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**PETITION.**

Filed June 21, 1926.

**In Chancery of New Jersey**

To His Honor, Edwin Robert Walker, Chancellor 10  
of the State of New Jersey.

The petition of Harry Lazarus of the City of  
Passaic, County of Passaic and State of New  
Jersey, respectfully shows:

1. Your petitioner was lawfully joined in the  
bonds of matrimony to his present wife Marion  
Lazarus, the defendant in this suit, on the 28th  
day of January, 1923, by a Rabbi of the Jewish  
Gospel. 20

2. Petitioner was a bona fide resident of the  
State of New Jersey when this cause of action  
arose, and has ever since and for more than  
two years next preceding the commencement of  
this action continued to be such resident.

3. No children were born as a result of the  
marriage aforesaid.

4. That defendant on divers dates with divers  
persons and at divers times has committed 30  
adultery, particularly with one Herman Simon  
of the City of Passaic, County of Passaic and  
State of New Jersey, defendant having committed  
adultery with said Herman Simon on the 17th  
day of June, 1926 at and in the vicinity of Van  
Riper avenue, situate in the City of Clifton,  
County of Passaic and State of New Jersey.

5. Your petitioner therefore prays that the  
marriage between your petitioner and the  
defendant may be dissolved for the cause afore- 40

*Petition.*

said, according to the statute in such case made and provided, and that he may have such further relief as may be just.

And your petitioner will ever pray, &c.

10

IRVING L. WERKSMAN,  
Solicitor of Petitioner.

IRVING L. WERKSMAN,  
Of Counsel.

STATE OF NEW JERSEY, }  
COUNTY OF PASSAIC. } ss.

20

HARRY LAZARUS, being duly sworn according to law, upon his oath deposes and says, that he is the petitioner named in the foregoing petition, and that the said petition is not made by any collusion between him and the defendant, but in truth and good faith for the causes set forth in the petition.

HARRY LAZARUS.

Sworn and subscribed before me  
this 18th day of June, 1926.

30

LILLIAN SHOOLS,  
A Notary Public of New Jersey.

40

**ANSWER.**

The defendant, Marion Lazarus, residing in Passaic, County of Passaic and State of New Jersey, answering the petition, says:

1. She admits the statements contained in paragraph 1. 10

2. She admits the statements contained in paragraph 2.

3. She admits the statements contained in paragraph 3.

4. She denies the statements contained in paragraph 4.

She prays that the petition may be dismissed.

ALBERT J. BIEDERMAN, 20  
Solicitor for Marion Lazarus.

30

40

*Harry Lazarus, direct.*

**TESTIMONY.**

IN CHANCERY OF NEW JERSEY.

May 10, 1927.

10	<p><i>Between</i></p> <p style="text-align: center;">HARRY LAZARUS,</p> <p style="text-align: right;"><i>Petitioner,</i></p> <p style="text-align: center;"><i>and</i></p> <p style="text-align: center;">MARION LAZARUS,</p> <p style="text-align: right;"><i>Defendant.</i></p>
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20 Transcript of shorthand notes of testimony taken in the above-entitled cause before his Honor, Alonzo Church, Vice-Chancellor, at the Chancery Chambers, Newark, New Jersey, in the presence of John W. McGeehan, Junior, for petitioner; Alfred J. Biederman (by Merritt Lane) for defendant.

HARRY LAZARUS, sworn for the petitioner.

*Direct examination* by Mr. McGeehan.

30 Q Mr. Lazarus, you are the petitioner in this case? A Yes, sir.

Q And are the husband of Marion Lazarus?  
A Yes, sir.

Q When were you married to her? A January 28, 1923.

Q Or was it the twenty-sixth, 1923? A Well, I think—

Q Where were you married? A At Paterson, New Jersey.

40

*Harry Lazarus, direct.*

Q And where have you lived since that time?

A At the time of the marriage I lived at 114 Autumn street, Passaic, New Jersey.

Q How long did you continue to live there?

A About three and a half years.

Q That was some time in 1926? A In 1926, June. 10

Q Sir? A To June seventeenth, 1926.

Q And where did you move from there— Oh, was that at the time you separated from your wife? A Yes, sir.

Q You moved to—and have you since continued to live in this state? A Yes, sir.

Q Any children born of this marriage? A No, sir.

Q What were the relations between you and your wife up to sometime in or around the year 1926? How did you get along? A Well, we lived very happy. 20

Q And in or about the month of June, 1926, did your happiness continue or did something come up that marred it? A Something that came up that made me suspicious.

Q When was that? You don't need to give the date, if you don't know the exact date, but give the month, if you can. A Well, it happened in June. 30

Q In June, 1926? A Yes, sir.

Q And what was it that came up then; what occurred that made you suspicious? A Well, I happened to eat in a certain restaurant at Montclair and I happened to come in one day and Mr. Vreeland says to me, "Harry—"

Q Now, wait a minute.

The Court: No.

*Harry Lazarus, direct.*

Q You can't tell what was said. Did Mr. Vreeland say something to you or not? A He did say something to me.

10 Q All right. Now, after Mr. Vreeland said something to you in this restaurant in Montclair in June, 1926, did you observe anything of your wife's conduct after that? A I did.

Q And when did you make the first observation of something out of the ordinary in your wife's conduct? A Two days after.

Q Can you give us approximately what that date was? A It was on June sixteenth.

Q June sixteenth? A Yes, sir.

Q Now what did you see on that day? A I saw my wife meet Mr. Simon.

20 Q Were you with your wife just before she met him? A Yes, sir.

Q And were you walking or riding in some conveyance? A I was riding in a car.

Q Whose car? A My car.

Q And who else was riding in that car before this meeting? A Nobody else.

Q Were you all alone? A My wife and myself.

30 Q That is what I want to know. And where did you drive from and to where in that car with your wife? A Well, the first place I went was to the barber shop.

Q And did you stop your car when you went there? A I did.

Q Where was that barber shop located? A The barber shop was located on the easterly side of Lexington avenue; I can't just place it.

Q Lexington avenue and what other street? A Lexington and Monroe street.

40 Q You mean, you don't know the compass point at the corner? A Yes, sir.

*Harry Lazarus, direct.*

Q One of the corners of Lexington and Monroe streets, is that right? A Yes, sir.

Q In what municipality? A Passaic, New Jersey.

Q Where did you stop your car when you went in this barber shop? A I stopped on one corner of Lexington avenue. 10

Q On the same corner as the barber shop or not? A No, sir; diagonally across.

Q Now while you were in that barber shop, did you hear or see anything? A Yes, sir.

Q What did you hear and what did you see? A I heard the tooting of my horn in my car.

Q And did you do anything when you heard that? A Yes, sir; I went to the window and looked out and saw Mr. Simon coming toward the car. 20

Q Mr. Simon? A Yes, sir.

Q Do you know Mr. Simon's first name? A Yes, sir.

Q What is it? A Hymie.

Q Hymie? A Yes, sir.

Q Is that his correct name or is that his nickname? A Well, that is what I understand they call him.

Q Hymie or Hermy? A Well, maybe Her- 30  
man Simon, but I understand his name is Hymie; that is what I heard people calling him.

Q Is Mr. Simon here today? A Yes, sir.

Q Will you point him out, please? A He is sitting in the back, last row.

Q The man who just stood? A Yes, sir.

Mr. McGeehan: Is that admitted to be Mr. Simon?

Mr. Lane: Yes, sir. 40

*Harry Lazarus, direct.*

Q Now, you say you saw Mr. Simon come over to the car; is that right? A Yes, sir.

Q And what did he do, when he got to the car? A He just stopped to talk to my wife.

Q And what did he do after that? A Well, that is all I saw him, just talking.

10 Q Well, did he stay there or did he leave? A Well, he stayed there a short while and then he left.

Q Now, were you subsequently shaved or given a haircut or whatever you got? A No; I was waiting for my next, to be shaved.

Q Were you after that shaved or given a haircut? A After that I was shaved.

Q Then did you come out of the barber shop? A Yes, sir.

20 Q Did you go to the car? A I did.

Q Did your wife say anything to you about Mr. Simon having spoken to her? A No, sir.

Q Now, this was what time that day? A It was about half-past seven of June sixteenth.

Q In the morning or evening? A Evening.

Q Now, on that same evening did you—where did you drive to with your wife? A My wife asked me to go shopping and I drove her to the grocery store to do her shopping.

30 Q And waited for her? A I waited for her.

Q Now, later that evening, did your wife leave you, later that evening, did your wife depart from your company? A Well, she did not depart until she asked me to take her to her father's store.

Q Did you take her there? A Yes, sir.

Q And while there did she remain with you or leave you? A She left me.

*Harry Lazarus, direct.*

Q Under what circumstances? Just tell how she left. A She went into the store and she didn't find her father and mother there, so she said to me, "Harry, I am going over; I think my mother and father is over at the grocery store and I want to meet her." Well, after she left I followed shortly. 10

Q Did she leave on foot or how? A She left by car.

Q Whose car? A Her father's car.

Q Where had that been? A Right in front of the store.

Q And you say she drove away? A Drove away.

Q You had your car there? A Yes, sir.

Q What did you do? A I waited until she drove away and I followed her. 20

Q And where did she drive to? A She drove down Passaic avenue and—

Q Where did she wind up? A She wound up on Elm street, Passaic.

Q Sir? A Elm street, Passaic.

Q Elm street. And what did she do when she got there? A She stopped the car.

Q Where did she stop your car? A I stopped my car a short distance away, across the way from her car. 30

Q Is Elm street a much used street or not? A Well, very few people pass.

Q Well, is it a street with a lot of stores on it and bright lights? A No stores.

Q And so on? A No bright lights.

Q Is it close to any street that is a busy street? A It is.

Q What street is that? A Monroe street.

Q And do you know where Mr. Simon has his store or place of business? A Yes, sir. 40

*Harry Lazarus, direct.*

Q What street? A On Monroe street.

Q Near what corner? A Near Lexington avenue and Elm street.

10 Q When your wife stopped her car and you stopped your car somewhere on the other side of the street, did you see anyone come to her car? A Yes, sir.

Q Who came to it? A Mr. Simon.

Q How long did he remain there? A He remained there about five minutes.

Q And did you make your presence then known to your wife or him? A No, sir.

Q Did he come in to her car or not? A No, sir.

20 Q After talking to her for five minutes, what did he do and what did she do? A She drove away in the car and he walked back towards Monroe street.

Q And then where did you go? A I just stood there with my car.

Q All night? A No, sir.

Q Well, where did you go after that? A I waited a short while and I went back to her father's store.

Q That is where you had left her? A Yes, sir.

30 Q And did you meet her there? A Yes, sir.

Q Did she say anything about having met Mr. Simon? A No, sir.

Q Well, now, this, you say, then, was on the sixteenth of June? A Yes, sir.

Q Where did you go with her after that? A We went to her father's home.

Q Did you watch her on the seventeenth of June? A I did.

40 Q What time of the day did you begin to watch her on the seventeenth of June? A I

*Harry Lazarus, direct.*

went to my place of business and I started about nine o'clock in the morning.

Q You started to watch her about nine o'clock in the morning? A Nine o'clock in the morning.

Q And was there any meeting between her and Mr. Simon during the daytime of that day? A Well, I can't see. 10

Q Sir? A I didn't see any meeting in the daytime.

Q Did she or he go to any of the other's place of business or residence that day, during the daytime? A I didn't see that.

Q So the only contact that you know of was later in the day? A In the evening.

Q In the evening. All right. Now, on the evening of the seventeenth of June, 1926, did you see your wife, and if so where? A I did see my wife. 20

Q Where did you see her the first time that evening? A I saw her leaving my home.

Q What time? A Well, about eight o'clock.

Q And when she left your home, where were you? A I was about two hundred feet away from my home.

Q In what? A In a car, parked.

Q Who did you have with you? A Mr. Stark. 30

Q How do you spell that? A S-t-a-r-k.

Q And who else? A Nobody else.

Q Just you and Mr. Stark? A Yes, sir.

Q Now, when you saw your wife leave your home, how did she leave, on foot or in some conveyance? A She left on foot.

Q Where did she go to, if you know? A She walked down to Lexington avenue and turned left. 40

*Harry Lazarus, direct.*

Q And did you follow her? A Not immediately.

Q You did not? A No.

Q You saw her disappear from the street, then? A I just saw her turn down Lexington avenue.

10 Q You saw that she turned to the left? A Turned to the left.

Q And do you know whether that is, from your house, in the direction of Elm street or not? A No; it is away from Elm street.

Q Is it toward Monroe street? A Away from Monroe street.

Q Away from Monroe street. And you say you did not follow immediately? A Did not.

20 Q How soon afterward did you? A Well, about a minute or two.

Q Then you followed, as soon as she got around the corner? A Around the corner.

Q I see. Did you catch sight of her, then, when you came to the street she turned on? A As soon as we started with the car and we turned around, we saw her.

Q You did. Now, where did she go to? A She went up Lexington avenue towards Clifton.

30 Q Who did she meet, if you know? A She met Mr. Simon.

Q Did you see her meet Mr. Simon? A No; I didn't see her meet Mr. Smon.

Q Well, did you see her with Mr. Simon? A I did see her with Mr. Simon.

Q And where was she with Mr. Simon? A About Lexington avenue and Burgess Place.

Q Was he in the car or on foot? A He was on foot.

40 Q What time was that, about, that they met? A I should judge, about a quarter after eight.

*Harry Lazarus, direct.*

Q Was it light or dark at that time? A It was just getting to turn dark.

Q Just getting dark. Are you sure of the time or are you just guessing at the hour? A Well, I am just about—well, I am almost positive of the hour, because I had a watch on my hand.

Q That was in June? A Yes, sir. 10

Q Daylight saving time? A Yes, sir.

Q And it was beginning to get dark? Was it beginning to get dark? A Well, it was light at that time.

Q Light. All right. Now, did you continue to watch her after she met or was with Mr. Simon? A No. We stopped the car for a short time when we turned around, waiting for another party to come up.

Q Who was the other party that you were waiting for? A Mr. Fresky. 20

Q Mr. Fresky? A Yes, sir.

Q Did Mr. Fresky come up? A He came up immediately with a car, too.

Q So that you had two cars? A Yes, sir.

Q Well, did you follow her further, after Mr. Fresky arrived? A After Mr. Fresky arrived we got all into one car and we followed.

Q Whose car was that, yours or his? A Stark's car. 30

Q In Mr. Stark's car? A Yes, sir.

Q That was the one you had been in all the time then? A No; we were in Mr. Fresky's car, first.

Q Mr. Stark had Mr. Fresky's car; is that right? A Yes, sir.

Q Then, Mr. Fresky came up in Mr. Stark's car? A Mr. Stark's car and we all got in.

Q I see. And who drove that car? A Mr.— 40

*Harry Lazarus, direct.*

Q When you all got in it? A Mr. Stark.

Q Where did you ride? A I rode right next to Mr. Stark.

Q In the front or the rear? A In the front.

Q Who was driving and where did Mr. Fresky ride? A Mr. Fresky was riding in the back, in the rear.

Q Where did you drive from there, after you all got in? A Mr. Stark drove us down Lexington avenue.

Q Is there any park in the vicinity of that part of Passaic? A Well, not Passaic; in Clifton.

Q Or in Clifton. Is there any park near there? A Yes, sir.

Q Where was that park with relation to the direction you saw them walking? A The park was quite a distance down from it.

Q Well, were they walking toward or away from that park? A They were walking towards the park.

Q An where did you come upon them next? Where did you see them next, after you saw them together, just before you waited for Mr. Fresky? A We saw them—after we were—well, about a block or two after we started riding.

Q I see. They were still walking? A Still walking.

Q And did you continue to follow them? A Yes, sir.

Q Where did they go to? A They were walking on Lexington avenue towards Clifton.

Q Where did they go to? A They went to that park in Clifton.

Q And when they got there was it light or dark? A Well, it was—it was not dark and it was not light at that time.

*Harry Lazarus, direct.*

Q Was it getting dark? A It was getting dark.

Q Where did they go in the park? A They sat down on a bench.

Q Where did you go with your car? A We went one street further and we parked in a side street. 10

Q And did you then approach nearer to them, after parking on the side street? A We did not.

Q Could you see them from the side street? A At that time we could.

Q And you say they were sitting on a bench? A Yes, sir.

Q Did you see the position that they were in? What position were they in in the park? A They were just sitting near each other. 20

Q Yes. Just describe it fully. What was the position of each? A Well, at the time they first came, I could see; but after, when it got dark, we couldn't see.

Q When you could see, what was the position they were in in the park on that bench? A Well, they were sitting near to each other.

Mr. Lane: I object to leading.

Mr. McGeehan: I am not leading. I am asking. 30

Mr. Lane: I am afraid you might.

Mr. McGeehan: You are afraid I might?

Mr. Lane: Yes.

Mr. McGeehan: I assure you I won't.

Q You say, they were sitting close? A Yes, sir.

Mr. Lane: He said "near." 40

*Harry Lazarus, direct.*

Q They were sitting near? A Near each other.

Q What else? Just describe what else they were doing. A Well, that is all I saw.

Q Just describe how they were sitting near. Give a full description of what you saw of them on that bench, please. A Well, I was in a car at the time, and, when they sat down, I just saw them sitting close and I couldn't see anything more at the time.

Q All right. And how close were they sitting? A Well, just—why, they were then rubbing elbows.

Q Rubbing elbows. I see. Not at arm's length? A No.

Q Now, after that how long did you remain there? A I remained there for about an hour.

Q And where did you remain, in the car or out of the car? A In the car.

Q And did both these other men remain there also? A Well, occasionally we walked out.

Q Occasionally you walked out? A Walked out—

Q Did you ever walk toward where they were? A Yes, sir.

Q Well, did you see them after that? A Yes, sir.

Q All right.

Q (By the Court.) What were they doing when you saw them?

Mr. McGeehan: Yes.

The Witness: Well, we walked over and we walked down towards Clifton avenue.

Q What were they doing? A After I saw them, I saw them kissing each other.

*Harry Lazarus, direct.*

Q In the park? A Yes, sir.

Q Were they sitting on the bench then? A Yes, sir.

Q In addition to kissing each other did you see what else they were doing? A I saw Mr. Simon holding his arm around my wife and kissing her; that is all I saw. 10

Q Now, did they leave that bench? A I didn't see them leave the bench.

Q Did you see them after they were—do you know whether they left the bench without seeing them getting up from the bench? A I didn't see them get up from the bench.

Q I didn't ask you that. Do you know whether they left the bench, by seeing them afterward? A I know they left the bench.

Q Well, why do you know that? Just tell us where you saw them. A I saw them walking up Lexington avenue. 20

Q All right. That was after they were on the bench? A After.

Q Then you know they left the bench, don't you? A Yes, sir.

Q Now, what kind of a street is—I withdraw that.

Q (By the Court.) Where did they go?

Mr. McGeehan: Sir? 30

The Court: Find out where they went on Lexington avenue.

Mr. McGeehan: Yes, sir.

Q Where did they go on Lexington avenue?

A They walked up about two blocks and turned right on Van Riper avenue.

Q What kind of a street is Van Riper avenue with respect to its lighting along there? A There was no lights on that street or no homes. 40

*Harry Lazarus, direct.*

Q No homes or no lights? A No, sir.

Q Was it a paved or unpaved street? A It was a paved street.

Q What was there inside of the pavement, if there were no homes, were there vacant lots, woods or park or what? A Well, vacant lots and brushes.

Q Now, when you saw them enter Van Riper street—is it Van Riper street? A I don't know whether it is Van Riper street or avenue.

The Court: Well, what did they do in there? Go on. Tell us.

Q Did you follow them in there? A I did not.

20 Q Not at all? A I followed after.

Q Well, then you followed them, did you? A Yes.

Q I didn't ask when. After they went into the street, what did you do, wait? A I waited.

Q Then, did you go into the street? A Yes, sir.

Q How did you go into the street, on foot or in a machine? A In a machine.

30 Q Did you have your lights on or off? A We had our lights off.

Q And how far into the street did you go before you saw something? A Went up about a hundred feet.

Q Were you together? A Yes, sir.

Q About three times the length of this court room? A About three times the length.

Q And could you see them on that street? A Well, I could just see two objects standing.

40 Q And did your car at any time switch its lights on? A The only time we—(interrupted).

*Harry Lazarus, direct.*

Q Did it at any time switch its— A Yes, sir.

Q —lights on? A Yes, sir.

Q When it did, what did you see? A I saw Mr. Simon and my wife.

Q Go on. Just describe to the Court what position you saw them in. A Mr. Simon was sitting on a hydrant and my wife was just close towards him. 10

Q And just tell what you saw. Tell what you saw go on between them, if anything. A Well, I went out of the car and I approached Mr. Simon.

Q Yes. Now, one minute. I didn't ask you what you did. What did you see, when the lights were turned on? A I saw Mr. Simon getting away and just buttoning his pants.

Q Where? What part of his pants? A Well, the top of his pants. 20

Q In the rear or front or side or where? A In the front.

Q And before he did that, you said you saw the two of them there? He was sitting on the hydrant? A Yes, sir.

Q Where were her legs and where were her arms and where was her body? A Well, I could only see her back, towards him.

Q She had her back towards him? A No; her back towards me. 30

Q And what did she do, when the lights were thrown on? A She jumped immediately away.

Q And did you see whether her clothes were up or down at that time? A I couldn't see whether her clothes were up or down. It was down at that time.

Q What? A They were down at that time.

Q That is after she jumped? A After she jumped away. 40

*Harry Lazarus, direct.*

Q Now, you say you could see him sitting on the hydrant? A Yes, sir.

Q Now, could you see how close she was to him, with her back towards your car? Could you see how close she was to him before she jumped and he jumped? A Yes, sir.

10 Q How close? A She was just directly on top of him.

Q Now, after you saw this, they jumped away, what did you do? A I struck Mr. Simon.

Q You struck him? A Yes, sir.

Q You got out of the car? A And struck him.

Q Well, one minute. You got out of the car, did you? A Yes, sir.

20 Q Did you go over to where he was? A Where he was. I got out of the car and I went over to where he was.

Q The question is, did you go over to where he was? A Yes, sir.

The Court: Yes; he said he did.

Q And then you struck him? A Yes, sir.

30 Q Were there any words between you and him or between you and your wife that took place simultaneously with that? A Yes, sir.

Q What were they? A Mr. Simon, when I struck him, he said to me, "Go on. You can kill me. I am a dirty cur." And my wife grabbed me—I was hitting him—and she grabbed me by the throat and she said, "I like him. Don't hit him."

Q Then what happened after that? A Mr. Stark went and called up the Police Department.

40 Q Mr. Stark, who was with you? A Yes, sir.

*Harry Lazarus, cross.*

Q Called up the Police Department? A Yes, sir.

Q And who came there? A The patrol wagon came there.

Q Do you know who was in the patrol wagon?  
A I know it was two officers.

Q And what did Mr. Simon do before the patrol wagon got there? A Well, somehow he got away. 10

Q And did your wife get away? A No; I held her.

Q How did you leave there with her? A I left with her in the patrol wagon.

Q And where did you go to? A We went to the Clifton Police Station.

Q Who did you see there? A I saw Chief Conklin over there. 20

Mr. McGeehan: That is all.

*Cross examination by Mr. Lane.*

Q Who is Mr. Vreeland?

The Court: Mr. Who?

Mr. Lane: Mr. Vreeland.

A Mr. Vreeland is the man at whose place I eat in Montclair. He is proprietor of a restaurant in Montclair. 30

Q Employed by you at all? A No, sir.

Q Who is Mr. Fresky? A Fresky is a man employed by me.

Q Who is Mr. Stark? A Mr. Stark is another man employed by me.

Q Has he an interest in your business? A Mr. Stark? 40

*Harry Lazarus, cross.*

Q Has he an interest in your business? A Yes, sir.

Q By the way, what is your business? A Wholesale plumbing supplies.

Q And how long have you been in that business? A Where? At Passaic or at Montclair?

10 Q Passaic. A Passaic I was in business four years, about four years.

Q And where is your place of business? A Place of business was at Montclair.

Q Where in Montclair? A At 83 Walnut street.

Q Do you have any place of business in Passaic at this time—did you in June? A Yes, sir.

Q Where? A At 829 Main avenue, Passaic.

20 Q What is Mr. Simon's business? A He is in the electrical game.

Q Where? A On Monroe street, near Lexington avenue.

Q How long have you known him? A I have known him about five years.

Q And you know his name is Herman, don't you? A Well, the only name I know him is by Hymie.

30 Q You ever have any business relations with him? A Just buying little articles at his store.

Q You have gone to the store to buy things and so has your wife, hasn't she? A Yes, sir.

Q And you have been doing that for the last four or five years, haven't you? A Yes, sir.

Q Where does Simon live? A I don't know the street he lives on.

Q You know about where he lives, don't you? A Yes, sir.

Q How far from the place where you live? A The place I live? About four or five blocks.

40

*Harry Lazarus, cross.*

Q On the same street? A No, sir.

Q Is he married? A Yes, sir.

Q Do you know his wife? A No, sir.

Q Got children? A Yes, sir.

Q Do you know the ages of his children, about? A No; I don't know the ages. 10

Q Well, they are aged from nineteen down to—twenty-two down to thirteen, aren't they?

A The only children I know is one of his daughters and his boy.

Q You knew that the daughter of Simon was friendly with Mrs. Lazarus, didn't you? A Just to say "How do you do?" that is all I have seen her do.

Q What? A Just to say "Hello" to her.

Q You know they met each other to the extent of talking with each other? A I have never seen her talk to her, just to say, "How do you do?" 20

Q Did you object to your wife speaking to Simon? A I have never—(interrupted).

Q Did you object to it? A Well, not in the street. In the store she talked to him. I didn't object to that.

Q But you would object to it in the street? A Well, I wouldn't say that. 30

Q Well, then, what would you say? You object to your wife speaking to a man when she casually meets him on the street or meeting him on the street? A No, sir.

Q You do not. Did you object to your wife speaking to Mr. Lazarus outside of the barber shop? A She can't talk—(interrupted).

The Court: Mr. Simon.

Mr. Lane: Simon, I mean. 40

*Harry Lazarus, cross.*

Mr. McGeehan: I object to that. I don't think that that represents his attitude in the case.

Mr. Lane: I withdraw it. I think his attitude shows considerable.

10 Q This time that you were in the barber shop, as I understand it, your attention was drawn to what occurred by the tooting of the horn of your car; is that right? A Yes, sir.

Q Your wife was tooting the horn? A Yes, sir.

Q And she had seen you go in the barber shop? A Yes, sir.

Q And she was waiting for you? A Yes, sir.

20 Q And how long a time after you got in the barber shop, did you hear the tooting of this horn? A Well, about five minutes after.

Q About five minutes after. Had you told her how long you were going to be in the barber shop? A I didn't tell her how long I was going to be in the barber shop.

Q You didn't know, did you? A I didn't know.

Q And then Simon came and spoke to her right out in the public street? A Yes, sir.

30 Q And stayed there for about how long? A Well, five minutes.

Q And you might have come out at any time? A I didn't hear the question.

Q And you might have come out of that barber shop at any time?

Mr. McGeehan: Objected to. That is obvious.

The Court: Yes. I don't think that is important.

*Harry Lazarus, cross.*

Q Well, did you object to that conduct on the part of your wife? A At that time I did.

Q You did. Had you spoken to your wife about it? A No, sir.

Q Had you spoken or did you speak to your wife at any time, after what you heard from Mr. Vreeland? A No, sir. 10

Q From what you heard from Mr. Vreeland did you anticipate that you were going to catch your wife in adultery? A No, sir.

Q But from what you heard from Mr. Vreeland, you heard something which made you object to her friendship for Mr. Simon? A Yes, sir.

Q But you never said a word about that? A Never said anything.

Q Why not? A Just suspicious. 20

Q Why didn't you say something then? A I wasn't sure. I wanted to make sure—until I saw it with my eyes.

Q You wanted to wait until you caught her in the act of adultery, is that right? A I said just a minute ago—

Q Is that right? A No, sir.

Q Well, then, why didn't you say that you objected to her speaking to Mr. Simon? A She never called it to my attention. 30

Q Why didn't you say it? You knew that she was speaking to Mr. Simon, or thought you did. You objected to that. Why didn't you tell her that you objected to it instead of simply watching her? A (Witness pauses.)

Q Well, can't you answer that? A Well, the only reason I didn't talk to her was for my own information. I wanted to find out.

Q Well, didn't you think that she was entitled to be warned that you objected to her talk- 40

*Harry Lazarus, cross.*

ing to Mr. Simon? A Well, I think, if she didn't tell me, I had no business telling her.

Q Although you knew from what you heard from Mr. Vreeland that there were suspicious circumstances which might lead to something if you didn't stop it; is that right? A Yes, sir.

10 Q And you never warned her at all? A I didn't— I wasn't sure that she was going out until I found out.

Q But you knew she was going out, when you were in that barber shop, or you knew she was meeting Mr. Simon when you were in that barber shop and you heard that tooting and you saw Simon come in—go over, rather, and you never said a word to her that you objected to it, did you? A Yes, sir. I didn't say a word to her.

20 Q Well, why didn't you?

Mr. McGeehan: I object. He has answered that.

The Court: Yes, Mr. Lane. He said he wanted to find out whether his suspicions were correct.

Q And you were on perfectly friendly terms with your wife at that time? A Yes, sir.

30 Q And, when you came back to her, after you had been in the barber shop, you carried on a very pleasant conversation, didn't you? A I did.

Q Although at that time you intended to follow her the next day? A No; not at that time.

Q When did you make up your mind to follow her the next day? A When she left her father's store and met Mr. Simon on Elm street.

40

*Harry Lazarus, cross.*

Q That was on the sixteenth? A On the sixteenth in the evening.

Q Then you followed her down to some place on Elm street and you saw Simon come and speak to her again? A Yes, sir.

Q Your suspicions were then becoming verified? A Yes, sir. 10

Q And you did not like that at all, did you? A No, sir.

Q Then you never said a word to her about that? A I didn't say anything to her.

Q And that night you carried on a very pleasant conversation and you went back to the father's store finally? A Not as pleasant a conversation as when I first talked to her, after I left the barber shop. 20

Q Well, what did you say? A Well, I just talked.

Q Well, that night, that same night, you went to the father's house or to her father's house, didn't you? A I did. Yes, sir; I went.

Q And had a good time? A No; didn't have a good time.

Q Well, apparently so? A Just talked.

Q And you had made up your mind then that you were going to follow her the next day? A Yes, sir. 30

Q And the next day you told her that you were going out, were going to be out very late, didn't you? A I did.

Q You told her that you were not going to be back until twelve or half-past twelve that night, didn't you? A I didn't mention any hour. I said I was—

Q Well, very late? A I was going to come home late. 40

*Harry Lazarus, cross.*

Q And you did that so as to give your wife an opportunity to go out, didn't you, eh? A I wasn't sure she was going out.

Q Well, you gave her that—or you told her that so that she might believe that you were not going to be around, if she wanted to go  
10 out. That is right, isn't it? A I didn't tell her with that intention.

Q Then, why did you tell her that which was not the truth? A I decided then I was not going to the meeting.

Q Well, you had made up your mind. You followed her from nine o'clock that morning, didn't you? Didn't you? A Yes. Yes, sir.

Q So that when you went out of that house, you went out of that house with the intention of  
20 following her all day and all night; that is so, isn't it? A I did.

Q And you told your wife that you were going away on business and that you did not intend to be home until very late? A Yes, sir.

Q That is right. Why did you tell her that untruth? A Because I was suspicious of her.

Q You never said a word to her about your suspicions? A No, sir.

Q Or about her seeing Simon? A No, sir.  
30

Q Now, this park that you have referred to in Clifton is the busiest part of the Town of Clifton, isn't it? A It is not the busiest part.

Q Well, about the busiest part, put it that way? A The only busy part about it is just cars going past.

Q An intersection in the center of the town, isn't it? A It is not in the center of the town.

Q Well, near the center of the town? A About four or five blocks away from the center  
40 of the town.

*Harry Lazarus, cross.*

Q Within one block from the center of town, isn't it? A It is not one block. About three or four blocks from the center of town.

Q About a hundred feet from the railroad station, isn't it? A Oh, no. It is about a—judging—thousand to fifteen hundred feet to the railroad station. 10

Q How many streets bound it? A Bound what?

Q The park. A Well, there is Clifton avenue, Lexington. I don't know the other streets.

Q Clifton avenue and Lexington avenue are main thoroughfares, aren't they? A Yes, sir.

Q Business streets? A No, sir; not at the park.

Q Not at the park, but at each side of the park? A Clifton avenue and Lexington avenue is not any business streets. 20

Q The streets over which considerable traffic go? A Yes.

The Court: Well, Mr. Lane, we will stop now until two o'clock.

NOON RECESS.

Q This park in Clifton is lighted with arc lights, isn't it? A No, sir. 30

Q No lights in it at all? A No, sir.

Q Absolutely dark? A Well, there is lights on the corner.

Q And there are no lights in the park? A No, sir.

Q Or on the streets surrounding the park? A Yes, sir.

Q How big a park is it? A A block square. 40

*Harry Lazarus, cross.*

Q Eh? A A block square.

Q In what part of the park were these two people sitting in, when you first saw them? A They were sitting in the front of the park with their backs towards Lexington avenue.

10 Q Right near Lexington avenue? A Yes, sir.

Q So that you could see them from Lexington avenue? A Yes, sir.

Q And anybndy passing along of course, could see them? A Yes, sir.

Q And where were you with reference to them, when you saw them kissing? A We were just walking past the bench they were sitting at.

Q How close to them? A About fifteen feet.

20 Q And it was light? A No light, there was no light there.

Q What time of the night was it? A Well, it must have been a little after nine.

Q Daylight saving time? A Yes, sir.

Q In the month of June? A Yes, sir.

Q And it was dark then? A Yes, sir.

Q Sure of that? A It was dark at that time.

30 Q And their backs were to you? A Yes, sir.

Q Did you hear what they were talking about? A No, sir.

Q Did you hear any talking? A No, sir.

Q Did you see that more than once? A Yes, sir.

Q How often? A That—at intervals of a half hour.

Q Up until what time? A Until ten o'clock.

40 Q When did they first get to the park? A At half-past eight.

*Harry Lazarus, cross.*

Q And then at intervals of a half-hour you walked up Lexington avenue? A No; I didn't walk up.

Q Well, how did you get to the point where you could see this—his arm around her? A I walked right up to them, to where they were sitting on that street, Lexington avenue.

10

Q And each time you walked up you saw the same thing? A I only walked up twice.

Q And what time was it that you first walked up and what time was it that you secondly walked up? A The first time I walked up it was a little after nine o'clock.

Q What time did you next walk up? A About a half hour. I don't know how long it was.

Q And each time you saw the same thing?

20

A Yes, sir.

Q Exactly the same thing? A I saw them kissing.

Q You saw them kissing? A Yes, sir.

Q When you first saw them sitting in the park, when you said they were so close that they rubbed elbows, where were you then? A I was sitting in a car.

Q How far away from where they were? A I should judge, about one hundred feet.

30

Q On the same street? A No, sir.

Q On another street? A Yes, sir.

Q How far in from Lexington avenue? A We were just on the corner on Garrity Place and Lexington.

Q And how long did you stand there and look at them or sit there and look at them?

A Well, about a little over a half hour.

Q And during all the time you could see them? A I saw them sitting there.

40

*Harry Lazarus, cross.*

Q And during all that time you could see what they were doing? A Yes, sir.

Q And during none of that time, was there any kissing? A No, sir; because it was not dark.

10 Q I didn't ask you that. During none of that time there was not any kissing, was there? A No, sir.

Q Were they apparently talking? A Yes, sir.

Q Now, this place on Van Riper street or Van Riper avenue that you referred to—or, Lexington avenue—you said it was about one hundred feet in from Lexington avenue? A I don't quite get your question.

20 Q Or from Monroe street? A Monroe street is not near there.

Q Well, where is it then? A Hundred feet in from there, the point that they were at? A The points that they were going?

Q Yes. The point that they were at. A They were sitting in the park.

Q I am not talking about that episode now. I am talking about the fire hydrant episode.

30 The Court: Where were they when you saw them in Van Riper avenue?

The Witness: I saw them in Van Riper avenue, after they left the park they walked out.

Q Yes, I know you did. How far in from Lexington avenue? A They were standing about four hundred feet in from Lexington avenue.

40 Q I thought you said it was a hundred feet, this morning? A I didn't say a hundred feet.

*Harry Lazarus, cross.*

Q They were four hundred feet from Lexington avenue? A Yes; on Van Riper avenue.

Q You are sure you didn't say one hundred feet this morning? A I didn't say one hundred feet.

Q Lexington avenue is a well lighted street?  
A Lexington avenue is. 10

Q Are there any blocks on Van Riper avenue? A Well, Van Riper avenue starts from Lexington.

Q All right. Are there any blocks on it? Is it a one-block street or has it several blocks?

A It has several blocks.

Q How far in on the first block were they?  
A I said about four hundred feet.

Q Well, half-way of the block or one-quarter the block or one-third the block? A About one-third of the block. 20

Q About one-third of the block. That is a twelve-hundred-foot block? A I didn't measure the block.

Q Well, you say they were about one-third the block and you say they were about four hundred feet. That would make a twelve-hundred-foot block. Have you got a twelve-hundred-foot block up there? A I said "about." 30

Q You said "about" what? A One-third of the block. I didn't measure it. I haven't any idea.

Q Have you any idea as to how long that block is? A No, sir.

Q You saw it, didn't you? A I saw the block.

Q Yes. Then how have you any idea how far they were in from Lexington avenue, if you haven't any idea as to how long the block is? 40

*Harry Lazarus, cross.*

Where did you get this figure four hundred that you told us about? A I measured it.

Q You measured it? A Yes, sir.

Q When did you measure it? A The same night.

10 Q What time the same night? A About one o'clock.

Q Who was with you? A Mr. Fresky.

Q Who else? A Nobody else.

Q How did you measure it? A Just measured it with my foot.

Q Measured it with your foot? A Yes.

Q Paced it, you mean? A No, I just took my foot as a measure for a foot.

20 Q And you remember that measurement. Is that the first fire hydrant on Van Riper avenue? A Well, I wouldn't say that.

Q Well, can you remember—throw your mind back to that night. Can you remember the distance from the fire hydrant that you saw them at and the fire hydrant at the corner? A I can't remember.

Q Now, when you first saw them on Van Riper avenue, where were you? A Just riding down Lexington avenue in the car.

Q Was it a clear night? A Yes, sir.

30 Q And how far away were you from them when you first saw them? A Where, from Van Riper avenue?

Q No; from them. How far away were you from them when you saw them? A Well, I should judge about three hundred feet.

Q You were on Van Riper avenue? A No, sir; we were on Lexington avenue.

40 Q Well, then, I don't understand your four hundred feet. How could you be within one hundred feet, if they were four hundred feet

*Harry Lazarus, cross.*

from the corner? A When they turned in Van Riper avenue, we were riding with our car down Lexington.

Q What were they doing then? A They were walking.

Q Then what did they do? A They turned in Van Riper avenue. 10

Q Then what did they do? A They walked up Van Riper avenue.

Q When you came up to Van Riper avenue, what were they doing? A I didn't see at first. We waited about ten or fifteen minutes.

Q Didn't you see them at all, when you got to the corner of Van Riper and Lexington avenues? A I only saw two objects at that time.

Q What were the two objects doing? A Well, I couldn't tell you what they were doing. 20

Q Well, you could see. What do you mean, two objects? You say you saw the two objects. Now, what did you see? A I just saw them standing there.

Q All right. Then the two objects were standing? A Yes, sir.

Q Where were they standing? A Right near this hydrant.

Q How far away from the hydrant? A Well, I should judge a little over four hundred feet. 30

Q Four hundred feet from the hydrant? A No; four hundred feet from Lexington avenue.

Q Well, how far away from the hydrant is what I asked you? A Well, they were standing right near the hydrant.

Q Just standing there? A Well, that is—that was my idea. I saw them standing over there. 40

*Harry Lazarus, cross.*

Q And that you saw from the corner of Van Riper avenue and Lexington avenue? A I didn't know they were standing at the hydrant; I just saw them standing right there, about four hundred feet.

10 Q Then what did you do? A We waited about ten or fifteen minutes.

Q Right on the corner? A Yes, sir.

Q Where you could see them? A I said, I could just see two objects.

Q Well, where you could see the two objects? A Yes, sir.

Q Did you keep the two objects under observation? That is what I want to get at. A Yes, sir.

Q What did they do? A I couldn't see.

20 Q You saw the two objects, but you can't tell me what they were doing? A No, sir.

Q Well, then, what next happened? A After we waited ten or fifteen minutes, we rode up with our car.

Q Yes. Now, then, what did you see? A We came right on and Mr. Stark put the bright lights right at them, diagonally.

Q No. What did you see, first off? Anything? A We saw the two objects and at first we rode—

30 Q Yes. A —up to them.

Q Yes. Go on. Then what did you see? A Then, when we got right on top of them, Mr. Stark put the bright lights on.

Q Now, you saw these two objects? A Yes, sir.

Q Which, apparently were standing? A Yes, sir.

40 Q And you could see the two objects all the time, while you were looking down Van Riper avenue? A Yes, sir.

*Harry Lazarus, cross.*

Q Then you went down toward the two objects and put the bright lights on, and then, when you put the bright lights on, the objects were there, standing there. One was sitting on a hydrant; is that right? A Yes, sir.

Q Now, although you thought the two objects, which were always in your mind, were standing, when you put the bright lights on, one of the objects was sitting; is that right? A Yes, sir. 10

Q Sitting on the hydrant? A Yes, sir.

Q Just as you put your lights on? A Just as we put the lights on.

Q Just as you put the lights on. Well, did you see one of the objects bend down and sit on the hydrant? A I didn't see him bend down. He was sitting. 20

Q We have him standing. You saw the objects? A I saw—

Q On Van Riper avenue and Lexington? A I saw him standing from Van Riper and Lexington. I had an idea they were standing. I couldn't see over four hundred feet.

Q Yes. Well, as you got nearer the objects, before you put the bright lights on, did you see whether they were standing or not? A No, sir. We could see them standing. 30

Q You could see them standing. What I am trying to get at is when they altered their standing position to a sitting position. You could see them standing, coming down Van Riper avenue. Now, when did you see one of them sit down? A I saw them only standing, from Lexington avenue and Van Riper avenue.

Q Yes. Well, now, you are going closer to them all the time on Van Riper avenue, aren't you? A Yes, sir. 40

*Harry Lazarus, cross.*

Q As you got closer to them, what did you see? A When the light was put on I saw— (interrupted).

Q I don't care when the lights were put on. Before the lights were put on? A I couldn't see anything at that time. I just saw the objects.

Q You could see them from Van Riper avenue and Lexington avenue four hundred feet away, you could see they were standing, but, as you got closer to them, you couldn't see what they were doing, is that right? A I said, they were sitting.

Q You didn't see that until you put the lights on? A Yes, sir.

Q And you didn't put the lights on until you got opposite them; is that right? A Right on top of them.

Q How far away? A Five feet.

Q Now, on this clear night, in the month of June, you couldn't tell until you got within—how many feet? A Well, right on top of them.

Q Well, you couldn't tell until you got within five or ten feet of them and put the bright lights on— A Yes.

Q —those two objects, whether one of them was sitting or not? A Yes, sir.

Q It was a bright night, wasn't it? A Well, it was a clear night. I couldn't say it was a bright night.

Q How high is this hydrant? A I should judge about three feet.

Q Now, what was Simon doing, just sitting on it? A Yes, sir.

Q And between him and you was Mrs. Simon—Mrs. Lazarus, rather? A No, sir.

*Harry Lazarus, cross.*

Q Well, did she have her back to you or didn't she? A Yes; she had her back toward me.

Q All right. Then how could she be anywhere else than between you and him? A Well, I was in back of them when I came out. I couldn't be between the two of them. 10

Q She was between you and him? A She was not.

Q All right. Then she was in front of him? A She was in front of Mr. Simon.

Q Yes. And you were behind Mr. Simon and she had her back to you, is that right?

Mr. McGeehan: I object to that. That couldn't be.

Mr. Lane: Well, I know it couldn't be, but I am trying to find out. 20

Q This woman had her back to you; is that right? A Yes, sir.

Q Then where was Simon, in front of her or behind her? A Simon was in front of her.

Q And where were you, behind Simon or in front of Simon? A I was in front of Simon.

Q All right. Then Mrs. Lazarus was between you and Simon, wasn't she? A She was not between the two of us. I was in back of Mrs. Lazarus. I couldn't be between the two of them. 30

Q Could you see Simon through Mrs. Lazarus? A Yes, sir.

Q You could. She didn't give any obstruction to the view, although she had her back to you and was in front of him. Is that right?

A There was no obstructions.

Q There were no obstructions. You could see both Simon and you could see her? A Yes, sir. 40

*Harry Lazarus, cross.*

Q Although her back was to you. That is right? A Yes, sir.

Q And she was in front of Simon? A Yes, sir.

Q That is right. What was this, an iron hydrant? A Yes, sir.

10 Q One of these fire hydrants with a plug in the middle on top, a rounded top? A Well, I don't know what it had on top.

Q Don't you know whether it is that kind of fire hydrant or not? A I never noticed it.

Q And he was sitting on top of that? A Yes, sir.

Q You went back there one o'clock to measure the street? A Yes, sir.

Q But you didn't look at the hydrant? A  
20 No, sir.

Q Now, what were they doing when the lights went on? A They were surprised and jumped away.

Q Well, what were they doing before they jumped away, or did you see? A I saw Mr. Simon sitting on the hydrant.

Q Yes, I know. A And my wife—my wife right close to him.

Q Well, what else? A That is all. And I  
30 saw them jump away.

Q That is all you saw? A Yes, sir.

Q Well, you told your counsel this morning that you saw a great deal more than that. Now, can you remember this afternoon what you told him this morning that you saw? A Well, after Mrs. Lazarus jumped away I saw Mr. Simon button his pants, the top of his pants.

Q Yes. You were then five or ten feet—you were within five feet of them then? A Yes, sir.

40 Q And rushing towards them? A Yes, sir.

*Harry Lazarus, cross.*

Q As fast as you could go? A Well, Mrs. Lazarus held me back; she grabbed me around the neck.

Q And you struck Simon? A I struck Simon. And then she grabbed me around the neck.

Q You struck Simon first? A Yes. 10

Q And then you stated at a point about five feet away? A Five feet away.

Q And yet you saw Simon buttoning up his pants in the meantime? A Yes, sir.

Q Is that right? A Yes, sir.

Q And what did you see Mrs. Lazarus do; anything? A The only thing, she grabbed me around the neck.

Q Now, you assaulted Simon, didn't you? A I can't hear the question. 20

Q You assaulted Simon, didn't you? A I did.

Q You struck him? A Yes, sir.

Q And Simon got away, didn't he? A Not immediately.

Q You held him? A I did not hold him.

Q You made a complaint before Justice Bernstein, in which you swore that Simon assaulted you, didn't you? A Yes; he bit me.

Q And had him arrested for atrocious assault and battery; that is right, isn't it? A Yes, sir. 30

Q Although you assaulted him.

Mr. McGeehan: I object. He said he bit him.

Q Did he bite you first? A Yes.

Q Oh, he bit you first? A Yes, sir.

Q You went at him as hard as you could—

A As I—

*Harry Lazarus, cross.*

Q Go ahead. A Yes—

Q —from your distance of five feet away and struck him. In the meantime, however, he had bitten you? A Yes, sir.

Q And, although he bit you before you hit him, when you did hit him, he said, “I am a dirty dog; you can keep on;” is that right? A Yes, sir.

Q And he did not afterwards bite—and he didn’t afterwards try to fight back, or did he? A Well, he got away.

Q So that he ran away after saying he was a dirty cur—whatever expression you used—and you could keep on hitting him; is that right? A Yes, sir.

Q Any other words exchanged between you and him at that time? A That is all.

Q You went down to the police station, didn’t you? A I did.

Q Saw the chief of police? A Yes, sir.

Q (Continuing.) Didn’t you? Tried to have Simon and your wife arrested for adultery, didn’t you? A Yes, sir.

Q What? You did, didn’t you? A Yes, sir.

Q And the Chief asked you what you saw, didn’t he? A I did.

Q And you told him that all you saw was—and you illustrated that, when you got to that point, you saw Mr. Simon in the street—using your hands, showing the Chief—pulling up his trousers this way; isn’t that right? A I didn’t say that.

Q What did you tell the Chief? A I told him I saw him buttoning his pants.

Q Yes. A That is all I remember what I said to him.

40

*Harry Lazarus, cross.*

Q What? The Chief refused to take the complaint, didn't he?

Mr. McGeehan: I object to that as not material or evidential of anything.

The Court: I will allow it. Answer the question. 10

Q Didn't he? A Yes, sir; he refused to make the arrest.

Q Yes. And he refused to make the arrest, didn't he? A Yes, sir.

Q Because he asked you what you saw and all you said you saw was this motion with a hand, with one hand on one hip and the other hand on the other hip raising up his trousers. A I didn't say that. 20

Mr. McGeehan: I object. That is an improper question.

The Court: Yes; he refused to take the complaint. Why he refused is another matter.

Q Well, he refused to take the complaint after you told him all that you told us here? A Yes, sir. 30

Q You told him the same story and yet he refused to take the complaint? A Yes, sir.

Q You went to the police court to swear out a warrant for the same thing, didn't you? A Yes, sir.

Q And they refused to take the complaint after you told your story, didn't they? A Yes, sir.

Mr. McGeehan I object to that on the ground that the actions or act of any court 40

*Harry Lazarus, cross.*

or police official would not be determinative  
—(interrupted).

The Court It wouldn't be binding on this  
court.

Q Did you tell the police judge all that you  
10 have told us here? A Where at?

Q At the police court; not at the justice of  
the peace; at the police court. A I told the  
Chief of Police.

Q Didn't you go to court after that? A I  
did.

Q And did you tell the Court all that you  
have told us here? A I told the Justice of  
the Peace.

Q You told the Justice of the Peace. You  
20 also started suit against Mr. Simon for aliena-  
tion, didn't you? A Yes, sir.

Q For \$125,000? A Yes, sir.

Q Which is still pending? A Yes, sir.

Q You also went back the next day or the  
day after to your apartment and destroyed all  
the furniture, didn't you? A I didn't do it.

Q Do you know it was done? A I don't  
know.

Q Well, don't you know now? A I was told  
30 it, the landlord—

Q Who told you? A The landlord.

Q Have you ever been back to the apartment?

A No, sir.

Q Not at all? A Never.

Q You didn't go back to the house for your  
clothes? A No, sir.

Q Sent for them? A Yes, sir.

Q Who did you send? A My brother.

Q And what is his name? A Jules Lazarus.

*Harry Lazarus, cross.*

Q And did you instruct him to destroy the furniture? A No, sir.

Q Do you know who did it? A No, sir.

Q Did you notice anybody else on Van Riper avenue, when you say you saw what you say you saw; did you notice anybody else there? A No, sir. 10

Q Did you notice children skating on the sidewalk? A No, sir.

The Court: Skating? Roller skating?

Mr. Lane: Roller skating, yes, sir. (To witness:) Roller skating on the sidewalk?

The Witness: No, sir.

Q You didn't see anybody else there? A No, sir. 20

Q Do you know a Mr. Grossman? A Yes, sir.

Q Did you see him the night before last? A Yes, sir.

Q Did you tell him or ask him to go to your wife and say to her that you would drop your suit against her for divorce on the ground of adultery if she would consent to a divorce on the ground of desertion? A No, sir.

Q Did you have any such talk as that? A No, sir. 30

Q You saw him the night before last, didn't you? A He saw me.

Q Or he saw you. And you made no such remark as that to him? A No, sir.

Q Do you know the girl sitting alongside of Mr. Lazarus there (indicating)?

The Court: Mr. Who?

Q Well, your wife's father. A Yes, sir.

Q Did you tell her that you had— 40

*Harry Lazarus, re-direct.*

Mr. McGeehan: Who is that?

Q Did you tell her that you had broken the furniture? A No, sir.

Mr. Lane: I think that is all.

10 The Court: Really, Mr. Lane, I can't see much correlation between the breaking of furniture and breaking your marriage vow.

Mr. Lane: Well—

*Re-direct examination by Mr. McGeehan.*

Q Mr. Lazarus—

The Court: Now, wait a minute. Have you finished your cross examination?

20 Mr. Lane: Yes.

Q Mr. Lazarus, do you say they were four hundred feet in, approximately? A Approximately.

Q What distance were you referring to when you said that at some time on that evening they were about a hundred feet from you, or twice the length of this room? A That was when they were in the park.

30 Q I see. A And we were parked in the side street. That is the time I said we were one hundred feet away.

Q Now, can you show us in this room, or by pointing out some object from you, how far away your car was from that hydrant, when the lights were put on?

The Court: Well—

40 Q Just visualize that situation and try to figure out how far it was away, and point out

*Harry Lazarus, re-cross.*

the distance you think it was. A From over here where I am sitting to that—well, the ink well.

Q To the ink well? A (Witness nods yes.)

Mr. McGeehan: That is all.

10

*Re-cross examination by Mr. Lane.*

Q Did you just happen to put your lights on at that time or was there some reason for your putting them on at that particular moment? A We had no—

Mr. McGeehan: He was not driving the car.

Q Was there any reason for putting on the lights at that moment that you know of, or did it just happen so? A We just put it on just to—we didn't want them to know we were coming up.

20

Q Well, then, it was just a chance that you happened to put it on at that particular moment. A No chance. We just put it right on, as soon as we came to the objects we put the lights right on.

Q Just as soon as you put it on—that was the only reason? A Yes, sir.

30

*Further re-direct examination by Mr. McGeehan.*

Q That was to see what the lights would reveal? A Yes, sir.

The Court: That is all.

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 40

*Harold M. Vreeland, direct.*

HAROLD M. VREELAND, sworn for the petitioner.

*Direct examination by Mr. McGeehan.*

10 Q Mr. Vreeland, where do you live? A I live at 98 Walnut street, Montclair.

Q In Montclair. And are you engaged in business there? A Restaurant business.

Q How long have you had that restaurant? A Three years.

Q Where is it located? A 100 Walnut street.

Q And are you acquainted with the petitioner in this case, Mr. Lazarus? A I am.

20 Q How long have you known him? A Since I have had the restaurant, practically, he has been coming in there ever since I owned the restaurant.

Q Does he eat there? A Every noon.

Q Do you know him outside of his being a customer at your store? A No, sir.

Q Had you ever seen Mrs. Lazarus, the defendant in this case, before some time in June of 1926? A Once.

Q Where was that? A In Passaic.

30 Q In Passaic. Who pointed her out to you? A Mr. Lazarus.

Q What were you doing in Passaic with him? A Why, he came down to the restaurant one day, just stopped in to get a piece of pie and a cup of coffee. He said, "I am going down to Passaic. Will you ride down? I am coming right back." I said, "Sure." So I rode down with him and he had to take the stuff down there somewhere.

40 Q Did he greet his wife on the street? A Why, he—she was coming up the street—

*Harold M. Vreeland, direct.*

Q Did he greet her? Did he say "Hello" to her, or what occurred? A No; he just blew the horn and she kept on going; that was all.

Q Did he tell you who it was? A He says, "That is my wife." She was with some other lady.

Q Now, in the month of June, 1926, did you see Mrs. Lazarus anywhere? A I did. 10

Q With anyone else? A I did.

Q Just what day of the week was it, on a Monday, Tuesday, Wednesday? A On a Sunday.

Q On a Sunday. Have you a brother in the automobile business? A I have a brother in the garage business.

Q Well, in the garage business. And did you know Mr. Lazarus' car to see it? A Oh, yes. 20

Q What kind of a car was it? A Dodge.

Q And was there anything peculiar about the make up or appearance of that car that occurred to you or was seen by you? A Well, of course, I knew the car by sight every time I see it, but it was really—(interrupted).

Q Was there anything about it really different from the regular stock Dodge? A The only thing different about it was that he had two tires on the back, and the way he had one tire strapped on the back. It was stuck in between the tire carrier and the back of the body and strapped around there with a couple of straps, kind of stuck up above; I should say, a foot above the other tire. 30

Q Did you notice that car anywhere on the road in June of 1926, on the Sunday that you spoke of? A I did.

Q Just where were you when you saw it and where was it? A I was on my way over to 40

*Harold M. Vreeland, direct.*

Yonkers and a car was parked along the side of the road on Terhune avenue.

Q And is Terhune avenue in the country or in the built-up section of the town? A It is in the country.

10 Q Where in the country, between what two places? A Well, I think it is Garfield. You might call it Garfield and Hasbrouck Heights. It is between those two towns.

Q What kind of a road bed is there there? A Why, it is a smooth road. I wouldn't try to tell you what kind of a road it is, whether it is macadam or asphalt, I think, I am not sure.

Q Now, as you went along in your car was anyone with you? A My wife was with me.

20 Q Did you see this car on the road moving or standing still? A Standing still.

Q Was it on that pavement or off the pavement of the road? A It was pulled off the side of the road.

Q And did you look at it as you went by? A Well, I said to my wife—

The Court: No.

30 Q Never mind. You can't tell what you said to your wife. The question is: Did you look at it as you went by? A Yes, sir.

Q And did you see who was in it? A I did.

Q Who was in it? A Mrs. Lazarus and another gentleman—and a gentleman, rather. Not another one, but one.

The Court: Who was the man?

40 Q Who was the man? Did you know who he was at the time? A I did not.

*Harold M. Vreeland, direct.*

Q Was it Mr. Lazarus, the petitioner in this case? A It was not.

Q And what time of the day was this, about?  
A Oh, well, I just can't remember. I should say it must have been around twelve o'clock; something like that.

Q At noon time? A Yes. 10

Q On a Sunday? A Uh huh.

Q And did you subsequently tell anyone about having seen this on the road? A No.

Q Nobody at all? Never mentioned it to anyone? A Well, except one, excepting Harry.

Q That is what I am asking you. A Excepting Harry.

Q Did you tell anybody? A Yes, sir.

Q Well, who? A Mr. Lazarus. 20

Q When did you tell Mr. Lazarus about it?  
A On the following morning.

Q Did you get a good enough look at the man to remember him? Can you or can't you say whether—(interrupted). A Well, I wouldn't say I can pick him out of the court, or anything, but I can give you a fair description of him.

Q Was he an older or younger man than Mr. Lazarus? A I should say he was a man about my age. 30

Q What is that? A I am forty-two.

Q Forty-two. Can you or can't you say—you have seen, I suppose, Mr. Simon stand up here in court today? A No; I did not.

Q Were you up here when he stood up? A No; I don't think I did.

The Court: Look over the court room and see if you can pick out the man you saw in the car. 40

*Harold M. Vreeland, cross.*

The Witness: Yes; I think that is him back there in the second seat.

Mr. McGeehan: Indicating the gentleman who just smiled, Mr. Simon.

10 Q Do you remember what their position in the car was? Did you see anything at all except that they were sitting there? A Why, Mrs. Lazarus was sitting behind the wheel and this other gentleman was on the other side of her and he didn't have any hat on and he had his arm around the back of the back of the seat, like that (indicating).

Q Around the back of the seat where she was sitting? A That is right.

20 *Cross examination by Mr. Lane.*

Q You saw Simon in the corridor this noon time, didn't you? A What is that?

Q You saw Simon in the corridor this noon time, didn't you? A Yes; half a dozen times.

Q Yes. You knew who he was? A I picked him out when he first walked in this morning.

30 Q You knew who he was this noon time? A Yes, sir.

Q There was no difficulty in your picking him out in the court room a few moments ago when the Court asked you to pick him out, was there? A Absolutely not.

Q This was about noon time, was it? A About noon time.

Q And that road is what kind of a road? A Well, it is a smooth road. I won't try to tell you the surface bed of it, but it is a smooth road.

40 Q Sunday afternoon. A Not Sunday afternoon.

*Harold M. Vreeland, cross.*

Q Sunday noon time, then? A Around twelve o'clock.

Q It is a main thoroughfare, isn't it? A Why, yes, I should say—I don't go over that road a whole lot; I can't tell you a whole lot about it.

Q Do you know whether it was a main thoroughfare or can you tell? A No; I can't tell you. 10

Q You were using it as a main thoroughfare to get to Yonkers? A It was not a private road.

Q You know exactly what I mean? A No.

Q It leads to where? A It leads to, I think, Hasbrouck Heights.

The Court It leads to Hackensack. I have been over it myself. 20

The Witness: It goes to the right, I would call that road, over the river road.

Q You were on your way to Yonkers? A I was on my way to Yonkers.

Q And there were other people on that road? A I didn't see anybody else. I wasn't looking.

Q Didn't see anybody else on the whole road? A Outside of Mrs. Lazarus. 30

Q You were not looking for them, were you? A Absolutely not.

Q And yet you didn't see anybody else on the road at that time? A No; not that I remember.

Q Did you see anybody else on the road? Were cars going back and forth? A No; absolutely not.

Q The road was vacant? A No.

Q Except for you? A That is right.

Q Did you go up from the front of the car or the rear? A From the rear. 40

*Harold M. Vreeland, cross.*

Q And you went right on your way? A Yes, sir.

Q Did you stop or hesitate? A I hesitated.

Q Hesitated? A Yes.

Q At just what point did you hesitate? A Well, when I see the car, I said to my wife,  
10 "There is Harry Lazarus' car." And she said, "Yes." And I said, "Yes; see the tires?" She said, "That is right." I said, "I will have some fun with him." I slowed down and I was going to stop right in front of him and I got right up to him almost and I said, "I don't think it is Harry; I won't stop." And I stepped on the gas and pulled up to the side and got opposite and looked at him and saw it was not Harry. I wouldn't say anything, so I stepped on the gas  
20 and went on.

Q How long did you hesitate? A Just slow. If you were going to speak to somebody and you slowed down and you realized it was not the right one you keep on going, that is all.

Q This Mrs. Lazarus was behind the wheel? A That is right.

Q Apparently driving the car? A No. They were standing still; they wasn't driving.

Q I know. Did she have the wheel in her hands? A Well—no; she was just sitting there talking and she was sitting in the driver's seat.  
30

Q Just sitting there talking? A Yes, sir.

Q Do you know Mrs. Lazarus' father? A No; never seen Mrs. Lazarus' father until today.

Q Eh? A Until today.

Q Well, did you see him today? A Yes, sir.

Q Are you sure that he is not the man that was in that car at that time? A Absolutely.

Q And are you sure that they were not at  
40 that time, that you saw them, one of them

*Harold M. Vreeland, cross.*

teaching—Mrs. Lazarus teaching her father to drive? A (Witness laughs.)

Q This is no laughing matter. A Never Mrs. Lazarus' father.

Q Never Mrs. Lazarus' father? A No; never was.

Q A man about forty-two years old? A 10  
About my age.

Q And whom you had never seen before? A Whom I had never seen before.

Q And whom you have never seen since? A Until today.

Q Excepting today? A That is right.

Q And Mrs. Lazarus you had never seen before except once on a public street? A That is right.

Q And even then you didn't see her face to face? A Yes, I did see her right, her whole face. 20

Q Although her husband tooted his horn for her, she was looking right at you.

Mr. McGeehan: I object to that. I withdraw it.

Q Her husband tooted her horn for her and she looked at you but she paid no attention— A I don't just get you. 30

Q Well, I thought you had seen her once before? A Oh, I had.

Q And that you had seen her on a public street? A Yes, sir.

Q And that her husband had tooted the horn. A That was in Passaic. You was talking about here now. That is what I thought you meant.

Q Well, I meant—I am talking about the time you first saw her. A Well, then, I didn't understand. 40

*Harold M. Vreeland, cross.*

Q Well, you didn't see her face to face then, did you? A I see her coming right straight up the street, as we were going down.

Q Face to face? A Yes, sir.

Q And she didn't recognize her husband's car or the tooting of the horn? A No. Harry  
10 and I was talking and he said, "There is my wife with a friend."

Q Did she pass you? A No. She was coming up this street and we were going down that way.

Q Did you tell Lazarus everything that you have told us here? A Tell him everything that I told here?

Q Yes. A Yes, sir.

Q Yes; on the next day, so that you re-  
20 peated— A I didn't tell him everything on the next day, no.

Q What are the things you did not tell him the next day? A The next day all I said to him was—he came in to eat. I says—first, I said to my wife—(interrupted).

The Court: No.

Q Never mind what you said to your wife. I am not concerned with that. A Well, he said  
30 —he come in the next day and I said to him, "It's a wonder you wouldn't speak to somebody when you are out in the country." He says, "How is that?" I knew all the while it wasn't him—and he says, "How is that?" I said, "Why, you was parked along the road out there. I see your wife; I didn't see you." He says, "I was hunched down in the back seat reading." And I said, "Yes?" And I walked  
40 out to my kitchen and I says to my wife—(interrupted).

*Harold M. Vreeland, cross.*

Q Never mind what you said to your wife. Just confine yourself to what you said to Mr. Lazarus. A And he says, "I was hunched down in the back seat reading." So I said, "Yes?" And I went on out. I didn't say any more about it. A couple—(interrupted).

Q Never mind. That is all you told him at that time? A That is all I told him at that time. 10

The Court: Now, did you tell him anything else at any other time?

The Witness: I certainly did.

The Court: Now, what other time?

The Witness: I think it was the next day. I wouldn't tell the date for sure.

The Court: Yes. What did you tell him the next day? 20

The Witness: He came in and he was all excited and he come right out in the kitchen where I was. "Now," he says, "Harold, I want you to tell me something and tell me the truth." I said, "What is it?" He says, "You know that little remark you made yesterday?" And I says, "Yes." "Well," he says, "I lied to you. I wasn't in the car." "Now," he says, "I want you to tell me what you saw and who was with my wife," and I says, "I don't know who was with her." "Well," he says, "come on, you ought to tell me." I said, "If you want to know the facts, now," I said, "it is a ticklish proposition to mention," I said, "but there was a man with her." He says, "Well, all right; that is all I want to know." He says, "Will you take me out and show me where you see her?" And I said, "I 30 40

*Clarence E. Stark, direct.*

will." And that was all there was said. Then he says, "I am going to watch her," he says, "I think she is doing something wrong."

Mr. Lane: I think that is all.

10 *Re-direct examination* by Mr. McGeehan.

Q Why, Mr. Vreeland, was it, that you did not say directly, immediately what you had seen?

The Court: It doesn't make any difference.

Mr. McGeehan: I withdraw it.

---

20 CLARENCE E. STARK, sworn for the petitioner.

*Direct examination* by Mr. McGeehan.

Q Mr. Stark, you are employed by the petitioner in this case, are you not? A Not now.

Q Well, you have been employed by him? A Yes, sir.

30 Q You no longer are connected with him? A No, sir.

Q Do you remember an occasion in June, 1926, when you went with him on a certain expedition to follow someone? A Yes, sir.

Q Had you ever seen Mrs. Lazarus before? Did you know Mrs. Lazarus? A Yes, sir.

Q And did you know her well or not well to see her? A Yes; I knew her well.

40 Q Do you remember the occasion of June 17th, 1926? A Yes, sir.

*Clarence E. Stark, direct.*

Q Where did you meet Mr. Lazarus and about what time? A About seven o'clock at my home.

Q In the evening? A Yes, sir.

Q And did you accompany him anywhere? A Yes, sir.

Q In whose car? A My car. 10

Q You don't recollect being in Mr. Fresky's car then, first? A Not going from my home to Passaic, no; we went in my car.

Q Then, you drove from your home to Passaic? A Yes, sir.

Q And when you got to Passaic, where did you go? A Monroe street, near Lexington avenue.

Q Who was with you then? A Harry Lazarus and Ray Fresky. 20

Q Where did Mr. Fresky meet you or join you? A At this spot where I just said we had met.

Q I see. And what time was it the three of you came together on that night? A In the neighborhood of seven-thirty, twenty minutes to eight.

Q And just describe as briefly and to the point as possible where you went and what you saw. A Mr. Lazarus and I left Monroe street and went to within about two hundred feet of his home, in Mr. Fresky's car, at which place we stopped and parked. Mr. Fresky, at that time had my car at Monroe street. We waited at the door, or, two hundred feet, approximately, from the door, when Mrs. Lazarus left the house, the apartment house, and walked down Autumn street to Lexington avenue and turned left and went toward Clifton. 30

Q Yes. Well, did you follow? A Yes; we hesitated at the corner of Autumn street be- 40

*Clarence E. Stark, direct.*

cause we moved along more rapidly, of course, in a car than she did walking, so we hesitated a little bit at Autumn street, at which time Mr. Fresky came along in my car. There we exchanged cars.

Q And all got into which car? A My car.

10 Q What kind of a car was that? A Chevrolet coupe.

Q And then you went where? A We proceeded very slowly along the right-hand side of Lexington avenue and occasionally stopped, because we were going, as I said, faster than anybody could walk and it was necessary to hesitate now and then in order that we might stay behind and we—(interrupted).

20 Q Did you see her meet anyone? A I didn't see the meeting, but I saw them together shortly after.

Q Where did you see them together first that night? A On the left-hand side of Lexington avenue, near Burgess Place, or near—

Q How far from the park was that? About how far from the park? A Oh, I would say almost a quarter of a—well, yes, a quarter of a mile easily.

Q And did you see which way they walked?

30 A Yes, sir.

Q Did they walk to the park? A Yes, sir.

Q Did you see them in the park? A Yes, sir.

Q Now, just tell us where you were when you saw them and where were they? A We followed slowly and passed the park about fifty feet, at which there is a small intersection of a street—I don't know the name of it—and turned our car around and put it on the right-hand side of the street at the corner, being

*Clarence E. Stark, direct.*

approximately one hundred feet or one hundred and fifty feet from the park.

Q Did you get out of the car or stay in it?  
A We got out of the car twice, as I recollect it.

Q Did you see them from the car? A We could see two people, yes, sir.

10

Q Could you see where they were sitting or standing? A They—

Q Or what? A They were sitting on a bench with their backs to us.

Q Could you get a good view from the car?  
A Not as good as we did when we walked over. We walked over twice, I think.

Q During the times that you walked over, was it light or dark? A It was dark, I should say—dark.

Q At night. It was just getting— A It was getting dark. It was not light.

20

Q And when you walked over there on that occasion, did you see who was sitting there on the bench? A I couldn't make out any faces, but we had followed them to that bench and I knew no one else had left the bench, so I was sure it was they.

Q And what did you see occurring between them? A I saw them kiss.

Q While sitting on the bench? A Yes, sir.

30

Q And was that Mrs. Lazarus one of the parties that was kissing? A Yes, sir.

Q And did you know Mr. Simon, the co-respondent in this case, at that time? A Not personally.

Q Had you ever seen him? A Yes, sir.

Q Where had you seen him? A In his store. I had made purchases there.

Q Did you recognize the man who was with Mrs. Lazarus? A No; I did not.

40

*Clarence E. Stark, direct.*

Q My question referred to the time in the park, or while they walked down the street. A Oh, yes.

Q You recognized them then? A Yes, sir.

Q Who was he? A Mr. Simon.

10 Q And, then, when they left the park, did you see where they went to? A Yes, sir.

Q How long were they there altogether, would you say— A Well—

Q —sitting on that bench? A —three-quarters of an hour.

Q About three-quarters of an hour.

The Court: Well, then where did they go from the bench?

20 The Witness: They walked up Lexington avenue, on the right-hand side, until they came to Van Riper avenue, which is a dead end street at Lexington avenue, and turned up Van Riper avenue.

The Court: Did you follow them?

The Witness: No. We stayed at the corner so we could see—passed the corner far enough so we could watch them come up that street.

30 Q Did they come up that street? A Yes, sir.

Q Was it light or dark on that street? A Dark.

Q No lights? A Not on that street.

Q Any sidewalks or pavements? A Just had been sidewalked, yes, sir.

Q Were there any houses on it? A No, sir.

40 Q How far up the street would you say they went from the corner to the point where you later saw them? A At least, five hundred feet.

*Clarence E. Stark, direct.*

Q At least, five hundred feet. What did you do, after waiting at the corner, what did you then do some time after that? A We started the car and after we turned the corner we proceeded up Van Riper avenue with our lights out.

Q And did you go slowly or fast? A Well, I wouldn't say that we went very fast, because our lights were out and we went cautiously. 10

Q Did you go silently or making a noise? A As silently as we could.

Q Now, when you went along, could you see any figures on that street? A Yes.

Q Could you tell exactly whether they were standing or leaning against a hydrant or sitting or exactly what they were doing? A Leaning against the hydrant, as I remember.

Q Well, could you, before you put the lights on, observe that they were at a hydrant? A No; I could not. 20

Q My question goes to the time before you put the lights on. Could you, at that time, while you were going along the street, before you stopped and put your lights on, could you tell then exactly what posture they were in, whether leaning against the hydrant or—(interrupted). A Very close to each other.

Q Could you tell that? A Yes, sir.

Q Could you tell whether they were leaning against a hydrant or not? A No, sir. 30

Q Could you tell what they might have been doing with their hands? A They might have been embracing each other.

Mr. Lane: I object to "might have been."

Mr. McGeehan: I consent to that being stricken out.

The Court: Yes.

*Clarence E. Stark, direct.*

Q The question is, could you tell what they were doing, outside of the fact that you saw them close together? A No; I could not.

Q When you put the lights on, could you?

A I saw them very closely at that time.

10 The Court: What were they doing, when you put the lights on?

The Witness: I saw Mr. Simon in a sitting position at the hydrant and Mrs. Lazarus facing him, very closely.

The Court: Was she sitting on his lap, or what was she doing?

The Witness: I can't say she was sitting; she might have been leaning against him.

20 Q Did you see where her feet were? A No; I did not.

Q Did you see where their arms were? A No, sir.

Q Was there any space between their bodies at all that you could see? A No, sir.

Q By the way, as you recollect it, which one was towards the street or toward where your car was? A Mr. Simon's back was nearest the car.

30 Q Then Mrs. Lazarus was the other side of him? A Facing me.

Q Facing you? A Yes.

Q And how long had you seen them in that position, before you put the lights on? You testified you saw they were close together and you could see that before you came up to them, while you were going along the street. Will you tell us how long they were together in that position before you put the lights on? A No; I cannot.

40

*Clarence E. Stark, direct.*

Q I don't mean seconds. How far before you got there could you see them there? A Maybe half the distance between Lexington avenue and the hydrant.

Q And you kept your eye on them during that time? A Yes, sir.

Q Did they change their position at any time, before you got there? A No, sir. 10

Mr. Lane: I didn't catch the length of time.

Mr. McGeehan: For half the distance, he said. That is, half the five hundred feet.

Q Now, then, when the lights were on and you saw them in that position, did they change that position? A I don't recall. There I put my car in a different gear and reversed it. My attention was then on my automobile. 20

Q Well, you mean, you glanced away for a moment? A Yes, sir.

Q And when you looked up, what did you see? Where were they then? A They were separated. Mr. Lazarus stepped out of the car.

Q And when they were separated did you see them doing anything? A No, sir. I saw nothing after that. 30

Q Well, did you see the persons after that? Did you see that they were there? A Oh, yes.

Q Well, then, you saw something after that, didn't you? A I saw the two people there.

Q Now, the question is, when you saw them separated, just where were they with relation to each other? A They were apart.

Q Apart. And did you see anything that Mr. Simon was doing with his clothing? A No, sir. 40

*Clarence E. Stark, cross.*

Q You didn't see that. Did you see anything being done by Mrs. Lazarus with her clothing?

A No, sir; I heard her make a call, calling Harry's name, twice.

Q You did hear that? A Yes, sir.

10 Q Did you hear what was said in that excitement at the time by Mr. Simon or by Mrs. Lazarus? A No, sir.

Q Did you see any blows struck? A No, sir.

Q Did they or did they not get out of the range of your headlights at that time, if you know? A They have.

Q Was there a rapid movement or not? A Yes, sir.

20 Q Who else was in the car besides yourself and Mr. Lazarus, when this transpired? A Ray Fresky.

*Cross examination by Mr. Lane.*

Q Was your driver's seat nearest to the side of the street that they were on? A Yes, sir.

Q And as I understand it, the hydrant came first and then the back of Mr. Simon and then Mrs. Lazarus standing in front of Mr. Simon? A Yes, sir.

30 Q And Mrs. Lazarus did not have her back to you at all, did she? A No, sir.

Q Simon's back was to you? A Yes, sir.

Q There can't be any doubt of that; is that right? A No, sir.

Q And you couldn't see whether Simon was leaning against the hydrant or sitting against the hydrant? A He was leaning against it, as I recall it.

40 Q Leaning? A Yes, sir.

*Clarence E. Stark, cross.*

Q Not sitting on it? A I don't know whether he was sitting—he was leaning as I recall it, yes, sir.

Q And it is about a two and a half foot or three foot hydrant? A I don't know how high it is. Regulation height, I suppose. I don't know what that is.

10

Q Do you know about what the regulation height is? A No, sir.

Q I am wondering how you can estimate five hundred feet as the distance between the points that they were at when you saw them on Van Riper avenue from Lexington avenue, when you cannot estimate the height of a two or three foot hydrant? A I—

The Court: You don't have to answer that. Mr. Lane is wondering.

20

Q How can you do it with one and not the other? A I can estimate the hydrant height.

Q Well, then, please estimate it. A About thirty to thirty-six inches, maybe—thirty inches, I will say.

Q Did you measure the distance between Lexington avenue and the point on Van Riper avenue? A No, sir.

Q Well, with reference to your turning the lights on, did Mr. Lazarus get out of the car? A Immediately before the—when the car's wheels hit the curb.

30

Q Before the lights went on or after? A After they had been on, just the second I flashed them on.

Q And was he sitting alongside of you in the front seat? A Yes, sir.

Q When you were at—earlier in the day, at or near Mrs. Lazarus' home, did anyone get out of your car? A No, sir.

40

*Clarence E. Stark, cross.*

Q When you were parked two hundred feet away? A No, sir.

Q Did you see Mr. Lazarus at any time go up to the house? A No, sir.

Q Did any one of your party go up to the house? A No, sir.

10 Q Did you see anybody approach the house? A No, sir.

Q Did any one of your party, to your knowledge, ring Mr. Lazarus' bell about that time? A No, sir.

Q Did Mr. Lazarus at that time say anything about having rung her bell a short time before? A No, sir.

Q Was there any talk about a bell being rung? A No, sir.

20 Mr. McGeehan: At what time?

Mr. Lane: At the time they were up at the house, before Mrs. Lazarus came out.

The Witness: No, sir.

Q A short time before Mrs. Lazarus came out? A No, sir.

Q Nothing was said about it at that time at all? A No, sir.

30 Q Before this episode took place you were unfriendly with Mrs. Lazarus, weren't you? A No, sir.

Q You were unfriendly with Mrs. Lazarus, weren't you? A No, sir.

Q You wanted to be a partner with Mr. Lazarus in his business, did you not? A No, sir.

Q Were you a partner? A In name, yes.

40 Q What do you mean by that? A I was vice-president of the company, but I had no money involved, only my earnings.

*Clarence E. Stark, re-direct.*

Q Didn't you have a share in the business?

A Yes, sir.

Q Wasn't there difficulty between you and Mrs. Lazarus or between Mr. Lazarus and Mrs. Lazarus with respect to your being connected with that company, to your knowledge? A Not that I ever knew, no, sir.

10

Q You never heard of that? A No, sir.

Q Before I asked you the question? A No, sir.

Q You used to take Mrs.— you used to go home with Mr. Lazarus on several occasions, you did go home with Mr. Lazarus on several occasions, didn't you? A Home, to his house?

Q To his house? A Never.

Q Never? A Never. I was never in his house.

20

Q And never— A No, sir.

Q —never took him to the door of his house?

A I have done that; yes, sir.

Q You did that, when he was in an intoxicated condition several times, didn't you? A Never.

Q Never? A Never.

Q And didn't Mrs. Lazarus object to your bringing him home in that condition on several occasions? A I never brought him home in that condition.

30

Q Did you ever see Mrs. Lazarus, when you came home with him? A Never.

Mr. Lane: That is all.

*Re-direct examination by Mr. McGeehan.*

Q That car was at right angles to the curb,— when the lights were thrown on, how was it

40

*Raymond Fresky, direct.*

pointed? A It was pointed right toward the hydrant.

*Re-cross examination by Mr. Lane.*

10 Q By the way, this Chevrolet car of yours, how old is it, what model? A 1926.

Q It is a Chevrolet coach? A Yes, sir.

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RAYMOND FRESKY, sworn for the petitioner.

*Direct examination by Mr. McGeehan.*

20 Q Mr. Fresky, are you employed by Mr. Lazarus now? A No, sir.

Q Were you in 1926? A Yes, sir.

Q Who do you work for now? A Montclair Plumbing Supply Company.

Q And is that his company, is that Mr. Lazarus' company? A No, sir.

Q Is he connected with it? A I don't know.

30 Q Do you remember an occasion on June 17, 1926, when you were with him and this last witness who was on the stand, Mr. Stark? A I don't understand.

Q Do you remember that occasion?

The Court: The 17th of June, 1926, do you remember that?

The Witness: Yes, sir.

Q All right. Where did you join Stark and Lazarus? A On Monroe street, near Lexington avenue.

40 Q Did you leave in Stark's car from that point with them? A I did not, no, sir.

*Raymond Fresky, direct.*

Q Did you go along with them in Stark's car? A No, sir.

Q Were you with the two of them at or near a park that night? A Yes, sir.

Q Well, where did you go from to get there?  
A I left in Mr. Stark's car.

Q With whom? A With myself. 10

Q Well, did you go to that point alone or with them? A No; I met them near Autumn street.

Q All right. From—Autumn street is that?

The Court: Autumn street.

The Witness: Autumn street.

Mr. McGeehan: Thank you.

Q From that point did you go with them? A 20  
Yes.

Q In Mr. Stark's car? A Yes, sir.

Q Did you see Mrs.— did you know Mrs. Lazarus before that? A Yes, sir.

Q Did you see her going on the street, along the street with anyone? A Yes, sir.

Q With whom? A Mr. Simon.

Q Did you know Mr. Simon? A Yes, sir.

Q And where did they go to? A They 30  
walked down Lexington avenue.

Q Where did they go to? A Through the park.

Q Did you see them in the park? A Yes, sir.

Q And what happened, did you see them from— A From Gerrity Place.

Q Was your car left there? A Yes, sir.

Q Could you see them from your car? A 40  
You could see from the car. We saw them sitting on the bench.

*Raymond Fresky, direct.*

Q Were they the same people, or not, whom you had been following? A Yes, sir.

Q Did you see them do anything with each other while they were sitting there? A Not while we were sitting in the car.

10 Q Well, when you got out did you see anything occur between them? A Yes, sir.

Q What? A We saw them kiss.

Q And how long did they stay there, would you say? A Oh, they must have stood there about forty-five minutes.

Q About forty-five minutes? A About three-quarters of an hour.

Q And where did they go from there? A Well, from there they got up and they walked down Lexington avenue.

20 Q How far did they walk to come to—what street did they finally wind up on? A Van Riper avenue, two blocks.

Q How far did they have to go to get to Van Riper avenue? A It is two small blocks.

Q Are you pretty familiar with that section? A I live in Clifton.

Q So you know Van Riper avenue? A Yes, sir.

30 Q Did that lead anywhere in the direction they walked along it? A Well, it leads up to the River Road to Dundee Lake.

The Court: Does it come out on any other street?

The Witness: No, sir.

The Court: Or does it just run up and stop?

The Witness: Dead end.

Q It doesn't even run into the River Road?

40 A You can turn left or right on the River Road.

*Raymond Fresky, direct.*

Q And it ends there? A Yes.

Q Was that the direction they walked in?

A Yes.

Q Was that street illuminated by any lights?

A No, sir.

Q Were there any houses on it? A Over,  
far distant.

10

Q Was there some house on that? A Oh,  
you couldn't distinguish a house on Lexington  
avenue.

Q But there is some house erected on the  
street? A Oh, yes.

Q I mean in June of 1926, were there any  
houses on the street? A Where, up the other  
end of Van Riper avenue?

Q Around the point where you later stopped  
your car; is there any house at the point where  
you stopped your car on Van Riper avenue  
that night—was there any house? A We didn't  
stop our car on Van Riper avenue. It was  
across the street.

20

Q Well, did you go into Van Riper avenue  
before you went home that night? A Oh, yes.

Q Did you stop your car somewhere on Van  
Riper avenue before you went home that night?

A Yes, sir.

Q Well, now, around that point were there  
any houses? Did you see a hydrant there? A  
No, sir.

30

Q That night? A No, sir.

Q Is there any house around there? A No,  
sir.

Q All right. Now, you say you saw them  
walk in the park to—down Van Riper avenue; is  
that right? A Yes, sir.

Q How long did you stop your car at the  
corner of Van Riper avenue before going down?

40

*Raymond Fresky, direct.*

A Well, we must have stopped about ten minutes, I should judge—twelve minutes.

Q About ten minutes. And during those ten or twelve minutes—I will withdraw that. That was after they had turned into Van Riper avenue? A Yes, sir.

10 Q Now, did you, after that, ride down Van Riper avenue? A Yes, sir.

Q Were the lights on the car lit or out? A Out.

Q And, as you went down that street and before getting to the hydrant you mentioned, could you see any shadowy figures there? A Yes, sir.

Q Could you then distinguish them very clearly or not? A Yes, sir.

20 Q You could tell people were there? A Yes, sir.

Q Could you see whether they were standing or sitting down? A Well, when we started to ride we could see two objects walking and a little later we could see them standing there.

Q You could see them standing there? A Yes, sir.

30 Q And how far away were you, would you say, from the hydrant, when you saw the two figures standing there? A Well, about one hundred feet.

Q One hundred feet. How far do you say it is from the beginning of the street to the hydrant on Van Riper avenue? A From—beginning from Lexington avenue?

Q Yes. A To the hydrant?

Q Yes. A Well, I don't know. It is quite a ways, four hundred feet.

40 Q About four hundred feet. Were you with Mr. Lazarus when he measured it or not? A Yes, sir.

*Raymond Fresky, direct.*

Q Whose feet were used in the measurement?

A Mr. Lazarus'.

Q (Continuing.) Yours or his? I see. Now, what portion of that distance did you cover when you first distinguished these figures in a standing position? A About one hundred feet.

Q That is, a hundred feet you had covered or the hundred feet before you got to the hydrant? A Before I got to the hydrant I could distinguish two figures standing there. 10

Q You didn't know how much before that they were standing there? A No.

Q Now, when you got near the hydrant, at any time were the lights put on? A Yes, sir.

Q And what did you see when the lights were put on? A Well, I seen Mr. Simon against the hydrant and in a kind of sitting position. He was not really sitting on it like I am sitting on this chair—just leaning against it, and Mrs. Lazarus close to him. 20

The Court: How close?

The Witness: Very close.

The Court: Was she in his lap?

The Witness: Yes, sir.

Q And did you see where their arms were at the time? A Yes, sir; they were around each other. 30

Q Around each other. Could you see where their feet were at the time? A I could see her left leg.

The Court: Where was it?

The Witness (Continuing.) Up above the knee.

Q Up above whose knees? A Mrs. Lazarus. 40

*Raymond Fresky, direct.*

Q You could see her leg above the knee? A Yes.

Q Do you know whether her clothes were pulled up on that side or not? A Well, it looked that way. I didn't see that far. If it was not, her dress was very short. Well, it wouldn't  
10 be up above the knee, I don't think.

Q When the lights were thrown on—

The Court: What happened?

Q —what happened, what did they do after you saw them? A There was just a quick move. There was a quick move and Mr. Lazarus was out of the car before I knew it.

Q He was out of the car, but what did the  
20 others do? A Just moved quick. Mr. Simon kind of turned around in a way and started fixing up his pants.

Q Well, did he turn when he fixed up his pants? A Towards—oh, towards Paterson.

Q That is away from the car? A Yes; away from the car; turned his back to—(interrupted).

Q Could you see what he was doing, however?  
A Oh, well, all you could see, his hands up in  
30 front of him, that is all.

The Court: What did she do?

The Witness: Well, she just stood there, I don't know, just moved around fast. That is all I could say.

The Court: Did you hear any conversation?

The Witness: All I heard was, "Harry, Harry!"

*Raymond Fresky, cross.*

Q What was Harry doing when you heard someone say "Harry, Harry!" A I don't know. He was close—(interrupted).

Q Did you see the fight between him and Mr. Simon? A No, sir.

Q Which way was that car pointed? A Well, we were—(interrupted). 10

Q I mean, during the stop with the lights on. A Right towards the hydrant.

Q Right towards the hydrant? A Right to the hydrant, to the left.

Q And were you there when the patrol wagon came? A When the patrol wagon came, no, sir.

Q You were not there then. By the way, who was that man that you saw at the hydrant there with Mrs. Lazarus? A Mr. Simon. 20

*Cross examination by Mr. Lane.*

Q What seat in the car were you in? A In the rear seat.

Q And what part of the car were you looking out of to see this? A The left-hand side of the car, in back of the driver. I had the window open.

Q What? A I had the window open. 30

Q And the car was pointed toward the hydrant? A When we made—(interrupted).

Q When the lights were put on? A When we made that stop, yes, sir.

Q Well, what position was the car in when the lights were first thrown on the hydrant? A Right towards the hydrant.

Q Well, which side of the street had you been parked on? A Parked? We didn't park. When we stopped the car? 40

*Raymond Fresky, cross.*

Q Yes. A To put the lights on?

Q No; not when you stopped the car, before you started down at all. A We were parked down at the corner of Lexington and Van Riper avenue.

10 Q Which side of the street, with reference to the hydrant? A On the right-hand side.

Q Well, across the street from the hydrant? A Yes, sir.

Q Or on the same side of the street as the hydrant? A Across the street from the hydrant.

Q Lexington and Van Riper? A Yes, sir.

Q And then you came down the street? A Yes, sir.

20 Q How long did it take you? What speed did you come down the street at? A Well, I should judge, almost at twenty-five or thirty miles.

Q Twenty-five or thirty miles an hour. You were making considerable noise then, weren't you? A No, sir; we were coasting.

Q You were coasting all the way? A No; not all the way; no, sir.

Q You were coming down that street twenty-five to thirty miles an hour? A I said, about.

30 Q In a Chevrolet coupe you were making some noise, weren't you, eh? A No.

Q Eh? A I guess I made a little noise.

Q Yes, I guess you did make a little noise. And, from the point of Lexington and Van Riper avenue where you started from, you could not see these figures at all? A Yes, sir.

Q You could see them? A Yes, sir.

Q You could see them? A I could, yes, sir.

Q And at that time they were standing up?

40 A From Lexington avenue and Van Riper?

*Raymond Fresky, cross.*

Q Yes. A They were walking up the street.

Q Walking? A Walking.

Q Well, did you see them while they were walking to the point where they stopped? A Yes, sir.

Q And you could see them when they stopped? 10  
A Yes, sir.

Q Couldn't you? A Yes, sir.

Q And they were in your line of vision all the time? A Yes, sir.

Q Well, now, what did you see them do from that point? A Well, all we could see them standing at the hydrant.

Q Yes. They were just standing up? A Well, as far as we could see, but it was dark.

Q Well, you saw the two figures? A Yes. 20

Q It was a clear night, wasn't it? A Yes, it was a clear night.

Q And were you in Van Riper avenue or were you in Lexington avenue? A When?

Q When you stopped there at that point? A I don't understand.

Q Well, when you stopped, before you went into Van Riper avenue— A Yes, sir.

Q —you had followed them up Van Riper, avenue, you had your car parked, didn't you? A 30  
Yes, sir.

Q Where were you parked? A Across—(interrupted).

Q In Lexington or on Van Riper? A Across the street on another street. I don't know the name of the street.

Q You were not even on Lexington or Van Riper then? A Yes, sir.

Q Which street were you on? A When we started—when we got out I went—when they 40

*Raymond Fresky, cross.*

were in the park we had our car on—(interrupted).

Q I am not talking about the park. I am talking about when they were at the hydrant and you got to Lexington avenue and Van Riper avenue you stopped your car, didn't you?

10 A Well, they were not parked at the hydrant when we were all the way down. I don't understand.

Q You—

The Court: Well, now, what Mr. Lane means is this: They walked down Van Riper avenue.

The Witness: Yes, sir.

20 The Court: You say you stopped ten minutes before you turned in?

The Witness: Oh, yes.

The Court: Now, where did you stop?

The Witness: On Van Riper avenue.

Q On Van Riper avenue? A Yes, sir.

Q Near the corner of Lexington avenue? A Yes, sir.

Q Across the street from where they were?

30 A Yes, sir.

Q You could see them walking down the street? A Yes, sir.

Q Is that right? A Yes, sir.

Q And you could see them walk to the point of the hydrant? They were always in your vision? A All the time.

Q Always in your vision? A Always.

Q And all that you saw was them walking down and then stopping and standing there? A That is it.

40

*Raymond Fresky, cross.*

Q And you could see that, couldn't you? A Yes, sir.

Q It was a clear night, wasn't it? A Yes, sir.

Q And your vision was not interfered with by anything? A No, sir.

Q You were watching? A Yes, sir. 10

Q Now, the car was pointed down the street, wasn't it, towards the hydrant? A Yes, sir.

Q And you started in your car at this twenty-five or thirty miles an hour? A Yes, sir.

Q Down to the hydrant? A Yes, sir.

Q And it took you about a few seconds only to get there, didn't it? A Yes; a short time; I don't know how long.

Q And then, how far away from the hydrant was it when the lights were thrown on? A Oh, about from here to that light (indicating). 20

Q That light. Well, that is about twelve feet, isn't it?

The Court: About.

Q Then, I suppose, you had your eyes on these people all the time? A All the time.

Q That you were going towards them? A Yes, sir. 30

Q Well, did you see them change their position from a standing position to get into a sitting position? A No, sir.

Q What? A No, sir.

Q And yet, when you threw the lights on, Mr. Simon was sitting on the hydrant? A I wouldn't say sitting on it; he was leaning against it.

Q But you told the Vice-Chancellor that Mrs. Lazarus was in his lap, I thought. A Yes, sir. 40

*Raymond Fresky, cross.*

Q Well, then, how can a woman be in a man's lap unless he is sitting? A I don't mean she was sitting in his lap or anything. I mean, they were close together and embraced.

Q Oh, you don't mean she was sitting on his lap at all? A No.

10

The Court: They were embracing.

Q But he was leaning up against the hydrant?

A Yes, sir.

Q And she was facing him? A That is right.

Q And you didn't see anything, although you got within ten feet of them, without the lights being thrown on, in this clear night, you didn't see anything which you lead you to suspect that

20

that was going on, did you? A Yes, sir.

Q What? A Yes, sir.

Q You did see something? A Yes, sir.

Q Now, what did you see before the lights were thrown on? A I could see her bare leg, her left bare leg.

Q That was before the lights went on? A Yes, sir.

Q You could see her left bare leg? A Yes.

30

Q How far were you away from them, coming from Lexington avenue and Van Riper avenue, when you saw this lady's bare leg, left bare leg? A Just about a second before the lights were switched on.

Q So that, just about a second before the lights went on, there suddenly came up to your view this woman's left bare leg; is that right; is that right? A I don't understand.

Q Well, did you see her do anything which would expose her left bare leg? A No.

40

*Raymond Fresky, cross.*

Q Or did you just happen to see this left bare leg? A She was just standing there, that is all.

Q What had they done to change the situation in which you could see a bare leg; anything?

Mr. McGeehan: I object to that. That is assuming there was a change of the situation. 10

The Court: I will sustain the objection.

Q Well, what was it that caused you at that particular moment to observe the left bare leg? Was there any movement or anything, or—(interrupted). A Why, I was always watching.

Q What? A I was always watching. I always had my eyes on it.

Q That is what I am assuming that you always had your eyes on them and I am assuming that you saw them from the time you left Van Riper avenue and Lexington avenue and I am wondering whether you observed any motion on the part of anybody during all of that time that you were watching them. Did you? A Motion, that is all that I said, that I seen them together, close together, and I could see her left leg up above her knee just standing there. 20

Q Just standing there? A Well, then close together. 30

Q And you saw that before the lights went on at all? A Yes, sir.

Q And you saw that he was leaning up against the hydrant, before the lights went on? A Yes. I didn't know it was a hydrant until I saw it.

Q Well, leaning up against something, before the lights went on? A Yes; because he couldn't be standing back that way. 40

*Raymond Fresky, cross.*

Q Well, when was it with reference to— could you see from Van Riper avenue and Lexington avenue that he was leaning against something? A No, sir; only standing up, only two objects standing there.

10 Q Just standing up. How many blocks are there on Van Riper avenue? A I don't know. I don't know whether there is any blocks or not.

Q Well, you are familiar with that neighborhood, aren't you? A Familiar? Well, I live up in the Petonia section.

Q Then you are familiar— Are you familiar with it or not? A I know Clifton, but I don't know how many blocks are in the city.

Q Do you know Van Riper avenue? A I know Van Riper avenue just to walk through it, but I never looked to see how many blocks are in it.

Q You know there is more than one block in it, don't you? A Yes, there is.

Q And it runs from Lexington avenue on through? A To Randolph avenue.

Q To Randolph avenue? A Yes.

Q And does it cross the River Road? A No, sir. Well, that is not the River Road there; that is Randolph avenue, but it is along the lake, as 30 I said before, that is Randolph avenue.

Q And it is a connecting link between Lexington avenue and Randolph, isn't it? A That is right; one straight street.

Q What? A One street; one straight street.

Q Yes. And between Lexington and Randolph there are several blocks, aren't there? A Yes, sir.

Q Now, Lexington avenue is a busy street, isn't it? A Business?

40 Q Busy. A Busy, for traffic, yes, sir.

*Raymond Fresky, cross.*

Q Yes. And particularly in the month of June? A Well, I guess—

Q A lot of automobile traffic? A I guess there is traffic there all you want.

Q All you want. And it is a well-lighted street? A Lighted? No, sir.

Q It is not? A No, sir. There is a light about Clifton avenue and there is another light about four blocks up. 10

Q There is an arc light at the corner of Lexington avenue and Van Riper avenue, isn't there? A Lexington avenue and Van Riper avenue?

Q Yes. Right opposite where you were parked? A Not that I noticed.

Q Or on the same side of the street you parked? A Not that I noticed.

Q Didn't you notice whether there was a light there? A Yes; across the street there is. 20

Q That is what I say? A Yes, yes.

Q And your car was in full view of that light, wasn't it? A No, sir.

Q It was in the range of that light, wasn't it? A No, sir.

Q How long a period of time did your lights remain on the two people at this hydrant? A Oh, I should—about a minute, and then Mr. Stark just turned around again, turned the car around after Mr. Lazarus jumped out. 30

Q Are there any stores on Van Riper avenue? A There is way up the other end of Randolph avenue, near Randolph.

Q Isn't there one right on the next corner to the—on the corner of Van Riper avenue next to Lexington? What I mean by that is, you leave Lexington avenue, walk down a block and isn't there a store right there? A Yes; that building just went there before that time. There is a 40

*Raymond Fresky, cross.*

building there, a two-family or three-family house.

Q There is a grocery store? A Well, it is some kind of a store; I don't know.

Q Did you notice at this time that there were children on the street, skating up and down? A  
10 No, sir; there was no children.

Q Did you notice anybody else on the street? A No, sir.

Q What? A No, sir.

Q Did you notice any car on the street? A No, sir.

Q During all the time you were there no car— A No, sir; not to my knowledge.

Q —turned down that street? A Not to my knowledge.

Q There were hundreds of cars passing up  
20 and down Lexington— A Lexington.

Q —avenue there during that time? A Yes.

Q Was Mrs. Lazarus facing you? A Yes, sir.

Q Then the hydrant came first and then Simon and Mrs. Lazarus? A Yes. I guess that is what it was; yes.

Q Eh? A Yes, sir. Mr. Simon's back was towards our—towards us, the car—and Mrs.—  
30 (interrupted).

Q And he was leaning against the hydrant, so the hydrant had to be to his back? A Yes, sir; that is it.

Q And Mrs. Lazarus was in front of him? A That is it.

Q So that she was facing him? A Right.

Q Now, you didn't see Lazarus get out of the car, did you? A No, sir; he got out so easy I didn't realize he got out of the car. I  
40 knew he got out of the car, yes.

*Raymond Fresky, cross.*

Q And you didn't see any of the fight? A No, sir.

Q Although you were looking right at it. You were looking right at it, weren't you? A Yes, sir; but they were beyond the lights of the car.

Q Had the car passed on by that time? A No, sir; the car was standing there; Mr. Lazarus jumped out of the car. 10

Q Oh, and they were—you say, they were beyond the light of the car, beyond the range of the lights. How far away were they? A I mean, on the side. The car was facing this way.

Q And you couldn't see—

Mr. McGeehan: Let him explain. 20

The Witness: The lights was going this way, and, of course, they were on the side, on the side of the lights.

Q Out of the line of the car? A That is it, and I don't know whether they were fighting or not.

Q And you were within five or ten feet of where they were? A Yes, sir.

Q What? Looking right at them? A I was not looking right at them. I could see them doing something; I didn't know they were fighting. 30

Q No. The lights were thrown in their general direction, but they were out of the glare?

A Yes, sir; after Mr. Lazarus jumped out of the car—

Q And you couldn't see anything that went on there? A I seen a kind of a scramble. I didn't know they were fighting until I knew after, not that moment. 40

*Raymond Fresky, re-direct.*

Q I am only interested in what you saw at that time. You couldn't see that they were fighting? A No, sir.

Q And you couldn't say that they were fighting? A No, sir.

10 Q Although a few minutes before without the aid of the glare of the car— A Yes.

Q —because the lights were out, from a further distance, you could see Mrs. Lazarus' bare leg. A Yes.

Q Is that right? A Yes, sir.

*Re-direct examination by Mr. McGeehan.*

Q You say you saw a kind of a scramble?  
A That is what I said.

20 *Examined by the Court.*

Q How long have you known Mr. Lazarus?  
A About six years.

Q Where has he lived since you have known him? A On Autumn street.

Q In Passaic? A Yes, sir.

Q He has lived in Passaic for six years? A Well, as far as—yes; I have known him that long.

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Mr. McGeehan: We rest, your Honor.

The Court: It is doubtful if we finish before four o'clock?

Mr. Lane: Absolutely impossible.

The Court: Well, then, I think you better stop.

(Adjourned to June 8, 1927.)

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**MEMORANDUM OF VICE-CHANCELLOR.**

This memorandum is not to be published in the official or unofficial reports.

John W. McGeehan, Jr., for petitioner.

Merritt Lane for defendant.

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CHURCH, V.-C.:

This is a case for divorce on the ground of adultery. It was heard May 10, 1927. When petitioner rested, defendant's counsel announced that the case could not be completed on that day. Defendant and co-respondent were in court and their counsel cross examined petitioner's witnesses at considerable length. The case was adjourned on June 8, 1927. On that day neither the defendant nor the co-respondent was in court. Counsel announced that defendant rested. There is nothing, therefore, before this court except the testimony for the petitioner, which to me is convincing. Defendant had an opportunity to deny and prove her denial. An adjournment was taken for this express purpose. This she failed to do.

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Counsel contends that the charge of adultery is not proved beyond the reasonable doubt required in cases of this character, citing *Johnson v. Johnson*, 99 New Jersey Equity, 190, which he says governs this case. In cases of this character—fact only—each is determined by the testimony presented in the case before the Court.

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I have gone over the evidence carefully and am convinced that the charge has been sustained. I do not think it necessary to elaborate on the testimony, which, to say the least, is not pleasant reading. I heard it in court; I had the opportunity of observing the witnesses and I have since read the testimony as transcribed.

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*Memorandum of Vice-Chancellor.*

The manner in which the adultery was committed was unusual, but I cannot agree with counsel that therefore the act was not done. The entire testimony convinces me that adultery was committed. I will advise a decree accordingly.

10 It is only fair to the Court to say that the delay in filing these conclusions is not due to laches on my part. I have had both briefs only one week.

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**DECREE NISI.**

Filed March 13, 1928.

This cause coming on to be heard in the presence of John W. McGeehan, Jr., solicitor for and of counsel with petitioner, and Merritt Lane, Esq., of counsel with the defendant, upon petition and answer, and upon proofs taken in open court, and the Court having read, heard and considered the proofs in the cause and the arguments of counsel; and it appearing that the petitioner and defendant were joined in the bonds of matrimony on or about January 28, 1923, and that the defendant has been guilty of the adultery charged against her, the defendant, and one Harry Simon, in the said petition and at the time the cause of the action for divorce therefor arose, the petitioner was a bona fide resident of this State and has been continuously a bona fide resident of this State for more than two years prior to the commencement of this suit; and it further appearing that jurisdiction herein has been acquired by personal service of process upon the defendant within this State, as well as by appearance and answer of the defendant; it is on this 13th day of March, 1928, 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 of the Acts of the Legislature in such case made and provided, doth hereby ORDER, ADJUDGE AND DECREE that the said petitioner, Harry Lazarus, and the said defendant, Marion Lazarus, be divorced from the bonds of matrimony for the cause aforesaid, and the said parties and each of them be freed and discharged

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*Decree Nisi.*

from the obligations thereof, unless sufficient cause be shown to the Court why this decree should not be made absolute, within three months from the date hereof.

10 And it is further ORDERED, ADJUDGED ANE DECREED that the Order for Alimony Pendente Lite heretofore made in the above cause on the twenty-third day of July, 1926, and in behalf of the defendant herein, Marion Lazarus, and against the petitioner herein, Harry Lazarus, be and the same is hereby discharged.

E. R. WALKER,

C.

Respectfully advised,

20 ALONZO CHURCH,  
*Vice-Chancellor.*

I hereby consent to the form of the above decree.

MERRITT LANE,  
Solicitor for Defendant.

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**NOTICE OF APPEAL.**

Filed April 12, 1928.

The defendant hereby appeals from the whole and every part of the decree nisi made herein, on or about the 13th day of March, 1928, by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, upon the advice of the Honorable Alonzo Church, Vice-Chancellor, to the Court of Errors and Appeals in the last resort in all causes. 10

MERRITT LANE,  
Solicitor for and of Counsel with Defendant.

Dated April 12, 1928.

I conceive there is good cause of appeal in the above stated cause. 20

MERRITT LANE,  
Of Counsel with Defendant.

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**PETITION OF APPEAL.**

Filed April 12, 1928.

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

10     The petition of Marion Lazarus, the appellant in the above-entitled cause, respectfully shows that your petitioner finds herself aggrieved by a decree nisi made in the Court of Chancery, by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, upon the advice of the Honorable Alonzo Church, Vice-Chancellor, on the 13th day of March, 1928, in a cause wherein Harry Lazarus was petitioner, and  
20     Marion Lazarus, appellant, was defendant, in this respect, to wit, that the said decree nisi orders, adjudges and decrees that the said petitioner, Harry Lazarus and the said defendant-appellant Marion Lazarus be divorced from the bonds of matrimony for the cause of adultery, and that the said parties and each of them be freed and discharged from the obligations thereof, unless sufficient cause be shown to the Court why such decree should not be made absolute within three months from the date of said decree. And  
30     your petitioner humbly appeals from the said decree and each and every part thereof upon the ground that the same is erroneous for that the evidence did not warrant the Court in finding your petitioner guilty of adultery and in making the decree aforesaid, and the petition of the petitioner, Harry Lazarus, should have been dismissed.

40     Your petitioner therefore prays that the said decree of the said Chancellor may be, in the particulars aforesaid, reversed, set aside and for

*Petition of Appeal.*

nothing holden, and that your petitioner may have such relief in the premises as to this Honorable Court shall seem meet.

MERRITT LANE,  
Solicitor for and of Counsel with Petitioner.

Formal answer to petition of appeal filed.

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## New Jersey Court of Errors and Appeals

Between

HARRY LAZARUS,  
Petitioner-Respondent,

*and*

MARION LAZARUS,  
Defendant-Appellant.

On Petition  
of Husband for  
Divorce on the  
Ground of  
Adultery.

Decree for  
Husband.

Appeal of Wife.

Sat Below,  
Church, V. C.

(Italics, etc., mine except where otherwise noted.)

### BRIEF OF APPELLANT.

#### Statement of the Case.

The husband filed his petition May 10, 1927, charging his wife with an alleged act of adultery said to have been committed June 17, 1926, with the corespondent Simon. The wife answered, denying the allegations of the petition. The case came on for trial before Vice Chancellor Church. The wife rested upon the husband's proofs. The Vice Chancellor filed a memorandum which resulted in a decree *nisi*, and it is from that decree that the wife appeals. Petition, p. 1; answer, p. 3; memorandum, p. 89; decree, p. 91; petition of appeal, p. 94. The Vice Chancellor, in his memorandum, directs attention to the fact that at the conclusion of the husband's case the hearing was adjourned after the wife's counsel had announced that the case could not be completed on that day, and on the adjourned day neither wife nor corespondent was in Court, the wife's counsel announcing that she rested.

My recollection does not serve me as to whether, upon the second day, the wife and the co-respondent appeared. I think that they did not come into Court but that they were in counsel's office. The speed with which, upon the first day, the husband rested surprised counsel and counsel was quite sincere when he stated to the Court, at the conclusion of the first day's testimony, that it would be absolutely impossible to finish before four o'clock. During the recess, it was determined that defendant should rest and *that* determination has no probative value upon the fact of guilt. The question is whether the proofs adduced before the Court proved the wife guilty of adultery, in the language of some of the cases, which will be hereafter adverted to, beyond a reasonable doubt.

### Facts and Argument Thereon.

This is not a case of inclination, desire and opportunity.

Petitioner's case depends upon supposed proof of a single act of adultery, alleged to have been committed on June 17, 1926, in the evening, on a public street, *not in a dark hallway or at the side of the street in the shadow of a wall*, or anything of that kind, but *on the sidewalk, at the curb*, in front of a fire hydrant—a most unusual place to commit such an act. Not only is the place most unusual but the case also depends upon the rather remarkable coincidence that not before, nor after, the commission of the act, *but at the instant* of such commission, the husband and his witnesses arrived on the spot and turned lights of their car upon the parties so that the act could be observed.

The story of the husband is that: from the date of their marriage, January 28, 1923, to the

date of the commission of the act of adultery, they lived "*very happy*" (p. 5); he had no suspicion of his wife until Vreeland said something to him in Montclair a few days before June 16th, 1926; Vreeland is proprietor of a restaurant in Montclair at which place petitioner eats (p. 48); the co-respondent Simon is in the electrical business in Passaic and petitioner has known him for upwards of five years (p. 22); the respondent is married and has children (p. 23); petitioner knew that his wife was acquainted with Simon and visited his store (p. 23); whatever it was that Vreeland told him (p. 25), he did not anticipate that he was going to catch his wife in adultery but he *did* hear something which made him, petitioner, *object* to the friendship of his wife for Simon and which made him suspicious, and I quote from his testimony (p. 25):

"Q. But from what you heard from Mr. Vreeland you heard something which made you object to her friendship for Mr. Simon?

A. Yes, sir.

Q. But you never said a word about that?

A. Never said anything.

Q. Why not? A. Just suspicious.

Q. Why didn't you say something then?

A. *I wasn't sure. I wanted to make sure—until I saw it with my eyes.*

\* \* \* \* \*

Q. Well, then, why didn't you say that you objected to her speaking to Mr. Simon? A. She never called it to my attention.

Q. Why didn't you say it? You knew that she was speaking to Mr. Simon, or thought you did. You objected to that. Why didn't you tell her that you objected to it instead of simply watching her. A. (Witness pauses.)

Q. Well, can't you answer that? A. *Well, the only reason I didn't talk to her was for my own information. I wanted to find out.*

Q. Well, didn't you think that she was entitled to be warned that you objected to her talking to Mr. Simon? A. Well, I think, if she didn't tell me, I had no business telling her.

Q. Although you knew from what you heard from Mr. Vreeland that there were suspicious circumstances *which might lead to something if you didn't stop it; is that right?*

A. Yes, sir.

Q. And you never warned her at all? A. I didn't—I wasn't sure that she was going out until I found out.

Q. But you knew she was going out, when you were in that barber shop, or you knew she was meeting Mr. Simon when you were in that barber shop and you heard that tooting and you saw Simon come in—go over, rather, and you never said a word to her that you objected to it, did you? A. Yes, sir. I didn't say a word to her.

Q. Well, why didn't you?

\* \* \* \* \*

Q. And you were on perfectly friendly terms with your wife at that time? A. Yes, sir.

Q. And, when you came back to her, after you had been in the barber shop, you carried on a very pleasant conversation, didn't you? A. I did."

Petitioner had told a story of having driven with his wife on June 16th, 1926, to a barber shop on Lexington and Monroe Streets, Passaic (p. 6), and of having gone into the barber shop, leaving his wife in the car, and of having heard the tooting of the horn of his car (p. 7) and of having looked out of the window of the barber shop and seeing Simon coming toward the car, and stopping and talking with his wife and then leaving (p. 8), and of then having returned to the car and having a *pleasant* conversation with his wife, saying

nothing about his objection to her meeting Simon (p. 25).

He then said that he drove his wife, at her request to a grocery store to do some shopping (p. 8) and he then took her, at her request, to her father's store (p. 8); not finding her father and mother at the store, she suggested that they might be at the grocery store and that she would go and find them and she drove away. He says he followed her (p. 8); she went to Elm Street, Passaic, stopped her car (p. 9) upon the public street near Monroe Street, which is a busy business street, and Simon, the co-respondent, came out, talked to her for about five minutes (p. 10), the husband watching; he returned to the father's store and his wife afterwards met him there; they went to the father's house and made a visit (p. 27); they then went home. Although he says (p. 27) that when he saw his wife talk to Simon on Elm Street his suspicions were then becoming verified and—

“Q. And you did not like that at all, did you? A. No, sir.”

he said nothing to his wife about it and, when she returned to her father's store, and they went to the father's house and made a visit, nothing was said nor was anything said during the night. He had made up his mind to follow his wife the next day and told her, when he left in the morning, that he was going to a meeting and would be very late (p. 27) and—

“Q. So that when you went out of that house, you went out of that house with the intention of following her all day and all night; that is so, isn't it? A. I did.

Q. And you told your wife that you were going away on business and that you did not

intend to be home until very late? A. Yes, sir.

Q. That is right. Why did you tell her that untruth? A. Because I was suspicious of her.

Q. You never said a word to her about your suspicions? A. No, sir."

He says that: about eight o'clock that evening he and the witness Stark, who is a man employed by him (p. 21), were in a parked car about eight o'clock in the evening, about 200 feet away from his home and they saw his wife leave the house on foot (p. 11); they followed and saw her meet Simon about quarter after eight (p. 12); it was just getting to turn dark (this was in June, within four days of the longest day of the year, daylight saving time, and it does not begin to get dark until later than 8:15); he is positive of the hour (p. 13) because he had a watch in his hand; his own counsel realized that it could not be 8:15 and getting dark.

He was then joined by the witness Fresky, who is another employee (p. 13); the three followed Simon and defendant, who were on foot and walking towards Clifton (p. 14); Simon and defendant went in a park at Clifton; it was not dark and it was not light at that time (p. 14); they parked their car one street away in a side street (p. 15), and yet he says:

"Q. And did you then approach nearer to them, after parking on the side street? A. We did not.

Q. Could you see them from the side street? A. At that time we could.

Q. And you say they were sitting on a bench? A. Yes, sir.

Q. Did you see the position that they were in? What position were they in in the park?

A. They were *just sitting near each other*.

Q. Yes. Just describe it fully. What was the position of each? A. Well, at the time

they first came, I could see; but after, when it got dark, we couldn't see.

Q. When you could see, what was the position they were in in the park on that bench?

A. Well, they were *sitting near to each other*.

\* \* \* \* \*

Q. You say, they were sitting close? A. Yes, sir.

Mr. Lane: He said 'near'.

Q. They were sitting near? A. Near each other.

Q. What else? Just describe what else they were doing. A. Well, that *is all I saw*.

Q. Just describe how they were sitting near. Give a full description of what you saw of them on that bench, please. A. Well, I was in a car at the time, and, when they sat down, I just saw them sitting *close and I couldn't see anything more at the time*.

Q. All right. And how close were they sitting? A. Well, just—why, they were *then rubbing elbows*.

Q. Rubbing elbows. I see. Not at arm's length? A. No."

He says that he remained for about an hour in the car.

"Q. And did both of these other men remain there also? A. Well, occasionally we walked out.

Q. Occasionally you walked out? A. Walked out.

Q. Did you ever walk toward where they were? A. Yes, sir.

Q. Well, did you see them after that? A. Yes, sir.

Q. All right.

By the Court:

Q. What were they doing when you saw them?

Mr. McGheehan: Yes.

Witness: Well, we walked over and we walked down towards Clifton Avenue.

Q. What were they doing? A. After I saw them, I saw them kissing each other.

Q. In the park? A. Yes, sir.

Q. Were they sitting on the bench then?  
A. Yes, sir.

Q. In addition to kissing each other did you see what else they were doing? A. I saw Mr. Simon holding his arm around my wife and kissing her; that is all I saw."

If he saw this why did he not interrupt?

Stark says that from the place where they parked the car, they could see defendant and Simon sitting on the bench "with their backs to us" (p. 61). He says that he walked over toward them—

"A. I couldn't make out any faces, but we had followed them to that bench and I knew no one else had left the bench, so I was sure it was they.

Q. And what did you see occurring between them? A. I saw them kiss."

He says that they sat on the bench about three quarters of an hour.

Fresky, another employee of petitioner (p. 21), says that they could see *nothing* from the car except that defendant and Simon were sitting on the bench (p. 72) and they got out and walked towards them and saw them kissing.

The park referred to is about three or four blocks from the center of the town (p. 28). It is bounded by Clifton Avenue and Lexington Avenue, which are main thoroughfares over which considerable traffic goes (p. 29). The streets surrounding it are *well lighted*. Defendant and Simon were sitting with their backs towards Lexington Avenue, right near Lexington Avenue, so that petitioner and his witnesses could see them.

Q. *And anybody passing along of course, could see them?* A. Yes, sir.

Q. And where were you with reference to them, when you saw them kissing? A. We were just walking past the bench they were sitting at.

Q. How close to them? A. *About fifteen feet.*

Q. And it was light? A. No light, there was no light there.

Q. What time of the night was it? A. Well, it must have been a little after nine.

Q. Daylight saving time? A. Yes, sir.

Q. In the month of June? A. Yes, sir."

They heard no talking. Petitioner and his witnesses walked up to them twice (p. 31) and each time they walked up they saw the *same* thing (p. 31)—

"Q. When you first saw them sitting in the park, when you said they were so close that they rubbed elbows, where were you then? A. I was sitting in a car.

Q. How far away from where they were? A. I should judge, about one hundred feet.

Q. On the same street? A. No, sir.

Q. On another street? A. Yes, sir.

\* \* \* \* \*

Q. And how long did you stand there and look at them or sit there and look at them?

A. Well, about a litle over a half hour.

Q. And during all the time you could see them? A. I saw them sitting there.

Q. And during all that time you could see what they were doing? A. Yes, sir.

Q. And during none of that time was there any kissing? A. No, sir; because it was not dark."

Both Stark (p. 61) and Fresky (p. 71), say that *nothing* could be seen from the car except that Simon and defendant were sitting on the bench

and it is clear from the way in which petitioner's testimony was drawn out (pp. 15, 16 and 17), that he deliberately invented the elbow rubbing and it is equally clear that it could not be seen, even if it had happened, from the place at which they were parked and Spark and Fresky so testified.

Petitioner and his two witnesses would have the Court believe that these two people took their position on the park bench (not in the middle of the park where they might have gone, where there were no lights as testified to by petitioner and his witnesses) but right near Lexington Avenue, one of the busiest thoroughfares in the town and where there *were* lights, and then, on that park bench, in a position where, according to petitioner and his witnesses *any one could* have seen them, proceeded to kiss, and it must have been a continuous kiss because, according to petitioner and his witnesses, they all three approached to within fifteen feet of where defendant and Simon were upon *only two* occasions, and upon *each one* of those occasions the kissing was going on.

The story of petitioner that he could see them rubbing elbows from a car a block away, while his two witnesses testified that they could *not* see any such thing from that point, indicates that petitioner is a type who will see things that do not happen.

Petitioner says that he did not see them leave the bench (p. 16) but did see them walking up Lexington Avenue, a main thoroughfare, they walked up two blocks and turned right on Van Riper Avenue, which is a paved street; there are no houses on Van Riper Avenue, according to petitioner, and no lights on that street (p. 17)—but there are "*vacant lots and brushes;*" he saw them go into Van Riper Avenue; he waited; he finally turned into that Avenue in the car, with

the lights off (p. 18); he went into the street before they saw anything about one hundred feet, and then he saw "two objects standing" (p. 18). The lights were turned and (p. 19):

"A. Mr. Simon was sitting on a hydrant and my wife was close towards him,"

Again he is led and I quote his testimony, page 19:

"A. I saw Mr. Simon and my wife.

Q. Go on. Just describe to the Court what position you saw them in. A. Mr. Simon was sitting on a hydrant and my wife was just close towards him.

Q. And just tell what you saw. Tell what you saw go on between them, if anything.

A. *Well, I went out of the car and I approached Mr. Simon.*

Q. Yes. Now, one minute. I didn't ask you what you did. What did you see, when the lights were turned on? A. I saw Mr. Simon getting away and just buttoning his pants.

Q. Where? What part of his pants? A. Well, the top of his pants.

Q. In the rear or front or side or where? A. In the front.

Q. And before he did that, you said you saw the two of them there. He was sitting on the hydrant? A. Yes, sir.

Q. Where were her legs and where were her arms and where was her body? A. Well, I could only see her back, towards *him*.

Q. She had her back towards him? A. No; her back towards me.

Q. What did she do, when the lights were thrown on? A. She jumped immediately away.

Q. And did you see whether her clothes were up or down at that time? A. I couldn't see whether her clothes were up or down. It was down at that time.

Q. What? A. *They were down at that time.*

Q. That is after she jumped? A. After she jumped away.

Q. Now, you say you could see him sitting on the hydrant? A. Yes, sir.

Q. Now, could you see how close she was to him, with her back towards your car? Could you see how close she was to him before she jumped and he jumped? A. Yes, sir.

Q. How close? A. She was just directly on top of him.

Q. Now, after you saw this, they jumped away, what did you do? A. I struck Mr. Simon.

Q. You struck him? A. Yes, sir.

Q. You got out of the car? A. And struck him."

He then would have us believe that, when he struck Simon (p. 20), Simon said:

"Go on. You can kill me. I am a dirty cur."

"And my wife grabbed me—I was hitting him and she grabbed me by the throat and said 'I like him. Don't hit him.'"

He called the police department and a patrol wagon came but Simon had left.

Every one of the answers which indicated incriminating facts was drawn out of petitioner and the answers are really those of counsel and not of petitioner. When the witness was first asked as to what he saw when the lights were turned on he said: "Mr. Simon was sitting on a hydrant and my wife was *just close toward him.*" Counsel repeated the question: "And just tell us what you saw. Tell what you saw go on between them, if anything." The witness had not yet gotten the cue and he answered: "Well, *I went out of the car and I approached Mr. Simon.*"

Counsel is not yet satisfied and he asks the question: "Yes, now one minute. I didn't ask you what you did. What did you *see*, when the lights were turned on?" The witness now had gotten the cue and he made the same answer that we always get from detectives under similar circumstances: "I saw Mr. Simon getting away and just buttoning his pants."

It is remarkable how often, where raids are made, that the man just *happens* to be caught in the act of buttoning his pants. Is it conceivable that, had this witness, the husband, actually seen the things he said he saw, he would not have had that picture so firmly fixed in his mind as that, when his counsel first asked him the question as to what he saw, he would have immediately told it? The way in which this testimony is brought out indicates that it is a prepared story.

When the witness first caught the cue and was asked what he saw *when the lights were turned on* he said that he saw Simon *getting away and just buttoning his pants*. But that did not satisfy counsel and counsel asked a question which contained in it a suggestion to the witness:

"Q. And before he did that, you say you saw the two of them there. He was sitting on the hydrant? A. Yes, sir,"

and then counsel said:

"Where were her *legs* and where were her arms and where was her body?"

and the witness then answered:

"Well, I could only see her back, towards him."

That did not satisfy counsel so he repeated:

"She had her back towards him?"

The witness got the point and said:

“No; her back towards me.”

Notwithstanding the fact that the witness first said that he could *only* see her back, counsel persisted in attempting to get the witness to locate the position of her clothes, with the net result that the witness said that her clothes were down at that time. *That* did not satisfy counsel and, when the witness had stated that the clothes of the woman were down, *i. e.*, at the time he saw her counsel asked the leading question:

“That is after she jumped”

and the witness promptly responded

“After she jumped away.”

There was a noon recess. Upon being recalled, on cross examination, petitioners placed the fire hydrant and the place at which these people were standing four hundred feet in from Lexington Avenue and he denied that he had made this distance at the morning session one hundred feet. He *had* said one hundred feet and I have quoted his testimony (p. 18). The reason why he said four hundred feet in the afternoon is that, during the noon recess, it became apparent that one hundred feet in on Van Riper Avenue from Lexington Avenue, which is a well lighted street (p. 33), was a perfectly impossible place to put these people for the performance of the act of adultery. One hundred feet would not be sufficient for the car to turn into Van Riper Street come down the street to the point where these people were, *without the people observing the car*. It would not give time for the performance of the things which the witnesses say happened during the time the car *was proceeding from the corner of Lexington*

and Van Riper Avenues to the place on Van Riper Avenue where the act is alleged to have been performed. He finally placed the hydrant about one third of the block in (p. 33). When his attention was directed to the fact that if it were one-third of the block in and four hundred feet from Lexington Avenue, the block must be twelve hundred feet long (p. 33). He cannot very well conceive of such a block so he only says "about" (p. 33). He then testified (p. 34) in a manner which indicates how this story is made up. He said (p. 34):

"Q. Where did you get this figure four hundred that you told us about? A. I measured it.

Q. You measured it? A. Yes, sir.

Q. When did you measure it? A. The same night.

Q. What time the same night? A. About one o'clock.

Q. Who was with you? A. Mr. Fresky.

Q. Who else? A. Nobody else.

Q. How did you measure it? A. Just measured it with my feet.

Q. Measured it with your foot? A. Yes.

Q. Paced it, you mean. A. No, I just took my foot as a measure for a foot.

Q. And you remember that measurement. Is that the first fire hydrant on Van Riper Avenue? A. Well, I wouldn't say that.

Q. Well, can you remember—throw your mind back to that night. Can you remember the distance from the fire hydrant that you saw them at and the fire hydrant at the corner? A. I can't remember."

If he had measured the distance and had it in his mind why, when he was first interrogated with respect to it, did he not say four hundred instead of one hundred feet? This matter of measurement was an invention of petitioner on the stand.

He said on cross examination that, when he first saw them on Van Riper Avenue, he was just riding down Lexington Avenue in the car. It was a clear night in the month of June (p. 34). He first saw them when he was about 300 feet away. He had followed them along Lexington Avenue before they turned into Van Riper Avenue and, after they had turned into Van Riper Avenue, petitioner and his witnesses waited about "ten or fifteen minutes" (p. 35). During this ten or fifteen minutes they did not have defendant and Simon under observation nor did they know what defendant and Simon were doing. Yet, when they made up their minds to go into Van Riper Avenue, they *just happened* to catch defendant and Simon in the very act of committing adultery. From his testimony on page 35 it would appear, however, that, from the corner of Lexington Avenue and Van Riper Avenue, he saw defendant and Simon at the hydrant although he could not see what they were doing.

"Q. Didn't you see them at all, when you got to the corner of Van Riper and Lexington Avenues? A. I only saw two objects at that time.

Q. What were the two objects doing? A. Well, I couldn't tell you what they were doing.

Q. Well, you could see. What do you mean, two objects? You say you saw the two objects. Now, what did you see? A. I just saw them standing there.

Q. All right. *Then the two objects were standing.* A. Yes, sir.

Q. Where were they standing? A. *Right near this hydrant.*

Q. How far away from the hydrant?

\* \* \* \* \*

A. Well, they were standing right near the hydrant.

Q. Just standing there? A. Well that is, that was my idea. I saw them standing over there.

Q. And that you saw from the corner of Van Riper Avenue and Lexington Avenue? A. I didn't know they were standing at the hydrant; I just saw them standing right there, about four hundred feet.

Q. Then what did you do? A. We waited about ten or fifteen minutes.

Q. Right on the corner? A. Yes, sir.

Q. Where you could see them? A. I said, I could just see two objects.

Q. Well, where you could see the two objects? A. Yes, sir.

Q. Did you keep the two objects under observation? That is what I want to get at. A. Yes, sir.

Q. What did they do? A. *I couldn't see.*"

It appears that the impression which is given from his first testimony upon this subject, *i. e.*, that they did not keep Simon and defendant under observation is incorrect and that, *at no time*, did defendant and Simon get out of sight of petitioner and his witnesses and we have petitioner testifying that, from a point on the corner of Lexington Avenue and Van Riper Avenue, they could see defendant and Simon standing where they were near the hydrant and that they kept defendant and Simon under observation at that point for from ten to fifteen minutes and that, *although they could see them, they could not see what they were doing.*

He then said that: they came right on down in the car and that the bright lights were put on diagonally; when the bright lights were put on, one of the objects which he had seen from the corner standing was *sitting* on the hydrant (p. 41); he did not see that Simon was sitting on the hydrant until just as the lights were put on (p. 37).

He had testified that he had these two objects in view from the time he started from the corner of Lexington Avenue and even before and that he had kept them in view. Of course, as he got nearer he could see more clearly or he should have seen more clearly. *But he did not see them change their position.* See the cross-examination, p. 37:

“Q. Yes, well, as you got nearer the objects, before you put the bright lights on, did you see whether they were standing or not? A. No, sir. We could see them standing.

Q. You could see them standing. What I am trying to get at is when they altered their standing position to a sitting position. You could see them standing, coming down Van Riper Avenue. Now, when did you see one of them sit down? A. I saw them only standing, from Lexington Avenue and Van Riper Avenue.

Q. Yes. Well, now, you are going closer to them all the time on Van Riper Avenue, aren't you? A. Yes, sir.

Q. As you bore closer to them, what did you see? A. When the light was put on I saw—(interrupted).

Q. I don't care when the lights were put on. Before the lights were put on. A. I couldn't see anything at that time. I just saw the objects.

Q. You could see them from Van Riper Avenue and Lexington Avenue four hundred feet away, you could see they were standing, but, as you got closer to them, you couldn't see what they were doing, is that right? A. I said, they were sitting.

Q. You didn't see that until you put the lights on? A. Yes, sir.

Q. And you didn't put the lights on until you got opposite them; is that right? A. Right on top of them.

Q. How far away? A. *Five feet.*

Q. Now, on this clear night, in the month of June, you couldn't tell until you got within

—how many feet? A. Well, right on top of them.

Q. Well, you couldn't tell until you got within five feet or ten feet of them and put the bright lights on— A. Yes.

Q. —those two objects, whether one of them was sitting or not? A. Yes, sir.

Q. It was a bright night, wasn't it? A. Well, it was a clear night. I couldn't say it was a bright night."

The hydrant is three feet high and, according to petitioner, Simon was sitting on the hydrant (p. 38).

"Q. And between him and you saw Mrs. Simon—Mrs. Lazarus, rather? A. *No, sir.*

Q. Well, did she have her back to you or didn't she? A. Yes, she had her back toward me.

Q. All right. Then how could she be anywhere else than between you and him? A. Well, I was in back of them when I came out. I couldn't be between the two of them.

Q. She was between you and him? A. *She was not.*

Q. All right. Then she was in front of him. A. She was in front of Mr. Simon.

Q. Yes. And you were behind Mr. Simon and she had her back to you, is that right?

Mr. McGeehan: I object to that. That couldn't be.

Mr. Lane: Well, I know it couldn't be, but I am trying to find out.

Q. This woman had her back to you; is that right? A. Yes, sir.

Q. Then where was Simon, in front of her or behind her? A. Simon was in front of her.

Q. And where were you, behind Simon or in front of Simon? A. I was in front of Simon.

Q. All right. Then Mrs. Lazarus was between you and Simon, wasn't she? A. She was not between the two of us. I was in

back of Mrs. Lazarus. I couldn't be between the two of them.

Q. Could you see Simon through Mrs. Lazarus? A. Yes, sir."

Petitioner on page 40 insists on putting Mrs. Lazarus with her back to him, the petitioner, and still in front of Simon. On his direct examination he testified that the back of Mrs. Lazarus was towards him (p. 19).

But the car was in the street. Petitioner got out of the car in the street. The hydrant was at the curb. If the back of Mrs. Lazarus was toward petitioner she must have been on that side of the hydrant nearest the street which would have meant that she must have been *in the street*. Simon was in front of her, and yet the witness would not say that Mrs. Lazarus was between petitioner and Simon (p. 39) although he finally conceded that that *must* have been the situation, whereupon he said that he could see Simon *through* Mrs. Lazarus.

His testimony on page 40 is significant.

"Q. Well, what were they doing when the lights went on? A. They were surprised and jumped away."

This car came down the street, shot over towards this hydrant where these two people were, on a *clear June night*, until it got *within five feet of them* and they are *not surprised until the lights were put on*. It is never so dark on a *clear June night* as that one cannot see the distance between this hydrant and the corner of Lexington and Van Riper Avenues. Only the densest kind of a fog could have prevented defendant and the correspondent from seeing this car come down the street and it is hardly conceivable that, had they seen the car, they would have performed the act

of sexual intercourse on this public street if they did not know who was in the car.

He continued:

“Q. Well, what were they doing before they jumped away, or did you see? A. I saw Mr. Simon sitting on the hydrant.

Q. Yes. I know. A. And my wife—*my wife right close to him.*

Q. Well, what else? A. That is all. And I saw them jump away.

Q. That is all you saw? A. Yes, sir.

Q. Well, you told your counsel this morning that you saw a great deal more than that. Now, can you remember this afternoon what you told him this morning what you saw? A. Well, after Mrs. Lazarus jumped away I saw Mr. Simon button his pants, the top of his pants.

Q. Yes. *You were then five or ten feet; you were within five feet of them then?* A. Yes, sir.

Q. And rushing towards them? A. Yes, sir.

Q. As fast you could go? A. Well, Mrs. Lazarus held me back; she grabbed me around the neck.

Q. And you struck Simon? A. I struck Simon. And then she grabbed me around the neck.

Q. You struck Simon first? A. Yes.

Q. And then you started at a point about five feet away? A. Five feet away.

Q. And yet you saw Simon buttoning up his pants in the meantime? A. Yes, sir.

Q. Is that right? A. Yes, sir.”

This is preposterous. He then said that although he assaulted Simon first, Simon bit him first (p. 41). And then (p. 41):

“Q. Did he bite you first? A. Yes.

Q. Oh, he bit you first? A. Yes, sir.

Q. And you went at him as hard as you could— A. As I \* \* \* .

Q. Go ahead. A. Yes—

Q. —from your distance of five feet away and struck him. In the meantime, however, he had bitten you? A. Yes, sir.

Q. And, although he bit you before you hit him, when you did hit him, he said, 'I am a dirty dog; you can keep on'; is that right? A. Yes, sir.

Q. And he did not afterwards bite—and he didn't afterwards try to fight back, or did he? A. Well, he got away.

Q. So that he ran away after saying he was a dirty cur—whatever expression you used—and you could keep on hitting him; is that right? A. Yes, sir."

Stark's testimony with respect to this episode was that: page 63—the hydrant was about five hundred feet from the corner; they went along in their car, not very fast "because our lights were out and we went cautiously." Here, again, let me suggest that there was no particular need for caution upon this *clear June night* and that petitioner and his witnesses are guilty, to say the least, of gross exaggeration. One would think that the darkness was such as that you could cut it. They went as silently as they could. Counsel tried not to put Stark in the absurd position that petitioner had put himself and his witnesses in (p. 63):

"Q. Could you tell exactly whether they were standing or leaning against a hydrant or sitting or exactly what they were doing? A. Leaning against the hydrant as I remember."

*This* did not satisfy counsel because, if they could see from a point at the corner that these two figures were *leaning* against the hydrant, and they kept the two figures under observation, they *must* have been able to see what the two figures did while under observation, so counsel asked:

“Q. Well, could you, before you put the lights on, observe that they were at a hydrant? A. *No; I could not.*

Q. My question goes to the time before you put the lights on. Could you, at that time, while you were going along the street, before you stopped and put your lights on, could you tell then exactly what posture they were in, whether leaning against the hydrant or—(interrupted). A. Very close to each other.

Q. Could you tell that? A. Yes, sir.

Q. *Could you tell whether they were leaning against a hydrant or not?* A. *No, sir.*

Q. Could you tell what they might have been doing with their hands? A. *They might have been embracing each other.*”

That question was stricken out.

“Q. The question is, could you tell what they were doing, outside of the fact that you saw them close together? A. *No, I could not.*

Q. When you put the lights on, could you? A. I saw them very closely at that time.

The Court: What were they doing when you put the lights on?

Witness: I saw Mr. Simon in a sitting position at the hydrant and Mrs. Lazarus facing him, very closely.

The Court: Was she sitting on his lap, or what was she doing?

Witness: I can't say she was sitting; she might have been leaning against him.

Q. *Did you see where her feet were?* A. *No, I did not.*

Q. *Did you see where her arms were?* A. *No, sir.*

Q. Was there any space between their bodies at all that you could see? A. *No, sir.*”

And then (p. 64):

“Q. And how long had you seen them in that position, before you put the lights on? You testified you saw they were close to-

gether and you could see that before you came up to them, while you were going along the street. Will you tell us how long they were together in that position before you put the lights on? A. No; I cannot.

Q. I don't mean seconds. How far before you got there could you see them there? A. *Maybe half the distance between Lexington Avenue and the hydrant.*

Q. *And you kept your eye on them during that time?* A. *Yes, sir.*

Q. Did they change their position at any time, before you got there? A. No, sir.

\* \* \* \* \*

Q. Now, then, when the lights were on and you saw them in that position, did they change that position? A. I don't recall. There I put my car in a different gear and reversed it. \* \* \*

Q. And when you looked up, what did you see? Where were they then? A. They were separated. Mr. Lazarus stepped out of the car.

Q. And when they were separated, did you see them doing anything? A. No, sir. I saw nothing after that."

Counsel was not satisfied. He desired to bring out the buttoning up of the pants but his witness would not help him.

"Q. Well, did you see the persons after that? Did you see that they were there? A. Oh, yes.

Q. Well, then, you saw something after that, didn't you? A. I saw the two people there.

Q. Now, the question is, when you saw them separated, just where were they with relation to each other? A. *They were apart.*

Q. *Apart. And did you see anything that Mr. Simon was doing with his clothing?* A. *No, sir."*

Counsel was still not satisfied.

“Q. You didn’t see that. Did you see anything being done by Mrs. Lazarus with her clothing? A. No, sir; I heard her make a call, calling Harry’s name, twice.”

He saw no blow struck. *This witness was in the driver’s seat, which was nearest to the hydrant. He should have seen more than anybody else.* He saw the hydrant first, and then the back of Simon and then Mrs. Lazarus standing in front of Simon, and then he said (p. 66):

“Q. *And Mrs. Lazarus did not have her back to you at all, did she?* A. No, sir.

Q. Simon’s back was to you? A. Yes, sir.

Q. There can’t be any doubt of that; is that right? A. No, sir.

Q. And you couldn’t see whether Simon was leaning against the hydrant or sitting against the hydrant? A. *He was leaning against it, as I recall it.*

Q. Leaning? A. Yes, sir.

Q. Not sitting on it? A. I don’t know whether he was sitting—he was leaning, as I recall it, yes, sir.”

Lazarus had gotten out of the car on the street side of the hydrant, and yet he saw Mrs. Lazarus with her back to him, then Simon, then the hydrant, but *this* witness put the hydrant first, then Simon and then Mrs. Lazarus. Lazarus must have circled around but he did not say anything about that. Lazarus was sitting in the seat next to Stark, and should have seen what Stark saw and *only* what Stark saw (p. 67). Indeed, Stark being nearest to the hydrant, should have seen more, and yet he did not say anything about any derangement of the clothes of Mrs. Lazarus, nor did he say anything about Simon buttoning up his pants, although counsel tried his utmost to get it out.

On direct examination he testified (p. 64):

“By the way, as you recollect it, which one was towards the street or toward where your car was? A. Mr. Simon’s back was nearest the car.

Q. Then Mrs. Lazarus was on the other side of him? A. Facing me.

Q. Facing you? A. Yes.”

Petitioner put them in precisely the reverse position.

Fresky (p. 70), an employee of petitioner, said that there *were* houses on Van Riper Avenue, but not at the point where the hydrant was (p. 84). Petitioner had said that there were no houses on the street and that there were vacant lots and bushes. Fresky testified that he watched defendant and the co-respondent for about ten minutes at the corner of Van Riper Avenue and Lexington (p. 74), and that they then went down the street.

Counsel did his utmost to make the story of Fresky believable but his witness did not follow him. For example (p. 74):

“Q. And, as you went down that street and before getting to the hydrant you mentioned, could you see any *shadowy (leading)* figures there? A. Yes, sir.

Q. *Could you then distinguish them very clearly or not?* A. Yes, sir.

Q. You could tell people were there? A. Yes, sir.

The witness did not follow the suggestion contained in the questions:

“Q. You could tell people were there? A. Yes, sir.

Q. Could you see whether they were standing or sitting down? A. *Well, when we started to ride we could see two objects walk-*

*ing and a little later we could see them standing there.*

Q. You could see them standing there? A. Yes, sir.

Q. And how far away were you, would you say, from the hydrant, when you saw the two figures standing there? A. *Well, about one hundred feet.*

Q. One hundred feet. How far do you say it is from the beginning of the street to the hydrant on Van Riper Avenue? A. From—beginning from Lexington Avenue?

Q. Yes. A. To the hydrant?

Q. Yes. A. Well, I don't know. It is quite a ways four hundred feet" (p. 75).

"Q. \* \* \* Now, what portion of that distance did you cover when you first distinguished these figures in a standing position? A. About one hundred feet.

Q. That is, a hundred feet you had covered or the hundred feet before you got to the hydrant? A. Before I got to the hydrant I could distinguish two figures standing there.

Q. You didn't know how much before that they were standing there? A. No.

Q. Now, when you got near the hydrant, at any time were the lights put on? A. Yes, sir."

We have this witness stating that: as they came down the street, that is, after they had left the corner of Lexington and Van Riper Avenues and were proceeding towards the hydrant, they could see the defendant and the co-respondent *walking* (p. 74); as they continued they could see them standing at the hydrant (p. 74); they made no stop on Van Riper Avenue. However slowly petitioner and his witnesses might have been going it could not take very long to cover four hundred feet in an automobile. We have the two figures *walking*. We then have the two figures *standing*. We then have the lights put on, and according to this witness, when the lights were put on (p. 75)—

“And what did you see when the lights were put on? A. Well, I see Mr. Simon against the hydrant and in a kind of sitting position. He was not really sitting on it like I am sitting on this chair—just leaning against it, and Mrs. Lazarus close to him.

The Court: How close?

Witness: Very close.

The Court: *Was she in his lap?* (Leading).

Witness: Yes, sir.

Q. And did you see where their arms were at the time? A. Yes, sir; they were around each other.

Q. Around each other. Could you see where their feet were at the time? A. I could see her left leg.

Q. Court: Where was it?

Witness (Continuing): Up above the knee.

Q. Up above whose knees? A. Mrs. Lazarus.

Q. You could see her leg above the knee? A. Yes.

Q. Do you know whether her clothes were pulled up on that side or not? A. Well, *it looked that way*. I didn't see that far. If it was not, her dress was very short.

Q. Well, it wouldn't be up above the knee? A. I don't think.

Q. When the lights were thrown on what happened, what did they do after you saw them? A. There was just a quick move. There was a quick move and Mr. Lazarus was out of the car before I knew it.

Q. He was out of the car, but what did the others do? A. Just moved quick. Mr. Simon kind of turned around in a way and started fixing up his pants.

Q. Well, did he turn when he fixed up his pants? A. Towards—oh, towards Paterson.

Q. That is away from the car? A. Yes; away from the car; turned his back to—(interrupted).

Q. Could you see what he was doing, however? A. *Oh, well*, all you could see, his hands up in front of him, that is all.

Court: What did she do?

Witness: *Well, she just stood there*, I don't know, just moved around fast. That is all I could say.

Court: Did you hear any conversation?

Witness: All I heard was, 'Harry, Harry'."

He then said that he did not see any fight between Simon and Lazarus. This witness was in the rear seat (p. 77), back of the driver. The car was a closed car; the window was open. They had parked at the corner, on the opposite side of the street from the hydrant (p. 78). They proceeded down the street, about twenty-five miles an hour. The car was a Chevrolet coupe (p. 78)—

“Q. In a Chevrolet coupe you were making some noise, weren't you, eh? A. No.

Q. Eh? A. I guess I made a *little* noise.

Q. Yes, I guess you did make a little noise. And, from the point of Lexington and Van Riper Avenue where you started from, you could not see these figures at all? A. Yes, sir.

Q. You could see them? A. Yes, sir.

Q. You could see them? A. I could, yes, sir.

Q. And at that time they were standing up?

A. From Lexington Avenue and Van Riper?

Q. Yes. A. They were walking up the street.

Q. *Walking?* A. *Walking.*

Q. Well, did you see them while they were walking to the point where they stopped? A. Yes, sir.

Q. And you could see them when they stopped? A. Yes, sir.

Q. *Couldn't you?* A. *Yes, sir.*

Q. *And they were in your line of vision all the time?* A. *Yes, sir.*

Q. Well, now, what did you see them do from that point? A. *Well, all we could see them standing at the hydrant.*

Q. Yes. They were just standing up? A. Well, as far as we could see, but it was dark.

Q. Well, you saw the two figures? A. Yes.

Q. It was a clear night, wasn't it? A. Yes, it was a clear night."

He represented that defendant and Simon were always in his vision (pp. 80, 81). He could see them walking. His vision was not interfered with in any way. He was *watching*. The car was pointed towards them. It took only a few seconds to get to the hydrant (p. 81). The lights were thrown on about twelve feet away from the hydrant (p. 81). He had his eyes upon the people all the time as he was coming towards them but—

"Q. *Well, did you see them change their position from a standing position to get into a sitting position?* A. *No, sir.*

Q. What? A. *No, sir.*

Q. And yet, when you threw the lights on, Mr. Simon was sitting on the hydrant? A. *I wouldn't say sitting on it; he was leaning against it.*

Q. But you told the Vice Chancellor that Mrs. Lazarus was in his lap, I thought? A. Yes, sir.

Q. Well, then, how can a woman be in a man's lap unless he is sitting? A. *I don't mean she was sitting in his lap or anything. I mean, they were close together and embraced.*

Q. Oh, you don't mean she was sitting on his lap at all? A. No."

How can reliance be put upon the testimony of any witness who, on direct examination, says one thing and on cross-examination, when it appears that what he had said cannot be squared with what

he wants to say, says another thing? This is particularly important because the examination of the petitioner indicates that the petitioner did not testify as to what actually occurred but rather *to what he thinks ought to have occurred if the act of adultery were performed.*

I have already directed attention to the fact that when the witness was permitted to answer without suggestion he stated nothing which was incriminating (p. 82).

“Q. But he was leaning up against the hydrant? A. Yes, sir.

Q. And she was facing him? A. That is right.

Q. And you didn't see anything, although you got within ten feet of them, without the lights being thrown on, in this clear night, *you didn't see anything which would lead you to suspect that that was going on, did you?* A. Yes, sir.

Q. You did see something? A. Yes, sir.

Q. Now, what did you see before the lights were thrown on? A. I could see her bare leg, her left bare leg.

Q. That was before the lights went on? A. Yes, sir.

Q. You could see her left bare leg? A. Yes.

Q. How far were you away from them, coming from Lexington Avenue and Van Riper Avenue, when you saw this lady's bare leg, left bare leg? A. Just about a second before the lights were switched on.

Q. So that, just about a second before the lights went on, there suddenly came up to your view this woman's left bare leg; that is right; is that right? A. I don't understand.

Q. Well, did you see her do anything which would expose her left bare leg? A. No.

Q. Or did you just happen to see this left bare leg? A. *She was just standing there, that is all.*

He said that he was always watching but he saw nothing which would account for the exposure of the left bare leg.

The left bare leg was seen by no one else. It is an invention of this witness, just as he invented the sitting by Mrs. Lazarus in the lap of Simon, which invention he had to repudiate when he realized it did not square with what he subsequently said.

There were hundreds of cars passing up and down Lexington Avenue (p. 86). He put the hydrant first, then Simon, then Mrs. Lazarus (p. 86). He kept looking at them, *watching them*. He knew Lazarus got out of the car but he did not see any of the fight although he was five or ten feet away from where they were (p. 87). He tried to explain this by saying that they were out of the glare of the lights, but, in the first place, he said he needed no lights to see, and, in the second place, the lights would illuminate sufficiently for him to see all over the place, and, *without the aid of the lights, he had been able to see the left bare leg of Mrs. Lazarus:*

“Q. Although a few minutes before without the aid of the glare of the car— A. Yes.

Q. —because the lights were out, from a further distance, you could see Mrs. Lazarus’ bare leg? A. Yes.”

If this witness’s story is to be believed, from the time that Mrs. Lazarus and the co-respondent started to walk down the street they were under the observation of the witness, they were followed down the street by the car moving slowly, and *there was no time given for the act of adultery, if the parties had desired to commit adultery. This witness is the only one who saw any embracing and he happens to have been the last witness put upon the stand by petitioner.*

This witness saw too much and too little. If he had been close enough to the parties, while engaged in the act of sexual intercourse, to have observed, without the aid of lights, the left bare leg of Mrs. Lazarus *he would have observed more*. If he had been close enough to observe without the aid of lights, this left bare leg, he would certainly, with the aid of lights, have been able to observe the fight.

Counsel for petitioner, in his brief below, suggested that it might be claimed by me that it was physically impossible for the defendant and correspondent to have committed the act of sexual intercourse in the position described by the witness. I made and make no such claim. My suggestion is that it is impossible, in the light of human experience, that the sexual intercourse would have been committed at the *place* indicated by the witnesses, under the circumstances as described by them, when, according to the testimony of the petitioner and his witnesses, *the parties might have walked across the sidewalk, a distance of certainly not more than ten feet, and been in a vacant lot with bushes*, and that it is highly improbable, if not impossible, that this car of petitioner, with his witnesses, a Chevrolet Coupe, could have come down the street at twenty to twenty-five miles an hour so silently as that, until the car was within five feet of the parties, and the lights were thrown on, only then did they desist and it is highly improbable, that, if the witnesses saw what they say they saw, they would not have seen more. How could they have helped but to have seen more if, as they say, they had these figures under observation at the corner and continuously thereafter? They saw *nothing* with respect to change of position until the lights were thrown on, although one of the witnesses could see the left bare leg of Mrs. Lazarus,

without the aid of the lights. And it is highly improbable that they should have *just happened* upon the scene at a time when the act of sexual intercourse was being performed.

Vice Chancellor Van Fleet well said in *Daggers v. Van Dyck*, 37 N. J. E. 130, at page 132:

“Evidence, to be believed, must not only proceed from the mouth of a credible witness, but it must be credible in itself—such as the common experience and observation of mankind can approve as probable under the circumstances. We have no test of the truth of human testimony, except its conformity to our knowledge, observation and experience. Whatever is repugnant to these belongs to the miraculous, and is outside of judicial cognizance. Evidence is generally considered improbable when it imputes to the parties to a transaction, occurring in the ordinary course of business, conduct inconsistent with the principles by which men, similarly situated, are usually governed.”

And this expression of the Vice Chancellor's has been adopted by this Court innumerable times.

While there is no detective evidence in the case at bar, the proof of guilt rests wholly upon the evidence of the petitioner and his two witnesses, *who are his employees*, and the same rule should be applied as if detectives were involved, and that rule is well expressed in 19 N. J. L. Journal, 342, reporting a memorandum of the Chancellor of October 8, 1896, as follows:

“The Court of Appeals, of New York, in *Moller v. Moller*, 115 N. Y. 466, said of spy or detective witnesses, hired to obtain evidence in divorce proceedings: ‘We agree with the learned judges of the general term in their low estimate of the value, in divorce cases, of the evidence of prostitutes and private detectives. The courts have come to regard the uncorroborated evidence of such witnesses as

insufficient to break the bond of matrimony.' This is not to be regarded as holding that such witnesses will never be believed. It is, of course, possible for them to tell the truth, and, perhaps, *by the inherent probability of the truth of their statements*, to satisfy the court; but practical experience demonstrates that satisfaction from them alone is of rare occurrence. *Heimann v. Heimann*, memorandum by Chancellor, October 8, 1896."

The case of *Heimann v. Heimann* was *ex parte* so there was no weighing of testimony to be considered, and yet the evidence of guilt was held insufficient.

There is another feature which throws considerable doubt upon the truth of the story of petitioner and his witnesses, Petitioner sent for the patrol wagon, and he and his wife were taken down to Police Headquarters. Simon got away. Petitioner desired to swear out a warrant for him. At p. 42 petitioner testified:

"Q. Saw the Chief of Police? A. Yes, sir.

Q. (Continuing): Didn't you? Tried to have Simon and your wife arrested for adultery, didn't you? A. Yes, sir.

Q. What? You did, didn't you? A. Yes, sir.

Q. And the chief asked you what you saw, didn't he? A. I did.

Q. And you told him that all you saw was—and you illustrated that, when you got to that point, you saw Mr. Simon in the street—using your hands, showing the Chief—pulling up his trousers this way; isn't that right? A. I didn't say that.

Q. What did you tell the Chief? A. I told him I saw him buttoning his pants.

Q. Yes. A. *That is all I remember what I said to him.*

Q. What? The Chief refused to take the complaint, didn't he?

\* \* \* \* \*

Q. Didn't he? A. Yes, sir; he refused to make the arrest.

\* \* \* \* \*

Q. Well, he refused to take the complaint after you told him all that you told us here?

A. Yes, sir.

Q. *You told him the same story and yet he refused to take the complaint?* A. Yes, sir.

Q. You went to the police court to swear out a warrant for the same thing, didn't you?

A. Yes, sir.

Q. *And they refused to take the complaint after you told your story, didn't they?* A. Yes, sir.

Q. Did you tell the police judge all that you have told us here? A. Where at?

Q. At the police court not at the justice of the peace; at the police court. A. I told the Chief of Police.

Q. Didn't you go to the Court after that? A. I did.

Q. And did you tell the court all that you have told us here? A. I told the Justice of the Peace.

So, that, *immediately after the episode*, petitioner went to the Chief of Police, and the next day to a police magistrate. After considerable probing by his counsel, he told the *Court below much more* than that Simon was buttoning his pants (p. 19), and it was only after considerable probing by his counsel that he told the Court that he had seen the buttoning of the pants, etc. (p. 19).

The significance of this testimony, with respect to the visit of petitioner to the Chief of Police and the Police Court is that *at that time*, which was immediately after the episode, *he could not tell the Chief of Police or the Police Court sufficient to induce the issuance of a warrant*. It is clear, therefore, that his testimony, and that of his witnesses, upon the stand as to what was seen *is an*

*invention*, which has been created since the happening of the event, and the fact that this is so is proven by the manner in which the testimony was drawn out on direct examination, and by the manner in which, as the day progressed *and it became apparent that more testimony was needed*, that testimony was supplied, ending with the ridiculous statement of the last witness that he saw, without the aid of the lights, the left bare leg of this lady, but could not see the fight with the aid of the lights.

Petitioner is a man with such ideas as to what a woman may and may not do without being guilty of the commission of the act of adultery as that his testimony is entitled to little weight in any event, for he will see evil where evil is not present. See his testimony (p. 23):

“Q. Did you object to your wife speaking to Simon? A. I have never (interrupted)—

Q. Did you object to it? A. Well, not in the street. In the store she talked to him. I didn't object to that.

Q. But you would object to it in the street. A. *Well, I wouldn't say that.*

Q. Well, then, what would you say? You object to your wife speaking to a man when she casually meets him on the street or meeting him on the street? A. No, sir.

Q. You do not. Did you object to your wife speaking to Mr. Simon outside of the barber shop? A. She can't talk (interrupted)—

The witness was stopped by the interruption of the court for counsel in his question had used the name of Lazarus instead of Simon, and then counsel for the petitioner objected and the question was never answered. Petitioner's attention was directed to the fact that while he was in the barber shop and might come out at any minute,

and his wife did not know at what moment he might come out, she tooted her horn, and it was then that Simon came over and saw her, and then:

“Q. Well, did you object to that conduct on the part of your wife? A. At that time I did.

Q. You did. Had you spoken to your wife about it? A. No, sir.

The court observed petitioner upon the stand, and there is no question but that the attitude of mind of petitioner was that a woman could not speak to a man upon the public street without that being a suspicious circumstance, notwithstanding the fact that the husband and wife were living happily together.

This attitude of mind tinges all of his testimony and tinges also the testimony of his witnesses, who were his employees.

The testimony of the witness Vreeland, who ran a restaurant in Montclair, at which petitioner ate every noon, and who had known petitioner for a long time (pp. 48, 49), did not help petitioner. He said that on some day in June, 1926, on a Sunday (p. 50) he noticed the car of Lazarus parked along the side of the road on Terhune Avenue, and (p. 50) in that car he saw Mrs. Lazarus and a man, whom he did not know (p. 50). It was noon, Mrs. Lazarus was sitting behind the wheel and the man did not have any hat on——

“and he had his arm around the back of the back of the seat, that (indicating).

Q. Around the back of the seat where she was sitting? A. That is right.”

They were standing still. They were just sitting there, talking (p. 54). He told petitioner about it (pp. 56, 57). Petitioner said that he had been in the car——

“I was hunched down in the back seat reading” (p. 57).

The next day petitioner came in and said:

“and he was all excited and he came right out in the kitchen where I was. ‘Now,’ he says, ‘Harold, I want you to tell me something and tell me the truth.’ I said, ‘What is it?’ He says, ‘You know that little remark you made yesterday,’ and I says, ‘Yes’. ‘Well,’ he says, ‘I lied to you, I wasn’t in the car.’ ‘Now,’ he says, ‘I want you to tell me what you saw and who was with my wife,’ and I says, ‘I don’t know who was with her.’ ‘Well,’ he says, ‘come on, you ought to tell me.’ I said, ‘If you want to know the facts, now,’ I said, ‘it is a ticklish proposition to mention.’ I said, ‘But there was a man with her.’ He says, ‘Will you take me out and show me where you see her?’ And I said, ‘I will.’ And that was all there was said. Then he says, ‘I am going to watch her,’ he says, ‘I think she is doing something wrong’.”

But if Vreeland’s testimony is to be believed all that the man with Mrs. Lazarus was doing was having his arm “around the back of the seat” (p. 52), *not even around the back of the woman*. This was on a main thoroughfare at noon time, on a Sunday (p. 53), and the people in the car were *just talking* (p. 54). He saw no embracing, no kissing, nothing incriminating. He told the husband. The husband stated that *he* had been in the car. The next day the husband came in all excited, and said that he thought his wife was doing something wrong. What did the husband ascertain between the time he saw Vreeland (p. 5) and the next day when he went back to Vreeland, all excited? He did not tell us (pp. 6, 7). From his testimony it would appear that he ascertained *nothing*, because it was not until two days later that he made the first observation of

what counsel says was "something out of the ordinary in your wife's conduct." He told Vreeland that he thought his wife was doing something wrong, and yet he said that, after his talk with Vreeland, when he started to follow his wife (p. 25):

"Q. From what you heard from Mr. Vreeland did you anticipate that you were going to catch your wife in adultery? A. No, sir."

If the testimony of Vreeland be taken at its face value, it proves nothing. But the identification by Vreeland of defendant rests upon a sight which Vreeland had of defendant on the public street in Passaic on one occasion before. As Vreeland describes it (p. 48):

"A. Why, he came down to the restaurant one day, just stepped in to get a piece of pie and a cup of coffee. He said, 'I am going down to Passaic. Will you ride down? I am coming right back.' I said, 'Sure'. So I rode down with him and he had to take the stuff down there somewhere.

Q. Did he greet his wife on the street? A. Why—she was coming up the street—

Q. Did he greet her? Did he say 'Hello' to her, or what occurred? A. No; he just blew the horn and she kept on going; that was all.

Q. Did he tell you who it was? A. He says, 'That is my wife'. She was with some other lady."

It was but a casual glance, as the witness testified on cross-examination (p. 55). Although her husband tooted the horn, and although she was coming right up the street, she did not recognize her husband's car or the tooting of the horn. He attempted to support his identification by identifying the car but the only thing which he can point out as a mark of identification is that it was

a regular stock Dodge car but there were two tires on the back, and the method of strapping was peculiar.

Slim as is the basis for his identification of defendant, the basis of his identification of the correspondent Simon is slimmer yet.

He did not know the man (p. 51). He testified (p. 51)—

“Q. Did you get a good enough look at the man to remember him? Can you or can't you say whether—(interrupted). A. *Well, I wouldn't say I can pick him out of the court, or anything, but I can give you a fair description of him.*

Q. Was he an older or younger man than Mr. Lazarus? A. I should say he was a man about my age.

Q. What is that? A. I am forty-two.

Q. Forty-two. Can't you or can't you say—you have seen, I suppose, Mr. Simon stand up here in court today? A. No; I did not.

Q. Were you up here when he stood up? A. No; I don't think I did.

The Court: Look over the court room and see if you can pick out the man you saw in the car.

Witness: Yes; I think that is him back there in the second seat.

Mr. McGeehan: Indicating the gentleman who just smiled, Mr. Simon” (p. 52).

On cross-examination he testified (p. 52)—

“Q. You saw Simon in the corridor this noon time, didn't you? A. What is that?

Q. You saw Simon in the corridor this noon time, didn't you? A. Yes; half a dozen times.

Q. Yes. You knew who he was? A. I picked him out when he first walked in this morning.

Q. You knew who he was this noon time? A. Yes, sir.

Q. There was no difficulty in your picking him out in the court room a few moments ago when the court asked you to pick him out, was there? A. *Absolutely not.*"

What then did the witness mean by his play acting on direct examination (p. 51) when—"Q. Did you get a good enough look at the man to remember him? Can you or can't you say whether—(interrupted). A. *Well, I wouldn't say I can pick him out of the court, or anything, but I can give you a fair description of him*"? and what did he mean when his own counsel asked him, "*\* \* \* Can't you or can't you say—you have seen, I suppose, Mr. Simon stand up in court to-day? A. No, I did not*"? If the witness' testimony on cross-examination is to be believed (pp. 52, 53) this was all play acting to make it appear that Vreeland was actually picking out the man in the court room from his remembrance of him at the time he saw him in June, 1926, but it immediately appeared that he had seen Simon in the corridor at least half a dozen times and that he knew exactly where he was seated in the court room. There is no doubt whatever from his testimony but that Simon had been pointed out to him by petitioner. It was just a casual glance that Vreeland got as he passed the car of defendant (if he ever passed it), and to say that he could identify Simon is ridiculous. But if he *could* identify Simon, then there was no necessity for going through the performance which he did go through on direct examination when he was asked whether he could identify Simon.

This is another indication that the testimony has been prepared to meet the case and not the case prepared to meet the fact.

Petitioner testified:

"Q. But from what you heard from Mr. Vreeland you heard something which made

you object to her friendship *for Mr. Simon?*  
A. Yes, sir."

But Vreeland did not know Simon and therefore could *not* tell petitioner that his wife had been with Simon, and petitioner did not know of any acquaintance between Simon and his wife, as he says, so how could what Vreeland told him make petitioner object to defendant's acquaintance with *Simon?*

## THE LAW.

### There was insufficient proof of adultery.

The law applicable to this case is well settled. This Court has never departed from what it said in *Berckmans v. Berckmans*, 17 N. J. Eq. at page 454:

"The charge made by the complainant, if true, is known to our law as a crime; consequently this prosecution partakes strongly of the nature of a criminal proceeding, so much so as to place the complainant under the necessity, not only of placing a decided preponderance of testimony in favor of the charge, but of proving it to the satisfaction of this court, beyond a reasonable doubt. I do not mean to say that it must be done by such an amount of overwhelming and unmistakable evidence as to render it impossible to be otherwise but the evidence must be such as to satisfy the human mind, and leave the careful and guarded judgment of the court, free from any conscientious and perplexing doubts as to whether the charge be proved or not."

Vice Chancellor Lewis in the case of *Gray v. Gray*, 100 N. J. Eq. 71, said:

"Under the settled rule of our Court the burden is upon the petitioner to prove the

guilt of the defendant beyond a reasonable doubt if he is to prevail against her in his suit.”

In *Johnson v. Johnson*, 99 N. J. Eq., page 190, Vice Chancellor Bentley at page 193, said:

“From the time of the establishment of this Court its members and the members of the Court of errors and appeals have said and reiterated that adultery is a serious charge, to be proved only by strong, clear and cogent evidence. In *Day v. Day*, 4 N. J. Eq. 444, the chancellor quotes from the opinion of Lord Stowell in *Williams v. Williams*, 1 Hagg. Cons. 299:

‘The only general rule to be laid down is, that the circumstances must be such as to lead the guarded discretion of a reasonable and just man to the conclusion, for it is not to lead a rash, intemperate judgment, moving upon appearances, that are equally capable of two interpretations.’

“To the same effect is *Berckmans v. Berckmans*, 16 N. J. Eq. 122; affirmed, 17 N. J. Eq. 453. The court of errors and appeals there laid down the rule to be that a charge of adultery in a suit for divorce ‘partakes strongly of the nature of a criminal proceeding’ and must be proved ‘beyond a reasonable doubt.’ These opinions have been followed in innumerable cases, as late as *Marchese v. Marchese*, 98 N. J. Eq. 379. *Reid v. Reid*, 17 N. J. Eq. 101, is the same way. Vice Chancellor Van Fleet reiterated the rule in *Culver v. Culver*, 38 N. J. Eq. 163. To the same effect are *Hurtzig v. Hurtzig*, 44 N. J. Eq. 329; affirmed, 45 N. J. Eq. 869; *Osborne v. Osborne*, 44 N. J. Eq. 257, reversing the decree of this Court. There are many other applications of this rule.”

In the *Johnson* case there was evidence that the wife was estranged from her husband. Not so

in the case at bar, for petitioner says that he and his wife, up to the day of the committing of the act of adultery, *lived happily together*, although for a few days prior thereto he was suspicious because of something disclosed to him by some third party, with respect to which he said nothing to his wife. In the Johnson case the wife had confessed to her husband that all her love for him had been dissipated. No such evidence in the case at bar. The testimony offered in the Johnson case was directed toward the commission of a single offense as in the case at bar. She sought her husband's permission to go out for an evening. He put her off with some excuse until his return from work and in the meantime communicated with a private detective and arranged to have her followed. There is an analogy to this in the case at bar for Lazarus led his wife to believe that he was going away not to return home until late, in the meantime having made up his mind that he and his employees were going to follow her.

In the Johnson case the wife left home and met the co-respondent Olsan. They went to New York and boarded a passenger boat plying between New York and Atlantic Highlands. Upon the return of the boat, they left arm in arm. They then returned to Jersey City, where they stopped at a Chinese restaurant "apparently for the purpose of securing something to eat." At quarter of one A. M. they were observed to approach the house in which the co-respondent had a room, and enter the front doorway. Shortly after that the husband and his detectives entered. The Court said, p. 192:

"There is some discrepancy in the testimony as to the layout of the vestibule of this entrance, but not of a nature to discredit the testimony of the petitioner and his witnesses. When they gained entrance they discovered

the defendant and her companion in the hallway, *which was dimly illuminated standing face to face and drawing back somewhat from each other.* No conversation of any importance ensued, and the police officer arrested the defendant and Olsan and conveyed them to the nearest police station, where they were interrogated, and, finally, released, after Olsan had convinced the authorities that his home was in the building where he had been found, and that he and the defendant had not been lurking there for the purpose of burglary or thievery."

*Upon this state of facts the defendant was not called upon to proceed with her defence and she did not proceed with her defence.*

It is quite true that there was an attempt in the case at bar to supply proof which was not present in *Johnson v. Johnson, i.e.*, that the wife and the co-respondent were in contact, etc., but I have already considered that proof and the nature of it. But even in the Johnson case there was some attempt at this for they were put "drawing back somewhat from each other." The Court said, page 192:

*"The opportunity to commit adultery on the morning of the 23rd of July was ample, the defendant and Olsan having been alone in the hallway for a period of twenty or twenty-five minutes; but the proofs are utterly lacking to convince any reasonable and impartial man of any criminal desire. That the woman was shockingly indiscreet in entering the hallway of the boarding house on a night in the middle of summer, when she could not even advance the excuse of inclemency of weather, is apparent."*

The Court proceeded:

*"For what purpose she entered this building I do not know, but it is certainly not*

*proven that she accomplished her purpose if that purpose was to commit adultery."*

Bearing upon other features of this case is the statement of the Vice-Chancellor at page 194:

"This woman must be assumed to have been virtuous up to this time. Courts will not suppose that a hitherto chaste woman suddenly turns adulteress in the absence of strong proof. In the case of *Alexander v. Alexander*, 2 Swab. & T. 95, the full English divorce court refused to believe those who professed to be eye-witnesses to an adultery committed by the defendant *where there was no other evidence of any adulterous desire upon her part*. And so, here, I cannot say that the evidence in this case satisfies the rule as to the measure of proof which is to be gathered from the cases already reviewed."

In the case at bar there is no evidence of the least indiscretion of Mrs. Lazarus prior to the particular occasion of the 17th of June. It is true that on the 16th of June her husband saw Simon walk across the street and speak to her when she was in the automobile waiting for her husband to come out of a barber shop but, according to her husband, she signified to Simon that she desired to see him by tooting her horn. To say the least, it is *remarkable that a woman who desires to carry on a guilty clandestine conversation with a man would toot the horn of an automobile which her husband has just left to go into a barber shop, to call the man to her*.

The idea is preposterous.

The husband and wife were living happily together. The language of Vice-Chancellor Bentley, heretofore quoted, and the language of the full English Divorce Court in *Alexander v. Alexander*, 2 Swab. & T. 95, is clearly applicable.

Again Vice-Chancellor Bentley said, quoting from Vice-Chancellor Van Fleet in *Culver v. Culver*, 38 N. J. Eq. 163:

“*Adultery is always clandestine; it is generally committed in secret, and it rarely happens that direct proof of the fact can be obtained, but it is also true that parties living in adultery almost always, by their conduct towards each other, so plainly indicate their true relations as to furnish highly satisfactory evidence of their crime*”.

This language is peculiarly applicable to the case at bar. If petitioner and his witnesses are to be believed there was *nothing clandestine about the conduct of defendant and the co-respondent*. They selected a point on a public street *at the curb* within a distance of not more than four hundred feet, if petitioner's second statement be believed, or not more than one hundred feet if petitioner's first statement, before the noon recess and before he realized the fact that one hundred feet was not enough distance, be believed, of one of the busiest thoroughfares of the community, on a clear June night for the commission of the act, when at any moment pedestrians, automobiles, etc., etc., might pass and when, according to the petitioner and his witnesses, *there were any number of vacant lots screened with bushes in the immediate vicinity*. Petitioner's witnesses say that at that point there were no houses, there was nothing but vacant lots and bushes, and yet the Court is asked to believe that the curb of a public street is selected when the parties, by walking across the sidewalk, which could not have been more than ten feet in extent, could have entered a vacant lot screened with bushes where they would be in no danger of interruption.

It may be that these people stopped at this curb and kissed. If it was their intent to kiss and go

no further, the place on the public street might well be that selected. If, on the other hand, they intended to kiss and go further, there is much doubt whether the kissing would not have been postponed until a more secure place easily available could have been reached, but there is *no* doubt whatever but that if they elected to kiss upon the public street and then go further, *the episode would not have passed the stage of kissing on the public street.* They then would have proceeded to walk ten steps to the vacant lot. The whole thing is preposterous. If they intended to kiss and then go further, petitioner and his witnesses prematurely interrupted the episode and the act of adultery which might have been committed had they been let alone was not in fact committed.

Petitioner and his witnesses acted too quickly.

As Vice-Chancellor Bentley in *Johnson v. Johnson* suggested, "If the undoubted pleasure that this man and woman found in each other's companionship was not the result of innocent causes, the proof would have then or within a short time, been at the disposal of the petitioner."

And the Vice-Chancellor was so impressed with the weakness of the petitioner's case in *Johnson v. Johnson*, as that he said:

"This case should never have been commenced upon the facts proved, or, rather, assumed to have been proved, for the purposes of this opinion, because many of them might have been disproved had the defendant been called upon to develop her defense. *Perhaps the petitioner had ample ground to suspect his wife's fidelity, but his counsel should have advised him of the weakness of his case, and if there was substance of his suspicions a more patient surveillance would have resulted in more substantial proofs.*"

In *Marchese v. Marchese*, 98 N. J. E. 379, this Court reaffirmed what had been said in *Berckmanns*

v. *Berckmanns*, 17 N. J. E. 453, and what had been said by Vice-Chancellor Leaming in *Luderitz v. Luderitz*, 88 N. J. E. 103, 105, in which case Vice-Chancellor Leaming said:

“The difficulty which confronted me was the fact that adultery is a crime; from that circumstance the view has long been entertained that to justify a decree of divorce for adultery the evidence must establish the charge with practically that degree of certainty which is required to justify conviction in a criminal case.”

In this case, the evidence which was given by petitioner to the criminal authorities, was, *by them, held not even sufficient to justify the institution of criminal proceedings.*

In *Farrow v. Farrow*, 70 N. J. E. 777, there was direct evidence that defendant was seen in *flagrante delicto*. Abundant opportunities on many occasions were presented. Charges that defendant was seen “publicly drinking liquor in saloons, late at night” (p. 793), and that she was seen “to accept lecherous embraces of three different men,” were made. “Other accusatory incidents of meetings in alleys and stores between defendant and Mr. .... have been submitted.” This Court, however, adopting the Vice-Chancellor’s language, said of these incidents:

“None of them, even if true, present incidents which show the existence of an adulterous disposition or purpose. None go to prove that an act of adultery was committed” (p. 787).

In *Sargent v. Sargent*, 114 Atl. 428 (not officially reported) affirmed 92 N. J. Eq. 703, there was abundant testimony of both inclination and opportunity, and the Vice Chancellor said, at p. 430:

“If the circumstances taken both singly and together admit of two interpretations,

that interpretation which favors innocence, should be adopted.' ”

And this Court in affirming the Vice Chancellor, 92 N. J. E. 703, said:

“The most that can be said with relation to her conduct on these two occasions, looked at in the aspect most unfavorable to her, is that it was unjudicious and indiscreet. It was not inconsistent with the probability of innocence on her part.”

In *Cartan v. Cartan*, 93 N. J. E. 175, a case of extreme vexation, apparently, was presented to the Vice-Chancellor. He said:

“ \* \* \* the record (is) in a most unsatisfactory condition and has produced upon my mind, under the guarded discretion with which I have carefully considered every feature of this most troublesome case, such a state of doubt that I am unable to say that I believe the entire story told by any of the parties or their witnesses, regarding the intimacy and the criminal conduct of the defendants, or in the condonation of their offense by the petitioner, or in fact, what part of their respective stories, if any, I do believe' ” (pp. 180-1).

The Court, however, had no such hesitance. Judge Williams, in his opinion, says (p. 181):

“We are not in the same state of doubt as the Vice Chancellor expresses in regard to the charges of adultery.”

“Consideration of the case satisfies us *that the petitioner has absolutely failed to prove anything which would justify a court in branding this woman as an adulteress.*”

In this case, while there was a denial and this Court refers to that fact, the conclusion of this Court did not rest upon the denial but upon the fact “that the petitioner has absolutely failed to

prove anything which would justify a court in branding this woman as an adulteress," and yet there was evidence that the parties were seen in *flagrante delicto*.

And see:

*Torrens v. Torrens*, 94 N. J. E. 480;  
*Grundy v. Grundy*, 92 N. J. E. 687 (Court of Errors and Appeals);  
*Cooper v. Cooper*, 82 N. J. E. 581, affirmed 82 N. J. E. 660;  
*Osborn v. Osborn*, 44 N. J. E. 257 (Court of Errors and Appeals);  
*Brown v. Brown*, 63 N. J. E. 366;  
*Rector v. Rector*, 78 N. J. E. 402.

This case is wholly lacking in proof of the elements of lust, lewdness, depravity or secrecy. As Mr. Justice Garrison, speaking for this Court said in *Osborn v. Osborn*, 44 N. J. E. 257, at page 261:

"Adultery is not shown, nor are the elements of lust, lewdness, depravity or secrecy, the invariable concomitants of criminal conversation, to be found in the proofs."

And as the Court further said:

"If we give to the testimony the construction most unfavorable to the defendant, a decree based upon adultery must rest upon one of two grounds; either that opportunity is tantamount to guilt, or that a decree may rest upon a crime half proven, even though the half it rests upon is the half that is not proven."

And in *Brown v. Brown*, 63 N. J. E. at p. 366, the Court said:

"\* \* \* and no where in them (the proofs) \* \* \* has there appeared even a word used by her, either verbal or written, to indicate

that she possessed a carnal mind toward the co-respondent. \* \* \*

And in *Rector v. Rector*, 78 N. J. E. 402, Vice-Chancellor Garrison said:

“In other words, can we find from the proven facts that they had a sexual desire one for the other; and that upon some of the opportunities which they had they gratified it?”

In *Brown v. Brown*, 63 N. J. E. 348 (in this court), where the decree of divorce was unanimously reversed, there was evidence of

“frequent meetings, with more or less of opportunity to indulge illicit desires, if any they had, and acts of familiarity such as kissing and embraeng.”

No such testimony in the case at bar, excluding the last witness to the supposed kissing in the park, just preceding the alleged act of adultery.

Vice-Chancellor Van Fleet, in *Culver v. Culver*, 38 N. J. E. 163, cited by Vice-Chancellor Bentley, in *Johnson v. Johnson*, 99 N. J. E. 194, said:

“Adultery is always clandestine; it is generally committed in secret, and it rarely happens that direct proof of the fact can be obtained, but it is also true that parties living in adultery almost always by their conduct towards each other so plainly indicate their true relations as to furnish highly satisfactory evidence of their crime.”

In *Brown v. Brown*, 63 N. J. E., p. 348, this Court, reversing the Court of Chancery in granting a decree, in considering the testimony of a servant, said:

“As she acknowledged that she was under the pay and employ of the petitioner at the

time she claimed to have seen the acts of which she speaks, as well as at the time of her examination as a witness in this cause, it will be admitted that her statements in favor of her employer should be subjected to the most careful scrutiny. She was an interested witness and vitally essential to the petitioner's success as to the charge she was relied upon to sustain."

This indicated that the two witnesses produced by petitioner, who are in his employ, are interested witnesses and subject to the same attack, with respect to their credibility, as are detectives.

This Court further said:

"The time to which the witness would have us refer must have been before ten o'clock in the evening, \* \* \* The two servants were downstairs, and were liable to come up to the parlor floor at any moment for instructions, \* \* \* Not only were the two servants liable to go directly in front of this partly-open door, through the hall, up to bed at any moment, but the husband might also return home at any hour and go into the parlor, through that hall, or up to his bedroom above the parlor. This house was neither a bawdy-house nor a brothel. It was the home circle, in which the wife had placed her little children \* \* \* In the bright light of that early hour of the evening, in the parlor, with its double doors opening into and towards the opposite double doors of the back room, and within easy view of the interior of that room, were two respectable persons, one being a sister of one of the accused parties and the other a reputable counsellor at law and her friend, both naturally interested in preserving the proper deportment of her younger brother against the doing of a shameless act. \* \* \* *Under all these circumstances of exposure, is it within the bounds of human probabilities that such an indecent act was then and there committed, and that, indeed, by a brother almost in his sister's presence?*"

The Courts have said, basing their judgment upon human experience, that adultery is usually clandestine. In determining whether an act charged to have taken place has actually occurred, the probabilities may be considered. It will not be presumed that parties will commit an act in an indecent manner, or rather where their indecency may be discovered, when there is ample opportunity to perform it otherwise.

In the case at bar, there was nothing clandestine with respect to the conduct of defendant and Simon, if the testimony of petitioner and his witnesses is to be believed. Their conduct on the other hand was indecent to the point of absurdity—committed on the curb of a public street, where anybody might discover them at any moment.

Counsel devoted a great portion of his brief in the Court before in indicating the unusual places at which adultery may be committed. I do not doubt that it has been committed in very unusual places. He refers to automobiles upon the road, but usually those automobiles are drawn off into a deserted road and the lights are put out and the parties seek such seclusion as they can find. So, in public parks, but usually in dark corners of such parks. So sometimes in hallways, but usually when those who participate believe that it is so late that none will come in and the hallway is dark. So, too, in a room in an apartment house or any other house, and so, too, upon the grounds of a building in a neighborhood, but usually in the dark. I know of no case, of which I have read, where the charge has been the commission of the act of adultery *on the curb of a public street, when the parties by walking ten feet away could go into a vacant lot and into seclusion.*

I would be willing to admit that, under some circumstances, parties might so desire sexual intercourse as that, *if there were no other available*

*place*, the curb of a public place might be selected. I am unwilling to admit *that*, unless it be proven that both the man and the woman are of depraved nature, with no sense of decency whatever. There is not a scintilla of evidence in this case that defendant is that kind of a woman. On the contrary, the *evidence is that she and her husband had lived happily for at least three years and her husband made no charges against her general character*, nor against her generally with respect to sex matters. But I am unwilling to admit that *any* two people, *however depraved they may be, would deliberately select a curb of a public street when by walking ten feet they could go into seclusion.* Counsel suggested that there could be no purpose other than illicit intercourse which would lead defendant and Simon into this, as he called it "dark" street. There may have been no lights but it was a clear June night. Counsel suggested the purpose in his next statement. He said, "If their purpose had merely been to kiss and be alone, they would have remained upon the park bench, but they did not do so, because while they would take a chance upon kissing there they were too near a used street to indulge in the complete consummation of their desires."

I submit that this does not follow. I submit that the testimony that there was any kissing upon this park bench is false for no two people would deliberately sit and kiss continuously for one-half hour on a bench next to a busy thoroughfare along which people were passing all the time, any one of which passers by could have seen them, when they might have taken a bench in the interior of the park. It may be that they *did* go into this street for the purpose of indulging in kissing. If they did, it was reprehensible but not adultery. It may be that they went into this street to find a place where they might indulge

in sexual intercourse, but if they did, what the petitioner and his witnesses happened upon was the act of kissing which might have preceded the act of sexual intercourse. But they were interrupted at the *time of the kissing*. Had they gone to this place for the purpose of committing sexual intercourse before committing it they would have retired to the secluded place so nearly at hand.

I am not indicating what their purpose was. I am contending that, *if* their purpose was sexual intercourse, it is inconceivable that the act was committed under the circumstances as they have been detailed by petitioner and his witnesses.

Counsel in the court before made much of the fact that neither defendant nor the co-respondent took the stand. They were not obliged to.

By the fifth section of the act concerning evidence, 2 C. S. of N. J., page 2222 neither the husband nor wife is compellable "in any action or proceeding for divorce on account of adultery to give evidence for the other, except to prove the fact of marriage, nor shall any husband or wife be compellable to disclose any confidential communication made by one to the other during the marriage."

The effect of treating the failure of defendant to take the stand as evidence in the case or as having any bearing upon the consideration of the testimony offered against her is to compel her to be a witness in favor of her husband.

In *Johnson v. Johnson*, 99 N. J. E. 190 the defendant was not required to take the stand. And so in this case, the proofs adduced by petitioner did not require defendant to answer.

*The petitioner's case must be determined by the strength of his own case and not the absence of a defense.*

It is so in *ex parte* cases and it is so in all cases.

**Petitioner should have been denied relief under the doctrine of *Brown v. Brown*, 63 N. J. Eq. 348.**

Petitioner and defendant were living *happily* together according to petitioner's testimony. He heard something from Vreeland which made him object to her friendship for Simon (p. 25). He did not believe, when he started to follow his wife, that she had been guilty of adultery (p. 25). Although he saw his wife speaking to Simon on the street on the 16th of June, *to which he objected*, he said nothing whatever about it to his wife, although on perfectly friendly terms with her (p. 26). On the contrary, that night he went to her father's house and attended a family party (p. 27) and the next day left advising her that he was not going to return until late, although he intended to follow his wife all day long. He did this *for the purpose of giving her an opportunity to commit the act of adultery, although he did not believe that she had been guilty of adultery*, and although he *did* believe that her relationship with Simon was such as *might lead to adultery*. One reason he gave for not warning his wife was—

“Q. Well, didn't you think that she was entitled to be warned that you objected to her talking to Mr. Simon? A. Well, I think, if she didn't tell me, I had no business telling her.”

He did not believe his wife had been guilty of adultery yet he believed that there were circumstances which might lead her to commit adultery. He said (p. 26):

“Although you knew from what you heard from Mr. Vreeland that there were suspicious circumstances which might lead to something if you didn't stop it; is that right? A. Yes, sir.”

He also testified (p. 25):

“Q. Why didn’t you say it? You knew that she was speaking to Mr. Simon, or thought you did. You objected to that, why didn’t you tell her that you objected to it, instead of simply watching her? A. (Witness pauses).

Q. Well, can’t you answer that? A. Well, the only reason I didn’t talk to her was for my own information. I wanted to find out.”

We have this husband, therefore, advised of an acquaintanceship between defendant and Simon, which, in his opinion had not yet, but might, if he did not do something to stop it, lead to adultery. *He deliberately refrains from warning his wife.* Under these circumstances the doctrine of the cases of *Brown v. Brown*, 63 N. J. E. 348 and *Hedden v. Hedden*, 21 N. J. E. 61, at p. 74, which is cited with approval in many subsequent cases; *Cane v. Cane*, 39 N. J. E. 148, at p. 158; *White v. White*, 95 Atl. 197, affirmed 84 N. J. E. 512; *Delaney v. Delaney*, 71 N. J. E. 246, and *Atha v. Atha*, 94 N. J. E. 692, affirmed 95 N. J. E. 275 applies.

In *Hedden v. Hedden*, 21 N. J. E. 61, the Chancellor said:

“It is laid down that if a husband sees what a reasonable man could not see without alarm, or if he knows that his wife has been guilty of ante-nuptial incontinence, or if he has himself seduced her before marriage, whereby he is put upon his guard respecting her weakness, he is called upon to exercise a peculiar vigilance and care over her, *and if he sees what a reasonable man could not permit, and makes no effort to avert the danger, he must be supposed to see and mean the result.*”

What this Court in *Wille v. Wille*, 88 N. J. E. 581, at p. 582 said:

“A husband is legally justified in using any and all lawful means to procure testimony so

as to enable him to get rid of a wife whom he has reasonable grounds to believe is guilty of infidelity”;

has no application to the instant case. In that case, as this Court said at p. 585:

“The wife despised and hated her husband, as evidenced by her letters and post cards to him.”

The husband and wife had been living separate and apart for sometime.

“\* \* \* the wife was possessed of an ungovernable temper, used foul and filthy language, and was given, as evidenced by her letters and post cards to her husband during their separation, to lewd and obscene thoughts.”

The husband had information (p. 583) which would make a reasonable man believe that the act of adultery *had been* committed.

In the case at bar, the husband and wife were living in happiness together. The husband *did not believe that the act of adultery had been committed*. The husband *did* believe that the acquaintanceship, if continued, might *lead to adultery*. Instead of warning his wife with respect to the acquaintanceship, he *proceeded to give her an opportunity to commit the act of adultery*.

Vice-Chancellor Fielder in *Sargent v. Sargent*, 114 Atl. 428 (not officially reported), affirmed 114 Atl. 439, 92 N. J. Eq. 703, recognized the rule (p. 439)—“that a man may watch his wife without warning her of his intention to do so”, but continued:

“*but it is equally true that he may not actually participate in a course of action leading to her downfall. He may not, with his eyes open, do that which may in some decree conduce to it. If he sees what a reasonable man could not permit and makes no effort to avert*

*the danger, he must be supposed to see and mean the result."*

Citing many cases.

And the Court held, under the circumstances of that case, that the petitioner was barred from relief, and the headnote is :

"A husband who had reason to suspect his wife of an inclination for illicit relations with a negro chauffeur, but did not discharge the chauffeur or even warn the wife against intimacy with him, and facilitated adultery between them by absenting himself from home, and placed detectives in the home, suborned servants, and received reports from them, etc., held to have consented to the adultery if committed, within Divorce Act sec. 28."

The reasoning of that case is applicable to this. The husband and wife were living happily together. The husband received information which did not make him suspicious that his wife *had* committed adultery but which *did* make him believe that *if her course of conduct was continued, it would lead to adultery*. Instead of warning his wife he arranged to follow her with his employees and then falsely told her that he was going to remain away until late, in the meantime intending to follow her, thus giving an opportunity to her to commit the act of adultery which, up to that time, he did not believe had been committed. *And there is absolutely no proof in the case that, up to that time, any act of adultery had been committed.*

Upon this ground alone relief should have been denied.

But the conduct of the husband is also entitled to consideration upon the credibility to be given to the husband's case of adultery.

In *Brown v. Brown*, 63 N. J. E. at page 348 the knowledge and conduct of the husband was

considered upon the petitioner's main case, and also in *Berckmans v. Berckmans*, 17 N. J. E. 453. The fact also that the husband immediately commenced an alienation suit against the co-respondent for \$125,000. is also entitled to consideration for the husband is not only interested in severing the marital relations, which goes to his credit, but he is also interested in obtaining \$125,000. from the co-respondent, and another matter which is entitled to considerable weight is the general attitude of the husband, who sees evil in conversations between a married woman and a man, not her husband, even upon the public street.

**It is respectfully submitted that the decree should be reversed and the record be remitted to the Court of Chancery with directions to dismiss the petition.**

MERRITT LANE,  
Of Counsel for Appellant.

## New Jersey Court of Errors and Appeals

Between

HARRY LAZARUS,  
Petitioner-Respondent,

*and*

MARION LAZARUS,  
Defendant-Appellant.

On Petition of  
Husband for  
Divorce on the  
Ground of  
Adultery.

Decree for  
Husband.

Appeal of Wife.

Sat below  
Church, V. C.

### REPLY BRIEF OF APPELLANT.

#### I.

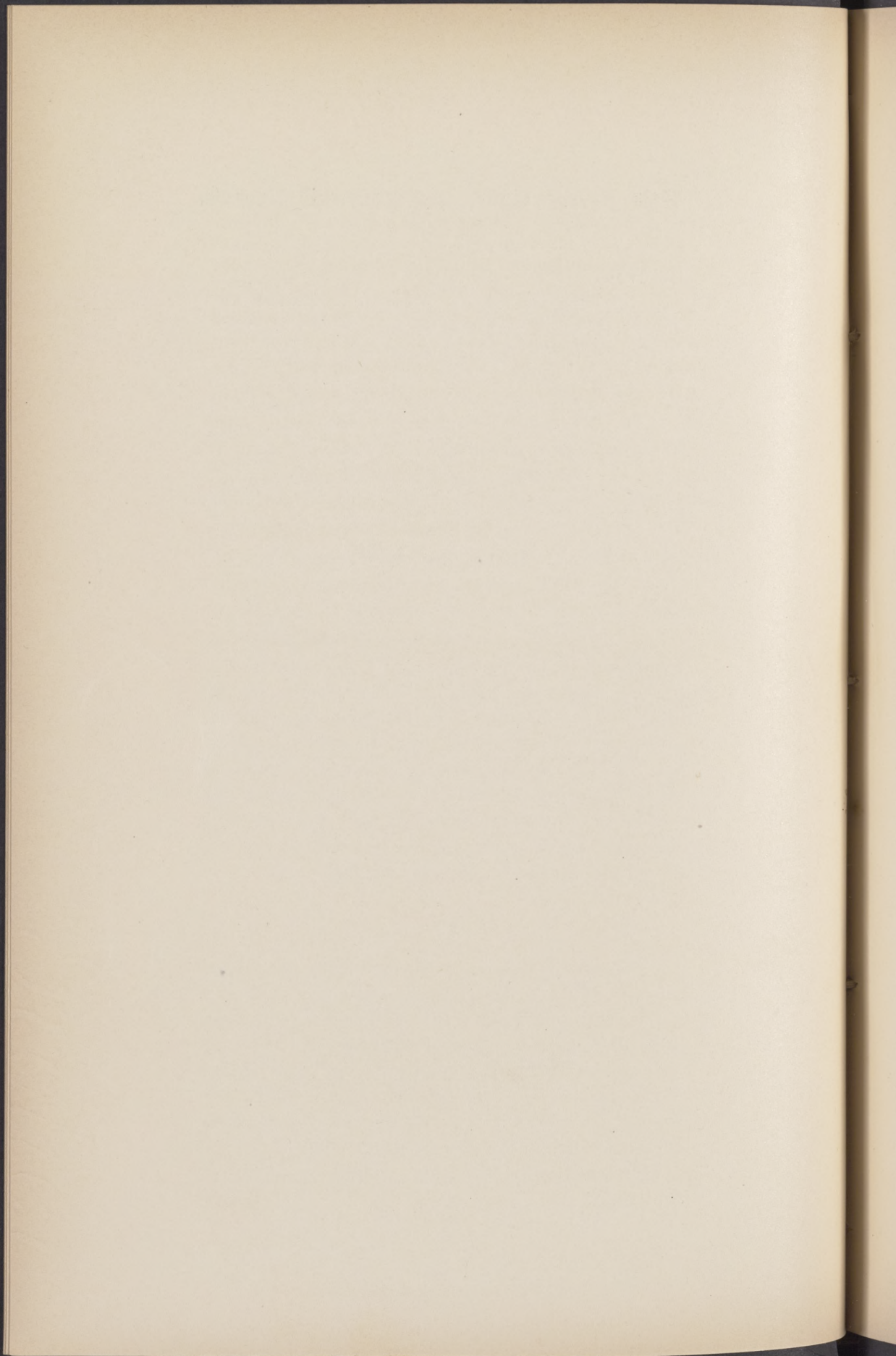
On p. 2 of his brief respondent says: "At the conclusion of the testimony of the petitioner, no motion for a dismissal or other attack on the effect of the testimony of the witnesses for the petitioner was made by the defendant's solicitor \* \* \*." No motion could have been made for there is no practice in Chancery of making any motion at the conclusion of the complainant's case equivalent to a motion to non-suit at law and defendant must rest before moving.

#### II.

*Johnson v. Johnson*, 99 N. J. E. 190, mentioned on p. 44 of my original brief, was a case in which a divorce was denied, although the defendant was not called upon to proceed with her case.

It is immaterial whether the Court believes that if the parties had been let alone they would have committed adultery nor whether they may have committed adultery at some other time.

The question is did they commit adultery at *that time*?

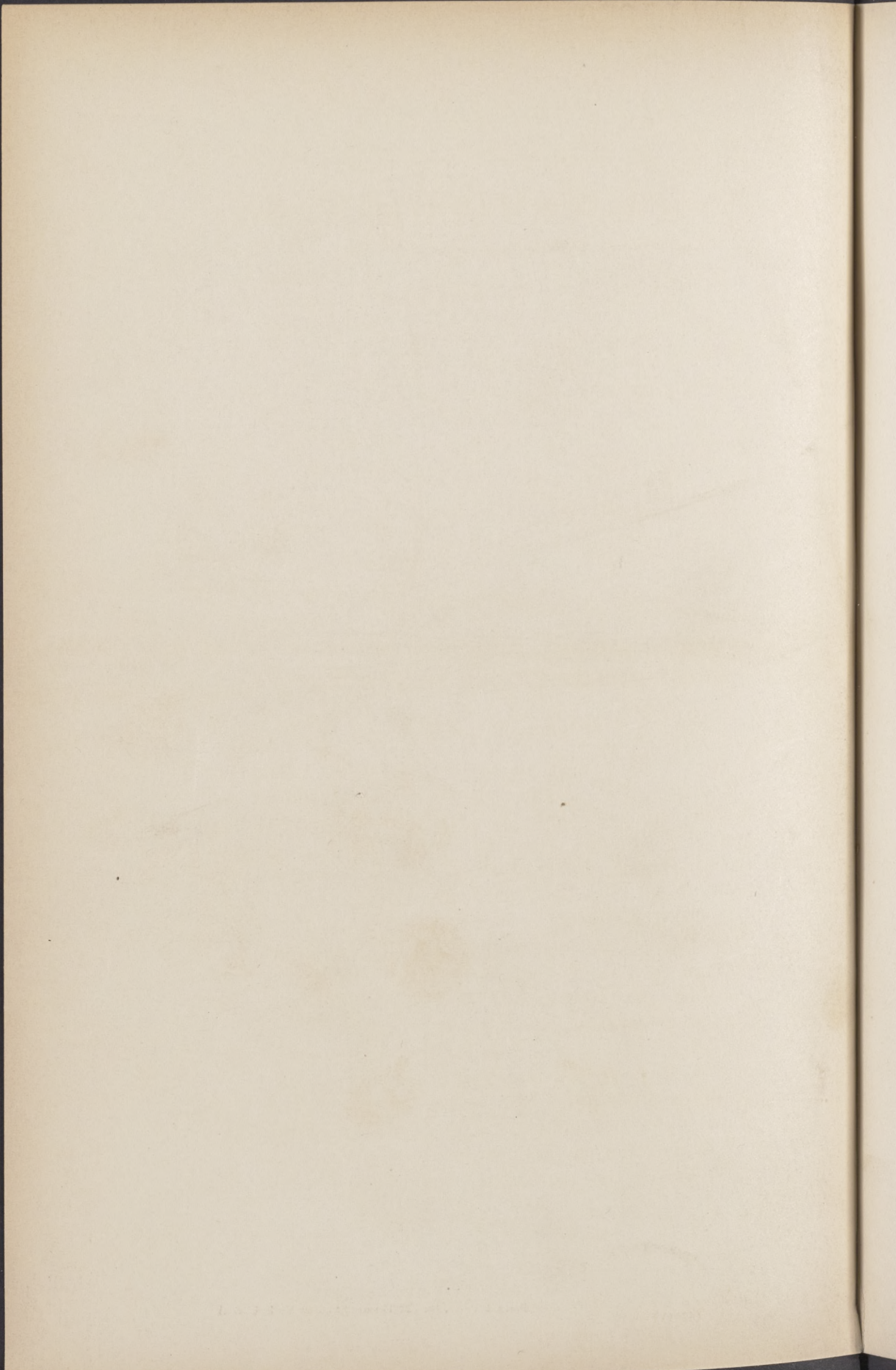


## III.

In his answer to Point II respondent says that a husband may watch his wife. That is true, if he has reason to believe that she has committed adultery, but if he believes that she has not committed adultery but may commit adultery if let alone, he may not keep his hands off and watch his wife. The latter situation is that present in this case.

Respectfully submitted

MERRITT LANE,  
Of Counsel for Appellant.



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

## New Jersey Court of Errors and Appeals

*Between*

HARRY LAZARUS,  
*Petitioner-Respondent,*

*and*

MARION LAZARUS,  
*Defendant-Appellant.*

*On Petition  
of Husband  
for Divorce  
on the  
Ground of  
Adultery.*

*Decree for  
Husband.*

**APPEAL OF  
WIFE.**

*Sat Below,  
CHURCH,  
V.-C.*

### BRIEF OF PETITIONER-RESPONDENT.

#### Statement of the Case.

The husband filed his petition June 21, 1926, charging his wife with adultery alleged to have been committed June 17, 1926 with the co-respondent Simon. The wife answered, denying the allegations of the petition. The case came on for hearing before Vice-Chancellor Church on May 10, 1927 and was continued to June 8, 1927, when the hearing was completed. The brief of the appellant is in error in stating that the husband filed his petition May 10, 1927, counsel having apparently confused the hearing date with the date of the filing of the petition. At the hearing on May 10, the petitioner and several witnesses testified in behalf of the petitioner and all were cross examined by the solicitor of the defendant, and the defendant was present in court during the hearing, as was also the co-re-

spondent in the case. At the conclusion of the testimony of the petitioner, no motion for a dismissal or other attack on the effect of the testimony of the witnesses for the petitioner was made by the defendant's solicitor, and when the Court expressed his doubt as to whether the case could be completed before four o'clock, the defendant's solicitor answered "Absolutely not," and an adjournment was taken to June 8, 1927. On June 8, 1927, on which date the hearing was scheduled to be continued, the defendant and the co-respondent did not appear, and the solicitor for the defendant announced that the defendant rested. Thereafter, briefs were submitted to the Vice-Chancellor, who subsequently filed a memorandum holding that the charge of adultery had been sustained and that he would advise a decree accordingly, and a Decree Nisi was thereupon entered (p. 91, S. C.). The defendant filed her petition of appeal on April 12, 1928 "upon the ground that the same is erroneous for that the evidence did not warrant the Court in finding your petitioner guilty of adultery and in making the decree aforesaid, and the petition of the petitioner, Harry Lazarus, should have been dismissed" (p. 94, S. C.).

### **FACTS AND ARGUMENT THEREON.**

It is respectfully submitted that the testimony in the case clearly and convincingly proved beyond a reasonable doubt that the defendant committed adultery with the co-respondent Simon, as alleged in the petition. The testimony of the petitioner and his witnesses very conclusively established his case, and as the Vice-Chancellor pointed out in his memorandum (p. 89, S. C.):

"Defendant and co-respondent were in court and their counsel cross examined peti-

tioner's witnesses at considerable length. The case was adjourned to June 8, 1927. On that day neither the defendant nor the co-respondent was in court. Counsel announced that defendant rested. There is nothing, therefore, before this court except the testimony of the petitioner, which to me is convincing. Defendant had an opportunity to deny and prove her denial. An adjournment was taken for this express purpose. This she failed to do."

The Vice-Chancellor in his memorandum decided the case according to the correct rule governing the quantum of proof in such cases, and held that the evidence proved beyond a reasonable doubt that the defendant was guilty of the adultery charged. This finding of fact by the Vice-Chancellor, it is respectfully submitted, was fully justified and supported by the evidence in the case and should not be disturbed. The Vice-Chancellor had an opportunity to observe the witnesses and weight their credibility, as well as the stories told by them upon the witness stand, and it is not conceivable that upon doing so the Court could have reached any other proper conclusion. The failure of the defendant to deny the truth of the evidence offered against her and the co-respondent are also significant and properly to be considered in the case, because, it is respectfully submitted that the presence of the defendant and the co-respondent in court during the testimony of the petitioner and his witnesses, and their subsequent decision, after a considerable lapse of time, not to appear in court and answer the incriminating evidence given in their presence against them, is not only significant from the standpoint of their guilt or innocence, but has a probative force in determining the fact of whether or not defendant was guilty of adultery. The subsequent absence of the de-

fendant and the co-respondent should be borne in mind in reviewing and considering the effect to be given to the testimony of petitioner and his witnesses delivered in the presence of defendant and co-respondent.

The petition sets forth, and the proofs show, that petitioner and defendant were married on January 28, 1923; that the petitioner was a bona fide resident of this State when the cause of action arose and has ever since, and for more than two years next preceding the commencement of the action, continued to be such resident; and that no children have been born as the result of the marriage. These facts were set forth in the petition for divorce and admitted in the answer and pleading of the defendant, and were testified to at the trial. The petition further charges that the defendant committed adultery

“particularly with one Herman Simon, of the City of Passaic, County of Passaic, and State of New Jersey, defendant having committed adultery with said Herman Simon on the 17th day of June, 1926, at and in the vicinity of Van Riper avenue, situate in the City of Clifton, County of Passaic, and State of New Jersey.”

The defendant filed an answer denying the allegation of her adultery and admitting the other allegations set forth in the petition. At the hearing, the evidence of the petitioner consisted of his own testimony and that of three other persons; Harold M. Vreeland, Clarence E. Stark, and Raymond Fresky. The petitioner testified that he and the defendant, after their marriage, lived happily together for a period of about three years, or until some time in the month of June, 1926, and that in the month of June certain things occurred that made him suspicious of his wife (p. 5, S. C.). He testified that he had

a conversation with Mr. Vreeland (who testified in the case), and after that conversation he observed his wife's conduct, particularly on June 16, 1926. On this occasion, which was the day before the alleged act of adultery, he saw his wife with Mr. Simon under the following circumstances. He was riding in his car with his wife, and he got out to enter a barber shop located at the corner of Lexington avenue and Monroe street in Passaic. He left his wife in his car, which was parked on the corner diagonally across from the barber shop. He heard the tooting of the horn on his car, and went to the window and looked out, and saw Simon going toward the car. *The witness here testified that he knew Hymie or Hermie Simon, also known as Herman Simon, and he testified that a certain man in the audience in the court room was the Mr. Simon to whom he referred. Thereupon counsel for the defendant admitted that the person pointed out by the witness was Mr. Simon (p. 7, S. C.).*

The witness then went on to testify that he saw Simon come over to his car and talk to his wife. Simon stayed there for a short while and then left. The witness got a shave and went out to the car, and his wife did not say anything to him about Mr. Simon having spoken to her. This occurred about 7:30 on the evening of June 16th. It will be noted that this was two or three days after Mr. Vreeland had said something to the petitioner that made the petitioner observant. When the petitioner found that his wife did not mention the fact that Mr. Simon had just been speaking to her, it is respectfully submitted that this may have reasonably caused him to be suspicious of his wife, as it would constitute a surreptitious attitude on her part, and indicated

that she did not wish her husband to know of her meeting with Simon. Her actions later that evening explained why she did not mention to her husband the fact that she had spoken with Simon.

After returning to his wife in the car, Mr. Lazarus drove his wife first to a grocery store, and later that evening the defendant asked him to take her to her father's store, which the petitioner did. She went into the store and didn't find her father and mother there, so she said to the petitioner, "Harry, I am going over. I think my mother and father is over at the grocery store and I want to meet her." The defendant left alone in her father's car, which had been in front of the store, and the petitioner followed her in his car. She went to Elm street, Passaic, where she stopped the car, and the petitioner parked his car a short distance away. He testified that the street in question has no stores and no bright lights, and very few people pass along it, but that it is close to a busy street called Monroe street, and that Mr. Simon has a store or place of business on Monroe street, between Lexington avenue and Elm street. As he watched he saw Mr. Simon come up to the car in which the defendant was sitting and remain there about five minutes, speaking to her, and then the co-respondent walked back towards Monroe street, and the defendant drove away in her car.

The petitioner thereupon returned to the store of the defendant's father, where he met the defendant, and she said nothing to her husband about having met Mr. Simon. Whatever the purpose of these meetings may have been, the action of the defendant in going to meet the co-respondent, apparently by pre-arrangement and appointment, after she mis-stated to her husband

what her destination was when she left him, and then failing to mention where she had been or whom she had seen, colors her conduct with clandestinity and constitutes one of the elements to be sought for in measuring and determining the relations between parties. Her secretiveness is important in this case in the light of the evidence of her conduct on the following night with Simon, and also is important as making reasonable the action of the husband petitioner in following her the next night. It gives credibility to his story and that of his witnesses.

Nothing else happened on the night of the 16th, but on the 17th of June the husband-petitioner watched the defendant. He started to watch her about 9 o'clock in the morning. He saw no meeting between the defendant and the co-respondent during the daytime. But on the evening of the 17th he followed his wife when he saw her leaving his home. He was waiting in a parked car about 200 feet from his house, when he saw his wife leave about 8 o'clock. He had with him at that time a Mr. Stark, who was a witness in the case. The defendant left the house on foot and she walked down to Lexington avenue and turned left. He testified that the direction in which she walked was away from both Elm street and Monroe street. He waited a minute or two and then followed as soon as she got around the corner, and he then saw his wife going up Lexington avenue toward Clifton. He did not see her meet Mr. Simon, but saw them together at Lexington avenue and Burgess Place. At this time it was still light, but just beginning to turn dark, about a quarter after eight. The petitioner and Mr. Stark stopped their car for a short time, waiting for another party to come up, who was Mr. Fresky. Mr. Fresky arrived

with his car. Fresky got into Mr. Stark's car with Mr. Lazarus and Mr. Stark, and then Stark drove the car down Lexington avenue, with Lazarus alongside of him and Fresky in the rear. They went toward Clifton, where petitioner testified there was a park quite a distance away from where the defendant and Simon had met. They followed the defendant and co-respondent, who were walking in that direction, and saw them go into the park in question.

It was then getting dark. The defendant and co-respondent sat down on a bench, while the watchers parked in a side street. From that position, the petitioner testified that he and the others could see the defendant and co-respondent, and they were sitting close together on the bench. The witness said they were sitting near each other, but he couldn't see anything more at that time. He remained there for about an hour in the car with the others. Occasionally they walked out, and walked toward where the defendant and co-respondent were. He testified that he saw them kissing each other, and saw Mr. Simon holding his arm around the petitioner's wife.

He next saw them walking up Lexington avenue, and they walked up about two blocks and turned right on Van Riper avenue. *The petitioner described Van Riper avenue by saying there were no lights on that street and no homes, but only vacant lots and brush, although the street was paved* (p. 18, S. C.). He followed them in there, after waiting. *It was then dark.* He went up the street about 100 feet in the car, and he could just see two objects standing. After going up the street, the lights of the car were switched on and he saw (p. 19, S. C.):

“Mr. Simon was sitting on a hydrant and my wife was just close towards him,”

and

“I saw Mr. Simon getting away and just buttoning his pants.”

“Q Where? What part of his pants?

A Well, the top of his pants.

Q In the rear or front or side, or where?

A In the front.

Q And before he did that, you said you saw the two of them there. He was sitting on the hydrant? A Yes, sir.

Q Where were her legs, and where were her arms, and where was her body? A Well, I could only see her back towards him.

Q She had her back towards him? A No, her back towards me.

Q And what did she do when the lights were thrown on? A She jumped immediately away.

Q And did you see whether her clothes were up or down at that time? A I couldn't see whether her clothes were up or down. It was down at that time.

Q What? A They were down at that time.

Q That is, after she jumped? A After she jumped away.”

He also testified that when he first saw his wife she was “just directly on top of him.” He then testified (p. 20, S. C.) that he struck Mr. Simon, and that when he did so, Simon said, “Go on. You can kill me. I am a dirty cur,” and that the defendant grabbed the petitioner by the throat and she said, “I like him. Don't hit him.” Thereupon the witness Stark, who was with Lazarus, went and called up the police department, and that the patrol wagon later came. By the time the patrol wagon got there, Simon had got away, but the petitioner held on to the defendant, and he left with her in the patrol wagon and went to the police station.

On cross examination it was brought out, additionally, that the petitioner was the employer of

the men whom he had with him in his plumbing supply business. The witness was asked whether he spoke to his wife after what he heard from Mr. Vreeland and he said he did not. He was asked whether, from what he heard from Mr. Vreeland, he anticipated that he was going to catch his wife in adultery, and he answered, "No, sir," and later on, that he was "just suspicious." When asked why he didn't say something, he testified:

"I wasn't sure. I wanted to make sure—  
until I saw it with my eyes."

When asked whether, after he saw the first meeting between his wife and Simon he did not intend to follow her the next day, he said that he did not. When asked when he made up his mind to follow her, he said it was after he saw her meet him the second time that night, when she met Mr. Simon on Elm street.

The cross examination brought out that at the time the witnesses saw the kissing going on they were just walking by the bench that the defendant and co-respondent were sitting on, which was about 15 feet from the sidewalk. There was no light there, and defendant and co-respondent had their backs to the street. Petitioner testified that it was after 9 o'clock, and it was dark at the time. He testified further on cross examination that the parties remained in the park until about 10 o'clock. Cross examined on the occurrence in Van Riper avenue, the witness brought out that the point where the parties were observed was about 400 feet from the corner of Lexington avenue on Van Riper avenue, and that Van Riper avenue is several blocks long. He testified that when he was at the corner of Van Riper and Lexington avenues, he could see only two objects, but he didn't know then

that they were standing at the hydrant. He simply saw them standing about 400 feet from the corner.

He further testified (p. 35, S. C.) that after the defendant and co-respondent walked down Van Riper avenue, the husband and his friends

“waited about ten or fifteen minutes”

and that from the corner where he waited he could see two objects down Van Riper avenue but could not tell what they were doing, and that they appeared to be standing there (p. 35, S. C.). He said (p. 36, S. C.):

“I didn’t know they were standing at the hydrant; I just saw them standing right there, about four hundred feet.

Q Then what did you do? A We waited about 10 or 15 minutes.

Q Right on the corner? A Yes, sir.

Q Where you could see them? A I said, I could just see two objects.

Q Well, where you could see the two objects? A Yes, sir.

Q Did you keep the two objects under observation? That is what I want to get at. A Yes, sir.

Q What did they do? A I couldn’t see.

Q You saw two objects, but you cannot tell me what they were doing? A No, sir.

Q Well, then, what next happened? A After we waited 10 or 15 minutes, we rode up with our car.”

The witness then testified (p. 38, S. C.) that they drove up, and when they got right on top of the two persons, Mr. Stark put the bright lights on and he saw what he had testified to on direct examination and he reiterated this on cross examination. The witness testified that he could not see them clearly from the corner, but that they appeared to be standing from there, but that when the bright lights were put on he

could see that he was really sitting on the hydrant. He testified that his wife was in front of Mr. Simon (p. 39, S. C.) and that Mr. Simon was in front of her and that after Mrs. Lazarus jumped away he saw Mr. Simon buttoning the top of his pants. The details of the fracas between Simon and the petitioner, as well as the petitioner's effort to have his wife and the correspondent arrested for adultery, were brought out.

The next witness called by the petitioner was *Harold M. Vreeland*, the owner of a restaurant in Montclair. He testified that he had seen the defendant, Mrs. Lazarus, some time in 1926, while he was riding with the petitioner, so that he knew the defendant to see. He further testified that in the month of June, 1926, on a Sunday, he saw the petitioner's car, which he recognized, on a country road between Garfield and Hasbrouck Heights, N. J.; that the car was standing still and was pulled off to the side of the road (p. 50, S. C.). He further testified that he looked at the car as he went by and that he saw the defendant, Mrs. Lazarus, and another man in the car, and that this other man was not the petitioner, Mr. Lazarus. He described the man and picked out the correspondent, Mr. Simon, in the court room, as being the man who was with the defendant on that occasion in the petitioner's car. He testified (p. 52, S. C.):

"Mrs. Lazarus was sitting behind the wheel and this other gentleman was on the other side of her and he did not have any hat on and he had his arm around the back, of the back of the seat, like that (indicating).

Q Around the back of the seat where she was sitting? A That is right."

He described under cross examination (p. 54, S. C.) how he slowed up his car and was going to stop in front of the other car, believing the petitioner was there, and that as he slowed up he saw that the petitioner was not there, but that Mrs. Lazarus and the other man were, so he drove on. He was asked on cross examination whether the man in question was not the defendant's father, but he testified (p. 54, S. C.) that he saw the defendant's father at court and that he was positive he was not the man with the defendant in the car on the day in question.

He further testified (p. 56, S. C.) that he subsequently told the petitioner what he had seen, and as the petitioner had testified that he became suspicious of his wife after a certain talk he had with Mr. Vreeland, this evidence indicates the reason for his being suspicious of his wife, being concerned when he saw the evidences of the interest manifested by Mrs. Lazarus and Mr. Simon in each other, and constituted the reason for his following her to determine whether or not his suspicions were well founded. Under questioning by the Court, he brought out in detail exactly what he told the petitioner and the circumstances under which he gave the information (p. 57, S. C.) and the attitude of the defendant in his conversation with Vreeland appears to be that of a husband who was learning for the first time of the deception of his wife and his natural desire to learn the truth, after first endeavoring to shield his wife and his home from the disgrace of her actions by pretending to Vreeland that he was hunched in the rear seat when Vreeland went by.

The next witness was *Clarence E. Stark*, who had been employed by the petitioner but was not employed by him at the time of the hearing.

He testified that he knew Mrs. Lazarus before June, 1926, and knew her well; that on June 17th, 1926, he met Mr. Lazarus in the evening and accompanied him in Mr. Stark's car and that Ray Fresky joined Lazarus and himself and that they went together in Mr. Fresky's car. He testified to seeing Mrs. Lazarus leave the house and that they followed her, and that he later saw her with someone, and he saw the defendant and a man walk to the park and that they followed and parked their car about one hundred or one hundred and fifty feet from the park, that they stayed in the car most of the time but got out of it a couple of times (p. 61, S. C.). He testified that he recognized both Mrs. Lazarus and Mr. Simon and that he saw them kiss each other while sitting on the bench with their backs to the street (pp. 61 and 62, S. C.).

He also testified (p. 62, S. C.) that he saw them leave the park and walk up Lexington avenue until they came to Van Riper avenue, which street they turned up and that they, the watchers, stayed at the corner, while the defendant and the co-respondent walked up the street. He testified that it was dark on that street and that there were neither lights nor houses upon it, and that after waiting at the corner they drove up the street with their lights out and that they went as silently as they could. He testified that before they put the lights on he could see the figures very close to each other, but that he could not tell whether they were leaning against a hydrant or not, but that when he put the lights on he could see that Mr. Simon was in a sitting position on the hydrant and Mrs. Lazarus was facing him very closely, and that she

“might have been leaning against him” (p. 63, S. C.).

He testified that there was no space between their bodies at all that he could see. His recollection was that Simon's back was nearest the car and Mrs. Lazarus was on the other side of him facing him and facing the car, and that he had seen them in that position for

“maybe half the distance between Lexington avenue and the hydrant.”

He was then asked (p. 65, S. C.):

“Q And you kept your eye on them during that time? A Yes, sir.

Q Did they change their position at any time before you got there? A No, sir.”

The witness testified that he did not see anything that Mr. Simon or Mrs. Lazarus did with their clothing, that he was busy changing the gears of his car and his attention was on the car for that instant.

There is a discrepancy between this witness' testimony and the testimony of Lazarus as to which one of the parties was nearest to the car, but it is respectfully submitted that in the excitement attendant upon such a discovery, the witnesses might easily have failed to note in their memory this detail, but still have deeply impressed upon their minds and memories the facts which would strike any observer, the fact that they were leaning together and that they stepped apart when the lights were thrown on, and the fact that Lazarus and Fresky testified to of seeing the man buttoning the front of his pants, and in the testimony of Fresky, the woman's clothing being up while in that position. The witness estimated (p. 67, S. C.) the height of the hydrant to be about thirty to thirty-six inches, and he testified as to the position of Simon that

“He was leaning against it, as I recall it”  
(p. 67, S. C.).

The re-cross examination of this witness brought out (p. 70, S. C.) that the car in question was a Chevrolet of the current year, 1926. A new car of this small and light type could easily approach in the dark noiselessly and with its lights out, so as to be unobserved by two persons deeply engrossed, as the defendant and co-respondent were, in the act that they were committing.

The next witness was *Raymond Fresky*, who had been employed by the petitioner but was not in his employ at the time he testified. He testified (p. 71, S. C.) that he knew Mrs. Lazarus before the month of June, 1926, and he corroborated the testimony of both Lazarus and Stark as to their movements while they were following Mrs. Lazarus and Simon. He testified that he saw them kissing each other in the park and that they sat in the park about forty-five minutes, and that he followed with the others when they walked down to and into Van Riper avenue. He testified (pp. 73 and 74, S. C.) that they stopped their car for about ten or twelve minutes at the corner of Van Riper avenue before going down. He testified before he got to the hydrant he could distinguish two figures standing there (p. 74, S. C.) and that he did not know how much before that they were standing there, and that the car rode down the street with the lights out, and when the lights were thrown on, he saw the following (pp. 75 and 76, S. C.):

“Well, I seen Mr. Simon against the hydrant and in a kind of sitting position. He was not really sitting on it like I am sitting on this chair—just leaning against it, and Mrs. Lazarus close to him.

The Court: How close?

The Witness: Very close.

The Court: Was she in his lap?

The Witness: Yes, sir.

Q And did you see where their arms were at the time? A Yes, sir; they were around each other.

Q Around each other. Could you see where their feet were at the time? A I could see her left leg.

The Court: Where was it?

The Witness: (Continuing.) Up above the knee.

Q Up above whose knees? A Mrs. Lazarus.

Q You could see her leg above the knee? A Yes.

Q Do you know whether her clothes were pulled up on that side or not? A Well, it looked that way. I didn't see that far. If it was not, her dress was very short."

The witness was then asked what happened when the lights were thrown on. He answered (p. 76, S. C.):

"A There was just a quick move. There was a quick move and Mr. Lazarus was out of the car before I knew it.

Q He was out of the car, but what did the others do? A Just moved quick. Mr. Simon kind of turned around in a way and started fixing up his pants.

Q Well, did he turn when he fixed up his pants? A Towards—oh, towards Paterson.

Q That is, away from the car? A Yes, away from the car, turned his back to—(interrupted).

Q Could you see what he was doing, however? A Oh, well, all you could see, his hands up in front of him, that is all.

The Court: What did she do?

The Witness: Well, she just stood there, I don't know, just moved around fast. That is all I could say.

The Court: Did you hear any conversation?

The Witness: All I heard was, 'Harry, Harry!'

The witness identified the man who was there with Mrs. Lazarus as Mr. Simon (p. 77, S. C.).

On cross examination (p. 82, S. C.) the question was asked,

"And you didn't see anything, although you got within ten feet of them, without the lights being thrown on, in this clear night, you didn't see anything which would lead you to suspect that that was going on, did you? A Yes, sir.

Q What? A Yes, sir.

Q You did see something? A Yes, sir.

Q Now, what did you see before the lights were thrown on? A I could see her bare leg, her left bare leg."

On (p. 83, S. C.), the witness stated that this was seen by him just a second before the lights were thrown on. He testified (pp. 87 and 88, S. C.) to seeing a kind of scramble after Mr. Lazarus jumped out of the car but said he did not know they were fighting at that moment, until he learned after.

At the end of this witness' testimony the petitioner rested and the Court asked:

"It is doubtful if we finish before four o'clock?"

Mr. Lane answered:

"Absolutely impossible."

The Court then adjourned the hearing until June 8, 1927.

In the face of this direct testimony, given as it was in the presence of the defendant and the co-respondent in open court, the defendant's solicitor naturally made no motion to dismiss and apparently intended to pursue the defense of the case for his client and the co-respondent,

but during the continuance of the case or on the adjourned date, the defendant and co-respondent apparently decided not to take the stand in an attempt to deny the facts proven and inferable from petitioner's evidence, and thereupon on the adjourned date, the defendant rested her case without taking the stand or giving any evidence whatever, and the co-respondent did likewise.

This circumstance should be taken into consideration by the Court, it is respectfully submitted, as corroboration of the testimony of the petitioner and his witnesses, and as being tantamount under the circumstances to an admission of the truth of their testimony by the defendant.

In *Bibby v. Bibby*, (33 N. J. Eq. 56) Chancellor Runyon held that the failure of the defendant to call the co-respondent, who was within the jurisdiction of the Court, was an important circumstance in corroboration of the petitioner's witnesses' testimony of defendant's adultery, saying,

“While the defendant was not a competent witness in her own behalf, to disprove the imputed adultery, Young, her alleged paramour, was, and he appears to have been in Paterson during the examination of witnesses in this cause. He might have been called but was not. The defendant has chosen rather to come to the hearing without his testimony. The fact that she did not call him is an important circumstance in corroboration of the testimony of the Mellors, and of much significance in reaching a conclusion as to her guilt.

There will be a decree of divorce.”

In the present case not only was the co-respondent within the jurisdiction of the Court but he sat in court and was identified by the witnesses and heard the testimony given, and the de-

fendant was present, and she now having capacity to testify and deny her guilt, as well as the circumstances testified to by petitioner's witnesses, her failure and the failure of the alleged paramour to testify should be taken with even greater force than in the above cited case of *Bibby v. Bibby*.

It is respectfully submitted that the adultery of the defendant is amply proven by the testimony of petitioner and his witnesses, whether the matter be considered from the standpoint of circumstantial proof of inclination and opportunity, or from the standpoint of direct evidence of the commission of the act.

We find from the uncontradicted evidence that the wife had on several occasions clandestinely met the co-respondent, on one occasion being in an automobile on a country road, parked to the side thereof, with his arm in back of her and practically around her, and just prior to the alleged commission of adultery she had spoken to him, immediately before she met her husband, and said nothing to him whatever of having met and spoken to the co-respondent, although Simon was known to the petitioner, as well as to the defendant. On the occasion that the adultery is alleged to have been committed, she deceived her husband as to where she was going, saying she was going to meet her parents, and instead met the co-respondent, and went with him to a park where they sat and embraced and kissed each other until it got dark. This is testified to by three witnesses, and not denied by either the defendant or the co-respondent. She then walked with him to a dark street and went several hundred feet down the street where she stopped with the co-respondent. Their criminal inclination for each other was demonstrated

by their kisses and embraces. They could have had no legitimate or proper motive or reason for going down this dark street, and they make no effort to furnish one by way of any testimony. That they were there cannot be doubted, for while the co-respondent got away after the petitioner assaulted him for what he had done, the defendant was restrained by the petitioner from leaving, and she was there when the police patrol came at his summons.

Both their acts towards each other and their act in going down this dark street without any houses on it, indicate a desire for intimacy on their part, and the evidence further shows that they had ample opportunity to indulge in this intimacy. They went to a point four hundred or five hundred feet from the nearest used street, the street that they were on being a dead end street between the park and the river road. They were at the point where they were found in the position later described for ten or twelve minutes, according to the testimony, during most of which time they were in the position apparently standing up, dimly visible to the watchers at the end of the block. They were still apparently standing up together, but the lights of the automobile suddenly thrown upon them revealed that their apparently standing-up position was a position in which their arms were about each other, and she was pressed against him and he was supported by a hydrant, her dress being up and the front of his trousers being open.

It is respectfully urged that no clearer proof of inclination and opportunity could be obtained in any case, and that in fact this evidence constitutes direct proof of the commission by the defendant and the co-respondent of adultery. Her dress was up so that the bare skin of her leg

could be seen; his trousers were open and he hurriedly buttoned them after they were fully revealed in the light of the headlights that were just thrown on. His position was that of leaning up against the hydrant while she rested on his lap facing him, with their arms about each other and her body facing his so close that there was no space between them.

It is argued in appellants brief that it is improbable that two persons would commit adultery under these circumstances. What particular individuals will do in the heat of passion is always difficult to conjecture. Both of the parties were married and could not go to public places together, such as a hotel, and on the night in question they had no bag with which to gain entrance to a hotel, nor an automobile to take them into the greater seclusion of the country or to some city where they were not known. Their desire was expressed and quickened by their embracing and kissing in the park, and as the shades of night fell they went to the new street which had neither lights nor houses on it, and where in the darkness they felt they could consummate their desire, and they did so. It is common knowledge that such acts do take place in unusual places, sometimes in automobiles upon the road, although the perpetrators realize that a policeman or trooper may come upon them at any moment out of the darkness. Sometimes in public parks, although the actors know that a park policeman or pedestrian may discover them, or the lights of a passing automobile reveal them. Sometimes in hallways, although the parties realize that some late arrival in the house may enter the hall at any moment. Sometimes in a room in an apartment or house where the per-

petrators take a chance on not being discovered by some member of the household suddenly entering the apartment or room. Sometimes upon the grounds of a building in a populous neighborhood, in spite of the fact that a neighbor might suddenly illuminate the scene or look out. Sometimes the very audacity of the place of commission of the act may be considered to render the probability of its occurring at such place less likely, because no one would look for so suspicious wrongdoing there, and the vigilance which such persons expect to exercise may cease and be forgotten in the excitement of and concentration upon the embrace. No purpose other than the illicit intercourse could have led these two people into that dark street. If their purpose had merely been to kiss and be alone, they would have remained upon the park bench, but they did not do so, because while they would take a chance upon kissing there, they were too near a used street to indulge in the complete consummation of their desires. They could not go to the home of either, because they were both married. They had no automobile in which to commit their act, and the only thing that they could do, they apparently decided, was to walk to some place that was safer than the park, so they walked down this dark, unlighted and uninhabited street, far from the nearest intersecting road, and stopped for the only purpose that they could have reasonably gone there for, and they were discovered in the middle of their act, which was proven not only by the then existing circumstances, and the circumstances which preceded it, but further by the confusion, actions and words, of the two participants when the lights of the car that had stolen up upon them were flashed on.

The appellant's brief suggests (pp. 48 and 49):

"It may be that these people stopped at this curb and kissed. If it was their intent to kiss and go no further, the place on the public street might well be that selected. If, on the other hand, they intended to kiss and go further, there is much doubt whether the kissing would not have been postponed until a more secure place easily available could have been reached, but there is no doubt whatever but that if they elected to kiss upon the public street and then go further, the episode would not have passed the stage of kissing on the public street. They then would have proceeded to walk ten steps to the vacant lot."

This is purely conjectural. The public street that appellant's brief speaks of is described in the testimony as an uninhabited dark street with no street lights on it and the point in question was a long distance from the nearest used street. They apparently figured that they were in complete seclusion where they were and could extricate themselves from their position more quickly than if they were to be found in the lot. Appellant's brief does not deny that it was entirely physically possible for them to have committed the intercourse in the position described by the witnesses, to wit, standing up and leaning against the hydrant.

It was in this position that the parties were found, she leaning upon him, with her legs apparently outside of his, because one witness saw the bare skin of one of her legs before the parties jumped away from their position. They had been in the same position for several minutes, and two of the witnesses observed the correspondent buttoning the front of his trousers after he jumped away in confusion, so that it

cannot be suggested that they had not yet had the opportunity to indulge their desire when the lights were thrown on.

Not only is the testimony of the petitioner supported by two witnesses, but the proof of the circumstances leading to his observation of his wife is reasonable and credible, and his actions after the discovery of her infidelity conform to those which a normal husband would naturally follow under the circumstances. In his rage he struck the paramour, he called the police, he immediately left their abode and promptly took steps seeking a divorce, and this in spite of the fact that he had never in any manner mistreated her or endeavored to get rid of her, nor suffered any unhappiness with her, apparently, previous to this occasion.

Added to this is the fact that, unlike in the case that may be cited by the defendant, the proofs of the petitioner are not denied by the evidence of the defendant or the co-respondent. The petitioner's evidence does not stand upon his own testimony, but is completely corroborated by two witnesses, who, although they were at the time employed by the defendant, were not so employed at the time they testified. Their manner and appearance on the stand showed them to be men of intelligence and character. Their friendship with the petitioner establishes the probability that they would be the likely persons to accompany him, and it is unlikely that their mere previous business connection with him as employees would lead them to perjure themselves, and their testimony stands not only uncontradicted, but supported by all the circumstances in the case.

All of the cases cited by the brief of the appellant are concededly the law governing the

quantum of proof required in divorce proceedings based upon adultery. Practically all of the appellant's quotations from the cited cases are the language of Vice-Chancellors in deciding the *FACT* questions submitted to such Vice-Chancellors. Those very rules when applied as they were by the Chancery Court in the present case to the evidence taken herein justify and required the finding of guilt upon the evidence adduced from the witnesses, and it is respectfully urged that by reason thereof the Decree herein should be affirmed.

#### Answer to Point II.

The additional contention is made in the brief of the appellant that the petitioner should have been denied relief upon the doctrine of *Brown v. Brown*, (63 N. J. Equity 348).

An examination of the testimony in this case shows very clearly that the facts do not at all warrant a denial of relief upon the theory that the husband participated in a course of action that induced or led to her downfall so as to indicate a consent to her adultery. All that the petitioner did in this case was to watch his wife, who was acting suspiciously, but he did nothing whatever to induce her to or to arrange matters so as to create circumstances calculated to cause her to commit adultery.

The case of *Brown v. Brown* (63 N. J. Equity 348) in the first place establishes no such doctrine as the appellant contends for in her brief. Although this Court in the opinion in that case discussed the actions of the husband *in considering the conduct of the accused wife*, the Court did not base its decision at all upon anything that the husband did as barring him from relief.

The Court pointed out in the Brown case that the husband

“encouraged her to accept of the escort of Mr. Cane, in different excursions at night, in order that these very acts might, through the detective instrumentalities which he had previously secured, and the aid of the testimony of servants of low character, be produced in evidence against her for the purpose of establishing her alleged carnal desire to seek the society of the co-respondent.”

The opinion also pointed out that he suggested to his wife that she go out with the co-respondent. In spite of all this, the Court expressly stated that the conclusions at which it arrived on the appeal

“do not rest upon the idea that the conduct of the husband has barred him from his right to maintain this suit \* \* \*.”

Therefore, the very basis of the second point in appellant's brief that

“Petitioner should have been denied relief under the doctrine of *Brown v. Brown*, 63 N. J. Eq. 348”

is a fallacy, as there is no doctrine enunciated in that case at all in line with what the appellant contends for under that heading.

Other cases cited under this point by the appellant include *Hedden v. Hedden* (21 N. J. Eq. 61 at p. 74), wherefrom the language of the Court is quoted as applicable to the case at bar but an examination of the facts in *Hedden v. Hedden* make a comparison between the two cases utterly impossible. In the Hedden case, the Court in its opinion pointed out the instances of nearly four years of abandonment and diabolical treatment of the accused wife and that

“The complainant, at or somewhere about the time when he abandoned his wife, had

attempted to procure other men to commit adultery with her, to lay the foundation for a divorce. This is shown by three separate witnesses on part of the defendant \* \* \*. On one occasion he took his wife to New York, met the proposed adulterer, as if by accident, in the train, and left her with him on the corner of Broadway, under a feigned pretense. The hired adulterer did not succeed \* \* \*.”

Then follows a number of similar efforts of the husband to accomplish the commission of adultery by his wife. Finally, the adultery which was charged in the case was alleged to be with a man named Clark, who was produced in court by the husband complainant as his witness, and as the Court remarked:

“In this case, the suspicion naturally arises that Hedden, who had repeatedly endeavored to induce others actually to commit the adultery, might have procured Clark to permit and tempt the defendant to be there under circumstances that would condemn her.”

The Court then stated that two other questions arose in the case:

“The first is, whether the complainant is not guilty of conniving at, and consenting to, the adultery of his wife in such way as to forfeit his title to a divorce”;

and in considering this question, the Court took into consideration the statute which provides that if adultery is by collusion with intent to procure a divorce, or if the complainant is *consenting* thereto, no divorce shall be granted. It was upon this situation that the language quoted in the appellant's brief was used and to which it applied. The Court summarized its finding on page 75, holding:

“I am therefore of opinion that the statutory bar of consent to the adultery, is proved

in two ways: First, by the consent to adultery with three other persons, whom he employed to commit the crime with her, which in the case of such actual employment, I hold to be a sufficient consent to subsequent adultery with others, although the adultery he devised was not committed; secondly, by the proof from circumstances, of his knowledge of and connivance at her intercourse with Clark, in such manner as to show intentional consent on his part to that adultery."

The foregoing shows that the language quoted from *Hedden v. Hedden, supra*, contained in appellant's brief is misleading, unless considered in connection with the context of the opinion and the facts upon which it is based. These facts do not in any respect correspond with the facts in the present case, for the husband at the time he followed his wife had reason only to be suspicious of her, having learned of a clandestine meeting in an automobile on a country road some time previously with the man whom he saw her meet clandestinely on the night of the commission of the adultery. He followed her and watched her and as soon as he saw what she was doing, he leaped out of the car in a rage, attempting to beat the paramour and calling for the police and going to the police station with his wife when they arrived. None of the cases hold such a course of observation of the wife a consent to her adultery.

The case of *Sargent v. Sargent*, 114 Atl. 428 (not officially reported), affirmed 114 Atl. 439, 92 N. J. Eq. 703. As the opinion states:

"Petitioner, therefore, had reason to suspect her of an inclination for illicit relations with Simmons, and, suspecting, he should have taken the step which lay within his power to keep Simmons away from his home, namely, discharge him and warn him

never to come to his house again. Instead, he retained Simmons in his employ."

The Court points out that this conduct followed a knowledge or belief on the part of the petitioner that the colored chauffeur in question had previously had relations with the defendant wife. Under these conditions, the opinion further states:

"Thus he gave Simmons the chance to be with his wife frequently in the automobile and also an excuse for and opportunity to be at his house at all times during the day when petitioner was absent at his business, and petitioner purposely, on at least two occasions between May 22 and July 11, absented himself from home for a night or nights, and he did all this, if not believing that defendant would commit adultery, at least to facilitate it."

Fact after fact along this line is brought out in the opinion, and the cited case, together with all other cases on the subject, shows a situation wherein a husband desires, consents to, connives at and intends the commission of adultery by his wife.

In the present case, the husband merely observed a wife, who without his connivance or consent or desire, was meeting another man. Her actions were suspicious, and he did what the Court in the opinion in *Sargent v. Sargent* said he could properly do, namely:

"that a man may watch his wife without warning her of his intention to do so, but it is equally true that he may not actually participate in a course of action leading to her downfall."

This complainant did nothing that made him participate in a course of action leading to her downfall.

Therefore, it is respectfully urged that the argument upon the second point of the appellant, in the submission of which the commission of the adultery by the wife is necessarily assumed, does not present circumstances or law whereby the decree in favor of the husband should be vacated.

The closing reference in appellant's brief to the institution of an alienation of affections suit by the husband against the paramour has no proper bearing upon the matters involved in this appeal whatever, as under the law the husband had a perfect right to institute a suit against the man who destroyed his home and violated his wife, and his natural pursuit of this legal remedy is corroborative rather than otherwise of the testimony of himself and the several witnesses in the divorce suit.

It is respectfully submitted that the adultery of the wife was proved beyond a reasonable doubt in the testimony taken at the hearing, the proof being so overwhelming as to apparently induce her and her counsel to decide not to follow their previously announced intention to deny the charges upon the witness stand, and that nothing in the conduct of the husband debarred him from his right to divorce for such adultery, and that therefore the appeal should be dismissed and the decree of the Court of Chancery affirmed.

JOHN W. MCGEEHAN, JR.,  
Solicitor for and of Counsel  
with Petitioner-Respondent.

