q. You took possession of those letters at some future time; sometime between 1941 and today? Those letters written by you to Amy Rogers? Isn't that so? A. Those letters were left by her when she left the house.

Q. And came into your possession. Didn't they? A. They were thrown away with everything—

Q. I asked whether they came into your possession. A. No, they did not.

Q. You just said they were thrown away. By whom? A. I don't know by whom.

Q. How do you know they were thrown away? Did you ever have possession of them? A. They were left downstairs, where she had them.

Q. Did you ever have possession of them after they were left in your home? A. I suppose you would call it that. Yes.

Q. And you knew of their destruction, didn't you? A. No, I did not.

Q. They were in a trunk at the home occupied by you and your wife? A. They were not. Some may have been in a trunk. Others were wherever she left them.

Q. You and your wife had only one residence after your returned from your honeymoon. That was with your mother? A. That was with ourselves, not with my mother.

Q. In the same house where your mother resided? A. That is right.

Q. These letters were in your quarters, occupied by you and your wife, weren't they? A. That is right.

Q. Coming to November 1941, you had dinners together? That true? A. We did on several occasions.

Q. Walked miles on the beach? A. We did not.

Q. Did you walk at all? A. Not at all.

Q. Why not? A. I know we didn't walk.

Q. Why? A. Because I walked all day long. I was down there for exercise and relaxation.

Q. Why would you say you didn't walk with Amy Rogers? A. There was no occasion to.

Q. Did you do any walking at all? A. The routine walking if we went from her home to the bus or to a cab or walked seven or eight blocks over to the beach.

Q. Was it difficult for Amy to walk with you? A. No, sir. Not at that time it was not.

Q. You went to ball games, didn't you, during that courtship? A. We did not. We went to one ball game.

Q. Then you did go to a ball game? A. You said "ball games."

Q. You are splitting— A. Well——

Q. You did go to one ball game? A. To a football game.

Q. Did you go visit relatives of yours? A. No, sir.

Q. You did not? A. No sir.

Q. Did you go visit a relative of your mother's? A. No sir.

Mr. Demarest: May I ask if Mr. Griffinger has the letters he has noticed me to produce? He is referring to letters.

Mr. Griffinger: I am referring to letters written to me by my client. Do you wish me to put those into evidence?

Mr. Demarest: Of course not.

Mr. Griffinger: I don't hear anything from the Court.

The Court: Let's go on.

Mr. Griffinger (continues):

Q. Do you know where Lake Worth, Florida, is? A. Yes.

Q. Do you have any relatives there? A. No, I never had.

Q. Did your mother have relatives there? A. Never.

Q. Did you have friends there? A. They were friends of Mother's.

Q. Did you visit those friends of Mother's in November 1941? A. I did.

Q. Did you visit them with Amy? A. She accompanied me.

Q. That is visiting them, isn't it? A. Yes.

Q. At that time did you propose that Amy wear your class ring? A. I did not.

Q. You realize that you are under oath, do you not? A. I do.

Q. Thank you. And you at that time suggested marriage? A. I did not.

Q. But you did have a courtship during that time, November 1941, with Amy? You did carry on a courtship? A. We had a deep friendship.

Q. Did it ripen into love before you left Florida? A. It did.

Q. On both parts? A. I assume so.

Q. Was that assumption also on your part? A. I knew it was on my part.

Q. But you didn't discuss marriage then, did you? A. Very generally.

Q. There was some mention made of marriage? A. No, there was not.

Q. Did Amy say to you that it was far too sudden for any such discussion? A. She could not, because we didn't discuss that angle.

Q. Was there any statement made by Amy or at your suggestion that it was much too soon? A. No.

Q. Did she say anything in reverse, that she would accept you? A. We discussed it, as I told you, in general. There was no acceptance, no declaration. It ripened later.

Q. When did you return to Florida after November 1941? A. The following April.

Q. How did it ripen? Telephone? Mail? A. Telephone, mail, telegrams.

Q. Then you returned in April 1942? A. Yes.

Q. Between November 1941 and April 1942, about how many letters would you average a day to Amy? A. One a day.

Q. That would be over a period of about four and a half months, almost. That right? A. Yes.

Q. So that would be approximately a hundred and fifty to two hundred letters. A. I don't know.

Q. Were those letters—were they destroyed, too? A. I don't know where they are.

Q. When you wrote Amy at that time, did you make a copy of every letter you wrote? A. I did not.

Q. After April 1943 you commenced making copies of your letters? A. I didn't commence then. I have always made copies from time to time.

Q. But up to the marriage you didn't make copies? A. I may have. I don't know.

Q. Do you wish to change your answer and say you made copies of all your letters? A. No, I don't want to say that. I don't recall. I didn't make copies of all letters. That I know.

Q. But you did make copies after April 1943? A. I may have.

Q. Those letters written between November 1941 and June 1942, were they part of the letters at your household or home occupied by you that

were also destroyed or have you got those letters? A. I don't know anything about those letters.

Q. But they were under your control? A. I won't say that. No, they were not.

Q. Let's not split hairs. A. I am not.

Q. Mrs. Carlson didn't have those letters A. I don't know whether she did.

Q. You said some letters were destroyed. A. Just how many she had taken and how many were thrown out, I don't know.

Q. You had letters in your possession you had written to her? A. I don't know how many I had in my possession that had been written to her.

Q. You have letters there you wrote to her that were in your possession, haven't you? A. Yes.

Q. They were with the other letters that were written by her to you? A. They were not.

Q. Were they separate? A. Those letters I received I had in my own quarters, my own dresser.

Q. And you also had letters you had written to your wife, didn't you? A. I did not.

Q. Were those letters destroyed, or what was destroyed? A. There were letters that upon her departure I cleaned house several months ago and everything went out.

Q. Did you look at the letters? A. I looked at some. I had no interest in it.

Q. But you kept the other letters, didn't you? A. Those letters you refer to are probably ones she sent after April.

Q. But those other letters, prior to the marriage and between November 1941 and the day of the marriage—those you say were destroyed? A. I don't know what happened to them. They were thrown out.

Q. But there were such letters in the residence occupied by you? A. There may have been.

Q. You were the last person that had some control over them or some possession of them? A. I had no control over them.

Q. Did your mother? A. No.

Mr. Demarest: This is a rather long examination on something and making a very long record, with very little to be accomplished.

Mr. Griffinger: My cross examination is going to be very, very long and I ask the Court for special consideration because this is an important matter. If counsel is going to object to my cross examination taking time—I am not going to try to curtail time because I wish to bring out the truth in this matter.

The Court: I'll keep it under control.

Mr. Griffinger (continues):

Q. Do you remember in December 1941, after you returned to New York, and in your correspondence with your future wife mention was made of the arthritic knee? A. I don't remember anything of that kind.

Q. In December 1941 did you get a report in some fashion, in written form, as a result of an examination of Amy Roger's knee in December 1941? A. No.

Mr. Demarest: May I ask by whom the examination is supposed to have been made so as to identify who we are taking about?

Mr. Griffinger (continues):

Q. Do you recall the name "Dr. Thomas" of Miami Beach? A. No.

Q. You have heard it before? A. No, I don't recognize it.

Q. There was no reference to him in any letters since? A. I don't recall.

Q. Weren't you informed at that time that the difficulty existing in the knee came about by pressure on the nerves? A. I was not.

Q. No. Didn't you write and say to Amy that there was nothing to worry about and that after the marriage you would see about eliminating arthritic condition in the knee?

Mr. Demarest: I object to this unless a letter is produced or accounted for.

Mr. Griffinger: I shall produce secondary evidence because the demand to produce was made, and I shall produce secondary evidence.

Mr. Demarest: When the other side asks me to produce letters written by our side of the case to the other side of the case and in the absence of that secondary evidence is introduced, I say that is not evidence. I say it must be compelling the production of something my side has control of, not something they had control of and lost it. I think the side that wants to put that evidence in should testify so and not ask this man to produce something that they are not in a position to produce.

Mr. Griffinger: My client didn't lose it. Those letters were in his possession and I say he removed them and I say I have my doubts that they were destroyed but that they are not here for obvious reasons. Secondary evidence must be used, therefore.

The Court: Your demand was for letters from the petitioner to the defendant that

were left in the matrimonial home when the defendant left for Chattanooga?

Mr. Griffinger: My demand is for letters passing between the petitioner and defendant from November 1941 to June 1942 and letters passing from the defendant to the petitioner which came into his possession and which, it is my contention, were taken by the petitioner.

The Court: Your contention is that those letters were in his possession when the defendant left?

Mr. Griffinger: Yes, it is.

The Court: (To stenographer) Repeat the question.

Stenographer: "Didn't you write and say to Amy that there was nothing to worry about and that after the marriage you would see about eliminating that arthritic condition in the knee?"

The Court: I'll permit it.

A. I did not.

Mr. Griffinger (continues):

Q. During your courtship in November 1941 was anything discussed between you and Amy as to any physical condition? A. No, sir.

Q. Was anything discussed between you and Amy from November 1941 until you returned to Florida in April 1941 in respect to a physical condition? A. Not that I recall.

Q. Was anything discussed between you and Amy in April 1942 at the time you visited as to any physical condition? A. Yes.

Q. When was that, and where? A. It was in April 1942 when I visited her in Miami.

Q. That was before the marriage? A. Before the marriage.

Q. What was said? A. She complained of having had a touch of rheumatic fever and that it was disappearing.

Q. Is that all? A. That is all I recall.

Q. What was your response in respect to this discussion as to this arthritis; as you call it, rheumatic fever? You were in love with her at the time? A. Yes, I was.

Q. What did you say when she told you she had rheumatic fever? A. She assured me——

Q. What did you say, please? A. I accepted her version to me of it. I don't recall what I said in so many words.

Q. You accepted her version of it. Was there any reason at that time to believe there was a version given of the recital of what was in existence? A. There was no reason for me to believe that she wasn't telling the truth.

Q. What did you say? A. I don't recall what I said.

Q. Or is it that you don't want to? A. I don't recall.

Q. But it was of no concern to you in respect to your contemplated marriage, was it? A. She spoke very lightly of it.

Q. But it did not affect your desire to ask her to marry you? A. That is right.

Q. And you did ask her to marry you? A. That is right.

Q. You gave her an engagement ring? A. That is right.

Q. That was all after you had discussed this particular ailment? A. No, I wouldn't say that.

Q. It was after? A. It may very well have been. I don't recall when we discussed it.

Q. But after you had given her the ring you didn't change your decision? A. I didn't have time. No.

Q. Did you want to? A. I didn't think of it.

Q. When you were there in April 1942 it was after you had had a series of correspondence, where you exchanged quite a number of confidences between you? A. What do you mean by that?

Q. They were affectionate love letters, weren't they? A. They were that.

Q. When did you first know of any arthritis in Amy's knee? A. That was in September 1942.

Q. Are you sure about that? A. To the best of my recollection.

Q. Not before? A. To the best of my recollection.

Q. Do you want to think a little bit?

Mr. Demarest: What was that question?

Mr. Griffinger (continues):

Q. Will you think and recall if that is the correct time? September 1942? A. Yes, it is.

Q. You are positive of that? A. I am.

Q. Then in June 1942, July and August 1942 there was no impediment in gait or mobility or getting around by Amy, was there? A. Yes, there was. She walked at a very very slow gait.

Q. Was there any discussion between you and your wife at the time as to why? A. Yes, I took her to the doctor and the hospital after our return from the honeymoon.

Q. For what? A. For the left knee that was swollen.

Q. Did the doctor discuss with you what the trouble was? A. He did not.

Q. Did you go with your wife to the doctor? A. I did.

Q. Did you have a discussion with him? A. With the doctor?

Q. Yes. A. I did.

Q. Did he tell you what was the matter? A. He mentioned she was anemic.

Q. You took her there for her left knee? A. Yes. The doctor suggested that she see another doctor in New Jersey, which we did the following day.

Q. Did that doctor who suggested that you go to a doctor in New Jersey give you a diagnosis or prognosis? A. He did not.

Q. Did you ask him? A. I did not.

Q. Did you ask him why he suggested going to another doctor in New Jersey? A. No.

Q. You did nothing to ascertain; what was the purpose of your visit to this doctor with your wife? A. The doctor suggested I go to this specialist about the knee.

Q. But he did not tell you anemia had caused this condition of the knee? A. He told me nothing about that.

Q. Weren't you interested? A. I was very much alarmed and upset.

Q. Alarmed and upset because Amy had a little trouble with her knee a week after the marriage? A. That was my reaction.

Q. Although it might have been a turn of the knee or a fall. What were you alarmed at a week after the marriage? A. When the doctor suggested taking her to the hospital, that is the obvious reaction in a groom.

Q. You were concerned for your loved one? A. Of course.

Q. You weren't alarmed because of the physical condition of your wife in respect to this action? A. I was disturbed over it.

Q. You didn't ascertain anything from the doctor except to take your wife to a New Jersey doctor? A. No.

Q. You didn't inquire of him why she should be taken to a New Jersey doctor? A. Yes. He told me this man was a specialist to look at that leg.

Q. Did he tell you what it was? A. No.

Q. Did you inquire? A. No.

Q. What kind of a specialist was he talking about? A. A bone specialist.

Q. Did he talk about a possible external injury that had occurred to the knee? A. No, he did not.

Q. When you say September 1942 was the first you knew about it are you referring to the Dr. Markoff incident? A. I am referring to what Dr. Markoff told me.

Q. Your sister's name is Esther Strom? A. Yes.

Q. She used to go on cases with Dr. Markoff, didn't she? A. She may have.

Q. She is a nurse, isn't she? A. A child's nurse.

Q. She is qualified as a nurse? A. Not as an R. N. As a child's nurse.

Q. She visited you from the time of your marriage in your home? A. I suppose she did, in family visits.

Q. A week before your marriage Amy Rogers came up from Florida and registered at the Hotel New Yorker? A. I had her registered at the Hotel New Yorker.

Q. You also registered there a couple of days later, prior to the marriage? A. I did not.

Q. Were you on the seventh floor of that hotel? A. I don't know what floor. I didn't register there.

Q. Did you register for both of you prior to the marriage? A. I registered the Friday before our marriage before I made the switch-over in rooms.

Q. The seventh floor? A. I don't know what floor.

Q. How did you register? A. I don't know, but I assume "Mr. and Mrs. Carlson." I remember telling the clerk that she was registered in her own name.

Q. That was before your marriage? A. Before our marriage.

Q. Where did you decide and when that June was to be the marriage date? A. Probably in our correspondence and it was determined when I was down in Florida in April, 1942.

Q. During that week, prior to your marriage, she met your mother and sister? A. She did.

Q. And your brother-in-law? A. I don't know whether she met my brother-in-law.

Q. Your sister is married, isn't she? A. She is.

Q. During that week before the marriage you were with Amy most of the time, weren't you? A. I was going to work all day long, a full day. I saw Amy only after hours.

Q. Your day ended at four o'clock? A. It did not. My day is from—at that time eight-thirty until five, or after. I saw Amy several times and we went down for our marriage license and had lunch with her possibly two of those days.

Q. Did you write, in December 1941, to Amy that you wanted to come down in February or March and be married at that time? A. There was talk of going down there, not to be married. That depended on my vacation and Amy's arranging it where she was employed.

Q. Didn't Amy write you she thought it best to wait and see about the condition of her knee? A. I don't recall that.

Q. She might have? A. I don't know.

Q. You wouldn't say she didn't write that? A. I would say I don't know.

Q. So it is possible she may have written you that? A. I won't acknowledge that.

Q. When you came down in April did you observe that she had gained or lost weight? A. No, she looked all right to me.

Q. How long were you down there in April 1942? A. Ten days, as I recall it.

Q. You didn't do very much walking, did you? A. Not with the girl, I didn't.

Q. You are referring to whom? "The girl"? A. To Amy.

Q. You will please continue to refer to your wife while I am cross examining you as "Amy".

Mr. Demarest: I object to that.

Mr. Griffinger (continues):

Q. You didn't do much walking in April, did you? A. I did, personally.

Q. Not with Amy? A. No, I did, myself. She was at business and I was down there on vacation.

Q. There was talk then about her knee, wasn't there? A. Not that I recall.

Q. Didn't you say at that time, "I don't care, Amy, if you haven't any legs. It wouldn't make any difference if we want each other and we are meant for each other"? A. I did not.

Q. Would you have said something like that? A. I don't know whether I would have or not.

Q. Can you identify your wife in this picture? A. Yes.

Q. Which one is it? A. This lady, here.

Q. This is Amy, isn't it? A. Yes.

Q. On the left? A. That is right.

Mr. Griffinger: I offer for identification this photograph.

(Photograph—Identification D-1.)

Mr. Griffinger (continues):

Q. Is that the way she appeared at the time of the commencement of your courtship? A. I don't know. I don't know when that picture was taken.

Q. You remember what she looked like in April 1942, don't you? A. I do.

Q. You would recognize this, would you? A. I would recognize that. Yes.

Q. Do you recognize this photograph or snapshot? A. Yes, I do.

Q. Who are the persons in that snapshot? A. My mother and Amy.

Q. You recognize her there? A. I recognize both of them.

Mr. Griffinger: I offer this snapshot for identification.

(Snapshot—Identification D-2.)

Mr. Griffinger (continues):

Q. How long have you known Dr. Markoff? A. Since September 1942.

Q. Did you know him before that? A. I did not.

Q. Did your sister know him before that? A. I don't know whether she did.

Q. Who called your attention to the existence of a Dr. Markoff? A. My sister.

Q. Where did the marriage take place? A. In New York City at the Calvary Baptist Church.

Q. From the marriage you proceeded where? A. We proceeded to a very small family reception at the Gripsholm Restaurant.

Q. Prior to this marriage you both had a physical examination, necessary in order to obtain your marriage license? A. A physical examination, you mean, for venereal disease? We did not. We had a blood test.

Q. You had a Wassermann? A. Yes, we did.

Q. Then what did you mean when you said you did not? A. We had blood tests made.

Q. By a physician? A. Yes.

Q. You went together? A. Yes.

Q. You selected the physician, didn't you? A. That is right.

Q. And the blood test was satisfactory, wasn't it? A. It was.

Q. Then from the Gripsholm Restaurant, where did you go? A. We returned back to the Hotel New Yorker.

Q. About what time? A. Probably around nine o'clock, I would say.

Q. How long did you remain in the Hotel New Yorker before you retired? A. We were accompanied back by my best man and his wife and they didn't leave until probably ten-thirty or so.

Q. What kind of beds did you occupy, twin or double beds? A. It was a double bed.

Q. Not twin beds? A. No.

Q. After you had disrobed and your wife disrobed, you both got into the same bed, didn't you? A. Amy disrobed and dressed in the bathroom and I got into my pajamas in the bedroom.

Q. But you got into the bed? That was the question. A. Yes.

Q. And you put out the light, didn't you? A. Yes.

Q. Did you fondle your wife? A. I embraced her.

Q. Did you put your arms around her? A. Yes.

Q. Did you press caresses upon her lips? A. I did.

Q. You brought her body close to you? A. After we were in the bed, I did.

Q. You had both your arms around her? A. I did.

Q. You fondled her hair? A. I don't recall that.

Q. You touched parts of her body with your hands? A. After we were there we both did. I caressed her.

Q. These passionate embraces happened while you were in bed? A. After we were in bed. Yes.

Q. Amy did not push you away, did she? A. She did not accept me.

Q. The question is very clear. She did not push you away? I don't care what your interpretation of her actions is. She did not push you away? A. No, she didn't.

Q. Nor did she kick you in any way, trying to keep you from her? A. No, she didn't kick me.

Q. Nor she didn't turn her back to you? A. Yes, she did.

Q. She was relaxed? A. No, she was tense.

Q. She was a bride. She was tense. But her body didn't indicate refusal of your caresses? A. It didn't indicate acceptance.

Q. But this was your first night? A. It was.

Q. Your caresses were sort of passionate ones, weren't they? A. I don't know whether they were.

Q. And she did not in any way revolt by expression or word of mouth, or did she get out of bed? A. She did not get out of bed.

Q. In a physical sense she responded to your embraces? A. I had my arms around her.

Q. Did she kiss you? A. I kissed her.

Q. She returned your kiss? A. Not with any degree of warmth.

Q. She didn't call you vile names? A. No, she didn't.

Q. She didn't say, "I hate you"? A. No, she did not.

Q. There was no talk that first night of any contraceptive? A. Oh, yes.

Q. That first night? A. Oh, yes.

Q. After you got in bed? A. Those were my instructions before I got in bed, to have a contraceptive.

Q. By whom? A. Amy.

Q. Did you have that discussion before? A. She asked me about it.

Q. She requested you to have a contraceptive, didn't she? A. That's right.

Q. When you got into bed did she ask you about the contraceptive? A. No, she didn't. She saw them.

Q. She saw you? A. She saw them.

Q. Had you placed the contraceptive on prior to getting in bed? A. I had not.

Q. You put them on in bed? A. I didn't put them on at all.

Q. At the time of the discussion about the contraceptive, Amy had requested you to have those. That right? A. Yes.

Q. When you got into bed, she asked you whether you had them on? A. She saw them.

Q. Then she didn't say anything at all, did she? A. No, she didn't.

Q. She wanted you to have them on so during the act of intercourse there would be a preventative of pregnancy the first night? A. That is right.

Q. You are sure there was a discussion about your using a contraceptive, aren't you? A. Surely.

Q. At that time there was no intent on the part of the defendant to refuse you marital relations?

Mr. Demarest: That calls for a conclusion.

Mr. Griffinger (continues):

Q. There was no expression of intent to deny you that? A. I don't know what was in her mind.

Q. She was referring to the organ of your body that penetrates the female—— A. She asked whether I was going to have any.

Q. In the course of intercourse with her as your wife? A. Yes.

Q. You, at the suggestion of your wife, procured the contraceptives, didn't you? A. I did.

Q. In anticipation of performing the act that first night of your marriage? A. That was my hope.

Q. That was what took place, wasn't it? A. It was not.

Q. How long did you remain at the Hotel New Yorker? A. As I recall, probably until Thursday. About four days.

Q. How much were you out of the hotel during those days you were at the Hotel New Yorker? A. We were out of there most of the time except for sleeping.

Q. You weren't in bed most of the time? A. No.

Q. Did you have intercourse as much as twice a day after the marriage? A. I had no intercourse at all.

Q. No intercourse on the honeymoon at all? A. No.

Q. No intercourse at the Hotel New Yorker? A. That is true.

Q. Did you embrace your wife the following night in bed? A. I did.

Q. You kissed her passionately? A. I kissed her.

Q. Hold her in your arms? A. Yes.

Q. Press her close? A. Pressed her close.

Q. Was she frigid or warm? A. She was non-responsive.

Q. There was nothing for her to do in that particular embrace you had her in? She was submissive? A. No.

Q. She pulled away from you? A. No, but she didn't accede.

Q. Did she use her elbows to push you away? A. No, just turned on her side.

Q. She was still in your embrace? A. Yes.

Q. She didn't try to jump out of bed? A. No.

Q. You both remained in bed the entire time until you got up in the morning? A. Fell to sleep.

Q. You were disrobed to the extent of her nightgown and your pajamas? A. I don't recall that.

Q. The first night you disrobed? A. I was completely disrobed; not at the beginning, but after we were in bed.

Q. Was Amy disrobed too? A. That is right.

Q. Notwithstanding your both being disrobed and embracing each other and kissing each other and touching each other's bodies, you say you did not have intercourse with your wife the first night? A. I do.

Q. How about the next day? Did you have the same situation with your wife at the Hotel New Yorker? A. The next evening was the same response.

Q. After you left the Hotel New Yorker, where did you go? A. Washington, D. C.

Q. Did you sleep with your wife there? A. We were at a friend's home and occupied one of the bedrooms.

Q. Did you fondle and embrace your wife there? A. I kissed her, but I didn't fondle her.

Q. You were in the same bed? A. The same bed.

Q. You say you kissed her but didn't fondle her. Do you want this Court to understand there was a distinction in what you did between kissing and fondling her? A. By "fondling her" I am interpreting it to mean from the sexual angle. She didn't accede to it.

Q. You didn't touch any part of her body? A. Obviously I did.

Q. You don't consider that fondling your wife, or do you have another word? A. I don't have any word. I know what my reaction would be and was.

Q. Are you trying to give us your mental response at the time or your wife's mental response? A. There were none.

Q. I want to know the physical response. On the honeymoon trip you were with your wife in bed when you went to bed? A. Yes.

Q. You touched her body with your hands as you did all the way through your honeymoon trip? A. Not all through the honeymoon trip. That is not so. The first night described what followed thereafter.

Q. The first night you held her in your arms and kissed her lips and fondled her body and caressed her with your hands. Is that true of every night thereafter? A. No, sir.

Q. You say the first night shows what happened thereafter. A. The response of the girl the first night was the same as it was afterwards.

Q. Had you had intercourse before that? A. Not with Amy.

Q. She was there, completely submissive? A. She was not.

Q. She didn't use her fists or arms? A. No.

Q. She didn't wiggle away from you? A. She was perfectly cool and aloof.

Q. I am not interested in her temperature. She was in your arms and completely in your control? She did nothing to escape from your physical embrace? A. Certainly she did. She turned away from me.

Q. That first night? A. And plenty of other times.

Q. And eventually she turned so she was in a position up close to you? A. I haven't said that.

Q. You want the Court to understand she turned from you and remained turned from you? A. Yes.

Q. You were undressed? A. We were undressed.

Q. And you had the proper emotional response as a result of that contact, in the male manner? A. I did.

Q. And you were capable of performing the male act thereafter? A. Yes.

Q. And it was your desire to perform the male act of intercourse with this woman who became your wife that day? A. It was.

Q. And you did not because she turned away from you? A. Have the act?

Q. Have the act of intercourse? A. I want to clarify to you that she was not at all responsive.

Q. You are abusing the word "responsive". I asked you, whether, being capable, the only reason you didn't penetrate the vaginal walls of the woman was because she turned her back on you. A. That is right.

Q. Is that the only way she prevented intercourse? A. That is right.

Q. She didn't place her hand anyplace to bar you? A. She may have. I don't recall.

Q. You weighed about a hundred and eighty-five pounds then, didn't you? Much heavier than you are today? A. I don't know what I weighed then.

Q. Let's go on the premise that you did because I have letters here saying you did. You weighed about a hundred and eighty-five pounds then? A. I can't say.

Q. Do you remember how much she weighed? A. I would say about a hundred and twenty-five.

Q. She was very affectionate prior to the marriage in letters and in her conduct towards you? A. Yes, she was.

Q. She acceded to any request you made, such as going here or there or doing this or that? A. No.

Q. There wasn't any real rupture between Amy and you, was there? Never mind counsel. A. I thought he was objecting.

Q. Were you waiting for an objection?

Mr. Demarest: No, but I am getting tired of it.

Mr. Griffinger: Counsel is getting tired.

Mr. Demarest: I would like to object to this line of questioning. I think it proceeds on the perfectly improper basis that a man is supposed to wrastle his wife into submission on the honeymoon or any other time she refuses to submit to the marital act.

The Court: The witness is under oath. It will develop who is telling the truth as we go along. (To stenographer) Repeat the question.

Stenographer: "There wasn't any real rupture between Amy and you, was there?"

The Court: You may answer.

A. Prior to what time?

Mr. Griffinger (continues):

Q. Prior to the marriage. A. No.

Q. So the first night after the wedding there were no differences, either mental or physical, between you and Amy, were there? A. No differences. No.

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Cross examination by Mr. Griffinger continued:

Q. During the week prior to the marriage ceremony being performed you were with Amy a considerable amount of that time after business hours, etc., weren't you? A. After business hours.

Q. Yes. Was she able to get around with you then, that week? A. Yes, we went around.

Q. Was her gait normal? A. Her gait was slow.

Q. She had complete use of her limbs? A. She appeared to have.

Q. The first night after the marriage she was able to make use of her legs and arms with freedom? A. No, her left knee was swollen a bit.

Q. Was that the first you knew about that swollen left knee? A. The first time I had seen it.

Q. Did that in any way impede her movements? A. She walked slow because of it.

Q. Did that impede her movements in bed? A. There was no movement in bed.

Q. She had to get in and out? A. Yes.

Q. Did that interfere with your embracing her? A. No.

The Court: Did she complain of distress in her knee?

A. While we were walking that week she had me take it easy crossing in traffic.

The Court: Did she manifest any distress in that knee at any time during that week? Understand what I mean?

A. I believe I do. Her evidence of distress was that we walked slowly as we crossed streets.

Mr. Griffinger (continues):

Q. She made direct reference to the knee as the reason for that? A. Yes.

Q. The word "knee" was used, wasn't it, in some part of the conversation with each other? A. I suppose it was.

Q. You knew the reason for her request to walk slowly was in reference to that knee? A. That was my only knowledge.

Q. You did refer to the knee in your talk? A. She dismissed it with the comment that the doctor assured her that it would come back to normalcy.

Q. The word "knee" came into the conversation? A. I suppose so.

Q. She couldn't have told you the doctor assured her the knee would go back to normalcy without using the word "knee"? A. I suppose not.

Q. She didn't mention elbow in talking of knee? A. No.

Q. So the question of the knee was discussed before the marriage? A. We discussed the question of gait.

Q. You told the Court you had been requested to walk slowly in crossing because of the knee. The word "knee" was used that week? A. Yes.

Q. So all this was prior to the marriage, wasn't it? A. Yes.

Q. When you got into bed the first night there was no difficulty on the part of Mrs. Carlson to take a prone position, was there? A. Not that I recall.

Q. No. There wasn't any distress in relation to the knee that night, was there? A. I don't know.

Q. There was nothing discussed between you and Amy that night after the marriage while you were in bed, was there? A. With reference to what?

Q. Anything. A. I don't recall.

Q. No discussion at all, was there? A. I don't recall.

Q. The next morning did you leave the hotel with your wife? A. Yes, we did.

Q. You went out to breakfast? A. Yes.

Q. You didn't have breakfast in your room? A. No, sir.

Q. After breakfast you returned to your room, didn't you? A. That I don't know.

Q. You were in the room before lunch, weren't you? A. That I don't remember.

Q. You don't remember details? A. No.

Q. You can't recall? A. I do not recall.

Q. Do you recall whether you were in the room at all during the day after the first night? A. We may have returned to wash up after breakfast in the morning and to go out in the evening.

Q. You don't recall? A. I do not.

Q. Do you recall whether you got into bed during the day? A. I do recall we didn't.

Q. Why do you recall that? A. Because I know we didn't get into bed during the day.

Q. For the purpose of this suit? A. No, for the purpose of my own truthful conviction of it.

Q. Is your memory very clear as to what happened the day after the marriage? A. It is as far as going to bed with her, which I did not do that day.

Q. That night did you go to bed with her? A. We went to sleep.

Q. Did you get in bed with your wife? A. I did.

Q. That is the second night. Did you fondle your wife? A. We embraced.

Q. Did you kiss her? A. I did.

Q. Were you dressed? A. In pajamas.

Q. Top and bottom? A. Top and bottom. Yes, sir.

Q. Did you remain robed in pajamas all evening? A. I would say I did. I don't remember.

Q. It was in June, wasn't it? A. Yes.

Q. Kind of warm, wasn't it? Was Amy in nightrobe or completely disrobed? A. She was in nightrobe.

Q. Did you fondle her the second night? A. I embraced her.

Q. Did you put your contraceptive on that night, too? A. I did not.

Q. You had a desire? A. I had a great shock from the night before and I was hoping and praying that attitude and reaction of Amy's would not be repeated that night or any subsequent time.

Q. Did you talk to her any time that day about the evening before? A. I did not.

Q. You didn't discuss it at all? A. No, I felt it was the Christian thing not to.

Q. You say you prayed that day? A. I did.

Q. Was she present with you when you prayed? A. She was.

Q. Did you express your prayers audibly? A. I always express them audibly.

Q. She heard them? A. She did.

Q. Was there any talk then? A. In my prayers.

Q. No, with your wife after she heard your prayers? A. What about?

Q. About the subject matter of your prayers? Did you pray for a change in the physical attitude of your wife to occur? A. I didn't say I prayed that.

Q. Was the subject matter of your marital relations part of your prayer? A. Not in the sense you are driving at.

Q. Although you said a moment ago you were shocked, did you talk with your wife the next day about what had occurred the night of your wedding?

Mr. Demarest: The question was asked and answered a moment ago.

Mr. Griffinger (continues):

Q. You did not. You didn't see fit to inquire of your wife by word of mouth as to the absence of sexual intercourse the night before?

Mr. Demarest: The same question for the same objection, that it was answered before.

The Court: Let's have the answer for the last time. You are referring to the second night?

Mr. Griffinger: I am referring to the day after the night before, or the marriage night.

The Court: (To stenographer) Repeat the question.

Stenographer: "You didn't see fit to inquire of your wife by word of mouth as to the absence of sexual intercourse the night before?"

A. That is true.

Mr. Griffinger (continues):

Q. And during your entire honeymoon, which took two weeks—isn't that so? A. That is not true.

Q. How long did the honeymoon take? A. I was away ten days at the maximum.

Q. During the entire ten days of the honeymoon did you discuss with your wife the having of intercourse? Yes or no? A. No, I did not.

Q. But each night of the ten days of the honeymoon you embraced your wife? A. Not each night. I did not.

Q. But you slept in the same bed? A. We did that. Yes.

Q. During the honeymoon your wife was not in any way interfered with as far as the knee was concerned, was she? A. In her walk.

Q. But not in bed, was she? A. I couldn't say that she was.

Q. Did you change in your love for your wife at that time? A. My love continued.

Q. It did? A. It did.

Q. Deep and desirous? A. Deep. Deep rooted.

Q. There was no change on the part of your wife towards you at any time, was there, in respect to her love for you?

Mr. Demarest: That calls for a conclusion as to what is in someone else's mind.

The Court: Well, as the witness might have observed.

Mr. Demarest: That was not in the question.

The Court: From what you observed of her actions did you notice any change?

A. As I observed, yes. There was a change from what I had anticipated and had had reason to expect.

Mr. Griffinger (continues):

Q. Did that affect your love towards your wife at any time during your entire marriage? A. It did not. At the beginning it did not.

Q. At any time? A. It became obvious to me after she returned to Tennessee.

Q. How was that? In what manner did it become obvious to you? A. In her general attitude as I pieced the background of it.

Q. That was after she had been to Dr. Markoff and thereafter the Post Graduate Hospital? A. That is right.

Q. Still your love and attachment and devotion to your wife continued down until April 1943? A. I worshiped the girl. Yes.

Q. Notwithstanding that she was at Dr. Markoff's office and also at the Post Graduate Hospital and what you contend was a disclosure to you of the arthritic condition? It didn't make any difference to you? A. No, it did not, because Amy told me not to be a worry-wart, that it would go over and I didn't know the seriousness of what that girl was apparently suffering from.

Q. What was she suffering from? A. I didn't know. I told you I didn't know.

Q. You know now, don't you, from what the doctors told you? A. Yes, arthritis.

Q. All the doctors that examined her and treated her were selected by you? A. Yes.

Q. Some doctors that had relatives connected with your bank? A. Yes, sir.

Q. Even one doctor you were doing some work for? Tax work? A. Oh, no, sir.

Q. Did you not work for Dr. Heyd? A. No, sir.

Q. Dr. Donaldson? A. No.

Q. Or his brother? A. No, sir, not for his brother.

Q. Was Dr. Donaldson connected with the bank in any way? A. No.

Q. As a depositor? A. He may be a depositor.

Q. In any remote way is he connected with the bank with which you are attached? A. I don't propose to say because I don't know. He may have his medical account there. I don't know.

Q. The first contact you ever had with Dr. Donaldson was through the bank? A. That is true.

Q. You say in 1943 was the first you knew about it? About her condition? A. '43? What time?

Q. April. A. April——

Q. That is what you testified a moment or so ago. A. That seriousness of her condition was then becoming evident to me.

Q. Did you know then for the first time as to any condition she had? A. In May 1943.

Q. Not before? A. Not before.

Q. Are you sure of that? A. I am positive, as I recall.

Q. Up to April 1943 you had no knowledge that anything was wrong with Amy whatsoever? A. I had been informed by Dr. Markoff that she had hypertrophic arthritis. To me, that meant words, and nothing else. We were hopeful she would improve in health. Obviously, I knew of the operation performed in December 1943.

Q. December 1942. A. Yes, 1942.

Q. Not before that? A. Not before that.

Q. You sure? A. Positive.

Q. How about right after your marriage? A. No, sir.

Q. You testified on direct that about a week or so after the honeymoon you had to go to the doctor. A. For her knee.

Q. Yes, that is what I am asking you about. Then you did know of her knee right after the marriage, didn't you? A. Yes, I saw the swelling of the knee.

Q. Then the first time being September 1942, that is not true? A. I didn't know anything about arthritis.

Q. What did the doctor tell you when you took her to him right after the honeymoon? A. The doctor told me it was anemia.

Q. In the knee? A. Her general health. The knee he didn't divulge about.

Q. He examined the knee in your presence, didn't he? A. He did.

Q. Did the doctor disclose to you that anemia and the knee condition had no relation whatever? A. We didn't discuss that.

Q. Didn't Dr. Markoff discuss that with you? A. We didn't discuss that.

Q. Did you ever discuss it with Dr. Markoff? A. I accompanied Amy several times to him.

Q. At that time did you have a discussion with him about the knee or anemia? A. Yes, I did in her presence.

Q. Did you ever see Dr. Markoff alone? A. I did not.

Q. You never saw him alone? A. I never saw him alone; never, at all.

Q. You never saw him alone. Are you sure about that? Let me read to you the sworn testi-

mony of Dr. Markoff in answer to that statement, and you tell me whether it is true or not. Question asked of Dr. Markoff—you know Dr. Markoff's testimony was taken by deposition? A. I understand.

Q. This is cross examination of Dr. Markoff and the deposition was had August 10th, 1944 at his office and the question begins on page 35 which I am asking this witness on cross examination in respect to attacking the credibility of an answer he gave to a previous question on the record. Question: "Now, you said that the last time you saw Mrs. Carlson was in November 1942. Is that correct?" Answer: "That's right." Question: "And you also said that about a year later, a year after that November visit, or a year after the treatment, you learned about her assertions in respect to her condition when she came to you, from Mr. Carlson. Is that right?" Answer: "That's right." Question: "That would be in November 1943?" Answer: "Well, within the year. I don't remember the date. I don't have any record." Question: "It would not be beyond the year, would it?" Answer: "I have no record of the date and I won't swear as to the date." Question: "Was it a visit by Mr. Carlson to you?" Answer: "A visit by Mr. Carlson right in my office." Do you still want to tell this Court you didn't have such a meeting or talk with the doctor? A. I would be glad to acknowledge that visit. I misunderstood.

Mr. Griffinger: That is enough. I don't believe he should give an enlargement on it.

The Court: If you have an objection to his answer you must state it.

Mr. Griffinger (continues):

Q. What was your understanding of my question? A. I thought your question was had I visited Dr. Markoff prior to April 1943.

Q. That is your explanation? A. Yes, or at any time from June 20th on, or any time prior.

Mr. Griffinger: If the stenographer will be so kind as to go back in the questions and see if your explanation fits into the questions and answers put to you prior to the reading of this testimony——

Stenographer: Question: "Did you ever see Dr. Markoff alone?" Answer: "I did not." Question: "You never saw him alone?" Answer: "I never saw him alone; never, at all."

Mr. Griffinger (continues):

Q. That is your explanation of that answer you gave? A. Yes.

Q. You want that to be your explanation?

Mr. Demarest: You have an answer. I should think he would want to have it on the record when he did see Dr. Markoff. I think the confusion is as to the time.

The Court: That is a problem you men will have to clarify.

Mr. Griffinger: That is Mr. Demarest's job.

Mr. Griffinger (continues):

Q. Now, it wasn't until April, you say, that your feelings changed or did your feelings change towards Amy prior to April 1943? A. No, they had not.

Q. From the day of your marriage up to April 1943 did you talk at any time with Amy with respect to marital relations, referring more specifically to the act of intercourse. A. Yes, we did.

Q. When was the first time? A. I don't recall when it was.

Q. After you returned from the honeymoon you did take your wife to a doctor about some trouble with her knee. Did he put a cast on her knee? A. A cast was put on at the hospital. I don't know whether he did.

Q. That was right after the return from the honeymoon? A. Yes.

Q. Notwithstanding that cast, did you have intercourse with your wife upon her return after having the cast put on her knee? A. No, I did not.

Q. Did your wife in words ever refuse to afford to you the act of intercourse? A. She certainly did.

Q. Did you ever argue about it? A. No, I did not.

Q. You did nothing in the form of trying to convince your wife, either? A. I tried to in as fine a way as I could.

Q. That was without using any talk or words? A. Without using any browbeating or any unchristianlike way about it.

Q. You didn't try to pursuade her by talk, sound reasoning, nice conversation? A. I did. That was futile.

Q. Did you do that in the beginning? A. I did.

Q. The first night? A. Not the first night; not the first day or the first week.

Q. The first month? A. I don't know whether it was the first month. She was smacked right into the hospital.

Q. During the ten days of the honeymoon you resorted to no discussion or pleading or argument to have your wife afford to you the act of intercourse? A. That is true.

Q. But all the preliminaries leading up to the very act was indulged in by you and your wife? A. No, sir.

Q. To the extent of kissing and embracing and contact with the body? A. There was no contact with the body or our organs. That seemed repulsive to her.

Q. You said the first night you were both in the nude and alongside of each other in the nude. A. I don't recall what I said about our state of dress.

Q. Shall we refer to the testimony?

Mr. Demarest: I think his testimony was that he took his clothes off after getting in bed and she took off her nightgown after getting in bed.

Mr. Griffinger: All right.

Mr. Griffinger (continues):

Q. So then you both had nothing on, materially, did you? A. I didn't.

Q. So there was contact with your organ and the body of the defendant? A. No, there was not.

Q. When you had her in your arms you say there was no contact? A. That is right.

Q. When you were kissing and embracing her there was no contact with your body and her body in that region? A. That is true.

Q. Your particular privates didn't touch her body at all? A. That is right, because she held her body away from that part of my body.

Q. You remember that very clearly? A. Obviously I would. It was a great shock.

Q. You testified you embraced and fondled her body and she was close against you until she turned her back to you, but now you say part of her body was away from you? A. Parts of our bodies obviously touched.

Q. But now you say that part didn't? A. That is correct.

Q. That is your signature, isn't it? A. Yes, I signed that.

Q. In your affidavit, made in this cause and dated January fifteenth, or tenth—what is that date? I guess it must be the tenth. I guess it is the tenth, 1944. You said on the second page near the bottom: "I also knew of what I believed to be inhibitions on the matter of sexual relations but I did not know the full particulars of her physical and mental and psychological condition which came to my attention shortly before the commencement of this suit." Remember saying that in your affidavit? A. I recall words to that effect.

Q. When you used the words "shortly before the commencement of this suit," what period of time before the filing of this suit did you refer to in identifying that statement "shortly before the commencement of this suit"? A. Several months.

Q. Do you know when this suit was filed? A. Sometime in August 1943.

Q. Do you know when service was made; do you know when the defendant had the first knowledge of any suit? A. No, I don't know that.

Q. You talked to New York attorneys first, didn't you, about this matter? A. I talked to counsel.

Q. That was in 1943, wasn't it? A. That was in 1943.

Q. That was before August 1943, wasn't it? A. Yes, sir. Of course.

Q. About how long before had you talked to New York counsel? A. After I returned from my trip to Chattanooga in June.

Q. Immediately after? A. Shortly thereafter.

Q. What do you mean by "shortly"? A week or day or month? A. It was probably within the following several weeks.

Q. What do you mean by "several weeks"? A. Two weeks. Sometime in there.

Q. You discussed the matter with counsel from New York, didn't you? A. I did.

Q. Your marital affairs? A. I did.

Q. When were you there? What date in June? A. Where?

Q. In Tennessee. A. About the middle of June. June fifteenth or sixteenth. Some time in there.

Q. How long were you there? A. At her sister's home, as I recall it, three days.

Q. You returned to New York? A. I returned to New York.

Q. That would be sometime around July first? A. Sometime in there.

Q. The beginning of July? A. Yes.

Q. You still wrote your wife after consulting counsel? A. I did.

Q. Your letters were still as affectionate as previously? A. I hoped something would change in her. Yes.

Q. All along, up to the time you obtained New Jersey counsel, you were being advised by New York counsel. That so? A. To an extent. Yes.

Q. Exhibit P-2, dated July 15, 1943, had been typed and written by you after you had seen counsel? A. I don't know what that exhibit is.

Q. It doesn't matter. July fifteenth was after you had seen counsel in New York, wasn't it? A. It probably would have been. Yes.

Q. I will use the letter for the purpose of questions I am about to ask. You said here: "I had visions of a home and family, of a happy married life which I was convinced that you shared...you said you did, too." You wrote that after you had already talked to counsel about your marital affairs, didn't you? A. I don't know exactly what I told counsel.

Q. I said you had written this letter after you had been to counsel in New York? A. It may have been.

Q. So even in this letter, Amy had indicated a desire for a happy married life and a family and all those things that go with a happy marriage? A. She did tell me that in the beginning.

Q. And she was as desirous of having children as any other woman? A. She was not.

Q. She wasn't? A. No.

Q. Were you? A. I certainly was.

Q. Did you know why she went to Dr. Markoff? A. Why yes, because of her knee and general condition.

Q. She had never seen Dr. Markoff before had she? A. I assume she had not.

Q. Your sister, you say, had been a nurse for Dr. Markoff? A. To whatever extent she had been with Dr. Markoff I don't know.

Q. You said you accompanied your wife in September 1942 to Dr. Markoff? A. Yes.

Q. Why did you take her there? A. Because she wasn't feeling well.

Q. Where wasn't she feeling well? A. In her entire body and in her knee. Her knee had swollen more.

Q. You never knew Dr. Markoff before? A. No, I never did.

Q. You never knew of him before? A. I knew Esther had worked for him in some capacity.

Q. He wasn't a specialist in that line? A. He was a general practitioner.

Q. His office was in Brooklyn? A. Yes.

Q. You lived in New Jersey? A. Yes.

Q. He wasn't an outstanding man in this particular field, was he? A. That is something I don't know.

Q. He was a general practitioner, wasn't he? A. Yes.

Q. Was there any other reason you took her to Dr. Markoff in 1942? A. Yes. The doctor at home who had examined her was then in the service and I knew no other doctor to take her to.

Q. You knew Dr. Donaldson? A. Well, I didn't take her there.

Q. You knew Dr. Heyd? A. I did not.

Q. The doctor you saw a week after your return from the honeymoon had suggested a New Jersey physician, hadn't he, for this very thing? A. Yes, he had.

Q. You knew about him. A. Yes.

Q. But you still took her to Dr. Markoff? A. I took her to another doctor because she had not improved with the other two doctors.

Q. Nothing outstanding about Dr. Markoff, was there? A. I don't know. He was a general practitioner.

Q. The doctor you took her to one week after the honeymoon gave you the address of an outstanding specialist? A. But he didn't do anything for the girl.

Q. You didn't take her there? A. She didn't want to go back to him.

Q. You took her to a doctor who said she had anemia and he gave you the name of a New Jersey physician? A. Yes.

Q. Did you take her to the New Jersey physician? A. Yes.

Q. And you took her to a New York doctor——

A. They were both New York doctors——

Q. —and the man recommended was an outstanding man in New Jersey in his field and still you took her to Dr. Markoff, who was not outstanding in this field. A. I don't know about that. He was a general practitioner.

Q. Your sister had worked for him? A. Yes.

Q. You discussed this with your sister? A. Just in a general way. We were worried about her.

Q. Just because your sister had worked for Dr. Markoff you took her to him? A. For no other reason.

The Court: From ten days after the marriage until the time you took the defendant to Dr. Markoff had she received any medical attention at all?

A. Yes.

The Court: By whom?

A. Dr. Legato in Cliffside Park. I am trusting to memory. He prescribed for the anemic condition. Dr. Legato suggested we see a doctor in this city who is a bone man and I took her to that physician and following that we had her admitted, on a Sunday, to St. Mary's Hospital.

Mr. Griffinger (continues):

Q. You went with your wife to Dr. Markoff's?

A. As I recall. Yes.

Q. Were you in the room at the time Dr. Markoff talked to your wife? A. As I recall it, I was.

Q. Was there a discussion on the first visit about your wife not having a menstrual period? A. That I don't know.

Q. Was there any such discussion about her not having a menstrual period on the next visit? A. That I don't know.

Q. Was there any discussion about her menstrual period on any of these visits? A. Not that I know of. He just asked her if she functioned properly as all doctors did.

Q. Did he use that word "function"? A. I don't recall the word he used.

Q. After several visits do you know of your own knowledge whether your wife did commence having menstrual periods again after treatment by Dr. Markoff? A. I don't know whether she did or not. I assume she did because she bought the necessary protection for it, so I assume she did.

Q. That was after she had been to Dr. Markoff for several visits? A. I don't know whether that followed visits to Dr. Markoff. That I don't know.

Q. But the operation that was required on your wife in December came about after she had been visiting Dr. Markoff, isn't that so? A. We went to another doctor and it was subsequent to her Markoff visits.

Q. An infection had occurred prior to December, between the visits to Dr. Markoff in September and the time she entered the hospital, the Post Graduate Hospital? An infection had occurred? Is that so? A. No, not to my knowledge.

Q. From the time of your marriage until September 1942, which would be June, July and August of that one year, was there any discussion

between you and your wife in respect to the performance of the sexual act? A. There was in a very deep heartfelt way on my part.

Q. How about your wife? A. She had no concern about it.

Q. Did she ever express any? A. She expressed a complete distaste for it.

Q. What words were used in expressing that? A. I don't recall the words.

Q. Did your wife use any words between June and September? A. I don't recall it. I know she would not accord herself to me.

Q. Did she ever express constant revulsion? A. She certainly showed it.

Q. Did she ever express it in words? A. She did. She just didn't want any; wanted nothing to do with the act.

Q. Did she say, "I do not want to"? A. I don't recall her exact phraseology.

Q. Did she ever seek separate sleeping quarters? A. We slept in separate beds.

Q. In the same room? A. Yes.

Q. In the same bedroom? A. Yes.

Q. What were the chronic disabilities of your wife? A. Those I don't know from the medical angle of it.

Q. You said here on page three of your affidavit: "I found there had been long standing or chronic disabilities and misrepresentation by the defendant." What were those chronic disabilities and misrepresentations by the defendant? Page three, the last four lines. A. I had been informed by Dr. Markoff that she had a hypertrophic arthritis and we didn't make progress. Amy didn't make progress during the months she visited him and naturally I sought other physicians. It was my joy to leave no stone unturned for that girl. I

took her to Dr. Donaldson and he reported to me what he had found and what he felt was necessary.

Q. And still you had nothing brought out but the arthritic condition of the knee? A. No, I had more than that brought out.

Q. You say "months she visited Dr. Markoff." Would I amaze you if I said she went four visits to Dr. Markoff? A. To the best of my recollection it lapped over several months. I know we were there——

Q. 9/23, 9/26, 9/30 and 10/6. Those are the visits to Dr. Markoff.

Mr. Demarest: Are you sure? His affidavit doesn't agree with those.

Mr. Griffinger (continues):

Q. You say it took several months? A. It was the fall months.

Q. Then in 1942, before the close of that year, you were aware of that arthritic knee of Mrs. Carlson's by Dr. Markoff and Dr. Donaldson and the New Jersey doctor? A. At the end of 1942 I was then aware of it.

Q. So it wasn't later on, in April, that you became aware of it? It was before April 1943, wasn't it? A. I knew of her arthritic condition the end of 1942.

Q. Was there any talk about your marriage right after your honeymoon, as to the success or failure of the marriage? A. No, sir.

Q. No discussion between you and your wife during 1942 in respect to the marriage between you? A. Yes, but not during our honeymoon.

Q. After the honeymoon? A. Yes.

Q. When was that? A. In July, the first month after the honeymoon.

Q. Who started the discussion? A. My wife did.

Q. What did she say? A. She indicated she was dissatisfied with marriage; that it wasn't what she expected and she knew why she felt that way, because she wasn't according marital rights to me.

Q. Did she admit such a thing in that conversation? A. Yes, she did. She was completely dissatisfied with marriage.

Q. And you were not. A. I went on. I hoped.

Q. She was dissatisfied but you went on? A. Yes. She offered to go to Florida.

Q. But you were satisfied, weren't you? A. Not in the fullest sense.

Q. But you didn't express any dissatisfaction, did you? A. I hoped and prayed she would change her slant.

Q. But your hopes and prayers did not take the form of discussions with your wife? A. They did.

Q. Did you express any dissatisfaction? A. I did.

Q. When was that? A. That was probably in the fall.

Q. I am referring to right after the return from the honeymoon. Your wife, you say, was dissatisfied? A. Yes.

Q. At that time did your hopes and prayers take the form of discussions with your wife? A. I hoped she would return to better health so these ideas she had would disappear.

Q. But you did not put in words any dissatisfaction in respect to the marriage between you and your wife at that time, did you? A. Not at that time.

Q. No. And there had been no real differences to make your wife unhappy at that time, had there because you had made no expression as to your dissatisfaction, had you? You did not express dissatisfaction right after the honeymoon, did you? A. For how long a period are you talking about?

Q. For about a month. A. I did in a general way. I didn't want to hurt the girl's feelings.

Q. And therefore she was contented? A. Yes, she seemed to be.

Q. And then she, out of a clear sky, said she wanted to get a divorce? A. She certainly did. She certainly did.

Q. You want the Court to believe nothing occurred from the day of your marriage until that discussion which would give rise to dissatisfaction on your wife's part? A. Yes, the fact that she didn't reciprocate the sexual motive of it.

Q. How do you know it was because of the sexual angle not working? A. Because that was the only angle I could assume.

Q. But you did not ask her in any way, directly or indirectly, whether that was the reason why, a month after the marriage, she of her own volition suggested a cessation of the marriage? A. I don't know that.

Q. You say it was because of the marital act that you assume she wanted a divorce? A. That was one of the reasons. It must have been.

Q. Still you did nothing from the day of the marriage, that first night, to force yourself upon your wife? A. That is true.

Q. You did not make it unpleasant for her? A. That is right, and I am glad of that.

Q. You did nothing to make her want her freedom; nothing unpleasant? A. Nothing unpleasant.

Q. And still she was the one who voluntarily suggested severing the marriage? A. She certainly did.

Q. And it is your conclusion it was because of the marital act? A. And because of her general health.

Q. Did that make any difference in respect to your feelings to your wife? A. I hoped that would improve. I lived with that hope.

Q. Your courtship was most pleasant and agreeable? A. Yes, it was.

Q. No great calamity occurred prior to the marriage between you two? A. Not that I recall.

Q. You were both normal people, weren't you; had likes and dislikes and everything was all right between you?

Mr. Demarest: I object to the word "normal". It is not justified by the facts in this case.

Mr. Griffinger: My client was all right. I don't know about yours.

Mr. Griffinger (continues):

Q. You say this is your signature? A. Yes.

Q. January 6, 1943 you wrote to "Grace". Who is Grace? A. Mrs. Bowers. She is Amy's sister.

Q. All those facts we have discussed, dealing with your feelings and thoughts—I'll read this and ask you whether those things existed and whether you meant what you wrote her. "So I'll go back to July when we returned shortly before from a brief honeymoon. Everything was grand as it has and always will be, notwithstanding an adversity now and then." Was everything grand up to January 6, 1943? A. No, it was not.

Q. But you wrote that, didn't you? A. I wrote that when I returned from seeing Amy at Post Graduate Hospital that night and I was hopeful that this would mean returning to normal condition on her part.

Q. But you had nothing to convince Grace Bowers about? A. She was her sister, who was concerned about it.

Q. But you had no need to repeat and repeat the perfect state of marriage between you? A. Yes, I was very emotionally upset.

Q. You are a banker and not an actor? A. Yes, but I was very upset and emotional.

Q. Your fingers did this typing? This letter was not dictated? A. No.

Q. It was typed by you? A. Yes.

Q. A four page letter? A. Yes.

Q. Now you are referring in your letter: "Somewhat underweight in June"—the sentence begins like that—"she soon gained about eight or nine pounds—however, she seemed to favor what was a swollen knee — we consulted a local doctor——"

Mr. Demarest: You left something out.

Mr. Griffinger (continues):

Q. "She seemed to favor what was a swollen knee—or at least so it seemed—we consulted a local doctor—a college friend of mine—he advised a check-up of blood count, etc.—and a visit to a specialist about the knee—it became necessary to hospitalize Amy for six days during which time the knee was completely immobilized—and apparently diminished in contour—her low blood count demanded vitamins and iron which have done her a world of good." You were thoroughly familiar

with words like "blood count" and "immobilize"? A. They were words that just meant so much to me.

Q. You were writing, then, with full knowledge of what they mean? That so? A. Not with full knowledge. The doctor said the knee had to be immobilized.

Q. You were interested in those statements of this doctor who was a college friend of yours? A. He went to High School with me.

Q. He had a discussion with you? A. He did not.

Q. Did you make a copy of this letter, too? All the letters you wrote since the marriage you made copies of. A. I make copies every now and then——

Q. This letter was written by you in January, six months after the marriage, and you lived with your wife and she lived with you and you were presumably a happily married couple? A. To the outside world, yes.

Q. "The fall months gave us some anxiety about my draft status—the same uncertainty that countless thousands are facing—we were and are reconciled to a change in status but nevertheless it is not always pleasant to contemplate—in late November, Amy appeared to lose some of her ginger — her vitality ebbed — so I arranged through his brother at the bank"—I repeat that —"his brother at the bank for Amy to visit a New York physician——". You mean the physician's brother, don't you? A. Yes.

Q. That was Dr. Donaldson, wasn't it?

Mr. Demarest: It says so on the next line.

Mr. Griffinger: Yes. (Continues):

Q. I asked you a question before, whether Dr. Donaldson was connected with the bank and you said he might have had an account. He had a relative at the bank that you knew? A. I don't think you asked me whether he had a specific relative.

Q. Do you want me to have the testimony read back?

The Court: I have it here in my notes.

Mr. Griffinger (continues):

Q. "Dr. Donaldson gave her a thorough, almost two hour examination—diagnosed the joint swellings as a form of arthritis—and further referred her to a surgeon—C. Gordon Heyd—reputedly one of the country's leading medical men in his field—Dr. Heyd's examination revealed what Dr. Donaldson had surmised—and what both are confident were the sources of infection in her precious body." Was her body precious to you in January? A. Certainly it was. Praise God, it certainly was.

Q. After you had been through this ordeal from June to January sixth, and never having had access to her body, still you wrote to her sister that her body was precious? A. I wrote that.

Q. And her body was precious to you in January? A. In that emotional state I wrote that in, yes.

Q. And whatever other state, you would have put that down, and from June to January you had not, you say, had access to her body in a physical way? A. I do, indeed. I do.

Q. This letter was written after she had been to Dr. Markoff, who at no time was one of the

country's leading men in his field, was he? A. That I don't know.

Q. The infection you are talking about in this letter was in her body at the time she went to the hospital after she had been to Dr. Markoff? A. That I don't know. I can only assume so. It must have been.

Q. Then you go on: "Perhaps it is best that I now say that we didn't have to dwell too long on the decision—it was Amy's wish that nothing be mentioned to any one of her family—though she did write a brief note to Earl——". That is her brother in the military service? A. I don't know that he is in the military service.

Q. But you do know that he is in the service? A. I do not know that.

Q. You don't know today he is in the service? A. I do not know.

Q. Do you know—have you ever known Mrs. Carlson's brother is in the service? A. I do not know. There was one brother in the service. I believe she had several brothers. There was a young fellow in the service I was informed about, but whether it is this one, I don't know.

Q. You don't want me to produce a letter that shows you did know? Shall we agree you did know he was in the service? A. I don't know.

Q. It is of no importance. Earl is her brother? A. I understand he is.

Q. You understand? A. I have never met him.

Q. Who informed you he was? A. Amy.

Q. Do you believe she might have told you an untruth about having a brother? A. I don't know what she may have told me by way of untruth.

Q. Was there anything to indicate that she didn't have a brother named Earl, as she told you? A. No.

Q. Then she has a brother named Earl? A. She told me she had.

Q. You are not trying to spar with me, are you? A. No, sir.

Q. "We went over to the Post Graduate Hospital on Sunday after Christmas—and you'd have been thrilled to see the little Trojan——." Who is the "little Trojan"? A. I referred to Amy.

Q. "What a stoic—calmly facing what we knew would be a rather severe ordeal." That is Amy you talk about? A. Both of us.

Q. But she did everything you wanted her to do? A. Only when she approved of it.

Q. There was no doctor she refused to go to when you suggested it; no person she went to see contrary to your wish? A. Not that I know of.

Q. You suggested Dr. Heyd and she went to Dr. Heyd? A. Dr. Donaldson suggested Dr. Heyd.

Q. When you suggested Dr. Markoff, she went to Dr. Markoff. That right? A. Yes.

Q. Never contrary, was she? "She was operated on Monday afternoon, the 28th, at 4:30—came down from the op room around 7—and just never recalled a thing——." You are talking of Amy? A. I certainly am.

Q. This is six months after the marriage? A. Yes.

Q. "We had arranged for a shift of three nurses which was all too little to do—and had one more on the 4 to 12 Tuesday afternoon shift—I saw her that Monday night but I may as well have been walking in Miami for all Amy knew or cared." She was very sick when you saw her then? A. That's right.

Q. "Even thus the following several days—but about the fourth day out—well, you'll be glad to

know that she has improved in rapid order—her spirit continues tops — same old Rogersonian humor—and ever so pretty even though she is of course somewhat peaked—or "pushed" as we say —one must expect that—both doctors have been grand to her—see her every day—we have been promised possibly a departure this Sunday—but with the severe cold gripping this area, I'm hopeful that the two will approve Amy remaining at the P. G. for a few additional days." The person you were talking to her sister about was Amy? A. Yes.

Q. Who was your loving wife and you her loving husband? A. I was her loving husband but she was not my loving wife. That was the way I felt at the time I wrote that.

Q. If she had not been your loving wife do you want this Court to understand you would have continued in your feelings and would give voice to these expressions and would have talked about your wife "her precious body" and "what a little Trojan"? A. I certainly do. I want the Court to believe that.

Q. You never had any disagreements or arguments from June to this time, or fisticuffs, with your wife, did you? A. Of course not.

Q. You never had vulgar words with each other? A. Never.

Q. You never had disputes about money, did you? A. That is true. Never.

Q. Still you say you are writing about her, who is your wife, and those are your feelings, and with all those things being absent you say she didn't have those feelings for you? A. That is true.

Q. And still there never was a discussion about that up until the writing of this letter? A. The girl was a very independent one.

Q. Still, she was your wife? A. Yes.

Q. Further on in the letter you say—as I read this I want to know whether this is still from a man denied marital relations with his wife: "Anything I may write about Amy and what she means to me—to my mother and sister—and the reaction and reception to my friends—well, Grace, you know your sister—she has really been an answer to what one prays for, but perhaps for lack of faith—is not destined to receive—we're both very happy and look forward to the time—if so willed—when we will be in our own home—presently, the draft status would be reclassified were we to take our own apartment—buying a home is out of the question with the uncertainty of the war——." In January 1943, six months after the marriage, she was what you had been praying for prior to your marriage, and during that six months had proved to you sufficiently that she was, as you say in this letter, "an answer to your prayer"? A. It is obvious I wouldn't have written to her sister discussing our marital arrangements, or to anyone else.

Q. But this letter is bursting with everything a man can say good about his wife from June to January. There was no obligation on your part to write this letter? A. She didn't want me to notify them. She asked me not to write at all.

Q. Then you wrote this on your own? A. In an emotional condition when I came home from the hospital that night.

Q. Then you didn't write it on the solicitation of Mrs. Bowers or your wife; you wrote it on your own solicitation and feeling? A. At that particular time, yes.

Q. Notwithstanding that for six months before that you had indured what you claim you did? A. That is true.

Q. Now I'll go further: "Only one thing wrong about your sweet sister — and I'm entirely at fault——." You mean Carl Carlson, of course— "She feeds me too well—has me up around 195 when I should hover around 185—however, it is living—and do I miss her—boy, they don't come finer—but, say, I had better pause right here—for once on the track—and it doesn't take me too long to get started—I'd devote several more pages, telling all about Amy — knowing sisters——." No one ever asked you to write that? Those were your true thoughts? A. That was the way I felt.

Q. Because your marriage was a most agreeable and satisfactory one? A. With the exception of marital relations.

Q. And Amy had made a perfect wife? A. She had not, not as far as that angle goes.

Q. But she had been all those things as described by you in the letter? A. As I wrote them, yes.

Q. "They don't come finer" and "answer to my prayer"? You are not writing this letter to your wife but to the sister of your wife, Mrs. Grace Bowers? A. That is right.

Q. To this question I would like a yes or no answer: Did you, during your marital life with the defendant, on several occasions while in the bedroom with your wife, resort to prayer to enable you to have an erection to perform the act of intercourse? Yes or no? A. No.

Q. Did your wife, before she visited Dr. Markoff, take a dose of castor-oil? A. Not that I know of.

Q. Did you tell her to take some castor-oil? A. I certainly never did.

Q. Did your sister tell her? A. I don't know.

Q. Did you tell your wife in September 1942 to see her sister in respect to her not having had a menstrual period since August? A. To see whose sister? You said "her sister".

Q. Your sister. A. I did not.

Q. Did you know your wife had not had a normal menstrual period which gave rise to a discussion about pregnancy in September 1942? A. There was no question or discussion of pregnancy as far as my wife was concerned and myself.

Q. There was no question about it? A. There was no discussion of it.

Q. Very well, but you had such a discussion in September 1942? A. I don't recall.

Q. You don't recall? A. No.

Q. So you can't say there was or was not a discussion? A. There was no discussion. I knew she couldn't be pregnant, if that is what you are driving at.

Q. I am not driving at anything. Was there a discussion in September 1942 about your wife seeing your sister, Esther, in order to take a dose of castor-oil, in order to bring about a menstrual period so a miscarriage would come into existence and therefore she would not give birth to a child? A. Never. No.

Q. Isn't it a fact that your sister took her to Dr. Markoff? A. I don't know whether Esther went with her or I did.

Q. Did Esther go with you and your wife? A. She didn't go with us two when I was there those occasions.

Q. Did you go with your wife the first time? A. I don't know. I went several times.

Q. How many of the four or five visits did you go? A. I was over there possibly three times.

Q. You don't remember that your sister went to the drug store and got a half pint of castor-oil and that your wife drank it all down and it produced no results and the visit to Dr. Markoff followed? A. Nothing like that happened.

Q. How do you know it did not? A. It did not, as far as I know.

Q. Did your wife take castor-oil or not? A. I don't know. If she took it she was probably constipated.

Q. Did she take it because of her pregnancy? A. She wasn't pregnant. She never spoke to me about any pregnancy. She couldn't be.

Q. Did she take castor-oil? A. I don't know. I never saw any around the house. I don't know whether she took any or not.

Q. Did you ever talk to your sister about getting castor-oil for her? A. I never talked to my sister about castor-oil.

Q. Did you ever talk to Dr. Markoff about castor-oil? A. I never talked to Dr. Markoff about any castor-oil.

Q. You don't know whether she took castor-oil or not for a pregnant condition? A. I don't know. I don't know whether she took castor-oil.

Q. You say she couldn't be pregnant? A. As far as I was concerned she couldn't be pregnant.

Q. Did you know of the claim of your wife that she had been to Dr. Markoff because of her pregnant condition—— A. No, I did not.

Q. I haven't finished. A. I'm sorry.

Q. You didn't know anything at all about a claim of your wife that she went to Dr. Markoff because of a pregnant condition? A. No.

Q. You don't know it today? A. I know it because of her legal papers.

Q. Is that the first you knew about it? A. Yes.

Q. Those papers were not in your possession before the first of the year. Will counsel concede the date of January third?

Mr. Demarest: Your affidavit came to me —defendant's affidavit was served on me January 3, 1944.

Mr. Griffinger (continues):

Q. Is that the first you knew about the claim of your wife as to why she went to Dr. Markoff? A. The first I knew about her claim of pregnancy.

Q. Is that the first time you knew about it, January 1944? A. The first time.

Q. Still, you discussed that with Dr. Markoff in November 1944.

Mr. Demarest: There was no such discussion. Is there such a discussion?

Mr. Griffinger: Yes.

Mr. Demarest: Then read it. I would like to hear it.

Mr. Griffinger: (Reading from testimony of Dr. Markoff) Question: "Now, Doctor, you said that the first time you saw Mr. Carlson was about a year after the treatment?" Answer: "That was the first time he told me about the fact that his wife told him that she was pregnant." Is the doctor referring to a discussion you had with him before January 1944?

Mr. Demarest: May I suggest to the Court: This use of Dr. Markoff's testimony in pieces like this is highly unfair and does not present the facts because in the remainder of Dr. Markoff's testimony

he concludes that the first he knew about a pregnancy was when Mr. Carlson and I communicated with him about this affidavit of Mrs. Carlson's filed January third. Counsel is doing the same thing he did at that hearing; trying to pull the red herring——

Mr. Griffinger: I am referring to testimony that is clear and concise. This testimony deals with this man and the doctor's recollection, based on records. This man says he did not talk to the doctor until he ascertained from his wife's affidavit of her claim. The doctor says he talked with him in November 1943. I refer to a question asked the doctor by the attorney for the petitioner.

Mr. Demarest: The doctor did not say he talked to him in November. He said he thought the conversation was with Mr. Carlson within a year of the time he had treated the defendant. Then he continues to say he has no record, but it was somewhere around there, and on redirect I straightened him out——

The Court: The questions and answers you are quoting from the transcript: Do they indicate a definite time?

Mr. Griffinger: As to a conversation with this man?

The Court: Yes.

Mr. Griffinger: Yes. Question: "Now, Doctor, you said that the first time you saw Mr. Carlson was about a year after the treatment?" Answer: "That was the first time he told me about the fact that his wife told him that she was pregnant." Ques-

tion: "In what manner did he disclose that she claimed that she had been pregnant?" Answer: "That she claimed that she was pregnant and she came to see me for the purpose of doing away with the pregnancy." Question: "And did he disclose that to you as the result of some proceedings that were pending?" Answer: "Yes, sir." There were no proceedings pending then and this man now says he didn't talk to anybody about it——

Mr. Demarest: It refers to the proceedings as pending. Mr. Griffinger argues that since he refers to a proceeding and that there was no proceeding pending, therefore he must have known of it before; but I say the doctor says he learned of it through some proceeding and it was this proceeding.

The Court: Perhaps redirect will clarify the situation.

Mr. Griffinger (continues):

Q. When you went to visit the doctor with your wife he hade an examination of your wife, of the vaginal organs? A. I believe he did.

Q. He disclosed to you that your wife had had intercourse, didn't he? A. Nothing was discussed about that.

Q. Did he disclose to you in any manner that his examination disclosed that the marital act had been consummated? A. Nothing was discussed about the marital act.

Q. Was there any discussion about menstruation? A. Not that I recall.

Q. And part of the examination dealt with intercourse on the part of your wife and yourself?

A. Are you referring to the time I took my wife to Dr. Markoff?

Q. Yes. A. There was no conversation about intercourse or sex matters whatever that I recall.

ADJOURNMENT TO AUGUST 15, 1944.

AUGUST 15, 1944.

BLAKE F. DONALDSON, 121 East 60th Street, New York City, a witness for the petitioner, on his oath testifies as follows:

Direct examination by Mr. Demarest:

Q. You are a practicing physician in New York City? A. Yes.

Q. For how long have you been? A. Since 1913.

The Court: What about the doctor's qualifications? Is there any objection or do you want the examination to go on as to them? I don't know the doctor.

Mr. Griffinger: I don't know the doctor, either.

The Court: Very well.

Mr. Demarest (continues):

Q. What school were you graduated from? A. Long Island College Hospital.

Q. Do you know the defendant in this case? A. Yes.

Q. Have you had occasion to see and treat her? A. Yes.

Q. Can you tell us when and under what circumstances you treated her? A. I treated her between December, 1942, and February, 1943.

Q. Did she come to you at the instance of her husband? A. Yes.

Q. Did you examine the defendant when she came to you? A. Yes.

Q. Did you ask for a history from her? A. Yes.

Q. Can you tell us what emanated from that examination and questioning, what you found and what she said? A. I advised her to go to an eminent surgeon, Dr. Heyd, to have the tumor on her pelvis operated and told her she would have to undergo treatment for chronic arthritis. I told her the fact that she had an itching rash on her fingers had something to do with the treatment of the arthritis, that it was an allergic disorder. This type of arthritis shows little tendency to involve the heart, but the reason for not subjecting her to radio therapy and X-ray of the tumor was on the forty per cent chance of this tumor becoming malignant after it had been shrunken down by X-ray and radio therapy, and my hope was to find some cause of the arthritis.

Q. Did you take a history from her indicating her prior condition? A. Yes.

Q. What was the history? A. She had arthritis developing in November, 1941. She had been treated in Miami for that.

Q. Was there any mention made of rheumatic fever by her to you?

Mr. Griffinger: I object. The question is leading.

The Court: Be careful.

A. I don't remember.

Mr. Demarest (continues):

Q. Was there any symptom indicative of rheumatic fever at the time you examined her.

Mr. Griffinger: I don't believe counsel should lead.

Mr. Demarest: This is a medical witness. He isn't being lead.

Mr. Griffinger: He answered the previous question "no" in respect to a question about rheumatic fever. Now counsel leads him again. I object to the use of descriptive words in the question. The doctor can tell what he found.

The Court: (To stenographer) Repeat the question before the last one.

Stenographer: "Was there any mention made of rheumatic fever by her to you?"

The Court: That question went to the case history?

Mr. Demarest: Yes.

The Court: The pending question goes to the doctor's examination. I'll permit it.

A. I found no evidence of rheumatic fever.

Mr. Demarest (continues):

Q. Is there a difference or not between the symptoms and evidences of arthritis and of rheumatic fever? A. The type of arthritis where you get spindle-shaped enlargements of the finger joints tends to run a chronic course and doesn't involve the heart, and rheumatic fever is a very serious disorder with a great tendency to involve the heart.

Q. I'll ask whether the pain and swelling which results from rheumatic fever is acute and whether it responds to treatment. A. Both conditions have remissions in treatment.

Q. What is the difference between remissions in rheumatic fever and an arthritic condition?

A. With the remissions in rheumatic fever there is a tendency to have the heart muscles destroyed and with arthritis there is a tendency to destroy the joints.

Q. Is there any theory upon which it is sustained that injections of sanolac would cause or contribute to an arthritic condition? A. Most doctors feel that every patient with joint manifestations today has an underlying allergy and benefits by vaccine therapy given once every three years.

Q. The infection found in this patient—did it have anything to do with any such injection? Was the infection she had, that you referred to as an arthritic infection—was that caused in any way, could it be caused in any way by the fact that in September, October and November, this patient had received injections of sanolac? A. No.

Q. After you had examined and questioned the defendant would you say that her answers to your questions and the things you found indicated a correspondence of truthfulness between what she told you and what you found?

Mr. Griffinger: I object to that. Counsel is apparently attacking the credibility of the defendant by this witness where the defendant hasn't been on the stand yet. He asks whether answers to questions about the history correspond to what he found. He may not be as good a doctor as he thinks. Maybe his findings were not what he thinks——

Mr. Demarest: Do we have to have an oration every time an objection is made? He knows Your Honor knows what questions are admissible and which are not.

The Court: I'll permit the question if it is reframed. Obviously the doctor is not in a position to judge her or tell us here whether or not the defendant was truthful in that sense of the word. He may testify, however as to what differences, if any, he found between the case history as given to him by the patient and what his examination disclosed.

Mr. Demarest: That is what I intended to ask.

A. I arrived at no opinion on that.

Mr. Demarest (continues):

Q. Did you arrive at an opinion as to whether she, at the time you examined her, was in such condition of health as to be a normal candidate for the assumption of the duties of married life?

Mr. Griffinger: I object—without an oration. I would like Mr. Demarest to confine himself to a date.

Mr. Demarest: I said at the time he exined her.

Mr. Griffinger: When was that?

Mr. Demarest: He testified in December 1942.

Mr. Griffinger: I object, because to assume that duty had occured in June, 1942. The doctor can't answer that question for the benefit of the Court. The marriage was in June.

Mr. Demarest: You can only answer one question at a time. I will eventually lead up to that.

The Court: If you connect it up you may go ahead.

A. I formed no opinion about it.

Mr. Demarest (continues):

Q. Will you say as to what her condition would have been in June 1942 with respect to her eligibility as a candidate for the marriage state?

Mr. Griffinger: The doctor just testified that in December he couldn't form an opinion. I don't believe he is qualified to anti-date that time.

Mr. Demarest: I put the question in because the Court expected me to and I expected the same answer I got before.

The Court: You may answer for that reason.

A. I formed no opinion about it.

Mr. Demarest (continues):

Q. When you examined the defendant, did she claim or state to you that she then was or had ever been in a pregnant condition? A. Nope.

Q. Did she state that she had not been pregnant, ever? A. No.

Q. Was the subject of intercourse with her husband discussed at all? A. No.

Q. Do you remember Mr. Carlson calling upon you after April 1943? A. Yes.

Q. Do you know what he came to see you about?

Mr. Griffinger: I object.

The Court: The doctor may answer yes or no.

A. Yes.

Mr. Demarest (continues):

Q. Was it with reference to his wife's, the defendant's, prior condition?

The Court: You may answer that yes or no.

A. Yes.

Mr. Demarest (continues):

Q. Answer this yes or no, too. Did you then tell him your opinion and findings? A. Yes.

Q. Had you ever told him before that visit what your complete opinion and findings were? A. I don't remember.

Q. In your opinion was it a necessity that the operation performed by Dr. Heyd should be performed? A. Yes.

Q. Was that operation performed as the result of any pressure or suggestion on the part of Mr. Carlson?

Mr. Griffinger: We are not interested in pressure and suggestions of the petitioner. It is not material as far as this case is concerned. And I didn't make an oration.

Mr. Demarest: In affidavits filed by the other side in the application for alimony there is a strong inference contained.

The Court: What page, Mr. Demarest?

Mr. Demarest: Page 1 of the defendant's affidavit.. First she refers in her affidavit to a supposed abortion and then she says, "I did not recover from this but instead my condition became such that soon thereafter, at the insistence of my husband, I went to another physician, a personal

friend of his, for diagnosis of my condition as a result of which I entered the Post Graduate Hospital, located in New York City, on December 27, 1942 and underwent a serious operation at which time certain of my sexual organs were removed. All arrangements for this operation were made by my husband."

The Court: You may answer. (To stenographer) Repeat the question.

Stenographer: "Was that operation performed as the result of any pressure or suggestion on the part of Mr. Carlton?"

A. No.

Mr. Demarest (continues):

Q. After that operation was performed would the defendant be able to bear children? A. No.

Q. Did you make any findings as a result of this examination and treatment as to the mental reactions of the defendant with respect to her husband and their cohabitation? A. No.

Q. Did you come to any conclusion as to her willingness to accurately answer your questions?

Mr. Griffiinger: Counsel is persisting in endeavoring to get a response to a question to which the doctor replied about five times, "No, no, no."

The Court: That is an observation and not a conclusion. You may answer.

A. No.

Mr. Demarest (continues):

Q. I don't know whether I asked you, Doctor—did you say you reported to Mr. Carlson when he

inquired of you sometime after April 1943 your findings and give him the history as you had taken it? A. You didn't ask me that.

Q. Did you so inform him? A. Yes.

Cross examination by Mr. Griffinger:

Q. Did I understand you to be engaged in general practice? A. I am an internist. Internal medicine.

Q. You are not a surgeon? A. No.

Q. It would follow that you do not perform operations of any kind. Now, arthritic knee. Is that an abnormality in your opinion? A. Yes.

Q. Does it prevent mobility? A. There are many stages of it.

Q. Does it prevent capacity to move the limbs of your body if you have an arthritic knee? A. If it reaches the stage of ankylosis, which is bony knee, yes.

Q. Could you tell me from my gait whether I have trouble with mobility? A. Can you touch the floor with your clinched fists?

Q. Can I? No, I don't believe I can. Then if I have an arthritic left knee the evidence of my mobility is judged by my ability to touch the floor with my clenched hands? A. No.

Q. Having seen me walk across the courtroom would you say my arthritic knee would effect me in respect to abnormality? A. It would depend entirely on how much arthritis you had in your knee.

Q. So an arthritic condition of the knee or any other joints are of various degrees, aren't they? A. Yes.

Q. In what degree would it effect or prevent or retard ordinary mobility? A. It all depends on how much you had.

Q. When Mrs. Carlson saw you in December 1941 was she able to get around to your office and so forth freely?

The Court: December 1941?
Mr. Griffinger: December 1942.

A. Yes.

Mr. Griffinger (continues):

Q. You said "Yes?" A. Yes.

Q. From your examination she had complete use of her arms and legs? A. No.

Q. She did not? A. No.

Q. To what extent? A. Stiffness in the fingers and shoulders and a little stiffness in the knee.

Q. Did that in any way prevent her from getting around, assuming that she proceeds at a slow, normal gait? Would she still be able to get around? A. To a limited degree.

Q. In December 1942 did you make a record of this visit? A. Yes.

Q. Have you that record with you? A. I have a copy of it.

Q. Was it disclosed to you as to a treatment by a doctor in September and October, prior to the visit to your office? A. No.

Q. Did Mr. Carlson disclose it to you? Mr. Carlson arranged for this appointment at your office, didn't he? A. Yes.

Q. And Mr. Carlson spoke to you prior to the visit and examination, didn't he? A. I don't remember.

Q. He discussed with you something dealing with his wife or the purpose of the visit, didn't he? A. I don't remember.

Q. Did you make inquiry of either Mr. or Mrs. Carlson concerning the treatment prior to De-

cember by Dr. Markoff? A. I got all the history that she gave me.

Q. Part of your interrogation included recent medical attention for some reason or other? A. Yes. She had gone to a podiatrist in Miami.

Q. But the additional treatment by Dr. Markoff about two months prior was not discussed? A. No.

Q. So you don't know why she went to Dr. Markoff and what he did, do you? A. No.

Q. In December, 1941, you did not arrive at any conclusion as to an infection and the cause of it? A. That is two questions. I did arrive at a conclusion.

Q. And a cause? A. No.

Q. Assuming that means had been employed in September or October by another man to bring about a miscarriage, and assuming that the means employed were not to the best interests of the patient, and assuming that out of that affair or condition or treatment an infection had been caused, would you say in any wise that it had been or was related to the condition you found in December? A. No.

Q. And if you were unaware that the patient had been, shortly before coming to your office, attended to by another physician, would you still say your answer is "no"? A. Yes.

Q. It was of no primary interest to you in your examination in December to ascertain whether this woman had been treated by various medical injections, etc., by another physician in order to form a truthful diagnosis? A. I most carefully took the history of this woman and I went into great detail. I had no reason to suspect that. There was no reason to suspect that she had had any treatment that would effect her condition other than favorable.

Q. You also took information from Mr. Carlson? A. Yes.

Q. Did you know after that that she had been to another doctor in Brooklyn? A. No.

Q. You don't know it even until today, do you? A. No.

Q. The operation that was performed dealt with certain vaginal organs besides appendicitis and gall bladder? A. Yes.

Q. Did you examine her at the time as to a condition resembling pregnancy? A. Yes.

Q. What was the resemblance? To how many weeks or months of pregnancy? A. It bore no resemblance whatever. She had no enlargement of the uterus. She had an irregular tumor on the pelvis. Her periods were going on. Pregnancy is always a possibility in a woman and for that reason pathologists in hospitals check the tissue and in this case they found there had been no pregnancy. She had an ordinary tumor of the uterus.

Q. Did you examine her vagina? A. Yes.

Q. When you made that examination did you conclude this woman had had intercourse? A. No.

Q. Did you conclude she had not? A. No.

Q. Did you tell Mrs. Carlson that acidity, an acid condition in her system, was contributing to a large degree to the arthritic condition in her knee? A. No. I told her that the skin rash on her fingers probably had some connection with it. That is a form of hives.

Q. Did you see her after December? A. Yes.

Q. When was that? A. On two or three occasions in the office. I gave her a course of sulpha diozene and hoped it might help her. She was very much disappointed in the surgery because

she had had an immediate remission of the arthritis and I warned her that was a flash in the pan and it might return, and it did. I told her she must engage in careful diet and exercise for the next three months.

Q. Did you suggest in March that a vacation would be beneficial to the patient? A. I don't remember.

Q. You corresponded with Mrs. Bowers, the sister of Mrs. Carlson, didn't you? A. I don't remember.

Q. Is this your blank or form? A. That is my prescription blank.

Q. Is that your handwriting? A. Yes.

Q. Does that refresh your recollection that you suggested in March that, "She needs a vacation. Sincerely, Blake F. Donaldson?" A. If it is written there. Yes.

Q. That was in March 1943? A. Yes.

Q. Immediately after that she did take a vacation as far as you know? A. I don't know. I lost track of her.

Q. Would some infection in any wise aggravate an arthritic condition? A. It would either cause or aggravate it. When she was operated she had so much aggravation of the gall bladder and a small section of the liver was given a microscopic examination in the effort to see whether the gall bladder was causing all this infection, and the examination of that section of liver showed necrosis, an infection of long standing and the organism that gave her the arthritis was not recovered.

Q. The arthritic condition that you found, would that in any wise interfere with the normal relations between man and wife? A. I don't know.

Q. At the time she went into the hospital was it disclosed to her as to what was going to be done? A. Yes.

Q. By whom? A. By me.

Q. In whose presence? A. Only in hers.

Q. Did she inquire as to whether that would prevent childbirth after that? A. I don't remember.

Q. Do you remember whether you assured her that childbirth would not be prevented? A. I don't know. At the time she was operated there was a possibility that this huge tumor was only an ovarian tumor.

Q. Would that prevent childbirth if it was an ovarian tumor? A. If it was. It wasn't.

Q. So it wasn't an ovarian tumor? A. No, it wasn't.

Q. And it would not prevent childbirth? A. The tumor would have prevented childbirth. Yes.

Q. But the removal would have made it possible for childbirth? A. The removal of this tumor would make it impossible for childbirth.

Q. Then up until the time of the removal of this tumor she still could have become pregnant? A. One chance in a million.

Q. But she could have? A. Yes.

Re-direct examination by Mr. Demarest:

Q. When you say "huge tumor" what size do you mean? A. It was about the size that a three month's pregnancy would be. About the size of a very large grapefruit.

Q. Could you tell from your knowledge and experience about how long a tumor of this type would take to develop to the size, as you described it, larger than a grapefruit? A. I do not know.

I have experienced. I have watched many women with tumors over very long periods of time. It is our policy not to touch the pelvic organ of a woman if we don't have to because it causes nervous ailments sometimes. It is our policy to wait, if possible. I have no idea how long this tumor existed.

Q. Would you say whether you had an idea whether it had existed prior to June, 1942? A. I didn't form any opinion on that subject.

Q. Was there in this patient, at the time of your examination or at any time up to the operation, to your knowledge and from what you saw, any evidence of any attempt at an abortion upon her?

Mr. Griffinger: I object. That is not proper re-direct.

The Court: Considerable latitude is allowed on re-direct. If that is your objection I'll permit the question and answer.

A. There was no evidence of that.

Mr. Demarest (continues):

Q. I show you a paper marked Identification P-1 and ask you if you know what that is? A. That is a copy of Dr. Heyd's report at the time of the operation. I have a similar copy in my records which he sent me.

Q. Do you remember whether you had any part in sending a copy of that to the defendant out in Tennessee? A. No.

Re-cross examination by Mr. Griffinger:

Q. When you answered the question of counsel in respect to any indications that an abortion had

been performed or committed did you base your reply on an examination of the vaginal organs? A. Yes.

Q. Or upon what the doctor said after the operation? A. On the examination of the vaginal organs.

Q. Were you able to find from that examination that there had not been a probing and bringing about of a menstrual period that had not occurred or the causing of a miscarriage? A. Examination of the tissue removed at the time of the operation showed no evidence of recent pregnancy or the presence of pregnancy.

Q. Then you didn't know anything about it until after the operation? A. I examined her before.

Q. At that time was it disclosed to you whether there had been any disturbance with the vaginal organs? A. Do you mean by that whether it was disclosed to me when I examined her?

Q. Yes. A. There was no evidence of a recent pregnancy.

Q. If a female has a normal period at intervals of twenty-one days and a period of six or seven or eight weeks elapses and upon medication or injections a normal menstrual cycle is resumed, would that, if it was brought about, show anything upon the examination of the vaginal organs to you?

Mr. Demarest: I object to a hypothetical question that doesn't take into consideration the facts introduced in evidence and contradicts facts already in evidence, because there is evidence that there was a lapse of only four days in the appearance of the menstrual period. Besides, this is not re-cross examination.

Mr. Griffinger: It all deals with the question I objected to about the question of abortion. Counsel opened the door and I think I have the right.

The Court: Let's have it all. I'll permit the question. (To stenographer) Repeat the question.

Stenographer: "If a female has a normal period at intervals of twenty-one days and a period of six or seven or eight weeks elapses and upon medication or injections a normal menstrual cycle is resumed, would that, if it was brought about, show anything upon the examination of the vaginal organs to you?"

A. Only if she was actually menstruating when I examined her. She had a history of many years of irregular periods.

Mr. Griffinger (continues):

Q. You got that history from her, too? A. Yes.

Q. She did not discuss with you the treatment by Dr. Markoff to restore her menstrual period which had been interrupted? A. No.

Q. You still got a history of irregular menstrual periods for several years but did not inquire that a month or two before that she had been most irregular and concerned with possible pregnancy? A. That information was not given to me by the patient.

Q. Was it refused or didn't you make inquiry? A. All I can tell you, Counsel, is that it is my custom to take a full half hour and get a full history and elicit all the information I can.

Q. During that time no information was withheld from you? A. Apparently, yes. This was.

Q. No answers were withheld from you? A. Well—

Q. Did the patient at any time say she refused to answer you or didn't want to answer you? A. I don't remember.

The Court: From her case history to you and your observation of her general demeanor, in your opinion was she conscious of any physical disarrangement other than the arthritic condition? In other words, was she conscious of the fact that there was a tumor?

A. I don't know, Your Honor.

The Court: Well, how would she know it?

A. I told her she had one.

The Court: Before you told her.

A. She had been examined, apparently, by a good many people. That is, various people had treated it. Patients tend to get panicky when they have arthritis and go to many doctors and don't always tell us who examined them and what various treatments they have had. They hope to get some advantage themselves by concealing that at times. That is customary. But I told her about the tumor.

The Court: What was her reaction when you told her, from what you observed?

A. She was quite willing to do anything that would help her.

The Court: Did she manifiest surprise when you told her?

A. I don't remember, Your Honor.

Blake F. Donaldson, for Petitioner
—Re-direct—Re-cross.

Carl O. Carlson, Petitioner—Cross.

Re-direct examination by Mr. Demarest:

Q. I think what the Court is driving at is: Would there be symptoms from which she would know that she had a disorder of that sort, although perhaps not that particular disorder? A. It could be, but I elicited none of those symptoms from her in questioning her.

Re-cross examination by Mr. Griffinger:

Q. By not eliciting some of those symptoms you came to the conclusion she was unaware of the condition in her vaginal organs? A. I didn't come to any conclusion about it. I told her she had a tumor that should be operated.

Q. From that it appeared she wasn't informed? A. It didn't appear at all. I just told her.

Carl O. Carlson, the petitioner, resumes the stand:

Cross examination by Mr. Griffinger (continued):

Q. In January 1942 you received a letter from Amy dated January 7, 1942, by airmail, and I show you the envelope and the letter and ask you whether you recall receiving this letter? A. Yes.

Q. Now, in this letter Amy refers to having written you concerning her health. Did you receive such a letter prior to January 7, 1942? A. I don't recall.

Q. Her reference in this letter to such a communication, would that refresh your memory? A. No, I do not remember.

Q. But you received all the letters from your wife, didn't you? A. I do not know.

Q. All letters addressed to you at that address would be received in the ordinary course? A. In the ordinary course, but I am not prepared to say they were all received by me.

Mr. Demarest: May I say to the Court that upon a demand of the other side to produce, I have furnished nine letters and I ask that they be marked in evidence since they have been delivered to the other side on that demand, and those letters commence in date with December 18, 1941 and they run down through January 1st, 7th, 9th, 10th, 15th, 25th, 30th and April 20, 1942. I ask that they be marked and admitted in evidence.

Mr. Griffinger: In due course. I think I have the privilege of asking questions on my cross examination, unless Mr. Demarest wants me to put them in now and discontinue my cross examination.

Mr. Demarest: I don't say you should discontinue cross examination, but you are referring to letters produced by me on demand and they should be put in evidence.

Mr. Griffinger: Not only are these going into evidence, but the letters you demanded are, too.

Mr. Demarest: I put the letters you produced into evidence at once.

Mr. Griffinger: I will put each letter in as I refer to them.

The Court: As long as they are put in. Are you going to identify them by date now?

Mr. Griffinger: Yes, and then I will put them in evidence individually, because the demand to produce covers almost two hundred letters and all he has produced is nine letters.

The Court: All right. Continue.

Mr. Demarest: Before proceeding, and without attempting to start any argument: The demand that was made to produce covered a period between November 2, 1941 and June 20, 1942, so that that would cover a little over two hundred days, two months in 1941 and five and two-thirds months in 1942. I am a little bit skeptical that there were over two hundred letters written by the defendant to the petitioner in that space of time.

The Court: That would be a matter of proof coming from the defendant.

Mr. Griffinger: It has already been testified by the petitioner that there were letters written practically every day before the marriage.

The Court: Let's not take counsel's statement. That may be proved by the defendant. Was the marriage certificate offered?

Mr. Demarest: No, we have testified as to the wedding ceremony.

Mr. Griffinger: We admit the marriage in the answer and also the counter-claim.

The Court: Yet that isn't right, according to strict rule.

Mr. Griffinger: That is true. I offer nine letters which were the subject matter of a notice to produce served upon the petitioner by the defendant and setting forth a de-

mand for letters written by the petitioner to the defendant between November 1941 and June 20, 1942, and also letters written by the defendant to the petitioner between those dates, which letters, the notice sets forth, were in the possession of the petitioner.

(Nine letters—Exhibit D-1.)

Mr. Demarest: The notice does not set forth that those last letters were in the possession of the petitioner.

Mr. Griffinger: The fourth line says, "which are in the possession of the petitioner."

Mr. Demarest: You read it. I read English.

Mr. Griffinger: "And all other letters written by the defendant to the petitioner", and I say the letters written by her to him are in his possession and naturally the letters written by the wife to the husband would be still in the hands of the husband.

Mr. Demarest: Not necessarily.

Mr. Griffinger: The Court will assume that.

Mr. Griffinger (continues):

Q. I show you a letter dated January 8th, the next day after the last one. Did you receive that letter in that envelope? A. Yes.

Q. In this letter I refer you specifically to the sentence: "Carl, I'll go this Saturday for my examination and will let you know. I feel sure it will be O. K. with the exception of my blood pressure being a little low." Do you remember reading that in the letter of January 8, 1942? A. I

don't remember parts of any of the letters. I do not recall——

Q. What? A. —what was stated in them.

Q. I ask you whether that being in the letter you read it and had knowledge of the statement? A. I must have.

Mr. Demarest: I think we will admit on the record that the petitioner had knowledge, at the time of the receipt, of the contents of each of these letters that have been produced and maybe that will save reference to a lot of questions as to whether he read and knew.

Mr. Griffinger: I hope the petitioner, listening to what you have just said, will answer instead of saying, "I don't recall." I asked him whether at the time he received that he recalled her reference to her health, etc. He says he doesn't.

Mr. Griffinger (continues):

Q. Look at this letter and tell me whether when you received this letter in January 1942—whether you remember now, by looking at the letter, whether there was reference to her physical health and an examination, etc. A. I don't recall.

Q. Look at it now. You read that letter in January 1942? A. Yes.

Q. That was before the marriage? A. Yes.

Q. There was reference to an examination? A. That is what she writes.

Q. And you were talking about her health, etc.? A. That is what she writes. I don't recall what I talked about.

Q. Do you know a Miss Wilkinson? A. No, I do not.

Q. Do you know someone with a similar name? A. Miss Wilkins.

Q. She is a friend of yours? A. No, she is not; never was a friend of mine. She was my secretary at the office.

Q. Did you ever discuss with Amy the physique or appearance—— A. Of whom?

Q. —of Miss Wilkins? A. I don't make it the practice to discuss with anybody the character of my office workers.

Q. Did you discuss with your wife the physical appearance of Miss Wilkins? A. I don't know whether I did or not.

Q. Did you discuss with your wife——

Mr. Demarest: I object. It is outside of the issue. What difference does it make whether he did or didn't? I would like the purpose stated.

The Court: Let's have the purpose of the question.

Mr. Griffinger: If Your Honor please, I think it is a little unfair on my adversary's part. I don't really have to disclose something now that will be tied up with evidence.

The Court: If it is tied up with the defendant's physical condition at that time, all well and good.

Mr. Griffinger: It not only has to do with the defendant's health but it may be the woman in question.

Mr. Demarest: There is no woman in question angle in an annulment case.

Mr. Griffinger: You speak for your client, but your client doesn't say that.

Witness: That is ridiculous.

Mr. Griffinger (continues):

Q. In this letter of January 9th, written the day after the previous letter—you received it? A. Yes.

Q. And you read it? A. Yes.

Q. At the time you read it you were fully informed of the contents, weren't you? A. At that time.

Q. But not now? A. I don't recall what that letter had in it.

Q. But in January 1942 you were aware of the information contained in these letters? A. I don't recall what is in that letter, so I say I am not aware of it.

Q. When you received the letter and read it, you were at that time fully informed of the contents and information therein contained? A. I can assume so.

Q. Yes. I'll put this with the rest of the letters. I think the Court can form its own conclusions from this. Unless I desire to make specific reference, I'll have these letters join those others. (Continues) I show you a letter dated December 17, 1941 and ask you whether you received that letter? A. Yes.

Q. And the letter has been in your possession ever since, hasn't it? A. Not ever since.

Q. Where has it been? A. In the possession of my counsel; not since that date but since I began proceedings.

Q. Prior to then it has been in your possession? A. It was in my home.

Q. At that time Amy had discussed with you in one of her letters the matter of her insurance policy. Do you recall that? A. She may have.

Q. And she had given you the policy? A. She did not. I never had the policy at any time, before or after.

Q. She had not forwarded it to you? A. Not at any time during the courtship or marriage did I have that insurance policy.

Q. Did you ever see it? A. I never saw it.

Q. Did you ever know about it? A. I knew about the insurance policy. I should according to what Amy told me.

Q. I show you a letter dated January 8, 1942 and ask you whether in that letter from Amy to you there isn't reference to the life insurance policy to you? A. Yes, there is, but I never saw the policy at any time or anywhere. She may have sent me some premium notices—

Q. But you knew there was a life insurance policy in the Phoenix Life Insurance Company on the life of your wife prior to the marriage? A. That is what I was informed. Yes.

Q. You did receive a receipt for an annual premium, didn't you? A. Some receipts that Amy had received for prior payments.

Q. She had sent you those receipts, hadn't she? A. If she says so, she apparently did.

Q. She did say so. You were making some arrangements for changing the policy to her interest, of course, in view of your bank connections? A. Changing what policy to whose interest? The policy was on her life in favor of her mother, as she told me. I never saw the policy and all I did was pay premiums on it for July 1942 and July 1943.

Q. The same policy? A. The policy was never changed. I never saw it.

Q. The policy was in existence before the marrage. A. It apparently was.

Q. "Mother has always been beneficiary, but that naturally would be changed." That was referring to you, wasn't it? A. I don't know what the girl had in mind, but the insurance company records will show it wasn't changed at all.

Q. How do you know that? A. Because I know.

Q. How do you know there was no change? A. There may have been a change as far as I was concerned, as far as my being named beneficiary.

Q. How do you know you were made beneficiary? A. I don't know. As far as I am concerned I had no evidence of it at all.

Q. There was no discussion about it at all? A. There was a discussion that I was insured and my mother was beneficiary and the two of us decided not to change the policies because, both mothers being elderly, we were both willing to gamble that they would precede us in death and we could change them later. Amy can confirm that.

Q. "Carl: I really hadn't inquired about the loan. Do you think the policies should be written down?"

Mr. Demarest: I see no connection with the issue we are trying before this Court whether the policy was changed and a loan granted. What bearing can it have upon the question of whether this marriage was ill conceived and ill executed?

Mr. Griffinger: Counsel doesn't want the information, but my answer is that this man claims from his testimony that he had at no time information as to whether his future wife had had an ache or tummy ache. I am now attacking his credibility. I wish to show that he was in possession of the

knowledge in looking over insurance policies insuring them against death.

The Court: When was the policy taken out? We are concerned with what the defendant's condition was alleged to have been June 20, 1942.

Mr. Griffinger: I go back to November 1941, the beginning of this contract.

The Court: All right. It is possible the policy you refer to was taken out long, long preceding 1941.

Mr. Griffinger (continues):

Q. In this letter also Amy refers to "Edith." Do you know who "Edith" was? A. Edith was Edith Bobbett.

Q. A friend of your wife's? A. I believe so. She lived with her.

Q. Your wife was employed at the time you met her? A. Yes, to the best of my knowledge.

Q. Why do you say that? A. Because that is what she had informed me and I am just stating it that way.

Q. Is there any reason why you would doubt the information? A. This whole affair makes me doubt everything, so I am stating it that way.

Q. You don't doubt yourself? A. No, I am telling the truth.

Q. Which I doubt. Well, never mind. "Edith has been very sweet about massaging my neck—just my nerves," This was after you had been their prior to that courting Amy? A. Yes.

Q. When you were there do you remember, by referring to this letter, after refreshing your memory, that she did have a little pain in the neck? A. No, I don't remember that. She may

have had a pain in the neck and not disclosed it to me.

Q. You may have had a pain in the neck and not disclosed it to her, but you remember other details, don't you? I show you a letter dated January 23, 1942, written by Amy as usual and ask you whether you received this letter and read it at the time you received it? A. I must have.

Q. And you must have read it? A. Yes, that would be the normal thing.

Q. You couldn't say whether you did or not, could you; whether you did the normal thing or not? A. I have read the letter.

Q. I'll read this, if you please, and you answer yes or no whether at the time you received this letter you read this: "I believe I mentioned in one of my letters about not feeling up to par. It all started a Saturday afternoon. I got soaking wet in the rain. I have been to the doctor a couple of times and he says it is rheumatic fever settled in my left knee. It is very painful and I can hardly use it. He advised me to stay off my feet as much as possible and also gave me a prescription. So, honey, I have been doing all I could so as not to worry you about it. If I am O. K. by 2/22/42, and I am praying I would be, we can still meet at Bach Tower." Do you remember reading that in this letter? A. Now that you have read it to me I do.

Q. There was direct reference to the left knee, wasn't there? A. And to rheumatic fever.

Q. And to a condition of cold and wetness that all of a sudden brought about this condition? A. That is what she refers to.

The Court: What is the date of that letter?

Mr. Griffinger: January 23, 1942.

Mr. Griffinger (continues):

Q. And that was six months prior to the marriage, wasn't it? That right? A. That is approxmately right.

Mr. Demarest: Call it five and it will be right.

Mr. Griffinger (continues):

Q. Do you know Dr. Harlow? A. Yes, I do.

Q. Do you know Mrs. Harlow? A. No, I never knew her. Mrs. Harlow died twelve or fifteen years ago. That is what I recall the doctor informing me.

Q. Do you know a Miss Harlow? A. Miss Harlow is the doctor's daughter.

Q. After you were married you took your wife to a Miss Hodge? A. A Miss Hodges.

Q. Please answer yes or no. A. Yes.

Q. And Miss Hodges, after that visit, increased her legacy to you? A. That is not true.

Q. But you did receive a legacy from Miss Hodges? A. That is true.

Q. Was there a change in Miss Hodges' will after you visited her with your wife?

Mr. Demarest: I object. The issues in the case have to do with the propriety and legality and effectiveness of this marriage. I see no connection from a financial angle. We know the petitioner did benefit under a will and received a $16,000 legacy.

The Court: How is that relevant? If it goes to the financial angle examination should be held in abeyance.

Mr. Griffinger: I remember that. All right.

Mr. Griffinger (continues):

Q. In January 1942, as set forth in one of those letters in Exhibit D-1, there was reference by the defendant to a condition in her knee. That right? A. What she referred to? Yes.

Q. And you then, in January 1942, knew of some condition of her knee. That right? A. Resulting from what she claimed was a rheumatic fever condition.

Q. So when you set forth in your petition and the third cause of action that you learned of the defendant's condition on various dates in the month of May 1943, that couldn't be true, could it? That is a mistake? A. No mistake whatever.

Q. It wasn't until May 1943 that you knew of the condition of Amy? A. That was when I pieced it all together, at that time.

Q. Prior to that, with the little pieces you had, you had no information from those pieces of anything that was bothering her? A. When Amy informed me during our courtship that she had had a slight attack of rheumatic fever, I believed her implicitly; and when she told me she had been assured by the doctor that it would disappear and then she came and told me about a fall that hurt her knee, I had no reason not to believe her.

Q. That was all before the marriage? A. Some months before.

Q. There was no obligation up to June 20th for you to marry her, except the willingness on your part and on her part to join in holy matrimony? A. That is right.

Mr. Griffinger: I did not offer this in evidence yesterday. It is identified as his signature and it is a letter he wrote to Mrs. Bowers, the sister of the defendant. I would like to offer it.

Mr. Demarest: I have no objection to it going in. I think it should go in on their case, but I guess it doesn't make much difference. That is the letter of January sixth?

Mr. Griffinger: Yes.

(Letter January 6, 1943—Exhibit D-2)

Mr. Griffinger (continues):

Q. When your wife went to Tennessee, that was following the suggestion of Dr. Donaldson, after he suggested a vacation? A. She went in April 1943 after persisting for many months, long before Donaldson suggested a vacation.

Q. Was the trip to Tennessee made after the visit to Dr. Donaldson in March 1943?

Mr. Demarest: Do you mean following the time or following the suggestion?

Mr. Griffinger: Well, I will re-word it. Did your wife go to Tennessee after her visit in March to Dr. Donaldson? Yes or no?

A. Yes.

Q. At the time of the visit in March to Dr. Donaldson there was a recommendation that your wife take a vacation? A. He may have suggested it.

Q. You heard him say this morning that he did? A. Yes, but not to her.

Q. You heard him say that in March he had suggested a vacation to your wife? A. I heard him acknowledge this morning when he saw that paper.

Q. Then she went to Tennessee? A. She did.

Q. You were supposed to go down shortly thereafter? A. There was no time when I was supposed to go down. I hoped and it was contingent upon when I could get away from the office.

Q. So you were supposed to go down soon as you could after your wife left; as soon as your assignments and duties permitted? A. Yes.

Q. In all, you were supposed to go down right after your wife if you could. That right? A. Yes.

Q. You made several attempts between April until you finally got down there to get down, as reported in your letters, saying that you couldn't get down this week but would try next week? A. Did you say "seven" or "several"?

Q. I said "several." More than one. A. That is right.

Re-direct examination by Mr. Demarest:

Mr. Demarest: I would like to clear up some things that have developed in cross examination.

Mr. Griffinger: May I ask just one more question?

Cross examination (continued) by Mr. Griffinger:

Q. I want to show you a letter and ask you whether you sent this? A. Yes.

Q. That is your signature? The letter is dated May 7, 1942. A. That's right. To Amy's mother.

Mr. Griffinger: I offer it.

Mr. Demarest: No objection.

(Letter May 7, 1942—Exhibit D-3)

Re-direct examination by Mr. Demarest:

Q. Yesterday there was a question about the time you visited New York counsel for the purpose of getting advised. I show you two copies of letters, part of Exhibit P-2. One is dated August 9th and one is dated July 15th. I ask you if, by looking at those letters, you can tell the approximate date when you consulted counsel?

Mr. Griffinger: I object as not being proper re-direct and not being material.

The Court: That issue was raised. I think you raised it. On the question of re-direct, I think much latitude should be allowed in such matters. (To witness) You may use the letters to refresh your recollection.

A. May I just look through them?

The Court: Yes.

A. Sometime towards the end of July or the first of August.

The Court: What year?

A. 1943.

Mr. Demarest (continues):

Q. So that your answer of yesterday is now to be amended? Do you recall what you said yesterday? A. I do not recall.

Q. That you saw New York counsel about two weeks after you returned from Chattanooga, which would be July first, approximately. A. That was New York counsel?

Q. Well, any counsel. A. That was shortly after I returned from Chattanooga.

Q. You have said in the letter of August ninth—

Mr. Griffinger: I believe the witness has answered and counsel persists——

Mr. Demarest: All right. We will probably ball it up worse so we will let it stay.

Mr. Demarest (continues):

Q. Now, in reference to this menstrual period matter of your wife: Did she at any time prior to the operation in December 1942 say anything to you about the regularity or irregularity of those periods? A. She, as I recall it, mentioned that she had been functioning about every three weeks but there was an irregularity in her menses.

Q. There was references in your cross examination to your use of the word "girl" or "the girl." Did you use that term in your contacts with the defendant? A. I did. That was to me a term of endearment which I called her many times personally and I undoubtedly mentioned it in letters. "Girl" was in no sense derogatory or other than a pet name.

Mr. Demarest: I refer counsel and the Court to a letter of April 13, 1943, part of Exhibit P-2, which is so addressed.

Mr. Demarest (continues):

Q. There has been some confusion, I think, on the question of the information you received from the defendant various times between November 2, 1941 and June 20, 1943 as to her condition. Did the defendant, during that period of time, say anything to you as to the nature of her knee in-

jury or trouble? A. She stated she had suffered a fall at her place of business and there had been a wrenched knee.

Q. When did she so state that? A. She informed me of that in April 1942.

Q. In your first visit, when you met her, was there a slowness of gait on her part? A. There was a slowness of gait.

Q. Was it discussed? A. Not except for the purpose of whether she was athletic or not. We discussed athletics and whether she danced. She said she wasn't dancing at that time. She had been athletic previously.

Q. Was rheumatic fever mentioned at that time? A. She mentioned having had a touch of rheumatic fever.

Q. And was that prior to the time when she mentioned it in a letter? A. Yes, it was.

Q. And you believed it then? A. I believed it.

Q. Do you know what led up to the statement she made in April 1942 about the fall? A. Well, I questioned her about her slowness of gait and she volunteered that.

Q. Did she have anything to say at that time about a continuance or recovery from rheumatic fever?

Mr. Griffinger: I object to the question. It isn't set forth that that is intended to be one of the abnormalties complained of, not that any have been brought out.

Mr. Demarest: The whole case is based on the fact that she said she had rheumatic fever, and didn't have that but had other things.

Mr. Griffinger: Is it contended that rheumatic fever prevented relations between these two?

Mr. Demarest: It is our contention she had progressive arthritis of the types stated by the doctors and that she had a tumor of the uterus and that she did not have rheumatic fever.

The Court: You may answer.

Mr. Griffinger: I want to put it on the record that this action is based on impotency of the defendant.

The Court: (to stenographer) Repeat the question.

Stenographer: "Did she have anything to say at that time about a continuance or recovery from rheumatic fever?"

A. She was very sanguine that it would disappear and she told me not to worry about it, and as she called it, to be a "worry wart." May I continue?

Q. Yes, if you have anything to add. A. By that she allayed any worry I might have had, because of what she explained to me that it was rheumatic fever.

Q. There was something said about the defendant saying that this marriage was wrong for some reason. I am not attempting to put words in your mouth and I am trying hard not to suggest the answer by my question, but after you returned from your honeymoon there was some discussion between you as to the proprieties of the marriage? A. Yes, that was in July 1942.

Q. I would like to straighten that out because I think it was touched on in cross examination and not concluded. What is her story of that? A. It came out of a clear sky to me. Amy told me one evening that she felt very disturbed about the whole affair and she had no taste for its continuance and that it hadn't proved to be what she

hoped it would be and she felt I was unhappy and she knew I was carrying a burden on the score of our differences.

Q. And did the discussion end up by her proposal that she get a divorce? A. Yes, it did.

Q. This letter dated April 13th, part of Exhibit P-2: I call your attention to the following: This letter is from you to her and speaking of her return you said, "You will have to reconcile yourself to many changes if you return north. In other words, Amy, you will either have to take your role as a wife should, and by that I do not mean relationship—we both know too well your ideas on that topic—". Did Amy ever write you or talk to you in any way refuting that wording I have just given to you? A. No, she never did.

Q. Referring to the letter of July 15, 1943, also part of Exhibit P-2, I ask you whether at any time after you had sent that letter the defendant ever, by letter or by word of mouth or in any other way, took issue with the contents? Do you remember what they were? A. May I see it just a second? No, she never did.

Q. I should like to clear up the order and substance of the visits made by you to Dr. Markoff. When the defendant went to see Dr. Markoff the first time, do you think you are able now to say definitely whether you accompanied her? A. The first time I did not accompany her.

Q. You did accompany her on other, subsequent visits? A. I did.

Q. After the defendant went to Tennessee in April 1943 you were asked on cross examination some questions which seem to be confusing, and I now ask you whether after that time you alone went to see Dr. Markoff, and if so, when? A. Subsequent to her trip to Chattanooga I saw Dr.

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Markoff personally in 1943 in the latter part of the year, at his office.

Q. What was the subject matter or your discussion when you saw him on that occasion?

Mr. Griffinger: I object unless it was in the presence of the defendant.

Mr. Demarest: It wasn't in her presence. I asked for the subject matter, not the conversation.

The Court: Just the subject matter. You may answer.

A. The subject matter was Amy's illness and the proceedings I was then contemplating.

Q. Did he give you particulars which at that time were new to you?

Mr. Griffinger: Mr. Demarest is very nicely trying to equalize the testimony of this morning by this method, and I object to it. We should keep the banner of truth flying, but not bring it out of muck and mire.

The Court: (To stenographer) Repeat the question.

Stenographer: "Did he give you particulars which at that time were new to you?

The Court: "You may answer yes or no.

A. Yes.

Q. Did you ever see Dr. Markoff after that visit in 1943? A. Yes, I did.

Q. When was that? A. That was in January, 1944, in the early part of the year, and subsequently in company with you.

Q. What was the object of your visit in January, 1944?

Mr. Griffinger: Now we are going far afield. This certainly isn't relative or material. Dr. Markoff's testimony is here. It was taken for the extent of his treatment and visits made in 1942. Now this man is going into 1944. His purpose is obvious and I don't think the Court should permit it.

The Court: (To stenographer) Repeat the question.

Stenographer: "What was the object of your visit in January, 1944?"

The Court: You may answer.

A. I went then to Dr. Markoff to have him execute an affidavit.

Mr. Griffinger (continues):

Q. Is that the affidavit on file on alimony application? A. Yes, it is.

Q. You say you saw him again, with me? A. I did.

Q. When, about, was that? A. I don't recall exactly.

Mr. Griffinger: We certainly can't be bound by visits to Dr. Markoff after the action is pending. I don't believe this defendant or anybody else should be charged with anything Markoff says after the suit was pending.

Mr. Demarest: I have no ulterior purpose. I just want to show when he went there to straighten out a mess. It is counsel's fault and not mine.

Mr. Griffinger: It is not my fault. It is your client's deliberate falsehoods.

Mr. Demarest (continues):

Q. In either November, 1941, or January or June, 1942, did you have any knowledge or information as to how long an attack of rheumatic fever would be in the course of its healing? A. No.

Mr. Griffinger: I object, unless the witness is qualified as a medical expert. I couldn't tell that myself and I have read up on it in medical books in twenty years in Court.

Mr. Demarest: I am merely showing whether he had knowledge or not which would charge him with a further degree of responsibility in inquiring about it.

The Court: He may answer that.

A. I had no knowledge.

The Court: Did you make any inquiry?

A. No, I did not.

Mr. Demarest (continues):

Q. You said something about your accepting statements as true. Do you recall what you said there? Whose statements? A. Amy's statements.

Q. You accepted Amy's statements as true? A. Yes.

Q. You mention on cross examination about bits or pieces of information. I ask you whether you can say when the complete pattern of these pieces of information seemed to have been reached by whatever you did to find out. A. I would say after I returned from Chattanooga in the summer of 1943. In July, 1943.

Q. There was reference to a condition on your honeymoon and thereafter, when you and the de-

fendant would be in bed in some embrace. I should like to have you tell the Court what you observed of the actions and any statements made by the defendant in respect to these embraces and contacts. A. There was no emotion——

Mr. Griffinger: If Your Honor please: I want this witness on redirect to be confined within the realm of that question. I don't want any observation or conclusion or deduction on this man's part. The question doesn't anticipate what his own conclusion was.

Mr. Demarest: I only want him to say what he could see and hear.

The Court: Particularize rather than generalize. Tell us just what you observed

A. Well, there was no reception on her part whatever; no reciprocation on her part to my embrace. She would eventually just turn aside.

Mr. Demarest (continues):

Q. Was anything said by her about her like or dislike of such things? A. I recall she disliked them.

Q. I am asking whether she said she did. A. Well, she did.

Q. Did she give any reasons? A. No, she did not.

Q. Could you see or feel any demonstration by her of this expressed dislike? A. Well, she refused to have the marital act with me.

Q. I am not speaking of that. I am trying to direct you merely to embraces. You embraced her and say there was no response and I am asking you so you can tell the Court in what way you

found there was no response, by saying what she did. I am trying not to lead you, because I know what you know. A. She was not at all—when I embraced the girl she was just there. There wasn't any emotion displayed by her. She just seemed anxious to get away from it.

Q. Is that all? A. That is all I can explain about it.

Mr. Demarest: All right.

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Re-direct examination of petitioner by Mr. Demarest continued:

Q. Much was made on cross examination about an Edith Bobbett. Will you tell me what you knew from the defendant about Edith Bobbett, and I think there is reference to her in one or more letters in evidence. A. Amy rented with Miss Bobbett an apartment in Miami Beach and seemed to have known her for quite a while and appeared attached to her. Both did. That was evidenced when we returned after our honeymoon. Miss Bobbett telephoned on three occasions—there may have been more—from various cities, Covington, Kentucky and Louisville and I believe Miami. Amy always seemed to have a very strong attachment for Miss Bobbett, for what reason I don't know.

Q. Did you discuss the subject with Amy? A. Yes, I did.

Mr. Griffinger: This is remote and immaterial as to the friendship and acquaintance and admiration for a girl friend with respect to this case.

The Court: As the question implied, it was with reference to a person mentioned

in one of the letters in evidence. I don't know what the purpose is.

Mr. Demarest (continues):

Q. Tell us what the discussion was. A. I asked Amy to stop this friendship. It just didn't seem right to me. It seemed strange that a girl would be calling another girl from hundreds of miles away.

Q. How did that concern you?

Mr. Griffinger: We are dealing with facts. This man may be a peculiar person and his reactions may be different. Is the Court concerned with how it concerned him?

The Court: The preceding question and answer was that he asked his wife to stop her friendship with this person. Now the present question is his reason for it. You may answer.

A. It concerned me that there was evidence on Amy's part that she was very devoted, or had been to this girl and that it was reciprocated on the part of Miss Bobbett to Amy. I sensed that there was more—it seemed to me it didn't gibe that Amy would receive telephone calls from this girl who was out of her life, you might say.

Mr. Demarest (continues):

Q. Do I gather that you sensed that there was an affection for Miss Bobbett by Amy that should have been yours?

Mr. Griffinger: She may have had affection for a kitten. Does the man object to that?

Mr. Demarest: Well, never mind.

Mr. Demarest (continues):

Q. You mentioned Dr. Legato and another doctor whose name was not mentioned, as having examined Amy. Who was that doctor? A. Dr. Dilger. F. G. I believe his initials are.

Q. Of Hackensack? A. Of Hackensack, New Jersey.

Q. Do you know whether those doctors examined your wife internally?

Mr. Griffinger: I think the doctor's testimony or depositions should be had, unless he was there.

The Court: He may answer yes or no.

A. No.

Mr. Demarest (continues):

Q. Did the defendant tell you whether they did? A. I was present at Dr. Legato's examination of her. He did not examine her internally. I was present when I took her to Dr. Dilger and at his regular examination, but he took her into his examining room for what I took to be an internal examination. I talked with Amy on both occasions after leaving the doctor's about the fact that she had apparently not stated the facts to them.

Mr. Griffinger: I object. This man has gone beyond before the Court's ruling. He said he didn't know and then he said, "I sensed he made an internal examination." The witness must be within control of the Court all the time.

The Court: Of course, he has no more right to sense the situation than you or I have. However, there was a conversation with his wife afterwards.

Mr. Demarest: That is why I asked for the conversation afterwards.

The Court: You may recite that conversation now.

A. The conversation afterwards was in both instances that I asked Amy why she hadn't told what I believed to be the truth about her menstrual condition and she said that was up to the doctors to ascertain. She said why should she tell them that. She had reported to both doctors on routine examination that she functioned properly.

Mr. Demarest (continues):

Q. To both doctors? A. Yes.

The Court: When did you see Dr. Legato?

A. In July, shortly after our return from our honeymoon; about July 8th or 10th, 1942.

The Court: And Dr. Dilger?

A. The following day or two days later, on a Saturday.

Re-cross examination by Mr. Griffinger:

Q. Your attorney asked you in respect to these three letters whether Amy had refuted certain statements made in these letters, and you said quickly, "No." Are you positive that the letters you received from Amy at this time, without examining them, that they did not at any time refute those statements A. I don't recall.

Q. If your attorney asked you that question now would you say you do not recall or that there was no refutation? What would your answer be? A. I don't recall any refutation.

Q. When you answered directly to your attorney that there had not been any refutation, that was a mistake, wasn't it? A. I don't feel that at all.

Q. If you don't recall you can't say positively that there had not been or that there had been at this time. Isn't that so? A. Well, I am going to say there was no refutation.

Q. You change your "do not recall" to negative by saying there was no refutation? That is right.

Q. Then you do recall there was no refutation? A. That is to the best of my recollection.

Q. The best of your recollection brings to your mind that there was no refutation? A. That is right.

Q. You said you went to the doctor's in July after the marriage and after you had been with your wife to the doctor's you asked her why she didn't disclose to the doctor something relating to her menstrual period. Isn't that so? A. Yes.

Q. That was within several weeks of your marriage, wasn't it, at the most? A. That is right.

Q. Was there anything prior to those visits to the doctor which created in your mind a menstrual situation enough to give you the line of inquiry that you made of your wife as to why she did not disclose something to do with her menstrual period? A. Yes. She had told me she was irregular.

Q. That was discussed between you and Amy after your marriage, or before your marriage. A. After we were married.

Q. That discussion came about in the usual course between husband and wife? A. I would say that.

Q. It really had nothing to do with the visit to the doctor in July, did it? She wasn't pregnant then, was she? A. She wasn't pregnant at any time.

Q. She hadn't mentioned any menstrual trouble in July, did she? A. Not that I know of.

Q. Then it had nothing to do with the visit to the doctor in July? A. The doctor asked her those questions.

Q. You said you weren't in the room. A. I said I wasn't in the room when Dr. Dilger made the examination.

Q. But you were in the room when he made inquiries? A. Yes.

Q. And he asked about her menstrual periods and she refused to answer? A. No, she said she functioned all right.

Q. And prior to that she told you she didn't function properly? A. Yes.

Q. You upbraided her for that? A. I didn't upbraid her, but we discussed it.

Q. Before the marriage you went to Dr. Donaldson's office? A. Yes.

Q. You and your intended wife were both there? A. Yes.

Q. You had tests made by Dr. Donaldson? A. We had tests made by a nurse.

Q. You talked to Dr. Donaldson, didn't you? A. After the tests were taken he spoke to us.

Q. Isn't it a fact that Dr. Donaldson said you were both physically O. K. and could indeed have a very happy marriage and have a family?

Mr. Demarest: May I ask what Mr. Griffinger is reading from?

Mr. Griffinger: Just from my mind.

Mr. Griffinger (continues):

Q. Didn't Dr. Donaldson discuss those things with you and your wife? A. I don't recall whether he did or not.

Q. Now I'll show you a letter which you wrote your wife—is that your signature? A. That's right.

Q. —on April 24, 1943. You recall that letter, don't you? A. Yes.

Q. Now I'll read this part of the letter: "Remember that day in June when we went up for that Wassie test his direct talk to us?" Prior to that Dr. Donaldson's name is mentioned, and then: "Remember that day in June when we went up for that Wassie test his direct talk to us? We have everything to live for." Wasn't that true that you are talking about here later, just as I have stated? That you could have a happy marriage and family? A. He hadn't examined either one of us so I deny that he said that.

Q. Do you remember, when the matter of rheumatic fever first came about in a conversation with your wife, who was mentioned as having brought to her attention anything like rheumatic fever? Did she tell you? A. I don't know whether she did or not.

Q. Did she tell you that during the time you had the discussion and prior to the marriage that some friend of hers where she was employed had said to her that his sister had had a similar situation in the knee and his sister thought it was rheumatic fever and as a result of that conversation relayed to you that word "rheumatic fever" came into your discussion? A. I don't remember that.

Q. Do you remember that it was not traced to any medical findings? A. I remember only what Amy told me.

Q. And, of course, what you told her? A. As well as I can recollect.

Q. Were you interested in the menstrual angle of your wife in August, 1942? Why do you look at your lawyer and nod to him? A. I didn't. I thought he was rising to object.

Mr. Demarest: I think you are not on redirect now. I don't believe that is a redirect question.

Mr. Griffinger: I brought it out in his questioning where he upbraided his wife.

The Court: It has always been my view here that, particularly in this branch of the Court, extreme liberality should be allowed in the examination of witnesses on direct and redirect and cross and recross; that the examination should simply be kept within bounds. I have permitted considerable latitude so far. You may answer.

A. I knew she functioned during that month from June twentieth.

Mr. Griffinger (continues):

Q. Were you interested at the time you went with your wife to Dr. Markoff? A. I had no concern about it.

Q. Were you or not? A. No.

Q. You had no discussion with your wife similar to the one you had in July, did you? A. No discussion. No.

Q. Were you aware that her cycle had not occurred at the proper time when she went to Dr. Markoff? A. Not that I recall. No.

Q. In the various visits was there any discussion between you and your wife or between you and your wife and the doctor as to her cycle not having occurred? A. No discussion whatever as far as her menstrual cycle was concerned.

Q. Did you, since September, 1942, discuss with either your wife, Dr. Markoff or your sister the taking of this large dose of castor oil? A. I knew nothing of this castor oil as alleged until I heard of it in these proceedings

Q. Did you discuss it with Dr. Markoff? A. No, I didn't.

Q. Did he disclose it to you? A. He didn't disclose anything to me. I didn't even know he was aware of it.

Q. I'll read the testimony and as I read it I'll ask whether it was brought to your attention as to the castor oil. I'll show you, to refresh your memory, your recollection, the photostatic copy of Dr. Markoff's record and ask you to read to the Court what it says here.

The Court: What is the date?

Mr. Griffinger: September 23, 1942.

Mr. Griffinger (continues):

Q. Read that, please. A. "Took castor oil yest." I guess that means "yesterday."

Q. Yes. Notwithstanding the fact that the doctor knew about it and it was on his records and you discussed matters with the doctor on subsequent visits and a year later, you say you never had brought to your attention this castor oil your wife was given or had taken? A. I had no knowledge of castor oil at any time until such as when I told you.

Q. But you had fully discussed with Dr. Markoff, not only alone but with your attorney? A. After the proceedings were started.

Q. You say even at that time you had no knowledge of the castor oil? A. My knowledge came when the girl filed it that way.

Q. On the second occasion you went with her to Dr. Markoff's? A. Yes, and there was nothing said on any occasion about castor oil. I had no reason to know of it.

Q. Even though it was given in your home by your agency through your sister? A. It had not been given through my agency.

Q. You wouldn't recall whether you went out and bought it? A. I did not buy it. I knew nothing of its purchase, if it is as you have alleged.

Esther Elizabeth Strom, 365 62nd Street, Brooklyn, New York, a witness for the petitioner, on her oath, testified as follows:—

Direct examinationm by Mr. Demarest:

Q. You are the sister of Mr. Carlson? A. Yes, sir.

Q. Do you know the defendant, too? A. Yes.

Q. When did you first meet her? A. I met her five or six days before their marriage.

Q. Where? A. Pennsylvania Station the first time.

Q. Did you at any time after the marriage ceremony live in the same house where your brother and the defendant lived? A. I never did. I had my own quarters in Brooklyn.

Q. Did you visit over there at the house at Cliffside Park? Grantwood? A. Yes, I came home to visit my mother and the family.

Q. Did you, from time to time, have occasion to see and talk to the defendant? A. Yes.

Q. Do you remember a conversation you had with her in the summer of 1942? A. I do.

Q. Where was the conversation held? A. At home at Franklin Avenue.

Q. That is your mother's house? A. Yes, in their living quarters; my brother's and Amy's living quarters.

Q. How did the conversation start? A. Well, we were just sitting there discussing things in general when Amy brought up the subject.

Q. What subject did she bring up? A. She brought up the subject of marriage.

Q. What did she have to say to you about it? A. Well, her first question was, was I happily married; she supposed I was because she could tell by our attitude and behavior, my husband and myself.

Q. She said that to you? A. Yes.

Q. Did she talk about her own marriage? A. Then she started to talk and dwell a little bit about sex and marriage relationship. She went on to say that she couldn't quite understand it; she just couldn't see it; and as far as she was concerned marriage was a very nice thing if marriage responsibilities were left out of it.

Q. Did she mean or did she say the sex angle?

Mr. Griffinger: I object to "Did she mean."

Mr. Demarest (continues):

All right. Did she say? A. She said. Yes, sir.

Q. Did she tell you what she thought about the sex angle? A. Well——

Q. Tell us what she said and what her notions and emotions were that you could see, but not your conclusions.

The Court: Tell us what she said and what you observed.

A. Well, she said that the sexual responsibilities certainly were not to her liking.

Q. Did she use those words or are those your paraphrasing of her words? A. Well, if she didn't just use those exact words, there was no doubt left in my mind at all——

Mr. Griffinger: I object to what was in her mind.

Mr. Demarest: All right.

Mr. Demarest (continues):

Q. Did she say whether she wanted or didn't want——

Mr. Griffinger: I object to leading questions.

The Court: Wait until the question is finished.

Mr. Demarest (continues):

Q.——to have sexual relations with her husband?

Mr. Griffinger: The question is: Did she say whether she wanted or didn't want to. It is definitely leading.

The Court: We all appreciate the fact that Mrs. Strom is an important witness.

She has testified that there was conversation. Now it seems to me that the witness should be asked or directed to recite just what the conversation was, to the best of her recollection.

Mr. Demarest (continues):

Q. Have you ever been on the witness stand before? A. No, sir.

Q. Then we will try to heed this admonition. Relate the conversation as you recall it. You don't have to use the exact words, but use them as you recall. Understand? A. Yes.

Q. What was the conversation? A. The conversation was definitely about sex. Amy said that she did not care for it. She showed repugnance towards it. She did. I couldn't help but feel it.

Q. No— A. She said she didn't care for it and as far as she was concerned marriage was a pretty good thing if the sexual responsibilities were not attached to it.

Q. Did she say anything about your brother with respect to that? A. Yes, she did. She volunteered it, for that matter. She said that she was very glad that my brother was considerate and kind about this matter; she would not know what she would have done had she gotten a man who would have been demanding. Those were her very words.

Q. Did she say that she and your brother had had intercourse. A. No, sir.

Mr. Griffinger: Please. I am going to insist that the Court admonish counsel that these leading questions, which have been three or four in a row, should not be allowed.

The Court: With a witness so important in a situation like this, as this witness undoubtedly is and has been from the outset, leading questions will not be permitted. That was the purpose of my suggesting that the witness relate in her own way, to the best of her recollection, all the conversation that took place between herself and the defendant at that particular time. Let's see whether we can't get all of the conversation without further questioning. Give the witness time in which to make her answers. Don't rush her. Understand what I mean?

Mr. Demarest: Yes, but I don't think the last was a leading question. My question was whether the subject was discussed.

The Court: (To stenographer) Repeat the question.

Stenographer: "Did she say that she and your brother had had intercourse?"

The Court: What was your answer?

A. No.

The Court: What does "no" mean?

A. No intercourse.

The Court: That she said there had been no intercourse?

A. That is right.

Mr. Demarest (continues):

Q. Was there more to the conversation than you have up to this point testified to? A. Well, yes, there was in this way: That she said children

didn't appeal to her; she was nervous; she didn't know how to handle them and she said repeatedly that she was nervous about them and she felt better if they weren't in her presence.

Q. Anything more about their relationship? You think over the conversation and as things come to you you tell us, because I want to get as much of the conversation as possible and still I don't want to lead. A. Well, as I said before, the whole conversation centered around the fact that Amy just shirked her marital responsibilities and she just was very happy that she was not called upon to perform them more than she was; and she was very happy that my brother was of such a nature. She made that very emphatic to me.

The Court: How long after the marriage did that conversation take place?

A. That was in August, 1942.

The Court: The marriage was in June, 1942?

A. June 20th. It was about the middle of August.

The Court: Preceding that time, how often had you seen and talked with the defendant?

A. Oh, I had seen her quite often.

The Court: Once a week?

A. Yes, sir, because my husband and I used to come home and go over to the pool and swim.

The Court: Is that the first conversation you and she had in solitude?

A. No, we had had other discussions, but not as deep as that.

The Court: All right.

Mr. Demarest (continues):

Q. Did any of these other conversations have to do with her actions and reactions with respect to marriage? A. They definitely did.

Q. What were those discussions? A. Well, as I said before, it was in a lighter vein, about marriage and home and responsibilities like that. Children.

Q. What did she have to say about such things as children in addition to anything you may have said before? A. Well, children were pretty nice things to have around at a distance. They made Amy nervous, very nervous, and so forth.

Q. Did you have occasion to observe whether or not there were acts of affection between your brother and Amy in your presence? A. There were no acts of affection.

Q. On the part of either? A. Well, when my brother came home and he would try to kiss her she would offer her cheek.

Q. Anything else? A. Yes, there was never any emotion shown; never any. Why, for a newly married couple, especially for a bride—

Mr. Griffinger: Are we going to get an identification tag?

Mr. Demarest (continues):

Q. I ask you again whether this was as to both parties, your brother and Amy, or as to one party? A. Well—is that yes or no?

Q. Was it one or both that showed no emotion and acted without affection? Did one or both of

them act that way? A. I would say in the beginning my brother—well, he came home and as I said, he kissed her and she offered her cheek and after a while—he didn't stop kissing her. No. But I could see he was puzzled.

Q. Did you go with the defendant to Dr. Markoff's office September 23, 1942? A. I did.

Q. I understand you suggested Dr. Markoff as a physician? A. I did.

Q. How did the visit to Dr. Markoff come about? A. Amy was in very poor health, principally her knee which was swollen and hurt to walk. She was anemic and in a general run down condition; loss of weight. If it wasn't noticeable to anyone else, it was to me.

Q. Did you talk to her about it? A. Yes.

Q. When? Before the visit? A. She definitely had not been feeling well and we discussed it.

Q. What was said between you and Amy on the subject? A. About Dr. Markoff's visit or going there?

Q. Leading up to it. A. I came home and Amy told me there was an irregularity of her menses.

Q. Did she say for how long? A. That had been for over a period of time.

Q. Did she say that? A. That's right.

Q. Did she say for how long? A. She didn't say a number of years, but my impression was—

Q. Did she say anything about years? A. No.

Q. What did she say about anything that had to do with the time of this irregularity? A. She said a period of time.

Q. That led up to some more discussion, did it? The fact that she was irregular? A. Yes.

Q. What was that discussion? A. She was irregular and she just didn't know what to think about it.

Q. Did she know what to do about it, or say she did? A. Yes.

Q. What did she say about that? A. She knew about it to the extent that caster oil could be taken and used effectively.

Q. What happened about it? A. So I got the castor oil.

Q. Why did you get the castor oil. A. Why did I get it? Because Amy's leg was in such condition she had difficulty to walk. That is the reason.

Q. Did you suggest the castor oil? A. No. she knew about the castor oil being used to bring on a delayed period for many reasons.

Q. Did you offer to get it? A. She asked me to get the castor oil because she wasn't able to go get it. The store was about three blocks away.

Q. Did you get it? A. Yes, I did.

Q. What did you do with the castor oil? A. I got it and gave it to Amy and she took it.

Q. Did she take it in your presence? A. No, she went in the bathroom.

Q. How much castor oil did you get? A. I do not recall.

Q. Was it in a bottle? A. Yes, sir.

Q. Do you recall how much you paid for it? A. No, I have no recollection.

Q. Did you ever find out from Amy how much of it she took? A. No.

Q. Did you ever find out from any other source than Amy how much she took?

Mr. Griffinger: I object.

The Court: Yes or no?

A. No, sir.

Mr. Demarest (continues):

Q. How long was that before the time you went to see Dr. Markoff with her? A. That was one day before.

Q. Were you present when Dr. Markoff took her history and made his examination? A. Yes, sir.

Q. Throughout? A. Yes, sir.

Q. Did you hear the questions and answers? A. I heard all of them.

Q. Were there questions having to do with the regularity of her menstrual periods? A. Yes, sir.

Q. What were they? A. Well, when he took her general history he asked her about her periods, are they regular or irregular, and she answered, "Irregular."

Q. Were you present when he conducted his internal examination? A. Yes, sir.

Q. Did he ask her questions about that? A. Yes, sir.

Q. What did he ask her about that? A. He asked her whether she had ever been examined internally by any other doctor and her answer was, "No."

Q. Did he examine the knee? A. Yes, sir.

Q. Which was first, the knee or the other? A. He looked at her hands when he came in and he diagnosed it as arthritis immediately. Hypertrophic arthritis.

Q. Did he look at her knees? A. Very much so. Through a floroscope.

Q. Did he make a diagnosis of that, that you heard? A. I don't understand.

Q. Of the knee? A. The knee was in connection with the arthritis. In fact, he only looked and he gave the diagnosis.

Q. Were any questions asked about a supposed pregnancy? A. There was a question asked about irregularity.

Q. Did the doctor say anything about a pregnancy? A. No, he didn't ask anything about any pregnancy.

Q. After that examination was over, you and Amy went out? A. Yes, sir.

Q. Did you have a conversation with her then? A. Well, yes, we did, sir. We just stepped outside the doctor's office and before I had a chance to say anything to Amy she turned to me and said, "Dr. Markoff had a lot of nerve asking me whether I had ever had an internal examination, because I had. That was in Florida and I went with Miss Bobbett and at the time the doctor revealed to me that I would need an operation." For a minute I was so shocked—

Mr. Grifinger: I object to the witness' acting.

Mr. Demarest (continues):

Q. She told you what that doctor in Florida had said? A. Yes.

Q. Continue with what she said beyond that. A. She said he had said she would need an operation.

Q. You just said that. A. And she again expressed the fact that she thought Dr. Markoff should not have inquired as to that point.

Q. I want to go back to the August conversation and ask you if you recall in that conversation anything having to do with Cincinnati? A. Yes, sir.

Q. What was that all about? A. Well, Amy told me that when she was in Cincinnati she had

this apartment with some girl and she had this date; made this date.

Q. With whom? A. With some man that she had met through her office; and at the last minute he called up and said he was very sorry, he had to break the date. I believe they were going out to dinner and for an automobile ride.

Mr. Griffinger: May I have the year, at least?

A. It was when Amy was in Cincinatti. I don't know what year that was.

Mr. Griffinger: That is Cincinatti, U. S. A.?

Mr. Demarest: Ohio.

Mr. Griffinger: I object unless it is connected with this cause of action. I don't know how far back this supposed statement is going.

A. I can tell you approximately, on second thought. Probably sometime in 1939.

Mr. Demarest (continues):

Q. All right. There was a date with some man and it was to be called off for some reason. What did happen? A. He came to the house.

Q. What did she tell you happened when he came to the house?

Mr. Griffinger: Just a moment. I don't know what extent the witness is going to but I am going to insist on the petition being strictly adhered to. If this is anything to attempt—whatever is attempted and it is not in the allegations or these counts as

to abnormalities or as to the psycho-physical condition, I object.

The Court: What is the purpose of this line of questioning?

Mr. Demarest: It is not my purpose to prove any unlawful or illicit act. It is my purpose to elicit from this witness the conversation as related to her by the defendant as to what reaction the defendant experienced as a result of some occasion or occurrence at Cincinnati with someone else. I have no idea of slinging any mud.

The Court: You can't use that any more than you would have the right to show that one you have charged with adultery with a named correspondent had committed adultery with one not named.

Mr. Demarest: I don't like to discuss this in the presence of the witness.

The Court: Then let counsel come into Chambers.

Conference In Chambers—The Court, Mr. Demarest and Mr. Griffinger.

Direct examination of Esther Elizabeth Strom

Mr. Demarest (continues):

Q. What did the defendant tell you about the Cincinnati situation? We have gotten to the point where you said the date was first broken and then kept by some man coming to her apartment. A. Yes.

Q. What happened? A. He came to the house and they were sitting around talking for a while and he started to make love and advances and I suppose that went on for a period of time and

then he threw her on the floor and was persisting and just at that moment her roommate walked in.

Q. What did that have to do, in her conversation with you, with her husband? A. You mean my impression?

Mr. Griffinger: No.

Mr. Demarest (continues):

Q. No, what did she say the result of that experience was, if she so stated, with respect to men or her husband? A. She didn't state anything in particular in connection with her marriage about that, but—

Q. Did it have some effect upon her own conduct?

Mr. Griffinger: We are confined to the conversation.

Mr. Demarest (continues):

Q. Did she say it had had an effect upon her own conduct? A. Yes, she did.

Q. What did she say? A. She said she had a very bad nervous, mental reaction which a few months later she had to leave Ohio and go back home. She had a nervous breakdown as a result of it.

Q. Did she say whether or not she had continued relationship with this or any other man after that?

Mr. Griffinger: I object.

Mr. Demarest: "Whether or not," I said.

A. No, sir.

Mr. Demarest (continues):

Q. After that was discussed did you continue to discuss the conduct between her and your brother in their marital status? A. At that time, you mean? That was the concluding story.

Q. I have some other things on my notes that you told me and haven't said. I am wondering whether you can recall them? A. About this same situation, you mean?

Q. About the marital situation between the two of them. A. Well, she said that she felt that she probably never should have gotten married because her slant on marriage from that angle of it was not right and she knew it wasn't right. She said she knew it wasn't right.

Q. Did she give you any particular examples of why she had arrived at that conclusion? A. No.

Q. Do I understand that this has to do—this attitude she discussed with you—had to do with the act of sexual intercourse? When you mention the "angle" is that what you mean? A. Yes, sir.

Mr. Griffinger: I don't understand the question myself.

Mr. Demarest: She said, "From this angle" and I wanted to know whether she meant from the standpoint of sexual intercourse. That is why I asked, because she was using a word that was not definite.

Mr. Demarest (continues):

Q. At any time prior to the defendant's departure in April 1943 for Tennessee did you tell your brother of this conversation? A. No, sir.

Q. Did you tell him of it afterwards? A. I told him after he came home from Tennessee.

Cross Examination by Mr. Griffinger:

Q. How long have you been married? A. I've been married ten and a half years.

Q. In August 1942 was the first time you had had this confidential talk with your sister-in-law? A. No, sir.

Q. Was there any discussion before that? A. Yes, sir.

Q. When before that? A. Well, between June twentieth and August.

Q. Was it along the same lines? A. Yes.

Q. You talked about sex? A. Yes, sir.

Q. The same conversation? A. Oh, it wasn't the same conversation.

Q. How long before August did this conversation take place? A. I don't quite understand.

Q. I asked whether there had been similar conversations between June 20th and this discussion you say occured in August. Was there talk like that before August? A. There were several.

Q. How many would there be between June and August? A. I certainly would say four or five.

Q. They all dealt with sex? A. Sex; marriage; home; children.

Q. When was the first conversation in respect to marital relations between man and wife? A. That had been touched on before August.

Q. Why did you say to the Court that this particular conversation took place in August? A. Because I remember very well that I was home at the time trying to give a little assistance because Amy was very incapacitated as far as health was concerned.

Q. You recall that same conversation took place before August? A. Not the same—

Q. Similar, all about marriage and the relationship between man and woman? A. Different things.

Q. You had discussed these intimate details in August with Amy? A. Yes.

Q. And before that? A. Three or four times.

Q. The reference to August had no significance to the other conversation because they were along the same line prior to August? A. No.

Q. This wasn't the first time you had a conversation dealing with the most intimate details between Amy and her husband? August was not the first time, was it? A. No.

Q. You said that Amy told you that she did not care for "it." When you used the word "it" you were talking about the sexual act, weren't you? A. Did I use the word "it"?

Q. Yes. Is that what you were referring to when you said Amy told you that she did not care for "it"? When you made the statement, "it" would mean sexual intercourse? A. It would mean anything that was connected with sexual intercourse.

Q. She told you that in August, you said? A. That was the first time that we had any deep discussion about it.

Q. That was almost two months after their marriage? A. Yes, sir.

Q. It was referring to the sexual act, wasn't it? A. It was referring to marriage and everything that had to do with marriage. It wasn't referring just to the sexual act.

Q. Your exact answer was that Amy told you in August that she "did not care for it;" that the sexual responsibilities were not to Amy's liking. When she spoke to you in August she was talking about the sexual act? A. We finally got to that.

Q. And she was talking about the sexual act, "it," that she had had with your brother. A. She wasn't referring to that. She didn't state that she had had any relations with my brother.

Q. And she did not state that she did not have did she? A. She didn't say anything about it.

Q. But she said she did not like "it." Isn't that what you said? A. She said she did not like anything connected with sex.

Q. That was two months after the marriage. A. Yes.

Q. Nothing was said during that conversation as to the absence of any sexual relations between your sister-in-law and your brother, was there? A. The absence?

Q. There was nothing said as to whether there had or had not been any sexual act between them? A. No, she didn't say there had or hadn't been.

Q. You also said that Amy said to you that she had been called upon to perform the sexual act more often? A. I didn't say that.

Q. Didn't you say that she said she was called upon to perform the sexual act more often? A. No, she said she was very glad my brother was a considerate husband.

Q. And that he did not call upon her to perform the act more often? A. She said she was glad he was not the more demanding type.

Q. Whether it was more often or not you don't remember, do you? A. Not to my recollection.

Q. Your brother and his wife lived at that home in the same house your mother lived in, didn't they? A. Yes, sir.

Q. Did your sister-in-law get along pleasantly with your mother? A. She did.

Q. There were some difficulties, though? A. Not that I know of.

Q. How often were you there? A. I visited once a week.

Q. In this conversation you had with Amy you became confidential too, didn't you? A. No, I didn't.

Q. You didn't exchange any confidences? A. I did not.

Q. You were talking about a very intimate subject. A. Yes.

Q. You had been married eight and a half years prior to that? A. Yes.

Q. Was the conversation entirely one-sided? A. It was one-sided to this extent: That Amy said she had got the impression that I had a very fine and considerate type of husband. That was as far as the discussion of my personal life went, because I had nothing to reveal and say, because I don't discuss it.

Q. Without your disclosing any confidence or details Amy just unfolded this entire discussion to you? A. Yes, sir.

Q. There was nothing said about the nature of your married life? A. There was no reason to.

Q. Nothing said about your marital intercourse with your husband? A. Nothing at all.

Q. Without that suggestion you want the Court to believe as you stated that Amy immediately unfolded to you the intimate details of her relations or thoughts on sexual intercourse? That right? A. As I say, she said she had observed that my married life was what it should be and that was all that was discussed as far as I was concerned.

Q. How did she make that observation if you hadn't talked about it? A. Because she could see by my husband's and my actions.

Q. From the day of the marriage until this discussion and prior to the discussion there was no argument or open fight between your brother and his wife, was there? A. Not to my knowledge. I don't know because I wasn't home.

Q. When they were there they were on perfectly happy terms except for your impression of the kiss? Outside of that nothing occurred that gave you the impression that they were unhappy? A. It certainly wasn't any impression that there was a great deal of reciprocation on Amy's part.

Q. You brother was perfect in his attentions? A. My brother had faults.

Q. But outside of your translation of the manner of osculation, the manner of your brother and his wife when you were there was on a very desirable and agreeable basis? They didn't throw things or use swear words? They were a contended couple except for your description of the osculation between they? A. Well, they certainly didn't act like newlyweds.

Q. Did Amy say she and her husband were not happy at any time from June to August? A. Amy—

Q. Yes or no, please. A. No, she didn't.

Q. She didn't say they were unhappy? A. No, she didn't say that.

Q. Still, without you disclosing the intimate details of your marital relationship, you say that Amy disclosed all that you have stated on direct examination, voluntarily? A. She did.

Q. In September you said she couldn't go to the store, which was about three blocks away, for this bottle of castor oil? A. Not that particular day.

Q. But the next day she went to the doctor's all the way into Brooklyn? A. She did.

Q. That is more than three blocks. A. She only had one block up to the corner.

Q. And she had to go from the subway to the doctor's? A. She certainly didn't have extra energy for an extra walk.

Q. The distance from your mother's home to President Street, Brooklyn, was certainly more than three blocks from your mother's home where you got the castor oil? A. Of course.

Q. The next day she went to the doctor's? A. Yes.

Q. You have been and still are a nurse? A. I am not practicing.

Q. You were at one time? A. Yes.

Q. In the course of your practice you were with Dr. Markoff? A. I was not. I was on Dr. Markoff's case and took care of his baby for seven weeks. He called me several times and wanted me to go on cases but I couldn't accommodate him. I was on registry.

Q. You took care of this child for him? A. Yes, his baby.

Q. No other cases? You sure of that? A. Yes.

Q. Were you a patient of Dr. Markoff's, too? A. I was.

Q. He had treated you for several things prior—A. He hadn't treated me for several things at all.

Q. Dr. Markoff, in answer to a question in respect to your being associated with him in an employment status—Page 19—says you were a nurse on cases. A. As I said, I was sent from the registry to his home and I was there seven weeks and he called me up several times but I could not accommodate him. I met him on cases but they weren't cases of his.

Q. Was he wrong? A. He certainly is.

The Court: Maybe you should have the question and answer on the record.

Mr. Griffinger: Question: "Now, you had treated Mrs. Strom prior to that or known her? Answer: "Yes, sir." Question: "In an employment status?" Answer: "As a nurse on cases, and also she was a patient of mine."

Mr. Griffiinger (continues):

Q. At the time the castor oil was obtained by you did you agree with Mrs. Carlson that if there was a delay in her menstrual cycle that castor oil would bring about the period? A. Well, it is a well known fact.

Q. Yes, it is a well known fact, and at that early stage it is also used, as far as you know, in the event a woman feels or believes she may be pregnant? A. Doctors often recommend it to be used to bring on a period regardless of whether there is a pregnancy present.

Q. Do you know when Amy had had her last menstrual period prior to that September? A. No.

Q. Did Amy, immediately prior to your obtaining this castor oil, express in some way or other the thought that she might be pregnant? A. She expressed the anxiety that she was three to four days overdue.

Q. It was a bottle of castor oil you got, wasn't it? A. I believe so.

Q. She consumed the entire bottle, didn't she? A. I don't know, because I wasn't there when she consumed it.

Q. But you purchased the castor oil to eliminate the condition which Amy Carlson was concerned about? A. I purchased the bottle of castor oil.

Q. As a result of an expression of anxiety on Mrs. Carlson's part you immediately went to the drugstore and got castor oil to meet the stiuation? A. Yes, sir.

Q. Did you discuss any of your own personal affairs with Amy?

Mr. Demarest: The question was asked and answered before.

Mr. Griffinger (continues):

Q. Did you discuss the fact that you had been a nurse or did she know it before that time? A. She knew.

Q. Did you disclose that you were experienced in those things concerning the failure of the menstrual period to come around on time? A. My knowledge of nursing would most naturally include that.

Q. Have you any children? A. No, I haven't.

Q. The same thing Dr. Markoff attended Amy Carlson for you had also, didn't you?

Mr. Demarest: It is immaterial what Dr. Markoff may have attended this witness for, or what, if anything, this witness needed attention for from any physician. It has no bearing upon the issue here.

Mr. Griffinger: This witness has been offered by the petitioner to carry the burden imposed upon him and she tells of unsolicited conversation from the defendant which Your Honor must realize is an expression of confidence. I feel I am allowed

to bring out the conversation with this witness in respect to such matters as we set forth in our pleadings, going to the very vitals of this case and through that agency to show that through the sister of the petitioner this pregnanecy was eliminated.

Mr. Demarest: What pleadings are you talking about?

Mr. Griffinger: I am referring to his pleadings. Mrs. Strom testified she took the defendant to Dr. Markoff. This is part of your case. We charge that. Way to Brooklyn.

The Court: I understand that, but I don't see how that question could be relevant, particularly because it does not go to credibility. That is one of the purposes of cross examination; in fact, one of the outstanding purposes of cross examination. The witness testified she disclosed nothing to this defendant concerning her own marital affairs. Am I right about that?

Mr. Griffinger: That is right. That is why I am attacking her credibility.

The Court: I don't think you can attack it now. If you claim there was such a conversation, that will have to come through testimony of the defendant.

Mr. Griffinger: The question, of course, is, "Did Dr. Markoff attend you for the same condition?" and Dr. Markoff's testimony is in in this case and he testified it was for the same thing that he took care of Mrs. Storm for.

The Court: The objection must be sustained. If that testimony is to be brought

out you may bring it out through some other means.

Mr. Griffiinger (continues):

"When you came to visit your sister-in-law in September was your brother there? A. When I came to visit her?

Q. Yes. A. What about?

Q. The day before going to Dr. Markoff's A. No, my brother was over in the bank.

Q. Was he there that night? A. He came home from work. Yes, sir.

Q. You were still there, weren't you? A. I was still there. Yes.

Q. He knew you were taking your sister-in-law to Dr. Markoff's, didn't he? A. No, he didn't.

Q. Are you sure of that? A. I am positive.

Q. You are positive? A. Positive. Never any more positive in all my life than I am of that.

Q. You were taking your sister-in-law to Dr. Markoff the next day without your brother knowing anything about it? A. Yes, sir. Yes, sir.

The Court.: Why?

A. Why did I take her to Dr. Markoff?

The Court: Why did you keep that information from your brother?

A. Well, she had an irregularity of her periods.

The Court: Go on.

A. And she expressed concern about that and then she did not feel well. She had a general run-down condition and, if I may add, I never tried to interfere as far as their relations were concerned.

Mr. Griffinger: The question is, why the secrecy of the visit?

The Court: She had a general run down condition—

A. Yes.

The Court: Had there been any discussion as to that phase of it between yourself and the defendant and your brother?

A. No, sir.

The Court: No discussion as to the defendant's run down condition?

A. No.

The Court: No discussion as to the irregularity of her periods? That right?

A. Yes, sir.

The Court: Then what was your reason for not disclosing this prospective visit? Was it a reason the defendant had?

A. Well, the girl, Amy, said, "We will go over to Dr. Markoff and see what he has to say."

The Court: That doesn't answer my question. Did the defendant express a reason for your brother not knowing about this trip or did you have a reason for not disclosing to him that the trip was to be made?

A. No, Your Honor.

The Court: Neither of you had any reason, as far as you know, for not telling your brother about it. Is that right?

A. Yes.

Mr. Griffiinger (continues):

Q. Amy had not known anything about Dr. Markoff other than what you disclosed to her? That so? A. She had heard me mention his name. Q. She hadn't been to see him before? A. She never had seen him.

Q. Your brother had provided another doctor before that, hadn't he? A. She went to several doctors.

Q. You knew he had been providing this medical attention for his wife? A. Yes, sir.

Q. Still you didn't tell him that night you were taking his wife to Dr. Markoff? A. No, because Amy had expressed a wish to go to Dr. Markoff.

Q. You still didn't tell your brother? A. No.

Q. It was because, you say, her period had become irregular, then? A. And a general run down condition.

The Court: When did anybody tell your brother that this trip had been made?

A. Amy told him.

The Court: When?

A. I don't know that.

Mr. Griffiinger (continues):

Q. Long after? A. Within, I guess, a period of a week.

Q. Were you there when she told him? A. No.

Q. How do you know she told him in a week? A. Well, possibly in a telephone conversation or I was home.

Q. You were home and she told you she hadn't told your brother until a week after that visit? Is that right? A. She didn't mention anything to me.

Q. When did your brother know for the first time she had been to Dr. Markoff? A. Within a week, I believe, as far as I recall.

Q. Not less than a week? A. As far as I recall. I wasn't home.

Q. Did you tell him at any time? A. No, sir.

Q. Did you tell at any time after that? A. As far as I recall, no.

Q. Your brother knew that you knew Dr. Markoff, didn't he? A. Yes.

Q. He knew you were a patient of his, didn't he? A. That I don't know if he did or not.

Q. He knew you had been on that one case with Dr. Markoff? A. On his case. Yes.

Q. There was no conversation prior to that first visit between you and your brother about taking Amy to Dr. Markoff? A. Dr. Markoff's name had come up.

Q. Where? A. Between the three of us, about her run down condition and loss of weight.

Q. Your brother said he didn't know Dr. Markoff under any circumstances prior to the visit made by Amy. A. Yes.

The Court: Do you recall my asking you a short time back if there had been any discussion between the three of you as to the defendant's run down condition? You

said, "No." Remember that? A few questions back?

. Yes.

ADJOURNMENT

AUGUST 16, 1944

Cross examination by Esther Elizabeth Strom (continued) by Mr. Griffinger:

Q. Mrs. Strom, after the conversation which took place before the visits to Dr. Markoff did you have any further conversations with your sister-in-law along the same lines? A. Not that I can recall.

Q. You said you didn't tell your brother anything about it until after he returned from Tennessee. That right? A. Yes.

Q. And although he had gone with his wife to Dr. Markoff's on several occasions you still didn't talk to him about having taken your sister-in-law to Markoff? A. No, sir.

Q. You didn't talk to him about it at any time after the visits to Dr. Markoff had stopped? A. No, sir.

Q. Did you talk to your mother about it? A. No, sir.

Mr. Demarest: I am a bit confused. When counsel said in one of his earlier questions, "Talk about it" I assumed he was referring to a conversation which was just mentioned. These later questions it appears now that he is talking about whether she told her brother or mother

about Dr. Markoff. May we clear that up?

Mr. Griffinger: The first "it" I referred to is where it is alleged by this witness that Mrs. Carlson, the defendant, said to her in this session of confession that she "did not care for it." The last few questions have been referring to what I said, the visit to Dr. Markoff. I didn't say "it." "Did you tell your brother about the visit to Dr. Markoff" and she said, "No." That right?

A. That is right. I didn't tell him.

Mr. Griffinger: Then I asked whether she told her brother about the visit to Dr. Markoff after he made a visit and she said, "No." Now I ask, "Did you discuss the matter with your mother?" I think the witness understood my question.

The Court: This is about the Markoff incident?

Mr. Griffinger: Yes.

Mr. Griffiinger (continues):

Q. Did you tell your mother? A. No.

Q. You did not disclose it to anyone other than the conversation with Amy and yourself. A. No, sir.

Re-direct examination by Mr. Demarest:

Q. Did you know whether or not your brother had gone to see Dr. Markoff with the defendant a few days after the first visit? A. I knew.

Q. When did you find that out? A. Within a week of the time.

Q. You said on your cross examination something to the effect that Amy didn't say that she

and your brother were unhappy. What did she say? A. Well, she seemed to be reproaching herself—

Q. No, what did she say?

Mr. Griffinger: If Your Honor please: That conversation was fully given on direct and this is the same question again. I think it is repetitious. I don't want to bar anything from the Court's consideration, but Counsel made a previous objection about saving time. There should be some end to this. It means I have to cross examine her again.

Mr. Demarest: I am trying to clear up a question because the other side asked a question which was answered by the witness to the effect that Amy didn't say they were unhappy and then it was left lying there without any followup question to find out what was said on that subject.

The Court: I'll permit it for that reason.

Mr. Demarest (continues):

Q. "She didn't say they were unhappy, but I want to know what she did say about it."

Mr. Griffinger: If at all.

A. She seemed—

Mr. Demarest (continues):

Q. No. If you can't give her words give the substance of her words, but not what she seemed to say. It is the Court's business to decide how she seemed and your business to give a resume of the words she used. A. She said that she was very

happy and glad that my brother was considerate and kind when it came to such matters and that he did not force himself upon her. He expected her, naturally, to have certain marital responsibilities but she expressed again several times that she was happy that she did not have a man who forced himself upon her and expected such things.

Q. This all arose from the subject of whether they were happily married. A. Yes.

Q. You referred in your cross examination to a statement by Amy to the effect that she didn't like "it." I don't know what more you said. I have notes I made. That she didn't like "it." Will you say what you intended by the use of that word "it"?

Mr. Griffinger: That is strictly your problem. There is no translation allowed of a witness.

The Court: I hardly think it is a fair question. The witness' explanation of that might be different from what the defendant meant.

Mr. Demarest (continues):

Q. Did Amy refer to any specific matter or subject as you have testified to by the use of the word "it"?

Mr. Griffinger: If Your Honor please: I urge my objection to the attempt to have this witness transpose on Your Honor's good judgment as to what can be inferred or interpreted by this Court as to that conversation, assuming the Court believes it took place. Certainly this witness could say to Your Honor, "This is what I believe

or suppose or presume this defendant meant."

The Court: I don't think the question calls for that. (To stenographer) Repeat the question.

Stenographer: "You referred in your cross examination to a statement by Amy to the effect that she didn't like "it." I don't know what more you said. I have notes I made. That she didn't like "it." Will you say what you intended by the use of the word "it"?

Mr. Demarest: What did she refer to?

Mr. Griffinger: Now, I think counsel should ask, "What were her words?"

Mr. Demarest (continues):

Q. All right. What were her words. A. That she did not care for marital relationship.

Q. Period? A. Yes.

Q. That was all? A. Yes.

Re-cross examination by Mr. Griffinger:

Q. You want the Coourt to believe that in this conversation in which you did not disclose any of the details of your marriage life with Mr. Strom, as you say, that you didn't in any wise discuss any relationship between you and your husband; that Amy Carlson volunteered, without encouragement or conversation on your part, and as a result of that conversation used the words "marital relationship" with Carl? A. Yes, sir.

Q. Was the word "intercourse" used? A. Not to the best of my recollection.

Q. Are you positive that the words "marital relation" were used? A. Marital relationship.

Q. Was that referring to intercourse. A. Yes.

Q. How? How was the statement made by Amy Carlson using the words "marital relationship," referring to intercourse? Were there any other words used explaining marital relationship a little more clearly? A. I do not recall.

Q. Was the word "bed" used? A. I do not recall.

Q. Was the word "bedroom" used? A. I don't recall.

Q. You don't recall that? A. No.

Q. Was the word "contraceptive" used? A. No, sir.

Q. Was the word "embrace" used? A. Yes, sir.

Q. Was the word "fondling" used? A. Yes, sir.

Q. Was any reference made to the disrobing of each of them? A. No.

Q. Was there any discussion as to the preliminaries before getting into bed or before they retired for final sleep? A. No.

Q. So all she said, as you want the Court to believe, to you was, "I do not care for marital relationship." That right? A. Yes.

The Court: How long did this conversation last?

A. About an hour, sir.

The Court: About an hour?

A. Yes, sir.

Mr. Griffinger (continues):

Q. Are you positive, Mrs. Strom, that Amy Carlson was talking about marital relationship be-

tween your brother and herself? A. She was talking about marital relationship and I assumed it was between my brother and she.

Q. For that hour she was talking about that? you just answered the Court that it was about an hour. A. Yes, about an hour.

Q. And all the conversation was during that hour. A. Yes.

Q. And it was confined to the relationship between Amy and your brother. That right? A. Yes, sir.

Q. And you did all the listening, did you not? A. She asked me a lot of questions.

Q. You didn't answer her, though, did you? A. They were questions of a personal nature.

Q. Did you answer them? A. I did not.

Q. Notwithstanding the fact that she asked you a lot of personal questions and you didn't furnish answers, Amy was telling the sister of her husband those intimate details you have recited before? A. Yes, strange as it may seem.

Q. For a whole hour she was discussing that relationship? A. Yes, sir.

Q. That was the complete subject matter of that hour's talk? A. It centered around that. Yes.

Q. During that time Amy did not use any other reference to the physical act between husband and wife other than "marital relationship." That right? A. She said she did not care for the sexual act.

Q. She also said she did not care for "it?" A. Yes, sir.

Q. When she said she did not care for "it," that was after you were talking for a while, I suppose about the sexual act. That right? A. Yes, sir.

Q. Did you advise her or did you just listen through that hour? A. She didn't ask for my advice.

Q. But she did ask you a lot of questions, didn't she; a great deal of personal questions. A. About myself.

Q. Yes, and you had been married about eight and a half years at the time? A. Yes.

Q. Although she was asking you personal questions about yourself which dealt with married life you didn't furnish the answers, did you? A. No.

Q. What was the nature of the advice she was seeking? A. I don't know.

Q. You were interested in your brother, in his welfare, weren't you? A. Frankly speaking, I didn't give it very much thought.

Q. You didn't care?

Mr. Demarest: She didn't say that.

Mr. Griffiinger (continues):

Q. Were you concerned enough to talk to your brother about it. A. No, sir.

Q. You never spoke to your brother about it? A. No, sir.

Q. You never had any conversation with him at any time up to the present concerning this talk with his wife?

Mr. Demarest: The witness answered that question so many times, that she told him on his return from Tennessee.

Mr. Griffinger: This witness has changed her answers so many times I want it again.

The Court: You may answer, finally.

A. No, not until after he returned from Tennessee.

Mr. Griffiinger (continues):

Q. Did you ask Amy any questions about her marital relations in the discussion? A. No, sir.

Q. During the conversation you put no questions to her at all? A. I do not recall.

Q. She did all the talking? A. Most of it.

The Court: What prompted the conversation as to the Cincinnati incident?

A. That came at the very last.

The Court: What proceded it.

A. We were talking about men in general and their nature and makeup and outlook on life.

Mr. Griffinger (continues):

Q. When she told you about the Cincinnati incident were you curious any further? Did you ask any more questions? A. I didn't have to ask.

Q. When she told you what had occurred it stopped right there because you didn't ask any more questions? A. I did not.

Q. Did you tell her that you were proud of the fact that she was protecting her virtue? A. No, sir.

The Court: What conversation was there as to men in general?

A. Well, Amy said that she thought on the whole that men were inclined to think more of sex than anything else and that marriage and the normal outlook on marriage—well, she just did not seem

to have that normal outlook on marriage, and that —oh, well——

Mr. Demarest: Will you say it, please?

A. Well, that men were just scoundrels, in other words.

The Court: As I recall your answer, back three or four questions, your answer was: "We discussed men in general". Now you have given the defendant's story. What did you say about men in general?

A. Well, I said I thought when a woman got married she had to assume certain responsibilities as to the home and to thoughts or raising a family and as to the welfare and responsibility of her husband, and that it was very important to keep a marriage going; to have understanding.

The Court: Did the defendant make any answer to your statement that you thought a marriage should be kept going, and what was your reaction to that?

A. Well, she said the marriage should be kept going if there weren't marital responsibilities associated with it.

The Court: What, if anything, did Mrs. Carlson say about keeping this marriage going?

A. She didn't say anything.

The Court: How did the question of keeping the marriage going come up? How did that become part of the conversation? What did it have reference to?

A. Just the general marriage; anyone's marriage.

Mr. Griffinger (continues):

Besides talking about her relationship with your brother you went into a general discussion about all men, all male gender in general? A. Yes.

Q. You still did not express any views or opinion? A. I told Your Honor what I said.

Q. All you said was that when you get married you assume marital responsibilities? A. Yes.

Q. But in response to the statement that men are scoundrels, you didn't affirm or deny that? A. I didn't say anything.

The Court: At the time you went with the defendant to Dr. Markoff, did you know she had consulted or had been treated by other physicians?

A. Yes, sir.

The Court: Did you know who they were?

A. Dr. Legato and Dr. Dilger.

Mr. Griffinger (continues):

Q. You said you knew your brother had taken his wife to Dr. Markoff on the second visit about a week later?

Mr. Demarest: No, she didn't say that. She said, in answer to my question, "A few days later".

Mr. Griffinger: She said that she knew that within a week.

Mr. Demarest: That is better.

Mr. Griffinger: Was that changed to a few days?

Mr. Demarest: I asked the question using the words "a few days".

Mr. Griffinger: All right.

Mr. Griffinger (continues):

Who told you? A. Amy told me.

Q. Amy told you Carl had gone with her to Dr. Markoff's? A. Yes, sir.

Q. Did she tell you she had told Carl you had been there the first visit? A. I do not recall.

Q. And you knew, then, within a few days of the first visit that your brother was aware of Dr. Markoff? A. As Amy had told me. Yes, sir.

Q. And you knew after the second visit that your brother had gone with your sister-in-law to Dr. Markoff? A. Yes.

Q. And you also knew of subsequent visits that she had gone to Dr. Markoff with your brother? A. No, sir.

Q. Didn't she tell you of subsequent visits she made to Dr. Markoff? A. That was over a period of time.

Q. During the period until the menstrual period was restored didn't you discuss it with Amy? A. No, I didn't see her.

Q. Well, over a period of a few weeks weren't you at the home where your sister-in-law and brother lived? A. I do not recall. I may have been.

Q. Didn't you follow up any further by talking to your brother or sister-in-law as to the visits made after you had taken her there? A. Not to any great extent.

Q. But you knew in September that your brother knew all about Dr. Markoff. That right? A. What do you mean "all about Dr. Markoff"?

Q. You said you knew within a few days after the first visit that your brother had taken his wife there on the second visit. A. Yes.

Q. You said Amy told you that. A. Yes, sir.

Q. You knew your brother had been there with her, didn't you? A. Yes.

Q. Still you didn't talk to your brother about it until after his return from Chattanooga, Tennessee in June 1943 although the second visit had occurred in September 1942? Is that right? A. I do not recall.

Q. You said that, didn't you, in answer to my question, that you did not discuss it with your brother or have any conversation with him about it until after he came back from Chattanooga in June 1943? A. I didn't discuss it with him. No.

Q. Do you know who discussed it with your brother after the first visit to Dr. Markoff? A. No, sir.

Q. Do you want that answer to stand? A. After the first visit?

Q. Yes. My question is very clear. I asked whether you know who discussed it with your brother after the first visit. You say "no". Do you want that answer to stand? A. I don't know who discussed it, unless Amy discussed it with him.

Q. Did Amy tell you she discussed it with him? A. I do not recall.

Q. You said a few questions back in answer to a question that you found out a few days later or within the week from Amy that she had told her husband. Now you say you do not know whether Amy discussed it. That is why I asked whether you want that answer to stand or do you want to answer that as you know? A. She must have discussed it with him.

Q. Did she so inform you? A. Not that I can recall.

Q. What did you find out within the week? A. There was a discussion of Dr. Markoff.

Q. You said you found out your brother had taken Amy to Dr. Markoff's within the week. A. Yes.

Q. Did you find it out from your brother? A. I do not recall.

Q. You say you did not discuss the matter with your brother until his return from Tennessee in June 1943 so it couldn't have been your brother you discussed it with. A. I did not.

Q. So that Amy did tell you or did she not tell you within a few days or within the week that she had discussed it with your brother? A. She must have mentioned it.

Q. But you don't remember, do you? A. Not exactly. No.

Q. Was there any other person that could have informed you that your brother had taken his wife to Dr. Markoff other than your brother or Amy?

Mr. Demarest: It is quite obvious——

Mr. Griffinger (continues):

Q. Did anyone else besides your brother or sister-in-law inform you within that week you mentioned of the subsequent visits to Dr. Markoff? A. No, sir.

Q. And you say the only person that informed you was Amy? A. Yes.

Q. Did she also tell you she had talked with her husband? A. I do not recall.

Q. And you don't know how your brother came to take Amy to Dr. Markoff's the second visit, do you? Do you actually know? Not what you guess. A. No.

Q. Although Amy discussed it with you after the second visit you didn't ascertain any facts that had been discussed between Amy and her husband about the visit? A. No.

Q. But other things you remember very distinctly, don't you? That is all.

The Court: Do I understand that after your visit to Dr. Markoff with the defendant you and she did not further discuss that subject, that visit?

A. Not that I can recall, sir.

The Court: You did, though, have——

A. If it was it was in a very general way.

The Court: Did you discuss it at all?

A. After my first visit——

The Court: After your first visit to Dr. Markoff's with the defendant did you and she discuss it?

A. On the way home.

The Court: I mean outside of that; other than that; on or subsequent occasions.

A. No, sir.

Mr Griffinger (continues):

Q. Were there any confidential talks along the lines you have described after the visit to Dr. Markoff? A. No, sir.

Q. You had no discussion in December, January or February or any other date after that? A. No, sir.

Q. They all took place before? A. Yes.

Q. You answered a question before that you had known about Dr. Legato and Dr. Dilger, hadn't you? A. I knew of them.

Q. You know your sister-in-law had received attention from them? A. Yes, sir.

Q. You also testified that when you took your sister-in-law to Dr. Markoff you did not have any talk or instructions or request from your brother. That right? A. That's right.

Q. You had not taken the matter up at with him prior to the visit? Are you positive of that? A. I am positive, sir.

Q. Still you knew that two other physicians, prior to that time, had had an opportunity to be in attendance upon your sister-in-law? A. Yes, sir.

Q. Those two other physicians you knew had been selected and requested by your brother to give his wife attention? That right? A. Yes.

Q. Notwithstanding the fact that your brother selected these physicians and requested their attention, you took your sister-in-law to this Dr. Markoff without conferring or talking or getting his advice. That right? A. That's right.

Mr. Demarest: That question has been answered at least five times.

Mr. Griffinger: All right.

Re-direct examination by Mr. Demarest:

Q. When here recently in your re-cross examination you mentioned "martial relationship"—you used those words? A. Yes.

Q. I ask whether by that term you meant sexual relations?

Mr. Griffinger: This woman may consider marital responsibilities washing dishes. She

can't put in the Court's mind what she means by it.

Mr. Demarest: Yes, you can't tell what one person means by a word and what another person means. She used the word and I think she can explain what she means.

The Court: I understood by her answer that she was quoting the defendant's words; that the defendant had used that term in interpretation of the word "it".

Mr. Demarest: I'm sorry, I misunderstood it, then.

Mr. Demarest (continues):

Q. When you were asked by Mr. Griffinger whether certain other things were mentioned you said Amy did mention in that conversation "fondling" and "embracing". Do you recall that? A. Yes.

Q. What did she say about fondling? A. She said that—well, she was repulsed by the closeness of bodies, by the touch and feel of the man's hand and that it was just repulsive to her.

Q. And what did she say about embracing? A. She said that while embracing didn't bring one in such close contact it was not too tasteful to her.

Re-cross examination by Mr. Griffinger:

Q. You remember this part quite well? A. Yes.

Q. It was an unusual conversation coming from a sister-in-law to you, wasn't it? A. Yes.

Q. It is very clear to you? A. Yes.

Q. Have you given the Court the full benefit of that conversation or is there anything else you can think of we haven't heard? It seems difficult for you to recall certain things and now you recall something else. Is it all before the Court now? A. Everything is before the Court.

Mr. Demarest: If the Court please: I stated, I think, in Chambers before this case started that there was one physician whose testimony I wanted to put in. That is the operating surgeon, Dr. Heyd. Charles Gordon Heyd. We were not able to contact Dr. Heyd anywhere because during his vacation period he disappears and doesn't want to be reached and makes it impossible for people to reach him. One of the reasons why I want him to testify is that the report of the operation that has been mentioned before I think is important. Its admission into evidence may still be accomplished without his testimony but to date it has been contested. I should like him to testify as to the conditions he found in the language which will be found in the report and to refute the inference in the affidavits and pleadings of the other side that Dr. Heyd was a party to something in the line of medical or surgical care that wasn't strictly necessary but was arranged by the petitioner. I don't know when I can reach the doctor and I ask leave to withhold his testimony, to be admitted later after the normal closing of my case.

The Court: You have presented your case, then, with the exception of the testimony of Dr. Heyd?

Mr. Demarest: Yes, except that I want to again make the offer of the copy of Dr. Heyd's report, which has been identified now by both Mr. Carlson and by Dr. Donaldson as being Dr. Heyd's report. I should have said, also, that I wanted to have Dr. Heyd bring with him the hospital record which will be something, perhaps, in addi-

tion to this report. Since it has been testified that a duplicate or photostat of this report has been furnished the defendant, I see no reason to quibble about its admission.

The Court: Is that report the one the petitioner testified he had sent a copy of to the defendant at her request?

Mr. Demarest: That's right. They have a copy of it.

Mr. Griffinger: I'll answer my worthy colleague on that point. At this point in the case——

The Court: Of course, standing alone does it bind the defendant?

Mr. Griffinger: No, but I just wanted to make mention of the fact that January 11, 1944 Dr. Heyd had executed an affidavit in this case and Dr. Heyd has been available January, February, March, April, May, June and July, undoubtedly. There was no attempt made to take his deposition although knowledge of his testimony was known to my adversary. There is no reason why this case should be prolonged based on the vacation conditions of the doctor. It was known to a full extent what he was going to testify to. Counsel must realize that this case is at issue and if that is the only witness to be produced the petitioner has produced his full case. If counsel will feel better about it—I haven't seen the report and if you will let me look at it, maybe we can come to some agreement.

Mr. Demarest: Well, suppose you take this report and look at it and it may be admitted sometime during your case. I usually like to get my exhibits in during my case, but you may have it.

Mr. Griffinger: Does that conclude your case, then?

Mr. Demarest: Yes, it does.

Mr. Griffinger: If that concludes your case, then I will not delay the case and will consent to this report going in.

Mr. Demarest: I have made no such proposal, that if he allowed this to go in I will not ask for Dr. Heyd's testimony, because I said specifically that I wanted him for other purposes.

Mr. Griffinger: Your Honor knows my offer is based on saving time. If the doctor is still going to be called—do you rest or don't you rest?

The Court: My recollection is that the petitioner, on direct examination, testified that as a result of a request from the defendant he forwarded to her a copy, typed or photostatic, of Dr. Heyd's report.

Mr. Demarest: That is correct.

The Court: Petitioner was shown a paper which he identified as being a copy of the copy he sent. Under the circumstances the paper is admissible because of that. It doesn't bind the defendant at all.

Mr. Griffinger: Then does the petitioner rest?

The Court: With the exception of Dr. Heyd's testimony, as I understand it.

Mr. Griffinger: The application is made that the Court grant that reservation. I would like to answer that.

The Court: Do you object to Dr. Heyd's being brought in later?

Mr. Griffinger: Yes, your Honor. This case should not be tried in installments.

The Court: Under ordinary circumstances we are in perfect harmony on that, but what I have in mind are the unusual circumstances in this case. The defendant has come from a long distance and Dr. Heyd is on vacation and unavailable and to delay the completion of the petitioner's case until Dr. Heyd returns will mean bringing the defendant back.

Mr. Demarest: May I add one other thing? As a result of our conference in Chambers I understand that Mr. Griffinger is going to take medical testimony on his side after the completion of their hearing at some date convenient to your Honor. I certainly have the right, after the taking of such testimony on his part, to have an opportunity for rebuttal on that testimony, and therefore I should have the right to call Dr. Heyd, if and when necessary.

Mr. Griffinger: My doctor was in my office at ten o'clock yesterday, being he was supposed to be there. My doctor is available at any time, and within two hours from the time the Court makes the appointment that doctor will be at a stated place in Newark. He only asked me to take his testimony in Newark because of his operating and other appointments. In saying that this doctor is going to testify in answer to my doctor is going too far. He couldn't do that any more than my doctor could answer him. Apparently what he has done is complete in this report. I feel there is some limitation. When from January 1944 to date Dr. Markoff's testimony was obtained in the way counsel wanted it, it seems the same

thing could have been done with Dr. Heyd in June or April, because he couldn't say anything today that he couldn't say then.

Mr. Demarest: If I had known Dr. Heyd was going to be away I would have done something about it. I have found since that he absolutely can't be reached.

The Court: The Court has no right to force you to go on with your case until the petitioner's case is completed.

(Conference in Chambers—Counsel and the Court.)

Mr. Demarest: Then on the grounds that the defendant has knowledge of this paper, this report, I will offer this report of Dr. Charles Gordon Heyd in evidence.

The Court: That may go into evidence.

(Report Dr. Charles Gordon Heyd—Exhibit P-3.)

Mr. Demarest: Yesterday I told you I had had delivered to me this long letter of December 20, 1941——

Mr. Griffinger: I have no objection to that going in.

Mr. Demarest: —and continued under date of December 21, 1941. It is a letter I produced as being within the period demanded.

The Court: From whom to whom?

Mr. Demarest: Written by the petitioner to the defendant.

The Court: Very well.

(Letter December 20, 21, 1941—Exhibit D-4.)

Mr. Griffinger: I have no objection to any letters you want to put in.

Mr. Demarest: I think we have all of them. This last letter will go in in addition to the letters produced on demand as Exhibit D-1 of the defendant.

Mr. Griffinger: I will waive its going in on the defendant's case and it may go in now as the defendant's exhibit.

Mr. Demarest: The petitioner rests with the request that the reservation be allowed for the production or taking the testimony of Dr. Charles Gordon Heyd as soon as it can be conveniently arranged.

The Court: Very well.

Mr. Griffinger: If the Court please: At this time, with the reservation that if the Court should not determine, upon my application, that the motion should be granted, that the testimony in behalf of the defendant be allowed, I would like at this time to make a motion or application addressed to the Court for dismissal of this cause of action filed by the petitioner and that the matter then proceed only on the counterclaim of separate maintenance.

Mr. Demarest: May I state on the record my objection to the effect that if at the end of the case of a petitioner or complainant in the Court of Chancery the defendant makes a motion to dismiss, that motion is taken into consideration by the Court; that then the Court, according to the rule as I understand it, must preclude the defendant from introducing testimony to sustain the defendant's defense or answer and that the decision rests then upon the petitioner's

or complainant's testimony and that of the witnesses adduced in sustaining the cause of action alleged in the petitioner's pleadings and that the truth of the testimony is admitted by the making of the motion and if, as it now appears, a motion is to be made and is made I do now and will in the future object to the taking of any testimony on behalf of the defendant sustaining or attempting to sustain the defendant's answer or defenses.

Mr. Griffinger: Before I go on with my motion I want to say to the Court and I want to say, too, for the record: Counsel has stated to me that he has resented a statement and assertion by me that he is acting in bad faith. For a moment I was a bit concerned, but now I say to Mr. Demarest that he has proven that he is acting in bad faith because he asked the Court to permit the taking of testimony of Dr. Heyd and I have indicated my cooperation and before I go into my motion I want to answer counsel's objection. Dr. Heyd's affidavit—if you will refer to it I will show to the Court an exhibit of his bad faith——

Mr. Demarest: This has no bearing on the question at issue.

The Court: I will hear the motion with the reservation that if it is denied that you will not be denied the right to put in your case.

Mr. Demarest: I wish my objection noted.

The Court: It is on the record.

Mr. Griffinger: We have come before this Court as the result of a petition filed by Carl O. Carlson in which petition he sets forth three causes of action, all addressed

to the Court for a decree of annulment of the marriage entered into between the petitioner and defendant, Amy Rodgers Carlson, on June 20, 1942. Meeting the allegations in the petition we are confronted with the first cause of action in which he sets forth that the defendant was physically and incurably impotent to consummate the marriage. Then he goes on in that allegation by setting forth reasons and causes, the exact nature of which is unknown. Primarily it is impotency he alleges in the first cause of action because in Paragraph 3 he reccalls that he was ignorant of such impotency. Then he goes on and sets up residence and asks that a decree be awarded and that the marriage be decreed null and void. The second cause of action repeats the first cause of action set up in paragraph 1 and then he goes on and states that the defendant had formed in her mind not to accord the petitioner intercourse. Then he goes on to say she would not accord him the act of intercourse and made mental reservations. He charges impotency in the defendant, who is a female. In the third cause of action he says that the defendant entered the marriage with certain misrepresentations to the petitioner. He mentions rheumatic fever. He says that was a misrepresentation and that she couldn't perform her marital duties and that she concealed certain facts known to her prior to the marriage and that she was suffering from one or more chronic diseases and from abnormalities in the genital organs—I repeat that, genital organs, because I intend to

refer to it later in my arguments—and psychophysical conditions dealing with misrepresentation. He says if he had known he would not have entered the marriage. He says paragraph 3 that he learned of this on various dates in the month of May 1943. Strange as it may seem, that date is eleven months after the marriage took place. That is his allegation and the petition is signed and witnessed and there is an affidavit setting forth that the petition is true and that he has read the same. Now, what have we got? What have we before the Court in this attempt on this man's part, the petitioner, to have the Court break the sacred contract that he entered into? What have we before the Court to influence the Court or convince the Court, if any, or to show to the Court, if any, that a man can come in by petition and at his whim and will say to the Court that there must be some quirk which will permit you to advise the decree and permit the petitioner to get a decree of annulment by some surreptitious route? We have the petitioner, Carl Carlson. He takes the stand and says to the Court—and I believe him as far as this is concerned—that, "I met the defendant in November 1941. We fell in love, to such an extent that I saw her every day during that romance, then I wrote her every night. I saw her every day as her occupation permitted, and I wasn't satisfied and I saw her every night. After I returned to New Jersey we continued corresponding, almost exchanging a letter every day." Then he says that correspondence continued and ripened into real love,

"and I proposed or suggested marriage and I was accepted." Then he says, "I returned in April 1942 and pressed my suit and courtship," and he said he was happy and she was happy; nothing occurred between them that would in any wise make him want to change his mind. He says, further, that the marriage was set for June and that she came up a week before the marriage and they were together as much as they could be. That is all preliminary to the marriage. I think he did say that when he came down in April she hadn't moved as fast as she had in November and there was some discussion about her knee but she told him she thought it was rheumatic fever and I asked him wasn't it because of information she had received from someone where she was employed and he said he didn't remember. Nevertheless, the marriage took place. I ask the Court to look upon this from your experience in these matters; the description of this man of the first night. Your Honor has undoubtedly read in many of these cases that to the marital act there are never any witnesses. That seems a logical conclusion on anyone's part. But he describes the marital act, although every once in a while he dares to call upon his Almighty as his ally and said he prayed. He does make statements that stamp his testimony as untrue. He said he entered the sacred wedding bedroom with his wife and he describes in detail the entering into the wedding bed and all those things that take place in the bedroom. He doesn't say he had to wrestle. Here is this man at the height of his desires; possessing all the attributes

of a normal man, I hope; and doing all those things preliminary to the consummation of the ordinary act expected of two people; who says definitely to the Court that she did not run out of the bed or seek another room or bolt herself in the bathroom; she didn't strike him or call him names or spit at him; she was in bed all the time; but he says, "That particular act I did not perform." When I questioned him he said he did all the preliminary acts; that he tried to get certain parts of her body separated. From the lips of this man could there be any more complete corroboration of such an opportunity, and wouldn't the Court be judicial and reasonable to draw the natural inference that the opportunity and availability having occurred, that there was cohabitation? Let's assume the remote hypothesis that the Court has a slight doubt after hearing that testimony. This is in June 1942. They continued to occupy the same bed. That was very definite. June, July, August and September. Then what happened? During that time no arguments, he says; no disagreements; no words; no difficulties; everything was fine. Everything was fine, he says, with this man who makes copies of his love letters. Why, I don't know. Maybe he is a sadist at heart and likes to create a situation such as this. I don't know. Then we come to August—but first, I must not forget. He said they used contraceptives. He said it. Would this woman ask her husband to use contraceptives for any other reason than to have intercourse? I could be vulgar. I am represent-

ing a client to whom this is a most important issue. Would she even suggest or intimate or even agree that he use that particular protection if it wasn't in respect to having the act of intercourse? He says it came about by her direction. Would such a thing occur if she had made a reservation or determination in her mind? What was she going to lead up to? A grand climax? That didn't happen. She was there all night. No, he added that for embroidery and it wasn't good embroidery. Now we come to September. I don't believe there is any dispute of this statement: That the eve of immaculate conception has not returned since the birth of Christ. Now we have this one statement that she went to Dr. Markoff. Both the petitioner and his one witness agree emphatically that there were two physicians who had something to do with the defendant because of some disturbance in her knee. Maybe a week after the honeymoon he was most solicitous about it and told her to have it looked at right away. There were these two physicians, one a college friend of his and another. They had some contact with the defendant. He admits they went to Dr. Donaldson's office before the marriage and that Dr. Donaldson stated, "Go ahead and have a happy marriage," but notwithstanding the two physicians in New Jersey and without discussing it with her brother before, or until he returned from Tennessee almost six or seven months later, the petitioner's sister gave or purchased for the defendant a bottle of castor-oil. Before that there was a

hair-letting-down conversation between the sister and the defendant which was one-sided only, apparently. Here is this sister-in-law and the defendant says to her within two months of their marriage that she didn't care for "it," and so forth. The demeanor of this corroborating witness was very obvious from the response shown to petitioner's counsel. He became very impatient with her slow gait. Maybe she had arthritis of the tongue. I don't know. It was obvious that she was creating situations that never existed and on cross examination she was groping for answers. I think her testimony could be considered of no value whatever. The reference made to castor-oil brings us to the elements in this case: Out of the mouths of the petitioner and his witness, has there been or not been cohabitation? There is no charge that this defendant had relations with other men; no adultery charge; and the weak attempt to bring in the Cincinnati incident, but she caught herself and said nothing happened there. Then September comes around and she is properly alarmed, as women will be. They have no other way of knowing. The signs have not come around. The signpost has not been illuminated and the great event is about to happen to her. The sister knew about it because she did the thing so academic to the layman. She prescribed the dose of castor oil, which I think the Court will take judicial notice can do a lot of damage. The next day nothing happened. So what did they do? This man, or someone, had indicated a desire not to have a child

or permit his wife to go on with the pregnancy so off to Dr. Markoff. Here are two doctors, here. The sister says Amy went to Dr. Markoff for a rundown condition. Even your Honor asked about that. Here are two doctors here and no evidence that they failed in anything or were inferior in knowledge; no evidence of that; but off she goes to Brooklyn, and let me tell your Honor that I have been there. You make a long trip by subway and next to the last station you get off and walk for a long block and two short blocks. That would be all right, but strange as it may seem, Dr. Markoff had had some contact with Mrs. Strom as a nurse and had treated her. She takes her over to Dr. Markoff. Isn't it strange that Mrs. Strom should testify that she was told by Amy that her menstrual period hadn't come around? Isn't it strange, or is it untrue, that the second visit the petitioner takes here there? Isn't it strange, also, that she insists that she did not disclose it to the petitioner that she had been there. This is her brother and sister-in-law and there is a marriage there. She knew there was a marriage. She was at the marriage. Still she took her over the first time and here is a man so directly concerned with his wife and who should be informed, but isn't it strange that he took her over again and again, and still Mrs. Strom maintained silence? If that were so, I would believe it if she had continued taking Mrs. Carlson over, because maybe she didn't want the petitioner to be disturbed; but no, both the petitioner and the witness say he took her

the second time. He knows why he took it over; because that momentous occasion hadn't come about that she would return to her menstrual cycle, and would eventually bring into the world that great little bundle, which he evidently didn't desire. After that Dr. Markoff wasn't any longer needed in the picture. Why? Because he had served the purpose for which this woman was taken there; because the next thing you know October and November go by and then in December a situation exists which requires a very serious operation. Is there any reason why this woman shouldn't have an operation? Is there any reason why my wife shouldn't have an operation in my judgment and the physician's who recommend it? We are mere puppets in the hands of medical men because we rely on their judgment. So he had the operation performed. A "Trojan" he calls her in a letter. He knew what he had done to this woman and the least he could do was try to make amends by the medical aid he could give her. He wrote truthfully that she was a "Trojan" because she gave to him all, and with no exceptions; and to her sister in Tennessee he wrote this four page letter, and he says, "—the sources of infection in her precious body." Was her body prescious because he gazed upon it; because she was opposite him at the breakfast table; or because he had ravished that body not only by intercourse but by aiding in destroying it. Now he comes in and says, "I have done the job physically; now I want to do it legally. I want to cast her in

the mire where I put her so I can be free to carry on any transgressions." Has he established to the satisfaction of this Court that he has not had the marital pleasure and enjoyment of the woman who agreed to be his wife and who he took a vow with on June 20th, which to all intents and purposes he never intended to keep? But that is neither here nor there. We are not here to identify the petitioner as to his character and the blackness of his soul. We are here for a legal question which says that he must prove that that marriage was not consummated and that it must be proof that your Honor can rely upon.

I have not discussed Dr. Donaldson. Dr. Donaldson's one reply was, "I cannot form an opinion." He says she has an arthritic condition of the knee and joints. Since when is an arthritic condition of the knee an ailment of the vaginal organs? No one yet has said, not even Dr. Markoff, that the arthritic condition would prevent intercourse; not even the petitioner. If Your Honor will recall, I asked him that. "Did it interfere in bed? Was she able to get in and out of bed? Was she able to relax in bed and recline in bed?" All he could say was, "Yes, but there was no response."

We have to have proof that there was no cohabitation and if Your Honor feels that from the testimony of the petitioner and his witness that inference can be drawn that there was cohabitation I respectfully submit that the petition fails and that a decree of dismissal should be advised by Your Honor and that we should proceed on the

ability and financial condition of the petitioner to meet the decree, if so advised, for separate maintenance.

Reply argument made by Mr. Demarest.

* * * * * *

Mr. Griffinger: I would like the Court to refer to Revised Statutes 1:250-1 which was referred to by this court. *Heller* v. *Heller*, 116 N. J. Eq. 543.

The Court: Before Advisory Master Stafford, on appeal.

Mr. Griffinger: Yes. The Court said about impotency: "—the parties, or either of them was at the time of marriage physically impotent; provided the party making the application was ignorant of such impotency or incapability at the time of the marriage, or has not subsequently ratified the marriage." "Impotence, as a ground for nullity of marriage, is a want of power for copulation, and may be curable, incurable, accidental or temporary." "To justify a decree of annulment of marriage on the ground of impotency the accused spouse must be shown to be incurably impotent, and the burden of proof rests with the one making the charge." The Heller case is very specific as to what must be shown. I believe Your Honor is justified in dismissing the petition on the grounds that the petitioner failed to sustain the burden.

(Noon recess.)

Deposition of Dr. Samuel T. Markoff.

Deposition of Samuel T. Markoff, a witness on behalf of the petitioner in the above cause, taken *de bene esse,* pursuant to notice and stipulation of counsel, before the undersigned, Abraham M. Siegel, a Master in Chancery of New Jersey, on Thursday, August 10, 1944, at 11 a. m., at the office of the deponent, No. 1481 President Street, Brooklyn, New York, in the presence of W. Howard Demarest, Esq., Solicitor of Petitioner, and Simon J. Griffinger, Esq., Solicitor of defendant.

ABRAHAM M. SIEGEL,
Mastery in Chancery of New Jersey.

Mr. Demarest: May I state on the record that the witness, Dr. Markoff, is offered on behalf of the petitioner, pursuant to notice served on the solicitor for the defendant, that as a result of the service of this notice and a motion that was made by the defendant, the taking of the testimony was definitely permitted by the Court, and because of Mr. Griffinger's absence from the city on the date when it was made returnable by notice, which was August 2, we have stipulated and we now stipulate on the record, Mr. Griffinger being present, that the taking of the testimony is postponed until today at 11 o'clock, and that the testimony of the witness need not be signed after being transcribed by the Master.

Is that correct?

Mr. Griffinger: That is correct.

(Rulings by Advisory Master noted in testimony, details S. C., pp 48-54.)

SAMUEL T. MARKOFF, a witness on behalf of the petitioner, being first duly sworn according to law, on his oath deposes and testifies:

Direct examination by Mr. Demarest:

Q. Doctor, you are a practicing physician in the State of New York? A. Yes, sir.

Q. Practicing in Brooklyn? A. Yes, sir.

Q. How long have you been so practicing? A. Since 1926.

Q. And from what college or schools are you graduated? A. I graduated from Yale Medical School, I went to Yale College.

Q. And you have been practicing in Brooklyn ever since— A. Since 1926, when I graduated.

Q. Do you know the defendant, Amy Rogers or Amy Rogers Carlson? A. Yes, sir.

Q. Did you have occasion to see her and treat her? A. Yes, sir.

Q. Can you tell us when? A. Yes, sir. I can refresh my memory from the record. (The witness takes a paper from his desk and looks.). September 23, 1942, was the first time I saw her.

Q. And on that occasion was she accompanied by anyone? A. Yes, sir.

Q. By whom? A. She came in with her sister-in-law.

Q. That is Mrs. Strom? A. Mrs. Strom.

Q. Was Mrs. Strom present during the examination? A. Well, at the time I examined her—she was here with her in the office, but I don't know whether she went into the room or not.

Q. Mrs. Strom was a nurse? A. Yes.

Mr. Griffinger: I object to that. Note my objection.

The Master: The objection is noted.

Ruling — immaterial — objection sustained.)

Q. When you examined and talked to Mrs.—let's call her the defendant—can you tell us the nature of your questioning and her response and what the object was of your questioning? A. (Looking at paper). Well, I might say this, that she told us her last period was August 21, that was the month previous, that four days before she came to see me, on September 19, she flowed lightly, she had been under a doctor's care for anemia and rheumatism. That was her history.

Q. As she told it to you? A. As she told it to us. And she was taking lextron and drisdol. She complained that her left knee was swollen for the last eight months. That was her story as she gave it to us, I mean without questioning, she just volunteered the information. Then I examined her.

Q. And what did you find? A. I found that she had a generalized hypertrophic arthritis and a fibroid which was the size of an eight-week pregnancy; and the diagnosis, I told her, was that she had chronic hypertrophic arthritis and a tumor of the uterus.

Q. The fibroid that you mentioned was located in the uterus? A. In the uterus. And I prescribed for her, I gave her an injection which was a foreign protein, the name I put down, sanolac, and I gave her pituitary ovarian gland. That was in the office.

Now, she came to see me on September 26, a few days later, and told me she had stained when urinating.

She came to see me September 30, and she told me that she had been staining.

Q. That means flowing, right? A. Flowing started. And the next time she saw me was October 6, '42. She was treated for the pain of her left knee, and she repeated her story that she

had it now for nine months, and then she told me that on September 30 she had a regular period, a regular flowing, a regular period.

On 10/17 she came to see me again, and she said the pain of the knee was the same, and I gave her 2 cc. of sanolac—that's that foreign portein injection.

On 11/3/42 she came in, and I gave her 2 cc. of sanolac.

She came in on the last visit, the last time I saw her was November 28, '42. I gave her a short wave treatment and I gave her 2 cc. of sanolac. At this time I told her that the diagnosis was arthritis deformans in the fingers, elbows, knees, and ankles. I think the only place that was excepted was her shoulders, I said not involving the shoulders. And I prescribed salicylates as a powder to relieve her pain in her joints.

Now, that's the last time I saw her.

Q. Doctor, when you questioned the defendant and later examined her, what would you say as to the hooking together of her original answers with the conditions which you found, did they correspond? A. Did her answers correspond—

Q. Did her answers to your questions reflect the same conditions which you found, or did you find that her answers were not indicative of what you found?

Mr. Griffinger: I object. Note my objection.

The Master: It is noted.

(Ruling—objection overruled.)

Now, Doctor, will you answer, please? Do you remember the question?

A. The answers she gave me were fairly corresponding, that is, they were some fair measure of relation.

Q. Did you find that she had any evidence of rheumatic fever, as I believe you said she claimed to have had?

Mr. Griffinger: I object. Note my objection.

The Master: It is noted.

(Ruling—objection overruled.)

All right, Doctor.

A. I found no evidence of rheumatic fever or rheumatism.

Q. Am I correct in saying that she did claim that she had had that ailment?

Mr. Griffinger: I object. Note my objection.

The Master: The objection is noted.

(Ruling—objection overruled.)

A. She gave the history that she had anemia and rheumatism, that was her history.

Q. Do you recall whether she said rheumatic fever?

Mr. Griffinger: I object.

The Master: The objection is noted.

(Ruling—objection overruled.)

A. I don't recall if she said rheumatic fever.

Q. But you do say that you found no evidence of rheumatic fever? A. No, sir, no evidence of rheumatic fever.

Q. Can you say for how long this condition which you diagnosed as certain kinds of arthritis had existed in her? A. Could I tell about how long?

Q. Yes.

Mr. Griffinger: I object.

The Master: It is noted.

(Ruling—objection sustained.)

A. I could say that she had it for a considerable period, that is, for several years.

Q. With a condition of that sort what would you say as to the likelihood of the patient knowing what was the trouble with her?

Mr. Griffinger: I object.

The Master: The objection is noted.

(Ruling—objection sustained.)

Mr. Griffinger: I want to put on the record that upon making objections I am refraining from giving my reasons because it is my intention to discuss and argue that before the Advisory Master rather than clutter up the record now and have repetition.

The Master: All of which is noted.

A. She would have knowledge of the condition.

Q. Can you say why you gave that answer? A. Because it's associated with swelling and pain.

Q. And is rheumatic fever eliminated from your consideration in giving that answer? A. Yes.

Q. So that if she had suffered from rheumatic fever do you say as a physician that her symptoms would have been different and her causations would have been different than those you found?

Mr. Griffinger: I object.

The Master: It is noted.

(Ruling—objection overruled.)

A. Yes.

Q. Can you tell us what may be some of the differences between the symptoms and causations of rheumatic fever and the type of arthritis which you have just mentioned?

Mr. Griffinger: I object.

The Master: The objection is noted.

(Ruling—objection overruled.)

A. Rheumatic fever never leaves permanent damage in the joints, they clear up postively, where hypertrophic arthritis is a progressive crippling disease which leaves permanent injury.

Q. As to the tumor condition, you referred to it in your testimony as a fibroid of the size of a two months' pregnancy— A. Eight to ten weeks.

Q. Eight to ten weeks pregnancy? A. Yes, sir.

Q. Does the reference to that size or that period of time have anything to do with the length of time during which that tumor or fibroid may have been there? A. Yes, sir.

Q. Does it mean that it was there only for eight to ten weeks?

Mr. Griffinger: I object.

The Master: The objection is noted.

(Ruling—objection overruled.)

A. No, sir.

Q. What would you say as to the period of time during which the fibroid tumor which you found had been there prior to the time you examined her in September, 1942?

Mr. Griffinger: I object.

The Master: Noted.

(Ruling—objection overruled.)

A. The tumor was there for a considerable period, possibly several years.

Q. What would you say as to the likelihood or certainty of the defendant's knowledge that such a condition existed at the time that you examined

her or for a period, let us say, dating back to June, 1942? A. That's very hard to answer because—

Mr. Griffinger: Well, just a moment.

I object to the Doctor elaborating on his first response that it is very difficult to answer.

(Ruling—objection sustained.)

Q. What would your opinion be from what you saw or what you heard from her, on that question? A. It's impossible to state that she may have known or not known about it, I mean it's impossible for me to state from my examination of her or from her answers, it would be impossible to say that she knew or didn't know about it.

Q. As to the symptom which would be evident when such a condition existed, for instance, where we have, as you say, a fibroid tumor which probably had been there in some size or other for several years, is that right? A. Yes, sir.

Q. Now, what symptoms would there be which would indicate a year, two years, before you examined her that there was such a tumor? A. Pain would be the symptom, pain in the uterus, heavy bleeding with her periods, clots with her periods or bleeding in between the periods, would all be signs of a tumor of the uterus.

Q. Would periods in three weeks instead of the normal interval be any indication.

Mr. Griffinger: I object.

The Master: The objection is noted.

(Ruling—objection sustained.)

Go ahead, Doctor?

A. Yes, frequent—more frequent bleeding than four weeks would be an indication.

Q. Would such a tumor or fibroid condition, in your opinion, as examining physician in this case and from your practice, make for a reluctance with respect to intercourse by a woman in such a condition?

Mr. Griffinger: I object.
The Master: The objection is noted.
(Ruling—objection sustained.)

A. Yes, sir, it could make for reluctance to have intercourse, yes, sir.

Q. Did you consider, in making your examination, any story to the effect that one knee was swollen and had been hurt in a fall that the defendant has said that she suffered in April, 1942?

Mr. Griffinger: I object.
The Master: Noted.
(Ruling—objection overruled.)

A. No history of a fall was given me.

Q. If there had been such a fall would the fall have been a primary cause of a contributing cause to the swelling and condition of that knee?

Mr. Griffinger: I object.
The Master: Noted.
(Ruling—objection overruled.)

A. The fall would be a contributing cause to make it worse, but it wouldn't cause it.

Q. Not as the primary cause? A. Not as the primary cause.

Q. You say you had no history of such a fall? A. No history of a fall.

Q. Did you find an anemic condition? A. Yes.

Q. Would that anemic condition have anything to do with the arthritis or the tumor? A. Yes, sir.

Q. Can you give us the connection there? A. The bleeding from the uterus would make her anemic and the arthritis would also contribute to her anemia, indirectly, but the bleeding directly.

Q. What would be the effect of anemia upon a person's activity and vitality?

Mr. Griffinger: I object.

The Master: Noted.

(No ruling.)

A. Anemia would make them very weak and tired and make them anxious to be inactive, to stay at home and rest.

Q. Would it have any effect upon a normal gait of walking, reducing it to less than walking? A. Not anemia.

Q. Would the arthritis have that effect? A. The arthritis would.

Q. Did the treatment which you prescribed and the medicines you instructed to be taken have anything to do with childbirth or the prevention of child birth.

Mr. Griffinger: I object.

The Master: The objection is noted.

(Ruling—objection overruled.)

A. No, sir.

Q. I have before me an affidavit signed by the defendant saying:

"In September, 1942, I became pregnant."

Q. When you examined the defendant in September, 1942, was she pregnant? A. No, sir.

Q. Was there any history of pregnancy? A. No, sir.

Q. Was there any claim by her of pregnancy? A. No, sir.

Q. Could she have been pregnant, possibly? A. No, sir.

Q. From the affidavit again, I quote:

"Upon the insistance and demands of my husband I went to a physician who administered medicine locally on a series of occasions and brought about a miscarriage to avoid giving birth to a child."

I ask you whether or not you administered medicine locally or otherwise or prescribed medicine on one occasion, or on any other occasion, to bring about a miscarriage or to avoid the giving of birth to a child by the defendant, whom you examined? A. On no occasion did I give her any medication to bring about the miscarriage of a pregnancy.

Q. Or to avoid giving birth? A. Or to avoid giving birth.

Q. Was such a proposal or suggestion made to you by either the defendant or Mr. Carlson? A. No, no proposal was ever made.

Q. When did you first learn that such a statement had been made? A. I learned it from Mr. Carlson some time later. It may have been a year later or so.

By the Master:

Q. A year later than what? A. About a year after she had been to see me.

By Mr. Demarest:

Q. Did you at that time make an affidavit in this case? A. It's possible that I did.

Q. I show you my office file containing a copy of an affidavit, and I ask you to read it, to your-

self. A. (Looking at the paper referred to). I have read the affidavit, and it is the one I signed.

Q. Do you still say that this affidavit is so without the necessity of any change? A. It's absolutely so, it's correct.

Q. When reference is made to a fibroid or fibroid tumor of the size of a two-months' pregnancy, is there any inference by the use of that language that there is any kind of or any period of pregnancy?

Mr. Griffinger: I object.
The Master: Noted.
(Ruling—objection overruled.)

A. There is no reference to any pregnancy being present. It's merely the size of the uterus that we're discussing.

Q. The fibroid was in the uterus, was it not? A. That's right, right.

Q. Did you advise the removal of the fibroid? A. If it caused trouble, I told her she would have to have it removed.

Q. What would you say from your examination of the defendant, in September and later months in 1942, as to her fitness to assume a marital state in June of 1942?

Mr. Griffinger: I object.
The Master: Noted.
(Ruling—objection overruled.)

A. I would say that she was in no condition to become a mother, she would never be able to conceive.

Q. And that condition still existed when you examined her? A. Yes, sir.

Q. In June of 1942—if you can reflect your examination and diagnosis back that far—would you say that she at that time could have normally and with comfort performed the act of intercourse?

Mr. Griffinger: I object.
The Master: Noted.
(Ruling—objection sustained.)

A. I would say that it would be difficult.

Q. Do you recall whether in your asking questions of the defendant in September when you first saw her and examined her, whether she said that she had theretofore been regular in her menstrual periods?

Mr. Griffinger: I object.
The Master: Noted.
(Ruling—objection overruled.)

A. (Looking at papers). She was regular every twenty-five to twenty-eight days, but since her marriage her periods were every three weeks. That is her exact statement, her volunteered statement.

By the Master:

Q. Doctor, throughout this examination, and just now in answer to the last question, you have been looking at papers, have you not? A. At my card, at the history card.

The Master: All right, thank you.

By Mr. Demarest:

Q. Was there any conversation between you and the defendant or between you and the petitioner, Mr. Carlson, in the defendant's presence as to a

supposed desire on Mr. Carlson's part not to have any children? A. No, sir, there was never any such conversation.

Q. Was there anything said by the defendant to you to the effect that she herself did not desire children?

Mr. Griffinger: Of course, I object to that for various reasons.

The Master: Noted.

(Ruling—objection overruled.)

A. I don't recall whether she stated anything about not having a desire to have children.

Mr. Demarest: Cross examine.

Cross examination by Mr. Griffinger:

Q. Now, Doctor, you have been practicing in Brooklyn since you were admitted as a physician? A. Right.

Q. And when were you admitted? A. In 1926.

Q. And you have been practicing in this vicinity? A. Well, in Brooklyn. I used to have an office some place else.

Q. But in Brooklyn, that is the area? A. Right.

Q. And in the last few years what has been the nature of your practice? A. General practice.

Q. Are you a surgeon, too? A. No, sir.

Q. Would it be proper to say it was a sort of internal medicine and diagnostician? A. That's right.

Q. And mostly women? A. Well, I would say it was equally divided between women and children and men.

Q. But predominantly women and children? A. Yes, sir.

Q. Do you do any pediatrics to any large extent? A. Yes, sir.

Q. Now, according to your records, the first time you saw Mrs. Carlson was on September 23, 1942? A. Yes, sir.

Q. And at that time she was with Mrs. Strom—
A. Right.

Q. And her husband? A. Well, I remember Mrs. Strom, but I don't remember whether her husband was here or not.

Q. Now, you had treated Mrs. Strom prior to that or had known her? A. Yes, sir.

Q. In an employment status? A. As a nurse on cases, and also she was a patient of mine.

Q. And you had never seen Mrs. Carlson at her home or any place else prior to that? A. No, sir.

Q. Now, when Mrs. Carlson came in to see you with Mrs. Strom did you have a conversation with Mrs. Strom with Mrs. Carlson out of the room, discussing Mrs. Carlson's condition and case and so forth? A. I don't recall.

Q. Well, didn't you talk to Mrs. Strom first before you saw Mrs. Carlson, either on the occasion of the visitation or prior thereto?

Mr. Demarest: I object as immaterial.

The Master: The objection is noted.

(Ruling—objection overruled.)

A. I don't remember that.

Q. Did Mr. Carlson talk to you prior to the visitation By Mrs. Carlson? A. That I remember definitely, no.

Q. Mrs. Strom arranged the visit, didn't she? A. She must have.

Q. Now, Mrs. Strom is married, isn't she? A. Yes, sir.

Q. Did Mrs. Strom, if you recall, have a fibroid growth or similar condition?

Mr. Demarest: I object to the question as not pertinent to the issue and immaterial.

The Master: Noted.

(Ruling—objection sustained.)

A. Yes, she had a fibroid.

Q. And did Mrs. Strom's fibroid resemble also a similar situation of something resembling an eight to nine-week pregnancy?

Mr. Demarest: I object to the question as immaterial, and not cross examination, and not relevant to the issue involved.

The Master: Noted.

(Ruling—objection sustained.)

A. The answer is no, sir.

Q. But you do say that it was a similar situation which Mrs. Strom had?

Mr. Demarest: The same objection on the same grounds.

The Master: It is noted.

(Ruling—objection sustained.)

A. A similar situation.

Q. Was it disclosed to you at that first visit or at the second visit when you spoke to Mrs. Carlson, or to Mrs. Sthom, that a large dose of castor oil had been administered prior to the visitation to your office? A. (Looking at papers). She took a dose of castor oil the day before she came to see me.

Q. And on September 23, she said that she had her last menstrual period on August 21, 1942? A. (Looking at papers). She had her last real period

August 21, but she started four days before she came to see me, on September 19.

By the Master:

Q. Now, Doctor, you are still looking at your office record, are you not? A. Yes, sir, my card.

Mr. Griffinger: I waive no objections that may be available to the defendant in respect to the use of any record.

The Master: That is noted. I simply wanted the record to show that the witness is looking at a paper.

By Mr. Griffinger:

Q. Now, Doctor, what is the normal lapse of time between menstrual periods in the average woman? A. Well, if she is—we will say between twenty-one days, which is very soon, to thirty days, which is the average; about fifty per cent of women have an average period of thirty days.

Q. And if a woman had periods which occurred twenty-one days apart it would follow, Doctor, that having been accustomed to periods occurring twenty-one days apart, that not having that period occur would naturally give inference, by this woman or any other woman, that she was pregnant?

Mr. Demarest: I object to the question on the ground that it calls for a conclusion not warranted by any prior testimony or facts.

The Master: The objection is noted.

(Ruling—objection overruled.)

Q. Answer the question, Doctor. A. The answer is that she may have that inference.

Q. Now, Doctor, on the 23rd of September, 1942, did you make a thorough examination? A. Yes, sir.

Q. Did she tell you that she had some arthritic condition in her knee? A. She told me that she had a swollen—her left knee was swollen, that is what she said.

Q. An arthritic condition is constitutional? A. Arthritis is a constitutional disease if it's all over the body, if it's not local.

Q. Is it organic? A. It is organic.

Q. Now, Doctor, if there had been a fibroid growth in the uterus would that in any way be associated with the arthritic condition, that is, as a causal condition? A. No, sir.

Q. There are many forms of fibroid growth, aren't there, Doctor? A. You mean forms—

Q. In the female organs, I am referring to. A. Well, fibroid of the uterus just refers to the uterus alone; if you mean about the shape of the uterus, it can be in many forms.

Q. And the size? A. And the size, yes, sir.

Q. A fibroid condition can exist where it in no wise disturbs a person, is that so? A. Positively.

Q. Now, did she tell you that she had been under the doctor's care for anemia? A. Yes, sir.

Q. Now, anemia, Doctor, would not in any wise cause the fibroid growth, would it? A. No, sir.

Q. And it would not be any contributing factor in respect to the arthritic condition in her knee, would it? A. No, sir.

Q. Now, an arthritic knee does not in every case prevent mobility, does it? A. Not necessarily.

Q. If I told you, Doctor, that I have an arthritic knee and you see me walk, you would say that the condition isn't so positive in respect to preventing me from having a normal gait, would you? A. You could have a normal gait.

Q. Now Doctor, on the first visit what was your diagnosis? A. That she had a fibroid uterus and that she had a hypertrophic arthritis, generalized.

Q. What was your prognosis? A. That it would be progressive.

Q. Why did she come to see you?

Mr. Demarest: I object to the question. How could the Doctor tell that? It calls for a conclusion. He may say why she said she came. Further than that, I object.

(Ruling—objection overruled.)

Mr. Griffinger: I want to have the Master direct the witness that in the event an objection is made by Mr. Demarest which includes the assertion that he may say, that the witness is not to follow that admonition.

The Master: I so state to the witness, without further comment.

Now, are you ready to have the question answered, Mr. Griffinger?

Mr. Griffinger: Yes, I am, sir.

The Master: All right, the objection is noted and the question may be answered.

Doctor, do you remember the question?

The Witness: Yes.

The Master: All right, will you please answer it.

A. She came to me for further treatment and advice.

Q. Now, you said, Doctor, that as part of the history she had stated that she had been treated and was being treated by a physician? A. Right.

Q. Did she disclose the name of the physician? A. No, sir.

Q. Did you ask her? A. No, sir.

Q. Were you interested in ascertaining the name of the physician? A. Yes, sir.

Q. And you still did not make that inquiry? A. In Florida she said the doctor was, so—

Q. But you did not make any inquiry? A. No.

Q. You did not think it important or material to communicate with him? A. No, sir.

Q. Did she say what she had been treated for? A. Yes, sir. She had been treated for anemia and rheumatism, and he had been giving her lextron and drisdol.

Q. And the rheumatism you are referring to, is that objective or subjective? A. It is both objective and subjective.

Q. And did you make the examination in respect to the objective findings? A. Yes, sir.

Q. And what was the nature of your examination? A. She had swollen—

Q. No, Doctor, excuse me. I am sorry. What was your examination? Not what she had, but what was your examination? A. My examination—

Q. Consisted of what? A. First I weighed her. She weighed 126½ pounds. Her blood pressure was 120 over 80. The joints that I examined, the knees, the fingers, and the elbows, were all swollen. And I did a vaginal examination, and found she had a tumor of the uterus.

Q. Now, in your vaginal examination did you find this fibroid growth? A. Yes, sir.

Q. And where was it located? A. In the uterus.

Q. Well, at the tip of the uterus? A. No, the solid body of the uterus. It was an eight to ten-week size. By that we mean a pregnancy that would be a ten-week size, would be the same as the fibroid growth I found.

Q. Isn't it a fact, Doctor, that such a growth is in many instances caused by a pregnancy which has not properly conceived in the woman? A. No.

Q. Now, where in relation to the uterus is the placenta? A. The placenta is anywhere in the uterus, it may be, for instance, say, on the top or on the botton of the uterus, the placenta.

Q. Did you examine the placenta for any scars? A. This lady had no placenta.

Q. Had it been removed? A. She had no placenta.

Q. It had not been created? A. No.

Q. And you made an examination for that? A. I made an examination of her uterus.

Q. But you didn't go any further? A. Just an examination.

Q. You made no other tests, did you? A. No other tests.

Q. On that first visit and examination did you prescribe lextron and andrisdol? A. She had been taking lextron, but I told her to take lextron and vitamin D when she came to see me on October 6, 1942.

Q. Are those administered by injections? A. They were given by mouth.

Q. And also by injection? A. By injection she got some protein, 2 cc. of sanolac.

Q. 2 cc. of sanolac by injection? A. By injection.

Q. Was that given by you or your nurse? A. I gave it to her.

Q. And thereafter was she given similar injections? A. She was given similar injections.

Q. By you or your nurse? A. I gave it to her, I don't remember the nurse giving it to her.

Q. And Mrs. Strom was capable of giving it to her?

Mr. Demarest: I object to that question as not being within the issues and not cross examination.

The Master: The objection is noted.

(Ruling—objection sustained.)

A. Yes, if Mrs. Strom had the sanolac and the hypo, she could give it to her at her home, any nurse can give it.

Q. Would that assist in making her menstrual period normal again.

Mr. Demarest: I object to the form of the question, if it is thereby intended to infer that the normalcy was to result from anything in the nature of a miscarriage.

The Master: The objection is noted.

Mr. Demarest: And I ask counsel if that is the inference intended by the question.

Mr. Griffinger: The Doctor will answer the question.

The Master: The objection and statements are noted.

(Ruling—objection overruled.)

You may answer, Doctor. Do you remember the question?

The Witness: May I have it, so I make sure about that?

(The question was read by the Master).

A. No, sir.

Q. Would it in any way be related to her menstrual periods? A. No, sir.

Q. What is sanolac? A. Sanolac is a milk preparation where the cream is taken off, and it's injected into a person by a needle.

Q. Did you prescribe for her pituitary glands? A. She had a—with the sanolac on the first visit, 1 cc. of pituitary gland.

Q. And that was in connection with her ovum, wasn't it? A. It was in connection with her fibroid.

Q. But her ovum was also inter-related with her fibroid, wasn't it? A. No, sir.

Q. Does the uterus entail the ovum? A. The uterus was where the fibroid was, but it had nothing to do with the ovum.

Q. Now, three days after her first visit she was at your office again, wasn't she? A. Yes, sir.

Q. And she reported that she had signs of a menstrual period? A. Yes, sir.

Q. And four days thereafter she again came to your office and stated that she had further signs of a mentsrual period? A. That's right.

Q. And on October 6, which would be about six days after that September 30 visit, she stated to you, in your office, that she had a regular menstrual flow again? A. Yes, on September 30.

By the Master:

Q. You mean that she stated to you that she had the regular flow on September 30? A. On September 30.

Q. And the statement was made on October 6, is that right? A. Yes, sir.

By Mr. Griffinger:

Q. Now, did she state to you on the first visit of September 23, that she was married to Mr. Carlson, did she give you that history, when they were married? A. Yes, she gave us a history.

By the Master:

Q. When you say "us," you mean yourself, don't you? A. Well, she gave me the history and she might have given the nurse the history, too.

By Mr. Griffinger:

Q. Did she say when she was married? A. Yes, sir.

Q. Now, when you examined her on that day did you find from your examination that there had been penetration? A. Yes, sir.

Q. And were you able to determine then, at that September 23 meeting, how long before the visit there had been intercourse? A. No, sir.

Q. But you were positive that there had been intercourse by this woman with her husband? A. Yes.

Mr. Demarest: I object to the question and I ask that the answer be stricken as not responsive because the question—

Mr. Griffinger: Just a moment. I want to interrupt you because I want to make a statement on this record that I want the Court to note that the very reason why I objected to this testimony being taken in the absence of the presiding jurist is that the attorney—which may be also something that can be charged to me—but the attorney in making his objections, beyond the control of the Court, may—and I don't say you will, I say may—include in his objections sufficient information to make it part of the witness's answer, which would be unfair to the defendant in this case. That is why I objected without including my reasons, so there would not be anything

charged to me, representing the defendant, of attempting to give information to the witness.

Mr. Demarest: If Mr. Griffinger will frame his questions in a manner which he should know to be proper without asking a physician to say whether his examination showed intercourse with this woman's husband, which is obviously an impossibility, then I will make no such objections on the record.

The Master: The objections and statements are noted.

(Ruling—objection sustained.)

By Mr. Griffinger:

Q. Now Doctor, you said that she would have knowledge of her arthritic condition of the knee? A. Yes.

Q. That would be obvious in every person who had an arthritic knee by virtue of the pain at intervals, doesn't the weather to a great extent determine the degree of pain? A. It has some influence on it.

Q. And if she had this arthritic condition for several years prior to your examination it would have been obvious to others, too, wouldn't it, Doctor? A. Yes.

Q. It would be a difficult thing to withhold from those intimate friends and acqaintances, isn't that so? A. Yes.

Q. And if a person had seen an individual almost daily prior to their marriage it would be something which that person would know by virtue of certain changes during the week or during the month, in that person having the arthritic knee. A. He should.

Q. Now, rheumatic fever, that is sometimes congenital, isn't it? A. Well, congenital means you're born with it. You are not born with rheumatic fever.

Q. Well, then, some ailment such as colds or pneumonia or what is known as the flu could be a contributing factor to getting rheumatic fever? A. Yes.

Q. And there are all stages of it; some to a large degree, some to a minor degree, and some of no concern to the doctor or patient? A. Yes.

Q. And there is only one prescription which most physicians urge and that is rest? A. Yes.

Q. There is not really any medication that you can prescribe for rheumatic fever, is there, Doctor? A. Oh, surely.

Q. There is? A. Yes.

Q. And that is to relieve or eliminate? A. Rheumatic fever, the joint effects can be cured; rheumatic fever, the joints don't leave any after effects.

Q. Now, Doctor—if you will permit me, to go back to the fibroid—such a condition does not require an emergency operation, does it? A. If there's no bleeding.

Q. Now, you said, Doctor, that with such a fibroid condition there would be some reluctance to have intercourse? A. There would.

Q. But it would not be physically impossible, would it, Doctor? A. No.

Q. And as far as Mrs. Carlson is concerned she was apt, wasn't she? She was able to have intercourse? A. Oh, yes. Yes.

Q. She was capable of having intercourse? A. Yes, sir.

Q. And an examination of her tissues indicated that she had had intercourse prior to her visit to you? A. Yes, sir.

Q. Now, you said that the last time you saw Mrs. Carlson was in November, 1942, is that correct? A. That's right.

Q. And you also said that about a year later, a year after that November visit, or a year after the treatment, you learned about her assertion in respect to her condition when she came to you, from Mr. Carlson, is that right? A. That's right.

Q. That would be in November, 1943? A. Well, within the year, I don't remember the date, I don't have any record.

Q. It would not be beyond the year, would it? A. I have no record of the date, and I won't swear as to the date.

Q. Was it a visit by Mr. Carlson to you? A. A visit by Mr. Carlson right in my office.

Q. And he was alone? A. I can't recall, I know he was here, but I don't know if he was alone or not.

Q. And he discussed this situation with you? A. That's right.

Q. Prior to the visit by Mrs. Carlson to you Mr. Carlson did not discuss this, did he? A. No, sir.

Q. And there was no discussion by Mr. Carlson or Mrs. Carlson at any time as to the act of intercourse between these two people, was there? A. No, sir.

Q. And it was only from a medical examination that you determined that Mrs. Carlson had had intercourse and that she was capable of having intercourse at that time, not thereafter, isn't that so? A. Yes.

Mr. Griffinger: Thank you, Doctor.

Re-direct examination by Mr. Demarest:

Q. Dr. Markoff, would it have been possible for you to testify here today in this case from

recollection only and without reference to your office record? A. No, sir.

Mr. Griffinger: Now wait a minute. He has answered, and I want to note an objection. And my objection is addressed to the re-direct by Mr. Demarest and the grounds I will be glad to give at the time it is argued before the Court, because the Master in fact cannot pass upon the admissibility of the testimony, and therefore I will ask that the Court pass upon my objections at that time.

The Master: The statement of counsel is noted. Go ahead, Mr. Demarest.

Mr. Demarest: State my comment, please, that there was no objection made in the first instance as to the use of the record in the direct examination.

(Ruling—objection sustained.)

By Mr. Demarest:

Q. Dr. Markoff, would you be willing to show this record to Mr. Griffinger so that he may examine it? A. No, why, of course (displaying the paper referred to).

Mr. Demarest: The witness offers it.

Mr. Griffinger: I have no desire to examine the record unless it is going to be made part of the testimony.

Mr. Demarest: My next question was to be whether or not the Doctor will allow the Master to take this record, mark it in evidence, and I request him to do so, with the understanding that I will offer it in evidence by photostatic copy made therefrom and return the original to the Doctor.

Mr. Griffinger: I object, and I don't believe the Master has the power to accept at this time any records into evidence unless the person making that record will be before the Court to subject himself to cross-examination at the time the record is made part of the evidence.

(Ruling—objection sustained.)

Mr. Demarest: I ask that the Doctor's record be marked in evidence as Exhibit P-1 in this case, and I ask counsel here to consent that this original record, being the front and back of a cardboard sheet, approximately eight by eleven be photostated with the understanding that a copy will be given to him and my copy used in court in lieu of the original.

Mr. Griffinger: I will not consent, and I object most strenously to the attempt on the part of counsel to use secondary evidence.

The Master: Are you through, gentlemen?

By Mr. Demarest:

Q. Dr. Markoff, will you be satisfied if this record is put in the hands of the Master and returned to you after the trial? A. Absolutely.

Mr. Demarest: Very well. Then I ask that it be offered on that basis.

The Master: Inasmuch as anything that I do as Master is obviously subject to the ruling of the Court, in this particular situation, in reference to Mr. Griffinger's objection, it is of course manifest that I must comply with the request of counsel for the

petitioner and mark the instrument referred to. And, of course, my marking of it is nothing, in effect, but an identification or labelling of what is to be offered, as it were, and what is referred to in this colloquy.

I will, therefore, mark the card in question Exhibit P-1 and will attach it to my record when filed in court.

Furthermore, I have no knowledge as to any right or power to make a photostatic copy. Mr. Demarest, is that request still before me?

Mr. Demarest: No, if the original record is taken, as it now is, photostats are not necessary.

(The instrument referred to was marked Exhibit P-1.)

Mr. Griffinger: I object to the Master, who is acting as the stenographer, to make it part of the testimony, either by photostat or any other method.

The Master: I have indicated my ministerial act in this situation, and I will follow that course. The instrument has been marked Exhibit P-1.

Go ahead, Mr. Demarest.

By Mr. Demarest:

Q. Doctor, you referred to a dose of castor oil taken by the defendant the day before she first saw you. Was there anything said about why or at whose instance that was done? A. No, sir.

Q. What is the size, physically, let us say, in inches, diameter or circumference, of an eight to ten-week pregnancy or growth so described?

Mr. Griffinger: I object because it is repititious on re-direct.

The Master: The objection is noted.

(Ruling—objection sustained.)

Go ahead, Doctor.

A. The uterus would be about three and a half inches long and just a little wider than the usual two inches—it might be two and a half inches wide.

Q. How much larger is that than the normal uterus size? A. The normal uterus would be about three by one and a half.

Q. You said in your cross-examination that you found penetration had occurred, but I ask you if you can say how long prior to your examination had there been pentration, if you can say? A. No, sir, I can't say.

Q. Could that penetration have been a matter of years before?

Mr. Griffinger: I object. The Doctor has answered the question already by saying he cannot tell whether it was a day before or a week before or any time before. He said there was penetration, and that is all he has testified to.

The Master: The objection is noted.

Go ahead, Doctor, and answer the question.

(Ruling—objection sustained.)

A. It could have been years before.

Q. A question was asked of you on cross-examination which contained a phrase as to whether the defendant had had intercourse with her husband, and I ask you whether you could tell whether she had had intercourse with her husband rather than intercourse with anyone else.

Mr. Griffinger: I object. Now, at this time I want to say, on the record, that if counsel wants to change the pleadings and charge the defendant with having withheld an act of prostitution prior to the marriage he will have to make application to the Court, but this attempt to have the Doctor change the truthful testimony he has already furnished by re-direct is a travesty on justice.

The Master: Are you through, Mr. Griffinger?

Mr. Griffinger: Yes, I am through.

The Master: The objection is noted.

The Witness: Could I have the question, please?

Mr. Demarest: Well, may I interrupt here a moment. I would like the Master to refer back to the cross-examination and find the place where the question of Mr. Griffinger on cross-examination appeared so that the question may be read in order that we may have accuracy here.

Mr. Griffinger: I object. I made my objection to your question, and the Doctor will answer it, and I think that is the extent of the taking of this testimony. The time for the reading of any other question will be before the court.

Mr. Demarest: I have made a request here, and I think that the Master is bound to grant the request to refer back to a question on cross examination in order that accuracy may prevail.

Mr. Griffinger: I don't think it is your power, Mr. Master. The hearing is conducted here before the Master and is to be

in question and answer form, and is not to be narrative.

The Master: Well, it certainly won't be narrative.

Mr. Griffinger: Narrative by counsel, I mean.

Now I ask that the Master repeat the question and see if the Doctor is capable of answering the question without having any other question read to refresh his recollection.

The Master: Now, Mr. Demarest, I don't see—and I agree with Mr. Griffinger that I have no power—and I agree with you that I must grant requests of counsel—but in the light of those two considerations, and in the light of Mr. Griffinger's last statement, indicating that he thinks the Doctor should first, in any case, give his answer to the question as propounded, don't you think, Mr. Demarest, that that is a practical course as of this juncture?

Mr. Demarest: Yes, read the question to the witness that I last asked him. Then we will see where we go from there.

The Master: Doctor, I will read the question to you, and then will you kindly answer it.

Q. (Read by the Master). A question was asked of you on cross examination which contained a phrase as to whether the defendant had had intercourse with her husband, and I ask you whether you could tell whether she had had intercourse with her husband rather than intercourse with anyone else. A. I couldn't tell with whom she had intercourse.

Q. So that if I correctly recall your answer to the question as to whether the defendant had had intercourse with her husband as being yes, you now say, from my question, you change that answer to say that you could not tell with whom she had at any time prior to your examination had any intercourse? A. I couldn't tell.

Q. If a person who is a layman and not a physician sees someone else, whether frequently or infrequently, with a swollen knee and a slow gait, would the layman ordinarily be able to distinguish as to whether that person suffered from arthritis. rheumatic fever or a trauma? A. No, sir.

Q. In your testimony on cross examination with reference to the defendant's being able and capable of intercourse did you intend to indicate whether you found in your questioning and the examination a willingness on the defendant's part.

Mr. Griffinger: I object, and I would respect the Doctor if he said that "That question cannot be answered by me," because I don't think psychology is part of his practice. I think he is confined to what he said at the beginning, that it is the general practice of medicine, and I don't think the Doctor probed the mind of the patient any more than had anyone else in respect to the relationship of this defendant with her husband.

Mr. Demarest: I only intended to ask whether from his questioning and examination he found evidence of a willingness on her part.

Mr. Griffinger: You can answer the question now.

The Master: The objection is noted.

(Ruling—objection withdrawn.)

A. I didn't probe that state of mind.

Q. Do you remember, Doctor, that Mr. Carlson made a visit or telephone call to you—as you said before— within the year for another purpose besides the recital of the language in the defendant's affidavit about the prevention of child birth?

Mr. Griffinger: I object.

The Master: The objection is noted.

You may answer.

(Ruling—objection overruled.

A. I don't recall if he made any other telephone conversation or visit.

Q. Do you recall talking to Mr. Carlson about your diagnosis of the case in the summer of 1943, as to the extent and nature of the arthritis which she had?

Mr. Griffinger: I object.

The Master: Noted.

(Ruling—objection overruled.

A. Yes, sir, I spoke to him about it.

Q. At that time did he ask the extent of the ailment that you found and indicate his desire to get full information?

Mr. Griffinger: I am not objecting if counsel will refer to the time.

Mr. Demarest: I refer specifically to some time in the summer of 1943.

Mr. Griffinger: All right.

A. Yes, sir.

Mr. Demarest: That is all, Doctor.

Re-cross examination by Mr. Griffinger:

Q. Now, Doctor, you said that the first time you saw Mr. Carlson was about a year after the treatment? A. That was the first time he told me about the fact that his wife told him that she was pregnant.

Q. You mean he told you a year after you saw the patient that his wife claimed she was pregnant? A. Yes, sir.

Q. In what manner did he disclose that she claimed that she had been pregnant? A. That she claimed that she was pregnant and she came to see me for the purpose of doing away with the pregnancy.

Q. And did he disclose that to you as the result of some proceedings that were pending? A. Yes, sir.

Q. And that was a year after you had last seen her? A. Yes, sir.

Q. That means that in November, 1943 in his discussion with you he stated that some proceedings were pending then, in which proceedings this assertion had been made by Mrs. Carlson, is that right?

Mr. Demarest: I object to the question as not being in conformity with the facts or the evidence.

Mr. Griffinger: Answer the question, Doctor.

The Master: The objection is noted.

(Ruling—objection overruled.

A. The date is the only thing I can't answer correctly, but his conversation with me was with respect to a claim which his wife had made.

Q. And that was in 1943, regardless of what time it was? A. Yes.

Q. It was not this year, 1944? A. 1943.

Q. You are positive it was 1943? A. Yes, sir.

Q. Now, Doctor, when Mrs. Carlson came to you she came to you as the wife of Mr. Carlson? A. Yes, sir.

Q. And as a sister-in-law of Mrs. Strom? A. Yes.

Q. And you knew that she was married? A. That's right.

Q. And at the time of the various visits you discussed with her her condition in relation to her marriage? A. Right.

Q. And you knew that she was married to Mr. Carlson? A. Yes.

Q. And there was discussion about marital relationship that took place between the husband and wife as part of your diagnosis, wasn't there? A. No specific—

Q. Nothing specific, but there was no denial that there was any relationship, was there? A. There was no denial.

Q. And the nature of your examination, the organs that you examined, dealt with the act of intercourse between husband and wife, didn't it? A. That's right.

Q. And your examination disclosed that that act had been consummated? A. Yes, sir.

Mr. Griffinger: Thank you, Doctor.

Further re-direct examination by Mr. Demarest:

Q. Would it disclose that it had been consummated between the husband and wife during the period of the alleged marriage, June, 1942, to the time of the visit? A. I couldn't tell when the alleged intercourse occurred.

Q. Nor with whom? A. Nor with whom.

Mr. Demarest: I think that is all.

Further re-cross examination by Mr. Griffinger:

Q. But there had been physical intercourse on the part of this woman? A. Yes, sir.

Q. Who was married when she came to you and so disclosed it to you? A. Yes, sir.

Mr. Demarest: Do you mean, Mr. Griffinger, that the disclosure was of a marriage rather than act of intercourse?

Mr. Griffinger: The question and answer are most obvious.

Further re-direct examination by Mr. Demarest:

Q. I ask the witness, then, on re-direct, whether the disclosure was that a marriage ceremony had taken place or that the parties had engaged actually in intercourse. A. The marriage had taken place.

Further re-cross-examination by Mr. Griffinger:

Q. But, Doctor, you asked the patient whether she had difficulty at times with intercourse? A. I don't recall asking her that.

Q. Did she disclose it to you? A. No, sir.

Q. But you did ask her whether there had been marital acts on her part, didn't you? A. I didn't ask her that. I took it for granted that she had.

Q. You took it for granted? A. That's right.

Q. And it was a positive inference on your part? A. Yes, sir.

Mr. Griffinger: That is all, Doctor.

Mr. Demarest: Doctor, thank you very much.

(The taking of the deposition thereupon terminated.)

Certificate of Master.

I, ABRAHAM M. SIEGEL, a Master in Chancery of New Jersey, DO HEREBY CERTIFY that the deposition of Samuel T. Markoff, a witness on behalf of the petitioner in the above cause, was taken *de bene esse,* pursuant to notice and stipulation of counsel, before me on Thursday, August 10, 1944, at 11 a. m., at the home of the deponent, No. 1481 President Street, Brooklyn, New York, in the presence of W. Howard Demarest, Esq., Solicitor of Petitioner, and Simon J. Griffinger, Esq., Solicitor of Defendant.

I DO FURTHER CERTIFY that the deposition of said witness was taken by me stenographically, and thereafter transcribed into typewriting under my direction, and that the foregoing transcript truly, accurately, and fully states the evidence given at the time and place aforesaid.

I DO FURTHER CERTIFY that the taking of said deposition there was offered in evidence on behalf of the petitioner one exhibit, which I have marked Exhibit P-1, and that I have annexed and hereby return said exhibit with this deposition.

ABRAHAM M. SIEGEL,
Master in Chancery of New Jersey.

Dated:
Newark, N. J.,
August 12, 1944.

MOTION TO DISMISS PETITION GRANTED

Mr. Griffinger: Will Your Honor hear argument now on alimony and counsel fees?

The Court: We haven't gone into that question at all.

Mr. Griffinger: If it will save time, I will urge the continuance of the amount allowed, thirty dollars a week. The affidavit of the petitioner sets forth certain——

The Court: It isn't a matter of saving time, if you wish to stay and go into the matter.

Mr. Griffinger: Very well. I'll withdraw that argument, then, and call the petitioner.

Mr. Demarest: I wanted to ask Your Honor, in connection with this decision: I mentioned at the beginning of our hearing here that I would like, when the testimony goes in, to file a memo, believing I could then file one which would adequately give the law as it might be applicable to the facts adduced.

The Court: Don't you think that right still prevails and will prevail until a decree of dismissal is actually signed?

Mr. Demarest: I think so, but I should like the opportunity.

The Court: I have always considered it that way, irrespective of what oral conclusions might be from the bench.

Mr. Demarest: I should like to make some reference to Dr. Markoff's testimony, which I consider very important, and I think I can point out to Your Honor items of the testimony which go a much greater distance in corroboration than I could in

the short time I could take in Court and the short time Your Honor has had to go over the lengthy correspondence. The proposal I have to make was to ask that I be given an opportunity to file this memo with Your Honor and I shall do it as promptly as possible or within whatever time Your Honor fixes. I think in a case taking two and a half days to try there are bound to be things I overlooked and the Court may have overlooked and if it does change Your Honor's mind then we approach a situation we have all tried to avoid and I suppose we will have to meet that when we come to it. May I call Your Honor's attention to Dr. Markoff's testimony, Page 17, for a correction. I have called it to my adversary's attention. Down two-thirds of the way on page 17, the line starting with the word "five." The correct answer is, "She was regular every twenty-five to twenty-eight days," but the transcript reads "thirty-eight days" and should be corrected to "twenty-eight days". That testimony is admitted as part of the record.

The Court: Yes, that correction may be made.

Defendant's Case On Separate Maintenance.

CARL O. CARLSON, the petitioner, resumes the stand.

Direct examination by Mr. Griffinger:

Q. Where are you employed? A. Fifth Avenue Bank of New York.

Q. How long have you been there? A. I have been there since nineteen hundred and thirty-one.

Q. What are your present duties? A. I am acting in the capacity as assistant manager of the real estate department.

Q. Are you paid a salary? A. I am paid a salary.

Q. On an annual basis? A. It is on an annual basis.

Q. What is your annual salary today? A. $4,000.

Q. Is that the total emolument you receive from the Fifth Avenue Bank? A. That is right.

Q. In addition to your salary do you perform duties in addition for a person or persons or corporations or groups of individuals for which you receive payment during the year? A. I formerly did, but those people have died. My answer would be "no."

Q. When you did, in what range would the additional emolument be, looking back the past five years you had occasion to do this. What would the average emolument amount to besides your salary?

Mr. Demarest: Inquiry is to ascertain present income. What was in the past five years is beside the present inquiry. He testified those people died. Unless he testifies they died within the year and he had an income during this year from them——

The Court: That is a proper objection. That $4,000 is net?

A. $4,000 is gross.

Mr. Griffinger (continues):

Q. Who is the owner of the house? A. At 225 Franklin Avenue?

Q. Yes. A. My mother.

Q. In her name? A. In her name.

Q. Was it always in her name? A. In Mother's and Dad's, and when Dad died it was in her name.

Q. Have you any interest in that home? A. I have advanced moneys to reduce the mortgage. I don't class myself as having any equity in the house. I paid them on behalf of Mother and Dad, before he died.

Q. What is the value of the house?

Mr. Demarest: He doesn't own it.

Mr. Griffinger (continues):

Q. You have some investment by virtue of a loan you don't consider a debt to you? A. That is right.

Q. But you have put some of your own funds in something to do with the house, haven't you? A. Yes.

The Court: What do you consider those payments to be, loans or gifts or what?

A. I consider them to be gifts. I never intend at any time to get them back. Mother wouldn't have it. I paid the insurance bill the other day, twenty-five dollars, and things like that.

Mr. Griffinger (continues):

Q. Do you have a bank or checking account or savings of any kind? A. I have a checking account.

Q. A savings account? A. No.

Q. Are you the owner of any bonds or securities? A. I have war bonds. No other type of security.

Q. Do you file an income tax? A. Yes.

Q. For 1943? A. That was the last one returnable. Yes.

Q. Did you pay a tax to the government? A. I overpaid the government. The government owes me $53.

Q. You came into a legacy? A. That is true.

Q. What is the total you received? A. The legacy was $16,000.

Q. You own an automobile? A. I have never owned an automobile.

Q. Have you any other personal property besides bonds? A. No, sir.

Q. Do you own any real estate anywhere? A. No.

Q. Any land? A. No.

Q. Does anyone own or hold for you any investments, lands, real estate, savings or bonds or any assets of any kind? A. No, sir.

Mr. Griffinger: If Your Honor please: I want to urge to the Court that a final decree, if advised by the Court, and in order to save time, should continue at thirty dollars a week. Now I want to argue counsel fee. I intend to ask the Court for a very modest sum, because I feel it would be a little difficult for the petitioner — although the man made a mistake there is no reason

for me to feel that I should punish him. My application for counsel fee is based on a considerable amount of study and work that I did in the matter. The amount I ask is $2,500. I made the amount definitely small because of the fact that I don't feel that it would be an unreasonable amount. I don't feel that my adversary in my position would have asked for such a small amount. I want Your Honor to know that from the beginning of the case, the trips to Chattanooga I had to make in preparing the case; the various motions; attendance in Court; trips to the doctor's in Brooklyn; the trial; I have figured out carefully that the number of hours in conference, attendance in Court, the depositions and trips to prepare my case have exceeded beyond thirty-one or thirty-two days, and notwithstanding that number of days by actual hours, and I am not looking into the midnight oil I used to read up papers so I would be properly prepared, I think $2,500 for my efforts is a very small and reasonable amount; and keeping in mind that when I say to continue the thirty dollars a week to the defendant I have in mind to make it as agreeable to the petitioner as possible.

The Court: As to the support: The pendente order will continue until a new order is advised, and that depends, somewhat, upon Dr. Demarest's promptness in getting in his brief.

Mr. Demarest: That is correct. May I say to Your Honor: We base alimony upon the ability of the husband to pay, consistent

with his income. At the time the amount of thirty dollars was fixed by the Court, Your Honor said that the sixteen thousand dollar legacy was principal funds and that it was not income; that it was not your purpose to participate in the expenditure of that fund, but that you would be guided by his income. At that time I consented to thirty dollars a week because it was quite evident that this defendant was in such physical condition, and had been until just prior to that time in an institution for treatment for this arthritic condition, where her expenses were even more than that per week. Fortunately she had her sister to assist in that. Your Honor will recall that while Mr. Griffinger asked for more than that per week and I suggested that, as a result of many conferences with my client, I would consent to an order of thirty dollars, Your Honor was impressed with the fact that that was a rather generous consent. Now conditions have changed. At that time Mr. Carlson did have some outside income. Now, because of the death of these people for whom he did tax work, which he testified to, his income is limited to $4,000 a year from which he must pay his taxes to the Federal Government.

The Court: Mr. Carlson should testify as to what his income tax deduction is from the $4,000.

Mr. Demarest: He hasn't testified to that.

Petitioner: I took my deduction last year—

The Court: How much did the bank retain?

Petitioner: Twenty per cent, but on my carryover from 1942-1943 where we had our tax year changed I had overpaid $53.

The Court: Twenty per cent. withholding?

Mr. Demarest: That is $800 withholding tax.

Mr. Griffinger: He was reporting as a married man then.

Petitioner: No, for 1943 you may verify that in the Newark ofice. In 1942 we reported a combined return, six months in 1942.

Mr. Demarest: I had just said we had been discussing this matter as to the thirty dollars I had consented to and there had been these changes so that today the income from which he may pay alimony, net, seems to be about $3,200. There may be some little adjustments back and forth, depending on whether his income tax amounts to what the bank keeps out. $3,200 a year is $60 a week. I think that is beyond the usual ratio that is allowed. I should like to reremind Your Honor that since the defendant is no longer under hospital expenses which prompted my former offer, that that figure should, when we come down to the final decree, be reduced to somewhere between twenty and twenty-five dollars. I would like to be able to express myself on the counsel fee.

The Court: You may.

Mr. Demarest: Mr. Griffinger was here before the Court on application for alimony and received a fee of $500 with the express understanding that that was granted to

take care of his Chattanooga trip and full preparation of the case. I think I can refer to correspondence on Your Honor's statement on that subject. We had quite some discussion since that order was signed on a visit where I had no opportunity to answer the argument that was made. I don't criticize the fact that it was done. I merely wish to recall to Your Honor that there was an application for a larger sum, which I opposed. In these cases these fees are just not paid. I was in a divorce case where the people had hundreds of thousands of dollars and after a long session of I don't know how many hearings, ten or a dozen, before a Special Master, Vice Chancellor Berry allowed me $2,500, and this case had consumed so much time in examining stockbroker's accounts. That was the only time I had any such fee. I didn't particularly ask for it. It was a fee Merritt Lane and the Court and myself agreed was reasonable under the circumstances. That $2,500 is very close to a year's salary for the petitioner. There is no reason for an outrageous demand like that. It is simply preposterous. I oppose it as vigorously as I can and I think the $500 allowed, with perhaps a slight or moderate amount to be added is sufficient. There have been trips to this Court which were not necessary for which counsel now asks compensation. I know how much work I have done on this case. I would no more ask a client to pay half that much than I would think of flying out the window.

The Court: How much time was given to Dr. Markoff's testimony?

Mr. Demarest: It started twelve o'clock and we were back in New York City by tube about quarter to two.

Mr. Griffinger: I didn't get back to my ofifce until about four o'clock.

Mr. Demarest: I don't know where you went, then. I got off the subway at Wall Steet and had lunch and was through with lunch quarter after two.

Mr. Griffinger: I was being most considerate when I didn't ask for an increase in alimony notwithstanding that I know and so does the petitioner that his wife still needs medical attention. Counsel says things have changed. They have changed for the defendant as well as the petitioner and in addition to maintaining herself and getting food, etc., she has to get medical attention, too. The petitioner himself testified that from the time she went to Chattanooga until he came down, until he was advised to stop, he only paid $200 altogether, which was totally inadequate for the medical attendance she was needing down there. I am sure the Court is aware that this $16,000, this man being in a bank is not leaving it idle. If his salary in $4,000 a year, that $16,000 is bringing in some money, too. Being in the banking business he wouldn't let $16,000 or any part of it stay idle. Let's assume it is bringing five per cent., or four per cent. He lives at home with his mother. He says he gives her something sometimes just to take care of things. Is this wife of his to be put to further hardships so he will have a larger amount even on the basis of $4,000? He is

averaging $100 a week, maybe $90 a week. This defendant says, "I want and need $30 or more." She discussed it with me but I said, "I am going to remain static at $30."

The Court: I assume the thirty dollars a week on pendente has been obeyed?

Mr. Griffinger: Yes, we have no complaint. We received it promptly. Counsel said he would like to argue against counsel fee. I am glad he did. I agree that this Gaston and Alfonso attitude—you go first of all—is ridiculous. We have a petition here filed that required careful review and inquiry. We have also an answer and counter-claim for separate maintenance. We have two actions; one to be met and one to be pursued. All meant investigation and inquiry; examination and investigation and review of the law; appearances in Court and arguments before the Court. Does counsel want to say that I, as solicitor and advocate, have not put forth my best effort? Have I not demonstrated to the Court that I have prepared the case in a manner which I believe would not only assist the Court but would justify my appearing in the matter? And those many hours I gave which almost accumulate thirty-one days, are they to be denied me? The wife is entitled to counsel. The Court recognizes that. Where the petitioner doesn't sustain, as counsel for the defendant I am entitled to be properly compensated. I believe I am being most reasonable. I urge the Court to allow me $2,500 on behalf of the defendant.

Mr. Demarest: I have never done this before and I don't know just how to approach it, but I have doubts about the thirty-one days and I would like, if it is within the province of the Court, to examine Mr. Griffinger on the time he spent and how he makes up these thirty-one days on this case.

Mr. Griffinger: With agility I'll take the stand if the Court should insist upon it.

The Court: If we are going to get into a dispute, then for the Court's protection Mr. Grifinger should supply an affidavit of services given.

Mr. Grififnger: I would like to.

The Court: You two lawyers are pretty far apart on this subject. The Court of Errors and Appeals has said that in such cases an affidavit should be submitted; then in the event of an appeal there is some basis for the Court's decision in fixing the amount; something to assist the Upper Court in knowing upon what basis the fee was fixed down here.

Mr. Griffinger: I will be very happy to do it.

Exhibit P-1.

(Opposite ☞)

11484 Carlson, Mrs Amy 34 225 Franklin Grantwood N.J.

9/20/42. L.M.P. Aug. 21.

8-10-47 P-1 J

Carlson v. Carlson Exhibit P-1 Charles W. Siegel, Master in Chancery.

On Sept. 19, flowed lightly for several hrs. Breasts same. Urinates normally no nausea. Took Castor Oil Sept 19. Menses = reg q 25-28 days, last since marriage. Periods q 3 wks. Has been under M.D.'s care for anemia and rheumatism. Taking hetrox, Duradol. WT 126½ BP 120/80 Left knee swollen - 8 mos - Hypertrophic arthritis

Veg: Tetroid size 7 & Walk prog. 1/4 cc fit 10 Ergoteutty 4 Ray Carlson 2cc Sandoz 1/2 cc fit -N for Carlson 4 qq 11 #15 1/2 dpc

9/26/42. No menses - Stained 9/24 - only a Wrinkling

9/30/42. Stained this morning dark brown WT 125. BP 100/60 Tetroids Hypertrophic arthritis Staining Black.

10/6/42. Pain of left knee - swollen - 8 mos - Was told it was arthritis. WT. 126½ BP 110/80 Had reg menses - 9/30 - reg flow. 2cc Sandoc. Left Knee hypertrophic arthritis Lextron - Vitamin D.

10/17/42 Pain of knee the same. Hypertrophic arthritis WT 126¼ BP 115/80 2cc Sandoc.

11/3/42. 2cc Sandoc.

11/28/42. Short wave 2cc Sandoc - Left Salpingitis arthritis Left knee, ankles. Def a mucus - fingers Anteflexion Left Shoulders. Mdy Exp 11

11484 Carlson

Exhibit D-1.

Aug. 15, 1944, 9 Letters.

Wednesday 5:15 P. M.
12/17/41

Dearest Carl:—

Have just come in from the bank—we were late getting away today—the work is getting heavier every day. Then too, they're trying to put thru a new Service Charge System which is going to make more work for the bookkeepers—

The "Season" as they call it here, is really in full swing—war or no war—so, guess Miami and Miami Beach will still experience a big tourist business—and we'll be busier than heck. The streets are crowded with cars and the paper states the hotels are receiving hundreds of reservations daily—the War fright apparently only lasted one week.

The "Drury Lane" Menu surely appealed to my appetite and I'll be couting the months—then weeks and then days when we can equally enjoy some of their seemingly appetizing dishes. Since I'm a little Country Girl, I'll of course prefer the "Country Kitchen"—Glad you all enjoyed it—and 'twas thoughtful of you to send it on to me. So sorry about your not receiving the "special" I sent until Monday—I wanted you to have it on Sunday—so guess its' to no advantage to send them "special" since they do not deliver as such —they should tho—

You know. Carl, anything you treasure will always mean just as much to me—altho I didn't know your Dad, but will say he must have been a wonderful person and father to have produced a son, such as you are—a real gentlemen to the *in*th degree and so thoughtful of other people—only

Exhibit D-1.

wish I could be likewise—you'll probably be disheartened with me—you know I can make friends very easily if I want too—but am more or less distant, and then do not try or make little effort to retain the friends I do make—with your help maybe I'll do better—so, I shall put the pictures along with *all my letters* and likewise treasure them—

Still you have said nothing about a gift for one Carl Carlson—why don't you answer my questions? So maybe you won't receive anything—see?

It's real snappy here today—you'd enjoy it, I'm sure—suppose tho it will warm up tomorrow, but this weather makes one feel the need of warm clothing—maybe some red undies.

I've written my sister all about our affair and related to her some of our plans as we now see them, and have asked her opinion and advice—you see, Carl, she has always more or less assumed the biggest part of the responsibilities at home and we naturally have always asked her for advice and suggestions instead of asking Mother —I haven't heard from either one yet—however as you suggested I have always thought of a very quiet private wedding—as a matter of fact, don't know if I'll be physically able to go thru that—maybe tho with your guiding arm and support and your ever presence—

Glad your mother and sister assumes the attitude they apparently do re our plans—she must be a *real mother* for most mothers hesitate to release their sons and especially so if there's only one son in the family. As I said yesterday you know we'll be waiting for those delicious home made cookies and surely think is most thoughtful of her to send them—

Carl, forgive me for writing this so hurriedly (is that spelled correctly?) but wanted to finish

before Edith came home, so will say *so-long* until tomorrow—

Lovingly yours

AMY

P. S. The reason for finishing before Edith comes home—see she starts talking and I can't concentrate—

New Year Day—1942
Now 9 P. M.

Hello Carl:—

Again I greet you on the New Year—and gee, what a beautiful day to start the New Year of 1942—how you would have enjoyed being here today—You might as well have been for your image was constantly before me—Edith and I spent the day inside and haven't as yet been out—listened to the Orange Bowl Game this afternoon—Were you listening too? It ended by being a rather thrilling game, however, didn't think it was going to be very exciting after the first quarter as the score was so one-sided—or was it the first half? Finally ended 40-26, Georgia, of course.

Your lovely New Years day card brought me out of bed this morning at 8:30—also a sweet telegram arrived this afternoon around 5 o'clock—Carl, you're so thoughtful and attentive—it's no wonder I love you so much—all women like those little attentions which I've been so fortunate to receive Yes, pretty soon we'll own a block or two in the U. S. P. O. paid for it air-mail postage, or will we be the proud owners of an air-mail phone? Sure, you know I like receiving air-mail letters, etc.—

Exhibit D-1.

If you'll examine closely the clipping enclosed wouldn't be at all surprised if you wouldn't be able to spot me struggling thru the wild and hilarious crowd trying to get in the Postal bldg. with only one aim in mind—Guess? Glad you received the Greeting—when did you get it? Also did you get my card Wednesday? And did your Mother get hers?

I forgot to tell you what small bit I'm doing for defense—started saving paper a week ago—now have a box full—

Mr. Barnes just came for Edith and he brought us a large box of oranges and tangerines—also a box of cut flowers—said tell you he was bringing flowers to me for you—he's okay—

Carl, I was reading my 1942 horoscope (remember Dr. Seward?) this afternoon and for the month ofApril these lines were very noticeable—"If you contemplate marriage, decide on a good day now, for the aspects will not be so well placed again, until June." Interesting?—I've just been wondering about the weather conditions in N. Y. in April—

Edith and I have been talking quite intimately today—Carl, see she was married for 12 yrs and should be capable of divulging some valuable information—from the marriage angle—I'll pass some of it on to you later on—

I'll walk over to the post office tonight, if you'll go along—

Always yours

AMY

Exhibit D-1.

Wednesday 5 P. M.
1/7/42

Dearest Carl:

Home again after another busy day at the office Mr. Mercer, our Vice Pres. received a very sad message the other day re his fathers death—who, I believe, lived in Penn. So, he'll be away all this week—about six others in the organization have colds and all more or less irritable because the work is so heavy—seems as tho we can never finish—Also Mr. Shumacker is leaving this Saturday to accept a better position with City Ice—so, little Amy will either ride the bus in the mornings or find some other kind person at the bank who happens to be passing my way—honey, I couldn't walk as I believe you suggested once—it would take an hour for me—now, I know you could scan that distance in ten minutes or less, but your legs are longer than mine—See? I received a delayed Xmas Card from a girl friend who lives in Toledo, Ohio, today—also your letter which was written and mailed On Monday—One day late—all because of the beautiful snow, I assume—speaking of snow —Yes, I'd like to see some beautiful snow scenes, such as we had in Cincy and especially so all thru Eden and Ault Parks—In Eden Park there's one spot where the U of C art students gather to do some of their best painting of snow scenes—and I adore seeing the snow and ice hanging on the spruce—palm trees flatness—sand and sunshine—well, guess I've had my share for I really drank in all the natural beauty of those rolling hills and shady trees of Ole' Tennessee while there this summer—and strange to say, had no desire to return—the climate here is okay, but there's no solid foundation to anything.

Exhibit D-1.

It's now 7:00 and Edith not home yet—our baked fish will be ruined—her friend gave us about five lbs. of red snapper yesterday—we had broiled fish last evening—baked tonight—looks pretty good too—Well, here she is now—see you after supper—Isn't it strange—I was writing about Cincy snow scenes before Edith came in and now she just handed me the enclosed clipping which her sister sent—Pretty?

Yes, you're a worry wart—I was just trying to make you envious of my ability or will power to lose weight—See?—No, honey, I've written you re my health which I'm sure you have received—There's nothing to be alarmed about—my nerves just tie up in a knot sometimes if I have an emotional upset—worry about anything too much or get overly excited—so, that's the reason for the vitamin pills—the various massages—the vegetable juice cocktails, etc—all of which tend to reduce one—I'll write more after I've seen Dr. Thomas this Saturday—

How about going skating for me? Would be fun wouldn't it—

Edith wants to hear a certain program, so I'll be seeing you tomorrow.

Oh yes, she asked if you might know a Mr. Malte Carlson, of N. Y.—I believe he's with some Dictaphone Co.—I realize, of course, New York is so small, etc—

Hope the snow has all melted so I won't be disappointed in the morning—Goodnight, my sweet—

Yours

AMY

Exhibit D-1.

Thursday 8:30 P. M.
1/8/42

Dearest Carl:—

Miami Beach is surely a haywire city—you would have enjoyed (enjoyed, did I say?) anyhow you would have chuckled to see those over-fed, untidy old jewish women going around today wearing, what looked like a 1500. or 2000. fur coat, over slacks—aren't women crazy? Twas very chilly here today, but somewhat warmer than your fair city, by far—

Was happy to receive the long letter written 1/6/42 also my little *friend*—he's my pal—and too, received a paper just full of interesting ads—I'm sure everything is more reasonable there than in Miami—I think they need a Price Adjuster here—and going higher every day—So, I won't bother about linens eh? Suppose we leave everything as is until we can see it and plan it together—don't you think that would be better? Yes the little fellow reminded us of our third anniversary—may we have many, many more—

One would have thought today was a holiday at the bank—very few people in—practically no work for the weary bookkeepers, which you might know made us very unhappy—Monday and Tuesday were heavy days, but today, the bottom fell out—looks bad—oh, honey, those new machines we operate are tops just like you—"Tops"—just touch a key and Presto! that's all—

I believe Edith finished the cookies last night—she said she realized she shouldn't eat them because of the richness, but just couldn't resist—I could only eat a few—but they were so good—

I'll try to answer your questions regarding my policy—It's up home someplace—I'll have Grace look around and send it here—

Exhibit D-1.

1. Policy with Phoenix Mutual Life Ins.—$100 ordinary life with double indemnity—recently I've been using the dividends, which is around $4.00 per year, to apply on the premium—I'm enclosing a receipt, so you can see—the policy is home, as I said above, but will write Grace—

2. You'll also see from the receipt the annual premium is $24 plus interest on the $125.00—I pay annually on 6/22.

3. The $125.00 to my knowledge was not deducted from the principle of $1000. Otherwise, there would be no int. charge—isn't that right?

4. I don't remember the date the policy was written but have been carrying it for at least 14 or 15 yrs.

5. Mother has always been the beneficiary, but that naturally would be changed.

Carl, I really hadn't inquired about the loan, do you think the policy should be written down—and by so doing would the interest charge be cancelled? Tho, of course, I'm sure it would—

Carl, I'll go this Saturday for my examination and will let you know—I feel sure it will be okay with the exception of maybe my blood pressure being a little low—I've always had that—Edith has been very sweet about massaging my neck occasionally—remember when you were here, I had a pain in the neck? Just my nerves—

Must wash the dishes, so I'll see you tomorrow, Goodnight, my sweet—

Lovingly

A

New Jersey State Library

Exhibit D-1.

Friday 7 P. M.
1/9/42

Dearest Carl:—

Such a rainy, dreary night—it's been cloudy all day—not one little ray of sunshine to brighten the day—and a bit chilly too—also another dull, slow day at the bank—wonder what's going to happen—

Honey, received your "special" last night about 10 P. M. which you wrote on Wednesday at the bank—was a little disturbed at first, thinking you might have been in an accident because of so much snow, ice, etc.—or possibly had heard some alarming news from Uncle Sam—gee, what a relief after reading it—Sweet, there's a little humorous incident connected with the receipt of this all important letter—you'll see when you look over my huge collection of letters some day.

No, I haven't seen or heard anything about shortage of clothing here, but from the prices they're asking, there must be a scarcity—yes, I think it advisable to get the two suits and other articles mentioned — from the description they must be lovely suits and seem rather reasonable in price—sorry, tho, no double-breasted suits are available as I've always admired them—but I'm sure these will look equally as well on you—the colors are grand too—

About my wardrobe, Carl—no doubt, I could stand a complete new one, but under the present situation and with prices so high here in Miami, I really hadn't planned on getting very many outfits—there are a number of things I'll need tho, and will try to find them here—I compared some of the prices here as against prices shown in the paper you sent, and honestly some are almost double—I'll want several pieces of Lingerie—a

pair of Patten Leather shoes to match my purse Edith gave me Xmas—Possibly a small black hat —gloves—hose—toilet articles—Now for *the Occasion* I'd like a street dress of some beautiful shade of blue—gloves—hat—bag and shoes to blend—wouldn't you like that combination? *Blue* —always true—or what would be your idea? Now, the dresses have—honey, you saw most of them— only two outfits—the costume suit of all wool black dress with waist line jacket of a certain shade of rose and black. A very expensive suit or dress $37.50 the little red and green outfit you also saw when we went to Lakeworth—then I have a number of other dresses—really think *The Dress* and possibly another less expensive one—will be sufficient—All of these things sweet, I'll get here— Yes, did give me a feeling of loving a guiding and helping hand, when you suggested we use *Our funds*—The only question re clothing is a winter coat—that is, in case we decide to carry out our plans before April—what would we do about that? —As I said before, only have a new light weight— light beige coat with beige fox collar which I don't think would be so appropriate for the N. J. snow—

Sorry you're working so hard—honey, take it easy—of course, the extra cash will always find a welcome in our household so just apply it to the Marac fund—suppose it will fit in there very nicely.

Re the apartment—as I said before we agreed to stay here until May 1st—that is, 6 mos. at the rate of $400.—all of which is supposed to be paid by 2/1/42 or 3/1/42—Edith owes $50.00 more and I Owe $75.00—here sister, Marion, paid $100. of the $400. because Edith's mother and father will be here in Jan. or Feby. for several weeks and then Marion will come down in Feby or March for

Exhibit D-1.

a visit of several weeks—$400 seems high rent for us, but we were figuring on a yearly basis of $500 which wouldn't be so high—these apts rent 6 mos. (a winter season) for $400—6 mos (summer season) $100—crazy—So, you see, I'm really obligated to pay the $75.00—which I can do by working until Mar. 1st or 15th—and will also be able to buy my necessary articles—

Honey you didn't say or mention any preferred time or date—so, when? Let me have your thought on the situation—Also when will you get your vacation? I believe I suggested you get or ask for your vacation in April and come down, but maybe we could arrange for March—Carl the more I think of our plan, the more nervous I get—How about you?—I really had no particular reason for suggesting April—other than I've always liked the month of April, and, too, thought I'd be in better financial circumstances—So, honey, if we decide on March we would or should postpone the Feby 22nd trip, don't you think? Why not get your vacation Mar 15th come to Miami—we have a private wedding in the Central Baptist (Dr. Angel) and then go to Bok Tower and other points in Flo—my sister and Edith said Havana, but honey, you've been there, haven't you? Then return to N. Y.—or N. J., rather—my sister suggested we come there on our honeymoon, but really I don't want to—we can visit them later—I'd like to have a new picture made for the paper—so will you give me a nice little write up about yourself?

I called Dr. Thomas this p. m. as I was anxious to find out about my blood test—he had gone out on a call, so I asked the nurse—She said twas okay, but am going tomorrow for an all over check-up—He's a graduate of North Western, Physician & Surgeon, about 38 or 40—Was recommended by

one of the boys at the bank—Dr. Thomas is delivering a new baby for this boy's wife sometime this month—

Don't know if I've answered your letter or not, but tried to touch on each paragraph written by you—if I haven't made my thoughts clear, just let me know—I only know my feet are cold right now —can you imagine that? and I'm in Miami too— and also know I love you—

Goodnight Carl

AMY

———

Wednesday 5:30 P. M.
1/14/42

Dear Carl:—

Just put the groceries away and then read the air mail card received today—don't especially care for the little "Miss" on the front—I'm fond of the little fellow—however, she seems to be a helpful little mate——

The lull we had in business seems to have disappeared as we've been very busy this week— And too, the bookkeeping dept. is suffering this week because two or three are out with colds— and one bookkeeper's wife gave birth to a 6 lb. baby girl this morning, so there wasn't much help from him today——

Yes, by all means don't neglect your defense work and air warden duties—that's important— if may be necessary for Miami to have another Blackout test as there has been quite a lot of criticism re the warning signals and some lights that were on—however, I realize I get neglected when you have so much outside work to do—but I'll try to understand——

Exhibit D-1.

You mentioned the loan on the policy—Yes, it will be in line to write them and get the particulars—does that receipt I enclosed give the Address of Company and Policy Number?

No there are no more loans—in fact that's the only one I ever made and really didn't consider that one—as they told me that was the cash value of the policy or something to that effect—guess I didn't know what I was doing——

You have my letter written yesterday re the Tampa trip—honey, let me know how you feel about it? At the present time, I'd prefer you or rather have you come to Miami—as explained in my letter—was somewhat cloudy again today—not lovely like yesterday.——

Hope you were successful in your shopping tour Sunday—would be helpful honey, if you knew someone in the Radio business who could give a nice discount——

Edith is home, so I'll say Goodnight—my sweet——

Yours

AMY

———

Friday 6:30 P. M.
1/23/42.

Dearest Carl:—

Hello honey—gee, have I been popular today—two letters this morning—one "special" about 3 P. M. and then the paper you mailed earlier in the week, this afternoon—have four important letters before me now and will try to touch upon each paragraph, lightly anyhow—The Bok Tower enclosure caught my eye first—a beautiful picture—and honey don't be so depressed, maybe it can be arranged for us to be there on 2/22/42 as we had

planned—will explain more fully in a later paragraph—

Yes, the sun is still shining around one AR—even brighter than it has dared shine from the blue heavens today—and that's bright, cause it really beamed forth today—the blackout couldn't last after today's sunshine coupled with the "Special" I received.

Sorry you've been working so late—please get more rest—forget about the extra funds you would have received by working such long extra hours —your health comes first—besides we won't need that additional income—the defense work—sorry that has been neglected too—(honey, all because of me?)—but you'll catch up and be far ahead of all the others—

Glad you received the wire sent on Wednesday and also that it was in line for me to send it to the bank—did you notice or recall in your letter of Tuesday and which I received on Thursday, you were wishing or hoping I'd wire you at the bank —your train of thought must have traveled straight to me.

Will be glad to get the tax blanks—haven't seen any around the bank, but imagine we could secure some from the post Office — its been sometime since I filled out one, but imagine we can work it out, as I'm sure you're too busy to be pestered with mine—Edith knows how, I believe—

I'm sure you've received my letter re the radio —did you want me to return the folder showing the Pilot Models? Hope you decided on choice #1 —but if not that one, I'm sure your selection will be okay—

Your "special" was a honey and so glad to notice the uplifting of spirit—you were more like COC—the little note from your sister was sweet —I admire her style of penmanship very much—

and as you suggested, I'll keep it with all my other collection—which is beginning to overflow my week-end bag where I have them placed—guess, I'll be forced to get out my lovely new bag for storage of my important notes—and you asked if I were tired of them?—well, how could you?—

I held out the "Heart to Heart Talk" you sent for. You had underscored a number of thoughts which most certainly were written just for us—the one in particular that hit me square in the face — that of "unconfessed Sin" — that has bothered me ever since I read it and have come to the conclusion that I must confess to you, otherwise I'll not improve—I believe I mentioned in one of my letters about not feeling up to par—it all started the Saturday afternoon I got soaking wet in the cold rain—I've been to the Doctor a couple of times and he says it's Rheumatic Fever settled in my left knee—it's very painful and can hardly use it—he advised me to stay off my feet as much as possible and also gave me a prescription—So honey, I've been doing all I could to try to get rid of this trouble without worrying you about it and too wanted to be okay for the Tampa trip next month, but seems as tho it's slow in healing—however I have several weeks to go yet—So, if I'm okay by 2/22/42, and I've been praying that I be, we can still meet at Bok Tower—It may be necessary for me to leave here on the 11:30 bus Sat. evening tho and get in Tampa early Sunday morning—We'd. have all day Sunday and Monday morning together—it's been necessary for me to take several days off lately and it may be that I couldn't ask for another extra day—honey. I hope you understand—the black out as you termed it, was merely caused thru fear of my losing you—especially after receiving your letter re my health

Exhibit D-1.

—Of course, you were unaware of my condition and therefore could not understand—I wanted so much to be 100% again before I told you, but maybe if I confess, as I said before, I'll improve that much quicker—Will you help me?—but if by confessing I lose you—well, I'd dislike to think what would be the outcome—

So, honey, now you know why I've been reluctant about discussing our trip—but please don't worry about me as I'm feeling much better today—

Do hope you get plenty of good rest over the week-end and I'll promise to not send any more blackouts—

See you tomorrow, honey—

Lovingly

AMY

———

Friday 5:30 P. M.
1/30/42.

Dearest Carl:—

Just come home and found your "special" of yesterday under the door—honey, what has happened that has caused you to be so despondent and in such a depressed mood? Surely not just because of my slight ailment which most certainly will clear up in a short time—in fact, the fever and most of the swelling has gone—just a little weak now, but a few more weeks will take care of that——

I'm afraid you're trying to do too much extra work—I've already cautioned you along this line tho—honey please for my sake, and yours too, don't lose your enthusiasm—your interest re our

friendship—I haven't changed one iota in my feelings, my affection and love for you——

I've forgotten the letter I wrote sometime ago and had hoped that you had forgotten, but evidently not, since you asked me to send it to you—honey, I've reread it and really can't see where or how it should have alarmed me so terribly much —only reason I can offer is that I was low at that time and after reading the first page, you seemed so far away from me—when you mention losing interest it worries me quite a bit—possibly you do not understand women and know that ever so often they are quite moody—sensitive—and it was during this depressed state of mind I read this letter—I've forgotten it—so will you destroy the letter I sent so you won't have it around—I'd like to have this one returned tho, as I'm guarding carefully all my letters from you—when I get lonesome, I glance thru some of them.

Honey, I should know within 10 days or less whether or not I can make the trip—I'm praying and fully believe my knee will be okay,—but will ask for Saturday off as I realize that would be quite a trip for just one night—we'll decide later —anyhow, sweet, pep up cause everything will turn out okay—it just must——

Will look forward to the letter you've written re you-me-us—until then, Goodnight and pleasant dreams——

Yours

AMY

Exhibit D-1.

Sunday P. M. 6:30
4/19/42

Carl, dear:——

Thanks for the lovely telegram that was delivered around nine this morning while I was scrambling eggs—the string beans with bacon fat were scheduled for a few hours later—the message surely gave me an appetite—those eggs tasted as if they'd been layed by the Golden hen—the beans were tasty too, later on, but would have been more palatable had you been here even if you didn't dare partake—

It's been a lovely day—the sun has been out all day—but I've been in—just doing little odd jobs that need to be done—listening to the radio, too, just reminiscing—recalling little incidents of a former Sunday—heard Dr. Allen this morning at eleven and the Fuller Hour at one—was wondering if you too, were listening—

Honey, received three letters on Saturday—one written Wednesday—regular mail—one written Thursday and received the one you wrote at 1:20 Friday late Saturday P. M.—We have a new mail man, so Mrs. Nunn said, and our mail has been coming in at different times—Suppose it doesn't make any difference just so I hear from you daily—

Gee, sweet, you surely had a busy week-end mapped out—was glad to hear that Dr. Harlow had asked you to do the extra work for him—that proves he has full confidence in your ability, which if he didn't he should be shot,—and, honey, does that mean you're to take care of his estate, etc. after his death? It might be a good idea, sweet, to take some one along with you when you call on Dr. H—cause if Miss H. is as desperate as you

say, she might take advantage of you—I'm sorry I just can't share you with her—So she had better be looking elsewhere for *her man*—

Honey, I feel grand today—just like walking on air—only five more weeks—must get weighed next week—do believe I've gained a few ounces—in the wrong place, however—I've been eating heavy meals and in between meals—I'd like to gain 10# before June—just must do that—for you—

Edith called me from Cincy last evening at 7:30 P. M.—just wanted to know what I was doing—asked about you—said she was lonely for Miami—I told her she could visit us sometime—said she would surely like to be at the wedding—She has always said she wanted to stand up with us—

Sweet, that was a grand letter you wrote to the various families on Franklin Ave.—They'll realize you have their interest at heart and will be more than willing to co-operate with you—so typical of you to put your whole soul and heart into everything you attempt to do—

Sweet, the radios in the neighborhood are going full force—can you hear?

Hope you had a successful week-end—How's my rival, Miss H?—

See you tomorrow—

My love to you

AMY

Exhibit D-2.

Wednesday evening 10 p. m.
January 6th 1943

Dear Grace:

I've just returned from Amy . . . to find the copy of your thoughtful telegram and also Monday's letter . . . you may be assured that Amy will appreciate receiving both . . . which I'll special to her tomorrow morning when this note goes on to you and Mr. Bowers . . .

first, to relate briefly about the events of the past several weeks . . . possibly better to make it 'months' . . . for as you may have known, Amy has not been feeling up to par . . . so I'll go back to July when we returned shortly before from a brief honeymoon . . . everything was grand . . . as it has and always will be notwithstanding an adversity now and then . . . Amy soon adopted herself to the North . . . its ways and people . . . new faces and places . . . and she seemed to match my degree of joy . . . which I like to believe unbounded . . . for such gives us both strength and faith . . .

somewhat underweight in June . . . she soon gained about 8 or 9 pounds . . . however, she seemed to favor what was a swollen knee . . . or at least so it seemed . . . we consulted a local doctor . . . a college friend of mine . . . he advised checkup-of blood count, etc. . . . and a visit to a specialist about the knee . . . it became necessary to hospitalize Amy for 6 days during which time the knee was completely immobilized . . . and apparently diminished in contour . . . her low blood count demanded vitamins and iron which have done her a world of good . . .

the Fall months gave us some anxiety about my draft status . . . the same uncertainty that count-

less thousands are facing . . . we were and are reconciled to a change in status but nevertheless it is not always pleasant to contemplate . . . in late November, Amy appeared to lose some of her ginger . . . her vitality ebbed . . . so I arranged thru his brother at the Bank for Amy to visit a New York physician . . . Dr. Donaldson gave her a thorough, almost 2 hour examination . . . diagnosed the joint swellings as a form of arthritis . . . and further referred her to a surgeon . . . C. Gordon Heyd . . . reputedly one of the country's leading medical men in his field . . . Dr. Heyd's exam revealed what Dr. Donaldson had surmised . . . and what both are confident were the sources of infection in her precious body . . .

perhaps it is best that I now say that we didn't have to dwell to long on the decision . . . it was Amy's wish that nothing be mentioned to any one of her family . . . though she did write a brief note to Earl . . . we went over to the Post Graduate Hospital on Sunday after Christmas . . . and you'd have been thrilled to see the little Trojan . . . what a stoic . . . calmly facing what we knew would be a rather severe ordeal . . .

she was operated on Monday afternoon, the 28th, at 4:30 . . . came down from the op room around 7 . . . and just never recalled a thing . . . we had arranged for a shift of three nurses which was all too little to do . . . and had one more on the 4 to 12 Tuesday afternoon shift . . . I saw her that Monday night but I may as well have been walking in Miami for all Amy knew or cared . . . even thus the following several days . . . but about the fourth day out . . . well, you'll be glad to know that she has improved in rapid order . . . her spirit continues tops . . . same old Rogersonian humor . . . and ever so pretty even tho she is of course

Exhibit D-2.

somewhat peaked . . . or "pushed" as we say . . . one must expect that . . . both Doctors have been grand to her . . . see her every day . . . we have been promised possibly a departure this Sunday . . . but with the severe cold gripping this area, I'm hopeful that the two will approve Amy remaining at the P-G for a few additional days . . . we burn oil here and can not convert . . . our quota was cut about 35% but we'll manage . . . and I'm petitioning the Ration Board for extra coupons because of Amy . . .

Amy will wish to tell you more of the particulars of the op . . . sufficient for me to write is that is that Dr. Heyd removed her appendix, the fibroids (believed to be the source of obstacle toward the fighting of the arthritis) and possibly sundry items here and there . . . I write seriously when I speak as I do . . .

we are all so happy to have the confidence in and of both doctors . . . Amy really is completely sold on them . . . she had been thinking of returning to Chattanooga to see a local chiropracter . . . but, obviously, such form of treatment would have been futile in this instance . . .

Dr. Donaldson is now treating her knees . . . wishes to avoid drainage . . . hopeful that the accumulated fluid will pass thru naturally . . . out of her system once the body is again strong . . . her appetite . . . she is eating the P-G out of its dining room . . . or almost that . . . it so happens that this hospital is ranked rather highly in the New York area . . . and such is reflected in the service, etc. . . .

now, that brings me about up-to-date about our little patient . . . presently, she dreams of being up and around real soon . . . which she will be unless some entirely unexpected reaction should

Exhibit D-2.

develop . . . and both Doctors have assured me that she is definitely on the gratifying road of recovery . . . for which we all give daily prayer . . .

I have written at great length, Grace . . . to acquaint you with the background . . . please be not alarmed . . . both Amy and I have never thought of this siege as a "bad break" . . . far from it . . . we like to plan and count it as a fortuitous one . . . far better to have the services of these doctors at this time than to gamble unknowingly at some future date . . .

anything I may write about Amy and what she means to me . . . to my Mother and Sister . . . and the reaction and reception of my friends . . . well, Grace, you know your Sister . . . she has really been an answer to what one prays for, but perhaps for lack of faith . . . is not destined to receive . . . we're both very happy and look forward to the time . . . if so willed . . . when we will be in our own home . . . presently, the draft status would be reclassified were we to take our own apartment . . . buying a home is out of the question with the uncertainty of the war . . .

Amy was somewhat . . . that is saying it perhaps mildly, worried when she failed to hear from her dear Mother during the holiday season . . . however, she did receive and I brought it over to her . . . a long, sweet letter a few days ago . . . whether you wish to tell Mother is for you to determine . . . Amy's suggestion would be to withhold such mentioning until she, A. R. C., is bouncing around again . . . which shouldn't be too long . . .

only one thing wrong about your sweet Sister . . . and I'm entirely at fault . . . she feeds me too well . . . has me up around 195 when I should hover around 185 . . . however, it is living . . . and do I miss her . . . boy, they don't come finer . . .

Exhibit D-2.

but, say, I had better pause right here . . . for once on the track . . . and it doesn't take me too long to get started . . . I'd devote several more pages, telling all about Amy . . . knowing sisters . . .

Amy asked me tonight to acknowledge your wire . . . to tell you something . . . which I hope I have done . . . please do not be worried . . . she isn't . . . everything will work out in good order . . . of that we are certain . . .

about flowers . . . a mighty nice thought . . . but Amy would have a relapse . . . several of our friends wished to send . . her request was to the contrary . . . so we bide by her wishes . . . however, I know that she will appreciate your intention . . . as do I . . .

if you write . . . may I suggest that you note on your envelope . . . PLEASE FORWARD . . . for unless something disturbs the present plans . . . we have hopes of leaving Sunday . . . or by Tuesday at the latest . . . The Post Graduate Hospital . . . GYN 491 . . . 20th Street and Second Avenue, NY, NY. . . .

it has been my pleasure for the last hour or so . . . if AMY doesn't feel up to it . . . I'll do the writing . . . provided you won't mind the typing . . . such as it is . . . we send our sincere feelings and greetings . . . somewhat belatedly . . . for a year of health and happiness to "C. J." and you . . . and those, all of whom it will be my privilege to meet some day . . .

CARL

Exhibit P-1.

Saturday evening—8:10 pm
April 10th 1943

Dearest:

Your Tuesday pm telegram was phoned in that late afternoon . . . and delivered the following morning . . . also your letter came on Thursday . . . I had hoped that you would wire me sooner than you did . . . but then perhaps I should feel grateful that you did . . . for I realize that you were overwhelemed with friends and relatives . . . your dear Mother, Sister . . . how are all . . . I hope you found them in good spirit and health . . .

I just received a major thrill listening to the Word of Life hour . . . Jack Wurtzen read a letter from a business man who mentioned that his Daughter, Barbara, had become converted several weeks ago listening to that hour . . . and then he introduced the writer . . . who happened to be none other than "Bob" Nelson . . . and what a testimony he gave . . . I so wish you had been right here . . . where, incidently you do belong . . . right now Carlton Booth is singing . . . I got on my knees . . . cried out aloud in penitence . . . for mercy . . . and feel so much better for having done so . . . for having heard Nelson . . . my prayers are for you, too . . . may God have abundant mercy on both of us . . . keep up your daily readings, Dear . . . and do not be afraid to pray . . . pray out loud . . . only the devil worries if you do . . .

Howiee stopped in this afternoon at 2 and didn't leave until I did . . . at 5 . . . ate and came home . . . dead exhausted . . . sleepy . . . cold . . . weary . . . unhappy . . . and with worlds of work left . . . am beginning the State tax returns tonight . . . not going into work tomorrow . . . but may jump

Exhibit P-1.

over to the City in the pm to mail a number of important letters . . . depending upon how much I accomplish in the meanwhile . . . Odie and Howie send their regards . . .

I just dont feel like writing about Mary's passing so will refrain . . . perhaps . . . in a later letter . . . I lost a grand friend . . .

You have outlined an ambitious health program, Amy . . . I personally do not subscribe to the theory that health will return with poundage . . . tho you are woefully short of both . . . however, obey your doctors . . . keep me informed of whatever you wish to have me know . . . it will be satisfactory for you to try the "treatment" but I fail to understand how such will restore the blood-count deficiency . . . right now . . . Jack Wurtzen is giving the invitation . . . and Booth is singing WHY NOT NOW . . . why not come to Jesus now . . . you know the song, Honey . . .

I'm going to ask one thing . . . please have your Doctor send me a report of your present physical condition . . . also what he proposes to do . . . and I should like to receive reports from time to time, Amy . . . for Im ever so worried . . . you will again call me a "worry wart" . . . but seems to me that I wasn't too far from the worrying stage when I did it at the time you called me thus . . . remember . . .

A surprise, almost an hour, blackout out last night . . . just as I came home and was sitting down at 9:40 to eat a bite for supper . . . we had two alerts and two blues . . . and I didn't get back until near midnight . . . I don't suppose you have any such things down your way . . .

Amy . . . you promised me one letter a week . . . I'll be looking forward to it . . . tho only if you have the chance between snatches in your health-finding set-up . . . Mother and Esther and Eric

Exhibit P-2.

. . . Carl, too . . . and all our friends are praying for your return to health . . . strong enough for the North . . . put your trust in HIM . . . thats our only bet . . .

CARL.

Exhibit P-2.

Tuesday evening at the office
April 13th 1943

Girl:

Your letters of last Wednesday and Friday are really remindful of happier days, as you say . . . of days which were to be followed by the sorrow of illness and with that . . . short, bitter tempers . . . yes, Amy, I, too, associate those days of writing with that of a year ago . . . I'm as busy now as I was then . . . Probably more so . . . yet . . . when you emphasized that one letter a week from you was all that you would care to write . . . obviously . . . the yen of COC to jump into the fervor simply wasn't there . . . but perhaps it will return . . . who knows . . . your two letters are entirely different from the girl you portrayed yourself after we were married . . . perhaps absence does something to you . . .

pills, pills, etc. . . . well, Amy, you've been dosing yourself with all manner of such commodities for many, many years from what I gather . . . so I suppose you're ready to try another bottle of vitamin stuff . . . it is my earnest hope that you will regain something passing for normal strength . . . but you'll do so only through the grace and gift of God . . . are you praying and reading your Bible daily . . . I hope so . . .

Exhibit P-2.

About the proposed dental x-rays . . . didnt you always insist that your teeth were o. k. . . . with no infection spreading from that source . . . I remember only too well your slant and reaction when I insisted that they be x-rayed by Dr. Demarest . . . and how gloating you seemed to be when the plates showed nothing . . . it is always likely that another would reveal the source . . . so, you have my permission to try . . .

about the medical bills you're running . . . send them to me . . . and also, please send me the brochure or whatever circulars Dr. Coffelt issues . . . is it a sanitarium . . . etc. . . . I'd like to have the details . . . as far as 30-day improvements are concerned . . . dear one . . . I'll be expecting a complete recovery . . . which means that you'll have to become more thoughtful . . . yes, appreciative of me . . . of those in your daily contacts . . . you'll have to reconcile yourself to many changes if you return North . . . in other words Amy . . . you'll either have to take your role as a wife should . . . and by that I do not mean relationship . . . we both know too well your ideas on that topic . . . I have in mind . . . normal, daily activities, etc. . . . learn to wait upon yourself . . . to do your own chores and to remain on your feet . . . I am having appointments with several doctors who attended you . . . and am getting their detailed diagnosis . . . for it has only been during the past ten days . . . that I realized what was what . . . and I really didn't like to be given to understand that you simply dont give a hoot . . . so, Amy . . . a good bit of the mess seems to be up to you . . . to clear up . . . and make life happier first, for yourself . . . and then me . . . neither one of us can contemplate what the future holds in store . . .

Exhibit P-2.

I'm going over your notes at a later time . . . to reply to any items you may have mentioned . . . sufficient now to say . . . that it has been extremely cold up North . . . down around 28 last week . . . heavy winds . . . all of which should make you feel glad to be away from your hearth . . . and heart . . . today was a bit sunnier but not the 85 about which you wrote . . .

I'm scheduled for Dr. Harlow tonight . . . at 7 . . . then Miss Lyman at 8:30 . . . (friend of Mary's . . . then home to finish the Johnson State tax report . . . keeps me hopping . . . last night was out on business until after 11:30 . . .

Just what my status will be in the new army regulations, I dont know . . . but I am hopeful of possibly getting ten days or so . . . in the last of May . . . would plan to run down for a few days . . . to see your progress . . . also to discuss several important matters . . . for very honestly, Amy . . . you seem to have given no indication of any love for me for months . . . if at all . . . I have permitted it to ride . . . thinking it advisable because of your illness . . . yet . . . I'm now bewildered . . . you were so darn anxious to get away . . . that it makes we wonder just where I stand . . .

I suppose you are somewhat nearer Miss Bobbitt than you were when in Grantwood . . . I would suggest that you contemplate no excursions . . . either coming or going to see her . . . however, you know best . . . but the register can not stand the expense of either fare or feelings . . . do you understand . . . I often feel that if I were the recipient of the ardor you've shown for that person . . . why I'd be somewhat happier than has been my lot . . .

Now, Amy . . . I know that this letter will not cause you to shout . . . except in possible anger

Exhibit P-2.

. . . the point is . . . that I'm at a turning in the road . . . our marriage never developed into what I had loftily anticipated . . . we've gone over all of that . . . your threats, etc. . . . I pray for your recovery . . . am looking forward to the day when we can see each in Tennessee . . . if it be so willed . . . yet, I caution myself ever often to withhold my enthusiasm for you've so often drowned it out . . . makes me shy, so to speak . . .

after you've waded thru this note, write and tell me about yourself . . . what they are doing to you . . . your knees, knuckles, hips . . . that was a new one, I didnt know it affected you in the hips until you casually mentioned it in your letter . . . incidently, there is no one sufficiently interested in looking after my wants . . . and that would seem to go all the way . . . even to you, Honey . . . please send your notes PERSONAL to me if you write to the Bank . . . your big, stinking, tired but ever-thoughtful husband.

CARL.

Exhibit P-1.

Wednesday evening—9:30 pm
April 21st 1943 at the Bank

Dearest Amy:

Dont blame me if these letters sound unreasonable, etc. . . . worries, etc. , , , long hours, are sufficient to drive me haywire . . . I'm still here figuring out a bad mtge case left over for several months . . . just telephoned home and learned that there was no mail to-day . . . but perhaps I should not complain too greatly . . . you did write on Saturday . . .

This letter found you somewhat depressed . . . please get into your mind Amy that recovery . . . if it ever comes, partially or otherwise . . . will not be a matter of weeks . . . you seem so worried about your weight . . . yet, you never appeared to worry about that same state when you were in Jersey . . . up to the present time you have utterly failed to tell me of Dr. Coffelt's diagnosis . . . does he know what he is treating you for . . . and why . . . I'm entitled to know that much . . . did you go to the other doctor re blood count . . . or does it happen that this condition is not very important in the opinion of Dr. Coffelt . . .

You speak of trying the Coffelt system for 30 days . . . and then returning to your Sister Grace for what apparently will be an indefinite period of time . . . I have never figured in your plans of discussion at any time, Amy . . . but I feel it is high time that you finally took me into some consideration . . . just how long do you contemplate staying in the South . . . when I indicated a brief vacation at end of June you immediately evidence idea that you'll be remaining in Tennessee for a long while . . . that you wished to celebrate the FIRST on June 20th in your home state . . . of course, it has never seemingly ever occurred to you, dear . . . that I

am a working fellow . . . that you married me and assumed certain normally-accepted obligations . . . and I'd sure like to feel that you are thinking of me in the manner a wife is supposed to . . . I write with fervor yet it will probably be all disturbing to you to read these lines . . . fact is, Amy . . . I'm merely entitled by all processes of normal reasoning and accepted society standards to that which I suggest . . .

If I'm to judge you from your inertia at home, I imagine that you are doing darn little but remaining in bed . . . you must remember that every Doctor who looked at you stated that you must keep on the go . . . be active . . . to continue the circulation, etc. . . are you doing that . . . or on what program are you . . . surely the daily treatments do not absorb all the waking hours . . . and I'd be interested in knowing if you are making every physical effort . . . great as the pain and discomfort may be . . . to aid yourself . . . where does the spinal treatment and manipulation enter in a case such as this . . .

You never did seem to care about having a copy of Dr. Heyd's report . . . dont you think your present doctor or doctors would be guided to a certain extent if they had the professional particulars of that memo . . .

I missed the air raid meeting tonight . . . 2nd time running because of long hours here at the office . . . also worry about you . . . there is little news of import . . . haven't had the time or chance to see any of our friends . . . would feel badly if I did . . . for all are quite upset over your continued illness . . . and under such circumstances it is perhaps best that I continue plugging my nose into this grindstone . . . at least such will keep me occupied . . .

Several small items have escaped my mind during the past few days but I'll relay them to you

when they pop back . . . I enclose a clipping from the Monday issue of the NY Tribune re Palm Sunday, etc. . . the weather you have been deploring has been equally had here in the North . . . we've been running short on the oil because of the necessity of keeping the burner going at a fair temperature . . .

I am sending your Mother a little Easter card from the two of us to-night . . . enclosing two new dollar bills . . . I realize . . . not a great deal yet sent with sincerity of thought behind them . . .

I'm not going into the Bank this Sunday . . . will probably go to Church with Mother . . . or if she is too tired will go alone . . . then to the Cemetery for a few moments of humility . . . possibly will say hello to Mrs. Biele . . . havent seen her in a long while . . . and may stop at Miss Thompsons later in the afternoon . . .

Then home to bed . . . plugging . . . and you know why my heart and spirit will be in the doldrums . . . yet . . . why should I complain . . . you never appear to worry . . . perhaps I should adopt the same unfair attitude . . . am wondering whether it would then awaken in you a fairer slant on things as they confront me . . . and us . . .

Well, Honey . . . this letter goes into your heart and records as unpleasant in your reaction . . . yet, it is so truthful . . . that I know you'll do everything to set me straight on these items which are so worrying . . . seeing that I'm a worry wart as you so often have described me . . .

We pray continually for your welfare . . . for the desire that you may yearn to read your Bible . . . you haven't answered me whether you have a Bible with you for daily meditation . . . please let me know . . . for if you dont, I'll send along some reading . . .

So, Amy . . . come, come . . . you've a task to fulfill . . . love . . .

CARL.

Exhibit P-1.

GOOD
same place . . . Friday 9 p. m.
April 23rd 1943

Dear Girl:

Your Tuesday letter seemed to have been written while you were in the dumps and it was upsetting to hear that you are losing faith in your good Dr. Coffelt . . . well, Amy, you insisted that he would be the man to put you back on your feet . . . but I've yet to hear what he did in the way of a diagnosis . . . won't you please inform me . . . naturally, I'm extremely disturbed to learn that you feel that Soddy "really feel it did me more damage than good" . . . Amy . . . it is all well and good to have teeth checked . . . but when will you realize that the condition stems beyond the molars . . . and why wait a "week or two" to try C. J.s Doctor . . . frankly, I'm getting very discouraged about the whole affair . . . your letters now strike so similarly to the up and down ones you used to send from Miami . . . only at that time, while a detected moods, it never dawned that it was deeper than the surface . . .

you have overlooked to give me an address so Im mailing this note to your Sister at Signal Mtn . . . and it will therefore probably come late to you . . .

yes, I imagine that Earl and Eva have a pretty little home . . . I honestly do not contemplate the day when we will be so situated for I can not assume such responsibilities in your present state of health or attitude . . . Im sure if you stop to analyze your sisters and sisters-in-laws you'll find their slants towards their husband rather surprising an possibly not in line with the attitude

Exhibit P-1.

you've shown me to date . . . tell me honestly, if my opinion is not so . . .

about May . . . lets forget vacation ideas for a while . . . I have little or no enthusiasm about a holiday . . . and can only keep my worried mind about you . . . free somewhat by plugging at this Bank . . . and fortunately the work is here to do . . . June . . . July . . . August . . . any time it doesn't appear to concern you a bit when you should at least formulate some ideas about your duties to me . . . and don't go pouting by yourself in a room just because I write as I do . . .

also . . . filling up on good old corn bread is undoubtedly tasty . . . but it will not build any red blood in your body . . . and mere pounds added in fat will hardly be indicative of improvement . . .

your missing me and hoping that the "separation won't *be too* long" (your italics) . . . yes, Amy . . . WILL be expected to be normal if you intend to return to NYC . . . in the meanwhile you've done considerable to smack my future smash in the face . . . of course, no fault of yours . . . yet, this absence has sure given me many hours of silence thinking . . . fairness . . . I wonder . . . you let me know . . . I'm tired . . .

you ask about me . . . I think my steady stream of letters has more than clearly given you an idea of how and what I feel like . . .

last evening after mailing several Easter cards, etc. . . . at the Grand Central P. O. I walked over to the Iceland Skating Rink . . . didnt go in . . . but watched about 4 of the girls from the bank . . . skating . . . gosh, it gave me a sort of insignificant feeling . . . I could not stand on skates for two feet . . . yet these stenos were racing around . . . vibrant, healthy, happy and cheery looking . . . and then I began thinking of us . . . so I walked

Exhibit P-1.

over to the Bus terminal and took the Orange and Black home . . .

your letter which I've read as I'm typing this note . . . also Warren's note . . . now in Gainsville, Fla . . . was stranded at Orlando for about 3 weeks . . . having missed overseas by the nip of 28 hour delay from Oklahoma . . . he didn' say much . . . awaiting release . . . was anxious in inquiring about you and your health . . . as are all of my friends . . .

to-day is GOOD FRIDAY . . . memories? . . . Miss Baldwin returned from lunch after a trip to Radio City . . . hundreds of lilies and thousands of tulips were planted in the early hours of this morning . . . the place is beautiful . . . NYC has had 70 degree summer sunshine to-day . . . making all and sundry feel good . . . I thought of you continually and wondered how you you are feeling . . . where your thoughts are . . . and what you have in mind about the future . . . it is important that you at least give me an idea, Amy . . . and a fair one . . . without disgruntlement at all on your part . . .

I'm going over to the Midtown Hospital after I finish this note . . . to leave a small box of candy for Miss Perry with a little Easter card and message of appreciation for her courtesies to us both . . . I also gave a small cheap box of candy to the scrubwoman widow who cleans our office . . . boy, Honey . . . she really was pleased . . . she has two young sons around 10 and 12 . . . lives in a very poor section of the City . . . I only feel sad that you wont be here to enjoy Easter . . . however, that is your own personal choice, not mine, as you know . . .

if you're doing all you can . . . get out and walk every day as the NYC doctors told you, Amy . . .

have you done any of that yet . . . or are you just resting and being waited upon by your relations . . . they'll do you a darn good turn if they make you attend to everything yourself . . . and push you out into a more active mood physically . . .

not knowing when you'll receive the Easter card I sent you in care of Coffelt . . . I'm a bit worried for I enclosed 5 dollars . . . please let me know whether you receive it . . . I did place my return address on it . . .I'm also sorry for apparently you will not get it in time for Easter . . .

now, Rogers . . . keep plugging . . . and it wont hurt you to tell me . . . did you bring a Bible with you . . . I last wrote "mediate" when I meant "meditate" about your Scripture reading . . . but we'll continue to pray . . . and one of these days there'll be an answer . . . love from us all . . .

CARL

Exhibit P-1.

Saturday afternoon
at the Bank—May 8th, 1943.

Dearest:

Your Tuesday note came in Thursday's mail . . . and was eagerly awaited . . . I'm glad to know that you finally received the many letters I sent to Soddy . . . yet, I'm certain you've overlooked answering the pertinent questions . . .

Sulphur treatments, etc. . . . would you mind giving me your doctor's diagnosis . . . how long he thinks you may have had it in your system . . . what are the chances of ever regaining normal health . . . not robust, just normal . . . I have an appointment with Dr. Donaldson next week . . .

Exhibit P-1.

and have been assured that he'll give me all the dope as he sees it . . . I'll keep you informed, unless you do not wish to know . . . please advise . . .

Amy, I have no time for Esther . . . or even my home . . . what with the mess of your sickness and the additional mess at the office . . . I'm not going to be boring by repeating just how swamped we are . . . I've never seen the likes . . . every institution is crying the identical needs of men . . . and it comes mighty hard to concentrate when my mind continually worries along down your way . . . for all the good that does . . . so, Amy, I've decided . . . why worry . . you don't seem to care . . and on that basis I'm approaching life anew . . .

Miss Baldwin remained until 9 last evening, came in at 8:30 . . . this morning and will do likewise for quite a spell . . . she certainly does everything to help me in my work . . . and at the same time . . . seems to be upset why I do not appear to hear from you more often than I do . . . it has been embarassing to tell the solicitous folks that I haven't heard much from you . . .etc. . . .

I enclose some notes which you will please return to me . . . it made me feel good to receive Mr. L. S.'s letter . . . not merited but still, good to have . . .

Would you mind tabulating your expenses . . . not to the penny but somewheres near so that I can budget it all . . . You have received $150 . . . against which I imagine most has been used for m. d bills . . . with the unexpected bills, it strikes me as being fortunate that I've always been a plugger . . . tax work, etc. . . the money I've earned on the outside this year has come in mightily handy to pay these items . . . and you should join with me in prayer of appreciation . . . I can only

Exhibit P-1.

continue to pray that GOD will keep me in health . . . my nerves are shot . . . but whose wouldn't be . . after what I've been thru . . .

Howard came in on Thursday p. m. . . for a few minutes . . . Odie is up and around once more . . . his regards . . . and he was so sorry to hear of the new trouble . . . also, he failed in Navy medical as we suspected he would . . . lost his job last week because the work and contract on which he had been engaged was completed and no new work in the office . . . he should not have too great difficulty in landing a new engineering job . . . but his health has been backfiring . . . so he plans to rest a bit more . . . once, lung trouble . . . care must always be exercised . . .

My draft status . . . I have been reclassified finally into—1 A-H—which means that I am temporarily deferred until such time if and when the 38-year barrier is lowered . . . or increased . . . as one may look at it . . . frankly, Amy, I'm not a darn bit concerned . . . the army or navy routine and work cannot surpass the drudgery of my present existence . . . at least I would be gaining good health if in the Service . . . however, from the looks of things, I'll probably not be taken . . . unless some reverses make it necessary for factory or farm power . . . I'm glad to know that your Brother has been heard from and that he is apparently safe wherever that may be . . .

about coming down in the latter part of May . . . I'm afraid that will be out of the question . . . I do not know what arrangements you may have in mind . . . but at best I do not suppose that you will be contemplating a return towards this section until some time in July . . . when does your ticket expire . . . as it is a matter of a few dollars only,

it really will not mean too much if you decide to remain in your country for a while longer . . . the anguish that has been mine is slowly disappearing . . . when I walked out to lunch today and paused for a few minutes to watch the happy thousands walk by . . . well Amy, you know the lump was there . . . however, I do not wish you to return to NY until you can give me better assurance than you did a year ago this time . . . that you are in better health . . . I feel that you'll find more comfort with your people than with mine . . . in spite of all we could possibly do and did . . . while you are in this state of unexplained and unexpected illness . . . if I ever get down for a week or 10 days in June or July . . . I'll endeavor to do so . . .

I just phoned home to see if a letter might be waiting there . . . but, no . . .

however, Mother did say that she had received a Mother's Day card from you . . . that was a nice thought . . . I sent one to your Mother yesterday morning, Air Mail . . . regretting greatly that it may not arrive in time by tomorrow . . . yet the same thoughts will hold true for Monday and days thereafter . . .

I'm going out now . . . it is shortly after 2 . . . up to the gym for an hour or so . . . then possibly dinner . . . then back to the bank for several hours until around 7 o'clock . . . I may come in tomorrow, haven't decided as yet . . . depending upon how much I get finished today, etc. . .

When you next write, please let me know what plans you have made with G and CJ re your boarding, etc. . . also It might have been thoughtful on your part if you had given me PROMPTLY the names and addresses of those folks who contributed their blood to you . . . I understand that you did not

have to pay . . . and therefore feel that our only decent gesture would be to show our appreciation in some way or other . . . please let me know . . .

love

CARL

Exhibit P-1.

Monday—May 10th 1943

Dear Amy:

Your Friday evening letter arrived at the office this morning. Out under a sheet all afternoon, eh . . . reminds me of a game we used to play at parties . . . you've undoubtedly participated in the same bit of nonsense . . . can be done with a number of popular song titles . . . as one reads his title he continues "under the sheets" . . . and it sure does bring a barrel of laughs, . . .

I will mail the articles you requested . . . probably tomorrow morning . . . in two separate packages for one box wouldn't take quite all . . . is there anything else you'll need, Amy . . .

It is now into the second month since you left for the South . . . as each day develops . . . there appears a sorrow about it all . . . and a cleft . . . I've done considerable reasoning during the past several weeks, Amy . . . and I'll probably be writing to you one of these days . . . giving you my conclusions . . .

I had a long session with Dr. Donaldson this afternoon . . . he dictated a letter to your Doctor . . . what he said is unknown to me but I did understand about a blood count of low figure . . . it is

Exhibit P-1.

not for us untrained folks to assimilate medical terminology . . . yet . . . the very necessity of it all continues to alarm me . . . I try to be fair in all my reasoning . . . in rationalizing equitably . . . yet, I can not but feel . . . and you often agreed to it in the past . . . that our marriage has been a complete failure . . . when one marries he or she has certain obligations which they must be God's laws and nature and mankind recognize . . . the responsibilities of wedlock are so highly important that they should not be undertaken without great thought . . . and then, they should be adhered to . . . unless deception has entered . . . oh, Amy, I talk and write in a manner which may not please you, yet, in fairness I know you wish me to tell you how I feel about it all . . .

How is your mental slant on life . . . are you improving at all . . . do you think that you will ever . . . well, whats the use of continuing . . . in this vein . . . I'm going home to bed . . . hopeful of sleep . . . punctured as it has been all too often of late . . . with restlessness . . . I'm doing every thing possible to stem the tide of pressure, here, there and everywhere . . .

I've just reread the letter, dearest . . . and it'll be mailed for I wish you to know of my great distraction . . . You will remain in my prayers . . . God bless you . . . .

P. S. . . . This week's Saturday Evening Post . . . with the farm Mother cover . . . has a full story on your friend of the forlorn, etc. . . . The Good Will Hour . . . get yourself a copy . . . you'll enjoy the inside dope on the man of many counsel . . . .

CARL

Exhibit P-1.

May 17th, 1943, 8:30 p. m.

Dearest Amy: What a Friend we have in Jesus . . . all our griefs and sins to bear . . . yes, that promise has kept me going these last months . . . I received your Wednesday letter on Friday . . . was not greatly shocked over the news about your health . . . you have always resented my speaking, Amy, about your health . . . yet, you must be aware of the fact that it is hardly . . . or has been at any time since prior to our marriage . . . a degree of health such as is normally and legally expected . . . I am sure that everything is being done by your Sister to keep you comfortable . . . was very, very surprised to read that you are drinking milk . . . remember your Northern slant on that food . . .

If you'll please give me a suggestion or two . . . my thought on the matter is that a box of candy is not a commensurate expression of appreciation for the life-giving blood which your two girl friends so glady gave . . . so I'll defer writing or getting anything until you tell me . . .

The office continues a maelstrom of activity . . . but, I am thankful to GOD that my mind is so completely occupied with the work here that I do not have the chance to ponder and mull over the misfortune which has struck elsewhere . . . Amy, I am very sorry to know that you are embarassed about your friends asking .. . where's that Yankee husband of yours . . . have you told them just why . . . I have analyzed the entire situation and feel that I could be of no aid to you . . . I'd only be disturbed about your poor health . . . and you wouldn't wish me to talk about it . . . you just tell those folks inquiring . . . that I'm slaving away up

northways . . . you know, Amy . . . if you ever professed at any time any love to me or for me, physically, sexually or spiritually . . . well, you would have given me a more buoyant slant on the whole affair . . . as it is, I sort of recall the time, you expressed your only vital desire . . . that of killing me .. . not so pleasant a topic . . . but it hurt . . . and I at that time dismissed it because of your illness . . . and a 1,000 other episodes . . . well, Amy, I do not suppose that you'll be coming back so would you mind either cashing at the Chattanooga R. R. depot or sending it back to me . . . the roundtrip ticket . . . my plans have been completely shattered and I'm on the verge of demoralization . . . it all adds up to something so unreal . . . I'll try to make my next note a bit more cheerful, yet, I do not see how I can . . . for stark truths are now upon me as you realize . . .

CARL.

Exhibit P-1.

Wednesday, May 19th, 1943.

Dear Amy:

I received your Saturday letter and the enclosed bill of the Hospital, also your schedule of payts . . . it was very surprising to read of the expenditures . . . the medical ones I can understand, yet . . . inasmuch as you have to date failed to tell me of the diagnosis made by Dr. Coffelt and Dr. Haskins . . . I am now obliged to insist that you inform me promptly . . . I do not intend to dally any longer about this unfortunate set-up . . . you have never . . . and the occasions are legion . . .

given me an inkling of your state of health prior to our marriage . . . I now intend to communicate with your Doctors, unless you write to me at once . . . no, Amy . . . with the problem you've made of our marriage, I was not relaxing on the gym roof, strolling in Central Park or playing tennis last Saturday afternoon . . . as a matter of fact I was busy working for my budget was never intended to include these heavy medical bills . . . I was further surprised to read that you are paying your Sister and CJ $10 weekly . . . in your prior letter you said that they did not wish a penny . . . with income taxes, insurance, my own expenses and nothing but medical bills, I am obliged that you curtail your expenses to a minimum.

The 3 Chattanooga phone calls came to almost $20 on my end . . . and yet, I've to hear from you or a member of your family about your health . . . what the outlook is . . . as you may have surmised, I've taken a saner slant on this marriage of ours and I'm going to be obliged to be honest yet frank with you, Amy . . . it is a bust and I can only see one way to make our lives happier . . . and that goes doubly for you, for you were the one who was always complaining . . . I wish you to let me know just how much longer you feel that we should continue . . . you've shattered completely all of the joy which was once mine . . . and have changed such to sorrow . . . the element of fair-play is missing entirely and I'm very honest to write that I can see or contemplate little but continued sorrow . . .

I guess never the north or south should mix . . . still, not so much that . . . as the fact that you should never have contemplated taking a man in wedlock when you must have known of your poor

Exhibit P-1.

state of health . . . it has been nothing but one siege of hospitals and doctors until I've grown to feel that I'M entitled to at least an explanation from you, will you give it to me . . . I should like to hear from you . . .

P. S. . . . I just remembered that your insurance premium and the loan of $100 comes due some time in June . . . I can not include these items in my budget . . . also, Amy . . . I'll ask you not to incur any expenses until you hear again from me . . . in the meanwhile, perhaps you'll answer some of my urgent inquiries of the past months . . .

CARL.

Wednesday evening, 9 P. M.
June 2nd, 1943

Dear Amy:

Your Friday, the 28th of May, letter came yesterday . . . and I'm replying at my first chance for it is my hope to get away from here in the latter part of next week . . . just how long I'll able to stay is very uncertain . . . and what day I'll be coming is equally in the dark . . . however, I'll let you know when my plans are more definitely determined . . . in the meanwhile, please do not make any arrangements for visiting or entertaining for such would appear out of the question, especially in view of your health . . .

No, Amy . . . I have not been on vacation . . . my office work has continued unabated . . . just when I'll be free to take a merited vacation, well . . . I can not say . . .

It was my intention to forward the two cards . . . and will do so . . .

Exhibit P-2.

About the proposed Hot Springs . . . very frankly, Amy . . . suppose we discuss that when I reach Chatt-ag . . . you furnished little or no information . . . which makes it impossible for me to comment sensibly from these many miles away . . .

I am sending my check to Dr. Austin . . . I assume it is for the dental exam . . . if not, wont you please let me know so that I may keep my records in order . . . does my remittance of $10 covers the bill in its entirety . . . wont you let me know . . .

CARL.

Exhibit P-2.

At home—July 15th, 1943.

Dear Amy:

I received the Monday telegram requiring me to tell you my plans immediately. I have thought and prayed sincerely over the problem that has been constantly on my mind . . . this is not new . . . I have followed that course as you know.

No man who holds the beliefs I hold could not feel and consider the shock which would come to a girl in your state of health when her husband tells her . . . as I did nearly two month's ago . . . that he is at last awake to the facts. It was my burden and my desire that those little drops of water which from time to time leaked out were just the last drops of moisture, and that clear weather and health and happiness . . . a wife and homelife, which anyone would reasonably expect, would be a reality.

During this year and nearly a month, all this has been just the reverse. I am not thinking primarily of the expense . . . or complaining about it

Exhibit P-2.

. . . although, of course, it has not been easy to bear. A husband owes these things to his wife, and my extra working hours made the many unexpected debts easier to pay.

I had visions of home and family, of happy married life, which I was convinced that you shared . . . you said you did, too . . . It was always in my mind to make the greatest possible allowances for those preferences and inhibitions which you expressed on our honeymoon . . . and I laid them to the fact that you had not completely recovered from the rheumatic fever which you said had attacked you.

We have discussed some of these things and, in May, when I felt convinced against hopes otherwise, it was time for me to speak frankly, or write frankly, as I did.

I will never understand why you undertook married life. All the ills which you had were . . . according to the doctors . . . of such long standing that you could not have been unmindful. I believed in you, and I loved you so much that I could think only that as our married life continued the love which you expressed for me, and the faith which we both professed would clear away what I believed were the results of an unimportant sickness . . . which would be a short and easy problem.

Instead of this, you went through tortures of mind and body, and I went through them with you . . . unseeing and hopeful. Eleven months is not so long a time, but at the end of that period, which seemed so long, I counted over the sad experiences . . . which were so many that I have lost track . . . and, as I told you when I saw you in June, there is no further hope in me that our mar-

riage . . . which should never have been . . . could ever be what marriages are supposed to be.

A stranger to our lives would think me anything but a gentleman to say things . . . or write things as I have done . . . and I couldn't have acted that way toward a person who has been as sick as you unless I was sure that I was the one who had been unjustly dealt with, and that in the beginning you owed me a solemn duty. Love forgives much, and I might have felt differently if I had known the facts. No one can say what they would do . . . all I can say now is that I wasn't given a chance to decide, and for all these months I have tried earnestly to look on the side of truth . . . now I see falsity instead.

I will, for the time being, continue to pay what is necessary for your care and treatments and, when I have meditated upon my course and sought the guidance which I always need, I will let you know. I had hoped for a reply to the telegram night letter I sent to you a week ago last Tuesday evening . . . but you have not seen fit to furnish the information.

You will find enclosed my check to your order for Fifty Dollars. I am also arranging to send my check to the Phoenix Mutual Life Insurance Company for Twenty Seven Dollars and Forty Six Cents, $27.46 . . . in payment of the premium due on your Policy No. 450844-L4-6. The premium amounts to $24.11 to which is added interest of $7.50 making a total of $31.61 from which is deducted the dividend of $4.15 . . . all of which leaves a net amount due of $27.46.

Believe me, I hope for your improvement and recovery and I say this with a humble heart.

CARL.

Exhibit P-2.

Monday evening
August 9th, 1943.
Special Delivery
Air Mail.

Dear Amy:

You will remember that I told you in my letter of the middle of July . . . that after I had pondered the situation . . . I would decide upon a course. You wanted to know what my course would be. I have laid the whole case before counsel and I am being advised as to the legal steps to be taken. Of course such matters are in the hands of the lawyers and they tell me that I have a case. When they finish whatever work it is that they have to do in such matters, they will let me know . . .

I am advised that for the present I should not discontinue furnishing reasonable funds . . . as they say . . . within my income . . . for your care. You know how limited that is . . . so, I am enclosing my check of $93.48 to the Ozark Sanatorium . . . represented by the bill you sent to me.

CARL.

Exhibit P-3.

Report of Dr. Charles Gordon Heyd.

Mrs. Amy Rogers Carlson

Diagnosis:

Appendicitis, chronic, obliterative.
Fibromyoma of uterus.
Cholecystitis, subacute, strawberry type.

Operation:

Appendectomy.)
Supravaginal hysterectomy) Dec. 28, 1942.
(adnexa retained))

Anesthesia: Gas-ether.

Findings:

The patient has basically a chronic, atrophic arthritis, involving most of the joints.

On opening the abdomen the uterus is the site of multiple fibromata, representing a gross bulk of approximately the size of a three months' pregnancy. Both tubes and ovaries seemed normal.

The appendix is completely obliterated throughout its extent, seven cm. in length, with the proximal one cm. ballooned out and with a marked reddening of the serosal surface.

In the area of the gall bladder is a fair degree of interstitial hepatitis. The gall bladder itself is mypervascularized with enlargement of the lymph nodes in Calot's triangle, and along the common duct.

The remainder of the abdomen is negative.

Exhibit P-3.

Operation:

Operation consisted of an inferior right rectus incision and suprevaginal hysterectomy. The cervical canal was excised, the stomp peritonized and both tubes and ovaries retained. Following which the appendix was amputated, the stump phenolized and inverted.

The gall bladder was removed, with phenolization of the stump, and doubly ligated with No. 2 chromic catgut.

The abdomen was closed in the usual anatomical fashion.

Specimen:

One uterus, one gall bladder, one appendix to Laboratory. The gall bladder was tied in aseptic condition and sent to Bacteriological Laboratory for culture for streptoccocci.

Drainage: One rubber tissue.

(Chas. Gordon Heyd, M. D.)

Conclusions.

(Not to be reported.)

In Chancery of New Jersey

150–569.

Between

CARL O. CARLSON,
Petitioner,

and

AMY ROGERS, falsely called
AMY ROGERS CARLSON,
Defendant.

On Petition for Annulment.

Conclusions.

Decided November 21, 1944.

W. HOWARD DEMAREST, of Newark, for petitioner.

SIMON J. GRIFFINGER, of Newark, for defendant.

Petition for annulment for fraud, petitioner charging the concealment of incurable impotency, a premarital determination not to consummate, physical abnormality, chronic diseases and inhibitions or fears grounded in whole or in part upon psychophysical conditions. Petition dismissed and decree for maintenance advised.

CAMPBELL, *A. M.*

These parties were married on June 20, 1942, and lived together in this State until April 4, 1943, at which time defendant went to Signal Mountain, Tennessee to visit with her sister. She has not since returned to petitioner. He is about thirty nine years of age; she about thirty-seven.

Conclusions.

Petitioner seeks annulment of the marriage for fraud; he sets up three causes of action in which he charges, first: That at the time of the marriage, defendant was physically and incurably impotent to consummate it by reason of some cause or causes the exact nature of which is unknown to him, but he is informed and believes "that among said causes are physical abnormality, chronic illness and inhibitions or fears, grounded in whole or in part upon psychophysical conditions"; second, that at the time of the marriage, defendant had formed in her mind a definite decision that she would not accord him the right of sexual intercourse; third, that he entered into said marriage upon representations made to him by defendant to the effect that she was in good health and normal physically and mentally, with the sole exception that she had then recently suffered an attack of rheumatic fever, from which her recovery was not yet complete; that she could and would perform her marital duties and could and would enter into normal family life, including the bearing and rearing of children. He charges that these representations were falsely and fraudulently made by defendant. In this third cause he further charges defendant with having fraudulently suppressed and concealed facts known to her that, at and prior to the marriage she had suffered and was then suffering "from one or more chronic diseases and from abnormalities in her genital organs, and that psychophysical conditions existed which materially interfered with and prevented the performance of the marital relations."

False pretenses are of two kinds: *suggestio falsi,* or affirmative false representation, and *suppressio veri,* or withholding the truth when it

should be uttered. *Turney* v. *Avery,* 92 N. J. Eq. 473, 113 Atl. 710. The frauds charged in the matter *sub judice* are of the latter type.

Defendant, by her answer, denies petitioner's allegations of fraud; she declares that the marriage was consummated; that sexual relations between her and petitioner were normal up to the time she left for Signal Mountain; that their last sexual relations occurred when petitioner visited her there in June, 1943. Defendant also pleads seven separate defenses. It will not be necessary to consider them, however, because dismissal of the petition is predicated upon other grounds.

By way of counterclaim, defendant charges that on or about June 16, 1943, petitioner abandoned her, ever since which time he has refused and neglected to maintain and provide for her.

At the conclusion of petitioner's case on final hearing, defendant moved to dismiss the petition on the ground that petitioner had failed to sustain the burden of proof. She further moved that a final decree for separate maintenance be awarded to her on the proofs offered by petitioner. I granted both of these motions.

Petitioner testified substantially to this effect: He became acquainted with defendant at Miami, Florida, in November, 1941, which was approximately seven months prior to the marriage, while he was on vacation there. He was in her company for about ten days during this period. He next saw her in April, 1942, while he was again on vacation at Miami, and was then in her company for about twelve days.

When he first met defendant there was no visible indication of her ill health; there was no discussion between them as to her then physical condition. On his second visit with her, however,

he observed a slowness in her gait. He inquired about it and she stated that she was recovering from an attack of rheumatic fever. No mention was made as to when she first became thus afflicted. On this occasion they briefly discussed their future; the expressed hope, unhesitatingly acquiesced in by the defendant, being that they would have children. Other than as to the rheumatic fever condition, she represented herself as being in normal good health. He made no independent inquiry at that time as to her physical or mental condition.

As to the events of the wedding night he testified in most intimate detail. Briefly stated, defendant repulsed his embraces and advances and refused to consummate the marriage. This condition continued for several successive nights, defendant eventually stating that although the sexual act appealed to her as being repulsive and repugnant, he possessed the hope, however, that her attitude would change. He declares that there never have been sexual relations between them.

During the honeymoon he discovered that defendant had a swollen knee. She told him that it was the result of a fall; that she had been assured, however, it was nothing serious and would disappear with time. Approximately ten days after returning from her wedding trip, he sought medical treatment for her. As a consequence, five physicians, or surgeons, were separately consulted. Each physically examined defendant. An operation was performed upon her in the latter part of December, 1942.

On direct examination, petitioner stated that it was not until after defendant had gone to Chattanooga (Signal Mountain), in April, 1943, that he made inquiries concerning the history of her

physical condition; that his inquiries were made of some of the doctors who had treated her subsequent to the marriage; that until then he had no information concerning the length of time the knee, or arthritic, as well as a certain uterine, condition had existed; that as a consequence of the information thus received he instituted the instant action.

On cross examination, he declared that at and during the times various physicians or surgeons were being consulted by or were treating defendant, he made no inquiry of any of them as to the nature, cause or duration of her physical condition; that none of them, except the first, volunteered diagnosis to him; that the first physician informed him that he diagnosed her symptoms as anemia; that he divulged nothing concerning her knee condition. Later on, however, he testified, and he was positive, that in September, 1942, he learned that her knee condition was arthritic. He subsequently contradicted this by stating, and he was again positive, that he first learned of her condition in May, 1943, Doctor Markoff having then fully informed him. And this declaration as to the time and source of his knowledge despite his admissions that he had accompanied defendant on several visits to Doctor Markoff between September 26 and November 28, 1942. Such inexplicable indifference, particularly when manifested by a bridegroom of about three months, bears the unmistakable badge of falsehood.

Doctor Samuel T. Markoff testified, *de bene esse,* on petitioner's behalf, substantially to this effect: Defendant came to him for treatment on September 23, 1942. She was accompanied by petitioner's sister, Mrs. (Esther Elizabeth) Strom, who had been associated with the Doctor as a

nurse. Defendant's case history was, in part, that her menstrual period the preceding month occurred on August 21; that four days before her instant visit she had flowed lightly; that she had been under a doctor's care for anemia and rheumatism; that her left knee had been swollen for the preceding eight months. He then examined her and found a generalized hypertrophic arthritis and tumor of the uterus. He gave her an injection and otherwise prescribed for and treated her. A week later, being September 30, she returned and informed him that her regular menstrual flow had commenced and that it appeared to be normal. He treated her knee condition on that occasion, as well as upon October 17, November 3 and November 28. She did not return to him subsequent to the latter date. Her answers to his questions fairly corresponded with and reflected the conditions he found. He did not recall whether she had mentioned the term "rheumatic fever." However, he found no evidence of that malady.

It was his opinion that the arthritic condition had existed for several years; that, because of its association with pain and swelling, the liklihood was that defendant was cognizant of the nature of her ailment; "She would have knowledge of her condition." He later drastically qualified this by stating: "It's impossible to state that she may have known or not known about it. I mean it's impossible for me to state from my examination of her or from her answers; it would be impossible to say that she knew or didn't know about it." As to the fibroid tumor, it was his opinion that it had existed for a considerable period, possibly several years; that it was impossible for him to state, from his examination of defendant or

from her answers, whether she knew of its existence; that pain in the uterus, heavy bleeding with her periods, and clots with her periods or bleeding between periods, would be indications of the tumor's presence; that this condition would occasion reluctance, with respect to sexual intercourse, by a woman thus afflicted; that as of June, 1942 (this was the marriage date), intercourse by defendant would be difficult, as distinguished from whether she could, at that time, "have normally and with comfort" performed the act; that as to her fitness to assume the marital status at and ever since the marriage, she was in no condition to become a mother; that she would never be able to conceive children. As to the tumor, he advised her to have it removed if it caused trouble. Reverting to the menstrual phase, he testified that it was "her exact statement, her volunteered statement," that, preceding the marriage, her periods occurred every twenty-eight days, but since then the cycle had recurred every three weeks. What significance he attached to this emphasized portion of defendant's case history does not appear. Obviously, no physiological reason being assigned, it may not be surmised that the cause for this functional variation was attributible to the psychic influences of the marriage ritual or to defendant's quiescent occupancy of petitioner's bed with him.

On cross examination, the Doctor testified that Mrs. Strom "must have" arranged for defendant's first visit to him; that, "definitely," petitioner had not talked with him prior thereto; that the average menstrual cycle occurs each thirty days; the defendant, not having experienced her usual twenty-one day period, may have possessed the belief that she was pregnant. It was his posi-

tive opinion that a fibroid condition may exist and in no wise disturb a person.

On her first visit, she informed him, as part of her case history, of the date of her marriage. His internal examination of her disclosed that she had been sexually initiated; that, although she may have possessed some reluctance, she was, nevertheless, able to and capable of indulging sexually; that there had been no discussion between him and the defendant, or with petitioner in defendant's presence, as to their sexual relations; that as to whether or not there was a willingness on defendant's part to submit to sexual intercourse, he did not probe her state of mind.

Doctor Blake F. Donaldson testified, on petitioner's behalf, substantially: He treated defendant between December, 1942 and February, 1943. In her case history she disclosed that arthritis had developed in November, 1941, and that she had been treated for it in Miami. He did not recall that she made mention of rheumatic fever. However, he found no evidence of it. He arrived at no conclusion as to whether defendant's case history corresponded with or reflected the conditions he found. He had formed no opinion as to whether, either at the time of her marriage or at the time he examined her, she was in a condition of health that would permit her to assume normal marital relations. The sexual relations of defendant and petitioner were not discussed with him by either of them. He came to no conclusion, as a result of his examination and treatment of defendant, concerning her mental reactions toward petitioner and their marital cohabitation. As the result of an operation performed on defendant by Doctor Charles Gordon Heyd on December 27, 1942, a pelvic tumor, her appendix and part of her

gall bladder were removed. These excisions rendered defendant sterile. On cross examination the Doctor declared that neither petitioner nor defendant had informed him concerning the latter's visits to and treatments by Doctor Markoff. A preoperation pathological test disclosed that she had not recently been pregnant. He had formed no opinion as to whether or not she had experienced coitus. He did not recall that in March, 1943, he had suggested that a vacation for defendant would be beneficial. However, when confronted with a memorandum, in his handwriting, directed to defendant's sister, to the effect that "She needs a vacation," his recollection was refreshed. He had formed no opinion as to whether or not the arthritic condition he found would in any wise interfere with defendant's normal sexual relations, or whether or not her tumorous condition had existed prior to her marriage. In response to a question by the court as to whether, in his opinion, defendant was conscious of the fact that a tumor existed, he said he did not know; that he did not recall whether or not she manifested surprise when he told her. As to whether there would be symptoms from which defendant would know that she had a disorder of that sort, although perhaps not that particular disorder, he stated that it "could be," but that he elicited none of these symptoms from her when he questioned her; that by not having elicited some of the symptoms he arrived at no conclusion as to whether or not she was aware of the condition before he informed her of it. The first time petitioner consulted him with reference to defendant's antecedent physical condition was in April, 1943. He did not recall whether he had informed petitioner thereof prior to that date.

Conclusions.

Esther Elizabeth Strom, petitioner's sister, referred to *supra* in connection with the testimony of Doctor Markoff, testified substantially to this effect: In August, 1942, she had a conversation with defendant, during which the latter declared that she could not quite understand sex and the marriage relationship; that marriage was a very nice thing provided its responsibilities were left out; that the sexual responsibilities were not to her liking; that she did not care for it; she showed resentment towards it; that she was glad petitioner was considerate and kind about the matter; that she did not know what she would have done had she gotten a man who would have been demanding; that there had been no sexual intercourse between her and petitioner; that children did not appeal to her. Reference appears later as to witness' interpretation of "it," *supra*. According to witness, "the whole conversation centered around the fact that Amy shirked her marital responsibilities and just was very happy that she was not called upon to perform them more than she was; she made that very emphatic to me." Preceding this conversation, the witness stated that she and defendant had had quite a few discussions, but "not as deep as that;" that these previous discussions "definitely did" have to do with defendant's reactions towards marriage. At witness' suggestion, defendant visited Doctor Markoff on September 23, 1942. This visit resulted, according to witness, because she observed that defendant was in poor health, principally her knee, which was swollen and painful; that she was anemic and in a general run down condition. Defendant had confided to witness, though, that there was irregularity in her menses; that for a period of time she had been irregular and "she

just didn't know what to think about it;" that "she knew about it to the extent that castor oil could be taken and used effectively;" that the witness did not suggest to defendant the use of castor oil because the latter "knew about the castor oil being used to bring on a delayed period for many reasons." Witness purchased castor oil and defendant took part or all of it. The following day she and defendant visited Doctor Markoff. Witness was present when the Doctor took defendant's case history and internally examined her. When the Doctor inquired as to her menstrual periods she replied that they were irregular. In answer to his question as to whether she had been internally examined by another doctor she replied in the negative. The question of defendant's pregnancy was not discussed by either the Doctor or defendant. Reverting to the alleged August, 1942, conversation, witness stated that defendant related an episode having to do with a man, at Cincinnatti, Ohio, in 1939, to this effect: "He came to the house and they were sitting around talking for a while and he started to make love and advances, and I suppose that went on for a period of time and then he threw her on the floor and was persisting and just at that moment her roommate walked in." In answer to a question as to what defendant had told her, if anything, was the result of that experience as it had affected her conduct with respect to other men, or to her husband, witness stated: "She didn't state anything in particular in connection with her marriage about that;" that "She had a nervous breakdown as a result of it;" that that concluded the conversation with reference to the Cincinnati episode. Witness explained that defendant's use of the word "angle" had reference to sexual intercourse. She

declared that she did not tell her brother, the petitioner, about this conversation until after he had returned from his visit with defendant in June, 1943.

On cross examination, this witness stated: That the use by her of the word "it", *supra,* meant anything having to do with sexual intercourse. Defendant did not tell her whether she had or had not sexually cohabited with petitioner. This latter statement contradicts her direct testimony, *supra;* in her direct examination she testified that defendant had told her that there had been no sexual intercourse with petitioner. As to the castor oil episode, she stated that it is a well known fact that its use will bring about a delayed menstrual cycle; that doctors frequently recommend its use to bring on a period whether or not pregnancy is suspected; that defendant had expressed anxiety because she was three or four days overdue; that as the result of defendant's anxiety, witness purchased the castor oil; that witness' experience in nursing "would most naturally" include knowledge concerning the failure of the menstrual period to function on time. She testified (and she was positive) that her brother, the petitioner, had no previous knowledge that the visit had been arranged with and made to Doctor Markoff; that the reason she had kept that information from him was because defendant "had an irregularity of her periods"; because defendant had "expressed concern about that"; that defendant was then in a general run-down condition; that, up to that time, there had been no discussion between the witness, petitioner and defendant concerning either the latter's rundown condition or the irregularity of her menstrual periods; that defendant did not express a reason,

nor did the witness have one, for not having informed petitioner in advance of the visit. But the witness' testimony to the effect that she had not previously discussed defendant's condition with petitioner contradicts the latter because he testified that it was discussed "Just in a general way; we were worried about her." Later on, witness also contradicted herself as to that situation; in response to a question as to whether there had been a conversation between herself and petitioner, prior to this first visit, about taking defendant to Doctor Markoff, she stated: "Between the three of us, about her run-down condition and loss of weight." Continuing, the witness testified that although she knew that petitioner had accompanied defendant to Doctor Markoff's office on several occasions subsequent to the time witness first took defendant there, she did not, however, at any time thereafter, tell petitioner about that first visit. Later, though, witness contradicted herself as to this; she testified that she told petitioner about it upon his return from his last visit with defendant in Tennessee. To make her testimony all the more irreconcilable, witness declared that defendant had informed petitioner concerning this visit, but she did not know when. She promptly contradicted herself by stating that petitioner had been told about it within a week of its happening. On top of this was her further contradiction that, with reference to defendant having informed petitioner of the occurrence, "She didn't mention anything to me."

As to the visit by witness and defendant to Doctor Markoff, I am unable to reconcile with the truth witness' explanation of the reasons why that circumstance was enshrouded with such com-

plete secrecy in so far as petitioner was concerned; what good reason existed for not having informed him before it took place.

Witness declared that about an hour was consumed by defendant in revealing most intimate secrets having to do with her sex experiences and her reactions thereto. It may not be assumed, the subject-matter considered, that witness was so disinterested in those revelations that her lack of attention stifled her faculty of retention. And yet, despite the suggestive reminder of petitioner's solicitor that "I have some other things in my notes that you have told me and haven't said. I am wondering whether you can recall them; * * * about the marital situation between the two of them?", she recalled nothing in addition to what she had previously testified; her recollection of what it required an hour for defendant to relate was exhausted in fifteen minutes of direct examination. The testimony of Mrs. Strom is swept away by force of its inherent untrustworthiness. It is plainly evident that she was controlled in what she said by an anxious zeal for her brother's cause rather than by her recollection or knowledge; that the loquacity and nervousness manifested by her while under examination were induced and aggravated by her struggle with the truth.

In law, impotence is construed to mean want of power for copulation. *Kirschbaum* v. *Kirschbaum,* 92 N. J. Eq. 7, 111 Atl. 697; *Turney* v. *Avery,* 92 N. J. Eq. 473, 113 Atl. 710; *Heller* v. *Heller,* 116 N. J. Eq. 543, 174 Atl. 573 (E. & A.). Nothing appears, however, in the citations *supra* indicating whether the word "power," as used in conjunction with the word "copulation," has reference to the physical or to the mental element.

Conclusions.

Nor does research disclose that this concise rule has since been enlarged upon in this jurisdiction. Notice is taken of the fact that in medical jurisprudence, as well as in medical science, several types of impotence, resulting from various causes and manifesting different reactions, are recognized. That lack of unanimity exists, however, between medical authorities on the subject, resulting, apparently, in our judical pronouncements disaccording with medical jurisprudence, was observed and emphasized by Chancellor Walker in the *Kirschbaum* case, *supra,* who cited and concurred in the views expressed by Doctor Bishop in 1 Bishop, M. D. & S. Sec. 782. As a consequence of this disunity, Doctor Bishop concluded (Vol. 1, sec. 784) that impotence is a defect of the body, not of the mind. This, then, supplies the omission referred to in the rule *supra.* Accordingly, the true rule is: In law, impotence is construed to mean want of power for copulation due to some anatomical defect in the sexual organs.

According to petitioner, he made no physical approaches to defendant's sexual parts; he does not say that he attempted copulation but was thwarted by reason of some sexual deformity of hers. Nor is there proof, medical or otherwise, to the effect that defendant was anatomically incapable of coitus. To the contrary, petitioner's testimony is to the effect that she refused to accede to his sexual approaches solely because of her premarital determination not to consummate the marriage; because of her declarations to him that the sexual act was repugnant. It is apparent therefore that with respect to petitioner's allegation of impotence, he has mistaken his cause of action.

Conclusions.

The only direct testimony offered in corroboration of petitioner's assertions as to nonconsummation is that of his sister, Mrs. Strom, referred to, commented upon and disposed of *supra.* A more brazen attempt to establish nonaccess would be difficult to perceive. The rule is that neither a divorce nor an annulment of marriage may be granted upon the uncorroborated testimony or admissions of a party to a suit, or any element in the proofs necessary to sustain the decree. *Heller* v. *Heller, supra.* On this subject of corroboration, however, especially as it relates to the peculiar circumstances usually involved in the type of action *sub judice,* it need not, in order to support a decree, be testimony given by another or other witnesses, but may arise out of and be furnished by surrounding circumstances adequately established; by the establishment of such circumstances as tend to render petitioner's testimony so probable as to be legally acceptable, thus serving to justify the court in accepting the truth of his whole story. *Rogers* v. *Rogers,* 89 N. J. Eq. 1, 104 Atl. 32, and cases cited. In the case at bar, the surrounding circumsfances were adequately and abundantly established, but what they established was so completely dispositive of petitioner's testimony as to justify rejection of the latter as false. Here we have defendant, a bride of about three months, expressing the anxiety, to petitioner's sister (a nurse, admittedly experienced as to the causes contributing to suppressed menstruation) that her period was three or four days overdue. It is reasonable to assume that if defendant had not sexually cohabited with petitioner there would have been no occasion for her alarm; no reason would have presented itself for

informing Mrs. Strom of her menstrual tardiness; no reason for Mrs. Strom suggesting and arranging for the prompt visit to Doctor Markoff. Furthermore, and despite her contradictions, if Mrs. Strom was of the belief, from what defendant told her, that there had been no sexual cohabitation with petitioner, it is obvious that she neither could nor did attribute defendant's menstrual tardiness to pregnancy. Why, then, she recommended castor oil to defendant as a menstrual impellent; what credible reason she had for voluntarily procuring and urgently directing defendant to take that doseage the day preceding the prearranged visit to Doctor Markoff; and, if the proposed visit to Doctor Markoff was solely because of defendant's rundown and knee condition, and if her menstrual retardation was not attributable to her coitus with petitioner, why he was not informed thereof before it took place, is wholly unaccounted for.

There being no proof to the contrary, it must be assumed that Doctor Markoff recorded defendant's case history on his office record card in the sequence in which she related it. If, then, as Mrs. Strom testified, the particular purpose of this visit to Doctor Markoff was to have defendant treated for her run-down condition and her swollen knee, I am unable to reconcile that reason with the fact that the first entry on the Doctor's record has reference to defendant's delayed menses; that she took castor oil the day before; that, preceding marriage, her menstrual cycle was twenty-five to twenty-eight days, but since then its recurrences have been at intervals of three weeks. Then follow notations to the effect that she had been under medical treatment for anemia and rheumatism; that her left knee was swollen; that an internal examination, then made, disclosed a fibroid tumor.

Conclusions.

But this irreconcilability does not conclude with defendant's first visit to Doctor Markoff; it is reflected in the Doctor's record of three subsequent visits by her, the first of which, being three days later, disclosing a single brief reference to absence of her menses. The next entry, four days later, is also a single brief reference to her menstrual deficiency. Six days later an entry appears to the effect that her left knee was swollen and that she had, directly after her preceding visit, experienced a regular and normal menstrual cycle. Entries made on two subsequent visits make no reference to her menstrual function; they record solely and very briefly, her knee and general arthritic condition.

The foregoing facts and observations considered, it is obvious, I think, that defendant's particular purpose, fortified by Mrs. Strom's professional advice, in seeking the services of Doctor Markoff was because she was alarmed about and suspicious of the reason for her menstrual delay; that for at least the reason that the Doctor's records make continued and particular reference to the menstrual phase up to and concluding with the time it is noted thereon that she had begun to function regularly and normally, to the exclusion of all reference to her tumorous and arthritic afflictions, it may be said that his treatment of these two latter ailments was, in so far as defendant was concerned, wholly incidental.

Doctor Markoff testified that his internal examination of defendant disclosed that she had experienced coitus. This was her first marriage. The assumption is that she was a virgin at the time of marriage, and that defloration resulted from her sexual relations with petitioner. He further testified that defendant was not pregnant

when she came to him for treatment; that, in his opinion, she was not capable, at the time of her marriage, of conceiving children, nor would she ever be. Doctor Donaldson's testimony is substantially to the same effect. But this testimony of Doctor Markoff is not dispositive of defendant's suspicion that she was pregnant when she first visited him; there is not the slightest showing that she was cognizant of her sterility preceding that visit, and, what is more, that he at any time informed her that she would never be able to conceive children.

As to defendant's fibroid condition, Doctor Markoff testified that though it might tend to make her reluctant to have intercourse, she was, however, capable of performing the act; that unless attended with bleeding, its removal was not urgent; that he advised her to have it removed "If it caused trouble." Upon what fact or theory the Doctor predicated his opinion that the tumorous condition might have caused defendant to be reluctant to sexual intercourse does not appear. There is no testimony of his to the effect that she made reference thereto in her case history; there is not the slightest showing from any source that the tumor had caused her "trouble" either during coitus or at other times right up to its excision. It may not be said that defendant was capable of diagnosing her own pathological condition. Nor is there proof to the effect that she had been informed of her tumorous affliction preceding her visit to Doctor Markoff. Fraud will never be presumed; mere suspicion is not enough. It must be established to the extent of satisfying the mind of the court that in all probability it took place. The mere possibility of fraud is insufficient ad-

judication of fraud. *Jersey Land Co.* v. *Gunzenhauser,* 117 N. J. Eq. 463, 176 Atl. 371 (E. & A.); *Wolosin* v. *Iavarone,* 112 N. J. Eq. 409, 164 Atl. 488 (E. & A.); *Equitable, etc.,* v. *Patzowsky,* 128 N. J. Eq. 579, 17 Atl. 2d 794.

The proofs and surrounding circumstances considered, I conclude that there was no fraud; that the proofs abundantly establish the fact that defendant had no premarital knowledge of her tumerous condition; that she had no premarital knowledge that she was sterile; that she did consummate the marriage and thereafter sexually cohabited with petitioner.

What construction petitioner anticipated would or should be placed upon his allegations to the effect that defendant possessed "inhibitions or fears, grounded in whole or in part upon psychophysical conditions," and that, as to her, "psychophysical conditions existed which materially interfered with and prevented the performance of the marital relations," I do not know. No proofs were offered that either directly or otherwise dealt with those subjects, with this possible exception: Mrs. Strom's testimony relative to the Cincinnati episode, so called, and which, I assume, was produced for the purpose of creating the inference that, because of an attempted rape upon her, defendant became possessed of a fear of all men. I have disposed of that subject *supra.*

As to petitioner's remaining allegations, that is, his charge to the effect that, preceding the marriage, defendant fraudulently represented that she was in good health, and normal physically, with the sole exception that she had then recently suffered an attack of rheumatic fever: The only medical testimony produced was on petitioner's behalf by Doctors Markoff and Donaldson, and

which I have reviewed *supra.* The only direct testimony to the effect that defendant had premarital knowledge of her arthritic condition was offered by Doctor Donaldson; his statement that defendant had so declared to him in giving her case history. There is no proof that defendant was afflicted with other than the fibroid condition, disposed of *supra,* and arthritis. Nor is there proof that either her arthritic or postoperative condition prevented defendant from engaging in normal sexual relations.

Carris v. *Carris,* 24 N. J. Eq. 516, appears to be the first reported case in this jurisdiction in which our Court of Errors and Appeals formulated general rules applicable to the dissolution of fraudulent marriage contracts. The latest pronouncement of our appellate court on that subject is *Linquist* v. *Lindquist,* 130 N. J. Eq. 11, 20 Atl. 2d 325.

In the *Carris* case, the court observed, with reference to the sufficiency of the fraud as it affected the marriage contract: "This is a delicate question, for the relation is peculiar, and not like other contracts, which may be dissolved by the mere act of the parties. Most serious considerations of public policy and good morals affect it, and demand that it should be indissoluble, except for the gravest causes. The mere presence of fraud in the contract is not sufficient to dissolve it. The fraud must exist alone in the common law essentials of it, and then not to have the effect of avoiding it against sound considerations of public policy." Aud further: "Neither are false representations in regard to family, fortune, or external condition sufficient. In granting relief, courts should always be careful that no violence is done to the nature of the relation and

to sound morals. It must be extraordinary fraud alone, that will justify an avoidance of the bond." And further: "* * * the fraud must be of an extreme kind, and in an essential of the contract."

In the *Lindquist* case, *supra,* the appellate court observed and ruled, quoting 1 Bishop on Marriage, Divorce and Separation, sec. 459: "In that contract of marriage which forms the gateway to the marriage status, the parties take each other for better, for worse, for richer, for poorer, to cherish each other in sickness and in health; consequently a mistake, whether resulting from accident, or, in general, from fraudulent practices, in respect to the character, fortune, health, or the like, does not render void what is done." These, the court observed, Doctor Bishop regarded as in the category of "error accidentalis," and therefore inadequate; that "The nature of marriage forbids its validity to rest on any stipulations concerning these accidental qualities." And further, quoting *Reynolds* v. *Reynolds,* 3 Allen, Mass., 605: "In the absence of force or duress, and where there is no mistake as to the identity of the person, any error or misapprehension as to personal traits or attributes, or concerning the position or circumstances in life of a party, is deemed wholly immaterial, and furnishes no good cause for divorce. Therefore no misconception as to the character, fortune, health or temper, however brought about, will support an allegation of fraud on which a dissolution of the marriage contract, when once executed, can be obtained in a court of justice. These are accidental qualities, which do not constitute the essential and material elements on which the marriage relation rests."

Conclusions.

Since *Carris* v. *Carris, supra,* certain undisclosed premarital conditions of health have, however, been recognized in this jurisdiction as grounds for nullity for fraud because, being communicable to a spouse by contact, sexual or otherwise, they are regarded as affecting an essential of the marriage contract. *Allen* v. *Allen,* 85 N. J. Eq. 55, 95 Atl. Rep. 363, affirmed by 86 N. J. Eq. 441, 99 Atl. 309, states the rule as being, substantially: in the absence of statutes specifically authorizing a decree of annulment, or declaring the marriage unlawful at the time it was contracted, no satisfactory authority exists to support the view that a marriage contract, voidable only, can be annulled for fraudulent concealment by a party touching his or her physical condition except syphilis and tuberculosis, or other disease of either party of a nature to render contact seri ously dangerous to the other or pregnancy of the wife.

As to syphilis, see *Crane* v. *Crane,* 62 N. J. Eq. 21, 49 Atl. 734; tuberculosis, *Davis* v. *Davis,* 90 N. J. Eq. 158, 106 Atl. 644; epilepsy, *Busch* v. *Gruber,* 98 N. J. Eq. 1, 131 Atl. 101.

No medical proof was offered showing that arthritis is a dangerous disease communicable to a spouse by contact, sexual or otherwise. Consequently, not being of a type affecting an essential of the marriage contract and whether or not defendant had premarital knowledge that she was thus afflicted, the fact that she made no disclosure thereof to petitioner did not constitute fraud.

The burden was upon petitioner to prove his charges by a preponderance of evidence. He has failed to do so. Defendant's motion to dismiss is therefore granted.

Conclusions.

As to defendant's counterclaim for seperate maintenance: Whether she went to Tennessee, on April 4, 1943, as the result of what petitioner declares was her persistence, or because of Doctor Donaldson's suggestion that she needed a vacation, is immaterial. That he acquiesced in her going to there is evidenced by at least the fact that he purchased for her a return ticket and accompanied her to the train when she departed. He thereafter wrote to her with diminishing regularity and dwindling affection. Copies of several of these letters he offered in evidence. As was commented upon in *McKee* v. *McKee,* 107 N. J. Eq. 1, 151 Atl. 620, I, too, carefully observed, throughout the several days of the hearing of this cause, petitioner's mannerism in testifying. He impressed me that his letter writing, particularly such as took place after defendant went to Tennessee, was the result of a studied purpose on his part to make evidence for himself; his keeping copies of the letters which he wrote, or allegedly wrote, to his wife, fortified my judgment that promptly upon her departure, if not before, he concocted a scheme to get rid of her, but to do so in such a way as to place the blame for the separation upon her. You will search in vain through the proofs for any evidence of petitioner's efforts to have defendant return to him. To the contrary, the proofs disclose that from the time of the separation he abstained resolutely and constantly from everything tending, in the slightest degree, to promote a reconciliation. He neither did nor said anything tending to show that the separation was against his will; his indifference to and manifest contentment with affairs as they stood, demonstrated, as plainly as he could do by

words, that he would rather have her continue to stay away than to return to him. It is impossible not to see that he studiously refrained from manifesting any interest in her for the purpose of keeping her away; that he did not ask her to return because he wanted her to continue the separation. She had, through the ravages of illness, lost her charms for him. He then became unwilling to either embrace or support her.

I conclude that petitioner abandoned defendant without justifiable cause on or about June 16, 1943.

According to petitioner's unsupported testimony, he sent to defendant, or paid medical bills for her, between April 4 and the middle of August, 1943, being a period of about nineteen weeks, approximately $250. This averaged about $13 weekly. Despite his actual knowledge that she was without means, and that she was in dire need of medical treatment, he contributed nothing to her thereafter until directed to pay $30 weekly by a pendente order advised February 1, 1944, and made retroactive as of the date of the filing of his instant petition on September 2, 1943. His admitted gross salary income at that time was $4,000 annually. Allowing a full 20 per cent. deduction therefrom for federal income taxes, his approximate net was $3,200 annually, or about $62 per week.

The station in life of these parties considered, together with petitioner's means and ability to support and maintain defendant, the contribution of $13 weekly by him was not a reasonable and proper allowance. He did therefore refuse or neglect to maintain and provide for her. *Richman* v. *Richman,* 129 N. J. Eq. 114, 18 Atl. 2d 403 (E. & A.).

Conclusions.

In addition to petitioner's net annual salary income of $3,200, *supra,* it appears that he has, since entry of the pendente order, *supra,* become possessed of a $16,000 cash legacy and which, despite the fact that he is engaged in the banking business, was not invested up to conclusion of final hearing. I conclude that, if prudently invested, this sum should yield a minimum net income of at least four per cent, or approximately $640 annually, thus establishing his disclosed net means at $3,840 annually, or, in round numbers, $74 weekly. *Andreas* v. *Andreas,* 88 N. J. Eq. 130, 102 Atl. 259.

The fact that defendant did not offer any proofs, does not disentitle her to relief. There was no showing that she possessed independent means or income. As ruled by the Court of Errors and Appeals in *Hueber* v. *Hueber,* 123 N. J. Eq. 154, 196 Atl. 721, the fact that she offered no proofs is unimportant because petitioner testified not only as to his financial ability, but his testimony further discloses that since the separation he has not maintained her in keeping with his financial ability. Considering the rules laid down in *O'Neill* v. *O'Neill,* 18 N. J. Misc. 82, 11 Atl. 2d 128, affirmed by 127 N. J. Eq. 278, 12 Atl. 2d 839, I conclude that $1,560 annually, to be paid in equal weekly installments of $30, is a reasonable sum for defendant's support and maintenance. A decree will be advised accordingly.

As to counsel fees: The preliminary counsel fee of $500 anticipated the necessity of defendant's solicitor going to Chattanooga for the purpose of conferring with her. Observation made in open court of defendant's infirm physical condition amply justified that undertaking.

Conclusions.

In addition to three full days occupied in final hearing, there were several appearances on preliminary motions, and practically another full day was consumed in taking the testimony *de bene esse* of Doctor Markoff. Defendant's solicitor has filed a verified statement of the exact services rendered by him. *Barr* v. *Borough of Belmar,* 118 N. J. Eq. 279, 179 Atl. 31 (E. & A.). Included therein is an item of $425, represented to be the aggregate of expenses necessarily incurred and actually disbursed by him in defendant's behalf. Its reasonableness has not been challenged. This expenditure practically depleted the preliminary allowance of $500, *supra.* Notice is taken that defenses to annulment actions involving the sexual element are, from their very nature, difficult to anticipate and laborious to meet. And when those issues are false, particularly of the pernicious type here encountered, the time and effort consumed in attempting to even fairly confute them increases in proportion to the degree of their *mala fides.* Petitioner having created that very situation, he is now called upon to compensate defendant's solicitor for the services observed to have been rendered not only in open court but as well for such as he properly had prepared himself to render in anticipation of the interposition of an active defense; not as a punitive measure, but solely with regard to the reasonable value of such services and the extent of petitioner's ability to pay. A minimum of fifteen days is, I think, a conservative estimate of the time occupied in pretrial work and appearances by defendant's solicitor, exclusive of his trip to Chattanooga. I conclude that the reasonable value of his services therefor is $1,500. I do not think that this award is beyond petitioner's ability to pay. He admits that the

$16,000 legacy is on deposit in his checking account. Obviously, being thus intermingled with his general or salary income funds, it partakes of the qualities of those funds; to all intents and purposes it is a windfall and therefore as available for use in liquidating the counsel fee award as are his general or salary funds.

I will accordingly advise an order directing petitioner to pay to defendant's solicitor a counsel fee of $1,500, together with her costs to be taxed.

206 MAY 7 1945

New Jersey Court of Errors and Appeals

Between

CARL O. CARLSON,
Petitioner-Appellant,

and

AMY ROGERS, falsely called
Amy Rogers Carlson,
Defendant-Respondent.

On Petition, &c.

BRIEF AND POINTS OF PETITIONER-APPELLANT.

This is a husband's suit for annulment with a counterclaim for separate maintenance. Defendant answered, attended in Court but did not take the stand or produce witnesses.

Stripped of all surplusage, petitioner's case is reduced to a single material issue. Was he defrauded in the contracting of this marriage with defendant?

The first count alleging impotency is abandoned. The second count alleging concealed predetermination to refuse marital rights, as a practical matter, is combined with the charge of fraud alleged in the third count.

Facts.

The facts are paraphrased or quoted from the the testimony and exhibits.

Petitioner, aged thirty-six, and defendant, aged thirty-four, met in Florida in November 1941, where petitioner was on a ten day vacation, and where defendant was employed (Case, p. 66, l. 17). They were in correspondence thereafter until another short visit in April 1942.

In the correspondence and on the second visit defendant's condition of health was mentioned, and false representations were made. Defendant represented good, normal health with but one exception (p. 70, l. 1). She explained a slowness of gait as resulting from an attack of rheumatic fever (p. 68, l. 32); that this touch of rheumatic fever was disappearing (p. 104, l. 3); later this condition was attributed to a fall (p. 72, l. 12). She agreed in the hope of family life and that they would be blessed with youngsters but didn't want them (p. 69, l. 3; p. 134, l. 18). She spoke very lightly of her ailment as then disappearing, and petitioner having no reason to doubt, believed her (p. 104, ll. 3-30; also p. 186, l. 24; p. 191, ll. 17-23; p. 192, l. 22) particularly since upon meeting he immediately fell in love (p. 95, l. 8). When defendant's health was inquired about in conversations or letters, she ridiculed petitioner as a "worry-wart" (p. 125, l. 32; p. 192, l. 19).

Letters from the defendant (Exhibit D-1, p. 320) were produced by petitioner upon notice. The marking as defendant's exhibits is not important. Several references to defendant's health are made. For example:

"Yes, you're a worry-wart—I was just trying to make you envious of my ability or will power to lose weight—there's nothing to be alarmed about—." (Letter January 7, 1942, p. 327, l. 13.)

In the letter of January 23, 1942 (p. 336, ll. 10-30) having read a religious article on uncon-

fessed sin sent by petitioner, defendant decides upon a "confession" and explains about "not feeling up to par." She says:

"It all started the Saturday after I got soaking wet in the cold rain—I've been to the doctor a couple of times and he says it's rheumatic fever setting in my left knee * * *." She says her silence "was merely caused through fear of my losing you—especially after receiving your letter re my health—Of course you were unaware of my condition and therefore could not understand —I wanted so much to be 100% again before I told you, but maybe if I confess, as I said before. I'll improve that much quicker—will you help me?—but if by confessing I lose you—well, I'd dislike to think what would be the outcome."

Another letter from defendant, dated January 30, 1942 (p. 337, l. 28), "—honey, what has happened that has caused you to be so despondent and in such a depressed mood? Surely not just because of my slight ailment which most certainly will clear up in a short time—. In fact, the fever and most of the swelling has gone—just a little weak now, but a few more weeks will take care of that."

After referring to the letter explaining her ailment and saying it should not have alarmed petitioner, or made him lose interest, defendant asks petitioner to "destroy the letter I sent you so you won't have it around."

This was the situation when the parties met again in April 1942 and defendant's slow walking was then explained as being caused by a fall (p. 68, l. 38; p. 72, l. 13). The knee was never seen by petitioner until after the wedding ceremony, which took place June 20, 1942 (p. 72, ll. 10, 18).

Instead of a condition of health as represented, and a willingness on defendant's part to enter normal married life and have children as discussed, petitioner, over a period of months, found one deceit upon another. On the wedding night, instead of a buxom bosom he was shocked to find artificial breasts (p. 70, l. 13 to p. 71, l. 10, and p. 122, l. 30). Embracing was permitted, fondling and intercourse were denied as repulsive and repugnant (p. 71, l. 14; p. 74, l. 3 to p. 75, l. 28; p. 77, l. 32; p. 112, l. 1, *et seq.*). His efforts and gentle persuasions were repulsed (p. 130, ll. 20-35; p. 131, l. 13). Also, he "was shunted aside, the light went on and she resumed reading" (p. 74, l. 12).

Visits to doctors and hospitals commenced ten days after the "honeymoon" (p. 72, l. 20). Defendant gave false answers to two examining physicians (p. 200, l. 27; p. 201, l. 9; p. 203, l. 19; p. 216, l. 26; p. 217, l. 13) and concealed information from a third (p. 172, l. 28, *et seq.*). The findings of three attending physicians revealed the defendant's true condition.

Dr. Samuel T. Markoff (whose deposition is printed with the exhibits) took defendant's history and examined and treated her from September to November 1942. She told him she had had medical attention while in Florida for anemia and rheumatism (p. 271, l. 12; p. 286, l. 28; p. 288, l. 12). His examination revealed a chronic generalized hyperthrophic arthritis and a fibroid tumor of the uterus (p. 271, l. 21). The arthritis would be progressive (p. 287, ll. 2-5). She gave a history of irregular menstrual periods. The diagnosis made again in November 1942 was arthritis deformans in the fingers, elbows, knees, ankles and elsewhere, excepting her shoulders (p. 272, l. 16). She did not complain of rheumatic fever

and the doctor found no evidence of it (p. 272, ll. 1-33). His prescribing and injection of sanolac and pituitary gland was for anemia and fibroid, but had nothing to do with her menstrual periods (p. 290, ll. 10, 34; p. 291, l. 5). Defendant would have knowledge of the arthritic condition (p. 293, l. 20; see also p. 273, l. 34). A layman cannot ordinarily determine whether a swollen knee or slow gait is caused by arthritis or other causes (p. 302, l. 11).

The tumor was also there for a period of several years (p. 275, ll. 16-37). The doctor could not say from his examination, or her answers, that the defendant either did or did not know, but he said certain symptoms would show (p. 276, ll. 1-30). Defendant did know it. She had been examined by another physician in Florida who told her she would need an operation (p. 217, l. 13).

Both the tumor and the arthritis were causes producing the anemia (p. 277, l. 40). The anemia had been treated in Florida long before (p. 271, l. 12). There was no history of a fall. A fall would not have caused the condition in defendant's knee (p. 277, ll. 14-38).

The fibroid tumor would cause reluctance to have intercourse (p. 294, l. 29).

Dr. Markoff found that in June 1942 (the time of marriage) defendant, because of the tumor, was in no condition to become a mother; she would never be able to conceive (p. 280, ll. 27-39) and so also in the fall of 1942.

Dr. Blake F. Donaldson said defendant's history showed that she had been treated in Miami in November, 1941 for arthritis (not rheumatic fever) (p. 157, l. 27, p. 166, l. 7). An operation for a tumor, the size of a very large grapefruit,

was recommended (p. 169, l. 33). There was no evidence of rheumatic fever. Defendant made no claim of pregnancy and no evidence of any pregnancy was found (p. 161, ll. 21-3; p. 167, l. 15; p. 171, l. 10). There was no evidence as to whether defendant had had intercourse (p. 161, l. 29; p. 167, l. 25). The tumor would have prevented childbirth. After its removal childbirth would still be impossible. Before its removal there was but one chance in a million that defendant could have become pregnant (p. 169, l. 21). In addition, defendant had a necrosis of the liver, an infection of long standing (p. 168, l. 27). Defendant's periods were irregular for many years (p. 172, l. 20).

The operating surgeon reported: chronic atrophic arthritis in most of the joints, fibroid tumor of the uterus, diseased appendix and gall bladder (Exhibit P-3 by Dr. Charles G. Heyd Report, p. 372).

Petitioner's knowledge was casual and incomplete until after the separation in April 1943, when his inquiry became specific (p. 78, l. 31 to p. 79, l. 12). In May 1943 he got the details concerning the arthritis, the tumor and anemia. Before that he had heard words without meaning (p. 126, l. 33; p. 193, ll. 18-35; Exhibit P-1, pp. 362-3). Of course, he knew of the December operation. Information continued to be collected from May 1943 until the beginning of this suit in September, and as it furnished proof, petitioner confronted defendant with his findings by mail (Exhibits P-1 and P-2, pp. 358, 362, 363, 366-7) and on his visit to her in Tennessee in June 1943 their affairs were discussed (pp. 83, 84, 85). There was no denial by defendant of his indictment by letter of her knowledge of the existence of these impediments, or that she suffered from them prior to marriage.

After nearly ten months of petitioner's self-denial and considerate, patient treatment, defendant climaxed her oft expressed dissatisfaction with this marriage in April 1943 by returning to her family in Tennessee. This return was upon her insistence. Petitioner bought a round trip ticket expecting her to return (p. 73, l. 3; p. 75, l. 39). Defendant commenced expressing dissatisfaction with the marriage and living in the East or North within a month after the marriage (p. 75, l. 40), and both then and during the succeeding months she raised the same question and proposed a Florida divorce if petitioner would pay the expense (p. 76, l. 10; p. 140, l. 8 to p. 142, l. 13; p. 192, l. 25 to p. 193, ll. 8-26).

On petitioner's visit to Tennessee in June 1943, he found her in very poor health (p. 82, l. 25). Other medical treatments had been taken and hospitalization again was contemplated. Defendant had no intent to return to her home in New Jersey (p. 82, l. 39; p. 83, l. 21) but she did repeat a proposal to go to Florida for divorce, demanding the whole of petitioner's legacy of $16,000 and a deposit in the bank to cover legal expense (p. 83, l. 29 to p. 84, l. 8). This was refused.

Defendant wished from the start to rid herself of petitioner, if not by divorce then by taking his life. In petitioner's letter to defendant (Exhibit P-1, May 17, 1943, p. 365, l. 1) petitioner said:

> " . . . If you ever professed at any time any love to me or for me, physically, sexually or spiritually . . . well, you would have given me a more buoyant slant on the whole affair . . . as it is, I sort of recall the time, you expressed your only vital desire . . . that of killing me . . . not so pleasant a topic . . . but it hurt . . . and I at that time dismissed it because of your illness . . ."

At no time did defendant challenge or deny the statements and charges shown in petitioner's letters (p. 193, ll. 8-26).

In addition to the corroboration contained in the testimony of the two physicians and in the letters of both parties offered in evidence, there is corroboration by defendant's admission and the testimony of petitioner's sister, Mrs. Strom, on the following points: marriage and residence (p. 208, ll. 1-15; p. 224, l. 35); sex relations repugnant and repulsive (pp. 208, 209, 210, 211, 222-24 and 239-241); children did not appeal (p. 211, l. 39); husband considerate and not demanding or forcing (p. 210, l. 27; p. 224, l. 21; pp. 237-8); defendant shirked marital responsibilities too (p. 212, l. 14); no claim of consummation by defendant (p. 224, l. 22); no acts of affection (pp. 213-14); irregularity of defendant's menses (p. 214, ll. 25-37); concealment and knowledge of need for operation (p. 217, l. 12); incapacitated in August 1942 by ill health (p. 222, l. 32); attitude on marriage from sex angle not right—shouldn't have married (p. 221, l. 14); disliked the sexual act and all connected with it (pp. 223-24 and p. 241, ll. 29-40); nervous breakdown from a prior attempted rape (p. 219-20). Witness revealed such information to petitioner when he returned from Tennessee (June 1943) (p. 221, l. 38; pp. 242-43). Witness and defendant had several of these sex-marriage talks (p. 122, l. 21). Defendant claimed men emphasized sex, were scoundrels, that marriage should not involve "marital responsibilities" (pp. 243-4); defendant was repulsed by fondling—the touch and feel of the man's hand but to embrace was less distasteful (p. 251, ll. 18-30).

There is substantial corroboration in the conduct of the defendant both before and after suit, and in many of the surrounding circumstances.

Petitioner rested on these proofs except that the unavailable operating surgeon might be called after defendant's case went on. Since there was no defense, that was the end.

Defendant moved to dismiss upon petitioner's case and was permitted to reserve, over petitioner's objection, the right to put in a defense if the motion should be denied. This was error. The learned Advisory Master had properly applied the law in *Renner* v. *Renner,* 13 M. 749, 181 A. 191. There is no question that equity disallows a defense after a motion to dismiss. In the cited case Advisory Master Campbell said:

> "In a court of equity the defendant must elect to offer matters in defense or rest his case. If he is willing to risk his case upon petitioner's proof, or, rather, the failure of petitioner to prove his case, such conclusion is tantamount to a submission of the case on the merits to the Chancellor.
>
> This defendant was, therefore, precluded from interposing a motion to dismiss with reservation; having moved to dismiss the petition, she elected to rest her case."

The motion to dismiss having been granted and the resulting decree being here attacked as erroneous, petitioner contends that upon reversal, a decree should be ordered in favor of the petitioner.

The case of *Briggs* v. *United Shoe Machinery Co.,* 92 N. J. Eq. 277-278, *and Munger* v. *Munger,* 130 N. J. Eq. 279-280, do not sustain the right to submit evidence if a motion to dismiss is lost. In the *Briggs* case, the motion was a renewal of a pre-hearing application and, being granted, the point was not decided. In the *Munger* case, the report does not reflect any reservation. These cases are referred to by Advisory Master Herr

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in his excellent book on Marriage, Divorce and Separation (1944 Supplement, p. 35). The point is still open, particularly since in the case at bar, as in the cited cases, the motion was granted.

It is submitted that the reservation should not be allowed in equity. The old practice affords a proper dignity to the courts of conscience by requiring the disputing parties to lay bare before the court their affirmations and denials, their characters, reactions and proofs. Here is a case where reason and good conscience require it and where public policy is likewise served. The penalty for refusing to so submit one's cause should be to have it rejected.

POINTS.

Petitioner-appellant relies upon the following points in this appeal:

1. The second and third causes of action, defendant's fraud and predetermination against sexual connection, as sustained by the proofs, present grounds for annulment and the decree of dismissal is erroneous.

2. The trial court erroneously failed to admit and to give proper weight, consideration, legal effect and credence to uncontradicted evidence.

3. The defendant, as counterclaimant, failed to prove any part of her counterclaim for separate maintenance and said counterclaim should have been dismissed.

4. No award for maintenance being justified, the allowance of $30 per week is erroneous.

5. The award of a counsel fee of $1,500 after a preliminary allowance of $500 to solicitor for defendant is excessive and unjustified.

POINT I.

The second and third causes of action, defendant's fraud and predetermination against sexual connection, as sustained by the proofs, present grounds for annulment and the decree of dismissal is erroneous.

Beginning with *Carris* v. *Carris,* 24 N. J. Eq. 516, and continuing through a long line of cases, the principle has been developed that an annulment should be decreed upon proof of defendant's fraud and that the making of

> "any representation which leads to the belief that she is in a marriageable condition, is a false statement of a fact material to this contract, and on well settled principles affords good ground for setting it aside and declaring the marriage void."

In this leading case, our court, citing the above language, said that the true doctrine was therein declared (at p. 525).

Acknowledging that the marriage tie should not be broken casually, the court made the practical, flexible recommendation that this carefulness

> "should not deter us from advancing where the principle leads us, although before in our courts the objective point had not been obtained."

The cases frequently refer to the influence of public policy as mitigating against or restricting the right of a defrauded spouse to a decree of nullity. Typically in the case of *Crane* v. *Crane,* 62 N. J. Eq. 22, the court said:

> "On grounds of public policy, the State has an interest in the status created by a mar-

> riage contract, and, when made, it can only be dissolved on grounds and by judicial proceedings sanctioned by law."

Lindquist v. *Lindquist,* 130 N. J. Eq. 11, also stresses that the

> "most serious considerations of public policy and *good morals* affect it (the marriage contract), * * *"

A difference is pointed out between executed and unexecuted contracts, and Bishop, Sec. 550, is cited as to absence of consent where the mind is overcome by fraud so that the law deems there to be no marriage.

It further cites the *Carris* case, saying:

> "It must be an extraordinary fraud alone that will justify an avoidance of the bond."

Reference is made again to "sound morals."

In that case a sound result followed that reasoning, but in the case at bar the application of the cited rule laid down in 1891 by Mr. Bishop (Sec. 460) would abhor the forward looking elasticity of the *Carris* case and by its narrowness, negative the tempo and sophistication of today.

Can it be generally said in our courts today that a man is presumed to say: "I take you to be my wife whether you have the qualities, (place, health, riches, etc.) or not, and whether you have deceived me or not. In other words, he waives the condition." The answer is that every applicable equitable maxim, every rule of right is scrapped because of a supposed public policy which puts so unconscionable a price upon connubial bliss. Does not sound public policy demand just relief in destroying the fruits of substantial deceit in the approaches to matrimony, as impartially as

in sustaining a marriage not so conceived? Does it make a difference whether the marriage has been consummated or not so long as it is in fact definitely childless? Is a woman separated by annulment held in different repute as to chastity than a woman widowed? So long as there is a substantial fraud, and no possibility of issue, the distinction is without difference. Petitioner's denial of copulation was attacked but not broken. The presumption does not survive such denial, and corroboration.

If we are to follow the *Carris* case in spirit, and adopt a forward looking view and "advance where the principle leads us," less stress will be laid on copulation and more on the kind of "good morals" or "sound morals" that means honesty and the vitalizing of that confidence and love which, rather than sensuousness, perpetuate the species. Public policy is not injured by this.

The statement of facts herein is authenticated by references to the evidence. Defendant knew of her illnesses and misrepresented and concealed them. Petitioner, an estimable, devout christian gentleman, exhibited qualities which would have been expected of such a man. Such action has been judicially termed "heroic." He faced for her lifetime an incurable arthritic. Beyond this he is to be a childless "husband." Defendant could not and cannot ever bear children. Disorders and abnormalities of long standing having effect on essentials of the marriage were fraudulently concealed.

Actual knowledge is hard to prove and corroborate in these cases. Resort must be had to the interlaced threads of evidence and surrounding circumstances. These and slight corroboration suffice.

Crane v. *Crane,* 62 N. J. Eq. 22, is an example of the policy of the Court of Chancery to draw conclusions as to defendant's knowledge of disease.

There was a history of treatment before marriage. Another physician testified to his opinion that the disease existed before the marriage. While neither physician told defendant the name of his disease, the evidence justifies the inference that he knew what it was. Both the original denial and the subsequent alleged admission of disease by defendant were supported only by complainant's testimony. Although the parties had had intercourse over a ten month period, and although defendant was maintained and cared for by complainant thereafter until his condition became offensive, the court decreed the marriage void.

In *Osborne* v. *Osborne,* 122 N. J. Eq. 19, this court said:

> "It is the undoubted law that where a woman who knows herself to be incapable of conceiving and bearing children and does not disclose that fact to her intended husband, the husband upon learning of the fact may in an appropriate action obtain a decree for annulment on the ground of fraud under the general equity jurisdiction of the Court of Chancery."

It is not argued that petitioner proved defendant to have had actual knowledge as far reaching as that cited above. It is argued that she knew of a condition which put upon her the duty to know and to disclose her condition fully to petitioner.

Defendant knew before marriage that she was in need of an operation for some internal disorder

(p. 21, l. 13). Is she to be found free from fraud because petitioner cannot prove precise knowledge? She failed to take the stand or utter a word of denial.

In general, equity does not require proof of scienter in order to sustain a charge of fraud. In the cited case and in other annulment actions knowledge by the accused person is required to be shown. In the case at bar knowledge should be deduced from the facts already cited and the surrounding circumstances. In equity each case is considered on its own merits.

So in *Davis* v. *Davis,* 90 N. J. Eq. 158, the defendant husband concealed tuberculosis, fearing that disclosure would prevent marriage. (The same thought is expressed in defendant's "confession" letter P. 336, L. 38). Although the disease was not one which affected an essential of the marriage relation, an annulment was decreed, not on the ground of concealment of any specific disease but because:

> "Where the question of morality and policy must be considered, as in this class of case, then it seems to me to be clear that each case must stand on its own facts and no general rule can be laid down. I am unable to agree that the rule of *caveat emptor,* apparently referred to by Bishop, Sec. 459-460 has any application * * *."

The court also says that the suppression of the fact of this disease by the defendant in order to encourage the marriage is equivalent to an express representation that he was free from it.

In the case at bar the defendant falsely "confessed" a disease which she did not have, and which probably seemed to her to be a safely trivial one, while she in fact had a more than one major impediment—progressive arthritis, a tu-

mor of the uterus and anemia. For these she had received medical attention and advice, although in giving physicians her history she referred to the arthritis, not as rheumatic fever, as stated in her letters, but as rheumatism. Nowhere did she make a frank, honest statement. She concealed the truth. *Turner* v. *Avery,* 92 N. J. Equity 473, is in point.

The testimony is uncontradicted that this marriage was not consummated. Argument is not a substitute for evidence. Defendant's motion to dismiss precludes the disregarding of the adduced testimony. It is like a demurrer to the evidence. There is point therefore to the degree of fraud necessary to impel the action of the Court where the consummation is denied.

The case of *Ysern* v. *Horter,* 91 N. J. Eq. 189, is the earliest officially reported case. It follows the delayed publication in *Cox* v. *Cox* reported only in 110 Atl. Rep. 924, wherein V.-C. Stevenson said:

> "I see no reason why as broad a definition of fraud should not be adopted for these cases where the marriage has not been consummated, as that which is applied in ordinary contract cases.
>
> If a criminal conceals his past life, and induces some one to marry him believing that he is a reputable and honest citizen, we have in my opinion substantially the same case as the one at bar. If the marriage state has not been in fact established, if the interests of society in the maintenance of the home and the interests of children have not intervened, I see no reason why the general doctrine that fraud vitiates all transactions and makes them voidable should not be applied."

This was reaffirmed in the *Ysern* case in the following language:

> "An unconsummated marriage which is infected by fraud of any kind whatsoever which

> would render a contract voidable, is voidable, at the option of the injured party, if promptly disaffirmed before any change of status has occurred.

The opinion then continues:

> "It may seem to some minds that the fraud inducing consent to marriage should be defined with some limitations which do not apply to ordinary contracts. It may also be that whatever more accurate definition of the rule may be made in the future, it will be extended to cases of consummated marriage, where the parties have separated and where there is no home or child to protect."

"The only question in a case like this is whether the fraud proved is 'Sufficient' to warrant the court in annulling the marriage."

In *Bolmer* v. *Edsall,* 90 N. J. Eq. 299, Walker, C. said:

> "Since the status of marriage is conferred by contract and since for avoiding contracts equity has jurisdiction over all questions of fraud, if such an impediment has entered into a marriage, a court of equity will pronounce it void."

In that case petitioner testified that defendant refused intercourse; that he attempted it; that she first claimed inability and later claimed the act was disgusting to her; that defendant said she had made up her mind against it before the marriage. Defendant as a witness called by the petitioner admitted these general claims. The court said:

> "If these facts be true, then to my mind, this woman perpetrated a palpable fraud upon this man in withholding from him information that she did not intend to submit to his sexual embraces, thereby depriving him of an absolute marital right."

There are many cases where annulment has been decreed for the concealment of certain diseases, and for refusal of marital rights. Rather than cite them all, the principle has been alluded to and normal decision support is believed to be here submitted. Each case has its equities.

Petitioner has shown a definite web of fraud. It is supported by the facts recited with page references and by the following circumstances and inferences to be drawn from them and from the case file.

Defendant's affidavit on application for maintenance *pendente lite* does not deny prior disease, but it charges that there was intercourse resulting in pregnancy, followed by an abortion and another questionable operation. This affidavit was made after she had probably heard Dr. Markoff refer to her tumor by pregnancy size (p. 271, l. 21) and after a copy of Dr. Heyd's report was sent to her (p. 89, l. 12). The report (p. 372) described her tumor as the "size of a three months' pregnancy." Never before the commencement of the suit, had petitioner heard of a claimed pregnancy (pp. 151-153). Defendant, or some one for her, jumped at the word "pregnancy". The casual charge of the crime of abortion is inexplicable. The succeeding charge of an operation "arranged for" by petitioner for the removal of certain "sexual organs" is merely the next step in building the house of cards.

The answer repeats all this, adding as trimming that the intercourse averaged three or four times weekly from marriage until June 1943. (It should be noted that defendant was in the hospital ten days in July 1942, was taking treatment for tumor and arthritis and anemia in September—November 1942, and hospitalized for an operation in December—January 1943, three or four weeks,

and that she left petitioner April 4, 1943, seeing him only three days in June 1943 while ill in Tennessee.) No more need be said, except to call attention to the fact that they occupied separate beds (p. 138, l. 23).

The answer further alleges that the arthritis was caused by an infection resulting from the supposed abortion. (Of course, the existence of the arthritis long before, is conveniently forgotten. It was even claimed at the hearing that testimony concerning arthritis was a surprise.) (p. 92, l. 29.)

The affidavit, counterclaim, and an affidavit filed in this court on application for fees, multiply defendant's financial worth nearly three times, and the last named affidavit repeats the same exaggeration although defendant was present and heard, and did not contest petitioner's testimony of his true financial status.

All reputations, the petitioner's, the very reputable physicians who treated her and the sister-in-law who was her emotional outlet, come under these ruinous charges.

If a defendant charged with fraud as here, and charged also with having insisted upon leaving her home here and refusing to return, had any proofs, even her own word, reasonably approaching the vicious attacks in the defenses, or the jurisdictional necessities of the counterclaim, she would not, and counsel would not, rest on petitioner's evidence as produced. Particularly would counsel avoid such a decision on the main case, where so grave a chance is taken, in view of the court's prior ruling in the *Renner* case that upon such a motion being denied, no defense was permissable.

It is reasonable to conclude that defendant did not dare to take the stand, that reliance was placed on such confusion as might be caused by an aggressive and belligerant cross examination, and that there was no hope of supporting these scurrilous charges.

If defendant had no such defense in fact, but if she were mercenary, the pleaded defense would be in character. That she was mercenary is indicated by her letter (D-1, pp. 330-332) and by her demands for divorce plus expenses and petitioner's $16,000 legacy (p. 76, l. 10, p. 83, l. 29) and by the wilful exaggeration of petitioner's financial worth. Pleading such defenses and swearing to such charges, specific and serious as they are, and their casual abandonment at the hearing, justify the conclusion that they were as false and fraudulent as were defendant's original representations of health and marital qualifications. If petitioner needed another supporting circumstance, this is it.

It should be noted here that every witness who could have sustained these attacks has given evidence directly opposite. The physician charged with abortion even produced his case record with his testimony.

Defendant will emphasize the contents of Exhibit D-2 (p. 341). The use of a defendant's exhibit, marked on petitioner's case, but not brought in on notice to produce, is irregular. Its exclusion was the subject of a special motion below, but it was not ruled out (pp. 56-57). Since most of its contents appear in the cross examination, the objection is not pressed.

The letter was admitted without objection (p. 187) in anticipation of defendant presenting herself and her sister, the addressee, as witnesses.

Both were in attendance. This letter, if sympathetically read, discloses petitioner's hope of defendant's release from illness. It was written when defendant showed a pronounced buoyancy. But this was in fact caused by operational shock as mentioned by Dr. Donaldson (p. 168) which would corroborate petitioner's testimony that he was emotionally disturbed when he wrote the letter (p. 149). Would it be unnatural for the frustrated groom to paint over the deficiencies and to click the spurs of hope, believing that the mental and at least some of the physical impediments had vanished? Soon the hope would wane again.

P 143, 01
145, 827

Petitioner's letters to defendant (P-1 to P-2, pp. 346-371) reflect the true depth of petitioner's character, religious fervor and gentleness. It is futile to print quotations from these unusual, apologetic accusations. They deserve full reading. They were never denied by answers. Defendant sat mute in court.

Testimony adduced by petitioner is challenged by defendant as being contradictory. It is surprising that there were not more inconsistencies. An examination of the cross examination will demonstrate the problem of these first time witnesses of obvious gentility and modesty, who could neither comprehend nor cope with the questioner. Neither their consternation nor the aggressiveness of counsel shows on paper.

The case presents the defrauder attacking the credibility and integrity of her accusers in written pleadings; but when her day in court came, she stood silent. Even in criminal procedure such silence may be critically mentioned. The presence of such pleadings negatives collusion, the failure to testify after such charges is a measure of corroboration.

POINT II.

The trial court erroneously ruled upon the admission and rejection of evidence.

These rulings were in the Advisory Master's written findings (pp. 49 to 55). These rulings have to do with the testimony of Dr. Samuel T. Markoff. Defendant's solicitor without objection asked the witness "Would it be proper to say it (his general practice) was a sort of internal medicine and diagnostician?" The answer was, "That's right" (p. 282, l. 32). The Court criticized this statement and ruled that the witness was not a diagnostician (p. 49, l. 26, *et seq.*). The ruling was unnecessary and erroneous since the witness was called as attending physician and not as an expert diagnostician. It is evident that every practicing physician must diagnose every patient's case.

The witness was asked in connection with symptoms which would charge defendant with knowledge of her tumor, "Would periods in three weeks instead of the normal interval be any indication?" (p. 276, l. 31). The objection to this question was sustained (p. 52, l. 4) on the ground that "indication" was intended to impute knowledge by defendant and that defendant was not capable of self-diagnosis.

The witness was asked, "In June of 1942—if you can reflect your examination and diagnosis back that far—would you say that she at that time could have normally and with comfort performed the act of intercourse?" (p. 281, l. 1). The objection was sustained (p. 52, l. 32) because it related back and it could not be determined whether the answer was expected from the examination or the diagnosis.

The above question is claimed to be proper, being addressed to the examining and attending physician.

The admission of Dr. Markoff's office record was objected to (p. 296, l. 26 to p. 298, l. 30). The admissibility whether originally proper or not is disposed of and the objection should have been overruled because the defendant used the exhibit in the final hearing (p. 206, l. 20).

The witness was asked with respect to his evidence as to penetration, "Could that penetration have been a matter of years before?" The objection was sustained on the ground that the preceding question had been answered without qualifications (p. 55, l. 1). The prior question inquired whether the doctor could say how long prior to his examination it had occurred. He said he could not say. The present question is not thereby made improper since it is merely a particularization.

These questions have to do with defendant's knowledge of her condition and particulars relating thereto. Other questions upon which adverse rulings were made have not been pressed here because upon the cross examination similar questions were asked and the information is in evidence. The testimony having been taken by deposition the answers are available to the Court on review.

POINTS III-IV.

Defendant failed to prove her counterclaim and it should have been dismissed *and no award* for maintenance is proper.

That defendant-counterclaimant has failed to sustain her charge of abandonment and her right to separate maintenance may be quickly disposed

of. That the award of $30 is excessive and that any award is erroneous is also contended, as it was in chambers and in court at the hearing. The court maintained that there was sufficient proof in the record.

It is conceded, that proofs within the petitioner's annulment case may be resorted to for aid, but petitioner's case refutes her claim. There is here no proof, and no corroboration of marriage (proof of marriage differing in the two types of case, *Sinclair* vs. *Sinclair,* 47 N. J. Eq. 266 last paragraph), or of marital offense, or of abandonment, or of financial need. It is alleged in the counterclaim that there was an abandonment in Tennessee in June 1943. This was the time when the husband, after a three day visit there, returned to the family home in New Jersey. Even that point is not established by more than the husband's bare statement. There is not one word of proof under her cause of action offered by counterclaimant or any witness except the husband. He was called to testify to his financial status only (p. 310). His salary is now $4,000 gross, $3,200 after withholding tax, plus small income from some War Saving bonds. He had as principal a $16,000 legacy and a checking account. Counsel didn't even ask how much of the legacy was left or how much petitioner had in cash or bonds. Petitioner's affidavit of worth filed in this court on application of defendant's solicitor for maintenance and counsel fees shows principal assets totalling $14,288.52 and a salary income of $4,000 before taxes.

On petitioner's case it affirmatively appears that defendant left home in April 1943, upon her own insistence, and that he purchased a round trip ticket to Tennessee for her (pp. 73-76), that when he wrote asking about her plans he got no promise of return or details of her health (Ex-

hibit P-1, p. 366); that he visited her in June 1943 and left in three days with the conclusion that she did not intend to return (p. 82). On the contrary, she demanded his $16,000 legacy (not then paid) and divorce expenses (p. 83). This was not new. She had complained the marriage was distasteful to her within a month after the wedding and suggested a Florida divorce and the payment of money. This was repeated intermittently (p. 76). On one occasion she wished she could kill him (p. 365). The husband committed no matrimonial offense. His letter of August 9, 1943 (Exhibit P-2, p. 371) negatives refusal to support by referring to and enclosing a check. Only when petitioner's suit was brought was it necessary to resort to *pendente lite* maintenance.

Since there is no evidence supporting the counterclaim the decree should be reversed and the counterclaim dismissed.

POINT V.

The award of counsel fee of $1,500 was excessive and unjustified.

This may be disposed of with few words. The final hearing was prolonged by protracted cross examination. The defense was not touched upon. Petitioner's income and net worth has been stated under Point III.

Defendant's solicitor had a $500 preliminary fee. The award of $1,500 is unwarranted and excessive. Petitioner's financial position justifies nothing like it. For counsel to travel a thousand miles or more for client conference when local counsel in the home town of his client's family might easily confer and relay the facts and documents is now, more than ever improper. The Ad-

visory Master informed counsel when the preliminary $500 award was made that it was to cover full preparation and the trip to Chattanooga, and that merely a nominal award, would be made if defendant succeeded at final hearing. Affidavit on this point is on file on a motion for fees in this court.

The award is far beyond what has been recognized as customary in cases where counsel was concededly entitled to an award. Petitioner contends that upon the reversal of the decree, the award should also be reversed.

Conclusion.

It is respectfully submitted that defendant-respondent at and before the time of marriage suffered from progressive, incurable, crippling arthritis affecting most of her joints, and from fibroid tumor of the uterus, which rendered her unfit for marriage and childbirth; that both were of long standing; she had a long history of anemia and irregular periods; that she suppressed the truth and represented her condition falsely; that by palpable explanation and subtle means she lulled petitioner into a reliance upon her minimizing and assuring statements; that she had positive knowledge of her ills from symptoms and medical attention before marriage; that she had a fear of marital relationships probably due to a sex attack upon her, and from her physical condition, which caused a psychophysical repugnance to and a consequent refusal of marital rights, as testified to, corroborated by letters and circumstances and not refuted.

This is a combination of causes which taken together cannot be cast aside. Fraud piles upon

fraud to make miserable a patient, kindly man, who was long in waking to the sad truth that he had been victimized. Defendant has lost nothing by her venture, she has benefitted by the best possible medical and surgical treatment, and her status, if changed, is for the better. The decree should be reversed, a decree *nisi* ordered, the counterclaim dismissed and the counsel fee adjudicated according to the sound discretion of the Court.

Respectfully submitted,

W. Howard Demarest,
Solicitor for and of Counsel with
Petitioner-Appellant.

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(6809)

206 MAY 7 1945

New Jersey Court of Errors and Appeals

Between

CARL O. CARLSON,
Petitioner-Appellant,

and

AMY ROGERS, falsely called
Amy Rogers Carlson,
Defendant-Respondent.

SUPPLEMENT TO PETITIONER'S POINTS AND BRIEF.

This supplement is submitted because the conclusions of the Advisory Master (now separately printed and submitted), were not delivered to counsel until May 16th, after the term had opened. Briefs had already been printed and filed.

Supplementing Point 2 of the printed brief, which sets up that the court failed to give proper weight, consideration, legal effect and credence to uncontradicted evidence, reference is respectfully, if critically made to the conclusions of the learned court below.

The conclusions state (p. 3, l. 5) that defendant filed an answer denying fraud, alleging consummation and normal sex relations until June 1943.

The filing of an answer unsupported by any testimony, has no bearing on the case. The court, with propriety, might remark that an answer was filed, but the consideration of any part of it as denial, when the case was decided at the close of

petitioner's case, is error. The answer consists of "general issue" denials. The separate defenses which the court says need not be considered, include the specific items to which by special mention, the trial court seems to have given substance.

Defendant-respondent's brief seems to proceed upon the same theory, arguing the contents of the answer and counterclaim as though proved, disregarding entirely the fact that the defendant abandoned her pleadings.

The conclusions on page 3, line 5 state that there was no discussion of defendant's health when the parties first met, and continues by saying that on a second visit certain inquiries were made. The contents of defendant's letters to petitioner during the interval, as admitted in evidence, were ignored. These, as well as the subsequent conversations, support petitioner's claim of misrepresentation.

The court mentions the discovery of the swollen knee (p. 4, l. 25) but avoids mention of petitioner's second discovery, the false bust. Neither is any significance attached to the change of defendant's story from rheumatic fever to a fall, as the cause of her bad knee. If the case is to be decided on the theory of consistency, that virtue must persist with all.

The court refers to a supposed difference between petitioner's direct and cross examination with respect to his knowledge of defendant's condition. It is submitted that a reading of the testimony, points of which were referred to by page and line number in petitioner's brief will demonstrate that the differences are easily accounted for because in the one instance the witness referred to a specific complete investigation, and in the other instance he referred to casual information

which he characterized as words carrying little or no meaning to him. Likewise, the conclusion that petitioner's "inexplicable indifference" in failing to question the physicians when they made their examinations of defendant "bears the unmistakable badge of falsehood" (p. 5, l. 32) is an unwarranted conclusion. It disregards the fact that a man may be concerned and yet be reticent, trustful and modest, as this man's testimony, letters and marital behavior overwhelmingly show him to be.

The conclusions (p. 5, l. 8) refer to Dr. Markoff's treatment, and lay stress upon defendant's periods, but no reference is made to the important facts, (1) that a history of defendant's anemia was given to the doctor; (2) that the doctor prescribed and gave treatments and injections for anemia; and (3) that anemia is commonly recognized as one of the causes for irregular menses, (a condition of many years standing, p. 172, l. 20). The inference drawn from the conclusions is that a court could find in the doctor's testimony some basis for the suggested claim that defendant believed herself pregnant, and the incidental claim that therefore the marriage must have been consummated. The doctor's testimony is directly the other way.

The conclusions (p. 6, l. 25) unduly emphasize Dr. Markoff's qualifying answer with respect to defendant's knowledge of her arthritis. The doctor testified that defendant would know of this ailment because of its subjective symptoms. He said on cross examination that he could not so state from his examination or from her answers. These were direct answers to restrictive questions. It is evident that from his extensive practice and from defendant's condition and history he formed an opinion of the likelihood of her knowledge. That is what he was asked.

The conclusions (p. 8, l. 1) refer to the doctor's "positive opinion" that the fibroid condition might exist and not "disturb a person." This abstract opinion is overridden by the equally positive statement that this particular fibroid tumor would cause relucance and make intercourse uncomfortable. It has been already argued that the doctor testified that the defendant at the time of both marriage and examination, because of the tumor, could not have become a mother and would never be able to conceive (p. 280, ll. 27 to 39). There is no contrary medical testimony. Dr. Donaldson corroborated (p. 169, l. 21) but said there was one chance in a million that defendant might have become *pregnant*. Note, however, that he did not say that there was any chance that she could have *given birth*. There is an important difference between the two. The conclusions of the court disregard this vital and uncontradicted evidence.

The conclusions (p. 10, l. 23) refer to Mrs. Strom's statement about defendant shirking her "marital responsibilities." This should be particularly noted because it is the basis for a misconception of the reliability of the testimony of this witness. Her supposed contradiction is explained away by the fact that she referred in other places to sexual or marital "relationships". The latter term referring to "it" (intercourse), the former was a general and not restricted term including sexless responsibilities. Such a supposed contradiction is a slender thread upon which to discredit a witness.

The conclusions (p. 12, l. 10) refer to a supposed conflict between testimony (1) that defendant said there had been no intercourse with petitioner, (2) later that defendant had not said whether there had been. The questioning on this

last point (Case, p. 224, ll. 1-12) compared with the evident confusion of the questions on the first point (pp. 210-211) clears the atmosphere.

The conclusions refer (p. 13, l. 5) to another alleged contradiction in Mrs. Strom's testimony. This point hinges upon what the witnesses understood when asked whether defendant's condition was "discussed." This witness said "no". Petitioner said "Just in a general way." Mrs. Strom clarified the situation herself later by saying they had talked about defendant's run down condition and loss of weight (p. 234, l. 25). The witness is justified in differentiating between a discussion and a family conversation, without being condemned.

The conclusions (p. 13, l. 18) also make a point of the failure of Mrs. Strom to tell petitioner about the first visit to Dr. Markoff and a supposed conflict in that respect. The occurrence may easily be reconstructed from the testimony. Mrs. Strom and defendant visited Dr. Markoff on September 23rd. Three days later, on the 26th, petitioner and defendant went to Dr. Markoff. They could not have gone there unless defendant told petitioner where or how to go. Mrs. Strom knew that petitioner and defendant made the second visit so she testified that petitioner knew of the first trip within a week. The cross examination dwelt on the point of secrecy. There was none that was material. What did the witness tell petitioner when he came back from Tennessee? Obviously about defendant's untruthful concealment from the doctor, and her admission to this witness, that she had been examined before in Florida and that she knew she would have to be operated for this tumor which Dr. Markoff found (Case, p. 217, l. 13). The court has mistaken the true significance of this whole incident. The witness, if less loyal to

defendant, would have promptly told her brother of the defendant's falsehood and of her true condition. It should also be specifically noted that defendant told the witness that she had been irregular over a period of time (p. 214, l. 25). This also she misrepresented to Dr. Markoff, but admitted to Dr. Donaldson (p. 172, l. 20).

A review of the prolonged cross examination throughout the case, and the problem of understanding some of the confused, verbose questions, will go far to explain why both the court and witnesses were confused. Mrs. Strom's story is not in material conflict on essentials. Again it is contended, erroneous deductions have been used to discredit a witness. Not in a single instance has the learned Advisory Master given petitioner or his witnesses the benefit of the least doubt or conceded that any witness, in the case may not have grasped the question.

Reluctantly and respectfully issue is joined with the Advisory Master because of his rejection of the testimony of this witness. When Dr. Markoff was examined, defendant tried to show that the witness Mrs. Strom had undergone surgery. Another attempt was made at final hearing. The court had seen Mrs. Strom leave the room in a hysterical condition, and petitioner also left the room to assist her. But this will not be found in the transcript. Let the defense deny the fact! Here was her vulnerable spot, her life's frustration, and as the defense, improperly, injected this note into the case, the effect was to instill fear, nervousness and confusion in this witness to such extent, that as the Advisory Master remarked petitioner's solicitor was obliged to urge the witness to try to recall further testimony of which he had notations. (Conclusions, p. 14, l. 20; Case, p. 221, l. 9.)

This nervous, fearful woman, never before a witness, faced a type of cross examination which included such questions as Case, page 224, lines 22, 26, page 226, line 17, page 236, line 29, and in which her testimony was referred to as "acting" (p. 217, l. 22), and which was in general, belligerent and accusative. These are the reasons why Mrs. Strom was not as good a witness as was expected. Judicious appraisal of such a witness requires allowances for circumstances. The statement in the conclusions that she was loquacious is contradicted by the record itself. Likewise the assertion that she struggled with the truth is challenged (Conclusions, p. 14, l. 28). Her struggle was with fear and nervousness. No word was uttered by the defendant upon which the court might condemn this witness. The court below relied on inferences which might be drawn if need be in almost any case. Having done so, this court is urged to examine their validity.

The conclusions refer (p. 17, l. 23) to Dr. Markoff's office record. This the court had ruled out but it has been used by court and counsel. Petitioner contends that irregular menses, being effected by a run down condition and anemia, should not be used to justify a conclusion not supported by testimony and especially when the negative is so supported. No one was concerned about a pregnancy, they were worried about defendant's irregularity. The testimony is that castor oil is commonly used for regulation when no pregnancy exists. The proofs are positive that here was anemia and a run down condition and that there was no pregnancy. Treatments for anemia were given and regularity was one of the results. These matters are all substantiated by page and line reference in the brief.

The conclusions (p. 18, l. 33) erroneously refer to tumor and arthritis as secondary in place of

importance to the menses in Dr. Markoff's record. An examination of the record refutes this. It also says that the treatment for tumor and arthritis was incidental. It is evident that short wave treatments were given and that the principal objective was to build up against the anemia. Contrary to the recital in the conclusions, there is uncontradicted evidence that a tumor of long standing was present and that defendant admitted advice from a Florida physician that an operation was necessary.

The conclusions (p. 18, l. 35 to p. 19, l. 13) disclose that the court made unwarranted deductions adding to the petitioner's burden. It cannot be assumed that defendant's defloration was accomplished by intercourse, either with petitioner, who denied it or with anyone else, which was not suggested. There is furthermore no reason for finding that the medical testimony of two doctors, negativing pregnancy and maternal possibilities is "not dispositive of defendant's suspicion that she was pregnant." No one testified that defendant suspected pregnancy. The limit of the testimony is as to an apparently increasing "irregularity."

The conclusions state (p. 20, l. 9) that the "proofs abundantly establish" no premarital knowledge of the tumor or sterility. The only proofs in the case point to such knowledge. Some is direct, some by circumstances. It is urged as to these diseases and the others here involved that the difficulty of proving actual knowledge is great; that where it is evident that there is no possibility of collusion, the admissions and actions of the defendant and the circumstances of the whole case must stand as the best proof; that defendant's silence be weighed in petitioner's favor and that this court find that proofs of the affirmative

here offered cannot possibly be regarded as "abundantly establishing" the exact opposite.

Findings appearing on page 24 in comment on defendant's counterclaim are to the effect that: (1) Petitioner acquiesced in defendant's departure since he bought her a round trip ticket and saw her off on the train. We contend that along with other evidence, this proves his expectation that she would return. (2) Petitioner wrote to her thereafter with "diminishing regularity and dwindling affection." We are content to have this conclusion rest upon these letters, adding only that there is not a word of evidence suggesting that these are the only letters written by him. These are samples, produced as petitioner's proof. They complain that defendant refused information. They are not refuted. (3) This "letter writing * * * was the result of a *studied purpose* to make evidence for himself; his *keeping copies* of the letters he wrote, *or allegedly wrote,* to his wife fortified my judgment that * * * he concocted a scheme to get rid of her * * *." This requires pointed comment. First, as to copies of letters. Petitioner made copies of most of his letters including the "Dear Grace" letter (D-2) which is hardly a case-making letter. Second, the suggestion that petitioner didn't write these oddly styled notes at all. The case took two days and the morning of a third to try. The cross examination took most of that time. If any point, was avoided as futile, it was the question whether petitioner had a ghost writer. Defendant had enough of his letters to convince the most skeptical. There is no warrant for the conclusion that petitioner did not seek her return. His letters persistently requested word of her plans. His visit was a positive attempt to do so. (4) "From the time of the separation," he failed "to promote a reconciliation." In the first place there was no separa-

tion. The point was stressed that defendant took a "vacation." There was no need of a reconciliation, since there had been no quarrel. Petitioner wrote and asked about her plans. He went to Tennessee and got his answer which was that he should give her all he had and she would get that Florida divorce she had spoken of only a month after the marriage (p. 83, l. 29 to p. 84, l. 8).

The remainder of page 24 and part of page 25 are fully answered by testimony and exhibits which are uncontradicted. This is not a case where any matrimonial offense has been committed by the husband. Defendant's counterclaim has been sustained by the court below wholly upon inferences which are in direct conflict with the only evidence which is before the court. Of course, a court may reject a witness' testimony, but can it go beyond that and say the opposite, although testified to by no one, is thereby proved? Both the decree of dismissal and the allowance of maintenance can be justified if on no other theory. If there is a false, pernicious issue in this case (Conclusions, p. 27, l. 21) it is in the claim of pregnancy, abortion and infection thrown out in the smoke screen answer of this defendant, by which the whole case has apparently become confused.

It is again respectfully urged that the decree below be reversed.

W. Howard Demarest,
Solicitor for and of Counsel with
Petitioner-Appellant.

206 MAY 7 1945

New Jersey Court of Errors and Appeals

Between

CARL O. CARLSON,
Petitioner-Appellant,

and

AMY ROGERS, falsely called AMY ROGERS CARLSON,
Defendant-Respondent.

On Appeal, &c.

BRIEF AND POINTS OF DEFENDANT-RESPONDENT.

Statement.

This is an appeal from a final decree advised by Hon. N. Demarest Campbell, Advisory Master, and entered in the Court of Chancery of New Jersey on November 21, 1944. The decree, among other things, dismissed petitioner-appellant's petition for annulment and sustained the counterclaim of defendant-respondent, filed under the statute, for support and maintenance because petitioner-appellant abandoned and failed to support complainant.

Facts.

The pertinent facts in this case are substantially as follows:

The petitioner-appellant, Carl O. Carlson, and defendant-respondent, Amy Rogers Carlson, became acquainted during the month of November, 1941. Following a courtship of seven months, dur-

ing which time petitioner-appellant and defendant-respondent were together for weeks at a time in Florida and other places, they were married in New York City on June 20, 1942.

Immediately after the marriage, petitioner-appellant and defendant-respondent went to reside at Cliffside Park, Bergen County, New Jersey, where they resided together and occupied the same bedroom up to June 16, 1943, when petitioner-appellant abandoned the defendant-respondent and refused and neglected to support her as will hereinafter appear.

During the month of September, 1942, while defendant-respondent was still living with petitioner-appellant as aforesaid, she informed him that she believed herself to be pregnant, whereupon petitioner-appellant denounced defendant-respondent and remonstrated with her, finally insisting that if such was her condition, that she have her pregnancy aborted, as he did not wish to have any children. In compliance with petitioner-appellant's desire, defendant-respondent procured with the assistance of Mrs. Esther Carlson Strom, sister of petitioner-appellant, a large bottle of castor oil, which was consumed by defendant-respondent. Having failed in this manner to abort defendant-respondent's pregnancy, the petitioner-appellant insisted that defendant-respondent go to one Dr. Markoff, accompanied by the sister of petitioner-appellant, Esther Carlson Strom, who was a nurse and had formerly been employed as such by the said Dr. Markoff.

In accordance with arrangements previously made by the petitioner-appellant, defendant-respondent went to the office of Dr. Markoff, accompanied by petitioner-appellant's sister, Esther Carlson Strom, and the said Dr. Markoff did then and there administer medicines and injections,

which the defendant-respondent says was an abortion. As an aftermath of this alleged abortion, defendant-respondent became seriously ill and was compelled to enter the Post Graduate Hospital on or about the 27th day of December, 1942, to undergo surgical treatment.

On January 10, 1943, the defendant-respondent was discharged from this institution and returned to the home of petitioner-appellant and defendant-respondent at Cliffside Park, aforesaid, where they continued to reside together occupying the same bedroom at all times. Although defendant-respondent's recovery was a slow process, petitioner-appellant and defendant-respondent, who at the time was not in the best of health, resumed marital relations immediately upon her discharge from the hospital.

During the month of April, 1943, defendant-respondent, at the advice of her physician, Dr. Donaldson (p. 168, ll. 9-21):

> "Q. Did you suggest in March that a vacation would be beneficial to the patient? A. I don't remember.
>
> Q. You corresponded with Mrs. Bowers, the sister of Mrs. Carlson, didn't you? A. I don't remember.
>
> Q. Is this your blank or form? A. That is my prescription blank.
>
> Q. Is that your handwriting? A. Yes.
>
> Q. Does that refresh your recollection that you suggested in March that, 'she needs a vacation. Sincerely, Blake F. Donaldson?' A. If it is written there. Yes."

and with the consent of petitioner-appellant, went on a vacation, visiting her sister in Tennessee.

During the month of June, 1943, while the defendant-respondent was so visiting her sister in Tennessee, the petitioner-appellant visited defendant-respondent, spending several days with

her and completing the arrangements for defendant-respondent's care and treatment at the Ozark Sanatorium in Arkansas. After petitioner-appellant completed arrangements for defendant-respondent's treatment at the sanatorium, he returned to his home in New Jersey and never contributed adequately to defendant-respondent's support, nor did he have any relations with her and his attitude was indicative of the fact that he had abandoned her and no longer regarded her as his wife.

On September 2, 1943, petitioner-appellant filed a Petition in the Court of Chancery, seeking an annulment of his marriage to the defendant-respondent, wherein three separate causes of action were alleged:

1. That the defendant-respondent, Amy Rogers, was physically and incurably impotent to consummate the marriage.
2. That the defendant-respondent, Amy Rogers, entered into the said marriage contract with petitioner-appellant having fixed mental reservations that she would not accord to petitioner-appellant said rights due him as part of the marriage contract.
3. That the defendant-respondent, Amy Rogers, by her fraudulent representations induced the petitioner-appellant to enter into the marriage contract with her.

Counsel for petitioner-appellant has stated in his brief that the first count alleging impotency is abandoned and the second and third counts combined.

On January 13, 1944, the defendant-respondent, through her solicitor filed an Answer and Counterclaim to petitioner-appellant's Petition, wherein she denied all the allegations contained in petitioner-appellant's petition, except as to the mar-

riage and residence of the petitioner-appellant, which allegations she admitted.

The Counterclaim of defendant-respondent asked for relief in the form of alimony because of the abandonment of the petitioner-appellant and his neglect and refusal to support her, together with costs and counsel fees with which to defend the action brought by petitioner-appellant.

During the trial, the petitioner-appellant admitted that from the date of the marriage on June 29, 1942 until June, 1943, petitioner-appellant and defendant-respondent had lived under the same roof and were regarded by everyone as man and wife but he denied that he had sexual relations with her during that period. He admitted, however, that petitioner-appellant and defendant-respondent occupied the same bed at all times during the marriage and up to the time when she had gone to Tennessee, and notwithstanding petitioner-appellant's denial of having had sexual relations with defendant-respondent, he admitted that on the first night of his honeymoon with defendant-respondent, she instructed him to have contraceptives in readiness before going to bed with her (p. 75, ll. 10-25):

> "Q. When you made these attempts, did she require any other preparation on your part? A. Yes. She instructed me to have two contraceptives ready.
>
> Q. Then would you do that? A. I would.
>
> Q. Would she then permit intercourse? A. No, sir.
>
> Q. Tell us about it. A. I would be on the side with her. I was never astride the girl——
>
> Q. So—? A. Well, it would end ineffectually. There was no betrayal of emotion on the girl's part whatever.
>
> Q. When the requirement was mentioned that you use contraceptives, was that, to you, an invitation from her to have intercourse? A. No, I will always feel that it was not."

The petitioner-appellant also admitted that he accompanied his wife on several occasions after the initial visit to the office of Dr. Markoff for medical treatment but endeavored to explain these visits by saying that they were necessitated by reason of the arthritic condition of his wife.

The testimony of Dr. Markoff, had by depositions, established the fact that when the menstrual cycle had resumed, the defendant-respondent was not required, nor did she make, any further visits to Dr. Markoff's office. A copy of the doctor's record—marked Exhibit P-1—established a discharge of the defendant-respondent after she commenced her menstrual cycle. A close examination of this record, its reference to the condition of defendant-respondent's breasts, the regularity of her menstrual period before marriage and the irregularity of it after marriage; the fact that defendant-respondent had taken the dose of castor oil hereinbefore referred to, plus the continual reference on divers days that there was no menstruation, leads to the irresistible inference that the history here detailed was that of a pregnant woman rather than as stated by Dr. Markoff in his testimony, for certainly he would not admit that he had performed an abortion, if such was the case, thereby admitting that he was guilty of crime.

Correspondence was offered in evidence that corroborates the contention of the defendant-respondent that the relationship between petitioner-appellant and defendant-respondent was most satisfactory. The petitioner-appellant, on cross examination, admitted that there was no lack of affection on the part of defendant-respondent and also on his part towards his wife. This admission on the part of petitioner-appellant is more conclusively borne out by petitioner-appellant's letter, marked Exhibit D-2, to "Grace", the sister of the defendant-respondent, which letter was introduced

into evidence and made part of the case, following the admission by petitioner-appellant that he had written the same and in which he expressed his feelings toward the defendant-respondent. This letter described the relationship between them and spoke of the defendant-respondent in very flattering terms, stating to the sister of the defendant that he, the petitioner, was happy and that the defendant was a good wife. By no stretch of the imagination would a man—7 months after his marriage—write a letter of such character if he had not had relations with his wife and if she had deceived him in making the marriage contract.

The testimony of Dr. Markoff and Dr. Donaldson, offered in behalf of the petitioner-appellant, established the fact from their medical examinations that defendant had had sexual intercourse (p. 295, l. 31):

> "Q. And it was only from a medical examination that you determined that Mrs. Carlson had had intercourse and that she was capable of having intercourse at that time, not thereafter, isn't that so? A. Yes."

(p. 294, ll. 34-41)

> "Q. And as far as Mrs. Carlson is concerned she was apt, wasn't she? She was able to have intercourse? A. Oh, yes. Yes.
>
> Q. She was capable of having intercourse? A. Yes, sir.
>
> Q. And an examination of her tissues indicated that she had had intercourse prior to her visit to you? A. Yes, sir."

The Advisory Master queried the petitioner-appellant and his attorney after the testimony of the doctors was submitted as to whether there was any contention that sexual relationship had occurred on the part of defendant-respondent with

any person other than petitioner-appellant. The petitioner-appellant and his counsel denied that there was any such allegation or inference to be drawn, stating that adultery was not any part of the case.

On this state of facts and after conclusion of a three day trial, the Advisory Master heard arguments made to dismiss the petitioner-appellant's annulment, and advised a decree for separate maintenance.

After the decision of the Advisory Master to dismiss and advise a decree for separate maintenance, the petitioner-appellant, who admitted that he was not living with his wife and had refused to support her adequately, was called to the witness stand by the attorney for the wife to testify as to his income and financial condition.

The decree was signed after hearing this testimony, allowing $30.00 a week to the wife for separate maintenance and a counsel fee of $1,500.00.

POINT I.

The conflicting testimony of the petitioner-appellant, his hesitancy and reluctance to acknowledge the truth except when confronted with unimpeachable evidence in support of it, coupled with the general improbability of his testimony, indicates a settled purpose to free himself of his matrimonial obligations and his testimony, therefore, is of little probative value.

The question before the Court, on Appeal, is purely one of fact, viz: Did the defendant-respondent enter into the marriage relationship with the petitioner-appellant possessed of a physical ab-

normality, chronic illness, inhibitions or fears and with fixed mental reservations which render her impotent or unwilling to consummate the said marriage; did defendant-respondent, with the knowledge of said physical abnormalities, chronic illness, inhibitions or fears, and with fixed mental reservations, fraudulently conceal the same from petitioner-appellant to induce him to enter into a contract of marriage with her; and, did she in fact, refuse to consummate said marriage.

The testimony deduced at the trial of this cause before the Honorable Advisory Master was contradictory on a number of salient points. On these contradictions, the learned Advisory Master resolved the facts in favor of the defendant-respondent, he having had the opportunity to hear the witnesses testify, observe their actions and demeanor on the witness stand and to formulate in his own mind an opinion as to the credibility of the witnesses and the probability or improbability of their testimony.

The law on this point is well settled and in the case of *Cartan* vs. *Phelps,* 91 N. J. Eq. 312, the Court of Errors and Appeals held:

> On appeal from the decree of the Court of Chancery, greater weight is given to a finding upon a question of fact, because the Chancellor, who hears the case in the court below and sees the witnesses and hears them testify, has better opportunity to judge their credibility than the reviewing court. But that rule imposes no restraint on the power of the reviewing court to ascertain by full investigation and analysis of the evidence, what the facts are and whether the general finding is consistent therewith.

The above case was cited in *Cavanna* vs. *Brooks,* 97 N. J. Eq. 333 Court of Errors and Appeals; *Union Trust Company* vs. *Goerke Co.,* 105 N. J.

Eq. 105, Court of Errors and Appeals; *Sparks* vs. *Lorentowicz,* 106 N. J. Eq. 810, Court of Errors and Appeals; *Haviland* vs. *Haviland,* 114 N. J. Eq. 196, Court of Errors and Appeals; *Guardian Life Insurance Co.* vs. *Mareczko,* 114 N. J. Eq. 374, Court of Errors and Appeals; *Thirteenth Ward Building & Loan Assn., Newark* vs. *Weissberg,* 115 N. J. Eq. 496, Court of Errors and Appeals; and *Rains* vs. *Rains,* 127 N. J. Eq. 331, Court of Errors and Appeals. In this latter case, the court held:

> Where, as here, if the character of a party for truth and veracity is unimpeached, and his testimony uncontradicted, is not contrary to circumstances in evidence, and contains no inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to the truth of the testimony, it will be given effect.

The *Carton* vs. *Phelps* case was also cited in the following cases:

Gilliam vs. *Gilliam,* 130 N. J. Eq. 530, Court of Errors and Appeals;
Kellog vs. *Martin,* 130 N. J. Eq. 343, Prerogative Court;
Martindell vs. *Martindell,* 133 N. J. Eq. 268, Court of Errors and Appeals;
Amond vs. *Amond,* 134 N. J. Eq. 431, Court of Errors and Appeals.

That the rule here contended for had been repeatedly upheld and is the law governing appeals from the Court of Chancery and is particularly applicable to the case under consideration.

POINT II.

A decree in an action in annulment based on fraud, alleging concealment of facts essential to the marriage, will not be allowed when the complaining party had knowledge of the alleged fraud prior to the marriage, and notwithstanding, entered into the marriage contract.

The petitioner-appellant in the case before the court alleged, amongst other things, that the defendant-respondent suffered from rheumatic fever and a knee condition which impeded her power of locomotion and rendered her incapable or unwilling to consummate the marriage entered into by them. There is no testimony in any shape or form to corroborate these allegations, nor have they been substantiated by surrounding circumstances.

The court's attention is directed to the cross examination of the petitioner-appellant in regard to his knowledge of defendant-respondent's physical condition prior to their marriage (p. 103, ll. 29-40 and p. 104, ll. 1-32):

> "Q. During your courtship in November 1941 was anything discussed between you and Amy as to any physical condition? A. No, sir.
>
> Q. Was anything discussed between you and Amy in April 1942 at the time you visited as to any physical condition? A. Yes.
>
> Q. When was that, and where? A. It was in April 1942 when I visited her in Miami.
>
> Q. That was before the marriage? A. Befor the marriage.
>
> Q. What was said? A. She complained of having had a touch of rheumatic fever and that it was disappearing.
>
> Q. Is that all? A. That is all I recall.

Q. What was your response in respect to this discussion as to this arthritis; as you call it, rheumatic fever? You were in love with her at the time? A. Yes, I was.

Q. What did you say when she told you she had rheumatic fever? A. She assured me——

Q. What did you say, please? A. I accepted her version to me of it. I don't recall what I said in so many words.

Q. You accepted her version of it. Was there any reason at that time to believe there was a version given of the recital of what was in existence? A. There was no reason for me to believe that she wasn't telling the truth.

Q. What did you say? A. I don't recall what I said.

Q. Or is it that you don't want to? A. I don't recall.

Q. But it was of no concern to you in respect to your contemplated marriage, was it? A. She spoke very lightly of it.

Q. But it did not affect your desire to ask her to marry you? A. That is right."

It is clear from this testimony of petitioner-appellant that he had full knowledge of defendant-respondent's physical condition prior to his marriage; knowledge which was obtained through information furnished by the defendant-respondent without any attempt on her part to conceal her true physical condition nor to minimize in any way the full extent of it.

The rule of law on this point is well established in this State and is clearly enunciated in the case of *Goldstein* vs. *Greifinger,* 107 N. J. Eq. 52, where the Court of Errors and Appeals in dismissing the husband's appeal confirmed the findings of the Court of Chancery and ruled that knowledge by the husband of the wife's tubercu-

lar condition prior to the marriage barred him later from seeking annulment of his marriage on these grounds.

Having been placed on his guard by knowledge of defendant-respondent's physical condition prior to the marriage it became the duty of petitioner-appellant to use due caution in a matter in which his happiness for life was so materially involved. Having subsequently entered into the marriage contract with defendant-respondent with the knowledge of these facts, he threw all caution to the winds and must be presumed to have ratified and accepted the condition of which he now complains. Although the conditions are of an immaterial matter, viz: her physical condition, her so called physical ailments were of such general and inconsequential character and are of such a nature that "all flesh is heir to" such infirmities, and is in itself no ground for voiding the marriage (even if he had not had knowledge of the alleged conditions).

POINT III.

A decree annulling marriage must be considered as requiring the same proof with respect to corroboration as that required in an action for divorce. An annulment will not be granted on the uncorroborated testimony of petitioner.

The petitioner-appellant in the case before the court has failed completely to offer any evidence of any kind or description in support of the allegations contained in his petition, nor has he sustained his allegations by surrounding circumstances, all of which to the contrary, tend to make his testimony more incredible and of no probative value.

The rule of law with respect to corroboration required in actions in annulment is clearly defined in the case of *Crane* vs. *Crane,* 62 N. J. Eq. 21; *Garcin* vs. *Garcin,* 62 N. J. Eq. 189; *Bissell* vs. *Bissell,* 93 N. J. Eq. 537; *Woodward* vs. *Heichelbech,* 97 N. J. Eq. 253; and many other cases too numerous to mention.

The ruling of the Court of Chancery, dismissing the Petition for lack of proof and corroboration should be sustained.

Conclusion.

The solicitor for the petitioner-appellant has inserted in his brief, certain excerpts from certain letters and has lifted the sentences from the context of the letters which is apt to create an erroneous impression, for a careful reading of the letters in their entirety will show that the letters which were written before and after the marriage contain nothing but favorable testimony for the defendant-respondent and the letter written by the petitioner-appellant known as the "Grace" letter, written when the defendant-respondent was in the hospital on the 6th of January, 1943, is plenary evidence of the relationship between the parties and was written eight months prior to the filing of the petition for annullment (p. 344, ll. 15-23), which partly reads as follows:

> anything I may write about Amy and what she means to me * * * to my Mother and Sister * * * and the reaction and reception of my friends * * * well, Grace, you know your Sister * * * she has really been an answer to what one prays for, but perhaps for lack of faith * * * is not destined to receive * * * we're both very happy and look forward to the time * * * if so willed * * * when we will be in our own home * * *

This letter is confirmatory as wholly writ that relationship between the parties was natural, happy and in all respects the usual situation between married couples and it was so prior to the time that he conceived the unholy purpose to rid himself of this marital obligation.

It is respectfully submitted, that the Advisory Master's rulings are unassailable and that the petitioner-appellant's petition should be dismissed for there was an utter failure to corroborate the facts set forth in the petition. His own testimony on every salient feature was inherently improbable and where not improbable was contradicted by the petitioner-appellant's own testimony, by the circumstances of the relationship between the parties and by the correspondence, all of which leads to the irresistible conclusion that the entire proceedings were without merit and was a bald attempt to rid himself of his marital obligations.

The appeal should, therefore, be dismissed, and the decree should in all things be affirmed and the allowances fixed by the court below sustained.

Respectfully submitted,

SIMON J. GRIFFINGER,
Solicitor for Defendant-respondent.

JACOB L. NEWMAN, of Counsel.

May term 1945.

Arthur W. Cross, Inc., Law Printers, 71-73 Clinton Street, Newark 5, N. J.
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New Jersey Court of Errors and Appeals

May Term, 1945.

Between

Carl O. Carlson,
Petitioner-Appellant,

and

Amy Rogers, falsely called
Amy Rogers Carlson,
Defendant-Respondent.

SUPPLEMENTAL REPLY ON BEHALF OF THE DEFENDANT-RESPONDENT.

The solicitor for petitioner-appellant has seen fit to submit for the further consideration of the court, a supplemental memoranda in the above entitled cause, whereupon counsel for defendant-respondent, after reading the matters contained therein, makes the following reply:

There is no provision in the Rules of the Court of Errors and Appeals which permits the filing of a supplemental brief, nor has the solicitor for petitioner-appellant made application to this court for permission so to do.

However, out of the abundance of precaution, it is the desire of counsel for defendant-respondent to make a very brief and concise reply to the animadversions and references to the Advisory Master's opinion made by the solicitor for petitioner-appellant. The entire memoranda submitted seems to be a rehash of the original brief

filed by the solicitor for petitioner-appellant, with seeming dissatisfaction of the court's views on the evidence, the inferences to be drawn from the evidence, the court's construction and views of letters offered in evidence and the result of the court's able, clear, convincing, and well considered opinion of the facts, evidence and surrounding circumstances. Trivial, unimportant and inconsequential incidents and statements are commented upon in the memoranda while the real question involved in the case is totally ignored. The supplemental memoranda filed by solicitors for petitioner-appellant contains no matter appertaining to the evidence in the case which was not available to him at the time that he filed his original brief, and contains no information of any value that would help the appellate court to determine the question now under consideration, viz: that the petitioner-appellant had failed to prove the allegations contained in his petition and there was no corroboration of the material facts as required by law.

The evasive tactics in relation to the real issue involved in this case as borne out by the supplemental brief of the solicitor for petitioner-appellant bears the unmistakable mark of a drowning man grasping at a straw, a potent illustration of which is that the following alleged incident occurred in the trial of the cause, as stated in his supplemental brief: "that the court has seen Mrs. Strom leave the room in a hysterical condition, and petitioner also left the room to assist her." He then states that this was not in the transcript and challenges the defendant-respondent in peremptory and forceful manner to deny the fact. In reply to this challenge, solicitor for defendant-respondent respectfully submits that if this matter is not in the transcript, then it is improper for the solicitor for petitioner-appellant to allude to

it and is not in evidence in the cause and therefore should not be commented upon; and, even if it were in the transcript and was evidence, which is vigorously and strenuously denied, it is just another example of citing trivial, unimportant and irrelevant matters to sustain a very weak and unmeritorious cause of action, and further, an attempt by the solicitor for petitioner-appellant to counteract the effect of the unreliability of the testimony of Mrs. Strom (sister of petitioner-appellant) as a witness, by stating that it was due to her nervousness and that her testimony should have received more consideration at the hands of the court. The court having seen and heard the witness is the best judge of the character, value and weight of her testimony.

The supplemental memoranda filed by solicitor for petitioner-appellant, in effect, seems to be merely a statement on his part that the Advisory Master should not have arrived at the result he did; that if he, the solicitor for petitioner-appellant, had been the judge of the facts in this case, he would not have taken this view, but would have construed the evidence and the facts in a manner more favorable to his client's viewpoint.

It is respectfully submitted:

(a) That the memoranda entitled "Supplement to Petitioner-appellant's Points and Brief" should be disregarded in its entirety for the reasons stated above.

(b) That if it be given any consideration at all by the court, it does not in any respect add to nor give any added weight to the original brief.

(c) That in substance and in fact, the whole effect of the supplemental memoranda filed herein seems to reflect the dissatisfaction

of the solicitor for the petitioner-appellant with the decision arrived at by the court below after full, fair and adequate consideration.

The real issue in this case is that as a matter of law, the petitioner-appellant had no standing before the Court of Chancery because none of the essential facts alleged in his petition as a basis for annulment were corroborated and therefore the court's conclusion on the merits of the case is unassailable.

Respectfully submitted,

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