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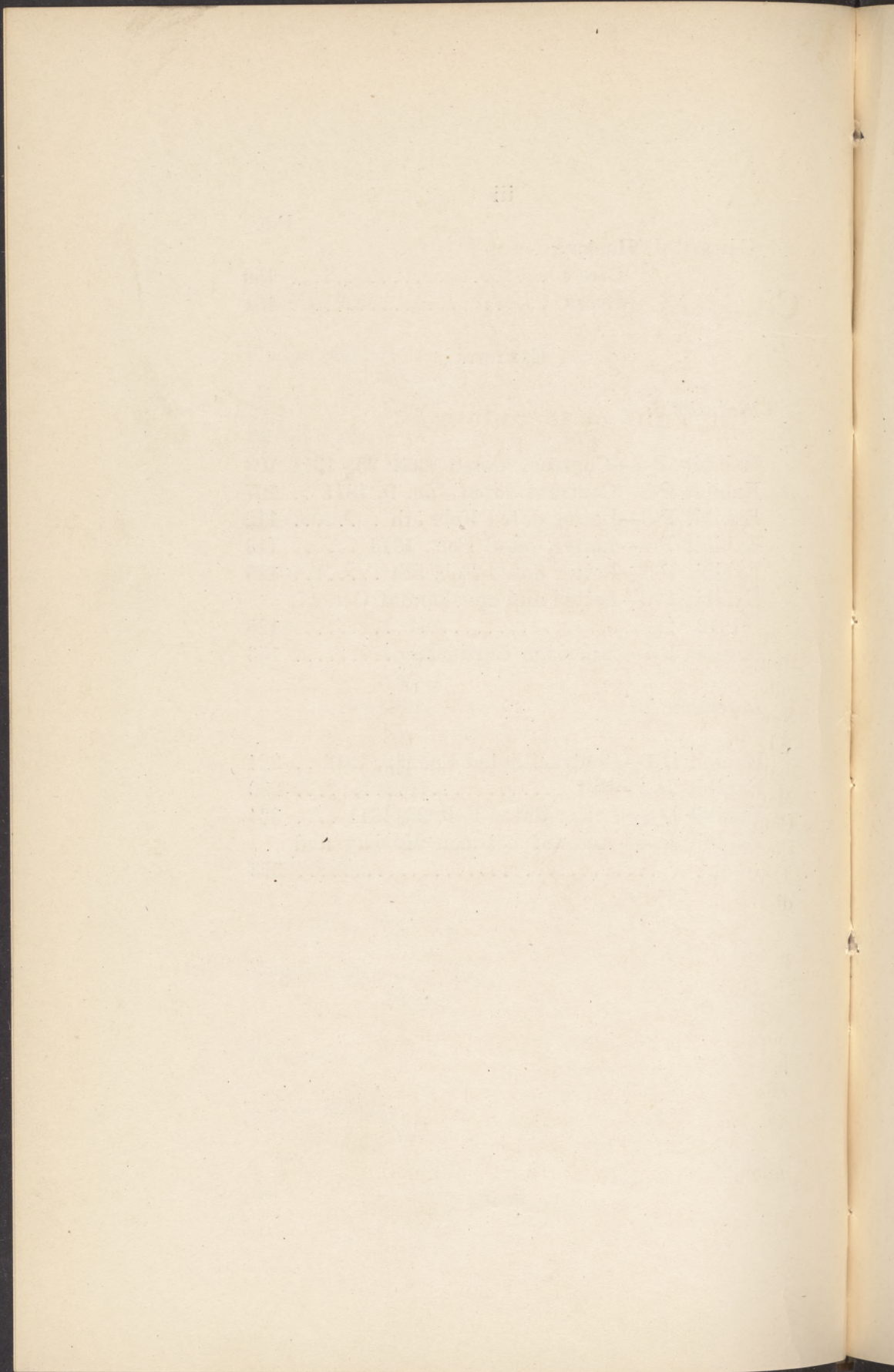
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New Jersey
Court of Errors and Appeals

Bill of Complaint

(Filed, Sept. 3, 1913, J. G., V. C.)

IN CHANCERY OF NEW JERSEY

*To his Honor, Edwin Robert Walker, Chancellor
of the State of New Jersey:*

Humbly complaining, showeth unto your 20
Honor, your oratrix, ELOISE MACKAY, of Coytes-
ville, in the County of Bergen, in the State of
New Jersey:

1. That she was lawfully joined in the bonds of
matrimony to her present husband, EDWARD JAY
MACKAY at the Borough of Fort Lee, in said
County of Bergen and State of New Jersey, on
the 8th day of May, nineteen hundred and ten, by
J. William Flynor, D.D., a minister of the Metho-
dist Episcopal Church. 30

2. That your oratrix' husband is an actor by
profession and was away from her a great part
of the time; that at times he treated her fairly
well, but at other times was cruel and inhuman to
her; that he remained out of the house until all
hours of the night and frequently came home un-
der the influence of intoxicating liquors, and on
several occasions struck your oratrix.

3. That on the sixteenth day of September,
nineteen hundred and twelve he came home from 40

Bill of Complaint

the City of Columbus, in the State of Ohio where he had been playing with a theatrical company, and remained home until the twenty-third day of September, when he packed his suit-case with clothes and went to the City of New York, where
10 your oratrix is informed and believes he met a woman named Adele L. Davis, whose stage name is Adele L. Blood, and remained with her until on or about the fourteenth day of October, when he returned to your oratrix.

4. That on or about the tenth day of September, and before your oratrix' husband returned from the state of Ohio, Edwards Davis; the husband of the said Adele L. Davis came to the home of your oratrix, and told your oratrix that
20 her husband was going out with his wife and that he had evidence to that effect; that your oratrix told her husband what the said Davis had told her, whereupon he denied it.

5. That on the seventeenth day of October, nineteen hundred and twelve your oratrix found a letter inclosed in an envelope addressed "Miss Adele Blood, c/o Queen's Hotel, Montreal, Canada"; that your oratrix tore open said envelope and found inside a letter bearing date October
30 seventeenth, nineteen hundred and twelve, a copy of which is hereto annexed and hereby made a part hereof; that her husband tried to compel your oratrix to return said letter to him, but she refused to do so and she still has the same in her possession.

6. That on or about the twenty-first day of October, nineteen hundred and twelve he abandoned your oratrix and went to the home of his mother and did not again return to his own home until the thirty-first day of December, nineteen
40 hundred and twelve, when he again returned to

Bill of Complaint

his home where he remained one week; that he at that time again abandoned your oratrix and has never since returned to his home, excepting when he came to get certain of his clothing.

7. That after he abandoned your oratrix on the twenty-first day of October, nineteen hundred and twelve, his mother asked your oratrix to send his trunks to her home as she had more room to keep them than your oratrix has, and she accordingly sent them to the home of his mother, who lives only two blocks away from your oratrix' home, but that her husband has never returned them to his own home. 10

8. That your oratrix has since the second time her husband abandoned her in the beginning of January, nineteen hundred and thirteen, tried to induce him to return to her and live with her for the sake of their children, but that he has either refused or given her an evasive answer each time that she has requested him to come home. 20

9. That about the month of February, nineteen hundred and thirteen, your oratrix heard rumors that her husband was going with a woman named Marie Campbell; that she investigated and learned that he was living in an apartment house at No. 567 West 149th Street, in the City of New York with her; that he was at that time playing with John E. Kellard at the Harris Theatre on Forty-second Street, near Eighth Avenue, in the City of New York, and that he lived at the above address with her as her husband from about the month of February, nineteen hundred and thirteen until in or about the month of May, nineteen hundred and thirteen, when he went to Washington, D. C., with the Poli Stock Company, where he remained until about the middle of July, nineteen hundred and thirteen. 30 40

Bill of Complaint

10. That on numerous occasions he has told your oratrix that he would never live with her again and has told her that if she pressed him for money he would leave the jurisdiction of the Court and get out of this country.

10 11. That he has been steadily employed for the last several years; that he works at least forty-two weeks of each year and receives from \$175 to \$200 a week; that he recently told your oratrix that he had been offered \$300 a week if he would return with the Poli Stock Company in Washington, D. C., the coming winter.

20 12. That since he abandoned your oratrix her husband has not given her anything towards her support, but after he first abandoned her, her husband's father, Frank Finley Mackay gave her \$1.50 a day for the support of herself and children and paid for the rent, coal and gas of the house she lives in at Coytesville; that the said Frank Finley Mackay now gives her the sum of \$15 a week and pays for her rent, coal and gas.

13. That your oratrix' maiden name was Eloise Leek.

30 14. That two children were born to your oratrix and her husband, namely, Frank F. Mackay and Richard Mackay, who are both in the custody of your oratrix.

15. Your oratrix charges that ever since about the sixth day of January, nineteen hundred and thirteen, her husband, the said Edward J. Mackay has abandoned your oratrix without justifiable cause and has refused and neglected and still refuses and neglects to maintain and provide for her and their children in accordance with his means and their station in life.

40 16. Your oratrix was a *bona fide* resident of the State of New Jersey when this cause of action arose and has lived continuously at Coytesville,

Bill of Complaint

in said State of New Jersey, ever since the tenth day of March, nineteen hundred and ten, where she still resides.

In tender consideration whereof and forasmuch as your oratrix can only obtain relief in this honorable Court.

To the end thereof that the said Edward J. Mackay may answer the premises, but without oath, and that he may be ordered and decreed to provide such suitable support and maintenance for your oratrix and her said children, to be paid and provided by him or made out of his property, for your oratrix and her said children, and for such times as the nature of the case and the circumstances of the parties render suitable and proper; and that the said defendant may be compelled to give reasonable security for such maintenance and allowance and to pay the said from time to time under the compulsory order of this Court as provided by statute, and that she may have such further and other relief in the premises as may be equitable and just.

May it please your Honor, the premises considered, to grant unto your oratrix the State's writ of subpoena, issuing out of and under the seal of this Honorable Court, to be directed to the said Edward Jay Mackay, commanding him by a certain day and under a certain penalty therein to be expressed, to be and appear before your Honor, in this Honorable Court, then and there to answer all and singular the said premises, and to abide by and perform such order and decree therein as to your Honor shall seem meet, and shall be agreeable to equity and good conscience.

And your oratrix will ever pray, &c.

WELLER & LICHTENSTEIN,

Solicitors for and of Counsel

with Complainant. 40

Bill of Complaint

Affidavit annexed to bill of complaint

State of New Jersey, }
 County of Hudson. } ss:

10 Eloise Mackay, of full age, being duly sworn according to law, upon her oath deposes and says that she is the complainant in the within bill of complaint named; and that her said complaint is not made by any collusion between her and the defendant, but in truth and good faith for the cause set forth in said bill of complaint.

20 Deponent further says that she was lawfully joined in the bonds of matrimony to her present husband, Edward Jay Mackay, at the Borough of Fort Lee, in the County of Bergen and State of New Jersey, on the eighth day of May, 1910, as set forth in said bill of complaint; that deponent and her husband, the said Edward Jay Mackay lived and co-habited together on and off at Coytesville, in the County of Bergen, as set forth in her bill of complaint, until the first week of January, 1913, when he abandoned her as therein set forth at Coytesville, aforesaid, and has never since returned to her.

30 Deponent further says that since said first week of January, 1913, her husband, the said Edward Jay Mackay has abandoned deponent without justifiable cause and has refused and neglected and still refuses and neglects to maintain and provide for her and the children of the parties herein, in accordance with his means and their station in life.

40 Deponent further says that the said defendant is an actor by profession; that he is employed at least 42 weeks in each year and earns from \$175 to \$200 a week; that he recently told deponent that he had been offered \$300 a week for the com-

Bill of Complaint

ing winter to play with the Poli Stock Company at Washington, D. C. as set forth in the bill of complaint filed herein.

ELOISE MACKAY.

Sworn and subscribed to before me this

2d day of September, 1913.

10

Richard W. Gutheil,

Notary Public of New Jersey.

Letter annexed to bill of complaint

Oct. 17/12.

My Own Darling Al—

Since writing to you this afternoon I have seen Lee Shubert and he has agreed to the salary of \$175—He tried to make it \$150 but I told him I couldn't take less than other mgrs had paid me—and there was no reason why I should sacrifice \$210 in five weeks—That is by taking \$25 less—and having to pay \$87.50 commission—which would mean a loss of \$210 if we played five weeks—But I do hope dearest for our sakes that the play will be successful—It will mean so much to me this season and from now on—Before, I worked for the sake of keeping others going—giving all I could and received nothing in return—(I mean by that the "mental boost") until there was no joy in the work—nothing but work for work's sake—Now there is ambition—desire to succeed—an absolute willingness to work—and you my darling are the incentive—I want you to be proud of me—as I am of you—your notices were beautiful—and I know deserved—There isn't a girl on the American Stage with my girl's personality and charm of acting and it won't be

20

30

40

Petition for Writ of Ne Exeat

long dear before you are at the head of your own
 company—But this season dear if all goes well
 with me, and I see no reason why it should not—
 and you feel you want to rest after a while—by
 that time my affairs would be straightened up—
 10 you have your boy to look after you—why dear
 that would be a happiness and never a burden—
 I *love you*. Don't forget that—Good night dear-
 est I'm going to begin studying—How I miss
 you and wish I could be with you—Think of me
 and love me—

Your Lover,

(Signed) ED.

20

Petition for Writ of Ne Exeat*(Filed, Sept. 3, 1913, J. G., V. C.)*

IN CHANCERY OF NEW JERSEY

30

Between
 ELOISE MACKAY,

Complainant,

and

EDWARD JAY MACKAY,

Defendant.

On Bill, etc.
 Petition for Writ
 of *ne exeat re-*
publica.

Your petitioner, Eloise Mackay, of Coytesville,
 in the County of Bergen and State of New Jer-
 sey, respectfully shows:

1. That she is the complainant in the within
 cause named and was lawfully joined in the bonds
 of matrimony to her present husband, Edward
 40 Jay Mackay, at the Borough of Fort Lee, in

Petition for Writ of Ne Exeat

the County of Bergen, in the State of New Jersey, on the eighth day of May, 1910, by J. William Flynor, D.D., a minister of the Methodist Episcopal Church.

2. That her husband is an actor by profession and after her marriage to him he was away from her a great part of the time; that at times while living with her treated her fairly well, but at other times was cruel and inhuman towards her; that when at home he often remained out of the house until late at night or early the next morning and frequently came in under the influence of intoxicating liquors and on several occasions struck your petitioner. 10

3. That on the sixteenth day of September, 1912, he came home from Columbus, Ohio, where he had been playing with a theatrical company, and remained home until about the twenty-third day of September, 1912, when he packed his suitcase and went to the City of New York where your petitioner believes he met a woman named Adele L. Davis alias Adele L. Blood, and remained with her until about the fourteenth day of October, 1912, when he returned to his home. 20

4. That on or about the tenth day of September, 1912, and before your petitioner's husband returned from the State of Ohio, Edwards Davis, the husband of the said Adele L. Davis told your petitioner that her husband was going out with his wife, and that he had evidence to that effect; that your petitioner told her husband what the said Davis had told her, but he denied it. 30

5. That on the seventeenth day of October, 1912, your petitioner found a letter enclosed in an envelope addressed "Miss Adele Blood, c/o Queen's Hotel, Montreal, Canada"; that said envelope was in the handwriting of her husband, 40

Petition for Writ of Ne Exeat

the defendant in the above cause named, and contained a letter, a copy of which is hereto annexed and hereby made a part hereof, which letter is also in his handwriting.

10 6. That on the twenty-first day of October, 1912, your petitioner's husband abandoned her and went to the home of his mother; that he did not again return to his own home until the thirty-first day of December, 1912, when he again returned to his home and remained one week when he again abandoned your petitioner and has never since returned to her excepting when he came home to get certain of his clothing.

20 7. That your petitioner has since the second time her husband abandoned her in the month of January, 1913, tried to induce him to return to her for the sake of their children, but he has refused to do so and has told her he never would live with her again.

30 8. In the month of February, 1913, your petitioner heard rumors that her husband was living with a woman named Marie Campbell; that she investigated and learned that he was living in an apartment house at 567 West 149th Street, in the City of New York, with the said Marie Campbell; that he lived with her from about the month of February, 1913, until the month of May, 1913, when he went to Washington, D. C., with the Poli Stock Company.

40 9. That when he returned from Columbus, Ohio in September, 1912, as herein set forth, petitioner asked him for some money, and told him that she could not live as she was living; that he said to your petitioner, "You had better look out if you undertake to press me for money, I will leave this country and go to Australia"; that your petitioner said to him "Well, I think

Petition for Writ of Ne Exeat

we can bring you back if you leave the State," whereupon he replied "Well, I guess my body will not do anybody much good"; that he is now stopping for a few days at the home of his mother at Coytesville aforesaid, and petitioner knows that he will leave this State for the next theatrical season just as soon as his company is ready for him. 10

10. Petitioner has some contracts in her possession that were heretofore signed by her husband with different theatrical companies; that he works at least 42 weeks of each year and now receives a salary of from \$175 to \$200 a week; that he recently told your petitioner that he had been offered \$300 a week if he would return with the Poli Stock Company to Washington, D. C., for the coming winter. 20

11. That after your petitioner's marriage to the defendant he never gave her but very little money; that at first he paid the trades-people for the amount of food purchased himself, and after he abandoned your petitioner as hereinabove set forth his father, Frank Finley Mackay gave your petitioner \$1.50 a day for the support of herself and children and paid for the rent, coal and gas of the house in which she lived at Coytesville, aforesaid, until about the month of April, 1913; that the said Frank Finley Mackay has since that time given her the sum of \$15 a week, and pays for the rent, coal and gas, and on two or three occasions has sent her some extra money; that her youngest child is only twenty months old, and therefore your petitioner can not do anything to help herself; that she is living in a lonely place without any servants, and on the money the defendant's father is giving her she can merely eke out an existence, and can not afford to purchase 40 30

Petition for Writ of Ne Exeat

decent clothing for herself and children and can not afford to go to any places of amusement whatever.

10 12. That two children were born to petitioner and her husband, namely, Frank F. Mackay and Richard Mackay, who are both in the custody of petitioner.

13. That since about the sixth day of January, 1913, her husband, the defendant in the above cause has abandoned your petitioner without justifiable cause and has refused and neglected and still refuses and neglects to maintain and provide for her and her children in accordance with his means and their station in life.

20 14. Your petitioner was a *bona fide* resident of the State of New Jersey when this cause of action arose having lived continuously at Coytesville, in the County of Bergen aforesaid ever since the tenth day of March, 1910, where she still resides.

30 15. That the complainant in the above entitled cause is about to commence an action against her husband for separate maintenance, and support for herself and two infant children, and petitioner verily believes that the defendant intends to quickly depart out of this State and the jurisdiction of this honorable Court and if he is suffered to do so her just claim for support and maintenance and that of the infant children of her marriage to the defendant and now in the custody of petitioner, will be defeated.

16. Your petitioner therefore prays that a writ of *ne exeat republica* be issued out of this Honorable Court to restrain the defendant, Edward Jay Mackay from departing out of the jurisdiction of this Court.

WELLER & LICHTENSTEIN,
Solitors for Petitioner.

Petition for Writ of Ne Exeat

Affidavit annexed to petition

State of New Jersey, }
 County of Hudson. } ss:

Eloise Mackay, of full age being duly sworn according to law, upon her oath deposes and says 10 that she is the petitioner in the foregoing petition named and that the matters and things therein set forth are true; that the defendant Edward Jay Mackay has abandoned deponent without justifiable cause and refuses to support deponent and her children in accordance with his means and their station in life; that the defendant has lately threatened to leave the State without making any provision for her support; that deponent verily believes tht the defendant intends to 20 quickly depart from this State and the jurisdiction of this Court, and if suffered to do so, would defeat the just claim of deponent for maintenance for herself and children, who are now in the custody of deponent.

ELOISE MACKAY.

Sworn and suscribed to before me this
 2d day of September, A. D., 1913.

Richard W. Gutheil,

Notary Public of New Jersey.

30

Letter annexed to petition

This letter is the same as that annexed to the bill of complaint.

Order for Ne Exeat

(Filed, Sept. 3, 1913.)

IN CHANCERY OF NEW JERSEY

10	Between ELOISE MACKAY, Complainant, and EDWARD JAY MACKAY, Defendant.	}	On Bill, etc. Order for <i>ne exeat.</i>
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20 The complainant having filed her bill against the defendant, to be relieved touching the matters therein contained, and now, upon reading the affidavit of Eloise Mackay, whereby it satisfactorily appears that the defendant, Edward Jay Mackay designs quickly to depart from this state:

30 It is on this third day of September, 1913, on motion of Weller & Lichtenstein, of counsel with the complainant, ORDERED, that a writ of *ne exeat republica* be awarded against the said Edward Jay Mackay until he shall fully answer the complainant's bill, and this Court shall make other order to the contrary; and the said writ is to be endorsed in the sum of Two Thousand dollars, in words at length, and not in figures.

Respectfully advised.

JOHN GRIFFIN,
 V. C.

Answer*(Filed, Sept. 19, 1913.)*

IN CHANCERY OF NEW JERSEY

Between ELOISE MACKAY, Complainant, and EDWARD JAY MACKAY, Defendant.	}	10 On Bill, etc. Answer.
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The answer of the defendant, Edward Jay Mackay, to the bill of complaint of the complainant, Eloise Mackay. 20

1. This defendant admits the allegations of the first paragraph of the bill of complaint.

2. This defendant admits that he is an actor by profession, but denies all of the other allegations of the second paragraph of the bill of complaint.

3. This defendant denies the allegations of the third paragraph of the bill of complaint.

4. This defendant is without sufficient knowledge of the allegations of the fourth paragraph of the bill of complaint to be able to deny or affirm them and leaves the complainant to the proof thereof, except as to the allegation therein contained that this defendant denied any improper relations with Adele L. Davis. As to this allegation, defendant admits that he denied any wrongdoing with the said Adele L. Davis. 30

5. This defendant denies that at any time he was guilty of any improper conduct with the said Adele L. Davis or Adele L. Blood. 40

Answer

6. This defendant denies the allegations of the sixth paragraph of the bill.

7. This defendant denies that he abandoned the complainant as alleged in the seventh paragraph of the bill. But as to the trunks, he admits that his trunks are now at his mother's house.

10 8. This defendant denies the allegations contained in the eighth paragraph of the bill of complaint.

9. This defendant denies the allegations contained in the ninth paragraph of the bill, except as to rumors which the complainant may have heard, and as to these the defendant has no knowledge; but he denies having had any improper relations whatever with the said Marie Campbell at any time.

20 10. This defendant denies the allegations of the tenth paragraph of the bill.

11. This defendant denies the allegations of the eleventh paragraph of the bill, except that he admits that he has worked on an average of twenty-seven or twenty-eight weeks a year for the last three years. His average earnings have been only One Hundred and Forty Dollars (\$140.00) per month for the last two (2) years.

30 This defendant denies that he was ever offered Three Hundred Dollars a week to return to the Poli Stock Company as alleged in the bill, and he denies that he ever so informed the complainant.

12. This defendant denies the allegations of the seventeenth paragraph of the bill of complaint, except in so far as in this paragraph they are admitted. This defendant says that during the last few months instead of sending money directly to his wife he has sent money to his father, Frank Finley Mackay, and his father has acted as this defendant's agent in paying same

40

Answer

over to the complainant. This defendant says that during the last two years the complainant has been paid on an average of upwards of One Hundred and Twenty Dollars per month for her support, by this defendant either directly or through his father, which sum includes rent, coal and gas but does not include extra sums paid over to her from time to time of which no account was kept. 10

13. This defendant admits the allegations of the thirteenth paragraph of the bill.

14. This defendant admits the allegations in the fourteenth paragraph of the bill, except that this defendant says that the name of the younger son is not Richard Mackay but Charles William Mackay. 20

15. This defendant denies the allegations of the fifteenth paragraph of the bill. 20

16. This defendant admits the allegations of the sixteenth paragraph of the bill of complaint.

17. And this defendant says that he has been at all times, and now is, willing and ready to support his wife in as decent and comfortable a manner as is compatible with his station in life and the amount of his earning capacity; that he conceives that he has at all times in the past so supported and maintained the complainant and the children; that because of this fact he objects to having the decree of this Court made against him in this cause, and prays to be hence dismissed; that he has at no time made any threats to leave the jurisdiction of this Court, and that he has at no time had any intention of doing so. 30

SMITH, MABON & HERR,

Solicitors of Defendant. 40

Replication

IN CHANCERY OF NEW JERSEY

10	Between ELOISE MACKAY, and EDWARD JAY MACKAY, Defendant.	}	Complainant, Defendant.	On Bill, etc. Replication.
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The complainant joins issue on the issue of the defendant filed in the above cause.

WELLER & LICHTENSTEIN,
Solicitors for Complainant.

20

**Notice of Motion to Dismiss Writ of
Ne Exeat**

Upon notice given by the defendant to the complainant to dismiss the writ of *ne exeat* the following affidavits were used.

30

Affidavit of Frank F. Mackay

Read on behalf of defendant

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

40 I, Frank F. Mackay, being duly sworn on his oath, deposes and says: I am the father of Ed-

Frank F. Mackay

ward Jay Mackay, the defendant in this cause. He has been living with me since July of this year and has been out of an engagement during that period. He is now rehearsing for a play to be known as "The Five Frankforters" but has not started to receive any salary as yet. I have acted as trustee for my son for the last two years taking what money he earns and paying part of it to his wife. To my certain knowledge the defendant has not earned a cent of money since July of this year and is not yet earning money. He has no money or property except what is held in trust by me sufficient for the payment of his family expenses until September 30th, when he may draw one-seventh of his salary. This makes necessary no change in the amounts paid to his wife inasmuch as I am advancing these amounts out of this trust fund which I as trustee am reserving for the express purpose of meeting the weekly drafts that are made for the support of the defendant's family.

10

20

FRANK F. MACKAY.

Sworn to and subscribed at 23 W. 44th St. the 26th day of September, A. D., 1913, before me, a Notary Public in and for the County of New York, in the State of New York, duly commissioned and sworn, as witness my hand and official seal.

30

(Seal) Frank E. Dalton.

New York County No. 140.

New York Register No. 4171.

Term expires March 30, 1914.

Notary Public in and for the County of New York in the State of New York.

Affidavit of Edward J. Mackay*Read on behalf of defendant*

IN CHANCERY OF NEW JERSEY

10	Between ELOISE MACKAY, and EDWARD JAY MACKAY, Plaintiff, Defendant.	}	Affidavits.
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State of New York,
 County of New York. ss:

20 I, Edward Jay Mackay, the defendant in this cause, being duly sworn, say: I was not making any money whatsoever on September 2, 1913, nor am I making any money now. I have not earned a cent of money since the month of July, 1913. This is the off season in my profession. I have no money at the present time except money that I am obliged to borrow from my father in order to carry me over until I can earn something.

30 I never threatened, as alleged in the verified petition of my wife, to leave the jurisdiction of this Court and go to Australia or any other place for the purpose of avoiding my duty to support her, or for any other purpose except in pursuance of my professional duties.

EDWARD JAY MACKAY.

Sworn to and subscribed at New York the 26th day of September, A. D., 1913, before me Frank
 40 E. Dalton, a Notary Public in and for the

John A. McMartin

County of New York, in the State of New York,
duly commissioned and sworn, as witness my
hand and official seal.

(Seal) Notary Public.

New York County No. 140.

New York Register No. 4171.

Term Expires March 30, 1914.

Frank E. Dalton.

10

Affidavit of John A. McMartin

Read on behalf of defendant

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

20

I, John A. MacMartin, being duly sworn say:
I am the auditor of the theatrical company which
is now rehearsing for the play known as "Five
Frankforters." Mr. Edward Jay Mackay, the de-
fendant in this suit, is one of the cast and has
been rehearsing with the company. He has re-
ceived no money therefor. His salary will not
be paid until the performances actually start.

JOHN A. MacMARTIN. 30

Sworn to and subscribed at New York the 26th
day of September, A. D., 1913, before me a No-
tary Public in and for the County of New York,
in the State of New York, duly commissioned
and sworn, as witness my hand and official seal.

(Seal.) Emanuel M. Klein.

Notary Public in and for the County of
New York, in the State of New York. 40

Affidavit of Eloise Mackay

Read on behalf of ^{Complainant,} ~~defendant~~

IN CHANCERY OF NEW JERSEY

10	Between ELOISE MACKAY, and EDWARD JAY MACKAY, Defendant.	}	Complainant, Defendant.	On Bill, &c. Affidavit.
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State of New Jersey, }
 County of Hudson. } ss:

- 20 Eloise Mackay, of full age, being duly sworn according to law upon her oath, deposes and says, that she is the complainant in the above cause named; that a notice of motion to quash the writ of *ne exeat* heretofore issued herein has been served upon her solicitors; that she is informed by her said solicitors that no affidavits have been served to substantiate said motion. That the defendant had two wives before he married her, both of whom are divorced from him.
- 30 Deponent further says that she was married to the defendant in May, 1910, and travelled with him until the month of October, 1910, when she came back to the home of her mother in the City of New York; that on November 9, 1910, when the defendant returned from his trip they took a furnished apartment on 104th Street, in the City of New York, where they resided until March 10, 1911; that during that time the defendant was playing in the City of New York in a play called
- 40 "Everywoman;" that in March, 1911, they moved

Eloise Mackay

to Coytesville, in the State of New Jersey, where deponent still resides; that the defendant continued to play in "Everywoman" until the latter part of April or the 1st of May, 1911, when he closed with that company; that he received from One Hundred and Fifty to One Hundred and Seventy-five Dollars a week during that time and deponent has the contract of the defendant made at that time, which she begs leave to exhibit to the Court; that at the time defendant closed with the said company he told deponent he intended to take a vacation; that he had some money laid by and did not feel that he should like to work any more that season and that he remained with deponent at Coytesville until November, 1911, when he went to Columbus, Ohio, to play with a company known as the "Stub-Mackay Players," where he received a salary of One Hundred and Seventy-five Dollars a week, and where he remained until about the middle of March, 1912, but once during that time returned home and stayed two days; that the contract for said period was signed on the twenty-fifth day of October, 1911, and deponent has the same in her possession and begs leave to exhibit the same to the Court.

Deponent further says that after said contract expired he entered into another contract with the same company; that in March, 1912, he returned home again and remained for four weeks when he again went to Columbus, Ohio, and remained until the month of September, 1912, when he returned home and remained for about a week when he took his suit-case and went to the City of New York, where deponent believes he met and remained for a little while and then went to the of October when he again returned home and remained for a little while and then went to the

Eloise Mackay

home of his mother to live; that in January, 1913, he returned home and remained for about a week and then left deponent again; that since he returned home in September, 1912, he played in what is known as the "Five Frankforters" in various places in the State of New York; that
10 he thereafter played for John E. Keller at the Garden Theatre in the City of New York for sometime; that he then went back with the "Five Frankforters" and remained with that company in the City of New York until the month of April, 1913, when he closed and went to Washington, D. C. with the "Poli Stock Company" and remained there until the 26th day of July, 1913.

Deponent further says that while the defendant was in Washington, D. C. he told her that he
20 played eleven performances a week and she knows that he never played eleven performances a week for less than Two Hundred and Fifty Dollars.

Deponent further says that while he was playing in New York she learned in the month of February, 1913, that he was living at No. 567 West 149th Street in the City of New York with a woman named Marie Campbell; that deponent watched him and saw him on several occasions,
30 at least six or eight times, leave the theatre with the said Marie Campbell and go to a "Chop Suey" restaurant and then to the above address; that they would enter her apartments between 1 and 2 o'clock in the morning and on several occasions deponent remained until 5 o'clock in the morning and he did not come out of her apartments; that she learned at the theatre in which he played that Marie Campbell was passing there as Mrs. Edward Mackay; that deponent went there and accused her of taking her husband from
40 her and exposed him by telling the doorman that

Court's Memorandum

she was not Mrs. Edward Mackay but all she would say in answer was that "It was not right, you should not talk that way"; that while he claims to make his home with his father at Coytesville, he is out of the State nearly all the time.

ELOISE MACKAY.

Sworn and subscribed to before me, this

29th day of September, A. D., 1913.

10

Richard W. Gutheil,

Notary Public of New Jersey.

Court's Memorandum

MACKAY,	}	20
v.		
MACKAY.		

The complainant and defendant were married in May, 1910. They lived at Coytesville, Bergen County, N. J. Two children were born of the marriage. The defendant is an actor and has lived a great deal of his time necessarily away from his wife. He, however, deserted her in January, 1913. He had been married twice before, the complainant being his third wife. The wife traced the husband from a theatre in New York City to a Chop suey restaurant where he was accompanied by an actress, whose name is given, and from there to an apartment where they stopped all night. It seems as if the defendant, following his past custom, has tired of his present wife and is preparing for a fourth. His conduct does not in any manner commend itself to 40

30

Final Decree

the Court, and that he can readily stay away from New Jersey without any inconvenience to himself is very apparent.

The motion to discharge the writ of *ne exeat* should be denied.

A true copy.

SAM K. ROBBINS,
Clerk.

10

**Order Refusing to Discharge Writ of
Ne Exeat**

Following the handing down of the foregoing memorandum of the Court, an order was entered refusing to discharge the writ of *ne exeat*.

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Final Decree

(Filed, January 2, 1914)

IN CHANCERY OF NEW JERSEY

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Between
ELOISE MACKAY,

Complainant,

and

EDWARD JAY MACKAY,

Defendant.

On Bill for
Maintenance.
Final Decree.

This cause coming on to be heard in the presence of John I. Weller, of counsel with the complainant, and Dougal Herr, Esq. of counsel with

40

Final Decree

the defendant, whereupon, and upon duly considering the complaint of the complainant and the answer of the defendant, and the evidence offered to sustain the allegations thereof, it now satisfactorily appears to the Chancellor, that the complainant, and defendant, were lawfully married on the eighth day of May, nineteen hundred and ten, and that the defendant without any justifiable cause abandons the complainant and separates himself from her and refuses and neglects to maintain and provide for her, and that the parties have their matrimonial domicile within this State, and that the defendant was duly served with process within this State. 10

IT IS THEREUPON, on this thirty-first day of December, nineteen hundred and thirteen, by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, Ordered, Adjudged and Decreed, and the said Chancellor by virtue of the power and authority of this Court and the act of Legislature in such case made and provided, doth ORDER, ADJUDGE and DECREE that the defendant, Edward Jay Mackay, do pay to the complainant, Eloise Mackay, the sum of Forty Dollars (\$40) a week, on Monday of each and every week after the date of this decree, Thirty-four Dollars (\$34) of which is for the maintenance and support of the complainant, and Six Dollars (\$6) thereof 20
30
for the maintenance and support of the infant children of the marriage, mentioned in the bill of complaint; until the further order of this Court.

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the said defendant do pay to the said complainant or her solicitors, her costs of this suit to be taxed, and a counsel fee of One Hun-

Notice of Appeal to Court of Errors and Appeals

dred and Fifty Dollars (\$150), and that the said complainant do have execution therefor according to the practice of this Court.

E. R. WALKER,
C.

Respectfully advised,
Charles H. Hartshorne,
10 Advisory Master.

A true copy.

SAM K. ROBBINS,
Clerk.

**Notice of Appeal to Court of Errors
and Appeals**

20

(Filed, Jan 3, 1914.)

IN CHANCERY OF NEW JERSEY

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Between ELOISE MACKAY, and EDWARD JAY MACKAY, Defendant.	}	Complainant, Notice of Appeal.	On Bill, etc.
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The defendant hereby appeals from the decree made herein on the thirty-first day of December, Nineteen Hundred and Thirteen and entered on the second day of January, Nineteen Hundred

Petition of Appeal

and Fourteen, and from the whole and every part thereof, to the Court of Errors and Appeals of the last resort in all causes.

Dated, January 2nd, 1914.

SMITH, MABON & HERR,
Solicitors for Defendant.
DOUGAL HERR,

Of Counsel. 10

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

DOUGAL HERR,
Of Counsel with Defendant.

Petition of Appeal

(Filed, Jan. 24, 1914.)

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NEW JERSEY COURT OF ERRORS AND
APPEALS

Between ELOISE MACKAY, Complainant-Respondent, and EDWARD JAY MACKAY, Defendant-Appellant.	}	Petition of Appeal from Chancery.	30
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To the Honorable the Court of Errors and Appeals in the last resort in all causes:

The petition of Edward Jay Mackay, the appellant in the above stated cause, respectfully shows that your petitioner finds himself aggrieved by a final decree made in the Court of 40

Petition of Appeal

Chancery by his Honor, Edwin Robert Walker, Chancellor of New Jersey, bearing date the thirty-first day of December, A. D., Nineteen and Thirteen, wherein the said Eloise Mackay was complainant and your petitioner was defendant, in this respect, to wit:

10 That the said decree adjudges that your petitioner refuses and neglects to maintain and provide for his wife, the said Eloise Mackay; and that your petitioner do pay to his said wife the sum of Forty Dollars (\$40.00) a week, Thirty-Four Dollars (\$34.00) of which is for the maintenance and support of said Eloise Mackay and Six Dollars (\$6.00) of which is for the maintenance and support of the two infant children of the marriage; and that your petitioner do pay the costs of said complainant and a counsel fee of One
20 Hundred and Fifty Dollars (\$150.00) to complainant's solicitors.

And your petitioner humbly appeals from the whole of said decree, as aforesaid, upon the ground that the same is erroneous, for that in truth and fact your petitioner had not refused or neglected to maintain and provide for his said wife; and therefore the Court of Chancery lacked jurisdiction to make the whole and every part of said decree.

30 And your petitioner humbly appeals from that part of said decree which adjudges that your petitioner neglects and refuses to maintain and provide for his said wife upon the ground that the same is erroneous; for that in truth and fact your petitioner did not refuse and neglect to maintain and provide for her.

Petition of Appeal

And your petitioner humbly appeals from that part of said decree which orders and decrees that your petitioner do pay the sum of Forty Dollars (\$40.00) a week to his said wife, upon the ground that the same is erroneous; for that said sum of Forty Dollars (\$40.00) a week is not a suitable and proper sum in view of the nature of the case and circumstances of the parties, but 10
is grossly excessive.

And your petitioner finds himself aggrieved by an order made in said Court of Chancery in said cause bearing date the third day of September A. D., Nineteen Hundred and Thirteen, in this respect, to wit: that said order provides that a writ of *ne exeat republica* be awarded against your petitioner until said Court of Chancery shall make other order to the contrary, said writ to be endorsed in the sum of Two Thousand Dollars 20
(\$2,000.00). And your petitioner humbly appeals from all of said order upon the ground that the same is erroneous, for that the affidavit of said Eloise Mackay, the complainant, upon which said order was made was insufficient in form and substance to invest the Court with jurisdiction to make said order.

Your petitioner therefore prays that the said decree and order of the said Chancellor may be, in the particulars aforesaid, reversed, set aside, 30
and for nothing holden.

And that your petitioner may have such relief in the premises as to this honorable Court shall seem meet.

SMITH, MABON & HERR,
Solicitors of Appellant.
DOUGALL HERR,
Of Counsel with Appellant. 40

Answer to Petition of Appeal

(Filed Feb. 11, 1914)

NEW JERSEY COURT OF ERRORS AND
APPEALS

10	Between ELOISE MACKAY, Complainant-Respondent, and EDWARD JAY MACKAY, Defendant-Appellant.	} On Bill, etc. } On Appeal. } Answer to Pe- } tition of Appeal.
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The answer of the above named respondent to the petition of appeal of the above named appellant.

- 20 This respondent, not acknowledging all or any of the matters which in the said petition of appeal are contained, to be true, for answer thereto, nevertheless, says and admits that a decree was on or about the thirty-first day of December, 1913, made and entered in the Court of Chancery, in the same cause for that purpose mentioned in the said petition, as is therein stated; but as to the substance and form thereof, this respondent prays to refer thereto when the same shall be produced.
- 30 And this respondent is advised and believes that the said decree is agreeable to equity, and she prays that the same may be affirmed, with costs to be adjudged to this respondent.

WELLER & LICHTENSTEIN,
Solicitors for and of Counsel
with Complainant-Respondent.

The Case of the Complainant

IN CHANCERY OF NEW JERSEY

Between ELOISE MACKAY, <div style="text-align: right; padding-right: 20px;">Complainant,</div> and EDWARD JAY MACKAY, <div style="text-align: right; padding-right: 20px;">Defendant.</div>	}	On Bill, etc. Minutes of Final Hearing.	10
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Chancery Chambers, Jersey City,
December 11, 1913.

Appearances ::

Weller & Lichtenstein (Mr. Weller), solicitors
of complainant.

Smith, Mabon & Herr (Mr. Herr), Solicitors of
defendant. With whom was associated
Mr. E. J. Rogers, of the New York Bar. 10

ELOISE MACKAY, sworn:

Direct-examination by Mr. Weller:

Q. Mrs. Mackay, where do you reside? A. Coytesville, New Jersey.

Q. How long have you lived there? A. Going
on four or five years. 30

Q. You are the wife of Edward J. Mackay? A.
Yes, sir.

Q. Have you any children by him? A. Yes.

Q. How many? A. Two children.

Q. Are they boys or girls? A. Boys.

Q. How old are they? A. Three and two years.

Q. Give the names of each? A. Frank F. Mac-
Kay— 40

Eloise Mackay—Direct

Q. How old is he? A. Three years old.

Q. And the other? A. Richard Mackay.

Q. How old is he? A. Two years.

Q. What is your husband's business? A. Actor.

Q. With what company has he been playing this last year, if you know? A. With the Frankfurters.

Q. Do you know who that belongs to? A. Schuberts.

Q. How long has he been with this company? A. He has been playing about the last eight weeks with it, and then he was with it last spring.

Q. Where was he, between that time? A. With the Poli Stock Company of Washington.

Q. When was he with that company? A. About the latter part of May, until the middle of July.

Q. What year? A. 1913.

Q. This year? A. Yes, sir.

Q. Did he tell you anything about his salary? A. He did not when he left, but when he returned he told me that they had offered him \$300 a week to return.

Q. Do you know, of your own knowledge, what he has been getting heretofore? A. \$175 to \$200, to \$250 a week.

Q. I show you a paper, dated the 25th of October, 1911, which purports to be an agreement between J. W. and W. B. Dusenbury, parties of the first part, and Edward Mackay, party of the second part; did you ever see that paper before? A. Yes. I have seen it before.

Q. Where did you see it? A. Mr. Mackay gave it to me.

Q. Whose handwriting is that at the bottom? A. Mr. Mackay's.

Q. You know his signature? A. Yes, sir.

Eloise Mackay—Direct

Q. What did he say to you about that contract, if anything? A. When he handed it to me, he asked me to keep it for him; that is all.

Mr. Weller: I offer that contract in evidence.

The Master: Is there any objection to it, Mr. Herr?

Mr. Herr: No objection. 10

Contract dated October 25, 1911 offered in evidence and marked Exhibit P-1.

Q. What is the length of the season? A. Forty weeks is usually a theatrical season.

Q. That is the usual season? A. Yes, sir.

Q. I show you another paper, bearing date January 9, 1911, purporting to be a contract between Henry W. Savage, Incorporated, and Edward Mackay, and ask you if you ever saw that paper before? A. Yes, I have seen that paper 20 before.

Q. Whose signature is that on the paper? Mr. Mackay's.

Q. You have been in the theatrical business, have you not? A. No, Mr. Weller.

Q. You have traveled with your husband in his business? A. Yes, I have traveled with him.

Q. I noticed that this first agreement that I offered in evidence, marked P-1, shows that the parties of the first part are to pay transportation 30 both ways, also for excess baggage, customs, and plays furnished by the parties of the first part; is that a usual thing in the theatrical profession?

Mr. Herr: I object to that question.

The Master: I will sustain your objection.

Q. How long did you travel with your husband? 40

Eloise Mackay—Direct

The Master: Is it material, with respect to these contracts? The contracts speak for themselves, but take your own course.

Q. How long did you travel with him? A. Over a year.

Q. And did you ever see many of these contracts he had after that? A. Those are the last two contracts that I saw; those are the last two engagements.

Q. Did you ever see any before that? A. No, sir.

Q. Do you know the custom as to the furnishing of costumes? A. Yes, I know that they don't furnish the costumes; I know that the management pays for them, outside of their boots and shoes.

Q. Now, I will go back to the contract dated the 9th of January, 1911, in which you said that it is his signature. A. Yes, sir.

Q. It is marked P-2. A. Yes, sir.

Q. Just when, and under what circumstances was it that your husband told you that the Poli Stock Company had offered him \$300 a week? A. Why, he came over to the house one afternoon.

Q. When, about? A. On his return, about the middle of July; and he was telling me how popular he was, and so much so that they wanted him to return at a salary of \$300 a week.

Q. What else did he say to you about it? A. He said he didn't care to go back; that he had not been feeling very well, and spoke of his parts, and how successful he had been in all of them while he was there; that is about all he said.

Q. Now, after you first went to Coytesville, what arrangement did you and your husband have about the financial part of the family; how much did he give you a week?

Eloise Mackay—Direct

Mr. Herr: I object to the form of that question.

Q. Was there any arrangement made as to how much he should give you? A. Absolutely none at all.

Q. How much did he give you? A. Why, he never gave me anything; he would look after the bills when they came in at the end of the week, 10 and then gave the money to me to pay them, but he never allowed me anything; he just paid the bills.

Q. I show you a small piece of paper and ask you in whose handwriting it is, excepting what I have written at the bottom? A. Mr. Mackay's.

Q. I show you a memorandum or note, without date, and ask you in whose handwriting that is? A. Mr. Mackay's.

Q. I show you another paper, a letter, bearing 20 date February 5th, without a year, and signed "Ed." and ask you in whose handwriting that is? A. Mr. Mackay's.

Mr. Weller: I offer that in evidence.

Mr. Herr: There is no objection, except, of course, as to the last part of it, what somebody else wrote at the bottom of it.

Mr. Weller: I will read it in the record.

Q. (Reading) When did you see this paper, Mrs. Mackay? A. Sometime in February. 30

Q. What year? A. 1913.

Q. Where did you get it, under what circumstances? A. Well, I had been out in the afternoon, and during my absence Mr. Mackay called and he wanted my mother to tell me what was on that paper.

Q. He called, and you got it from your mother? A. Yes, when I returned my mother gave it to me.

Eloise Mackay—Direct

Mr. Weller: The paper is as follows: "I am not responsible for any debts except my own, or those contracted by order from me."

Paper marked Exhibit P-3.

Q. I show you another paper—this is the one I have already mentioned—a letter addressed to
10 "Loi" and signed "Ed," which you say is in your husband's handwriting. A. Yes, sir.

Q. Where and when did you get that letter? A. He sent that over from his house.

Q. When? A. About the same time.

Q. What time? A. In February.

Q. 1913? A. Yes, sir.

Mr. Weller: I offer that letter.

Mr. Herr: No objection.

Letter marked Exhibit P-4.

20 Mr. Weller: (Reading): "Lou: Enclosed please find \$1.50. Please pay your bills for every day as they come in. I don't wish any more credit from the trades people. This amount a day will more than cover the necessities. Acknowledge this and send over my rubbers, please. Ed."

Q. What was there, if anything, said about the \$1.50 a day at that time? A. He had arranged to
30 give me that amount.

Q. \$1.50 a day? A. Yes, sir.

Q. He paid the house rent? A. Yes, he paid the house rent.

Q. How much was there a month? A. At that time it was \$17 as far as I know, of course I didn't pay it.

Q. He paid for the coal and lighting? A. Yes,
40 sir.

Eloise Mackay—Direct

Q. How much did your coal amount to in a year, about? A. \$100 a year.

Q. And your husband paid for that? A. Yes, sir.

Q. And your lighting, or gas, or whatever you used? A. That would probably amount to \$80 or \$90 which is just a rough estimate.

Q. Can you tell how much a month? A. Dur- 10
ing the winter it was larger, during the cold months, it was sometimes \$10 or \$15 a month, and during the summer probably, it would run to \$2 or \$3.

By the Master: Q. You do not know what it would average for the year, per month? A. \$80 or \$90.

By Mr. Weller: Q. How many months did you heat the house by gas? A. Seven months.

Q. Heat or cook? A. Well, I never had but one 20
stove.

Q. You did not heat in the summer time by gas? A. No.

Q. How many months did you not heat by gas? A. Five months.

Q. When you did not heat, how much was it a month? A. Two or three dollars.

Q. And what was the biggest month you ever had when you did heat by gas? A. \$15.

Q. What was the smallest when you were heat- 30
ing with gas? A. Why, it would average probably five or six dollars, in the fall.

Q. In the fall? A. Yes, before it got real cold.

Q. When did he make the arrangement to give you \$1.50 a day, or when did he first start to do it? A. About the first of February, 1913.

Q. How long did he keep that up? A. Until the
month of April. 40

Eloise Mackay—Direct

Q. Was it before or after this suit was commenced? A. Before.

Q. Well, he kept it up to the month of April, \$1. 50 a day—then what did he give you? A. \$15 a week.

Q. What time did he stop giving you \$1.50 a day? A. About the end of March or the first
10 part of April.

Q. And then he gave you \$15 a week and paid your gas and coal bills? A. Yes, he paid the coal, rent and gas.

Q. How many tons did you use during the year? A. I used a ton of coal every month during the winter months, and during the summer months it averaged about a ton and a half a month, for the three months, or half a ton a month during the summer.

20 Q. Which do you designate summer months and winter months? A. I have been using a ton since the first of November.

Q. And still use it up to what time? A. I will say up to the first of May.

Q. And from May to November, about how much a month? A. About half a ton or a ton and a half for three months.

Q. Now, that coal is paid for and shipped there by Mr. Mackay, or his father, isn't that so? A.
30 Yes, sir.

By the Master: Q. And he always paid the rent during that time, he or his father? A. Yes, and he paid the coal, rent and gas.

Mr. Weller: I want to have marked the letter dated February 5th, addressed to "Loi" and signed "Ed."

Mr. Herr: I have no objection.
40 Letter marked Exhibit P-5.

Eloise Mackay—Direct

Mr. Weller: (Reading) "February 5th. Lou: Enclosed please find \$5 to cover your expenses to date, 5th, 6th and 7th, leaving you also a margin of fifty cents, also am sending letter that was in the box yesterday morning. Ed. P. S. Pay your bills as they come in. I will not accept any more credit in this town."

By Mr. Weller: Q. It is dated February 5th; what year was it? A. 1913. 10

Q. Have you any trade or profession? A. No, sir.

Q. Have you any money of your own? A. No, sir.

Q. Are you a well woman? A. Well, no, not in one sense of the word; I have been sick since my last baby was born.

Q. What ails you? A. I have flabitis, in my right leg. 10

Q. Just explain to the Court what that is? A. It is an affection I have had since the time my last baby was born. and after, and if I have been on my feet all day it swells, and I am not able to stand on my feet, and it is very painful, and I keep it bandaged.

Q. How long can you stand on that leg? A. I can not stand on it constantly, I can not stand on it all day.

Q. Are you the first wife of Mr. Mackay? 30

Mr. Herr: I object to that. I don't see that it is at all relevant.

The Master: (After argument) At present I shall have to overrule that question.

Q. Mrs. Mackay, after you married your husband. he was away from you a great deal of the time, was he not? A. After he went to Columbus, Ohio, he was away almost a year. 40

Eloise Mackay—Direct

Q. And when did he go there? A. November, of 1912—no, November of 1911.

Q. How long did he remain there? A. Well, outside of his coming on, say for probably four weeks, he remained from November to December.

Q. Was he then traveling? A. No, he was there
10 permanently with a stock company.

Q. He came on for four weeks to reorganize the company for the summer season? A. Yes.

Q. Did he tell you what his salary was a week? A. I knew what it was, through this contract.

Q. That is the last contract that I offered? A. Yes, sir.

Q. That was \$175 a week? A. Yes, sir.

Mr. Herr: I object to that; the contract speaks for itself.

20 Q. When did he come home from Columbus? A. He came on in March, and remained four weeks, and remained—

Q. And then came home? A. He was not home until September 16th; then he returned.

Q. Nineteen hundred twelve? A. Yes, sir.

Q. How long did he remain home at that time, after he came home on September 16th, 1912? A. Why, he was in the house, but in that week he was out every other night and then he took his
30 suit case with some clothes and told me that he was going to take them to the tailor's to have them pressed, and then I didn't see him after that until November, and then he came in, I didn't see him again for a few days, when he came home to the house.

Q. Was he home on the 17th of October? A. Yes, he came back; Saturday was the 14th, it fell
40 on a Saturday.

Eloise Mackay—Direct

Q. And he returned Monday or Tuesday, that would be about the 16th or 17th? A. Yes.

Q. Did you have any trouble with him at the time he left? A. At the time he packed his suit case?

Q. No, on the 17th of October. A. Why, we had a little altercation or argument over a letter.

Q. I show you an envelope and ask you in whose handwriting it is? A. Mr. Mackay's 10

Q. I show you a letter enclosed in it, which letter is dated October 17th, 1912, addressed to "My Darling Al" and signed "Ed" and ask you in whose handwriting they are? A. Mr. Mackay's.

Q. Where did you get that letter and envelope? A. In his pocket.

Q. Tell us about it; tell us under what circumstances you got them? A. Well, I simply took the letter out of his pocket, because I knew that he had been going with this woman. 20

Mr. Herr: I object to all such testimony, and also to the putting in of any further proof.

Mr. Weller: I offer the letter.

Mr. Herr: I object to it.

The Master: (After argument) I think I will allow the letter to be marked.

Letter and envelope marked Exhibit P-6. 30

Mr. Weller: The letter is the same letter as the copy annexed to the bill of complaint.

Q. Now, you say there was an altercation about that letter. Just after that did the defendant go away? Where did he go? A. He went to his mother's place.

Q. And did he ever return to live with you af- 40

Eloise Mackay—Direct

ter that, and if so, when? A. He came back to the house and he occupied his own room after that.

Q. When did he come back? A. Well, he came back sometime in November.

10 Q. Was it November, or December? A. November, but not to remain: he just came in the house and went out again; he came back on December 31st or the 1st of January, it was New Year's morning.

Q. How long did he remain? A. About five days.

Q. Then what happened between you and him, if anything? A. There was an argument, over money, arose.

Q. What is that? A. An argument, over money, arose.

20 Mr. Herr: I object to any further testimony on that line.

Q. What else occurred? A. I asked him for some money, and he told me he could not give it to me; I said, "You have been working for the last few weeks, you opened on the 17th of November," he said he could not give it to me; I said, "You are receiving your salary," and he said, "Yes," I said, "Why can't you give me some of your salary?"

30 Q. What did he do? A. Well, he said, "I can't give you any," and so I turned around, and that is the morning that he struck me on the back.

Q. Where and how did he strike you? A. With his fist or the back of his hand.

Q. What did he do then? A. He finished dressing and left the house.

Q. Now, has he ever lived with you since that time? A. Not since then.

Eloise Mackay—Direct

Q. Have you talked with him about returning to you? A. Several times.

Q. What did you say to him? A. I asked him, I said I thought we ought to continue to live together, at least for the children.

Mr. Herr: I object to that as irrelevant.

The Master: I will admit it.

A. (Continuing) I said, being boys, they ought to have their father over them to control them and he said, oh, he could come home at least for them, and then when I would ask him directly if he would come back he would avoid it, and he would say, if you are going to get on that subject again he would get mad and fly out of the house, out of my house, he would usually come over for some of his clothing and while he was there I would ask him if he would not come back. 10

Q. What home was he living in at that time? 20

Mr. Herr: I object to that question.

The Master: I will allow it.

A. At that time he was living—

Q. Where was his home? A. In New York.

Q. Where did he have his home and clothing at that time? A. His mother's home in Coytesville.

Q. When he first left you he went to his mother's? A. Yes, sir.

Q. How near was his mother's home to yours? 30
A. About two blocks.

Q. Was he at his mother's home when he came over for these clothes? A. He was there when he sent for his clothes, or when he came for them.

Q. On these calls that he made to your house? A. Yes.

Q. Did you ever ask him to come back to you when he came over to your house? When was the last time you asked him to come back? A. 40

Eloise Mackay—Direct

Why, he came in to see me on his return from Washington last summer, about the middle of July, and I asked him then if he was going to continue that way, apart.

Q. Did you ever ask him in New York? A. Yes, one time when I went to the Thirty-ninth Street Theatre.

10 Q. How did you happen to go there? A. I went there on rumors that I had heard, and also to ask him for some money, and while I was waiting, why, this woman that I have heard about, that he was going with, came—

Mr. Herr: I object to this testimony.

The Master: I will allow it.

A. (Continuing) and I happened to know who she was.

20 Q. What was the conversation you had with your husband? A. The conversation with my husband, I didn't tell him anything about this woman being there, because she left before I did.

30 Q. What occurred, in conversation with your husband? A. I asked him if he would give me some money, or something of that sort, and he said, all in a flurry, "Go up to my father's place and talk over the matter," I said "I don't care to go to your father's, for he has nothing to do with it; we will settle this thing ourselves;" he said he wanted it heard before his father, I didn't want to talk to his father, and I said, "I don't care to go to your father; if you don't care to talk with me I am going home."

Q. About what time of day was it? A. That was after the matinee, about 5 o'clock.

Q. You spoke about a woman that you met there; who was that woman?

40 Mr. Herr: I object to that question.

Eloise Mackay—Direct

The Master: I will sustain your objection.

Q. Now, a while ago you said that the theatrical season was forty weeks? A. Yes, sir.

Q. Do you know whether or not your husband has had work all that time, if he wanted to work, for the last two years? A. Yes, sir; he was in Columbus from November 1911 until the following December, just four weeks when he came on to reorganize the company, and then he was out, I think, about a couple of weeks, when they opened with the Five Frankfurters, and then they opened with John E. Keller on the 18th. 10

Q. Do you know how much he got a week with the Five Frankfurter Company? A. \$175 a week.

By the Master: Q. How do you know this? A. From this letter, the letter that was put in evidence. 20

Q. How long was he playing with the Five Frankfurter Company? A. I don't know whether he is playing now with it, he has been playing until last Saturday night.

Q. Up to last Saturday night in the Frankfurter Company? A. Not continually, I think he has been in only two months.

By Mr. Weller: Q. Before that he was in Washington? A. Yes, with the Poli Stock Company. 30

Q. How long was he in that company? A. From the latter part of May until the middle of July, I don't know just when it did open, but it closed about the middle of July, eight weeks he was there.

Q. In summer playing do they get more than in winter playing? A. They get more in stick than they do in winter. 40

Eloise Mackay—Direct

Q. Do you know how much he was getting then?

A. I heard that he was getting \$250 a week.

Mr. Herr: I object to that.

The Master: Strike it out.

Q. How long did that engagement run whereby he gave you \$1.50 a week? A. Down to the first part of April.

10 Q. And since time he gave you \$15? A. Yes, sir.

Q. He did on one or more occasions, he or his father did? A. Why, the last five weeks he has been sending me extra money; he sent me first \$35 and then \$30 and then \$25 and then the last week he sent me \$15 and the week previous \$15.

Q. Was there \$15 or \$20 that he sent you? A. Yes, sir—well, this week I received \$15 but the week before that \$15 for me and \$5 and clothes
20 for the baby's birthday.

Q. Go and give me the amounts that you received each week? A. Last week \$15, the week previous \$20; do you want the three weeks previous to that?

Q. Yes. A. I received \$25 a week for three weeks.

Q. Do you mean you received \$75 for the three weeks previous? A. Yes.

Q. Go on. A. And then the two weeks before
30 that I received \$25 and \$35.

Q. This \$30 in one week and \$35 in the other week? A. Yes.

Q. Had you, before you filed your bill in this cause received more than \$15 a week? A. No, sir.

By the Master: Q. Were these sums that you
40 have just mentioned the only sums that you have received extra, that is, above the \$15 a week that

Eloise Mackay—Direct

you have testified to? A. Well, probably two dollars he sent me one week for stockings for the children.

Q. These figures that you have mentioned, for the last six or seven weeks, were they all that he sent you during that time? A. Yes, sir.

By Mr. Weller: Q. Is the money that he has been giving you sufficient to support you and the children? A. It is not. 10

Mr. Herr: I object to that testimony.

The Master: That is a proper question; she is living with her children, and she has kept them properly.

Q. You have the two children with you? A. Yes, sir.

Q. And your mother? A. Yes, sir.

Q. How long has your mother been there? A. Since he left for Columbus, Ohio, but not steadily, 10 because she went away last summer.

Q. Before that time you had a servant girl? A. Yes, sir.

Q. Did you have to pay her out of the money you received from your husband? A. Yes, while he was away I had to pay for the girl.

Q. Is the money sufficient to support you according to your standing in life? A. It has not been, because I have been under a heavy expense; he never fitted up the house when we first came 30 there; he never furnished it, and I have been trying to furnish it and even have furnished it on the installment plan, and paying up by the week to get some furniture in the house to make it habitable and comfortable.

Q. How about the clothing of yourself and the children? A. I always paid for the children's first.

Q. Have they ever wanted for anything? A. 40

Eloise Mackay—Direct

Not exactly wanted; on one or two occasions I was left without any money, and I had to send over to the mother to have a prescription filled, and she sent her son down to the drug store to get them to put it up for me.

By the Master: Q. You spoke of your mother going away last summer? A. Yes, sir.

10 Q. How long had she been with you? A. She came over to live with me, after my husband went away, because the maid that I had didn't remain with me in the evening.

Q. Have you had a servant, one who has been with you since your mother went away? A. No, sir.

Q. You have done all the work in the house yourself? A. Yes, sir; with the exception when I paid a woman to come in and clean and do the
20 heavy washing.

Q. When was it that you had a servant? A. Why, when I went over to Coytesville I had a servant; I had one when Mr. Mackay went to Columbus, and she remained with me until after the holidays; then I got another one to remain with me, and—

Q. And she remained with you how long? A. Until the summer, just before Mr. Mackay came back.

30 Q. What year? A. 1912.

Q. Since then you have had no servants? A. No.

By Mr. Weller: Q. Can you, with the money that you get from your husband, go to any places of amusement? A. Well, I don't feel that I can.

Q. What kind of a place is it where you live? A. A country place.

Q. Tell us something about it; there are thousands of country places. A. It is a country town; it is a quiet town, and a very small town.
40

Eloise Mackay—Cross

Q. Where do you live, in the town or on a country road? A. I live on a country road.

Q. How far from the centre of the village? A. Probably five blocks.

Q. When you want clothing, or anything of that kind, where do you have to go to buy it? A. To New York.

Q. I show you a paper and ask you what it is? 10
A. It is my marriage certificate.

The Master: The marriage is admitted, is it not?

Mr. Herr: Yes, your Honor, it is admitted.

The Master: Have you asked her as to her marriage?

Mr. Weller: No, sir.

The Master: You might ask her as to her marriage.

Q. When were you married? A. May 8, 1910. 20

Q. Where? A. Fort Lee.

Q. By whom? A. The Rev. Dr. Flynn.

Q. Of what church? A. Bartholmew's Church.

Q. Did you see him make out and sign this certificate? A. Yes, sir; I stood right alongside of him.

Q. (Showing witness paper.) Is that the certificate he made out? A. Yes, sir.

Q. You were married to Edward J. Mackay at that time? A. Yes, sir, I was. 30

Mr. Weller: I offer that certificate in evidence.

Certificate is marked Exhibit P-7.

Q. That is all.

CROSS-EXAMINATION by Mr. Herr:

Q. Now, the only way that you know of your husband's earning capacity is by these contracts 40

Eloise Mackay—Cross

that are offered in evidence and by what he told you? A. Yes, sir; and by his standing in his profession.

Q. He stands high in his profession? A. Very.

Q. And the people who stand high in the theatrical profession are able to demand a high salary, especially if their services are needed the same as Mr. Mackay's? A. I do not know in what sense you mean.

Q. Mr. Mackay was a leading man? A. Yes, sir.

Q. Are not leading men expected to go to the leading hotels and stay at nice hotels? A. Yes, sir; but when I travelled with Mr. Mackay he did not stop at high-class hotels; when I was in Columbus with him he would not stop in a high-class hotel. He stopped at the Southern Hotel.

Q. Do you know the rates at the Southern Hotel? A. Yes, sir; and I know the rate that he paid.

Q. What did he pay? A. \$45 a month for his room.

By the Master: Q. Did that include board? A. No, sir.

Q. That was for his room only? A. That was his room only.

By Mr. Herr: Q. You do not know what he paid for board? A. No, sir.

Q. Was it on the European, or American plan? A. No, on the American plan.

Q. When did he tell you that? A. He told me—I had it in a letter; that was when he first went on there, he said that he went there and made a very good rate, what he considered a very low rate.

Q. What rate was that? A. \$45 a month.

Eloise Mackay—Cross

Q. That was in November, 1911? A. Yes.

Q. You do not know if he changed that room for another? A. He never told me so.

Q. During the months that he was at the hotel, his bills for room and board, was \$1,135.85, in Columbus, at the Southern Hotel? A. He can't deny that; I know what his room was.

Q. Now Mrs. Mackay, start in with November 1, 1911. 10

The Master: What do you say the amount of that bill is?

Mr. Herr: \$1,135.85.

Q. Now, Mrs. Mackay, start in with November 1, 1911, from that time on until the present time, was there any season in which Mr. Mackay played as much as 40 weeks? A. From November 1, 1911.

Q. Yes. A. He played more than 40 weeks. 20

Q. In what period did he play more than 40 weeks? A. He went on to Columbus, Ohio, November 5, 1911, and he played continuously until March, when he came on for four weeks, and went back in May, and played until the third of September.

Q. That was under a different management?

A. Why no; I understand that Mr. Dusenberry was the backer just the same.

Q. Don't you know that Mr. Dusenberry went 30 out of business in November? A. No, I did not know that.

By the Master: Q. You say, from September, 1911 to September, 1912, he was employed with the exception of four weeks vacation time out? A. Yes, sir.

By Mr. Herr: Q. Do you not know, from your experience, such as you have had with the theatrical profession, that the season is 20 weeks long, 40

Eloise Mackay—Cross

and that actors consider themselves very fortunate if they are employed more than 20 weeks?

A. I do not; I know nothing about profession, but I know if a man is a good actor he can always get it.

Q. Is it customary for a show to run more than 20 weeks in a year? A. There are lots of them that run only that, and some more than that.

Q. Can you figure on one now? A. No, at present I can not.

Q. Start in with November, 1911; do you know where Mr. Mackay was between November 1st and 13th? A. November 1st and 13th?

Q. Yes. A. I think about that time he opened with the Five Frankfurters, rehearsed and opened with them.

Q. Do you know how long he played in Columbus, Ohio, with the Dusenberrys, before the show broke up? A. I understood that he played right through the winter and the summer season.

Q. You understood that? A. Yes, sir.

Q. You could not testify at all from your own knowledge that he played there at all with the Dusenberrys after September 2d? A. I could from what Mr. Mackay told me when he was on that four weeks in March; he said that Mr. Dusenberry had some money in the stock and was going to start this company with him and Mr. Stubbs.

Q. He didn't tell you that Mr. Dusenberry had intended him to come in under the old contract after December, 1911? A. No, he did not tell me that.

Q. Now, between December 4th and 16th, 1911, do you know what salary Mr. Mackay was getting, outside of the contract? A. Was that when he was with John E. Kellard?

Eloise Mackay—Cross

Q. Yes. A. I do not know, only what he told me.

Q. And only what you know from the contract?

A. Yes.

Q. So that if he had been making less, or working for somebody else, you did not know it? A. No, sir.

Q. Between December 2d and 16th, 1911, you did not know, as a matter of fact, whether Mr. Mackay was entirely idle and without an engagement, except what you know from the contract?

A. No, sir.

Q. Didn't he tell you anything about his having entered into the management of the Southern Theatre, in December 1911, in his own capacity?

A. I do not think that it was under his own management.

Q. Didn't he tell you that he had something to do with the management? A. Yes, sir; interested in the managerial end.

Q. That was what he earned under the contract? A. No, I did not know that; his salary might have continued just the same, and he might have taken up the managerial end, and during the managerial end of it he might have received a bigger salary.

Q. Did he tell you that he had an interest in the management? A. Yes, sir.

Q. He did not tell you what he was earning?

A. It was a foregone conclusion that he was leading man and manager at the same time, and he didn't say anything, to the contrary, he always told me what he was receiving.

Q. Now, between April 14th and May 27th, 1912, you did not know, as a matter of fact, that he was not idle all that period? A. I think that

Eloise Mackay—Cross

was the time that he was in the city reorganizing the company.

Q. From April 14th to May 27th, 1912? A. Yes, sir.

Q. How old was this oldest son of yours when you travelled on the road with your husband? A. He was only a little baby.

10 Q. You took the baby with you? A. No, sir; the baby was left here.

Q. After your marriage, your husband played in Pittsburgh and took you along? A. Yes, sir.

Q. He paid all the bills? A. Yes, sir.

Q. And you lived there with him as his wife? A. Yes, sir.

Q. You stayed in Pittsburgh about a week? A. Yes, sir.

20 Q. And then you came back to your baby to New York? A. Yes, sir.

Q. Then your husband went to St. Louis for about a week, about that time? A. Yes, sir.

Q. And then to Kansas City? A. Yes, sir.

Q. And didn't you meet him at Kansas City? A. Yes, sir.

Q. And you remained with him on the road for the entire season, until October, 1910? A. Yes, sir, until the first of October.

Q. You left for New York then? A. Yes, sir.

30 Q. And you had your mother there? A. Yes, sir.

Q. And your mother had written you that she wanted to move, and you came on to help her move? A. Yes, sir.

Q. And in the meantime your husband stayed in Chicago for three weeks, with Mrs. Fisk? A. Yes, sir.

40 Q. And then came back to New York, and was engaged by the Liebler Company to support Miss

Eloise Mackay—Cross

Olga Nethersole in the New Theatre? A. Yes, sir.

Q. You were ill at that time? A. I think I was.

Q. And he stayed in New York while he was at that theatre, living with you only Christmas time, 1910, bought toys for the children? A. Yes, I think he left Christmas morning.

Q. And then he left for an engagement at Portland, Maine? A. Yes, sir. 10

Q. He stayed one week in Portland? A. Yes, sir.

Q. And then went to Boston for another week? A. Yes, sir.

Q. And then the company that he was with closed? A. I think he went farther than that, I think he went to Providence first, and after that he closed.

Q. It was the first week, in January, 1911? A. Yes, sir. 20

Q. That was the time that he was engaged by Mr. Henry Savage for the "Every Woman" Company? A. Yes, sir.

Q. And that engagement was in Boston? A. It opened in Boston.

Q. And that is where he had been with the other company that had closed, the Olga Nethersole Company, that closed in Boston? A. Yes, sir.

Q. Doesn't that refresh your mind, so that you can remember now that he started out on his new engagement in Boston after the old one stopped? A. Yes, sir. 30

Q. While he was playing with the Every Woman Company he came back to you in New York and stayed for six or seven weeks, while they were rehearsing? A. Yes, sir.

Q. And then they opened in Hartford, Connecticut for three nights, and that same Saturday night 40

Eloise Mackay—Cross

he came back and spent Sunday with you? A. Yes, sir.

Q. And that same Sunday afternoon he left for Baltimore Maryland, didn't he? A. Yes, sir.

Q. Where he stayed a week, and then went to Washington, D. C. where he stayed another week? A. Yes, sir.

10 Q. And then he came back to New York City and stayed with you until June 9, 1911? A. No.

Q. He came back to New York? A. He came back to New York at the end of the engagement in Washington.

Q. And didn't he remain in New York until June? A. You mean he lived with me?

Q. Yes, until June 10th, 1911. A. Yes.

Q. That was a period of about 14 weeks, wasn't it? A. Why, he was there right through the summer until he went to Columbus, Ohio.

Q. And during those weeks that he was on, he helped you to move out to Coytesville? A. Yes, sir.

Q. When did you move to Coytesville? A. We moved to Coytesville in June.

Q. Now, from June 10th to November 5th, your husband lived with you in Coytesville and was idle, wasn't he? A. Yes, sir.

Q. Now, there is a period of five months, lack-
30 ing five days, during which your husband was idle? A. By his own choice.

Q. Then, during that year, or the season of 1911, he did not play as many as forty weeks, did he? A. No, he wanted to remain idle that summer.

Q. Then, you want to change your testimony that you gave a moment ago.

40 The Master: You may ask her, if you wish, if she wishes to change it.

Eloise Mackay—Cross

Q. I understood you to say that there was not a period in the season during which your husband didn't play less than forty weeks. Now, we have a season in 1911 during which he did not play as many as forty weeks. A. Yes, but when I made that statement I did not probably state that he remained idle because he had some money put away, and he told me that he never spent a summer in the country; he had some money put away, and he had enough money to remain idle for the summer and he was ill, and that was the reason. 10

Q. That is the season you stated in your testimony that he was not well? A. No, that is not the season.

Q. What was the season that he was not well? A. Do you mean the time that he said he remained from Washington and said it was very warm and he didn't want to stop there? 20

Q. Yes. A. That was just last summer.

Q. Now, as a matter of fact, don't you know that during the whole period from June 5th to November 10th he was trying to arrange for an engagement? A. He made no effort whatever, because he had two or three engagements offered to him and he did not take them; he said he wanted to wait, and he did wait; when the Columbus engagement came he said, "Do you think I ought to take it?" and I encouraged him, I said it would be a good salary, and I said he ought to go on, and he did. 30

Q. That was on or about November 5th, 1911? A. Yes, sir.

Q. The following summer, 1912, he worked all summer, didn't he? A. 1912?

Q. Yes. He went to Columbus for a summer stock season? A. Yes. 40

Eloise Mackay—Cross

Q. And he came on December 16th, back? A. Yes, sir.

Q. And when he came back he was very much fagged out? A. Yes, sir. I don't know as it was from his playing.

Q. He was fagged out? A. He didn't appear to be; he didn't take any apparent rest. He re-
10 turned after the first week; he was up in New York every other day.

Q. Was he playing? A. No, he was idle.

Q. Do you know whether or not he was trying to get another engagement? A. Why certainly, that is in the profession, they are always trying to get engagements when they are idle.

Q. That Thanksgiving dinner, when he got Thanksgiving dinner for you he went out and bought turkey for you? A. No.

20 Q. He was not there that Thanksgiving? A. Of 1912?

Q. Yes. A. Not that I remember.

Q. Do you remember that he was there about Christmas time and got up a little Christmas celebration? A. Yes, sir.

Q. You don't remember about Thanksgiving? A. No, sir.

Q. Your mother has been living with you, and is living with you now? A. Yes, sir.

30 Q. And has been since what time? A. Since Mr. Mackay went to Columbus, Ohio.

Q. She has returned to you since last summer? A. Yes, sir.

Q. You have a sister? A. Yes, sir.

Q. Your sister lives with you? A. She is, at the present time, and since this trouble came up.

Q. Didn't she live with you before that? A. No.

40 Q. She is living with you now? A. Yes, sir.

Eloise Mackay--Cross

Q. And has been for some weeks? A. Yes, sir.

Q. Has she any means of support? A. I don't see how that has anything to do with this case.

Q. Does your sister pay you any board? A. They contribute something.

Q. How much? A. It is not always a stated amount.

Q. How much last week did she contribute? A. 10
It is not any stated amount; I can't tell you how much, it might be five dollars, or it might be six dollars, or it might be seven dollars.

Q. Does your mother contribute anything? A. Yes, sir.

Q. How much? A. It is not so much; it is sufficient to pay for what they have.

By the Master: Q. If you can tell, Mrs. Mackay, you ought to tell, it leaves an unfavorable impression in the Court's mind; if you can not give 20
the figures definitely, you may give the approximately? A. Suppose I put it at an average of \$6.00 a week for both.

Q. Do you think that they contribute as much as \$6.00 a week? A. They do; may be a little more; I did not think that my family matters were to be taken into consideration this morning or I would have hunted it up.

Q. Have ~~you~~^{they} any means of ~~your~~^{their} own? A. 30
Some.

By Mr. Herr: Q. You have a niece of yours living with you, too? A. Yes, sir.

Q. How old is she? A. Fourteen years old.

Q. Does she contribute to your support? A. Her mother does whatever is necessary.

Q. Her mother? A. Yes, sir, that is my sister.

Q. Is that included in the \$6.00 that you have already testified about? A. No, sometimes she gives me something extra.

Eloise Mackay--Cross

Q. Your niece is the daughter of your sister who is staying with you? A. Yes, sir, but they have not been living with me only since this trouble came up and it was only because I did not want to be distressed by his people.

By the Master: Q. Did you say that besides the \$6.00 a week your sister pays something in ad-
10 dition for the board of the niece? A. Yes, sir.

Q. Now, you averaged the sum paid by your sister and by your mother at about six dollars a week, or perhaps a little more; how much does your sister pay for her daughter's board? A. I do not know just what it would average.

Q. Can you tell me approximately? A. Well, it is less than ten dollars; probably over three dollars.

Q. Less than ten dollars, over three dollars do
20 you mean? A. Yes, sir.

Q. Do they pay that regularly? A. Well, I get it every week; it may not be right on the day.

Q. You get some every week from them? A. Yes, sir.

Q. And it averages about ten dollars a week? A. Yes, about.

Q. Perhaps a little more? A. Yes, it might.

By Mr. Herr: Q. Your elder boy spent a good deal of time at your husband's father's house,
30 doesn't he? A. He goes over there once in awhile for the day.

Q. He has his meals there? A. He has his meals home.

Q. He has his meals at his grandfather's home, doesn't he? A. That is the first I knew of it. He has his breakfast home and then he goes there; the only meal that he eats there is his luncheon. He is always home, because Mr. Mackay's brother
40 is home.

Eloise Mackay—Cross

Q. You have received certain moneys from your husband since November, 1911, outside of the money that you received from his father? A. I received money first direct from Mr. Mackay from Columbus, and then his father took up the matter.

Q. Do you remeber what moneys you received?
A. I can not tell you. I had a memo of that; I have the check book.

10

Recess until 2 p. m.

At 2 o'clock p. m. the hearing was resumed.

ELOISE MACKAY, re-called:

20

By Mr. Herr: Q. Do you remember what moneys you received from your husband between November 25, 1911 and December 22, 1912? A. Only from him, I have—

Q. Then your account shows the following moneys to have been received from his father? A. No, some of these came from his father.

Q. Can you tell what items came from his father? A. After the holidays, that would bring it probably to January and February, Mr. Mackay was sending me some direct, at first, and then the father took up the management of his affairs, and continued sending me money.

30

Q. After the father took up the management of his affairs, didn't your husband send you some money directly? A. Not anything, not while I was receiving this.

Q. That is all you received during that period

40

Eloise Mackay—Cross

from any source at all, outside of rent and coal and gas? A. Yes, sir.

Q. Turn over to this item, July 10, 1912; that was a check from your husband? A. No, I did not receive that; that came from his father.

Q. How does it happen that it was an uneven amount, with ten cents after the sixty dollars? A. I think that was something like ten cents that was charged to have it cashed in New York.

Q. That came from your husband to your father, and was cashed by him and was given to you? A. Yes, sir; I did not receive it direct from my husband.

Q. But some of this did come from your husband, and some from his father? A. Yes, sir; when he first went away, that is all I received direct.

20 Q. Your account shows that you received the following items from your husband, or through his father:

	November 25, 1911	\$ 70.00
	November 29, 1911	50.00
	December 11, 1911	25.00
	January 12, 1912	20.00
	January 17, 1912	25.00
	January 22, 1912	20.00
30	January 30, 1912	20.00
	February 12, 1912	30.00
	February 24, 1912	40.00
	March 10, 1912	50.00
	March 21, 1912	20.00
	April 4, 1912	40.00
	April 25, 1912	25.00
	May 3, 1912	8.00
40	May 29, 1912	40.00

Eloise Mackay—Cross

June 11, 1912	50.00	
June 22, 1912	40.00	
July 17, 1912	59.90	
July 26, 1912	39.90	
August 2, 1912	24.90	
October 2, 1912	75.00	
October 30, 1912	15.00	
November 9, 1912	20.00	10
November 26, 1912	5.00	
December 7, 1912	1.00	
December 10, 1912	2.00	
	<hr/>	
	816.60	

By the Master: Q. Is that the amount as you recall it? A. Yes, sir; the total amount is \$816.60.

By Mr. Herr: Q. You did not put all the items 20
in that book that you got, did you, at all times?

A. No, not after that date, but I kept track of it.

Q. After what date? A. The last date there,
December 10, 1912, because after this I was not receiving any money at all, just the \$1.50 a day.

Q. Do you claim, Mrs. Mackay, that your husband has not supported you properly during the years 1911 and 1912? A. I do, according to his standing in life and the salary he makes; there was a servant paid out of this money, too. 30

Q. Was not any money paid to the servants, direct, by Mr. Mackay's father? A. Only when the servant left, and that was \$7.00 and something that I paid her myself.

Q. Was not any other money paid by Mr. Mackay's father? A. No, sir; that bill was standing, and when she left Mr. Mackay paid it; this bill averages up to the time Mr. Mackay went away, I paid the servant \$4.00 and that left an 40

Eloise Mackay—Cross

amount to me of \$20 probably it might be \$21 and some cents, that is the average for that amount of time.

Q. Of course, in addition, the amount of rent of the house and gas and coal? A. Yes, sir.

Q. Did you feel, prior to November, 1911, that you were being properly supported? A. I did not, because I never had the handling of a penny; I had no way of buying anything for my children.

Q. Did you consider you were getting enough money, either directly or indirectly, to live comfortably and properly? A. I certainly did not.

Q. Did you feel the same way in 1912 about it? A. Yes, sir.

Q. Do you recall the month of September, 1912, over a year ago, the year before you started your suit; your husband was in Columbus then, wasn't he? A. Yes, sir.

Q. You do not claim that he was not properly supporting you then, do you? A. No, he was not properly supporting me then.

Q. Do you remember writing to the Columbus Citizen, a newspaper published in Columbus, during the month of September, 1912? A. I did not write the letter; Mr. Mackay wrote the letter.

Q. (Showing witness a paper) Is this Mr. Mackay's handwriting? A. No, this is my handwriting.

Q. Do you recognize it? A. I do. I have a copy that Mr. Mackay made out himself for me, the copy; he made the letter and I copied it, and I have the copy home.

Q. Isn't it true, that the only knowledge you have of the theatrical profession, is only what you acquired by travelling with your husband?

A. While travelling with him I read a great many books and papers about it.

Eloise Mackay—Cross

Q. You have never been in the profession? A. No, but I travelled with Mr. Mackay long enough, surely, to know the customs.

Q. You travelled with him during part of the first year? A. Yes, sir.

Q. You never travelled with him any further than that, did you? A. No.

By the Master: Q. That was from the time you 10 were married up to what date? A. To 1911.

Q. The year that you were with your husband on the road, did he have work the entire time that year? A. Yes, sir.

Q. How long was that, about? A. From May until November.

Q. During the year 1910? A. Yes, sir.

Q. From May to November? A. From May until November.

Q. He didn't work during the summer months? 20 A. Yes, sir; that was right through the summer.

Q. Do you know what salary he received at that time? A. \$150 a week; I am not positive about it, but I think it was \$150.

Q. You were asked about your sister coming to your home, or being at your home; when did your sister first come to your home? A. When I was ill, when the baby was born she came over to take care of me; the nurse I had engaged I could not get, and so I telephoned for her to come over and she came over and she was there in all fourteen 30 weeks.

Q. Did she charge you anything for it? A. No.

Q. After the fourteen weeks did she go away? A. Yes, sir.

Q. Then your mother came with you? A. My mother was there during that time, helping me.

Eloise Mackay—Cross

Q. You say your sister came again to your place last June? A. Yes, when my mother went away to the country.

Q. When did your mother go away? A. In June, I think.

Q. Who did she take with her? A. My niece.

Q. How did your sister happen to come to your
10 place? A. Because I didn't want to be alone; it was quite a lonely place; I didn't want to be alone with two children.

Q. Your mother does work for you? A. She helps me with the children in the house.

Q. How long did your mother stay in the country? A. She was there until September.

By the Master: Q. And your sister was with you during that time? A. Yes, sir.

By the Master: Q. Mrs. Mackay, you said, I
20 think, that the coal furnished you amounted to about \$100? A. Well, I have never averaged it.

Q. Do you know what the price was that he paid for it? A. I know during the winter the coal has been over \$8 a ton; I only know the coal was ordered; I never paid for it.

Q. The rent was \$17 a month then? A. It was then, but it is now \$22.

Q. Prior to that time it was \$17? A. Yes, sir.

Q. The rent is now being paid by his father, or
30 your husband? A. That I don't know; the lady that owns it told me that after the improvements were made it was to be \$22. Whether they are paying it or not, I do not know.

Q. That is all.

Sarah Leek—Direct

SARAH LEEK, sworn:

Direct-examination by Mr. Weller:

Q. Mrs. Leek, you are the mother of Mrs. Mackay? A. I am.

Q. And you have lived with her off and on for the last couple of years? A. Yes, sir.

Q. How did you happen to go there first? A. 10
My son-in-law sent for me.

Q. What son-in-law? A. Mr. Edward Mackay.

Q. Did he ever say anything to you about your being there or your having been there? A. Nothing, only that I was perfectly welcome to stay there any and at all times.

Q. Did he ever say anything about the work that you done? A. Yes, he did, when he was going away last spring to Washington he came to me and said, mother, I thank you very much for 20
all you have done.

Q. Did you ever notice any trouble between him and your daughter, Mrs. Mackay? A. Yes, sir.

Q. What was the last time that he left home? A. Well, he was at home, he came the 1st of January or around the 1st of January, that is last January, and he was there for about a week.

Q. What trouble did he have, if any, at that time at the end of the week? A. Why, there was some argument, I think it was over money, and 30
Mrs. Mackay was preparing his breakfast, and he came out in the kitchen and they continued their conversation about the money, and something was said, I don't know just what it was, and he took his hand like that (illustrating) and struck her in the back of the head.

Q. Who? A. Mr. Mackay.

Q. What did he say? A. He said, I can't live with you any longer.

Sarah Leek—Direct

Q. Has he lived with her since that time? A. Not to my knowledge.

Q. You have been there all the time excepting while you were away on a summer vacation? A. Yes, sir.

Q. You went away, when? A. The 7th or 8th of June.

10 Q. How long did you remain away from there? A. I remained away until the 16th of September.

Q. That is from June until September? A. Yes, sir, from June until September.

Q. Had you been in the habit of doing any work for your daughter? A. Yes, sir, considerable.

20 Q. What did you do there? A. I helped take care of the children and I helped taking care of cleaning the house and preparing some of the food and did everything in general; of course I had been obliged to do a great deal more because my daughter has been obliged to go out and leave the children alone.

30 Q. What kind of a place is that? A. It is a very pretty little place, but very lonely; well, the little place is situated on a little country road, and there are only two other houses on the street, and the other one next to us is close by, and Mr. Mackay's brother lives in a house down below that; there are only three houses on the street, and this is a very lonesome street at night.

Q. I show you Exhibit P-3 and ask you if you ever saw that before? A. Yes, sir; my son-in-law gave me that to give to Mrs. Mackay.

Q. When did he give you that, about? A. Well, I could not remember the date.

40 Q. Was it last winter or before that? A. Mr. Mackay came in the house and he delivered that

Sarah Leek—Direct

message to me, and I said, "Please write it on a piece of paper, because I do not like to give any message like that," and he did it, and I handed it to my daughter.

Q. I show you Exhibit P-5 and ask you in whose handwriting that is?

Mr. Herr: We will admit that.

Mr. Weller: Also Exhibit P-4? 10

Mr. Herr: Yes.

Mr. Weller: Also Exhibit P-6?

Mr. Herr: We will admit it, subject to the same objection.

The Master: What do you want to ask this witness?

Mr. Herr: We will admit the handwriting.

By Mr. Weller: Q. Whose handwriting is on this document? A. My son-in-law's just the same 20 as the others.

Q. Whose is that?

Mr. Herr: We admit the handwriting of Exhibit P-6 as being the handwriting of the defendant.

Q. That is all.

No cross-examination.

Mr. Weller: Your Honor, this gentleman 30 (indicating) is a detective, Henry H. Thayer; he can testify that the spring of 1913 he followed Mr. Mackay, the defendant, on numerous occasions, that he was living with another woman, taking her to chop suey houses and restaurants, and spending money with that woman.

Sarah Leek—Direct

Mr. Herr: I object to that, and move that the statement of counsel be stricken from the record.

The Master: No counsel has a right to offer it.

10 Mr. Weller: I presume, your Honor ruled on Mrs. Mackay's question on the same point.

Mr. Herr: I simply object to it on the ground that it is irrelevant.

The Master: The issue before me now is whether this defendant is giving adequate support to his wife. If he is not, then the next question would be what his ability is to give her adequate support. Now, I do not see how this testimony is relevant.

20 Mr. Weller: I merely want to put myself on record.

The Master: At present I decline to receive it. If I should find that the defendant is providing for and adequately supporting his wife, then that would amount to a withdrawal of the case.

30 Mr. Weller: That was a writ of *ne exeat* taken out in this case, and a motion made before vice chancellor Griffin to dismiss it, and an order overruling it, on a memorandum by the other side. I think there was a memorandum, I have not put any evidence in on that now, I didn't think it was necessary.

The Master: Evidence about what?

Mr. Weller: About the threat to leave the family.

The Master: To abandon the family.

40 Mr. Weller: To leave the State.

Edward J. Mackay—Direct

The Master: Well, that writ of *ne exeat* until the Court discharges him, and he is forbidden to leave the jurisdiction of the Court until the order of the Court is given to him.

Mr. Weller: Then, I will close my case.

10

The Case of the Defendant

EDWARD J. MACKAY, sworn:

Direct-examination by Mr. Herr:

Q. Mr. Mackay, you are the defendant in this cause? A. Yes, sir.

Q. And the husband of Mrs. Mackay? A. Yes.

Q. I want you to state what you did in the way of professional engagements, from November 1, 1911 down to the present time? A. I was idle from November 1, 1911 until November 13th, when I entered upon an engagement at the Southern Theatre in Columbus, Ohio.

Q. And where were you during that period, from November 1st to November 13th? A. Part of it in Coytesville.

Q. New Jersey? A. New Jersey; and part of the time in Columbus, rehearsing. 30

Q. Did you receive any money during that interval? A. No.

Q. Now, from November 13, to December 2d, where were you? A. In Columbus, Ohio.

Q. The same year? A. Yes, sir.

Q. And you were playing there under a contract with Dusenberry, marked Exhibit P-1; you were playing under this contract during that interval. A. Yes, sir. 40

Edward J. Mackay—Direct

Q. And receiving how much per week? A. \$175 a week.

Q. For how many weeks? A. I received that for a period of three weeks, to my knowledge.

Q. Now then, from December 4th to December 16th, 1911, what were you doing? A. I was playing at the Southern Theatre in Columbus, Ohio.

10 Q. Under what arrangement? A. Under a new arrangement with the Dusenberry Brothers, in which I received \$125 a week.

Q. And that was for a period of two weeks? A. Yes, sir.

Q. From December 18 to December 23, 1911 where were you? A. In Columbus, Ohio.

Q. What were you doing? A. Idle.

Q. And why were you idle during that time? A. Southern Theatre had failed.

20 Q. And what did you do during that interval towards getting a new engagement? A. Mr. Harry O. Stubbs and myself made an arrangement with the Dusenberry Brothers to take a chance on the Southern Theatre and opened up the doors on Christmas day.

Q. And then from December 25, 1911 up to April 13, 1912, what were you doing? A. On December 25, 1911 to April 13, 1912 I was managing the Southern Theatre in Columbus, Ohio.

30 Q. Under what arrangement did you manage that theatre? A. Under an arrangement of working salary of \$75 a week.

Q. \$75 a week? A. Yes, sir, working salary.

Q. From April 14, 1912 to May 27, 1912, what were you doing? A. I was idle.

Q. That was a period of six weeks? A. Yes, sir.

40 Q. How did you come to be idle during that time? A. Mr. Stubbs thought it well that we

Edward J. Mackay—Direct

close up our theatre and another contract was formed with the Dusenberrys, whereby we were to go to Oleotangi Park for the summer, and I came back to New York to arrange for a company, and to arrange for plays, and I came back to Coytesville.

By the Master: Q. About when did you return to Coytesville? A. I think it was April 16th or 17th. 10

By Mr. Herr: Q. I show you what purports to be a contract, dated February 19, 1912, between the Oleotangi Park Theatre, party of the first part and yourself, party of the second part, and ask you if that is the contract under which you operated at that time is, in the summer of 1912? A. From the 27th of May, that would be until Labor Day.

Q. Yes. A. That is the contract. 20

Mr. Herr: I offer that in evidence.

The Master: Is there any objection.

Mr. Weller: No.

Contract marked Exhibit D-1.

Q. Did you operate under that contract between the 27th of May, 1912 and Labor Day? A. Yes, sir; I did.

Q. And you received how much money? A. \$100 a week.

Q. Now, that contract provides for a percentage in addition to the \$100 a week salary? A. Yes. 30

Q. Did you get any? A. None.

Q. And how was that? A. Why, I had to get out under this contract; I was to receive ten per cent over a certain amount of money, I believe, if the receipts were \$1,500 but the receipts did not come up to that; sometimes we played to as low 40

Edward J. Mackay—Direct

as \$900 and \$1,100 and one week we played to \$3,200.

Mr. Weller: My motion is to cross-examine to see if this is the best evidence, and then I may move to strike it out.

The Master: You may do so.

By Mr. Weller: Q. Who were the managers of
10 the Oleotangi Park Theatre? A. W. W. and J. W. Dusenberry.

Q. Where are they? A. I believe both are in Columbus.

Q. How do you know that? A. Because it was part of my business to know it.

Q. You made a statement out every day? A. The treasurer made a statement out every day, but I would receive a weekly statement.

Q. Didn't those people keep books? A. Yes,
20 sir.

Q. And those books fully showed how many people attended every day and how much money was taken in every day at every performance?

The Master: I overrule that question. You want to show that possibly he was entitled to the ten per cent, isn't that it?

Mr. Weller: Yes, your Honor.

The Master: The books are out of the jurisdiction of the Court.

30 Mr. Weller: I understand that but they could have subpoenaed these books; if they could not get these books, they could have examined them out of the State; he might say that he only got \$10 a week; he might say anything; here is a contract in evidence whereby he was to get \$100 a week and certain receipts.

40 The Master: Well, continue your examination.

Edward J. Mackay—Direct

Q. You say there were full books of account showing all the accounts? A. Yes, sir.

Q. Showing all the receipts? A. Yes, sir, certainly.

Q. You say that W. J. and J. W. Dusenberry are both out in Columbus, Ohio, now? A. Yes, sir, to my knowledge.

Q. So far as you know the books are there? A. 10
A. Yes, sir.

Q. You have made no efforts to examine those books or get the testimony from those books? A.
No, sir.

Q. You have made no efforts to get those books here? A. No, sir.

Q. That is all?

Mr. Weller: I object to the showing of anything as to whether or not the receipts of the theatre were sufficient to pay this 20 gentleman.

The Master: What is your next question? Continue your examination and we will see if there is an objection.

Q. Did you ever receive the 10 per cent?

The Master: He has said that he did not.

Mr. Weller: I move that that testimony be stricken out?

The Master: I refuse to strike it out; I think he is entitled to testify that he did 30 not receive it.

By Mr. Herr: Q. From September 2d, 1912 to October 31st, 1912, what were you doing? A. I was idle.

Q. From October 31st, 1912 to November 9th, 1912, what were you doing? A. I was with the Five Frankfurters Company.

Q. The Five Frankfurters Company? A. Yes, sir.

Edward J. Mackay—Direct

Q. And what salary did you receive for that work? A. \$175 a week.

Q. From November 9th to November 16th, 1912 what were you doing? A. I was idle.

Q. From November 18th to November 30th, 1912, two weeks, what were you doing? A. I was playing with Mr. John E. Kellard in Hamlet.

10 Q. And what did you receive during those two weeks? A. The first two weeks \$50 a week.

Q. From November 30th, 1912, to February 15th, 1913 who were you with? A. I was with John E. Kellard.

Q. Hamlet? A. Yes, sir.

Q. And what did you receive during those eleven weeks?

20 Mr. Weller: I object on the ground that there are books kept by all those theatres and they can be produced.

The Master: I don't think that that is a valid objection; you may cross-examine on it.

Q. (Last question repeated.) A. \$75 a week.

Q. From February 16th, 1913, to March 9th, 1913, what were you doing? A. I was idle.

Q. From March 10th, 1913, to May 17th, 1913 a period of ten weeks what were you doing? A. I was with the Five Frankfuters Company.

30 Q. At a salary of what? A. \$175.00.

Q. Per week? A. Per week.

Q. From May 18th, 1913, to June 8th, 1913, three weeks, what were you doing? A. I was idle.

Q. From June 9th, 1913, to July 19th, 1913 a period of six weeks, what were you doing? A. I was with the Poli Stock Company, Washington, D. C.

40 Q. And you were making then, what? A. \$225 a week.

Edward J. Mackay—Direct

Q. From July 19th, 1913, to September 27th, 1913, what were you doing? A. I was idle.

Q. On September 27th, 1913, were you employed on that day? A. I don't remember.

Q. Do you remember what you were doing on September 29th, 1913, and last Saturday, December 6th? A. I was with the Five Frankfuters Company. 10

Q. At a salary of how much \$175 a week.

Q. You had one isolated performance of the Five Frankfuters Company just prior to that engagement? A. Yes, sir.

Q. That was on September 27th last or thereabouts? A. Yes, sir.

Q. And what did you receive for that engagement? A. I received one-eighth of \$175, one-eighth of my week's salary.

Q. That was on September, what date? A. 20 September, 27th, Saturday night, in Paterson, New Jersey, I believe we played.

Q. Now have you ever received since November 1st, 1911 to date any other moneys than those you have testified to for your own use? A. No, sir.

Q. Outside of the contracts which have been put in evidence, being three in number, did you have written contracts with the people for whom you were playing during this period? A. I have 30 the one with the Shubert people, the Five Frankfuters Company.

Q. That is for this engagement just spoken of? A. Yes, sir.

Q. Have you any others? A. Mr. Kellard's agreement with me was a verbal one.

Q. Had you any other written contracts other than those that have been offered in evidence? A. No, sir.

Edward J. Mackay—Direct

Q. The other arrangements which you had during that interval were not in writing? A. The one with Mr. Kellard was a verbal arrangement or agreement.

Q. Now, during this period from November 1st, 1911 to date, what necessary expenses have you had; that is to say what expenses have you had
 10 which were necessarily made by you in travelling from place to place with your company, in your hotel expenses and in costumes which you had to furnish yourself; and all other necessary expenses connected with your profession? A. From November 13th, when I started in at Columbus, Ohio, there were a good many personal expenses, the hotel which was a European hotel; I had a room, I have forgotten whether it was \$45.00 a month, and a cafe attached to the hotel on
 20 the European plan, I had to buy clothes there, we changed the bill there every other week, furnished my customers in Columbus, Ohio, and I had the services of a boy there to pay, and there were a great many necessary expenses attached to that engagement in Columbus.

Q. What do you mean by "cafe"? A. A restaurant.

Q. Have you made an account of the expenses that you had had during that interval from November, 1911 to date? A. Not to date, sir.
 30

Q. Up to what time did you make one? A. I have made one as far as I can estimate it from November 6th, 1911 to April 13th, 1912, then from May 27th to August 4th, and from March 10th to May 17th down to July 18th, is as far as I can make it, but I wrote to Columbus, Ohio where I was, I am trusting to my memory for some small accounts, I wrote to a man at the Southern Hotel by the name of Bert.

Mr. Weller: I object to that.

Edward J. Mackay—Direct

Q. What is the total of the list of necessary expenses that you have been able to make?

Mr. Weller: I object to this, unless he shows the list was made up.

The Master: He can testify to the results he has reached, then you may cross-examine him and it may result from the cross-examination that the footing is not correct, but that he is entitled to state. 10

The Witness: I have an account here.

The Master: You must not testify from statements made to you by somebody else, you must testify to statements made by your own books or from your own memory. We are not allowed to take into consideration the expenses made up by somebody else who is not here to be cross-examined.

The Witness: I have here personal expenses. 20

By Mr. Herr: Q. What is the total? A. \$1,543

Q. For what period? A. From November 6th, 1911 to April 13th, 1912.

Q. What is the total of that? A. Well, I have it there \$1,543.

Q. The next itemized list that you have made of these expenses what is that total? A. Personal expenses, fourteen weeks from May 27th to September 4th. 30

Mr. Herr: You need not answer that question just now.

Q. You have given to Mr. W. F. Oakes all of those items which you have set down here, a list of personal expenses and asked him to itemize them and have them ready and totaled for use on this trial? A. Yes, sir.

Q. Now, Mr. Mackay, during this period from 40

Edward J. Mackay—Direct

November 1st, 1911 to the present date, have you been paying over money directly or indirectly to your wife? A. I have.

Q. And some of it you have paid indirectly and some directly? A. Yes, sir.

Mr. Herr: We will take up first the indirect items.

10 The Master: Well, Mr. Herr, do you intend to show any other payments than those that the complainant has admitted, it is not necessary to go into this.

Mr. Herr: There are two or three omitted here.

Q. Those items that you have paid indirectly for her, say to whom did you pay them? A. I paid them to my father.

20 Q. What did you ask your father to do? A. To pay to Mrs. Edward Mackay, some money.

Q. And during this period what was your custom with regard to these payments to your father did you follow any general plan as to the intervals during which you paid them, as to the amount of them? A. Oh, Mr. Mackay saw that the amount of money was paid regularly every week.

Q. I don't care what he did; I ask you what you did in sending money to your wife? A. I sent him money regularly every week.

30 Q. You sent him money every week? A. Yes, sir.

Q. In addition to the money that you sent him did you pay her directly any money during the period from November, 1911 to the present date?

The Master: You may call his attention to any specific items.

40 Q. Did you pay her any money during that interval directly to your wife? A. Yes, sir.

Edward J. Mackay—Direct

Q. Have you seen this list? A. Yes, sir.

Q. On December 18th, 1912 did you pay her any money? A. Yes, sir.

Q. How much? A. I think the amount was \$2.00, I got that memorandum from Mrs. Mackay's book.

Mr. Herr: I call for the production of a statement outside of that book, which Mrs. Mackay made of items of money paid to her by Mr. Edward Mackay, on or about the month of February, 1913. 10

Q. I ask you whether or not, Mr. Mackay, you found a memorandum in your wife's handwriting, purporting to show amounts of money paid to her by you? A. Yes, it was on her desk open.

Q. Did you take it? A. I did not take it, I made a copy of it; it was her property.

Q. Is it a book? A. Yes, that was a book, it was on Mrs. Mackay's desk. 20

Q. Are there any items of money that you paid her, outside of what is shown in that book? A. Yes, sir.

Q. What items are they? A. When I went to Columbus, Ohio, I had to borrow money from my father and my brothers and I paid \$30.00 to my wife, and when I came back in January, I brought more money back and gave it to her; I do not know whether Mrs. Mackay has any record of it or not; it was thirty or thirty-five dollars; there are other moneys that I would give her when I went over the house. 30

Q. Of which you kept no record? A. No, sir, of which I kept no record.

Q. Now, it has been testified, Mr. Mackay, that you had an altercation with your wife concerning a letter, which was put in evidence as Exhibit 40

Edward J. Mackay—Direct

P-6; did you have words with your wife concerning that letter? A. I did.

Q. Did you strike your wife? A. I did not.

Q. Did you, when you left your wife in January, 1913, strike her? A. No, sir, there was no act of physical violence on my part, I am quite sure.

10 Mr. Herr: In view of the stipulation that we have made about the abandonment, I think, there are no further questions.

Q. How long have you been an actor, Mr. Mackay? A. My first engagement was in 1891, regular engagement.

Q. And you have been playing right along ever since except for a period of idleness between seasons? A. Yes, sir.

20 Q. What is the usual length of a theatrical season? A. I believe in some cases, in New York, that the theatrical seasons was thirty weeks.

Q. (Last question repeated.) A. It is entirely indefinite, it might mean one or it might mean a period of thirty or forty weeks.

By the Master: Q. Do you mean to say there is no regular time of a theatrical season? A. Yes, sir.

30 By Mr. Herr: Q. What is the usual number of weeks in a season that an actor has? A. The season is supposed to commence about the middle of September and terminates about the 1st of May.

By the Master: Q. You mean to say that theatrical seasons run from the middle of September to the 1st of May? A. Yes, sir.

40 By Mr. Herr: Q. Did you ever tell Mrs. Mackay that you had been offered \$300 a week by the Poli Stock Company? A. No, sir; that I had been offered?

Edward J. Mackay—Direct

Q. Yes. A. No, sir.

Q. What does the length of a season, as the word is used in a theatrical contract, depend upon, what controls the length of such a season?

A. The success of the play, the monetary success of the play.

Q. Who decides that success? A. The management. 10

Q. Has the player, the actor himself, anything to say about the length of a season, about the length of a contract that he may be acting under; when the contract does not specify a period of time? A. No, sir.

Q. What is the custom in the profession in respect to the payment of hotel bills, the payments of costumes and the furnishing of costumes, and the payment of railroad expenses, that the contract does not provide for? 20

Mr. Weller: I object to that question, it is incompetent irrelevant and immaterial.

The Master: Why?

Mr. Wheeler: It is not a question on custom, it is a question of what he has done in other expenses.

Mr. Herr: I will withdraw the question.

Q. In these expenses that you have classified as necessary to the carrying on of your profession; have you been under expense that you had to pay out for this purpose? A. That I did of my own volition? I have one here for railroad fares from Columbus, Ohio to New York in order to visit Mrs. Mackay. 30

Q. Does the list which you have made and which you have furnished to Mr. Oakes include any expenses which are not necessarily incident to your business in the profession as an actor? A. Yes, 40

Edward J. Mackay—Direct

I have down here for instance, doctor's bill out there and Christmas gifts.

Q. Christmas gifts to whom? A. To Mrs. Mackay.

Q. And your children? A. Yes, and then the railroad fares.

10 Q. What did you say about those railroad fares? A. That is the time that I returned to see Mrs. Mackay, on January 28th, 1912.

Q. Are there any other expenses? A. Well, I have, for instance, the Elks benefit, I donated \$10.00: hotel, cafe, laundry; yes, I have down here fishing tackle, and sweater and so forth.

Q. There are certain items which you have given Mr. Oakes, which you have included as necessary expenses incident to your profession? A. Yes, sir.

20 Q. Do all such items represent moneys which you have necessarily expended, or do they include moneys which you could have avoided expending? A. I do not know if Mr. Oakes took from those; I did not have to buy fishing tackle.

Q. You have given Mr. Oakes certain items which were included in here; many other items, and which you have told him are necessary expenses incident to your profession? A. Yes, sir.

30 Q. Are they necessary expenses incident to your profession? A. Yes, sir.

Q. And were you obliged to pay for your sleeper or hotel bills, costumes and other items that you have set down and given Mr. Oakes as incident to your profession? A. Yes, sir.

Q. In rehearsing before a play is actually put on the stage; do you receive any compensation for your work? A. None, sir.

40 Q. That is the general custom? A. Yes, sir.

Edward J. Mackay—Cross

Q. How long do those rehearsals last? A. Not less than two weeks; sometimes three, four or five weeks, during which time I received no compensation.

Q. From the time that you were living at Coytesville, at your father's home, did you or your father board in your wife's house? A. No, sir.

Q. That is all.

10

CROSS-EXAMINATION by Mr. Weller:

Q. Mr. Mackay, when you went to Columbus, Ohio, did you have a bank account? A. No, sir.

Q. Had you no bank account whatever? A. No, sir.

Q. Were you by when your attorney prepared your answer in this cause?

Mr. Herr: I object to that question.

The Master: I will admit the question. 20

Q. (Last question repeated) A. I do not know how to construe that question.

Q. Do you know when the answer was filed in this cause; were you present with your attorney when your attorney prepared it? A. Yes, sir.

Q. Did you tell him to put in there only \$140 a month?

Mr. Herr: I object to that question. That is the pleading, that is not evidence.

The Master: Do you want to show that 30 as an admission?

Mr. Weller: I merely want to test his credibility, your Honor.

Q. You know that he put that in? A. What is the amount in there?

Q. \$140 a month.

By the Master: Q. You write the statement "his average earnings have been only \$140 a 40

Edward J. Mackay—Cross

month, for the last two years;" you knew that that was in that answer, didn't you? A. I don't remember that sum, sir.

Q. You don't know that part stated in the answer? A. No, sir, I do not; I do not know what it was based on, not what my gross earnings have been for the last one hundred weeks.

10 By Mr. Weller: Q. Hasn't it been more than \$140 a month? A. I think my gross earnings have been more than that.

Q. Why did you allow that to go in?

Mr. Herr: I object to that question.

The Master: I will overrule the question.

Q. Did you take a list of your figures to your attorney? A. I gave my attorney my gross earnings for the last one hundred weeks.

20 Q. You gave him that? A. Yes, sir.

Q. In writing you gave it to him? A. Yes, in fact I have got it here.

Q. You have got it here? Yes, sir, I think so.

Q. Will you let me see it? A. Yes, sir, and also this list of Mrs. Mackay's expenses.

Q. Does it show—is that the same statement that you gave your attorney? A. I don't know, sir, that is a statement that I made up for my satisfaction, to find out, because I had no idea
30 of proceedings of that kind was going to come up.

Q. Did you ever give your attorney any statement that you only earned \$140 a month for the last one hundred weeks? A. No, sir.

Q. You did not? A. No, sir, my gross earnings for the last one hundred weeks.

Mr. Weller: (To Mr. Herr.) You have got the statement that he gave you?

40

Mr. Herr: I have not.

Edward J. Mackay—Cross

Q. You have testified, Mr. Mackay, that from September 2d, 1911, to October 31st, 1912, you were idle, is that true? A. What are those dates, please?

Q. From September 2d, to October 22d, 1912?
A. A period of nine weeks and two days idle.

Q. You testified on your direct-examination, that from September 2d, to October 22d, 1912, you were idle? A. Yes, sir. 10

Q. And from November 2d to November 9th, you received \$175 a week? A. Yes, for one week.

Q. Just for one week? A. Yes, sir.

Q. Where did you get this statement from that you are reading from? A. From my knowledge of the facts.

Q. That is the facts? A. Yes, sir, the truth.

Q. You recognize this letter dated October 20 17th, 1912, that is your handwriting

Mr. Herr: It is admitted that it is his handwriting.

A. Yes, sir that is my handwriting.

Q. (Reading) "Since writing you this afternoon, I have seen Lee Shubert and he has agreed to the salary of \$175 a week; he tried to make it \$150 but I told him that I could not take less than other managers had paid me, and there was no reason why I should sacrifice \$210 in five 30 weeks." A. Yes, that is right, Mr. Savage paid me \$175 for the "Everywoman Company."

Q. You had there a contract with the Shuberts for five weeks for \$175 a week? A. Yes, sir.

Q. When did that contract start; when did you commence? A. The first; there were two periods of the Frankfurters Company, the first period was October 21st, when we went out and stayed out a week or ten days, I think it was, and 40

Edward J. Mackay—Cross

we closed up. Which period do you refer to? Then there was one after that in February.

Q. Did you write to this woman that you had an agreement for five weeks? A. Yes, what is the exact wording of that letter?

10 Q. (Mr. Weller reading) "Since writing to you this afternoon I have seen Lee Shubert and he has agreed to the salary of \$175 a week; he tried to make it \$150 but I told him I could not take less than other managers had paid me, and there was no reason why I should sacrifice \$210 in five weeks." A. That is by taking \$25 and having to pay 7 1/2% commissions which would amount to a loss of \$210 if we played five weeks, but we did not under this first engagement.

Q. You meant to say that you only played one week? A. Yes, sir.

20 Q. Then where did you go? A. I came back to Coytesville.

Q. How long did you stay there? A. Let me see; from October 31st to November 9th—to November 16th I was idle.

Q. At Coytesville? A. Yes, sir, at Coytesville.

Q. Are you reading that from the paper? A. Yes, sir.

Q. Where did you get that paper? A. I was sitting down and thinking out the time.

30 Q. Why did you do this "sitting down and thinking out the time"? A. Because there came a party at one time from a moving picture concern in Chicago and they offered to give me my yearly earning salary and a bonus of \$200 or more to join him, Mr. Rogers met us at his office and I went over a period of my earnings; I have forgotten what the period was from November up
40 to—

Edward J. Mackay—Cross

Q. November, 1913 where were you? A. With the Frankfurters Company.

Q. What moving picture company was that?

A. I can not even remember the contractors that made me the offer.

Q. Where is the paper that you and Mr. Rogers made at that time? A. I did not make any paper, I put it down in a little book. 10

Q. Where is the book? A. In my trunk.

Q. Why didn't you bring that book with you? A. Why did I not; I have this with me.

Q. Why didn't you bring the book, I am asking you? A. Why, what need is there.

Q. When was it that you took it from the book? A. I took this out after Mrs. Mackay started her action.

Q. You can't remember hardly a thing without looking at that memo? A. Yes, sir, I can, 20 but I want to be sure; if you take them in succession from November 1911, I can go right straight down, but when you take certain months and dates it is very hard; it is over two years ago.

Q. When you were over here in Coytesville, just a little ways from your home, you refused to take \$175 a week? A. Yes, sir.

Q. And you would not take less from him than other managers; he also had offered you \$175 at 30 that time. A. No, he only offered it, he never paid it.

Q. Who else? A. Mr. Savage of the "Everywoman Company."

Q. Now, about that contract that you entered into, you say the theatrical season has no definite time? A. No, sir.

Q. What is the use of your signing a contract? 40

Edward J. Mackay—Cross

A. Just the reason we have organized an actors' equitable association, the contract is a joke.

Q. Do you know who your contract was with, that you had from September 2d to Labor Day?
A. J. W. & W. J. Dusenberry.

Q. And that is the contract that you have here?

A. Yes, sir.

10 Q. And you got \$100 a week, and percentage, if there was a percentage? A. Yes, sir.

Q. When you could get \$175 a week; why did you take \$100 a week? A. For the reason that I expected from representations of the Dusenberrys that I would receive not only \$175 a week but even more than that.

Q. How long did it take you to find out? A. Well, you can't tell from week to week, they repeated the fact of it being a park and early summer that the business was necessarily light, and
20 that the business would improve and keep on improving.

Q. What is the date of that contract? A. February 19, 1912.

Q. And before February 19, 1912, where were you working between the date of this contract and May, for whom were you working? A. I was working with Harry Stubbs and myself and the Southern Theater.

30 Q. Running it alone on your own hook, were you? A. Yes, sir.

Q. You were proprietors of the theater and managers? A. Yes, sir.

Q. Did you keep books? A. Yes, sir.

Q. Where is Harry Stubbs? A. I believe Harry Stubbs is in South America, the last time I heard from him.

40 Q. Where are those books? A. They would be

Edward J. Mackay—Cross

in the office of the Dusenberrys; I took some of the statements home, where they rendered me a weekly statement.

Q. Have you anything showing the receipts of this theatre? A. Yes, sir.

Q. And those receipts belonged to you? A. Yes, sir; and I can show you a great loss.

Q. And how long did that loss continue? A. 10
It was not constant losing; some weeks we would lose and some weeks I got out of it with my salary and a sort of a bonus you might call it.

Q. You did get your salary and a bonus? A. Yes, sir.

Q. Your salary was \$175 a week? A. No, sir; my working salary was \$75 a week.

Q. How much was your bonus? A. I got \$75.

Q. Was that the period that you boarded at the Southern Hotel? A. Yes, sir. 20

Q. If your salary was so small, how could you afford to pay \$1,100 and odd hotel bill and yet support your family? A. I paid all my expenses, some weeks it would come back, and when it did come back I would send it to Mrs. Mackay.

Q. Have you got that hotel bill? A. No, sir.

Q. How did you know that your hotel bill was \$1,100? A. I wrote to Bert and asked him.

Q. And that is the only way that you know it is \$1,100? A. I can not find some of the Southern Hotel bills, maybe Mrs. Mackay has got some of them. There are many papers I wish I had got. 30

Q. Without writing to this gentleman; you do not know anything about it? A. I wanted to be as near to the right figure as I could get it.

Q. Where did you get your figures without writing to that gentleman out there for them? A. I would average \$45 or \$55 a month for my board. 40

Edward J. Mackay—Cross

Q. Why did you average it at \$45 or \$55? A. Well, they raised it on me.

Q. When did they raise it on you? A. I think it was—

Q. Where did you get this data to put in your statement? A. I wanted to get as near to the figures as I could get.

10 Q. You didn't get it, did you? A. I think Mr. Bert sent in a statement of what my expenses were.

Q. And that is all you know about it? A. That is all I can be positive about.

The Master: We will now take an adjournment until 10 o'clock tomorrow morning, the witness will be here at that time without further process.

20

Chancery Chambers, Jersey City,
December 12, 1913, at 10 a. m.

The Master: Have you had any computation made of the amount received for the period for which the defendant testified yesterday?

Mr. Herr: Yes, your Honor.

30

EDWARD J. MACKAY, re-called:

Cross-examination by Mr. Weller:

Q. You spoke about paying board at the Southern Hotel, what arrangement did you have at that hotel? A. My best recollection is, my first arrangement was \$45 a month, I mean for my
40 room.

Edward J. Mackay—Cross

Q. What was your arrangement for board? A. There was no arrangement for board.

Q. You just ate in the cafe. A. Yes, or anywhere in the city.

Q. You didn't eat there altogether? A. Not altogether.

Q. Isn't it a fact that you boarded there by the week? A. No, sir, my arrangement was made 10 by the month as I told you.

Q. I show you a bill, a receipted bill from the Southern Hotel, that is your bill is it not? A. Yes, sir.

Q. That shows that you paid for cafe \$16.95? A. Yes, sir.

Q. For one week, doesn't it? A. Yes, that is the cafe bill, that is the restaurant bill.

By the Master: Q. Was that the total board for the week? A. I think it was, if I may see the 20 date.

Q. Mr. Weller: Q. The 1st day of September, 1912? A. Yes, sir.

Q. You mean that covered the whole cost of your feed for one week's time at that date? A. I do not know when this is dated from.

Q. Up here (indicating) is the date from when it is from? A. First to and including; it says the first and from to and when—

Q. You do not know when? A. I do not re- 30 member, but I think that might have been, probably have been for a week.

Q. Don't you know you paid your board for a week? A. No, sir.

Q. You paid your room rent by the week? A. No, sir, I paid at the end of the month, to Bert O'Brien the clerk.

Q. It appears that you only paid \$19.50, if you paid by the month? A. You see, that is not right. 40

Edward J. Mackay—Cross.

Q. How do you account for that being \$19.50?

A. I don't remember that particular bill; that was practically before we closed the day before.

Q. This was practically the last bill you paid then? A. No, sir, it is not, because I came back from Lake Muskako and had a bill then of some days.

10 Q. You arrived home on the 16th of September? A. I paid this hotel by the month, my arrangement was by the month for the room.

Q. You got home the 16th of September? A. I believe so, yes, sir.

Q. You were only idle fifteen days, between the date that you closed your theater and the date you arrived home? A. I believe that is the length of time.

Q. Where did you go? A. I visited with Garry
20 Cathcart at Lake Muskako.

Q. When did you visit Garry Cathcart? A. I can't tell you the exact date.

Q. How long did you visit him? A. I was there for a week.

Q. Did you go to Garry Cathcart's right away right after the theater closed? A. No, sir.

Q. How long did you remain in Columbus, Ohio, before you went there? A. I think it was about two days when I got my affairs in order,
30 and this invitation from Mr. Cathcart was rather sudden.

Q. I show you a telegram dated Louisville, September 12th, 1912, where were you when you received that telegram? A. I was there at the Southern Hotel, Columbus, Ohio.

Q. You had got back already from Lake Muskako? A. I was there in Columbus on September 12th.

40 Q. I show you another one addressed to Colum-

Edward J. Mackay—Cross

bus, Ohio? A. This is from Louisville, that is to Columbus, Ohio.

Q. This is from Mrs. Davis?

Mr. Herr: I object to that question.

A. Yes, sir.

The Master: Leave it in.

Mr. Weller: I offer this bill.

The Master: Are you going to offer the 10 telegram?

Mr. Weller: Not yet.

Mr. Herr: My ground of objection to the offer is that this is my witness, he is offering to put in evidence.

The Master: You do not want it offered at this time. Why not mark it for identification?

Marked for identification Exhibit D-2.

Mr. Herr: It might shorten the case if 20 I consented to have it admitted now.

The Master: Then you consent to it now, do you, being offered in evidence?

Mr. Herr: There is no objection.

Marked Exhibit D-2.

Q. You testified yesterday, Mr. Mackay, that your hotel bill at the Southern Hotel, for the year that you were at Columbus, was around \$1,100?

A. On that point I believe it was agreed here that the exact amount of my expenses in Colum- 30 bus—which period are you speaking of, there are two periods, one from November 13th, to April, and then the other goes from May—

Q. I am speaking for the whole time that you were at Columbus? A. No, sir; because there was only one the first period when it came, and then Mr. Oakes was to give his account.

Q. Was that for the first period, that was around \$1,100? A. I did not add it up. 40

Edward J. Mackay—Cross

A. Mr. Dusenberry came to me on that Sunday, on the 28th, and he told me that they could not afford to pay my salary, that he had lost \$8,000, and asked me if I would reduce my salary and give him a chance.

Q. And you reduced it how long? A. Until I took the management of the theater, that was the
10 week at that Mr. Dusenberry failed and closed the theater; the Saturday previous to the night before Christmas.

Q. That was the time that you say that you worked for \$50 a week? A. I didn't work a week, they reduced my salary to \$125.

Q. What weeks were they? A. That was from November, well, it would be from November 13th, the next Monday would be November 20th, that would be from November 27th until the Saturday
20 of the week before Christmas.

Q. Now then, when did you take the management yourself? A. We began on Christmas Day of 1911.

Q. And you worked up to what time? A. We closed our theater the 13th of April.

Q. How many weeks? A. I think it was a period of fourteen weeks.

Q. At how much a week? A. I received a salary of \$75 a week.

30 Q. Is that all you got? A. No, sir.

Q. How much percentage were you getting? A. I did not get any percentage; I only received \$75 a week; you asked me my salary.

Q. Did you get anything besides that? A. I can not state the exact sum, for this reason, I can state that that was when I visited Mrs. Mackay, \$100 in addition from my salary, we were to pool our interests and not draw any money
40 out, because when we went in there, the theatre

Edward J. Mackay—Cross

had failed, and Mr. Stubbs hadn't any capital to amount to anything and I didn't have anything except a few hundred dollars that I had saved from my other engagements, and our agreement was that we would pool the interests and produce these plays and try and go through the year, and when I went out to Columbus, I was penniless, I had borrowed money and it was a 10 very hard season.

Q. This hundred dollars that you drew out came from the earnings of the business? A. Yes, sir, that came from the earnings of the business.

Q. You got one hundred dollars? A. Yes, sir.

Q. You never paid it back? A. No, sir.

Q. \$100 out of your salary? A. Yes, sir.

Q. Go on and tell what else there was from December to April 13th, what else did you receive in addition to your salary? A. At the end of the 20 month, if I would make up my bills—my expenses at the hotel I paid at the end of the month; I would draw as an expense account as manager, I was under a great deal of expense and Mr. Stubbs and Mr. Jack Luft—

Q. Why don't you answer the question? A. I can not tell the exact sum.

Q. Can you tell approximately what you received in addition to your salary? A. I can think of another sum that Harry gave me in addition 30 to my salary, that was \$200.

Q. When was that? A. I don't remember the date of it.

Q. Well, about when? A. I can not say positively.

Q. Was it during that period? A. It was during that first period.

Q. That makes \$200 during that period of fifteen or sixteen weeks; did you receive anything 40

Edward J. Mackay—Cross

else in addition to your salary? A. I said \$300, one payment was \$100 the other payment was \$200.

Q. What else in addition to these two payments aggregating \$300, did you receive during that period of six weeks in addition to your salary? A. Mr. Stubbs expenses would be put down
10 to the entertainment of the city councilmen.

Q. For your own personal expenses? A. That would go down in the hotel, under the cafe, and be charged to me.

Q. What would go down? A. The cafe expenses; for instance, if I entertained somebody at dinner, I would sign a check for that; that would go under the expenses.

Q. Now, these two sums which you have mentioned, \$100 and \$200 respectively, did you take
20 and use that for your personal use? A. Yes, sir.

Q. Then they were as much for your personal use as your salary was, were they not? A. Would you count that personal use when Mrs Mackay received \$30 and I paid for my railroad fares to New York, \$30 of that went to Mrs. Mackay when I visited her on the 18th of January, and expenses going back.

Q. What was your rent for December, 1911, your room rent? A. There is a question in my
30 mind whether I changed my room or not, but I have a remembrance of paying \$55 at a certain period and in the summer time, they reduced my room rent and made it \$50, but I can not remember when I changed my room.

Q. You never paid \$100? A. No, sir.

Q. You said you had an expert that made up your accounts for you? A. Yes, sir.

Q. And you at that time had that bill in your
40 hands? A. Yes, sir.

Edward J. Mackay—Cross

Q. It appears from this bill, Mr. Mackay, room account for November, 1911, \$93.21.

Mr. Herr: I object to that question.

The witness: For what month?

The Master: Mr. Herr, you object on what grounds?

Mr. Herr: Upon the ground that he has not been testifying from this statement and 10 because the question is incorrect, because the bill does not show what counsel has alleged that it shows.

The Master: Let me look at it. I don't think that that is quite a fair question, I think you ought to get that statement in evidence because it seems to me to mean what you think it does.

The Witness: This account is for room and cafe rent, which includes both room rent and 20 cafe.

The Master: I don't think you are entitled to cross-examine, unless it appears in evidence; if you do not want to offer it, they have not offered it, and you do not want to offer it, I do not see how you can cross-examine on it.

Mr. Weller: I think on this theory I should be entitled to cross-examine, he said he had received a letter from the hotel 30 manager, he said that he had an expert in here to make up the account, he has just now said that it was made up during this period.

Mr. Herr: No, sir, he did not say that; that didn't have anything to do with the making up of the account.

The Master: My suggestion yesterday in regards to the case which he claims for 40

Edward J. Mackay—Cross

these expenses, until the accountant submits his account and you have an opportunity to examine it; then we get through the cross-examination much more quickly than now; I do not want to insist on that course if you do not prefer to take it.

10 Mr. Weller: I had rather not take it, because I am now ready to cross-examine.

The Master: You may cross-examine.

Q. Where did you get your memo from, that you gave Mr. Oakes, the accountant? A. From memory, from small accounts that were left me.

Q. How did you happen to receive this letter, this year? A. I wrote for it.

Q. Why did you write for it? A. In order to come as truthful to the facts for my attorney.

Q. When you got it what did you do with it?
20 A. I gave it to my attorney.

Q. Did you use it in making up your account?
A. No, sir.

Q. Did you give it to Mr. Oakes? A. I gave it to Mr. Herr.

Q. Did Mr. Oakes ever have possession of it, if you know? A. Yes, sir, he handed it to me just now—

Q. Did he ever before yesterday have possession of it? A. I do not know, sir.

30 Q. Where is the other memo that you gave him, that Mr. Herr has just spoken of? A. He has it in his book.

Mr. Herr: I have it here.

Mr. Weller: I would like to see it.

Q. You have produced an itemized account, purporting to be an account of your personal expenses while in Columbus, Ohio; the account produced is headed "Personal expenses, twenty
40

Edward J. Mackay—Cross

weeks from November 6th, 1911 to April 13th, 1912" on that account is Southern Hotel, \$345; where did you get that from?

The Master: Is that memorandum in evidence, or did the witness testify from it yesterday?

Mr. Weller: No, your Honor, but he had testified that he has made up this bill, 10 and he handed it to the accountant and the accountant had tabulated it so it seems to me that it is as much in evidence as it can be.

Mr. Herr: There is no evidence that that account was handed to Mr. Oakes for tabulating; the evidence is that this account which was the only one which the witness had before him.

The Master: It seems to me that it will 20 be necessary that that paper that you show is about to be used in evidence.

Mr. Weller: It has been used in evidence, he said yesterday that he had an itemized account and he gave those exact weeks and he said that it amounted to \$1,100 and something like that.

The Master: Mr. Herr says that that is not the account.

Mr. Herr: I am to a certain extent in- 30 correct; I did ask the witness about that paper and he gave the column of \$1,500 and something, but then he testified, not from the paper but from his memory.

The Master: Did he use that paper?

Mr. Herr: He started to use the paper, but he did not use it to refresh his memory after it was objected to. 40

Edward J. Mackay—Cross

Mr. Rogers: That was the hotel bill, that he had received from his hotel that he had in his hand, and was laid aside; this account that Mr. Weller has in his hand, Mr. Mackay has not had in his hand at all.

10 The Master: You might use the paper and ask him if he has testified from that.

Q. Have you testified from that paper? A. No, sir.

Q. Why have you not testified from that?

Mr. Herr: I object to that.

The Master: I will sustain the objection.

Q. You testified all from memory, did you, yesterday? A. I did.

Mr. Herr: I object to that question.

20 The Master: It is not a fair question; your question is "you testified all from memory, yesterday," and I will overrule the question.

Q. What was your hotel bill at the Southern Hotel for twenty-three weeks, commencing April 6th and ending November 12, 1913?

Mr. Herr: I object to that question.

A. I can not calculate, I do not remember.

30 Q. You do not remember? A. No, I could sit down and figure it out probably.

Q. What were your restaurant bills at the restaurant during the same time?

Mr. Herr: I object to that question.

Q. Where did you get your total of \$1,500 yesterday that you said that you spent for board and room rent at the Southern Hotel? A. From memory.

40 Q. All from your memory? A. Mostly all of

Edward J. Mackay—Cross

those figures on that line, and it is divided and I was not permitted to add it up.

Q. You mean on the paper that you were pointing to? A. Yes, sir.

Q. When was it that you extracted it from your memory and put them on that paper? A. After this action was begun.

Q. You can't tell the date, exactly? A. The 10 day after I was released from jail.

Q. It was not necessary for you to board at the best hotel? A. I think it was as manager.

Q. You often did board at hotels where you got table board? A. No, sir.

Q. Have you not boarded as low as \$10 a week? A. At hotels on the road.

Q. Yes, and in cities? A. Not in several seasons.

Q. And how many seasons since you did it? 20
A. I do not know.

Q. I show you a letter dated Monday, February 20, 1911, and ask you in whose handwriting it is? A. February 20th, 1911 that was when I was in Columbus.

Q. Yes. A. That is my handwriting; may I look at it?

Q. Yes. A. Oh, yes, that is when I was in Washington.

Q. Where were you when that letter was written? A. I was in Washington, D. C. 30

Q. As a matter of fact you were getting board and room rent for \$10 a week? A. Yes, sir.

Q. And you were a manager at that time? A. No, sir.

Q. You were not? A. No, sir.

Q. What were you doing? A. I was an actor then. 40

Edward J. Mackay—Cross

Q. You were an actor? A. Yes, sir.

Q. Did you think it necessary when you were manager to have a first class hotel, and not so when you were not manager? A. No, sir, my circumstances at that time were a little different, then when I was manager, that is some period before November, Mr. Weller.

10 Q. You remember getting \$175 a week at that time? A. Yes, with the "Everywoman Company."

Mr. Weller: I offer that letter in evidence.

Mr. Herr: I object to the letter.

Mr. Weller: I don't need to offer it.

The Master: Your offer is retracted?

Mr. Weller: Yes.

20 Q. You said this morning or yesterday, you spoke about being obliged to obtain a loan from your father, when was that? A. When I went to Columbus, Ohio.

Q. Your father was able to loan you money, was he?

Mr. Herr: I object to that question.

Q. Isn't it a fact that you had to loan him money right along? A. No, sir.

Q. He had asked you for loans? A. Yes, sir.

30 Q. During the time you were in Columbus, Ohio? A. No, sir; he has asked me at times, but I do not remember when they were.

Q. I show you a letter dated March 21st, 1912, that is your father's handwriting? A. It is, sir.

Q. You received that letter, didn't you? A. Yes, sir, I did.

Q. You sent him at that time, \$200 to deposit for you? A. Yes, sir.

40 Q. In this letter he states—

Edward J. Mackay—Cross

The Master: How is that relevant?

Mr. Weller: Simply because yesterday he said that he had to borrow money from his father.

The Master: Well, that might be true, and he might borrow money from his father at any time.

Q. I notice by one of these contracts that the party of the first part who is the company agreed to furnish all transportation and costumes; that is the custom of the theatrical business; is it not? A. Not a fixed rule. 10

Q. It is a fixed rule, is it not for the theatrical companies to pay for transportation with the exception of hotel trunks? A. Not sleepers or baggage over a certain amount; they allow you 150 pounds, outside of that you have to pay excess. 20

By the Master: Q. It is customary for them to pay railroad fares, except the sleeping berths? A. Yes, sir.

By Mr. Weller: Q. You spoke of an offer made to you by a moving picture concern in Chicago? A. Yes, sir.

Q. And you said that they offered you a salary of two or three hundred dollars plus a bonus? A. I made up that item with Mr. Rogers, the amount of money that I had earned for that year. 30

The Master: The witness may state what the offer was.

The Witness: If I would find out what my expenses gross earnings for the year were, they would give me that and \$200 bonus, I think that is it; that was the S. & V. Film people of Chicago and Harry M. Webster.

Q. Did you give them the amount of your gross earnings for the year? A. No, sir. 40

Edward J. Mackay—Re-direct

Q. You figured up that it would amount to over four or five thousand dollars a year? A. No, sir; I don't think it would come to that; that is last year when I was with the Frankfurters Company.

Q. You were getting \$175 a week? A. Yes, sir.

10 Q. When you were down in Washington you were getting \$250 a week? A. That was before that.

Q. When was that Washington engagement? A. The first and second week in ~~July~~ ^{July} and ended in ~~August~~.

Q. You got \$150 a week then, didn't you? A. No, sir, \$125.

By the Master: Q. How much is the rent of the house which your wife occupied? A. At the
20 present time it is \$22 a month.

Q. How long has it been \$22 a month? A. Two or three months, I made an arrangement with Mrs. Custer to put in a bathroom.

Q. How much was the rent previous to that? A. \$16.

Q. Do you know how much per year or per month the coal bills, the fuel bills, for her were a month? A. Mr. Mackay paid all of them and has a record of them.
30

Q. Do you not know? A. I do not know.

Q. The gas bills, do you know about those? A. I do not know.

Q. Your father knows the amount of those bills? A. He has kept an accurate account of those, sir.

RE-DIRECT-EXAMINATION by Mr. Herr:

Q. During the summer of 1913, you have testi-
40 fied that you were playing in Washington with

Edward J. Mackay—Re-direct

the Poli Stock Company; what hotel did you stay at there? A. I stopped at the New Everett House.

Mr. Weller: I object to that question as incompetent immaterial and irrelevant.

The Master: I will allow the question and also the answer to stand.

Q. Have you with you some receipted bills for 10 money that you paid to that hotel for room and board? A. Yes, sir, I have.

Q. There appears one bill on top dated June 9, 1913 which is not receipted but is included in the bill of June 14, which is receipted?

Mr. Herr: I offer those in evidence.

Mr. Weller: Let me see the bills. I have no objection.

Marked Exhibit D-2.

Mr. Herr: I also offer in evidence the 20 account from the Southern Hotel, dated September 22, 1913.

Mr. Weller: I object to this, it is not a receipted bill and there is no evidence that it is an account.

The Master: I can not admit it without something to prove it.

Q. I show you an account dated September 22, 1913, made to Edward Mackay, Room 640 Southern Hotel, to which is appended a letter ad- 30 dressed, my dear friend Edward, signed "Bert O'Brien;" do you know who Bert O'Brien is?

A. A clerk in the Southern Hotel.

Q. Do you know his handwriting? A. I am not quite sure of it, as I testified to before, but I think that is his writing.

Q. Did you receive this bill and letter in the mail? A. Yes, sir.

Edward J. Mackay—Re-direct

The Master: You want to offer that account for what purpose?

Mr. Herr: Showing how much money he paid to the Southern Hotel.

The Master: I will overrule that offer.

Q. I show you the last three columns of a statement headed personal expenses, 23 weeks, 10 November 6, 1911 to April 13, 1912, another column headed April 14, to May 27; another column headed May 27 to September 4, fourteen weeks, another column headed September 2, to October 31, another column headed October 31, to November 9; another column November 9 to 16, another November 18th to February 15, another February 15 to March 9, another headed March 10 to May 17, and another headed June 9 to July 18th, totaling \$3,915.25 and ask you whether that statement 20 is in your handwriting and whether you made it? A. It is my handwriting and I made it.

Q. That is the statement in six columns? A. Yes, sir.

Q. Those three columns show certain amounts paid out for personal expenses? A. Yes, sir.

Q. How did you compute those amounts that you have put down there? A. I took for instance the weeks—

Q. Where did you get them? A. From memo; 30 and from my memory.

Q. Does what you put down \$3,915.25 represent as well as you can make out from memory and from such memoranda, the amount of personal expenses you had during this period? A. Approximately, yes, sir.

Q. Did you furnish Mr. Oakes, the accountant, with those figures in making up his statement? A. 40 Yes, sir.

Edward J. Mackay—Re-direct

Q. I call your attention to the third column of the same document headed "paid by Edward M" which takes up a column and foots up \$1,262.34; did you furnish those items to the accountant?

A. Yes, sir. then I collected the different bills from the butcher and the grocer and the breadman and Borden the milkman, etc., and turned over to Mr. Oakes such bills and memoranda as I could find. 10

The Master: What columns, about which you have been asking him questions?

Mr. Herr: It is not in evidence; I don't want to put it in evidence.

Paper is marked D-5 for identification.

The memorandum in these columns made by the defendant purporting to show payments to be made and upon which he was cross-examined is marked by direction of the Court Exhibit D-5. 20

By Mr. Herr: Q. Does that column represent moneys which you paid out directly on account of your wife? A. Yes, sir.

Q. And did you furnish the separate items of that account to Mr. Oakes, which such memo as you had to verify them? A. Yes, sir.

Mr. Herr: I offer in evidence.

Mr. Weller: I object to it.

Q. You say you wrote the letters February 30 20th, signed "my own Darling Lou."

Q. Who is Lou? A. That is Hon.; that is an abbreviation of the word "honey."

Q. To whom did you refer when you wrote that letter? A. Mrs. Edward Mackey.

Q. Did you send the letter to her? A. Yes, sir.

Mr. Herr: I offer that letter in evidence.

Mr. Weller: I don't care anything about it, I have no objection. 40

Edward J. Mackay—Re-direct

Letter marked Exhibit D-3; it is a letter dated February 20, 1911.

The Master: Your purpose in offering it is to show he was affectionate at that time?

Mr. Herr: Yes, sir.

Q. How did it happen that you were living for
10 \$10 when you wrote that letter; just explain that please? A. Well, I have to think of a period before, that was the beginning of the "Every-woman" season; wasn't it?

Q. You remember what your financial condition was at that time? A. It was very poorly; nothing that I can remember.

Q. Were you in debt at that time? A. Yes, sir.

Q. How much were you in debt? A. I don't know exactly, Mr. Rogers has an account of it.

20 Q. Why were you living on \$10 a week? A. In order to save money and pay my debts and support my family.

Q. Now in July, 1913, you were idle, you have testified? A. Yes, after the 19th.

Q. What was the condition of your health, in July, 1913? A. I was ill.

Q. Why did you write the memorandum which has been put in evidence marked P-3; how did you come to write that? A. I wanted credit stopped in
30 the village, and the moneys that I had—to pay my debts with the money that I had.

Q. The moneys that you had were not sufficient to pay those debts? A. No.

Q. You say that you had debts in the village? A. Yes, sir.

Q. How did you happen to have debts in the village? A. On account of the credit given to
40 Mrs. Mackay.

Edward J. Mackay—Re-direct

Q. Prior to that time, Mrs. Mackay had been ordering things from the store herself? A. Yes, sir.

Mr. Herr: It was admitted that that was either February or March.

Mr. Weller: Yes.

Q. Did you ever pay the servant, or any servants that your wife had, any money that you 10
recollect? A. I paid her directly and indirectly.

Q. When did you do that directly? A. When I was at home during the summer of 1911, just before the close of the "Everywoman" company, I paid it to a girl named Alice.

Q. How much did you pay her? A. \$3.50 a week.

Q. Have you ever bought any furniture for your wife, for your house in Coytesville? A. Yes, 20
sir.

Q. Did you ever buy any furniture for your house? A. I furnished the dining room, parlor and bedroom with what moneys I had after paying my debts after my engagements in the year 1911.

Q. You furnished those yourself? A. Yes, sir.

Q. Did you give her any money to pay for any furniture outside of what you bought, that you know of? A. Yes, furnishings.

Q. How much would that money amount to? A. 30
I have no remembrance of that sum.

By Mr. Rogers: Q. Now, Mr. Mackay, in your engagement with the "Five Frankfurters Company," how do you account for the discrepancy between nine and ten weeks, the accountant seems to make it ten weeks, and you have figured it at nine weeks; how do you account for that discrepancy? A. The conversation that I had with Mr. Oakes was over the phone and I did not refer to 40

Edward J. Mackay—Re-direct

a calendar in order to determine the number of weeks, but I thought it was nine weeks.

Q. Was it in fact nine or ten weeks? A. I have not counted it up since.

Q. When did you begin with the "Five Frankfurters Company"? A. It started September 27th, I think.

10 Q. Started September 27th? A. Yes, sir.

Q. And when did you close with that company? A. December 6th, Saturday night.

Q. Was there an odd day, the first Saturday? A. Yes, sir, there was an odd day, the first Saturday.

Q. And during that time did you have any time lost by reason of sickness? A. Yes, three days.

Q. What week was that? A. That next to the last week.

20 By the Master: Q. Was there any deduction from your salary on that account? A. Yes, there was.

Q. How much? A. That week we played at a Thanksgiving matinee, that made an extra performance, that made one-third of my salary \$175, I think it was \$51.

By Mr. Rogers: Q. There was one-third of your salary deducted? A. Yes, sir, one-third of my salary of \$175.

30 Q. How old is Mrs. Mackay's niece, the one that has been living with her, if you know, if you have any knowledge on that subject? A. I do not know the young woman's age exactly.

Q. Do you remember when you first saw her? A. Some five years ago.

40 Q. Was there any statement made to you at that time by Mrs. Mackay or by Mrs. Mackay's mother as to the age of the niece?

Edward J. Mackay--Cross

Mr. Weller: I object to that question.

The Master: I will allow it.

Q. Nine or ten years? A. Yes, sir.

Q. That is all.

CROSS-EXAMINATION by Mr. Weller:

Q. You spoke about house furnishing; isn't it a fact that the dining room set only cost about \$43 that you spoke of? A. I do not know what it cost. 10

Q. Isn't it a fact that the bedroom that you furnished cost less than \$50? A. I don't know the exact figures; I can not state.

Q. You say outside of that you gave her money to buy furniture? A. Yes.

Q. When and how much? A. Why on several occasions; in short that was one of the causes of dissatisfaction, so in December, I kept giving Mrs. Mackay to furnish the house and the curtains were in there and she asked me for money for furnishing a new carpet and she said it would cost about \$7.00 and over, and she said will you get the carpet and I gave her \$20.00. 20

Q. You gave her \$20.00 for those carpets? A. Yes, it was a Crex rug.

Q. Just that Crex carpet? A. Yes, sir.

Q. Mr. Mackay you have testified about column three of a little memorandum sheet? A. Yes, sir. 30

Q. Headed paid by Edward M, and then "Coyt" November 19, 1912 to February 3d, 1913, \$55.66, Schuster November 18, 1912 to March 12, 1913, \$213.28, but during the period covered by those two bills, is it not a fact that you were just paying your bills and not giving her any money at all?

A. No, sir.

Q. You were not giving her any money during 40

Frank F. Mackay—Direct

that time, yourself? A. I gave her money myself, and my father some for me.

Q. Is it not a fact that you had three different arrangements, first you did not give her any money at all, but paid the bills, then you gave her \$1.50 a day for a little while, and then it was \$15.00 a week? A. No, sir, Mrs. Mackay from the

10 time we were married—

Q. Isn't that true? A. It is not.

Q. Will you say that there was not a time that you paid all the bills and did not give her any money to pay the bills with? A. No, sir.

Q. Wasn't there a time in the latter part of 1912 or the beginning of 1913, just after you separated from your wife that you or your father paid the bills, and did not give her any money?

A. I believe there was.

20 Q. That is all.

The Master: Now, Mr. Herr, have you anything further?

Mr. Herr: I want to put Mr. Mackay's father on the stand.

The Master: That is all Mr. Mackay.

 FRANK F. MACKAY; Sworn:

30

Direct-examination by Mr. Herr:

Q. Mr. Mackay, you are the father of the defendant in this case? A. I think so.

Q. You are you mean, do you? A. Yes, sir.

Q. Since November 1911, you have acted as your son's trustee for the purpose of paying over money to his wife? A. I have acted as his agent.

40 Q. For that purpose? A. For that purpose, yes, sir.

Frank F. Mackay—Direct

Q. Since November, 1911? A. Yes, sir.

Q. Have you kept an account of the money that you have received from your son for the purpose, and of the money that you have paid over to his wife? A. Yes, sir.

Q. And that account was made out at that time, each item was set down? A. As the money was received I charged myself with it, as it was paid 10- out I credited myself with it.

Q. (Showing witness paper) Is this the amount that you get? A. Yes, sir.

Q. That starts with what date? A. It is 1911, November 1st.

Q. And it runs, you started it in the back of the book? A. Yes, sir, because I didn't expect to be engaged in that capacity more than a short while, I thought perhaps with one payment, but he kept sending me the money and it kept on in- 20- creasing until I had to go backward instead of forward as people ordinarily keep their books.

Q. What is the last date to which you run? A. Well, the last date would be in this book as December 3d, cash \$70.00 and December 1st, paid out \$20.12, that was for a postoffice order.

Q. That is December of this year? A. Yes, since this book has been in my possession, I have a note in another book of \$140.00 and I paid a bill of \$22.00 rent and \$16.40 for coal. 30

Q. Where is that other book? A. It is lying on my desk, I put it down on a piece of blank paper waiting for this book to come back to me.

By the Master: Q. Do you remember those items which you say you put down on another piece of paper, on your desk? A. Yes, sir.

By Mr. Herr: Q. What are the times that you have charged yourself with? A. The last item \$140.00. 40

Frank F. Mackay—Direct

Q. Isn't it on this book? A. It is on a piece of paper on my desk.

Q. Are there any other debit items except that item of \$140.00 which are not entered on this book? A. No, sir.

Q. And on the credit side, what are the items which are not down in this book since December?

10 A. An item of \$15.12, post office order that is on the 1st, seven days later will be the 8th, \$15.12, and \$16.40 for coal; \$22.00 for rent of the house.

Q. For whose benefit were those amounts paid out? A. They were paid out for Mrs. Edward Mackay's benefit.

Q. Now, then this contains every item paid out of the credit side which you have paid out to Mrs. Edward Mackay? A. Yes, sir.

20 Q. And have you furnished this book to Mr. Oakes as the basis of his computation of accounts? A. Yes, sir.

Mr. Herr: I offer the book in evidence.

Mr. Weller: I object to it going in evidence.

Q. You are trustee, are you, of the Actors Benevolent Association? A. I am chairman of the Actors Fund of America, I have been connected with the fund and trustee with the executives since 1888.

30 Q. Do you hold any office with the Players Club? A. I am on the Board of Directors of the Players Club, and I am on the committee of Admission; I have been chairman of the house committee.

Q. Are you accustomed to keep account for trust funds? A. Well, that is an easy thing, I have to deal with accounts and direct the secretary to keep them; I do not keep the accounts for
40 the fund, they are kept by the secretary but I had

Frank F. Mackay—Direct

to sign requisitions that I made on the fund and as chairman of the house committee I had to sign every requisition on the Players, I had to know that they were correct by reason of vouchers.

Q. Have you had any experience in theatrical matters as an actor? A. I have been an actor since 1851; I began my career in the City of Newark in 1851, played three months in Newark in 1851. 10

Q. How long did you carry on that profession? A. I retired and went on to be a teacher in 1858 and I have been in it ever since; I am now teaching the art of acting.

Q. How old are you, Mr. Mackay? A. I was eighty-one on the 20th of last July I am now in my eighty-second year.

Q. Now, are you familiar with the customs pertaining to the profession of the stage? A. In what 20 department?

Q. In the matters of contracts and arrangements made and carried out between the player actor and the manager? A. Well, yes, I have made a great many contracts as an actor and a good many as a manager.

Q. Where the contract between the manager and the actor does not state any particular time in which the season shall close, he refers to the engagement simply as a season, starting at a particular date; what is the custom as to the length of the season? A. There is no custom obtained in regards to the length of the season, since about 1880, or along there when it was taken to be as a mercantile business; the manager assuming that while they paid the expenses of management that the actors must stand all the loss, if there were any at the time; there is no contract made nowadays, that is for more than two weeks of ab- 40 30

Frank F. Mackay—Direct

solite right, because in that two weeks clause it, is always printed in it; now or nearly always that the contract made says without argument on either side the management has the right to close it.

Q. What is the average length of a theatrical season where the contract does not specify?

10 The Master: Is there any relevancy in that? We don't care about the average length.

Mr. Herr: I will withdraw the question.

Q. Now, under such a contract, where nothing is said about expenses, for headlines and costumes and other traveling expenses, what is the custom as to the profession as to the payment of these?

20 Mr. Weller: I object on the ground that the defendant himself testified that it was the custom of the management to pay everything excepting for transportation and one trunk, and a sleeper.

A. Well, the manager is supposed to pay the traveling expenses and the expenses of baggage, and they have a custom for some time past of terminating the engagement or leaving the actor's baggage at the place where they stopped.

30 Mr. Weller: I object to that as that is not relevant; the manager does not pay anything but railroad and baggage.

Q. Does the manager pay the hotel bills? A. No, sir.

Q. Does the manager pay sleeping car expenses? A. No, sir, they would let you sleep on the top of the roof.

Q. Does the management pay for the costumes?

A. No, sir, if it were a real historical dress the firm used to furnish this, but the actor furnishes modern dress, the actor has to furnish that a'

40

Frank F. Mackay—Cross

Q. Are you familiar with the play known as the "Five Frankfuters Company"? A. I saw it when it was produced, yes, sir.

Q. Is that a play in which modern or ancient dress is used? A. It is a fixed costume.

Q. What do you mean by "fixed" costume? A. Well, I think that the most of the people wear, in what we call street clothes, modern street clothes, 10 but I noticed that one character in it wore a dress that was entirely different and would have been considered very eccentric if seen on the street in the afternoon.

By the Master: Q. The part taken by your son in that play, if you know, requires what kind of a dress? A. I should say that was a dress, that he had to furnish; a fixed costume; it was a costume that express office—he was to represent an officer and that costume would not be available for street 20 or everyday wear.

Q. I think that is all.

Mr. Herr: I offer in evidence that book.

CROSS-EXAMINATION by Mr. Weller:

Q. Your son is a good actor? A. The public says so, and the general press throughout the country.

Q. And actors are always in great demand? A. No, sir, not always. 30

Q. Good actors are scarce? A. I do not think there are, there are a great many good actors that are not engaged, because they can not afford to pay his salary that they want and they won't pay it, and they let him lie idle sometimes.

Q. Some of them command very big salaries? A. I do not know of any that demand salaries that would be equivalent to the \$2.00 tickets that they sell. 40

Frank F. Mackay—Cross

Q. Your son Edward has always played for moderate salaries? A. Know I should consider \$250 a week a very good salary, that is the lowest salary I played for myself, on the contract, that is the last salary I have played for myself Brooks and Dickson Company; it was \$250 a week; of course a man like that ought to be paid
10 \$1,000 a week.

Q. When was it that you got \$250 a week? A. It must have been some fifteen or sixteen years ago, I have not been acting for the last six or seven years.

Q. I was referring to your son; I understood you to say that he got \$250 a week? A. I got \$250 a week the last salary I got when I was acting.

Q. You say that it is customary to furnish costumes for the actor? A. Not modern costumes,
20 what we call street costumes and evening dress.

Q. When they have any dress or costume, anything out of the ordinary? A. I just said, where they were historic parts and they have to wear tights, then there the management is supposed to furnish them.

Q. They don't play very many plays with costumes? A. I think thirty-three per cent of the Shakesperian plays are still in existence and they are still in the public.

30 Q. And in costume plays, your son seldom played in Shakesperian plays? A. Yes, he has played; I saw him last summer in Hamlet.

Q. When? A. He played with John Kellard.

Q. That was last year, or 1911? A. I think it was the winter a year go.

Q. He has not played in any Shakesperian plays since that time? A. I don't remember that he has.

40 Q. Mr. Mackay, what did you say this book is,

Frank F. Mackay—Cross

or what kind of a book is it? A. I should say it was an account book.

Q. An account between whom? A. Between F. S. Mackay and Edward Mackay, if you look at the top of the page, I think it will tell you what it is.

Q. An account with Edward Mackay? A. Yes, sir.

10

Q. And whenever you paid any money out for your son, you put it down in this book? A. Yes, sir, I think so.

Q. You loaned him money when he went out west? A. Yes, sir.

Q. I show you a loan of \$25; a loan of \$25, November, I see down here in 1912, you paid semi-annual dues for \$13.15? A. Yes, sir.

Q. Again you paid your son \$25? A. Yes, sir.

Mr. Herr: This book is not in evidence. 20

Mr. Weller: When Mr. Herr examined on this book, I supposed that he was showing moneys for Mrs. Mackay's benefit.

Mr. Herr: It might straighten the matter out for me to state, that book states all the moneys, on the left, that he got from his son, and on the right all the money that he paid out, all the money that he paid out plus the same.

Q. Of course the semi-annual dues of \$13.15 30 was not for Mrs. Mackay, it was for your son? A. Yes, sir.

Q. And on January 25th, you gave your son \$25? A. That was probably to pay a bill, he often came to me for money to pay bills and I simply entered it as cash.

Q. You paid William; who was William? A. That was \$30 he borrowed from William to go 40

Frank F. Mackay—Cross

away; that money was borrowed from William to get his costume to go away.

Q. You gave your son \$50 on the 10th of March?

A. Yes, sir.

Q. You gave the doctor \$50; that was for his sickness? A. I am a bad writer.

Q. Electric bill \$2.43? A. That was for the
10 house.

Q. On the second page I see that on May 10, 1912 I believe that is, you sent your son Edward a check for \$100? A. Check to Edward? Why, he sent it to me so I sent it back.

Q. You have testified that he sent you money?

A. Yes, sir.

Q. Now, it appears about the 10th of May? A. I gave him a check for \$100; it might have been to pay grocer bills, in Coytesville, I don't remember
20 it.

Q. On the top of the page where your account starts, on the 23d of September, 1913, you put down the figures, by checks \$50; \$25 and \$20 amounting to \$125; then you have written something in lead pencil? A. Doesn't my memorandum state those checks were all paid; I don't know whether they were paid to Edward or to the family, but I made them out; I think very likely they were all paid to him; they were paid to meet
30 different amounts due, he asked for checks to meet the payments, he would come in and ask me to draw a check for \$25 or \$30.

Q. You say on October 24th, 25th and 26th, 27th, 28th, 29th and 30th, you gave checks to Edward on each one of these debts? A. Yes, sir, I was paying the bills.

Q. That is all.

40

Mr. Herr: I offer the book.

Frank F. Mackay—Cross

Mr. Weller: I object to it, because it is a confidential account, it is an account between Mr. Mackay and his son.

The Master: Yes, but this witness testified that he set down all the money that he gave to his son, that he made for the use of the complainant in accordance with his wife's wish.

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Paper marked Exhibit D-4.

By Mr. Weller: Q. Mr. Mackay, this is an account between you and your son? A. Yes, sir.

Q. It is an account between you and your son? A. Yes, sir.

Q. He sends you money sometimes, once as large as \$1,000? A. It has nothing to do with this account; it is not in the book.

By the Master: Q. Mr. Mackay, are there some items in that book of money received from your son, which do not show on their face, the purpose for which they were given to you? A. There is no record kept of what they were paid, because he would come to me, and say I have got to pay a grocer so much, or a butcher so much, make me out a check for \$25 or \$30, or something to that effect, so whatever he asked me for I made out a check and it went in the book for him.

Q. There are some items in there, which show on their face that they were applied for the use of Mrs. Edward Mackay? A. Yes, sir.

The Master: Now, I understand it, Mr. Herr, he is offering this book, Mr. Weller, as evidence that the items in it show on their face that they were paid out for the plaintiff's benefit, are evidence of that fact; and are supported by this testimony, not that all the items in the book are to be taken into account.

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Frank F. Mackay—Cross

Mr. Weller: I have no objection to its going in.

Mr. Herr: There are some other items here, that do not appear to have been affirmatively proven to have been paid for her benefit, under date of December 5th, to Alice for her services.

10 By Mr. Rogers: Q. You say there are some items in that book that were paid out of the receipt of \$140, the last item you received was \$140, and received in December it does it not appear in that book? A. No, sir.

Q. Now, subsequently, on December 1st, I understood you to testify that you paid to Mrs. Mackay, a post-office order of \$20.15? A. Yes, sir, and then afterwards \$15.

20 Q. This December 13th, it does not appear in this book that Mr. Mackay has testified to? A. Yes, sir.

Q. And then there was a second item of December 8th, of \$15.00? A. Yes, sir.

Q. Now, Mr. Mackay, you are familiar with the requirements of the profession, in regard to men known as leading men, receiving large salaries, what is the requirements of the profession, as to the manner in which they shall live while on the road?

30 Mr. Weller: I object on the ground that there could not be any general or stated requirements as to the management, it altogether depends upon the management; it appears also from the testimony of the defendant himself, from his letter, that while he was playing with the "Everywoman Company" in Washington, he was paying \$10 a week.

40 The Master: I will admit the question.

Dougal Herr—Direct

Q. (Last question repeated)

Mr. Rogers: No, I will change that question.

Q. Is there a custom in the profession, as to the manner, in which leading men receiving high salaries, ranging from \$150 and up, shall live while on the road? A. I think there is.

Q. What is that custom? A. They shall dress 10 in first-class manner up to the custom and they shall board in first-class places.

Q. That is all.

DOUGAL HERR, sworn:

The fifth paragraph of the answer I think contains a pleading to the effect that the defendant's earning capacity averaged 20 about \$140 a month; I computed that amount from memorandum, which the defendant himself gave to me.

Mr. Weller: I object to that.

Objection withdrawn.

Mr. Herr: (continuing) which are the same memorandums largely the same memoranda that were put in evidence here, and it represents the net amount that he earned during the period from November 1911 to 30 date, as near as I can figure it, for the purpose of pleading Mr. Mackay did not tell me what the amount was, and I computed the amount so that, from what he told me was the amount and was his gross earnings?

Adjourned until 2 o'clock p. m. for recess.

Edward J. Mackay—Re-direct

After recess.

EDWARD J. MACKAY, re-called for further re-direct-examination:

By Mr. Herr: Q. Did you on one occasion turn over to your father the sum of \$1,000? A. Yes, sir.

10 Q. Was that in one item? A. It was a check.

Q. For that amount? A. For that amount.

Q. And what money was that? A. It was money given me for a purpose, that purpose was to publish a book, to be given to my father, to publish a book.

Q. Wasn't it your money? A. No, sir.

20 Q. Now, as an incident and an illustration of the amount of money that it cost you for costumes and so forth, can you pick out any particular occasion in which you remember the sums paid by you for costumes? A. One for instance, of a very recent date, is when I went with the Poli Stock Company this summer, in the latter part of June, I opened in a play called—in which Mr. Dietrichstein used a very peculiar coat, ves and trousers; a peculiarly shaped collar and necktie, which I bought for this character, in order to properly present it from the stage, it was necessary for me in that position, and also at that salary to furnish first-class clothes to meet Dietrichstein's costumes, I got that costume off Mr. For-

30 man.
Q. What did you pay for it? A. \$65.00.

Q. You paid \$65.00 for it? A. Yes, sir.

Q. Did you pay that money out of your own salary? A. Yes, sir.

40 Q. How long did you use that costume? A. One week.

Edward J. Mackay—Cross

Q. What happened to it then? A. It is in my trunk at home.

Q. Did you ever use it? A. It would not be a proper costume for the street, and the occasion has not arisen for me to use it on the stage.

Q. Was there anything else in connection with the costume that was necessary to bought? A. Yes, specially made collars; I bought a half dozen, and paid fifty cents apiece, and a peculiar necktie, I paid \$1.50 for it. 10

Q. Anything else? A. The shoes.

Q. Were the shoes peculiar? A. No, the shoes I could use.

Q. Have you ever used the collars or necktie, since that week? A. No, sir.

Q. That is all.

CROSS-EXAMINATION by Mr. Weller: 20

Q. What kind of goods was the costume made of? A. The texture?

Q. Yes. A. I do not know what the cloth was that Mr. Forman used; he said it was the best.

Q. Mr. Forman had it made? A. Yes, sir.

Q. He was the proprietor of the show? A. No, sir; he is a tailor in New York City.

Q. Was it woollen goods? A. No, it is cloth of some kind.

Q. You do not know what kind it is? A. No, sir, 30 it has a very peculiar color, it is blue, with velvet cuffs and velvet collar.

Q. Where were you on the 18th of December, a year ago now? A. I was in Coytesville, I think; I know I was playing with Mr. Kellard at that time.

Q. And your father was in Coytesville, at that time? A. Yes, sir. 40

Edward J. Mackay—Cross

Q. And you got this check of \$1,000, where? A. I received that check in New York City.

Q. In New York City? A. Yes, I think so; I was with Mr. Kellard.

Q. You handed it to your father, personally? A. Yes, sir.

Q. How did he happen to credit it to your account, do you know?

Mr. Herr: I object to that question.

A. I do not know except that when I was out there; I believe that he had, and did immediately strike it out of that book, it had no connection whatever with my business.

Q. This was money paid in advance? A. This was money loaned to my father to publish his book.

Q. By whom?

Mr. Herr: I object to that question.

A. I had a letter from—

The Master: If it is to explain any part of the testimony—

A. (Witness continuing) it is to substantiate it, I had a letter from a party whose name I do not care to let to be known, and it was taken from me out at Coytesville, in New Jersey, I am not quite certain if it had reference to the loaning of this money for my father's book.

The Master: I do not think it is necessary to cross-examine further on this particular subject; I do not see how this \$1,000 is going to have any bearing on the credibility of this witness.

Mr. Weller: It appears to have been charged in lead pencil lately.

Edward J. Mackay—Cross

The Master: Let me see. No, as I understand it, this memorandum down here, charges it off, it is in lead pencil at any rate, the older Mr. Mackay testified in fact, that that was intended to be charged off. Is there anything else of this witness?

By Mr. Weller: Q. That costume you purchased from Mr. Forman, didn't you tell your wife that you disposed of it to a man who was going to use it the next week? A. I did not. 10

Q. Didn't you say to her that you were looking to dispose of it? A. I had some conversation with Mrs. Mackay in which Mr. William Dean, of the Belasco Stock Company said I will equal the expense to you in getting this thing, but I think we arranged so that the Belasco Company, in case they produced that play elsewhere, we might be able to rent or dispose of it; I think I remember 20 a conversation of that kind.

Q. You say you have that in your trunk, today? A. I have.

Q. Did you say that you could dispose of it? A. No, sir.

By Mr. Herr: Q. I call your attention in this book No. 4 and ask you in whose handwriting that is? A. That is my father's handwriting.

The Master: The memorandum referred to by counsel, and witness, has near the 30 back end of the book in columns, figures 1913 and bears date April 18, February 1, February 4, and May 1st. Now, what next Mr. Herr?

Mr. Herr: I will call Mr. Rogers.

Edward J. Rogers—Direct

EDWARD J. ROGERS, Sworn:

Direct-examination by Mr. Herr:

Q. Mr. Rogers, you know the defendant in this case? A. I do.

Q. Did you know him in 1911? A. I did.

Q. Did you have any arrangement with him at
10 any time during that year, by which you were to
pay for him certain bills or debts?

Mr. Weller: I object to that question as incompetent, irrelevant and immaterial.

The Master: In the year 1911?

Mr. Herr: Yes, your Honor.

The Master: How is that irrelevant?

Mr. Herr: It is relevant for the purpose of showing that he had no money at that time, and had no money prior to that.

20 The Master: The question is whether he is supporting his wife properly, and not what he owned two years ago.

Mr. Herr: My point is an element of finding out whether he adequately supports his wife in the station of life in which she is entitled to be supported, as a question how much property and money he has.

30 The Master: When was this debt discharged, was it two years ago, or thereabouts?

The Witness: It was in 1911.

The Master: I will rule out the evidence.

Mr. Rogers: There is another point that occurs to my mind, they have shown here that while he was in Washington, he was living for \$10, a week, and it is only corroborating his statement.

William Forbes Oakes—Direct

The Master: He has already testified as to that, I do not think you need say anything more on that subject.

Q. That is all.

Mr. Herr: I will call Mr. Oakes.

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WILLIAM FORBES OAKES, sworn:

Direct-examination by Mr. Herr:

Q. Mr. Oakes, you are a certified accountant of the State of New Jersey? A. Yes, sir.

Q. How long have you been such? A. I think it was 1904.

Mr. Weller: I do not dispute his qualifications.

The Master: And his qualifications are 20 admitted?

Q. Have you been consulted by Mr. Mackay, the defendant, and his father, for the purpose of drawing up their accounts in shape? A. Yes, a week ago yesterday.

Q. Did you meet Mr. Mackay and his father? A. I did.

Q. And were you furnished by them with certain memo? A. I was.

Q. And was this document which is marked for 30 identification as D-5 one of the memoranda which you were furnished with? A. Yes, sir.

Q. Did you use that memoranda in making up your account? A. Yes, sir, partly.

Q. So far as it was relevant?

Mr. Weller: I object to that as a conclusion of law.

A. I excluded the first three columns and I used the other three.

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William Forbes Oakes—Direct

Q. In addition to having this from Mr. Mackay, did you go over these accounts with him? A. I went over these accounts and received his explanation of all the papers that he turned over to me.

The Master: What do you mean by these accounts?

10 Mr. Herr: This statement marked Exhibit D-5.

Mr. Herr: I now offer that in evidence so far as the last three columns are admitted.

The Master: No, I won't admit it as evidence, it is not evidence of anything.

Q. Now did the elder Mr. Mackay turn over to you this account book of his, which is in evidence as Exhibit D-4? A. Yes, sir.

20 Q. Did you examine that in making up your statement? A. Yes, sir.

Q. Did you consult him item by item, as to the items appearing on it? A. I did.

Q. In case of doubt as to whether any particular item there, represented money paid out for the wife or for the defendant, what course did you pursue in making up your accounts as to that particular item? A. I used my own judgment rather than accepting the explanation Mr.
30 Mackay had given to me, and wherever such case did occur, I invariably carried it to Edward Mackay, rather than his wife.

By the Master: Q. You mean wherever the item did not explicitly state or show that it was paid to the use of the wife; that there you charged it against Edward Mackay? A. Yes, I might be a little more specific; I can tell you one
40 specific item if I can find it; you see in going over

William Forbes Oakes—Direct

these books together, with his father, asking explanations wherever there was anything indefinite, I asked him if he could give me any further explanation, which would enable me to reach the amounts correctly. These are small bills to the house, \$18.

The Master: Witness referring to a column on the credit side of the account, 10 near the end of the book, headed "1913" and to an item shown there under date of November 13, 1913, "Small bills to house, \$18."

Q. Now, go on. A. And the entry immediately after following, "a check to Edward" he volunteered the explanation to Mr. Mackay, Sr.

Mr. Weller: I object to that answer.

(Continuing) This item of \$52.62, was to pay 20. sundry bills for groceries.

By the Master: How did you enter that on your statement? A. I have charged that as cash advanced to Edward Mackay, by his father.

Q. Personally? A. Yes, personally.

Q. Do you mean to say throughout that entire book, in making up your statement, you have charged to Edward Mackay, personally, every item which, upon its face, did not indicate distinctly that it was for the use of Mrs. Mackay? 30
A. I have charged such to Mr. Mackay.

By Mr. Herr: Q. Have you with you the accounts which you have prepared from the basis of that book, and the memorandum? A. Yes, sir.

Mr. Weller: I would like to cross-examine the witness before he goes to that book.

William Forbes Oakes—Direct

Q. And have you indexed those amounts and tabulated them? A. Yes, sir; I have.

Q. Have you a summary, showing the various balances, before you? A. Yes, sir; I have.

Mr. Herr: I offer these accounts in evidence.

10 The Master: Now, Mr. Herr, you had better go and show from what date he has made these up, and I infer, of course, that they are made up from these various memoranda. Now, these schedules which you have just referred to, do you offer those?

By the Master: These various schedules which you have just referred to are made up from the memorandum marked for identification, D-5, and from the book of the elder Mr. Mackay, marked D-4, is that right? A. Yes, sir.

20 Q. And from those sources only? A. No, sir.

Q. What else? A. I had various bills which Mr. Mackay, himself, paid.

Q. How do you know that he paid them? A. Well, from the memo on the bills that he paid, I have only his hearsay for that.

Q. And those bills you have here in the envelope you are showing to me? A. Yes, sir.

30 Q. From what other sources did you make up those schedules? A. Together with this memorandum.

Q. What memoranda? A. All those papers that I have here.

The Master: The witness refers to a number of loose pieces of paper containing figures.

40 Q. Now, these loose memoranda which you have last referred to, were handed to you by the defendant, Mackay? A. Yes, sir.

William Forbes Oakes—Direct

Q. And from some of the information which he gave you respecting that memoranda you made up some of the items respecting these schedules? A. No, sir; I did not find it necessary to use any one of them; I have used these for comparative purposes only.

Q. So that none of the loose memoranda to which you have directed my attention served as data for your schedule? A. That is practically so. 10

Q. And the only data for your schedules are the memoranda marked D-5 and Mr. Mackay's book, just referred to, D-4, and the package of bills receipted, or not receipted, which you now show me? A. Yes, sir.

The Master: Now, Mr. Herr, what are you offering in evidence?

Mr. Herr: The bills receipted and un- 20 receipted.

The Master: I do not see how they can be admitted.

Mr. Weller: I object to the introduction of them.

The Master: I will sustain the objection to the introduction of the schedules.

By Mr. Herr: Q. Mr. Oakes, you made up a separate schedule, not your schedule based upon this book of the elder Mr. Mackay, in the manner that you have stated? A. Yes, sir. 30

Q. Does that particular schedule that you have made up from D-5 depend in any way upon the instrument marked for identification D-5? A. Absolutely none.

Mr. Herr: I will offer that schedule in evidence.

Mr. Weller: Then I will have to ask him a couple of questions on that first. 40

Eloise Mackay—Direct

By the Master: Q. There are four schedules taken from the book marked Exhibit D-4? A. Yes, sir.

Mr. Weller: I think we can fix up this matter by cross-examination.

Mr. Herr: That is all, with a reservation that if we can get the percentage somewheres near.

The Master: I suppose all you need to do is to get approximately the expenditures by the defendant for his wife shown in that book; it is not required to be exact.

Mr. Weller: I will try to get together with Mr. Herr.

Mr. Herr: I ask your Honor, if we consider it necessary later on the 26th, to be allowed to put in some evidence to substantiate these schedules.

The Master: If you can not agree on that, I will allow you to put in some further testimony. Is that all of this case?

Mr. Weller: No, your Honor, I have a little bit in rebuttal.

Complainant's Rebuttal

30

ELOISE MACKAY, re-called:

Direct-examination by Mr. Weller:

Q. Mrs. Mackay, your husband has just testified about a costume that he bought for \$65. Did he tell you about that costume? A. He told me about it, and I don't know whether it was a

Eloise Mackay—Direct

member of some other company or the tailor, I don't know which, that he said he was going to dispose of it for him, and he said he was very lucky to be able to dispose of it.

By the Master: Q. Did he say that he had disposed of it? A. He did not say that, but he said that he was very lucky to be able to dispose of it.

Q. When was that, about? A. That was just 10 before he went to Washington. That was somewhere in June, because the costume was being used at the time.

By Mr. Weller: Q. Was there a period when your husband did not give you any money at all, but just paid your bills? A. Yes, sir.

Q. What period was that? A. When he first came back from Columbus, Ohio.

Q. He said he came back on September 16th? A. Yes, sir; that is the time the bills were running. 20

Q. And they ran along for what time, until he gave you \$1.50? A. Yes, sir.

Q. When did he begin to give you \$1.50 a day?

The Master: She has already testified to that. Is that all?

Mr. Herr: I have no cross-examination.

Adjourned until December 26, 1913, at 10 a. m. 30

Jersey City, December 26. 1913.

Hearing of the cause resumed at 10 o'clock a. m.

Eloise Mackay—Direct

Counsel state that they have agreed that the father's book shows \$1856.11 paid by him as agent for the defendant, to and for the use of the wife, between November 1, 1911 and December 1, 1913.

ELOISE MACKAY, re-called:

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Direct-examination resumed by Mr. Weller:

Q. I understand, Mrs. Mackay, that you moved to Coytesville in 1911? A. Yes, sir.

Q. From where did you move? A. From New York.

Q. Have you lived in Coytesville continuously since that time? A. Yes, sir.

Q. And you lived there when this suit was started, and live there still? A. Yes, sir.

20 Q. And what time was it in 1911 that you moved there? A. In March.

Q. Now, your husband has sworn, and his witnesses attempted to prove that they gave you certain moneys, I want to know if that giving of money had been uniform or had there been different intervals between the payments and the way it was paid? A. Yes, sir; it was no stated amount at any time.

30 Q. When you first moved to Coytesville what was your custom? A. When I first moved there Mr. Mackay's people were in the house, and they gave me money; they remained there until probably the end of May.

Q. After that how were the bills paid? A. The bills would come in and I would hand them to Mr. Mackay, and he would see the amounts and he would give me the money to pay them.

40 Q. After November, 1911, when your husband

Eloise Mackay—Direct

went away on the road, how were the bills paid?

A. I paid them then.

Q. When was it that you first did get a stated amount of money? A. Not until the \$1.50 a day was started.

Q. When did that start? A. In January.

Q. And it ran until when? A. It ran until April. 10

Q. I believe you testified, that before this suit was started you were getting \$15 a week? A. Yes, sir.

Q. Has that been increased since the suit was started? A. Yes, sir.

Q. How much have you got since then? A. I got at first \$35 and then \$30 and then it continued \$25 for about four weeks, and then I think it was \$20. I gave you the items the other day.

Q. Once he sent you \$20? A. Yes, sir. 20

Q. Is the place where you live, of your own choice? A. It is not at present.

Q. Why? A. Because it has been rather disagreeable there for me.

By the Master: Q. Had you any objection to that place as a residence before this suit was begun? A. I had; I was not satisfied with the house; it is not healthy; it is very damp there; and I have contracted rheumatism there since I have been there, and also malaria. 30

Q. Your husband testified that he was offered a position by a film company out in Chicago? A. Yes, sir.

Q. He also testified that they offered him his average salary and a bonus of two or three hundred dollars; did your husband ever speak to you about it? A. He spoke to me about it and said that they had offered him his salary for 40

Eloise Mackay—Cross

fifty-two weeks, and to give him a two year contract.

Q. Did he say anything about its being an average salary? A. I don't recollect that.

CROSS-EXAMINATION by Mr. Herr:

Q. During the last two years, Mrs. Mackay,
10 the amounts you have received from your husband, or from his father, have never been uniform in amount for very long at a time? A. No, he would send it to me, he would send me fifty or sixty dollars, and it would be to cover two or three months.

Q. And whether he was making money or not?

A. I do not know whether it depended upon that.

Q. You knew when he was busy or not? A. Sometimes.

20 Q. Isn't it a fact, that when he was not busy he sent you less money than he did when he was busy? A. I can not answer that question, because I never received any stated amount, and since I have been getting the regular amount it has been continued the same, whether his salary was less or not.

Q. Before September, and during the summer of 1913, you were receiving \$15 a week, and \$1.50 at another time? A. Yes, sir.

30 Q. And you have testified, that since September 2d this sum has been larger? A. Yes, sir.

Q. You know that your husband was engaged in the summer, and in the fall of 1913 he was idle? A. He was engaged in Washington at \$125 a week, and he didn't raise it, I only received \$15 a week when he received \$125.

Q. That was during the summer? A. Yes, sir.

40 Q. How long was he there? A. Eight weeks.

Eloise Mackay—Cross

Q. Why did you move to New Jersey, Mrs. Mackay?

The Master: One moment; what is the object of that cross-examination?

Mr. Herr: That is all, your Honor.

Mr. Weller: That is our case.

The Master: Before taking any more testimony, let me ask counsel if you agree 10
on these figures; Mr. Weller, as I understand, admits that the wife has received from the husband during the period from November 1, 1911, to December 6, 1913, a period of two years and one month, \$2,497 covering everything; cash given, both directly to his wife and by the defendant's father to his wife, and bills for maintenance such as coal, gas, groceries, etc. Am I right in that? 20

Mr. Weller: You are right.

The Master: And Mr. Herr contends that that sum should be increased by \$388 which would make it about \$2,900.

Mr. Herr: About that, yes, your Honor.

The Master: And that is the total that you claim has been contributed.

Mr. Herr: That is the total we are able to show by memoranda.

The Master: That is all you expect to 30
show by evidence. Now, if you put your witness on the stand, he would not testify to any larger sum than that. So much for the contributions by the husband during that period of two years and one month. Now, let us take his receipts. I understand from the memoranda, or the evidence taken, and my notes that the total sum 40

Eloise Mackay—Cross

received by the husband during the same period of two years and one month was \$9,850.

Mr. Weller: That is about right.

10 The Master: That would make any average, by the year of twelve months, as figured by the accountant, \$4,699. The next question that arises is, how much allowance should be made to the husband for what may be called the personal expenses of his business; for, of course, a man, who is carrying on that profession, must necessarily incur some expenses in consequence of it which might be fairly called the expenses of business; and I will be glad to hear counsel upon that. I do not think there is any need to take any more
20 testimony on this point, or any further testimony at all, and if counsel agree with me, I think we may commence to sum up. I shall be glad to hear you both on anything that will contribute to the proper disposition of this case; but would you like me to give you certain figures which have been running in my mind, so that you may express your views on those figures? These are tentative. It seems to me that
30 we must try to separate, as well as we can, other expenses incurred in travelling on his business, and while engaged in his business; the expenses which he must necessarily incur in the prosecution of his business. Of course, it must be admitted that what you might call the ordinary cost of living, should not be allowed as a business expense, but only so much as may
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Eloise Mackay—Cross

be allowed the extra expenses of living necessary in the conduct of his profession. Now, it has run in my mind, that \$15 a week in a hotel for a room bill would not be an unreasonable sum for him to pay, while maintaining his position as an actor of high rank; and for weekly board say \$21: that would make \$36 a week; but of course, that includes what I may call his ordinary cost of living, or board. Suppose we say that that would cost \$20, and deduct \$20 from the \$36. That would leave a matter of about \$16 a week, which could be called expense necessarily incurred in his profession. The evidence shows that he was actually engaged in his business about two-thirds of the 109 weeks so that an allowance on that theory would be about \$16 a week for two thirds of the year, and it would amount to about \$550 a year. Then the question arises, what allowance should be made for other expenses in his business, such as costumes, and the like. There was only one purchase of costumes actually proved before me, about \$60 and it runs in my mind, that under the evidence, two or three hundred dollars for other necessary expenses might be fairly allowed. I will be glad to hear both of you on this subject as to whether this is a fair allowance as a business expense, and on anything else that you think would be relevant to the case.

(Counsel thereupon argue before the Court.)

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Eloise Mackay—Cross

The Master: (After argument) In this case the issues are very narrow. I have nothing to decide except whether the sum which the husband has contributed to his wife's support is adequate, in view of all the evidence in the case, and if not, how much it should be. Now, his business or profession is evidently one which does not yield a steady return; it is liable to interruptions. I think I ought to take his own testimony with respect to his periods of occupation and idleness, because there is no evidence to the contrary. Of course, we must bear in mind that he is testifying in his own interest, but he has been as far as I can judge, a frank and truthful witness, with reference to the facts within his memory. It appears from his own statement, that during twenty-five months from November 1st, 1911, until December 6, 1913, his actual gross earnings were about \$9,850, and it appears that during some of that period he has contributed to his wife's support, in cash, and payment of her bills and household expenses, in round figures, \$2,500. That amount is admitted. His counsel contend, however, that it is about \$400 more; that is about \$2,900. If we take these figures, of \$2,900, to be correct for that period, it amounts to about \$1,380 a year. His gross earnings, however, are, according to his own figures, about \$4,700 a year. If we should allow him \$550 for his expenses of living necessarily incurred in his professional business, and a sum, say, of \$250 a year, or

Eloise Mackay—Cross

thereabouts, for other expenses necessary to his business it would make an allowance of about \$800 a year. Deducting that from the \$4,700 it would leave about \$3,900 or \$4,000 as the average of his net annual earnings. He has contributed for his wife and two children, somewhere about \$1,380 or thirty-three per cent of \$4,000. I do not think that is enough. I think, under the circumstances of this case, the wife ought to have more than thirty-three per cent of his net earnings. She lives alone there with her two children, and with such assistance as her mother and sister, from time to time, give. They pay apparently enough to cover their own board, about ten dollars a week for the mother and sister and sister's child. That would be very little more than enough to cover the actual cost of their keep. That my an uncertain dependence. They may withdraw at any time. If the husband is earning net \$4,000 a year, and I must take it that is the lowest figure that he is likely to earn, he certainly ought to pay more than one-third of his earnings to his wife and children whom he has abandoned. I think, in view of all the circumstances, there ought to be an allowance of forty per cent of his income for her, and in addition to that, I think there ought to be an allowance of six dollars a week for the two children. I will advise an order allowing \$40 a week. What have you to say about counsel fee? There has been no order for temporary alimony?

Mr. Weller: There has been no order at

Eloise Mackay—Cross

all. Your Honor sees there has been considerable work in the case.

The Master: There has been no allowance for counsel fee.

Mr. Weller: No, there has been no allowance.

10 The Master: Do you want to make an application for counsel fee?

Mr. Weller: I think I ought to have \$200 for counsel fee.

The Master: Mr. Herr, have you anything to say on the matter of counsel fee? The case has taken two days practically.

Mr. Herr: I should think \$100 would be a fair counsel fee.

The Master: Yes, but it took some time to prepare the case.

20 Mr. Herr: \$50 a day; there was not much preparation, it was all a matter of figures.

The Master: I think a counsel fee of \$200 would not be unreasonable. There has been at least two days' work, perhaps more in the trial of the case. Add the time for the preparation of the case. I suppose the equivalent of two days' work for conducting and preparing the case would not be an unreasonable allowance. Do you want it at once, Mr. Weller?

30

Mr. Weller: Oh, no.

The Master: I will allow you a counsel fee of \$200. Up to what time has the wife's allowance been paid thus far?

Mr. Herr: Up to date.

Mr. Weller: I think so.

40

The Master: Well, then, the allowance from this time at \$40 a week should run

Eloise Mackay—Cross

from next Monday, January 5th, 1914. Do you want any mention of the bond made? I think you and Mr. Weller had better confer on the subject of the bond, between now and the time I advise the decree, and also on the form of the decree Mr. Weller will draw it and submit it to Mr. Herr, and if you can not agree on the form of it come 10 to my office. I go away a week from tomorrow, to be gone a couple of weeks, so it will be necessary to have it settled at once.

Mr. Herr: How about this evidence that I did not put in, if the Court please?

The Master: It is not necessary. As I understand it, we agreed upon the figures. How much would it amount to?

Mr. Herr: It would practically add \$400. 20 You take \$2,900. That is the amount that we claim. But I wanted to make it clear; my calculation \$83.52 of bills included in that \$288 are to go in since. We paid them since January 6, 1913.

The Master: That would not make any material difference in the final result. These figures that are given with respect to expenditures, must necessarily be regarded as approximate on the amount of 30 contributions to her support, and whether they are a hundred dollars, more or less, in a period of over a year and two months, would make very little difference in the result.

Mr. Herr: It makes a great deal of difference, as we do not know how much longer he is going to be idle. 40

Edward J. Mackay—Direct

The Master: You ought to have the benefit of any doubt that may exist, and if you wish to offer any further evidence, for that purpose, I will give you the benefit of that doubt, and I will open the case and let you prove that, but confine yourself to that point alone.

10

EDWARD J. MACKAY, recalled in rebuttal:

Direct-examination by Mr. Herr:

Q. Since January 6, 1913, and up to the 2d of September, 1913, did you pay any bills yourself, of your wife in Coytesville among the tradesmen?

A. Numerous bills.

20 Q. What were some of these bills? A. Mr. Coyle, the grocer.

Q. (Showing bills) Are these the bills, you paid? A. Yes, just a minute; this bill I did not pay, but I think my father paid it; I have the bill home.

Q. Have you the bills arranged, Mr. Mackay? A. Yes, sir.

Q. And the bills that you now have are the bills that you paid for your wif'e use during what

30 period of time? A. These bills go back to 1912.

Q. From what time, Mr. Mackay? A. Here is one November 26, 1912.

Q. Have you eliminated all the bills there, that have been paid by your father? A. Yes, sir.

Q. Take the bills which you yourself have paid? A. Yes, sir.

Q. And what is the total of those bills? A. \$272.

47

Edward J. Mackay—Cross

Q. And that \$272 represents money that you have paid for your wife since 1911 and not included in any previous evidence in this case? A. They are not included in the totals heretofore testified to in the case.

By the Master: Q. Instead of \$288 which Mr. Herr stated to me, the figures are \$272? A. Yes, sir. 10

Q. Those bills represent that total of \$272, do they? A. I understand that is so.

The Master: Now you offer those bills in evidence, Mr. Herr?

Mr. Herr: Yes, your Honor.

The Master: Have you any objection, Mr. Weller?

The Witness: I would like to explain this one of sixty-three cents, I do not mean to say that I paid that sixty-three cents but that is included 20 in the account.

By the Master: Q. In other words, what you mean is where there is a package of bills fastened together as coming from one creditor, the accounts are carried forward from one of these pages, the total appears on some one of them, where they are paid? A. Yes, sir.

CROSS-EXAMINATION by Mr. Weller:

Q. I show you one marked No. 1 and the total 30 appears on the last page to be \$26.27? A. Yes, sir.

Q. That was charged in your father's book and is now eliminated, I understand? A. Yes, sir.

Q. There are also a lot of small bills, one for ninety-six cents, one for \$1.55, one for \$11.16 another for \$11.16? A. That is the same bill.

Q. You did not know anything about these bills 40

Edward J. Mackay—Cross

for the above amounts, when they were received?

A. That is another \$11.16; that is a duplicate.

Q. Where did you get the total of \$28.37 from?

A. From the bills that I got from Mr. Coyle, and paid the amount.

Q. Where did you get the total of that from?

A. It is the amount brought forward February 3,
10 1913.

Q. It is brought forward to February 3, 1913, where did you get that total from? A. From previous bills?

Q. Where are those bills? A. Those bills? I have not all of my receipts, or all the bills that were sent to me, Mr. Mackay had them; these are the bills as many as I collected.

Q. In other words you can not state what the bills of \$26.81 were made up from? A. No, sir.

20 Q. You can not tell whether it included any of the previous bills on here or not? A. I am not saying where I paid by cash \$5.00, the sum here (indicating); these bills, well they are not receipted I had to pay these bills additionally; Mrs. Mackay did not, and I have some others that are not receipted; I am at a disadvantage in that respect.

Mr. Herr: I offer those bills.

Q. I show you a bill marked 7 from William
30 Keller; who is Mr. Keller? A. He is a baker.

Q. When was that bill paid? A. Which bill?

Q. The bill from Keller. A. Those were all paid at different dates. This bill Mr. Keller gave me when I asked him for it in September.

Q. This year? A. Yes, this year.

Q. You do not know what time it covers, do you? A. It covers from January 1, 1912, to
40 March.

Edward J. Mackay—Cross

Q. You did not try to get Mr. Keller's books here? A. I would be glad to have Mr. Keller's testimony here.

Q. You do not know when these cash payments were made to Mr. Keller; you do not know that dates of any one of these payments, do you? A. Yes, March 16, 1913, there is one there \$3.75.

Q. That is the only one that you know when it was paid or anything about it? A. There is another one. 10

Q. What date is that? A. That is January 12, 1913.

Q. This is merely a bill, is it not? A. It is a receipted bill.

Q. Where is the receipt on there? A. There is Mr. Keller's writing, at least I think it is.

Q. But it don't say paid? A. Doesn't it?

Q. Isn't it paid? A. I think it is. 20

Q. Then there are two bills, one of February 16, 1913, and one of January 12, 1913; they are the only ones really receipted for? A. Yes, sir.

The Master: Q. Have you any receipts? A. Mrs. Mackay took care of most receipts.

Q. You got that only in September last? A. Yes, sir.

Q. How did you mark these two paid and this not? A. I could only find this statement, for instance, this is January 12, 1913, and when I asked for this, it was made out by Mr. Keller September 18, 1913. These are the only receipts that I could find to prove that I had paid. There is another one paid by me, these are receipted bills. 30

Q. About \$12.00 is all that appears by receipts? A. That is all the receipts I have.

Mr. Weller: Now, we will take up the next one April 10, I understood that that was out before, Mr. Herr. 40

Edward J. Mackay—Cross

Mr. Herr: No, it is not out. That is in Mr. Weller.

Q. I show you the one marked 10 and ask you whose handwriting is on the bottom of each one of them? A. My brother Frank's.

Q. Now, let me see, does the first one say "paid March 1, 1913, at his house Mr. M." and the other one say "February newspaper bill for Mrs. Edward J. Mackay, paid his house March 20, 1913," do you know why that is; do you know what that means? A. I don't know what he means? A. I don't know what he means by "his house."

Q. How much do you claim the entire bill is? A. One for \$1.40 and one for \$1.18.

Q. Didn't it strike you as strange, one of these bills was paid on the 19th, one on the 20th of the same month? A. I don't understand, there is a memo in my brother's handwriting as having paid cash \$155.

Q. You don't know how it happens that there are two paid, one one day, and the other the next day for newspaper bills? A. No, sir, I do not.

Q. I show you a bunch of bills number 8 for Bordens Condensed Milk, did you pay all these bills personally? A. Yes, sir.

Q. Were you home of the 24th of November, 1912? A. I was playing in New York.

Q. As a matter of fact were you not playing in Columbus, in 1912? A. No, sir, I was in New York, I was with Mr. John E. Kellard.

Q. You put on one of these "paid by me personally," how did you happen to write that on one and not on the others? A. I was sorting out my bills to see what I had paid.

Q. That is the only one you paid? A. Oh, no, sir.

Edward J. Mackay—Cross

Q. Why didn't you put that on all of them? A. That was put on after September, I have marked most of these bills paid to separate the bills paid by my father from those paid by me apart.

Q. If you did that in that case, why didn't you put it on in all these cases? A. Because in going over these bills in order to get somewhere in shape for Mr. Herr, I didn't put that down. 10

Q. Here is a bill from Doctor Hager for \$16.00, as a matter of fact, has not your father got that included in his account? A. No, sir.

Q. This is the bill paid for Doctor Hager? A. Yes, sir, that was a bill for my boy's birth.

Q. What is that bill? A. This was sent April 15th and received.

Mr. Weller: It seems to me that isn't cross-examination.

The Master: Do you ask me to rule on 20 any objections?

Mr. Weller: Yes, sir, I think first it is not permissible because he does not know how it is made up at all.

The Master: Why are not these admissions of Mr. Coyte against his interest as having received these sums of money, of course you can object to that if you choose.

Mr. Weller: I don't want to be technical, I presume these two items are correct. 30

The Master: The Witness has testified that he has paid these two sums; do you want these marked in evidence? If you put it in, it encumbers the record and it will add very much to the appeal. The Witness has testified on Exhibits in the Court memoranda "from Coytes Village Store" showing credits for cash paid to the store on bills for merchandise rendered 40

Edward J. Mackay—Cross

to Edward Mackay under dates and for amounts as follows: November 26, 1912, \$5.00; December 4th, 1912, \$6.39. Of the bills rendered by William Keller the item aggregating \$26.12, the Court finds is not supported by the bills rendered.

By the Master: Q. Mr. Mackay, do you re-
10 member having paid \$26.12 to Mr. Keller, have you any memory of your own? A. Not the lump sum, no, sir.

The Master: Included in the items of \$26.12 are two items, respectively, \$2.10 and \$4.82, appear to be supported by receipts rendered by William Keller to Edward Mackay, under dates as follows: January 1, 1913, \$4.82, March 2, 1913, \$2.10.

20 Mr. Herr: Have you any more?

Mr. Herr: No, sir, no more.

The Master: Mr. Weller, are there any other bills that you want me to rule on?

Mr. Weller: How much does the butcher bill aggregate?

Mr. Herr: \$165.24 net, after deducting what has been paid by Mr. Mackay Senior.

30 The Master: Do you want these bills in evidence?

Mr. Herr: want all the receipts in evidence.

The Master: All the receipts are admitted in evidence, and you and Mr. Weller can sort them out and agree upon what are receipts.

By Mr. Herr: Q. There is one item that you
40 have testified to November 19, 1912 to Coytes Village Store, what was the occasion of that pay-

Statement as to Exhibits

ment and what were you testifying about it? A. Mr. Coyte and I commenced to keep my accounts then, and I have the date down here, bill rendered by Mr. Coyte was \$19.30, I have the statement here that I paid. This bill I paid by cash, I paid \$17.90 to Mr. Coyte.

Q. Have you been employed since December 6, 1913, the date of the first examination in this 10 cause? A. No, sir.

Q. That is all.

CROSS-EXAMINATION by Mr. Weller:

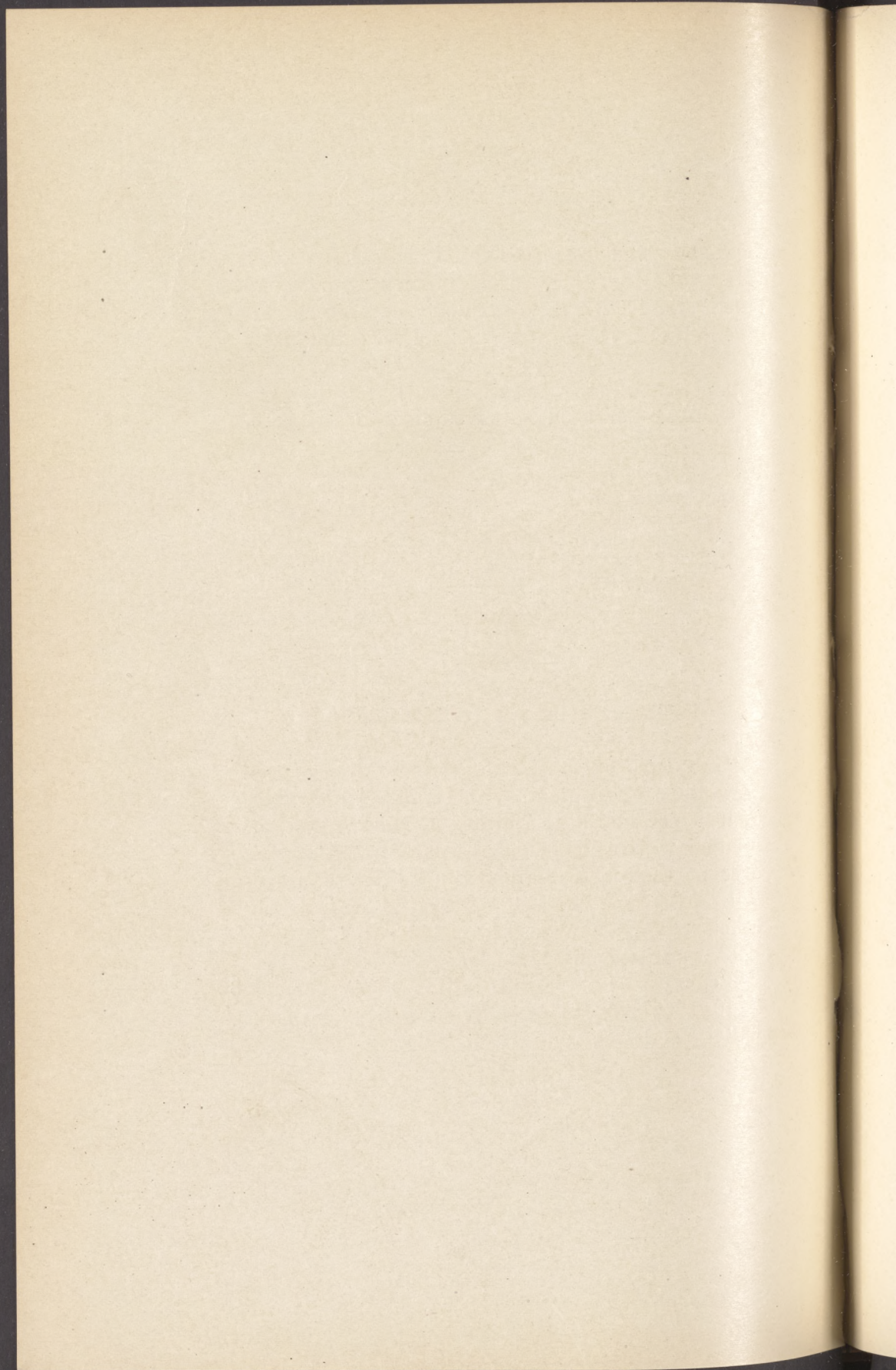
Q. Have you been rehearsing? A. No, sir.

Q. That is all, Mr. Mackay.

Statement as to Exhibits

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“Exhibits D-2 consists of receipted bill of the New Ebbitt, Washington, D. C., dated February 5, 1913, for \$44.93, to Edward J. Mackay, and of another receipted bill dated June 14, 1913, same account, same hotel \$60.00, and another receipted bill dated June 14, 1913, same account, same hotel, for \$48.43, and another bill dated June 9, 1913, same account, same hotel, \$22.90. Exhibit D-8 consists of a receipted bill dated September 30 1, 1912, to Edward Mackay, from the Southern Hotel, Columbus Ohio, totaling \$47.89.”



New Jersey
Court of Errors and Appeals

Between ELOISE MACKAY, Complainant-Respondent. and EDWARD J. MACKAY, Defendant-Appellant.	}	On Bill, etc. On Appeal from Decree and Or- der of the Court of Chancery.
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APPELLANT'S BRIEF

This is an appeal from a decree in Chancery advised by Charles H. Hartshorne, Esq., Advisory Master. The decree is based upon a bill filed by the wife (the respondent on this appeal) praying maintenance under Section twenty-six (§26) of (P.L. 1907, P. 474) the Divorce Act, and awards \$40 per week and a counsel fee of \$150. The bill was filed on September 3, 1913, and on the same day a petition was filed for a writ of *ne exeat*, and an order made thereon, *ex parte*, by Griffin, V. C. awarding a writ. The husband was taken into custody thereunder, and was released upon filing an appropriate bond with the sheriff.

On September 29, 1913, upon notice, the husband moved before Griffin, V. C. for the vacating of the writ of *ne exeat*, but such motion was denied.

The hearing on bill, answer and replication took

place on December 11, 12 & 26, 1913, and the decree was advised on December 31, 1913 and entered on January 2, 1914.

This appeal was taken by the husband on January 2, 1914.

Grounds of Appeal

The grounds of appeal are:

1. That the Court of Chancery was without jurisdiction to make the decree, or any decree favoring the wife.
2. That the amount of the award decreed is excessive, and should be materially reduced.
3. That the Court should have discharged the writ of ~~the~~ *ne exeat*.

POINT I

The Court of Chancery was without jurisdiction to make the decree, or any decree favoring the wife.

A. There is no inherent jurisdiction in the Court of Chancery to award maintenance to a wife. The jurisdiction springs solely from the statute.

Yule vs. Yule, 10 N. J. Eq., 120

Rockwell vs. Morgan, 13 N. J. Eq., 110.

Aushutz vs. Aushutz, 16 N. J. Eq., 162.

Lynde vs. Lynde, 54 N. J. Eq. 473.

Margarum vs. Margarum, 57 N. J. Eq., 249.

Pomeroy, Eq. Jur., (3d ed.) III §119, 120.

B. *By the statute, jurisdiction does not vest unless there has been a neglect or refusal on the husband's part to maintain the wife.*

Section twenty-six (§26) of the Divorce Act, which is the statute in question, provides that

“In case a husband, without justifiable cause, shall abandon his wife or separate himself from her, and refuse or neglect to maintain and provide for her, it shall be lawful for the Court of Chancery to decree and order such suitable support, etc.”

There is a remarkable distinction between the provisions of Section 26 and ~~of~~ Section 25 of the Divorce Act. Section 25 is the section which invests the Court with jurisdiction to award alimony in divorce and nullity cases. It provides that “pending a suit for divorce or nullity, or after decree for divorce, it shall be lawful for the Court of Chancery to make such order touching the alimony * * * as the circumstances of the parties and the nature of the case shall be rendered fit, reasonable and just * * * .” It contains no such jurisdictional limitation as does Section 26. Under Section 25 the mere filing of the petition satisfies the jurisdictional requirements of the act. But under the maintenance section, two distinct facts must affirmatively and clearly appear as jurisdictional conditions: The abandonment, and the refusal or neglect to maintain. The distinction has been repeatedly pointed out and emphasized in the cases.

Yule vs. Yule, *supra*.

Cory vs. Cory, 11 N. J. Eq., 400.

Anshutz vs. Anshutz, *supra*.

Margarum vs. Margarum, *supra*.

C. *The statute does not enlarge the common law rights of the wife, but simply alters the form of the remedy.*

This jurisdictional limitation, imposed by the legislature in maintenance cases as distinguished from proceedings for divorce or nullity is significant. The reason for it is not far to seek. It was written into the act for the purpose of preserving intact the ancient rights of the husband at the common law, and the wise and beneficent protection afforded to him against the designing or improvident wife. For at the common law, the husband was liable only for "necessaries," and was not required to furnish his wife, though living apart from him, with money to pay for anything else. There was no Court with jurisdiction to decree maintenance, except as incident to a proceeding for divorce or nullity. The remedy of the wife, when not suing for divorce, was to pledge the husband's credit for necessaries, if he failed to supply her with them. Had the legislature been willing that these settled common law rights *inter sese* of husband and wife should in any instance be subjected to change or alteration ~~by the Court~~, by the Court's discretionary application of equity principles, this result would have been attained by omitting the limitation, and wording Section 26 in the same manner as Section 25.

Indeed, there would then have been no point in keeping the two sections separate; they might easily have been combined to read in some such way as:

"Pending a suit for divorce or nullity, or after decree for divorce, or pending a suit by the wife for maintenance where it appears that the husband, without justifiable cause, has abandoned his wife or separated himself from her, it shall be lawful for the Court of Chancery to decree and order such suitable support, etc."

The jurisdictional clause plainly evidences the legislative intent to preserve the common law rights of husband and wife, in the same state in which they have descended to us.

In *Weigand vs. Weigand* (41 N. J. Eq., 202, 209; affirmed by this Court in 42 N. J. Eq.⁶⁹⁹) Van Fleet, V. C. said of this section of the statute:

“The object of the statute under which this suit was brought is to make the right of the wife to support more secure than it was at the common law, by giving her a remedy, *whenever her husband fails to perform his legal duty*, directly against him, instead of leaving her right in that respect to be wrought out, as it has to be at common law, through a third person. And, in my judgment, the statute should be construed to give a wife a right of action against her husband, whenever she separates from him under such circumstances as will enable a third person to maintain an action against him for necessaries furnished to her.”

D. *The statute should be strictly construed, in favor of the husband, and against the vesting of jurisdiction.*

A strict construction, against the claim of jurisdiction, is necessary not only because of the express limitation of the statute, but because of the presumption of the common law in the husband's favor.

On broad and general principles, it is beyond any dispute that when a statute undertakes to invest jurisdiction conditionally, the condition must be *strictly* fulfilled before there can be jurisdiction. Where the condition is the existence of extraneous facts, those facts must positively, clearly and strictly exist before the condition can be satisfied. Under the statute we are considering, it is a legislative condition that before jurisdiction can

vest the husband must have "refused" or "neglected" "to maintain and provide for" the wife. Therefore, before jurisdiction can vest in the Court of Chancery, it must appear clearly and positively that the husband has refused or neglected to maintain the wife.

And it is proper at this point to remark that that is a strict legal question, rather than a practical question; that it must be resolved with reference to the strict legal liability of the husband at the common law, and not with reference to the judgment of the Trial Court. There is no discretion in the Trial Court until jurisdiction vests. The question whether jurisdiction vests is to be decided strictly with reference to the facts developed in relation to the husband's common law liability. Consequently, this Court should resolve that question without regard to the opinion of the Master. His opinion upon a matter not in any sense discretionary has no weight on appeal.

We have spoken of a common law presumption in the husband's favor, as an added ground for requiring a construction of the statute strictly in his favor. Since the statute in no degree alters the husband's common law rights, it is apparent that the new remedy must be applied in such manner as not to infringe those rights. If a presumption existed at the common law in favor of the husband, then that presumption must be given effect in applying the new remedy. If the burden of proof was upon the tradesman at common law, to prove that the allowance made by the husband was insufficient to pay for the wife's necessaries then that burden is upon the wife under the statute. If at the common law the husband was regarded as the first and best judge of the needs of the wife, of his own faculties and of the proper and just amount of the wife's allowance for neces-

saries under all circumstances, then he must still be so regarded, in suits under the statute.

Now, it has at all times been regarded the duty of the husband to afford his wife support commensurate with her necessities, his income and with the station in life of the parties. The wife's remedy at common law, if the husband failed in this duty, was to pledge his credit for the price of "necessaries," whereupon the tradesman had his action against the husband upon the implied contract. What were and what were not "necessaries," has been the subject of much litigation. From its very nature, the word is incapable of exact definition. It must vary in meaning under varying circumstances. Later in this brief we shall undertake to give an exact definition of the term so far as the circumstances of this case are concerned. For the present, however, we desire merely to point out certain general classifications and rules relating to the matter, in order to define the common law position of the husband.

It should be observed, first of all, that the wife was never permitted by the common law to be the judge of what were, and what were not, necessities. The husband was always the judge of these matters, for he "is fitter to be entrusted by the law than anybody else, and that the law will presume no such ill as that a husband should not provide for his wife's necessities." (*Manby vs. Scott*, Sid. 109, 110; Bacon: Albridge. I, 295.) Should the wife, to whom the husband has made allowance in his judgment sufficient for her necessities, order from the tradesman upon his credit the presumption was, in an action by the tradesman, that the allowance was proper, and the burden was upon the tradesman to prove it inadequate.

McCreery & Co. vs. Martin, 87 Atl. Rep., 433.

Montague vs. Benedict, 3 B. & C., 631.
 Seaton vs. Benedict, 5 Bing., 28.
 Kimball vs. Keyes, 11 Wend., 33.
 Mott vs. Comstock, 8 Wend., 544.
 Baker vs. Barney, 8 Johns., 72.
 Debrehan vs. Walker, 3 W. N. C., 26.
 Compton vs. Bates, 10 Ill. App., 78.
 Waite, Actions & Defenses—III, 650 &
seq.—

And it should also be noted, that there is a broad general classification of "necessaries" between those which may be termed "absolute" and those which may be called "relative."

"Necessaries consist of food, drink, clothing, washing, medical attention, and a suitable place of residence. These may be regarded as necessaries in the absolute sense of the word. But the husband may control the style of living, and may by the mode of life, which he adopts, or the position which he allows his wife to assume, confer upon the wife a power to pledge his credit for more than the absolute necessities of life. Practically, what shall be considered as necessaries will vary with the rank, position and estate of the husband."

Am. & Eng. Encyc. Law XV 876.

"The husband may permit extravagances on the part of the wife if he sees fit; but, having discharged the obligation which the law imposes upon him with relation to the wife's necessaries, he is entitled to regulate her expenditures for which he is responsible, by his own direction and judgment."

McCreery & Co. vs. Martin, 87 Atl. Rep., 433.

To sum up the matter, then, the husband is the judge of what the wife ought to have, and if he furnish her with absolute necessaries, or with

money to pay for them, he is not liable to furnish more; unless, indeed, he have "by the mode of life which he adopts or the position which he allows his wife to assume" conferred upon her the right to more. If it be urged by the tradesman that the husband has conferred upon his wife the right to receive more than absolute necessities, then the burden is upon the tradesman, and every presumption with the husband. This being the extent of the common law liability of the husband, remains the extent of his liability under the statute.

It is not contended that this appellant refused or neglected to furnish necessities, in the absolute sense of the term. The suit of the wife is to secure additional money, far in excess of the amount sufficient to pay for absolute necessities.

Consequently, the presumption is with the husband, that he has performed his duty, and is not suable under the statute, and this presumption should have led the Court to adopt a most strict construction of the statute, against the vesting of jurisdiction.

We have noted that the law recognizes and respects the husband's right to judge, in the first instance, what he ought to allow his wife. He is the first and the best judge. He knows better than anyone else what he can and can not afford. He is naturally led by considerations of pride as well as of justice and honor, to maintain his family as decently and comfortably as his means will allow. For these reasons the law has always allowed his judgment, within limits, to prevail, and has cast about him the protecting presumption. Within those limits, his judgment is supreme. And the limits of his discretion are the natural bounds of reasonableness, justice and honesty. Of what effect is it to say that the husband has the right to judge in these matters, if the Court be

permitted to entirely disregard his judgment and to substitute its own?

The husband's right to be the judge is a substantial right, expressly guaranteed to him by the jurisdictional limitation contained in the statute. How is that right to be respected and preserved, if when suit is brought, the Court itself undertakes to be the judge of what should be paid to the wife?

Upon broad principles the husband's judgment (if it is to have any substance whatever) is supreme when exercised within proper bounds, and the question for the Court is not whether if he were in the husband's place he would give more, but whether any reasonable man in the husband's place could honestly and justly have arrived at the same conclusion as the husband. An analogy which readily comes to mind is the situation in which a trial judge is placed who is asked to set aside a jury verdict as being contrary to the weight of evidence; the judge can not substitute his own judgment for that of the jury, but must decide whether any reasonable man could reasonably have come to the same conclusion from the evidence that the jury came to. Another analogy is that situation which is presented when the constitutionality of a statute is questioned, as in *Attorney General vs. McGuinness*, 78 N. J. Law, 346; *Attorney General vs. McKelvey*, 78 N. J. Law, 621; *Hudspeth vs. Swayze*, 89 Atl. Rep., 780.

Upon no other principle whatever can it be said with any truth that the husband is vested with a power to judge. The judgment made by him is of course subject to review, but if on review the judgment of the Court is substituted, of what substance is the right of the husband composed?

The question which the Master in this case should have asked himself from the evidence was

whether this appellant had *abused the discretion afforded him by law*, and unless the master could have answered that question affirmatively, jurisdiction was lacking in the Court, and the bill should have been dismissed.

The conclusions of the master, at the end of the testimony, show on their face that the Master completely ignored this phase of the matter, and that he did not even touch upon the jurisdictional question. All through the case he entertained every presumption *against* the husband instead of in his favor. At once, he placed on the husband the burden of proving affirmatively how much had been paid the wife, and regarded his evidence of earnings with great caution. When the husband could not prove from memory items of expense necessary to his profession, but was obliged to rely on experts (whose testimony was not disputed), the Master disregarded the expert testimony and made an allowance to the husband for such items, based alone upon the items affirmatively proven.

E. *The evidence shows that the husband has not refused or neglected to maintain the wife.*

The evidence shows that the husband's average earnings were less than \$4,000 a year, gross, and not over \$2,000 a year, net.

The evidence as to his gross earnings is full and accurate, and there is no question as to that, so far as the absolute amount of it is concerned, between the dates taken by the Master. The gross earnings amounted to \$9,850 between November 1, 1911 and December 6, 1913, the date of the first hearing.

But the Court clearly erred when he proportioned this gross income and set the amount as four thousand six hundred and ninety-nine dollars per year. The testimony is that the husband was idle and unable to earn any money whatever be-

tween June 10th and November 5th, 1911. The evidence also is that the husband was idle from and after December 6th¹⁹¹³ to and including the date of the last hearing, December 26th, and that on December 26th he had no prospects of obtaining a new position. As is shown by the affidavits filed in this case upon the application for support pending appeal, the husband did not obtain a position until some time after December 26th, 1913. Now the Court was clearly unfair when he struck an average of the gross earnings of the husband in starting his period with the beginning of a productive time and ending it at the end of a productive time. The testimony shows that there were many periods of unproductivity during the period of two years and one month taken into consideration by the Court. For instance, in 1912, a total of sixteen weeks during three different periods, and in 1913, prior to December 6th, a total of seventeen unproductive weeks during three periods. The Court should have started his calculation, in order to obtain an average fair to the defendant, on June 10th, 1911, instead of on November 6th, 1911. By so doing he would have commenced at the beginning of an unproductive and ended with the beginning of an unproductive period. This is the only fair basis upon which to make an average. If the Court had averaged the earnings in this manner through one hundred and twenty-nine weeks instead of one hundred and eight weeks the average gross earnings of the husband per year would have been shown to be less than four thousand dollars. The exact amount is three thousand nine hundred and seventy dollars and twenty cents.

Now, if we take this figure as a fair one, and deduct from it eight hundred dollars for necessary expenses incurred in the prosecution of the husband's profession (which figure of eight hundred

dollars is the Court's own figure) his net annual income would be shown to be thirty-one hundred seventy dollars and twenty cents. The average amount paid to the wife, to wit, thirteen hundred and ninety-two dollars, for the year (which also is the Court's own figure) is an amount equal to forty-four per cent of his total net income.

But we claim also that the Court erred in making the allowance of eight hundred dollars to the husband to cover the necessary expenses incurred by him in and about the prosecution of his profession. All of the expert testimony in the case, which is uncontradicted, is to the effect that an actor in the position of the defendant must maintain a good appearance. He must dress well, he must be seen in good hotels and in nice places, he must entertain to some extent, and he must belong to organizations where he will meet managers and be in line to get business. It would seem to be almost common knowledge that such would be the case, and certainly such a manner of life is necessarily expensive.

The Court did not take this fact into consideration to any extent whatever in making his allowance of eight hundred dollars. That allowance was based on the professional expenses of the husband actually proved while on the road, and did not include any of the necessary expenses of his profession while he is at home.

But the amount is inadequate also as covering the expenses of the husband while on the road. It is perfectly apparent from the testimony that it would be impossible to do what the defendant has done while travelling and living at hotels away from home on less than twice the sum stated by the Court. It would almost seem that this also would be common knowledge. Some of his hotel bills were introduced into evidence and other expenses were testified to which show without any

question that the amount of money necessarily spent by the defendant while on the road was at least fifteen hundred dollars a year. We submit that on the testimony the Court should have considered two thousand dollars per annum a fair allowance for necessary expenses. This would have left the net earnings of the husband at two thousand dollars per year, which, it is apparent from the testimony, is just about what his earnings actually were. Upon this basis the amount he paid to his wife during the interval from November, 1911 to December 1913, was fully seventy per cent. of his net earnings.

The Court made the mistake of dealing with an artist as it would deal with a business man. It made the mistake of entertaining all presumptions contrary to the defendant instead of in his favor. It made the error of ruling out of evidence many parts of the defendant's testimony which he could not trust his memory absolutely upon, and which he had kept no memoranda of. Practically all his necessary expense account was made up from memory afterwards. It should not have been excluded from evidence but should have been admitted. It was the best evidence that could be obtained. It was apparent that the husband had kept no book account and that he had forgotten many things which he did not put down in his memoranda. It was perfectly apparent that his memoranda were carefully made upon his best recollection of all the expenses to which he had been put, and he should have been given the benefit of the presumption that the list so made out was as near to the fact as anybody could get after the end of that long period of time. A business man keeping books would be in an entirely different situation. But to entertain a presumption against the husband under circumstances such as prevailed in this case means the ruling out of prac-

tically all testimony as to expenditures and substituting in their place a figure arrived at by the Court rather by guesswork than by evidence and evidently very much lower than it would be if it were based upon evidence. On the authority of the common law cases already cited, the presumption should have been with the husband. The accounts which he had made up should have been allowed in evidence as his best recollection and he should have been cross-examined upon them. And more weight should have been given by the Court to the testimony of the experts as to the amount of the necessary professional expenses.

The average amounts paid to the wife were in excess of \$1,392 per year.

The amount of one thousand three hundred and ninety-two dollars arrived at by the Master as the amount paid by the husband to the wife per year was based upon his own figures and admittedly these figures did not contain all of the items. In addition to the amounts paid the wife, as kept on the books of the father, the defendant sent her money from time to time, eight hundred and sixteen dollars of which she admitted receiving. There was more of which the defendant kept no account. Therefore, in computing the amount paid to her the Court should have taken into consideration these indeterminate amounts. Not only did the Court refuse to take into consideration all items of necessary expenses of the husband about which his recollection was indistinct, but he refused to consider any sums paid to the wife concerning which the husband's recollection was not distinct and his proof adequate; so that the Court implied a presumption against the husband both ways; when as a matter of law and as a matter of justice the presumptions should have been against the wife and not against the husband.

Now, the amount paid to the wife as estimated by the Court is sufficiently certain, and if we are right in our contention that the Court erred both in the ascertainment of the average gross earnings of the husband and in the ascertainment of a fair and just amount to be allowed him as necessary expenses of business then it follows that the amount paid to the wife was more than seventy per cent of the net earnings of the husband. Or, if we leave the eight hundred dollars allowance as it is and correct the Court's computation of the gross income, the result is that he is shown to have paid his wife about forty-five per cent of his income. Even on the Court's own figures, unfair as they are, if this Court should determine that they are properly computed, it appears that the husband has been paying the wife over thirty per cent of his earnings.

Where the husband's earnings are precarious, so that he never knows in advance how much they will be or how long he will be idle at any given time, where his earnings are derived entirely from his own efforts and he has no income producing property of any sort, and where his earnings are so modest as in this case they are proved to have been, no Court could say, applying the strict rule of construction, that it could entertain jurisdiction under Section 26 because the husband was proved to have "neglected or refused" to support his wife.

If the wife has received 70 per cent of the husband's income, or even 45 per cent of it, he has paid her a larger *proportionate* amount than he was required to have done. The authorities do not in a single instance require by decree the payment of an allowance so large as that voluntarily made by this appellant.

The ecclesiastical cases roughly awarded the wife one-third, upon the analogy of her "jointure" or dower. And so in *Bennett vs. Bennett*, 59 Atlantic Reporter, 245, Vice Chancellor Emory decreed one-third of the husband's income to be paid to the wife where he was earning some six thousand dollars a year. The cases in this state and generally, however, have not been so liberal to the wife, and have had regard more to the common law notion of "necessaries" than to the arbitrary proportion of one-third. For instance, in *Parker vs. Parker*, 57 N. J. Eq., 577 where the circumstances were of peculiar cruelty and where there had been an absolute failure to afford any means of support to the wife, Vice Chancellor Gray decreed eight dollars a week for the maintenance of the wife and child, where the husband owned a house and lot and received wages of twenty dollars per week. So in *Corey vs. Corey*, 11 N. J. Eq., 400 where the wife was aged and unable to work, and where the husband through her help had acquired an estate of between five and seven thousand dollars, the decree was for one hundred and forty dollars per year. Vice Chancellor Pitney, in *O'Brien vs. O'Brien*, 49 N. J. Equity, 436, decreed one hundred and fifteen dollars per month and one hundred and fifty dollars counsel fee to the wife and child, where it appeared that the total income of the husband was in the neighborhood of eighty-seven hundred dollars; that is, about sixteen per cent. In *Elliot vs. Elliot*, 48 N. J. Equity, 239, the estate of the husband amounted to seven thousand dollars besides his earnings from business, and the decree was for three dollars a week and twenty-five dollars counsel fee. In the recent case of *Howey vs. Howey*, 78 Atl. Rep., 696 (affirmed by this Court, 77 N. J. Equity, 591), Vice Chancellor Leaming awarded four dollars a week upon the husband's income

of sixty dollars per month; about twenty-eight per cent. In all of these cases the Court took jurisdiction because of the previous "refusal or neglect to support." But the decrees themselves provide smaller proportions of income ~~than the~~ defendant in this case voluntarily paid to his wife.

In *Harding vs. Harding*, 180 Ill., 481 the Court on appeal held sixty-four hundred dollars a year to be an excessive allowance to the wife where the husband's clear estate was two hundred and fifty thousand dollars. The amount of the award in this case was less than one-half of the income.

In *Oraund vs. Oraund*, 157 Ill., 321, fifty dollars a month was held excessive as an allowance, where the husband's salary was one hundred and twenty-five dollars a month.

In *Hall vs. Hall*, 78 Southwestern, 1127 (Kentucky) two thousand dollars alimony and one hundred and fifty dollars counsel fees was held excessive where the husband owned two pieces of property worth about thirteen thousand dollars with a house on each.

In *McGrady vs. McGrady*, 48 Mo. App., 688 twenty-five dollars a month was held to be an excessive allowance to a farmer's wife where the husband owned one hundred and sixty acres of land worth twenty to thirty-five dollars an acre.

In *Newsome vs. Newsome*, 95 Kentucky 383, four hundred dollars a year was held excessive where the husband was worth thirty thousand dollars and the wife three thousand dollars.

In *Cowles vs. Cowles*, 29 N. Y., App. Div., 476, one-third of the husband's income was held to be excessive where it is derived from his personal services and liable to be reduced without his control.

Examining the testimony in this case with the view to determining whether the wife has been furnished with such "necessaries" as she is en-

titled to have at the common law when living separate from her husband, we fail to find anywhere in the case any evidence that she has not enough money to get everything that can be considered "necessaries." Certainly she has had all "necessaries" in the absolute sense of the term. In its comparative sense, in which "necessaries" must be defined with regard to the husband's standing, there is no evidence in the case that the wife, when she and the husband were living together, kept up any more of an establishment than she now keeps up on the money which he pays her. She has a suitable house for which he pays \$22 a month rent, and which house she herself chose. It was altered in order to include a bathroom for her convenience. She has a woman who comes in and does the heavy work, such as washing and cleaning. Her mother and sister live with her and help her with the other work. There is no evidence that she could not get a maid if she desired to have one. On her own statement the children had not wanted for anything. All her doctor's bills, medicine bills, etc., have been paid by the husband. The case is absolutely without any evidence that she wanted for any necessary thing.

And no express standing or style of living has been proved in the case. There is no testimony to show that the wife ever lived or was accustomed to live, either before her marriage or after her marriage, in any other manner than she now lives. The only distinct evidence of her inability, or claim to inability, to afford anything she wants is her evidence to the effect that she does not feel justified in going to amusements. But surely this could not be classed as a "necessary." What she feels justified in doing is not relevant, in any aspect, for the question of what she is able to afford

is a question of fact to be arrived at from an examination of her expenditures. But she does not set forth in her testimony any facts by which the Court can judge whether or not she has money left over to buy luxuries or useless things or to attend amusements.

The significant fact to be gleaned from the testimony is that during all the time that the parties were living together there is no evidence that necessities were not paid for; in fact it is apparent from the reading of the testimony that all necessities were paid for. And yet the cost of such necessities while the husband was living with the wife did not exceed, according to the testimony, the amount of maintenance allowed the wife by the husband after January 1st, 1915, the date of the separation. In other words, the wife is seeking to have the Court determine as inadequate an allowance of one thousand three hundred and ninety-two dollars per year when the testimony shows that during the period of co-habitation a sum no larger than that was sufficient to pay all household and personal expenses.

Having in view then the necessity for a strict construction of the statute upon the jurisdictional question, the presumption in favor of the husband, the narrow meaning of the word "necessaries" at the common law, the right of the husband to fix the wife's allowance, so long as he does so honestly and reasonably, and the usual percentages of income awarded by the authorities, can it be said that the husband, under the evidence in this case, "refused or neglected" to provide for his wife?

It is submitted, for the foregoing reasons, that the Master erred in assuming jurisdiction.

POINT II

If the Court should feel that the Court of Chancery had jurisdiction in this case then it is submitted that the award is excessive. This for the reasons already set forth under Point I.

POINT III

The writ of ne exeat should have been quashed.

The writ was issued upon the wife's affidavit. The Court refused to vacate it, upon application made on September 29. No evidence material to the questions was adduced at the hearings. The writ has not been discharged, so that it still binds appellant, as part of the decree.

The writ should be vacated for the following reasons.

1. The wife's affidavit upon which the writ issued, was insufficient to support it. (P. 22)

The affidavit does not sufficiently prove defendant's intent to leave the State. It should be positive on this point.

Yule vs. Yule, 2 Stock., 141.

The only evidence of the sort which the affidavit contains is that in September, 1912, a year before the affidavit was made, he said that he would go to Australia if pressed for money. But this evidence tends to show, not that he *intends*, but that a year before he *intended* to leave the jurisdiction.

2. The affidavit does not show that the defendant's leaving the State would defeat her claim, or that his intention in leaving is to defeat her claim

One or the other fact must appear—

Yule vs. Yule, *supra*.

There is no allegation of purpose or intent. She prefers to base her affidavit on the theory that his leaving will necessarily defeat her claim. On her own showing, his leaving will be "to join his company," that is, to pursue his regular professional duties.

Since she has not asserted that defendant *intends* to defeat her claim, she should have shown that the *effect* of his departure would be to defeat her claim. And this she should have shown *positively*.

But her affidavit gives no *facts*. She merely says that she *believes* such will be the effect. This is an apprehension, merely. Clearly, on her own affidavit, such would not be the effect of his departure, but rather the direct opposite. Unless he pursue his professional engagements her claim would certainly be defeated for how otherwise could he earn his living, and hers? But his leaving the jurisdiction for the pursuit of such business (which she admits is his purpose) is an indispensable pre-requisite to the realization of her claim.

2. The wife's charge of a declaration of intent made a year previously is denied by the husband's affidavit; and the denial is corroborated by his father, so far as it is susceptible of corroboration. The wife's evidence is unsupported. (p. 20)

3. The husband's affidavit, and the evidence at the hearing, show the husband to be a resident of this State. The wife does not deny it. Therefore, his absence on business could not have had the effect of defeating her suit; she might have obtained valid service of process upon him, in his absence. (p. 19)

POINT IV

**The decree of the Court of Chancery
should be reversed, and the bill dismissed.**

Respectfully submitted,
DOUGAL HERR,
Of Counsel with Appellant.
Smith, Mabon & Herr,
Solicitors.

THE ARTHUR H. CRIST Co., Cooperstown, N. Y.
New York Office, 220 Broadway.

New Jersey Court of Errors and Appeals.

Between

ELOISE MACKAY,

Complainant-Respondent,

- and

EDWARD JAY MACKAY,

Defendant-Appellant.

On Bill, &c.

On Appeal.

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RESPONDENT'S BRIEF.

The bill in this cause was filed on or about September 2, 1913, by the complainant, for separate maintenance under the 26th Section of the Divorce Act of 1907. The defendant filed an answer in which he denied the abandonment, but at the hearing before the Court he admitted the abandonment. He contended that he was paying his wife an adequate amount at the time the bill was filed.

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It appears from the evidence in the record that his payments to his wife were very irregular; that from June, 1911 (p. 58, l. 19), when they moved to Coytesville until January, 1912, he did not give her any money whatever (p. 37, l. 6), but paid the rent of her house, paid for her coal and gas, and also paid the bills contracted by her with the grocer, butcher, baker, etc. The house that he rented for her is on a lonely country road near Coytesville, N. J., and in close proximity to the home of his parents, who, she claims, make life disagreeable for her. From February to April 1913, he gave her \$1.50 a day from which she was obliged to pay her own bills to the tradesman

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(p. 38, l. 17); and from that time up to the date of filing the bill he gave her \$15 a week to supply food, &c. (p. 40, l. 9), which, with the rent, fuel and light, amounted to about \$25 a week.

10 It appears from the letter annexed to the bill of complaint filed herein and marked Ex. P-6, that defendant had become infatuated with another woman and, about October, 1912, he abandoned the complainant; that he returned home about the month of January, 1913, and remained with her about a week, when he struck her (p. 44, l. 29; p. 69, l. 33) and abandoned her, since which time he has never returned to her. After he abandoned her he continued, through his father, Frank Mackay, to pay her rent and to pay for the coal and gas. Just after that time he ceased paying the tradesmen and allowed her \$15 a week with which to pay the grocer, butcher, baker, milkman, etc., and also for clothing and all other
20 household expenses.

The stenographic record in this case was so imperfect that the printed record is almost unintelligible. The Court, however, found as a fact from the testimony of the defendant himself, which we could not contradict, that for the past two years he had earned about \$4700 a year. From this the Court allowed him \$550 a year for his own personal expenses and \$250 a year for other expenses, such as buying extra costumes, etc., a
30 total of \$800, which sum was deducted from his gross earnings before any calculation as to alimony was made, but, as a matter of fact, the testimony showed that the defendant had only purchased one extra costume in the last two years which cost him but \$60. The Court deducted this \$800 from the \$4700, which left a balance of \$3,900 a year. The complainant has no trade or profession (p. 41, l. 12) and no means whatever of her own (p. 41, l. 14), and the Court
40 made an allowance to her of \$40 a week or \$2080 a year for the support of herself and two children,

one of whom is now about three and one-half years of age and the other two and one-half years of age.

The testimony also showed that the defendant had been offered a contract for two years with a moving-picture concern. This moving-picture concern offered to give him, according to his own testimony, his average salary and a "bonus" of \$200 or \$300 a year in addition thereto, but he did not accept it (p. 90, l. 28; p. 107, l. 32).

The defendant tried to show large expenditures, but it appeared from his own testimony that when he was working in Washington, D. C., in 1911, for \$175 a week, while he was still in love with the complainant, he got rooms and board for \$10 a week (p. 105, l. 30), and his father, Frank Mackay, swore he one time found the great Sorelli, who probably earned the highest salary of any actor living, in a cheap lodging house on Fourteenth Street, New York.

The defendant has appealed from the decree and also claims that the appeal extends to an order in *ne exeat* made sometime before that. We maintain that the appeal is only from the final decree and besides that the time within which to appeal from the order had expired at the time the appeal herein was taken. The evidence shows that the defendant was infatuated with Adele Blood, to whom he wrote the letter marked Ex. P-6, on October 17, 1912, about the time he abandoned the complainant. Complainant also offered to prove that in the Winter of 1912-1913 the defendant lived with a woman named Campbell in New York City, but the offer was overruled (p. 71, l. 26). The record in the *ne exeat* proceeding shows that the complainant is defendant's third wife, and it is fair to infer from all the evidence that if his expenditures were high, it was because of his fondness for other women.

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POINT I.

Even though a husband provides some support to his wife he comes within the statute, if such support is not in accordance with his means.

10 "A husband who without justifiable cause separates himself from his wife and neglects to provide for her such a support and maintenance as the Court shall adjudge 'the nature of the case and the circumstances of the parties render suitable and proper' is guilty of 'refusing and neglecting to maintain and provide for her' in the sense in which these words are used in the twentieth section of the act concerning divorces."

O'Brien v. O'Brien, 49 Eq., 436;

Shinn v. Shinn, 51 Eq., 78.

20 The conduct of the defendant after he abandoned the complainant was most unjust. He first sent her (p. 38) Exhibit P-3, which is as follows:

"I am not responsible for any debts except my own, or those contracted by order from me."

On the same page is Exhibit P-4, written in February, 1913, which is as follows:

30 "Lou: Enclosed please find \$1.50. Please pay your bills for every day as they come in. I don't wish any more credit from the tradespeople. This amount a day will more than cover the necessities. Acknowledge this and send over my rubbers. Ed."

On February 5, 1913 (top of p. 41), he sent the following:

40 "Lou: Enclosed please find \$5 to cover your expenses to date, 5th, 6th and 7th, leaving you also a margin of 50¢, also am sending letter that was in the box yesterday morning. Ed.

"P. S. Pay your bills as they come in. I will not accept any more credit in this town."

POINT II.

The amount allowed to complainant by the Court was very conservative under the circumstances.

It appears from the record that the defendant is a leading man in his profession. His father, Frank Mackay, says (p. 122, l. 7): "Of course men like that ought to be paid \$1,000 a week."

All the evidence seemed to show that the defendant could have worked the entire theatrical season, which, complainant says, is 40 weeks, at from \$150 to \$175 a week at the lowest. Defendant testified (p. 78, l. 31):

"Q. From June 9, 1913, to July 19, 1913, a period of six weeks, what were you doing?
A. I was with the Poli Stock Company, Washington, D. C.

"Q. And you were making then, what? A. \$225 a week."

As to this the complainant testifies (p. 34, l. 14):

"Q. Where was he between that time? A. With the Poli Stock Company of Washington.

"Q. When was he with that company? A. About the latter part of May to the middle of July.

"Q. What year? A. 1913.

"Q. This year? A. Yes, sir.

"Q. Did he tell you anything about his salary? A. He did not when he left, but when he returned he told me that they had offered him \$300 a week to return.

"Q. Do you know of your own knowledge what he has been getting heretofore? A. \$175 to \$200 to \$250 a week."

The Court below was extremely liberal with the defendant. In making up the total earnings of the defendant, it took into account a period from

December 25, 1911, to April 13, 1912, during which time the defendant and a man named Stubbs were running a theatre on their own hook. Defendant said he only earned a salary of \$75 to \$100 then and that he got \$200 that he called a "bonus," but he produced no books or records to show that that statement was true, although they kept books that were apparently accessible to the defendant and no reason was shown why they should not have been brought into court. As to this venture he said, "We took a chance," but he might have been earning his usual salary of \$175 a week. He also took into account a period from May to September, 1912, when the defendant claimed that he received only about \$100 a week. The calculation of the Court then was not based on the defendant's average salary—but an amount considerably below his average salary. Yet we find by his own showing that he was offered a contract for two years at \$200 or \$300 above his average salary.

(P. 90, l. 28.) "Because there came a party at one time from a moving-picture concern in Chicago, and they offered to give me my yearly earning salary, and a bonus of \$200 a year more to join him," &c.

This offer appears to have been made about November, 1913. He also took into account the extra payments made after the bill had been filed. These extra payments (and there was a number of them) not only show that the defendant had been dealing unjustly with the complainant previous to that time, but that he had the means for a more adequate allowance.

So far as the defendant's expenditures are concerned there is no reason why they should be large. He admits that while in Washington, D. C., with "Every Woman," while earning \$175 a week, he got a room and board for \$10 a week. He claims to have paid \$45 a month for a room

at the Southern hotel "because he was a manager." His carfare, with the exception of a sleeper, is paid by the management. The only extra moneys he paid for costumes in two years was \$60 for a suit, and this he told the complainant he had been lucky enough to sell.

"Since it is a secondary rule of statutory interpretation, derivable from the primary one thus defined, that a legal term employed in a statute is as far as possible to be given its already established meaning, the result just stated follows of necessity, namely, that the statutory alimony will be moulded by the judicial hands into shapes differing as little from those of the unwritten law as the other statutory words allow." 10

Bishop on Marriage, Divorce and Separation, 2nd Vol., p. 1041;
Black v. Black, 68 Wis., 303.

In the case of *Downing v. Downing*, 54 Atl. Reporter, 542, the husband earned from \$820 to \$1,000 a year. There was a wife and one child. The Court allowed \$30 a month for the wife and \$10 for the child, making \$40 in all, or \$480 a year or 48% of the husband's earnings. 20

"Every wife is entitled to a home corresponding with the circumstances and condition of her husband, over which she shall be permitted to preside as such wife, and it is the duty of the husband to furnish such home." 30

Shinn v. Shinn, 51 Eq., 78.

"When the husband's income can be determined, the wife will be allowed one-third thereof as alimony on a decree of divorce for cruelty. Other circumstances may increase the allowance; as for instance, having the care of three children."

Moran v. Moran, 2 Atl. Rep., 777.

It appears from the record that the defendant is able to earn from \$6,000 to \$7,000 a year if he chooses to work. 40

**We therefore most respectfully submit
that the decree of the Court of Chan-
cery should be affirmed.**

WELLER & LICHTENSTEIN,
Solicitors for Respondent.

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