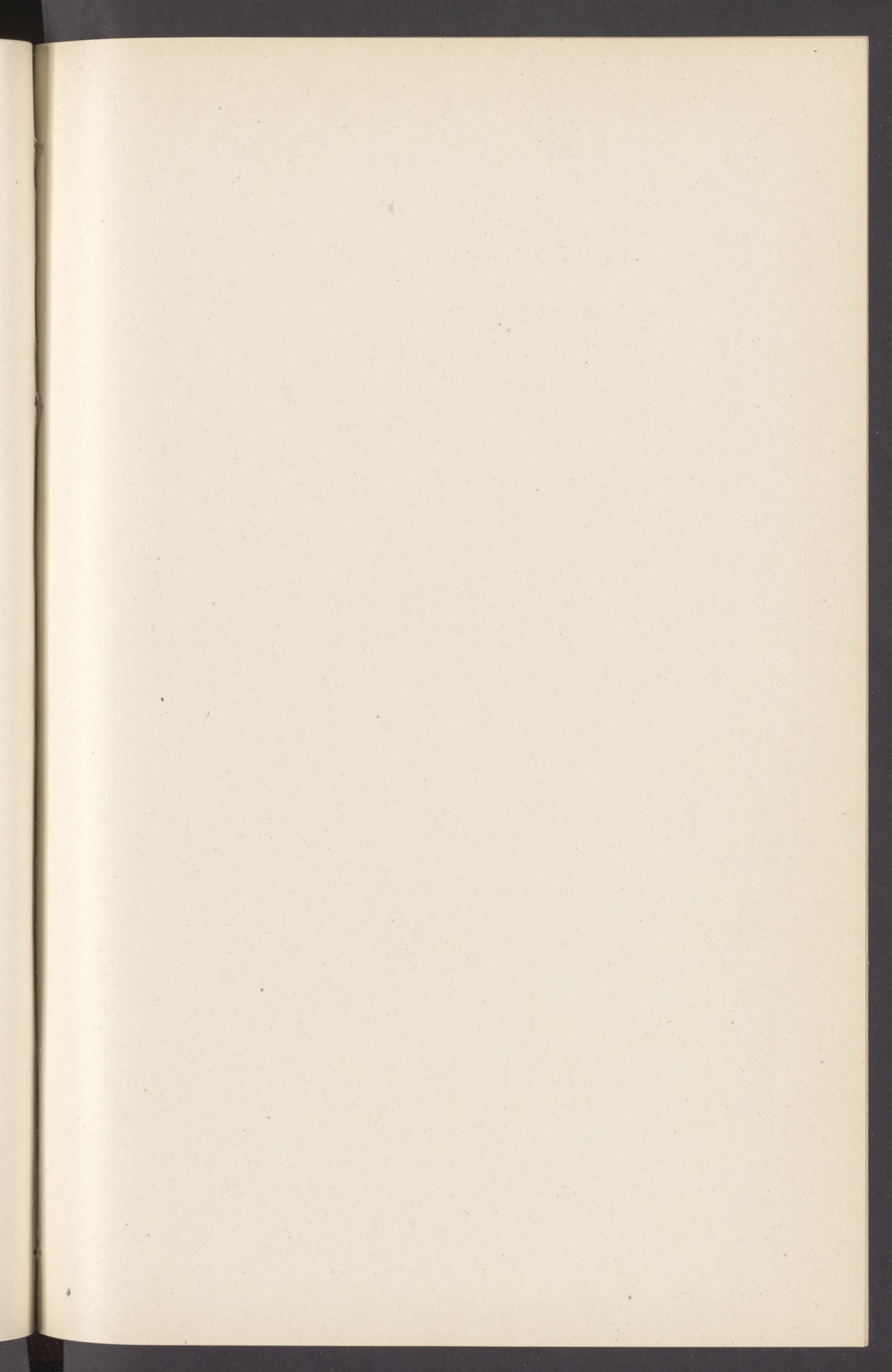


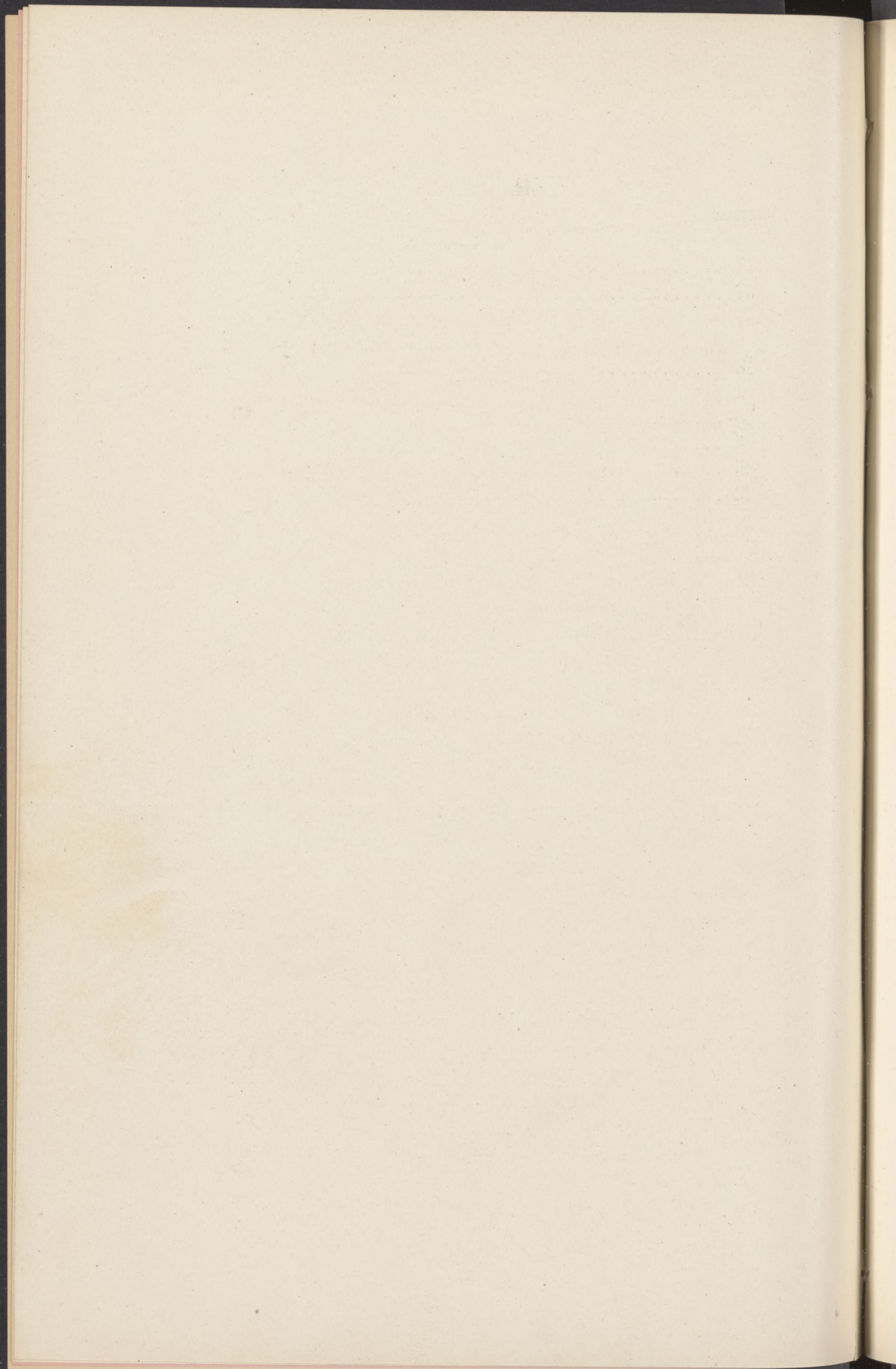
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Petition

Filed July 18, 1929

IN CHANCERY OF NEW JERSEY

TO HIS HONOR, EDWIN ROBERT WALKER,
Chancellor of the State of New Jersey:

The petition of Ruth Susanna Gartner, of the
Borough of Grantwood, in the County of Bergen
and State of New Jersey, respectfully shows:— 10

1. Your petitioner was lawfully joined in the
bonds of matrimony to her present husband,
Frederick Gartner, Jr., the defendant in this
suit, on the fifth day of January, 1922, at the
German Evangelical Church, 44th Street, Union
City, N. J., by Rev. William Mager.

2. At the time of the said marriage the de-
fendant had and was affected with a serious and
incurable venereal disease, to wit: a serious dis- 20
ease of internal syphilis, and the defendant in
that condition concealed and had failed to dis-
close the same to your petitioner.

3. Your petitioner being innocent and without
knowledge of such condition and disease of the
defendant cohabited with the defendant from the
time of her marriage down to the date when she
was compelled, because of her own safety, to leave
him upon the date as hereinafter set forth, and
continued to have sexual intercourse and relation- 30
ship with the petitioner, in accordance with her
duty and marital vows and became weakened and
undermined in health and body and continued to
suffer pain and torment of body, being innocent
and without knowing that the defendant, her hus-
band, had the dangerous, incurable and contagious
disease of internal syphilis, until April 10th,
1927.

4. For some time prior to the last mentioned
date, to wit: April 10th, 1927, your petitioner be- 40
gan to endure great hardship, pain and suffering

Petition

in her relationship with the defendant, who daily and frequently by threats of violence and forced petitioner to have sexual intercourse with him, not knowing the defendant had this disease, as a result of which the health and body of your petitioner became so impaired and undermined that
10 your petitioner began to suffer all kinds of internal sickness, pain and suffered severely in various parts of her body by reason thereof, until she could no longer endure the same, and thereby she consulted and received medical aid, and upon examination of her on or about April 10, 1927, it was discovered that the defendant had communicated to her the disease aforementioned, which was the first time, and to the shock and surprise
20 of your petitioner she discovered that her husband was during all his years of cohabitation with her, affected with the disease of internal syphilis, and although your petitioner has at times become suspicious there was something wrong with the defendant and requested him to submit to an examination, he continually declined and refused, until your petitioner had already contracted said disease from the defendant and discovered the same by medical examination, en-
30 tirely ignorant up to that time of the defendant's precarious disease, which he had in his system.

5. Defendant willfully communicated to your petitioner this venereal disease of internal syphilis.

6. Your petitioner on or about April 10th, 1927, having discovered the defendant had given her the disease aforementioned, was advised and compelled for her own safety and for the safety

Petition

and honor of her own physical condition, and realizing her danger was compelled to desist from further cohabitation with the defendant and was ordered and compelled to leave the defendant for her own protection and has never since that date lived or cohabited with the defendant, which is more than six months from the date last cohabited with by your petitioner with the defendant. 10

7. There were no children born of said marriage.

8. Your petitioner's maiden name was Ruth Susanna Michel.

9. Your petitioner is a bona-fide resident of the State of New Jersey, now residing at No. 287 Lawton Avenue, Grantwood, N. J., and prior thereto at Fisher Avenue, North Bergen, N. J., for two years one year at Park Avenue Cliffside, N. J.; lived one year at Greenmount Avenue, Grantwood, N. J., until April 10, 1927, when petitioner left the defendant, and for about a year at No. 355 Lincoln Avenue, Grantwood, N. J., and this petitioner says she has been a bona-fide resident of the State of New Jersey continually since the last act of cruelty which is the last date of cohabitation between the petitioner and defendant, to wit: April 10, 1927, at which time the defendant communicated said disease of internal syphilis to your petitioner and that she resided at the places above mentioned. 20
30

10. Defendant has resided with the petitioner at the addresses above mentioned up to April 10, 1927, and thereafter has resided at No. 224 Fourth Street, Bronx, N. Y., with his mother for about a year, then at Bellevue Hospital, New York, and has been confined and is now at the Kings County 40

Petition

Hospital, Borough of Brooklyn, County of Kings, State of New York, suffering from said venereal disease and softening of the brain, and has become incapacitated and feeble in mind as a result thereof.

10 11. Petitioner has no means of support except from her own exertions.

12. Your petitioner therefor prays the marriage between your petitioner and the defendant may be dissolved for the causes aforesaid, according to the statutes in such cases made and provided; that she be allowed to resume her maiden name; that a guardian or next friend be appointed for the defendant to defend this cause of action; that the defendant might be compelled
20 by this Honorable Court to support her if there are any assets or means from which support can be obtained, and your petitioner might have such other and further relief as may be just and equitable in the premises.

And your petitioner will ever pray, etc.

RUTH SUSANNA GARTNER,

Petitioner.

SAMUEL HARBER,

Solicitor of Petitioner.

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STATE OF NEW JERSEY, }
COUNTY OF HUDSON. } SS.

RUTH SUSANNA GARTNER, of full age, being duly sworn according to law, on her oath deposes and says:

She is the petitioner named in the foregoing petition; that her petition is not made by any collusion between her and said defendant, but in
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Petition

truth and good faith, for the causes set forth in
said petition.

RUTH SUSANNA GARTNER.

Sworn and subscribed to before me
this 16th day of July, 1929.

NICHOLAS S. ROGO,

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An Attorney of Law of N. J.

A true copy.

FERD GARRETSON,

Clerk.

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Amended Petition

Filed May 15, 1930

IN CHANCERY OF NEW JERSEY

TO HIS HONOR, EDWIN ROBERT WALKER,
Chancellor of the State of New Jersey.

The petition of Ruth Susanna Gartner, of the
Borough of Grantwood, in the County of Bergen
and State of New Jersey, respectfully shows:

10

FIRST CAUSE OF ACTION

1. Your petitioner was lawfully joined in the
bonds of matrimony to her present husband,
Frederick Gartner, Jr., the defendant in this suit,
on the fifth day of January, 1922, at the German
Evangelical Church, 44th Street, Union City, N.
J., by the Rev. William Mager.

20

2. At the time of said marriage, the defend-
ant represented himself and caused the petitioner
to believe that he was in good health, in good
physical condition and that there was nothing
wrong with him; that he had no disease of any
kind, which facts or statements were untrue at
the time of the marriage of your petitioner to
the said defendant, and were wholly false, untrue
and misrepresented, in that the said defendant
was not in that condition, but contrary thereto,
the said defendant at the time of said marriage
to your petitioner had and was affected with a
serious and incurable venereal disease, to wit: a
serious disease of internal syphilis, and the de-
fendant in that condition concealed, failed and
neglected to reveal and disclose the same to your
petitioner, and fraudulently and deliberately con-
cealed the same from your petitioner.

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3. Your petitioner would not have contracted
the said marriage with the defendant if she had

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Amended Petition

known or was aware of the fact that he was affected or was suffering from said serious and incurable venereal disease of syphilis and in entering into said contract of marriage with the said defendant, as the wife of said defendant, she entirely relied upon the statements that he was in good physical condition, in good health, that he had no disease, and that there was nothing wrong with him.

4. Your petitioner being innocent and without any knowledge of such condition of the defendant, and without the knowledge and information that the defendant had such disease as above set forth, cohabited with the defendant, and was forced, compelled, requested and ordered to cohabit with the defendant from the time of her marriage down to on or about April 10th, 1927, when she was compelled to leave the defendant, having at that time, and for the first time since her marriage, learned and discovered that the said defendant had and was affected from the time of his marriage to your petitioner down to said date of April 10th, 1927, with the said serious and incurable venereal disease, to wit: the disease of internal syphilis, and that he was not in good physical and healthy condition at the time of his marriage to your petitioner, and down to the said last mentioned date of April 10th, 1927; and that there was something wrong with him, namely that he had said disease, and that he had misrepresented to all of these facts as to his condition, and had wholly failed and neglected to reveal or disclose the same to your petitioner, when it was the duty of the defendant to disclose

Amended Petition

these facts that he was affected with said disease to your petitioner.

5. Your petitioner respectfully further alleges that she entirely relied upon the statements of the defendant as aforestated, with reference to his condition, that he had no disease, and there was nothing wrong with him at the time of his marriage to your petitioner, and without any knowledge thereof innocently and in good faith and for the purpose of performing her duties in marital vows to the defendant, from the time of her marriage down to the 10th day of April, 1927, had and continued to have sexual intercourse and relationship with the defendant, as a result of which the defendant communicated the said venereal disease of syphilis to your petitioner, and when your petitioner discovered the same, and that was on or about the 10th day of April, 1927, she was advised and compelled for her own safety and for the safety and honor of her own physical condition, to desist from further cohabitation with the said defendant, and was ordered and compelled to leave the defendant, and has never since that date, or on or about April 10th, 1927, lived or in any way cohabited with the said defendant, nor had any relationship with him from that date to the date hereof.

6. Your petitioner at the time of her marriage to the defendant, innocently and in good faith, and without the knowledge of the defendant's condition, at the time of their marriage, and with utmost confidence and trust in the defendant, thinking that there was nothing wrong with the defendant, and that he had no disease, and that he was normally in good condition, married

Amended Petition

the said defendant, and continued to cohabit and live with him, although the said defendant fraudulently, deliberately and deceitfully misrepresented himself to the petitioner, and failed and neglected and deliberately refused to disclose or reveal
10 his condition to your petitioner, as a result of which your petitioner has been misled, and when she discovered the same, immediately separated herself from the defendant, and has never lived with him since the date thereof.

7. Your petitioner from the date of her marriage to the defendant, to wit: the fifth day of January, 1922, down to the date hereof, has been a resident of the State of New Jersey. Your petitioner further alleges that your petitioner
20 and the defendant were bona fide residents of the State of New Jersey at the time this cause of action arose, and the petitioner has continued so to be, down to the time of the commencement of this action, and she has been for more than two years next preceding the commencement of this action a bona fide resident of the State of New Jersey.

8. There were no children born of said marriage.
30

9. Your petitioner's maiden name was Ruth Susanna Michel.

10. Your petitioner further shows that the defendant has resided with the petitioner in the State of New Jersey up to April 10th, 1927, and that he thereafter resided at 224 Fourth Street, Bronx, N. Y., with his mother for about a year, and thereafter became sick and went to Bellevue Hospital, New York, for treatment, and there-
40 after has been confined at Central Islip Hospital,

Amended Petition

Central Islip, Long Island, for some time, and is now at the Kings County State Hospital, Borough of Brooklyn, County of Kings, State of New York, suffering from said venereal disease, as your petitioner is informed, and has since his confinement in the last two named institutions of Central Islip Hospital and Kings County Hospital, New York, become incapacitated and feeble in mind as a result thereof. 10

11. Petitioner has no means of support except from her own exertions.

12. Your petitioner therefore prays that the marriage between your petitioner and the defendant may be annulled, vacated, set aside, and dissolved, for the cause of fraud, as herein set forth, according to the law and statutes in such cases made and provided; that she be allowed to resume her maiden name; that a guardian or next relative or friend be appointed for the defendant to defend this cause of action; that the defendant may be compelled by this Honorable Court to support your petitioner, if there are any assets or means from which support can be obtained; and that your petitioner might have such other and further relief as may be just and equitable in the premises. 20
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SECOND CAUSE OF ACTION

1. Repeats paragraph one of the first count and makes it a part hereof, as if specifically set forth herein.

2. Petitioner and the defendant cohabited as man and wife from the date of their said marriage until on or about April 10th, 1927, when 40

Amended Petition

your petitioner was compelled to separate from the defendant because of his extreme cruelty to her as hereinafter set forth in detail.

10 3. The petitioner and the defendant were bona fide residents of the State of New Jersey at the time this cause of action arose, and your petitioner has continued so to be a resident of New Jersey down to the time of the commencement of this action, and she has been for more than two years next preceding the commencement of this action a bona fide resident of the State of New Jersey.

20 4. Your petitioner further shows that the defendant has resided with your petitioner in New Jersey, continuously from the date of their marriage, at various places in said State of New Jersey, down to April 10th, 1927, and that after that date he has resided at 224 Fourth Street, Bronx, New York, with his mother for about a year, and thereafter went to Bellevue Hospital, New York, for sickness, and from there has been confined in Central Islip Hospital, Long Island, for some time, and from that institution is now at Kings County Hospital, Borough of Brooklyn, County of Kings, State of New York, suffering from the disease as hereinafter stated, and softening of the brain, and has since been confined in the institutions known as Central Islip Hospital and Kings County Hospital, and become incapacitated and feeble in mind as a result thereof.

30 5. Your petitioner further states that at the time of the said marriage to the defendant the said defendant had and was affected with a serious incurable venereal disease, to wit: a serious disease of internal syphilis, and that the said
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Amended Petition

defendant in that condition concealed and failed to disclose the same to your petitioner.

6. Your petitioner for a statement of the facts of extreme cruelty committed by the defendant upon your petitioner during their cohabitation, says that:

Your petitioner was innocent and without knowledge of the defendant's disease as aforestated, and cohabited with the defendant from the time of her marriage down to April 10th, 1927, when she was compelled because of her own safety to leave him upon the date herein set forth, to wit: April 10th, 1927, and although the said defendant failed and neglected and refused to disclose his condition of disease to your petitioner, the said defendant directed, requested, commanded and deliberately forced your petitioner to have sexual intercourse and relationship with him, and your petitioner to fulfill her duty in marital vows to the defendant, innocently and in good faith complied therewith, as a result of which your petitioner became weakened and undermined in health and body, and continued to suffer pain and torment of body, without knowing that the defendant, her husband, had a contagious, dangerous and incurable disease of internal syphilis, until April 10th, 1927, and thereby the said defendant abused his marital rights.

7. For some time prior to April 10, 1927, your petitioner began to endure great hardship, pain and suffering in her relationship with the defendant, who daily and frequently, by threats of violence forced the petitioner to have sexual intercourse with him, not knowing the defendant had this disease, as a result of which the health and body of your petitioner became so impaired and

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Amended Petition

undermined that your petitioner began to suffer all kinds of internal sicknesses, pains and injury, and suffered severely thereby in various parts of her body by reason thereof, until she could no longer endure the same, and thereby she consulted and received medical aid, and upon examination of her on or about the 10th day of April, 1927, it was discovered that the defendant had communicated to her the disease of internal syphilis, which was the first time, to the shock and surprise of your petitioner, she discovered that her husband was, during all his years of cohabitation with her, affected with the disease of internal syphilis, and although your petitioner had at times become suspicious that there was something wrong with the defendant, and requested him to submit himself to examination, he continually declined and refused, until your petitioner had already contracted said disease from the defendant, and discovered the same by medical examination on or about April 10th, 1927, and prior thereto being entirely innocent and ignorant of the defendant's precarious disease which he had in his system.

8. The defendant willfully and deliberately, and with intention of injuring your petitioner, committed the aforesaid acts of cruelty to her as herein alleged, by forcing her to have sexual intercourse and relationship with him, when he was affected with such disease, as herein set forth, and thereby communicated the same to your petitioner in a cruel and indecent manner, knowing at all times that he had no right to cohabit with your petitioner, being thereby or during all of such time affected with such a disease.

Amended Petition

9. The petitioner on or about April 10th, 1927, having discovered that the defendant had given her the disease aforementioned, was advised and compelled for her own safety and for the safety and honor of her physical condition, and realizing her danger, to desist from further cohabitation with the defendant, and was ordered and compelled to leave the defendant for the protection of herself, and has never since that date lived or cohabited with the defendant, which is more than six months from the date last cohabited with the defendant, which is more than six months from the date last cohabited by your petitioner with the defendant. 10

10. This petition for divorce is filed after more than six months from the date of the last act of cruelty complained of, to wit: April 10th, 1927, at which time suit for divorce on the ground of extreme cruelty became vested in your petitioner, and she has since that date never lived with the defendant. 20

11. The defendant was not in any way insane or incapacitated for more than one year after April 10th, 1927, during all of which time he resided at his mother's home at 648 224th Street, Bronx, New York, and after living with his mother for that period of time, he went to Bellevue Hospital, New York, and after treatments therein, was confined to Central Islip Hospital and Kings County Hospital, New York. 30

12. There were no children born of said marriage.

13. Your petitioner's maiden name was Ruth Susanna Michel.

14. Your petitioner has no means of support except through her own exertions. 40

Amended Petition

15. Your petitioner therefore prays that the marriage between your petitioner and the defendant may be dissolved for the cause of extreme cruelty, as aforesaid, according to the Statutes in such cases made and provided; that the de-
 10 defendant may be compelled by the decree of this Honorable Court to support her if there are any assets or means from which support can be obtained; and that your petitioner might have such other and further relief as may be just and equitable in the premises.

And your petitioner will ever pray, etc.

RUTH SUSANNA GARTNER,

Petitioner.

20 SAMUEL HARBER,

Solicitor of Petitioner.

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

RUTH SUSANNA GARTNER, of full age, being duly sworn according to law, on her oath deposes and says:

30 She is the petitioner named in the foregoing petition; that her petition is not made by any collusion between her and said defendant, but in truth and good faith for the causes set forth in said petition.

RUTH SUSANNA GARTNER.

Sworn and subscribed to before me
 this 3rd day of April, 1930.

JACOB FREESMAN,

An Attorney of Law of N. J.

A true copy.

40 FERD GARRETSON,

Clerk.

**Petition for Appointment of Guardian
Ad Litem**

Filed December 21, 1929

IN CHANCERY OF NEW JERSEY

Between: RUTH SUSANNA GARTNER, <div style="text-align: right;"><i>Petitioner,</i></div> <div style="text-align: center;">and</div> FREDERICK GARTNER, JR., <div style="text-align: right;"><i>Defendant.</i></div>	}	On Petition, Etc. Petition.	10
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TO HIS HONOR, EDWIN ROBERT WALKER, 20
 Chancellor of the State of New Jersey:

The petition of Ruth Susanna Gartner, of the Borough of Grantwood, County of Bergen and State of New Jersey, respectfully shows;

1. That she has lately filed her petition for divorce against her husband, Frederick Gartner, Jr., the defendant in the above entitled cause.

2. That on the 11th day of October, 1929, an order was duly made by this court, directing that the said defendant, Frederick Gartner, Jr., to appear and answer the petitioner's petition on or before the 12th day of December, 1929. 30

3. That publication was duly had of the same in the Hackensack Republic newspaper, in accordance and in compliance with the said order of the court.

4. That the said defendant, Frederick Gartner, Jr., has failed to appear and answer the divorce petition up to the date hereof.

Petition for Appointment of Guardian Ad Litem

5. That your petitioner is informed that the said defendant, Frederick Gartner, Jr., is feeble minded or mentally deranged, and is incapacitated by reason thereof, and that he is now confined in the Kings Park State Hospital, Kings
 10 Park, Long Island, New York, suffering from the same, which institution is only for the accommodation of such inmates or individuals.

6. That no application for appointment of a Guardian ad litem or next friend, to answer and defend this suit for the said defendant, Frederick Gartner, Jr., has been made, and that more than four days have elapsed since the publication specified in the said Order of Publication.

7. That the defendant, Frederick Gartner, Jr.,
 20 as above stated, is confined in the Kings Park State Hospital, Kings Park, Long Island, New York, and has no father, mother, guardian or person in loco parentis in this State to whom notice of this application can be given.

8. That the defendant has no father, and that his mother resides at 648 E. 224th Street, Bronx, New York, and his sister, Mrs. Kanski, resides at 271 E. Burnside Avenue, Bronx, New York City,
 N. Y.

9. That your petitioner has inquired, and has
 30 ascertained that the said defendant has no relatives residing in this State, to whom such application can be given.

Your petitioner therefore prays that a Guardian ad litem may be appointed for the said defendant, Frederick Gartner, Jr., by whom he may answer and defend this suit.

RUTH SUSANNA GARTNER,
Petitioner.

40 SAMUEL HARBER,
Solicitor of Petitioner.

Petition for Appointment of Guardian Ad Litem

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

RUTH SUSANNA GARTNER, of full age, being duly sworn according to law, on her oath deposes and says that:

She has read the foregoing petition, and noted the contents thereof, and says that the same is true to the best of her knowledge, information and belief.

RUTH SUSANNA GARTNER.

Sworn and subscribed to before me
 this 11th day of December, 1929.

JACOB FREESMAN,

An Attorney of Law of New Jersey.

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**Order Applying for Appointment of
Guardian Ad Litem**

Filed December 21, 1929

IN CHANCERY OF NEW JERSEY

10 Between:

RUTH SUSANNA GARTNER,
Petitioner,

AND

FREDERICK GARTNER, JR.,
Defendant.

} On Petition,
&C.
} Order.

20 The petitioner having filed her petition in the above cause praying that a Guardian Ad Litem be appointed for the defendant, Frederick Gartner, Jr., and it appearing that the said defendant, Frederick Gartner, Jr., is now confined as a person of feeble mind and mentally deranged, and is now confined in the Kings Park State Hospital, Kings Park, Long Island, New York, and that no application has been made for the appointment of a Guardian Ad Litem for the aforesaid defendant to answer and defend his suit within the

30 time required by law; and that the time for appearance specified in the Order of Publication heretofore, made, has expired; and it further appearing that the said defendant, Frederick Gartner, Jr., resides out of the State, and is confined in the Hospital above mentioned, and has no Father, Mother or Guardian or persons In Loco Parentis in this State upon whom notice of application for the appointment of a Guardian Ad

40 Litem can be served;

*Order Applying for Appointment of Guardian
Ad Litem*

It is on this 21st day of December, 1929, ORDERED that a notice that your petitioner will apply to the Chancellor of the State of New Jersey, at Chancery Chambers, State House, Trenton, N. J., on the 21st day of January, 1930, at 10 o'clock in the forenoon for an Order appointing an Guardian Ad Litem for and in behalf of the defendant, Frederick Gartner, Jr., to answer and defend your Petitioner's Suit, together with a certified copy of this Order be served upon the said defendant, Frederick Gartner, by mailing a copy of the said notice, and a copy of this Order directed to him at his last known address to wit: Kings Park State Hospital, Kings Park, Long Island, New York, by registered mail, within ten days from the date hereof; and that a copy of said notice and a copy of this Order be also mailed to the defendant's mother, Mrs. Minnie Gartner, who resides at 648 E. 224th Street, Bronx, N. Y., by mailing the same by registered mail to her said address, within the time aforementioned, and that a copy of said notice and a copy of this Order be also mailed to Hamilton Ward, Attorney General of the State of New York, at 49 Chambers Street, New York City, N. Y., by registered mail, within the time aforementioned.

FURTHER ORDERED, that the service made upon the said defendant, Frederick Gartner, Jr., and to his mother, Mrs. Minnie Gartner, and Hamilton Ward, Attorney General of the State of New York, at their addresses above mentioned in the manner aforesaid, shall be considered as service

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*Order Applying for Appointment of Guardian
Ad Litem*

substituted for personal service, and shall be considered proper service.

E. R. WALKER,

Respectfully advised:

C.

10 NORMAN C. ROGERS,

A. M.

A true copy.

GARRETSON,

Clerk.

The above is a true copy.

Solicitor and of Counsel for Petitioner.

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Affidavit of Dr. Arthur P. Hasking

Filed May 12, 1930

STATE OF NEW JERSEY, }
 COUNTY OF HUDSON } SS.

DR. ARTHUR P. HASKING, of full age, being 10
 duly sworn according to law on his oath deposes
 and says:

That I am a graduate physician, holding the de-
 gree of Doctor of Medicine, and have been duly
 licensed as such in the State of New Jersey, since
 1905.

That for the past twenty years I have devoted
 the major portion of my work to the mental dis-
 eases, that I am connected in a consultant capacity
 to a number of hospitals, that I am the attending 20
 psychiatrist to the psychopathic ward of the Jer-
 sey City Hospital, and have been so for the past
 17 years, for over twenty years I have been as-
 sistant to the County Physician of Hudson Coun-
 ty, and the large portion of my work has been the
 examination of alleged insane, for the Courts or
 for committment to Hospitals for the Insane.

That on March 6th, 1930, I had occasion to go
 to the Kings Park State Hospital, Kings Park,
 Long Island, which is a recognized institution for 30
 mental disease, maintained by the State of New
 York, and there interviewed, and examined one
 Frederick Gartner, Jr., an inmate of that institu-
 tion.

It is my opinion that the said Frederick Gart-
 ner, Jr., is suffering from a mental disease, known
 as General Paresis, which is a disease affecting
 the central nervous system and is of syphilitic
 origin. This disease has affected his cerebro-
 spinal system and impaired his mental process. 40

Affidavit of Dr. Arthur P. Hasking

At the time of my examination he was quiet, and tractable, his mental processes on gross matters appeared of average considering his present-day condition, although he showed no gross memory defects, yet he had a general feeling of well being and exhilaration, not apparently warranted by his condition, nevertheless when questioned on the finer details of his condition, and circumstances, he gave the impression of a patient with slow mental deterioration.

From the case history of the institution it appears that he has received treatment for his condition, which was of an approved and active nature, and he appeared to be making improvement in his physical and mental condition. He appeared to have a general insight into his condition and surroundings and the purpose of his institutional care and treatment.

He presented all the physical signs of the disease in a moderately advanced state and gave evidence of a slow deterioration of his mental faculties.

I discussed his case with the Staff physician of the institution, Mr. Gartner's record shows that he has been confined in New York State institutions for Mental Disease for the past two years, having spent part of the time in the Central Islip State Hospital, Central Islip, New York, and the remaining time in the Kings Park State Hospital.

That the record indicates that at times he has been violent, disturbed and irrational, in his manner, actions and discourse, that he is at present apparently in a period of partial remission, yet there has been a slow and gradual deterioration

Petition of Appeal.

Paragraphs allowed to stand, as pleaded and set forth in said Answer:

Petitioner appeals from the above parts of said Order On Motion to Strike Out, and herewith presents his grounds of appeal from the aforesaid Order on Motion &c.:

1. That the said Order is erroneous, in that Paragraph Six (6) of said Answer should have been ordered stricken out, for the reasons that complainant below has a title to said premises set forth in said Bill of Complaint; that such title is evinced by the matters set forth in Par. 1 of said Bill of Complaint, the laws of this State set forth in Par. 2; and the admissions of the defendant, Clark McK. Whittemore, in his Answer that judgment in said ejectment suit mentioned in the said Bill of Complaint, was rendered in favor of John C. Griffin (the Complainant in this present action, and the defendant in the ejectment suit mentioned in the Bill of Complaint), that such judgment in said ejectment suit, so pleaded in the Bill of Complaint, is not legally controverted by the defendant Clark McK. Whittemore in his Answer; that the same is *res adjudicata*, and is binding upon the parties thereto, and all connected, in all Courts of this State:

2. That Paragraph Seven (7) of said Answer should have been ordered stricken out, because the same presents no defense to this action which can be considered by the Court of Chancery; that the matters and things stated therein relating to the taxes and tax certificates mentioned in Par. 3 of the Bill, are matters and things which the said El Mora Realty Company, as owner of the major part of #645 Wyoming Avenue, Elizabeth, N. J.,

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Order Appointing Guardian

Gartner, Jr., is a person of feeble mind, and mentally deranged, and is now confined in the Kings Park State Hospital, Kings Park, Long Island, New York; and that no application has been made for the appointment of a Guardian Ad Litem for the aforesaid defendant to answer and defend this suit, and that more than four (4) days have elapsed since the date of appearance specified in the said order of publication, and

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It further appearing that the said defendant, Frederick Gartner, Jr., resides out of the State, and is confined in the Hospital above mentioned, and has no Father, Mother, guardian or person in Loco Parentis in this State upon whom notice of this application could be served.

IT IS THEREFORE ON THIS twelfth day of March, 1930, to which date this application was continued.

20

ORDERED, that FERD GARRETSON, ESQ., Clerk of this Court, be and is hereby appointed Guardian Ad Litem for the said defendant, Frederick Gartner, Jr., by whom he may appear and answer and defend this action or suit, and that ANTHONY P. LA PORTA, ESQ., a Solicitor of this Court, is hereby appointed to represent the said Guardian in this action, and to represent the said lunatic defendant, therein,

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E. R. WALKER,
C.

A true copy.

FERD GARRETSON,
Clerk.

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Answer

Filed May 2, 1930

IN CHANCERY OF NEW JERSEY

73-676

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Between

RUTH SUSANNA GARTNER,
Petitioner,

AND

FREDERICK GARTNER, JR.,
Defendant.

On Petition
for Divorce,
&c.

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The joint answer of Frederick Gartner, Jr., a person of unsound mind, by Ferd Garretson, Esq., Clerk in Chancery of New Jersey, as guardian, and the said Ferd Garretson to the amended petition for divorce filed in the above stated cause says that:

ANSWER TO THE FIRST CAUSE OF
ACTION

30

The guardian of the defendant has no knowledge of information sufficient to form a belief as to the mental and physical condition of the defendant, nor as to the facts and circumstances under which the alleged marriage took place and therefore leaves the petitioner to her proof and denies all of the allegations in the first cause of action but admits, however, the marriage relation as alleged in paragraph 1 of the first cause of action.

40

Answer

BY WAY OF FURTHER ANSWER AND DEFENSE TO THE FIRST CAUSE OF ACTION

The defendant by his guardian and the guardian for himself say that:

(1) The petitioner, Ruth Susanna Gartner, on July 18th, 1929, filed a previous petition in this cause for absolute divorce upon the ground of extreme cruelty. A copy of said petition is annexed hereto and made a part hereof and is marked Schedule "A." 10

(2) The defendant being a non-resident, on the 11th day of October, 1929, an order for publication, etc., was made in the cause, a copy of which is annexed hereto and made a part hereof and is marked Schedule "B." 20

(3) In pursuance to said order the cause was advertised and a notice as advertised in the newspaper provided among other things—"The object of said suit is to obtain a decree for divorce, dissolving the marriage between you and the said petitioner on the grounds of extreme cruelty. A copy of said notice together with the affidavit of publication is annexed hereto and made a part hereof and is marked Schedule "C." 30

(4) The publication was followed by mailing as appears by the affidavit of Samuel Harber and Delores Fitzsimmons and jurisdiction over the defendant was accordingly acquired. A copy of said affidavits are annexed hereto and made a part hereof and is marked Schedule "D." 30

(5) By reason of the filing of the previous petition and the taking of the steps aforementioned by her, the petitioner has thereby affirmed her marriage contract with defendant and has 40

Answer

accordingly forever waived and abandoned her cause of action, which is alleged in the first cause of action, and she should not be permitted to disaffirm her marriage contract by reason of the fraud alleged.

- 10 WHEREFORE, the first cause of action in her amended petition should be dismissed.

ANSWER TO THE SECOND CAUSE OF
ACTION

- 20 The guardian of the defendant has no knowledge or information as to the allegations contained in the second cause of action sufficient to form a belief and therefore leaves the petitioner to her proof, and denies the same, except, however, he admits the marriage alleged in paragraph 2 of the second cause of action.

BY WAY OF FURTHER ANSWER AND DE-
FENSE TO THE SECOND CAUSE OF
ACTION

The defendant by his guardian and the guardian for himself says that:

- 30 (1) This defendant at the time of the alleged acts of cruelties charged against him in the second cause of action was of unsound mind, insane, incompetent, and unable to appreciate or understand what he was doing at the time of the alleged acts of cruelties charged against him.

Answer

BY WAY OF FURTHER ANSWER AND DEFENSE TO THE SECOND CAUSE OF ACTION

The defendant by his guardian and the guardian for himself says that:

(1) They repeat the allegations contained in the separate defense to the first cause of action and say further that by reason of the petitioner's election and affirmance of the marriage she has condoned the act or acts of cruelty charged, which she has made the basis of her annulment cause, based upon the alleged fraud in the suppression of the lunatic's alleged physical condition and the communication to her of the disease. 10

WHEREFORE, this defendant by his guardian prays that the petition be dismissed in toto for the reasons aforesaid with costs. 20

ANTHONY P. LA PORTA,

*Solicitor of the Defendant and Guardian
Assigned by the Chancellor.*

30

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Schedule "A"

TO HIS HONOR, EDWIN ROBERT WALKER,
CHANCELLOR OF THE STATE OF NEW
JERSEY:

The petition of Ruth Susanna Gartner, of the
Borough of Grantwood, in the County of Bergen
and State of New Jersey, respectfully shows:

10 (1) Your petitioner was lawfully joined in
the bonds of matrimony to her present husband,
Frederick Gartner, Jr., the defendant in this suit,
on the fifth day of January, 1922, at the German
Evangelical Church, 44th Street, Union City,
N. J., by the Rev. William Mager.

(2) At the time of the said marriage the de-
fendant had and was affected with a serious and
incurable venereal disease, to wit: a serious dis-
20 ease of internal syphilis, and the defendant in
that condition concealed and had failed to dis-
close the same to your petitioner.

(3) Your petitioner being innocent and with-
out knowledge of such condition and disease of
the defendant cohabited with the defendant from
the time of her marriage down to the date when
she was compelled, because of her own safety, to
leave him upon the date as hereinafter set forth,
and continued to have sexual intercourse and re-
30 lationship with the petitioner in accordance with
her duty and marital vows and became weakened
and undermined in health and body and continued
to suffer pain and torment of body being innocent
and without knowing that the defendant, her hus-
band, had the dangerous, incurable and contagious
disease of internal syphilis until April 10th, 1927.

(4) For some time prior to the last mentioned
date, to wit: April 10th, 1927, your petitioner be-
40 gan to endure great hardship, pain and suffering

Schedule "A"

in her relationship with the defendant, who daily and frequently by threats of violence forced petitioner to have sexual intercourse with him not knowing the defendant has this disease as a result of which the health and body of your petitioner became so impaired and undermined that your petitioner began to suffer all kinds of internal sicknesses, pain and suffered severely in various parts of her body by reason thereof until she could no longer endure the same and thereby she consulted and received medical aid upon examination of her on or about April 10, 1927, it was discovered that the defendant had communicated to her the disease aforementioned which was the first time and to the shock and surprise of your petitioner she discovered that her husband was, during all his years of cohabitation with her, afflicted with the disease of internal syphilis, and although your petitioner has at times become suspicious, there was something wrong with the defendant and requested him to submit himself to an examination he continually declined and refused, until your petitioner had already contracted said disease from the defendant and discovered the same by medical examination entirely innocent and ignorant up to that time of the defendant's precarious disease which he had in his system.

(5) Defendant wilfully communicated to your petitioner this venereal disease of internal syphilis.

(6) Your petitioner on or about the 10th day of April, 1927, having discovered the defendant had given her the disease aforementioned was advised and compelled for her own safety and for the safety and honor of her physical condition,

Schedule "A"

and realizing her danger was compelled to desist from further cohabitation with the defendant and was ordered and compelled to leave the defendant for her own protection and has never since that date lived or cohabited with the defendant, which
10 is more than six months from the date last cohabited with by your petitioner with the defendant.

(7) There were no children born of said marriage.

(8) Your petitioner's maiden name was Ruth Susanna Michel.

(9) Your petitioner is a bona fide resident of the State of New Jersey, now residing at No. 287 Lawton Avenue, Grantwood, N. J., and prior
20 thereto at Fisher Avenue, North Bergen, N. J., for two years, one year at Park Avenue, Cliffside, N. J.; lived one year at Greenmount Avenue, Grantwood, N. J., until April 10, 1927, when petitioner left the defendant, and for about a year at 355 Lincoln Avenue, Grantwood, N. J., and this petitioner says she has been a bona fide resident of the State of New Jersey continually since the last act of cruelty which is the last date of cohabitation between the petitioner and defendant, to wit: April 10th, 1927, at which time the
30 defendant communicated said disease of internal syphilis to your petitioner and that she resided at the places above mentioned.

(10) Defendant has resided with the petitioner at the addresses above mentioned up to April 10th, 1927, and thereafter has resided at No. 224 Fourth Street, Bronx, N. Y., with his mother for about a year, then at Bellevue Hospital, New York, and has been confined and is now at the Kings County
40

Schedule "A"

Hospital, Borough of Brooklyn, County of Kings, State of New York, suffering from said venereal disease and softening of the brain and has become incapacitated and feeble in mind as a result thereof.

(11) Petitioner has no means of support except from her own exertions. 10

(12) Your petitioner therefore prays that the marriage between your petitioner and the defendant may be dissolved for the causes aforesaid according to the statutes in such cases made and provided; that she shall be allowed to resume her maiden name; that a guardian or next friend be appointed for the defendant to defend this cause of action; that the defendant might be compelled by this Honorable Court to support her if there are any assets or means from which support can be obtained and your petitioner might have such other relief as may be just and equitable in the premises. 20

And your petition will ever pray, &c.

RUTH SUSANNA GARTNER,

Petitioner,

SAMUEL HARBER,

Solicitor of Petitioner.

30

STATE OF NEW JERSEY }
COUNTY OF HUDSON } SS.

RUTH SUSANNA GARTNER, of full age, being duly sworn according to law, on her oath deposes and says:

She is the petitioner named in the foregoing petition; that her said petition is not made by any collusion between her and said defendant, but in

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Schedule "A"

truth and good faith for the causes set forth in said petition.

RUTH SUSANNA GARTNER.

Sworn and subscribed to before
me this 16th day of July, 1929.

10 NICHOLAS S. RAGO,
 As Attorney-at-Law of N. J.

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Schedule "B"

IN CHANCERY OF NEW JERSEY

Between:

RUTH SUSANNA GARTNER,
Petitioner,

AND

FREDERICK GARTNER, JR.,
*Defendant.*On Petition,
&c.

10

ORDER OF PUBLICATION
SUBSTITUTED SERVICE

The petitioner, having filed her petition in the above cause, and process of citation having been issued and returned according to law, and it now appearing that personal service of process upon the defendant within the State could not be made:

20

It is on this 11th day of October, A. D. 1929, on motion of Samuel Harber, Solicitor of the Petitioner,

ORDERED that the said absent defendant, Frederick Gartner, Jr., do answer the petitioner's petition on or before the 12th day of December, next, or that in default thereof such decree be made against Frederick Gartner, Jr., the defendant, as the Chancellor shall think equitable and just;

30

And it is further ORDERED that a notice of this order prescribed by law and the rules of this Court shall within twenty days hereafter be published in the Hackensack Republican, a newspaper printed at Hackensack, N. J., and continued there-

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Schedule "B"

in for four weeks sucessively at least once in every week, and

It is further ORDERED that service upon the defendant of the petition and of this order or notice of this order, as service substituted for
10 personal service of process within the state, be made within the said twenty days and in the manner prescribed by the rules of Court for such substituted service.

Respectfully advised:

NORMAN T. ROGERS,
A. M.

E. R. WALKER,
C.

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30

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Schedule "C"

STATE OF NEW JERSEY }
 COUNTY OF HUDSON } SS.

C. E. Zergmann of said County, being duly sworn, says that he is Clerk of The Hackensack Republican, a newspaper published and printed at Hackensack, in the County of Bergen aforesaid, and that the notice of which the annexed is a printed copy was published in the said newspaper on October 25, November 1-8-15, being four weeks successively, at least once in each week. 10

C. E. ZERGMANN.

Sworn to before me this
 15th day of Nov. 1929.

NELLIE W. BENTLEY,
Notary Public.

(Seal)

20.

IN CHANCERY OF NEW JERSEY

To Frederick Gartner, Jr.

By virtue of an order of the Court of Chancery of New Jersey made on the 11th day of October, 1929, in a certain cause wherein Ruth Susanna Gartner is petitioner, and you, Frederick Gartner, Jr., is the defendant, you are hereby required to appear and plead, answer or demur to petitioner's petition, on or before the 12th day of December, 1929, next, or in default thereof such decree will be taken against you as the Chancellor shall think equitable and just. 30

The object of said suit is to obtain a decree of divorce, dissolving the marriage between you and

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Schedule "C"

the said petitioner on the grounds of extreme cruelty.

Dated October 19th, 1929.

SAMUEL HARBER,
Solicitor of Petitioner.

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Office and Post Office Address,
422-38th Street,
Union City, N. J.

October 25. November 1-8-15.

Fees \$11.34.

20

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Schedule "D"

IN CHANCERY OF NEW JERSEY

Between:

RUTH SUSANNA GARTNER,
Petitioner,

AND

FREDERICK GARTNER, JR.,
*Defendant.*On Petition,
&c.

10

AFFIDAVIT

STATE OF NEW JERSEY
COUNTY OF HUDSON

} SS.

20

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

I am the solicitor and of counsel for the petitioner in the above cause.

On the 23rd day of October, 1929, I caused to be enclosed in an envelope the following papers, to wit: certified copy of the petition, certified copy of the order of publication, and copy of notice in the above cause as printed in the Hackensack Republican, as shown in the affidavit of C. E. Zergmann, Clerk of the Hackensack Republican, and directed my secretary, Miss Dolores Fitzsimmons, to send the same to the defendant, Frederick Gartner, Jr., at the Kings Park State Hospital, Kings Park, Long Island, N. Y., and she has informed me that she sent the same to

30

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Schedule "D"

the said defendant, at said address, as appears
by the annexed affidavit, by registered mail.

SAMUEL HARBER.

Sworn and subscribed to before
me this 11th day of December, 1929.

10 JACOB FREESMAN,
An Attorney-at-Law of N. J.

IN CHANCERY OF NEW JERSEY

Between:

RUTH SUSANNA GARTNER,
Petitioner,

20

AND

FREDERICK GARTNER, JR.,
Defendant.

} On Petition,
&c.

AFFIDAVIT

STATE OF NEW JERSEY

COUNTY OF HUDSON

} SS.

30

DELORES FITZSIMMONS, being duly sworn
according to law, on her oath deposes and says:

That she is the Secretary employed in the office
of Samuel Harber, solicitor of the petitioner in
the above cause;

That on the 23rd day of October, 1929, Mr.
Harber instructed me to send a letter to the above
named defendant, copy of which is hereto an-
nexed, containing enclosures of certified copy of

40

Schedule "D"

petition, order of substituted service and copy of notice, by registered mail to Kings Park State Hospital, Kings Park, Long Island, N. Y., with return receipt requested thereof. On the same day I went to the post office situated at the corner of 38th Street and New York Avenue, Union City, being the Weehawken Post Office, and mailed said letter by registered mail, with return receipt requested, card of which is hereto annexed, which card shows the receipt of such letter and enclosures by the above named defendant by the party who signed therefore as appears on said card. Sworn and subscribed to before me this 12th day of December, 1929. 10

DOLORES FITZSIMMONS.

JACOB FREESMAN, 20
An Attorney-at-Law of N. J.

COPY OF LETTER

Mr. Frederick Gartner, Jr.,
c/o Kings Park State Hospital,
Kings Park, Long Island.
RE: GARTNER vs. GARTNER.

Dear Sir:

I beg to enclose certified copy of petition, Order of Substituted Service, and copy of Notice requiring you to answer. If you have any defense or desire to answer this suit, kindly do so before the 12th day of December, 1929, in pursuance to the papers herein enclosed. 30

Very truly yours,

SH/DF

Enc.

3 Encls.

Registered Mail. 40

Schedule "D"

POST OFFICE DEPARTMENT
OFFICIAL BUSINESS
REGISTERED ARTICLE

KINGS PARK

Oct. 24, 1929.

6 P. M.

N. Y.

10 No. 7991

INSURED PARCEL.

No. _____

Return to Samuel Harber

(Name of Sender)

Street and Number)

422-38th St.

or Post Office Box)

Union City,

New Jersey.

20

RETURN RECEIPT

Received from the Postmaster the Registered or Insured article, the original number of which appears of the fact of this card.

FREDERICK GARTNER,

(Signature of name of addressee)

H. T. HOORN,

(Signature of Addressee's agent)

30 Date of Delivery,....., 192..

Form 3811

Replication

Filed May 6, 1930

IN CHANCERY OF NEW JERSEY

73-676

Between:

RUTH SUSANNA GARTNER,
Petitioner,

and

FREDERICK GARTNER, JR.,
Defendant.

On Petition,
Etc.

10

The petitioner, replying to the answer filed in the above entitled cause, says that:

20

REPLY TO ANSWER TO THE FIRST
CAUSE OF ACTION

Joins issue with the allegations contained therein.

REPLY TO FURTHER ANSWER AND DE-
FENSE TO THE FIRST CAUSE OF ACTION

30

Admits paragraphs 1, 2, 3 and 4.

Denies the construction or legal affect of the allegations contained in paragraph 5, and the conclusions set forth therein, and leaves the same to the Court for decision after the entire case is heard, and denies the status as set forth in said paragraph.

40

*Replication*REPLY TO ANSWER OF THE SECOND
CAUSE OF ACTION

Joins issue with the same.

10 REPLY TO FURTHER ANSWER AND DE-
FENSE TO THE SECOND CAUSE OF ACTION

Repeats the allegations contained in the reply to answer to separate defense to the first cause of action, and makes it a part hereof, and denies all other allegations contained in said paragraph 1.

WHEREFOR, the petitioner prays that she is entitled to relief as alleged and set forth in both causes of action in her petition.

20

SAMUEL HARBER,
Solicitor of Petitioner.

30

40

Order of Reference

Filed July 23, 1930

IN CHANCERY OF NEW JERSEY

73-676

Between:

RUTH SUSANNA GARTNER,
Petitioner,
 and
 FREDERICK GARTNER, JR.,
Defendant.

10

On Petition
 for Divorce,
 Etc.
 Order of
 Reference.

This matter being opened to the Court by 20
 Samuel Harber, Esq., solicitor of the petitioner,
 and it appearing that Anthony P. La Porta, Esq.,
 solicitor for the defendant by his Guardian as-
 signed by the Court, has consented hereto:

It is on this 23rd day of July, 1930, on motion
 of Samuel Harber, Esq., solicitor of the petitioner,
 ORDERED that the above entitled cause be re-
 ferred to Hon. Marshall Van Winkle, one of the
 advisory masters of this Court, to hear the same
 for the Chancellor, and to report thereon to him 30
 and to advise what order or decree should be
 made therein.

E. R. WALKER,
Chancellor.

I hereby consent to the entry of the foregoing
 order.

ANTHONY P. LA PORTA,
*Solicitor of Defendant, by His
 Guardian Assigned by the Court.*

40

Testimony

MR. LA PORTA: Your Honor, I have a motion to make. It appears that the petitioner originally asked for a divorce on the ground of extreme cruelty. Thereafter the petitioner sought to amend his petition and set up another count, asking that the marriage be annulled on the ground that a venereal disease known as syphilis was given to the petitioner by fraud, in that he failed to disclose the fact that he had syphilis at the time of the marriage. 10

THE MASTER: What is the issue raised by the pleadings?

MR. LA PORTA: We have an amended cause of action setting up two causes of action. 20

THE MASTER: I find three petitions here in the files.

MR. HARBER: That is the present petition—the amended petition. The issue is formed on this petition. That is the answer that goes with that.

THE MASTER: Is the defendant now in Kings Park State Hospital?

MR. LA. PORTA: Yes. 30

THE MASTER: Is that a hospital for the insane?

MR. LA PORTA: Yes. I don't think there is any question as to the defendant's insanity, as the guardian was appointed by the Court of Chancery.

You will observe that the original petition set up one cause of action asking for divorce on the ground of extreme cruelty. 40

Testimony

10 That was served by publication and jurisdiction was acquired. The Clerk in Chancery was appointed guardian ad litem for the defendant, and I the solicitor for the lunatic and guardian. After I came into the case, an amendment was made to the petition setting forth an additional cause of action for fraud and asking for an annulment of the marriage on the ground of fraud, and on the ground that the defendant was supposed to have communicated the venereal disease, knowing at the time that he had it.

20 Now, by the institution of the first suit, the ground for that being extreme cruelty, which presupposes a marriage, she has elected to stand by the marriage. In other words, she has affirmed the marriage, and once having elected to affirm the marriage, is thereafter forever debarred from setting up fraud.

(Discussion off the record, during which counsel cites the case of *Blum Bldg. Co. vs. Ingersoll*, 134 Atl. Reporter.)

30 MR. LA PORTA: I move that the cause of action on the ground of annulment be stricken out of the complaint and that the matter be proceeded with on the cause of action for extreme cruelty.

MR. HARBER: I object. Your Honor may allow the testimony in, but subject to my objection, and subject to Your Honor's right to rule it out later on.

40 MR. LA PORTA: She ratifies the marriage. She alleges that there was a law-

Testimony

ful marriage between her and the defendant, and then says that this marriage ought to be dissolved for extreme cruelty. You see, there is a declaration there of lawful marriage.

THE MASTER: Well, I am not deciding anything now. "Lawful marriage" means that it is under the auspices of a minister or justice of the peace, or of someone who could lawfully marry the defendant and the petitioner. I will hear your objection, but will not decide it now. 10

MR. HARBER: In a fraud suit for annulment there is a lawful marriage in the everyday vernacular. By "lawful marriage" is meant the parties went through the formality of the requirements of the law. For instance, they were both of age, and they appeared with proper witnesses before the proper authorities, obtained the necessary license, and waited the required period of time, and were at the time unmarried, as required by law. That would be lawful marriage. 20

THE MASTER: Yes, but the prayer of your petition is that this marriage be dissolved, and not annulled. That is the point. 30

MR. HARBER: That probably may be an error in the conclusion.

(Discussion off the record.)

THE MASTER: I will hold the motion under advisement. It is an important matter, and I will not decide it now. I shall be glad to have any authorities you have, 40

Frederick J. Quigley—Direct

but when the testimony is heard the question may be settled by the way the testimony is developed.

10 MR. HARBER: There is no other case in this State on the question. There is not a scintilla of law on the case, except this offhand decision on contracts.

THE MASTER: Offhand decision?

MR. HARBER: Offhand as far as this case is concerned.

FREDERICK J. QUIGLEY, a witness called on behalf of the petitioner, having been first duly sworn, testified as follows:

20 *Direct Examination by Mr. Harber.*

Q. You are a physician of this State? A. I am.

Q. And have been for how long? A. Twenty-two years.

Q. And have you been actively engaged in the practice of your profession? A. Yes, all during that time.

30 Q. Are you connected with any hospital? A. St. Mary's Hospital in Hoboken.

Q. Are you in daily attendance there? A. I am an attending surgeon there. Of course I have private cases there practically all the time.

Q. How long have you been connected with that hospital? A. About eighteen years.

Q. Are you connected with any other hospital? A. The North Hudson Hospital.

40 Q. You have been connected with that institution for how many years? A. I was active there for about four years.

Frederick J. Quigley—Direct

Q. Do you know Mrs. Ruth Susanna Gartner?
A. I do.

Q. How long have you known her? A. I think I have known her at least ten years; maybe twelve.

Q. Did she have a case with you in April, 1922, for examination? A. 1927. 10

Q. 1927? A. That is right.

Q. And where? At your office? A. At my office, yes.

Q. Had you had occasion to examine her before that date? A. I don't think so.

Q. And did you make an examination of her? A. I did.

Q. And what examination did you make, if any? A. My examination, according to my recollection, was that at that time the examination consisted of her history and the history of the case. 20

By the Master:

Q. Did she give you the history of the case for the purpose of having you treat her? A. Yes. 30

By Mr. Harber:

Q. She gave you the history of the case? A. Yes, the history of the case. I felt that it was the type of case that could better be treated by one of my colleagues, and I immediately referred her to Doctor Luippold.

By the Master:

Q. Did he have a specialty? A. Yes. 40

*Frederick J. Quigley—Direct**By Mr. Harber:*

Q. Is he a specialist? A. Yes, he is looked upon as a specialist—a genito-urinary specialist.

10 Q. Did you make an examination before you referred the case of Mrs. Gartner to Doctor Luippold? A. I considered that an examination.

Q. What is that? A. I made no further examination. I don't recollect that I did. I don't think I did.

20 Q. Did you take any blood tests or anything of that sort? A. Yes, that is right, I did. I did have a Wasserman done on her. I am sorry that I didn't refresh my memory, but I do recollect, and that that was the reason I referred her to Doctor Luippold.

Q. Then you did make an examination? A. I did have a Wasserman done on her, and it was positive, and that was the direct reason I referred her to Doctor Luippold.

Q. You took the blood test? A. Yes.

Q. What did it show? A. A four-plus Wasserman.

Q. Will you explain that to the Court? A. It means, of course, that she was syphilitic.

30 Q. There was no question about that? A. No question.

Q. Because of that condition which she had, you referred the case to Doctor Luippold? A. That is correct.

Q. Do you recall making a record of it? A. No, I don't recall that I did.

Q. But you remember the case distinctly? A. Very distinctly.

Frederick J. Quigley—Direct

Q. Did you give her any other advice, outside of referring the case to Doctor Luippold? A. The only advice I gave her was about her relationship to her husband.

Q. What was that, if I may ask? A. I felt that particularly on account of his mental state, that they shouldn't live together, because he showed entire mental aberration, and I felt that he might be a source of danger. When you have a case like that—of course, when a person is mentally deranged, they may show a homicidal tendency, and that was my reason for my advising her. 10

Q. You never treated him? A. Yes, I did.

Q. When was that? A. In 1927, I think; either March or April; that is my recollection. It was probably a month or a month and a half before I treated Mrs. Gartner. 20

Q. Where did you treat him? At your office? A. My recollection is that I saw him once at my office, and then, about a week or ten days subsequent to that, I was called by his wife, and he had evidently had some kind of convulsive seizure and was seen by some physician in Cliffside, and he advised his removal to a hospital, and, as I had been their family physician for some time, they called me, and I arranged for his removal to St. Mary's Hospital, and I treated him there for about two or three weeks. 30

Q. What disease did he have? A. Our diagnosis there was neuro-syphilis.

Q. What does that mean? A. Syphilis affecting particularly the nervous system.

Q. From your study of cases of that type—syphilis cases—is that a slow development after 40

Frederick J. Quigley—Cross

it is contracted? A. I don't pose as an expert on this, you know.

Q. I don't mean as an expert. I mean based on your experience. A. Usually manifestations affecting the nervous system more often affect it late.

10

Q. At a later stage? At a later stage; not always.

Q. Could you tell, while he was under treatment at the St. Mary's Hospital, how long he had had that condition? A. No; except, as I have said, in the average case, because of the effect it has had, a case of real syphilis, we would expect that he had had it for some considerable time.

20

Q. Could you fix the time? A. That I couldn't say. Possibly Doctor Luippold could tell you.

Q. But you couldn't tell from your experience? A. No.

Cross-Examination by Mr. La Porta:

Q. Did he appear very much mentally deranged, Doctor, when you saw him? A. The first time I saw him at my office, his mental attitude was something like this: You would ask him a question, and he would look at you rather blankly for a moment or so, and then he would apparently seem to get most of it, but he had a sort of—he had a tremor—he couldn't seem to regulate his speech. He had trouble in getting out his words, particularly if they were more than two syllables. He would kind of be balled up—mixed up in his conversation; and then subsequently, as I say—I think it was possibly two

40

Frederick J. Quigley—Cross

weeks, under my treatment, and then I saw him at the hospital, and he was pretty badly oriented at that time. He had confusion, and I couldn't make much out of it.

Q. In other words, he was insane? A. Yes.

Q. Did you observe the body of the petitioner when you examined her as to whether or not she had any eruptions from the syphilitic condition? 10

A. Eruptions?

Q. Eruptions of the skin. A. Of course eruptions are a relatively early manifestation. You see, an eruption comes out pretty early.

Q. It does come out pretty early? A. Yes, and if she had ever had that, she had long passed it.

Q. And you were her family physician right along? A. Yes. 20

Q. How long were you there as the family physician? A. I didn't ever treat her. I did her mother and father. If I did, it was for some minor trouble, but I don't recollect it. I don't think that I ever treated her.

Q. You have several stages of syphilis? A. Yes; primary, secondary and tertiary. Three stages.

Q. When does the tertiary stage arrive? After what period of time? What time, usually? 30

A. In some cases, probably two years.

Q. And possibly more? A. Sometimes.

Q. How much more? A. Oh, possibly thirty—sometimes thirty years.

Q. You can't tell that? A. I wish you wouldn't question me too closely on that phase.

Q. You didn't personally perform the blood test? A. I did. 40

Frederick J. Quigley—Cross

Q. Did you? A. No; I took the blood. I had that sent to the Hudson County Laboratory.

Q. I suppose you are satisfied from what you saw that it was syphilis, anyhow? A. I was satisfied from the Wasserman that she had syphilis, alone.

Q. As he had it, too? A. Exactly.

Q. Were there objective symptoms of syphilis in this woman? A. No.

Q. None at all? A. No.

Q. How did you ascertain that she had syphilis? A. It would be a natural thing, if one party was affected to take a Wasserman, to see if the other party, either she or he, was affected.

Q. Syphilis can be contracted in a number of ways? A. Yes.

Q. Did you ever hear of syphilis being contracted by the use of a foul drinking cup? A. No.

Q. Never? A. No.

Q. But it can be contractd by something else—some other form of syphilis? A. Yes.

By the Master:

Q. The Wasserman test is a well known test? A. It is a scientific test.

Q. Used by all scientific medical men? A. Yes.

By Mr. Harber:

Q. Did this petitioner tell you when she last had sexual relationship with her husband? A. No.

Q. You don't recollect that she did? A. No.

Eugene John Luippold—Direct

EUGENE JOHN LUIPPOLD, called as a witness on behalf of the petitioner, having been first duly sworn, testified as follows:

Direct Examination by Mr. Harber:

Q. Doctor Luippold, you have been practicing medicine in this State? A. I have. 10

Q. For how many years? A. Twenty-three.

Q. And you have been actively engaged in your profession all that while? A. Yes.

Q. Do you make a specialty of any particular branch of the profession? A. I give special attention to genito urinary diseases.

Q. Venereal diseases? A. There is a classification there. I am a specialist in the sense that I do nothing else but that. I give special attention to that alone. 20

Q. You devote most of your time to that branch of diseases? A. A great deal of my time.

Q. How long have you been doing that work? A. For fifteen years.

Q. You have had all kinds of cases before you? A. I suppose a great many.

Q. Do you know Mrs. Ruth Susanna Gartner? A. I do.

Q. Do you remember her coming to you in April, 1927? A. I do. 30

Q. By whom was she referred to you? A. Doctor Quigley.

Q. Did you examine her? A. I did.

Q. Did you keep a record of this particular case? A. Absolutely.

Q. Have you the record here? A. I have.

Q. Did she give you a history of the case? A. She did. 40

Eugene John Luippold—Direct
Minnie Kanski—Direct

Q. And with the history of his case you made a thorough examination of her? A. I did.

Q. What did you find from that examination of her? A. There were no characteristics of the disease about her, further than her blood test was positive, and from the history of the case otherwise.

Q. From the history of the case and your examination and the test of the blood, what did she have? A. Syphilis.

Q. You are positive about that? A. Yes.

Q. And she has been under your treatment? A. She has.

Q. Since that time? A. All that time, and still is.

Q. For that disease? A. And still is,—yes.

Q. You have never examined Frederick Gartner? A. I have never seen him.

Q. You have never seen the man? A. No.

MR. HARBER: They both have syphilis, I think the previous doctor testified.

No Cross-Examination.

30 MINNIE KANSKI, called as a witness on behalf of the petitioner, having been first duly sworn, testified as follows:

Direct Examination by Mr. Harber:

Q. Where do you reside? A. East 198th Street, the Bronx, New York.

Q. Are you a sister of the defendant, Frederick Gartner? A. I am.

40 Q. Did you come here voluntarily? A. Yes.

Minnie Kanski—Direct

Q. Of your own accord? A. Yes.

Q. You are here to testify to everything that you know? A. Yes.

Q. You have never seen me before this morning? A. Not until this morning.

Q. Was your brother, Frederick Gartner, in the United States Army? A. He was, yes. 10

Q. When was that? A. He was down to the Mexican border in 1911.

Q. When did he come back from the border? A. I am not sure of the month; it was around April, I think.

Q. Of what year? A. 1911, I think it was at that time,—about two years, I am not sure of that time, you see, because I was not living at home at that time. 20

By the Master:

Q. Was he in the regular army or the militia? A. I don't know.

By Mr. Harber:

Q. When he came back did he have any disease? 30

MR. LA PORTA: That is absolutely leading.

MR. HARBER: I will withdraw the question.

Q. When he came back was there anything the matter with your brother?

THE MASTER: If she knows. 40

Minnie Kanski—Direct

A. You see, I went to visit my mother at one time.

MR. LA PORTA: I move to strike that out as not being responsive.

10 Q. When your brother came back from the army and lived with your mother, did you go to visit him? A. I did.

Q. Very often? A. Yes.

Q. You were on good terms with your brother? A. All the time.

Q. Did you have occasion to talk to him while he was living with your mother? After he came back from the Mexican border? A. I did.

20 Q. Did he tell you anything about himself? A. I came up to my mother's and I noticed that there were different salves and things in the bathroom, and I asked my mother what it was.

MR. LA PORTA: I move that that be stricken out.

THE MASTER: Strike it out, that part about the salves, being admitted.

30 Q. As the result of what you saw, these different salves in that bathroom, and as the result of the talk you had with your mother, did you talk with your brother? A. I did, and he told me he had gotten the disease from a Mexican girl, and that he was being treated by a Dr. Pixley at the time, but I have since that time tried to find out about Dr. Pixley—

THE MASTER: (Interrupting) Never mind that, just answer the questions.

Minnie Kanski—Direct

Q. Do you know how long he was treated or attended, or under treatment after that? A. I don't know that.

Q. Did you have occasion to speak to him after that? A. No,—I did talk to him at the time he was ready to get married to Ruth— 10

Q. You knew that he was going with Ruth Gartner, his present wife? A. Yes.

Q. And you knew that when they were about to get married? A. Yes.

Q. Did you speak to your brother? A. I did.

Q. Who told you to? A. Nobody told me to; I took it on myself, because I wouldn't want to marry a man that had such a thing, either.

Q. What did you say to him, and what did he say to you? A. I asked him if he was doing the right thing, getting married, and he said that Dr. Pixley told him he was all right, that he was cured, and so I took it for granted that he was all right and said nothing about it. 20

Q. Did you disclose to anybody what your brother told you about this condition? A. No.

Q. Did you tell your mother? A. No.

Q. Did you tell it to Ruth Gartner, his wife? A. No. 30

Q. Did you ever disclose it to anybody? A. No, I did not.

Q. Do you remember when your bother got sick when he was in the St. Mary's Hospital?

A. Yes.

Q. Did you go to see him? A. I did.

Q. Did you talk to him then? A. I did.

Q. And what did he say to you, or what did you ask him? A. I did not ask him anything at 40

Minnie Kanski—Direct

the time; I knew that he had just had a stroke, but what it was from at the time I didn't know.

Q. Did you talk to him about his condition?

A. No, I did not, because there was always somebody else around.

10 Q. He was discharged from St. Mary's Hospital? A. Yes.

Q. Where did he go? A. To my mother.

Q. How long did he live with your mother then? A. About a year and a half before he got another stroke.

Q. Did you have occasion to see him? A. Oh, yes; nearly every other day I used to go to visit him.

20 Q. Did you have occasion to speak to him about his condition? A. Yes.

Q. Did he say anything to you? A. I said that his wife, Ruth, was going to get a divorce, and he said he didn't blame the kid, because she could never live with him again, knowing that he had that disease.

Q. During that year when he was with your mother, was he doing any work of any kind? A. Yes, in a garage for a time, washing cars, and for the telephone company.

30 Q. During that time? A. Yes, I wouldn't say that he was not out of work more than three or four weeks during that whole time.

Q. During that year and a half he was normal in every respect except this disease that he had?

A. Well, I didn't find nothing the matter with him; I found him just the same; he conducted himself just the same as he did before.

Q. The same as he did before? A. Yes.

Minnie Kanski—Cross

Q. Did he say anything about having any relationship with his wife while in that condition?

A. No, he didn't see her from the time he went home—

MR. LA PORTA: Please do not ask leading questions. 10

Q. I mean, when he was at St. Mary's Hospital and staying with your mother, I mean prior to that time, up to that time after they got married, did he say anything to you about having any relationship with his wife, while in that condition? A. I am sure they were living as man and wife, and they certainly must have acted as such.

Cross-Examination by Mr. La Porta: 20

Q. How old are you? A. Thirty-nine.

Q. Are you married? A. I am.

Q. How old is your brother? A. Thirty-six.

Q. When was it that your brother had this conversation with you that he got a disease from Mexico? A. At the time when he had come home, and I noticed different medicines and things, and I asked him about it.

Q. What year was that? A. I think 1911, when he came home from the Mexican border. 30

Q. That was before his marriage? A. Yes—he was down to the border two years, I know that.

Q. Was that before the marriage? A. Oh, yes; it was before the marriage.

Q. Were you present at the marriage? A. No, I was not. 40

Minnie Kanski—Cross

Q. How did you know that he was married to Ruth Susanna Gartner? A. Well, I am sure my brother wouldn't come home and tell us he was only living with her.

10 Q. Did you ever visit them while they were living together? A. Surely.

Q. Frequently? A. Yes.

Q. You are friendly with your brother now? A. Yes, we were always the best of friends, and he offered no objections to my being friendly with his wife.

20 Q. When did you first disclose these facts that your brother had a disease? A. Not at all, until I heard that at St. Mary's Hospital they didn't keep him on account of the disease, that they did not treat that disease.

Q. How did you come into this case? A. Oh, I didn't think it was square that she should be tied to a man that was diseased and have to live with him—that is why I came over.

Q. Who did you come over to? A. I asked Mrs. Gartner when it would be.

Q. Did you tell Mrs. Gartner that your brother had given her a disease? A. No, I didn't know until this morning.

30 Q. Did you tell Mrs. Gartner that your brother told you he had a disease from Mexico? A. No, I never did.

Q. Do you mean to tell this court that you just came out of the clear sky and now give this information for the first time? A. Yes, I do.

40 Q. You never told Mr. Harber? A. He knew nothing about it until this morning, until we got in court, and I said I was willing to testify to that effect.

Minnie Kanski—Cross

Q. You live at No. 217 East Hillside Avenue, Bronx? A. I did, but on the 30th of August I moved to No. 269 East 198th Street.

Q. Your name is Mrs. Kanski? A. Yes.

Q. Do you remember receiving a letter dated March 25, 1930? A. I got a letter from somebody, I don't know. 10

Q. From a lawyer? A. Yes.

Q. In this letter I said that I was assigned by the state as the attorney for a man whom I understood to be your brother, and I said, "Will you kindly give me whatever information you can relative to this matter, so I can prepare a defense in his behalf. I would like to see you if I can. Please write and inform me when you will call at my office and oblige, Your truly"—did you answer that letter? A. I don't think I did. 20

Q. As a matter of fact, you did not? A. No, I did not.

Q. Did you ever see me? A. No, I did not.

Q. And you pretend to be very friendly with your brother? A. I was.

Q. Then why were you not friendly enough to his lawyer to answer that letter? A. I didn't know it was necessary, my brother was satisfied to get the divorce. 30

Q. You had come to that agreement with your brother? A. No, I couldn't have said anything to him when he was in the State Hospital, because I understand that his word was no good—

Q. Your brother is crazy, is he? A. So they say.

Q. Did you see him in the hospital? A. Yes, I did occasionally.

Minnie Kanski—Cross

Q. When your brother came from Mexico, how old were you? A. I don't know, I was married at the time.

Q. How old were you, you are thirty-nine now? A. Yes.

10 Q. How many years ago was that? A. It was 1911, I got married—I got my marriage date mixed up that time—

Q. How old were you when your brother told you that? A. This is 1930, that was fourteen years ago.

Q. Then you were twenty-five years old when he told you that? A. I don't know.

Q. Just tell us exactly what he said. A. I have.

20 Q. You have what? A. I don't just remember the name of the disease he told me; he just told me a disease from a Mexican girl.

Q. Did he mention the disease? A. He has since then mentioned syphilis, but at the time I don't remember what he said; I just remember him saying that he had a disease, in fact, I wouldn't never think to ask him what disease, because since he had it from a girl, it must be something—

30 Q. Do you know what venereal disease it was? A. Well, no; I only know that it was a disease from a girl, and I figured a disease from a girl is something—

Q. Can you explain how it came about that he told you he had a venereal disease from a girl in Mexico—

THE MASTER: She didn't say that.

Minnie Kanski—Cross
Jacob Freesman—Direct

THE WITNESS: A disease from a girl in Mexico, that is just the way he said it to me.

Q. And you still feel as friendly to him as ever? A. I certainly do. 10

By the Master:

Q. How long has he been in the asylum? A. He was six months in Islip—well, he must be a year and a half about—you see he came to my father's for a week or so after the shock got him and then he was sent to Bellevue for observation, and then to Islip and for the rest of the time he has been at Kings Park. 20

By the Master:

Q. What does he talk about when he talks? A. When he talks he will talk on one subject and then on another subject. He seems to forget just what he is talking about.

JACOB FREESMAN, called as a witness on behalf of the petitioner, having been first duly sworn, testified as follows: 30

Direct Examination by Mr. Harber:

Q. Mr. Freesman, you are a member of the Bar of New Jersey? A. I am.

Q. And you are associated with Mr. Harber? A. I am.

Q. For how long? A. Over three years.

Jacob Freesman—Direct

Q. Do you remember when this Gartner case came in the office? A. I do.

Q. Were you asked to see the defendant? A. I was.

10 Q. Where did you go? A. First I went to Bellevue Hospital to make an investigation and see if I could find out anything from the records at Bellevue. I was informed that confidential records could not be disclosed to anybody, and I could get no information except that he was in the psychiatric ward, which was for demented people, and that he had since been sent to another place for demented people, and I finally found that he was in the Kings Park Hospital.

20 *By the Master:*

Q. Brooklyn? A. Kings Park, Long Island.

Q. Did you go there? A. I did, on several occasions. The first time I went there was in January, 1930, and I spoke to Dr. Shiffleman.

By Mr. Harber:

30 Q. Did you talk to the defendant in the presence of Dr. Shiffleman? A. Yes, I did.

By the Master:

Q. Is not the man insane? A. Yes, but this was a lucid period, that he had—I think Your Honor will take judicial notice, and the records show that he is insane.

THE MASTER: How do I know that he has lucid intervals except that you say so?

40

Jacob Freesman—Direct
Ruth Susanna Gartner—Direct

MR. FREESMAN: I am not going to say so, except what the conversation shows.

MR. LA PORTA: He is not qualified.

THE MASTER: Defendant is defending by a guardian, and that is some proof he is insane. His words may be all right; he might speak smoothly and easily, and still be telling lies, and imagining he is in an insane asylum. If some doctor came here with knowledge of his condition, and said definitely that he had lucid intervals, and there was proof that what he said was in a lucid interval, I might admit it, but I must overrule it now, if the defendant objects. 10

MR. LA PORTA: I do object. 20

RUTH SUSANNA GARTNER, the petitioner, called:

MR. LA PORTA: I object to her being sworn. The defendant is under legal disability, by reason of insanity, and under Section 3 of the New Jersey Evidence Act, it is held that where a party to a suit is disqualified—is under legal disability—the other party, the adverse party to the suit, is incompetent to testify. 30

THE MASTER: Is she not allowed to testify to the fact of the marriage?

MR. LA PORTA: She cannot testify to prove the case, to prove the marriage of the case.

Ruth Susanna Gartner—Direct

(Counsel for the defendant cites the case of *Demarest vs. Vanderbach*, 39 Equity, affirmed in 40 Equity.)

10 THE MASTER: I should like to see the statute itself. In the meanwhile while we are waiting for the statute, I will decide with respect to the second defense to the first cause of action. I do not know of any adjudicated case on this head, and none is called to my attention. The relief that is sought under the second cause of action in the petition is substantially the same, and a decree under either count would be virtually the same. Under one count there may be an annulment of the marriage. 20 Under the other count there may be a dissolution of the marriage. I will overrule the second defense to the first cause of action. I commend counsel for the defendant in respect to his thorough preparation of this case, and his vigorous defense at all points, the defendant being a lunatic. (Discussion off the record.)

30 THE MASTER: I will receive the testimony. I will allow the wife to be sworn, subject to your objection. I should like, however, to have a memorandum on that. You offer the witness, Mr. Harber?

MR. HARBER: Yes.

40 THE MASTER: And Mr. La Porta objects to the witness being sworn, on the ground that the Evidence Act prohibits her being sworn as a witness because the husband is under legal disability. The wife's counsel states that the defendant is insane.

Ruth Susanna Gartner—Direct

MR. LA PORTA: Yes.

THE MASTER: The wife's testimony will be received, but subject to Mr. La Porta's objection, and with the clear understanding that if I subsequently hold that the Section of the Evidence Act applies, the situation will be the same as if the wife had not been sworn. 10

RUTH SUSANNA GARTNER, the petitioner, having been first duly sworn, testified as follows:

Direct Examination by Mr. Harber:

Q. How old are you? A. Thirty.

Q. Were you married to Frederick Gartner, Jr.? A. Yes, sir. 20

Q. And where were you married? A. In the German Evangelical Church, 44th Street, Union City.

Q. When? A. January 5, 1922.

Q. This is the marriage certificate? A. Yes.

Q. Signed by the pastor? A. Yes.

Q. Is the original? A. Yes.

MR. HARBER: I offer it in evidence. (Marked Exhibit B-1.) 30

Q. Is this Frederick Gartner the only husband you ever had? A. Yes.

Q. Were you ever married before? A. No, sir.

Q. What was your condition at the time you were married to this defendant? A. I was in a healthy, good condition.

Ruth Susanna Gartner—Direct

Q. How old were you at that time? A. Twenty-two.

Q. Had you had anything to do with any man at the time you were married? A. No, sir.

MR. LA PORTA: She is presumed not
10 to.

Q. Were you a virgin at that time? A. Yes, sir.

Q. Did you have any disease of any kind at that time? A. No, Sir.

Q. Any venereal disease? A. No, sir.

Q. And where did you go to live with this defendant after you married him—at the time you married him, did you talk to your husband about his condition? A. I didn't know there was
20 such a condition existed.

Q. Did you talk to him about his condition? A. Before I married him I asked him if he was in good health, physical condition, and he said he was.

Q. How long before the marriage did you ask him that? A. Just a few weeks before.

Q. Before that? A. Yes, sir.

Q. Did you rely on that? A. Yes, sir.

Q. Did you marry him? A. Yes, sir.

30 Q. Did you know what his condition was after you got married? A. No, sir.

Q. Where did you go to live with him after you got married? A. With my mother.

Q. How long did you stay there? A. About a year.

Q. You lived there about a year? A. Yes.

Q. You lived with him as man and wife? A. Yes.

Ruth Susanna Gartner—Direct

Q. Did you have relationships with him? A. Yes, sir.

Q. Did you, during that year, know anything about his condition? A. No, sir.

Q. Did you know he had a disease? A. No, sir.

10

Q. Where did you go to live with him—where did your mother live at that time? A. At North Bergen.

Q. This city? A. Yes.

Q. Where did you go to live? A. In Cliffside Park.

Q. Did you take your own apartment there? A. Yes.

Q. How long did you live with him there? A. About a year.

20

Q. Did you live with him as man and wife there? A. Yes.

Q. Did you have relationship with him there? A. Yes.

Q. Very often? A. Yes, sir.

Q. Did you know, during that year, at that residence anything about your husband? A. No, sir.

Q. Or that he had any venereal disease? A. No, sir.

30

Q. Where did you go to live from there? A. With my mother then.

Q. Did he go with you? A. Yes.

Q. Where was she living at that time? A. Grantwood.

Q. How long did you stay with him there? A. About a year and a half.

Q. Did you know that he had any disease at that time? A. No, sir.

40

Ruth Susanna Gartner—Direct

- Q. Did you live as man and wife? A. Yes.
- Q. Did you have relationship with him? A. Yes.
- Q. Did you move from that place to your mother's again? A. Yes,—I went to live with my husband again in our own apartment.
- 10 Q. Where was that? A. Lincoln Avenue, Grantwood.
- Q. How long? A. About a year, until he had this spell.
- Q. Is that the place he had the spell? A. Yes.
- Q. You lived with him during that year? A. Yes.
- Q. And had relationship with him? A. Yes.
- Q. Did you know anything about his condition? A. No, sir.
- 20 Q. Was that the spell which got him in the hospital? A. Yes.
- Q. Up to that, how long had you lived with him, up to that time? A. Five years.
- Q. During that five years, did you know anything about the condition of your husband? A. No, sir.
- Q. Did you know that he had any venereal disease? A. No, sir.
- 30 Q. Did you know he had syphilis? A. No, sir.
- Q. Did you ever know that he had syphilis until after he was taken to the hospital, after that spell at the Lincoln Avenue residence? A. No, sir.
- Q. You say he never told you about the condition? A. No, sir.
- Q. Did you have anything to do with any other man from the time you were married up to the present time, except Frederick Gartner? A. No, sir.
- 40

Ruth Susanna Gartner—Direct

Q. You are positive about that? A. Yes.

Q. Now, where was he taken from the Lincoln place? A. To St. Mary's Hospital.

Q. How long was he there? A. About ten or twelve days.

Q. Did you discover then what was the matter with your husband? A. After he was in the hospital four days, the doctor discovered what the trouble was. 10

Q. Which doctor? A. Doctor Quigley.

Q. Did he tell you? A. Dr. Quigley?

Q. Yes. A. Well, my father called up Dr. Quigley and wanted to find out what was the result of the examination and Dr. Quigley said he could not discuss it over the 'phone, but that I should know about his condition. 20

Q. Did Dr. Quigley tell you what the trouble was? A. Yes.

Q. What did he tell you? A. He said he had syphilis.

Q. Was that the first time since you had known Frederick Gartner that you knew he had syphilis? A. Yes.

Q. That was the first time you knew he had syphilis? A. Yes.

Q. After the time he went to the hospital, that was the first time you were apprised of his condition? A. Yes. 30

Q. And that he had this disease? A. Yes.

Q. What did you do after you were told that? A. Dr. Quigley suggested that I have a test taken, a blood test.

Q. Did you have it made? A. I did.

Q. By whom? A. Dr. Quigley. 40

Ruth Susanna Gartner—Direct

Q. And after he made this blood test, what did he tell you? A. He told me that I also had syphilis.

Q. Did he refer you to anyone? A. He referred me to Dr. Luippold.

10 Q. You went to Dr. Luippold? A. Yes.

Q. Did he make a blood test and examine you? A. It was not necessary, I had the proof from Dr. Quigley.

Q. Dr. Luippold made an examination? A. He made an examination otherwise.

Q. Did he tell you about the condition? A. He didn't have to tell me, I knew about it.

Q. Have you been under treatment ever since? A. Yes.

20 Q. For syphilis? A. Yes.

Q. Have you had syphilis up to date? A. Yes.

Q. And you have been under treatment since that time by Dr. Luippold? A. Yes.

Q. You have never lived out of the State of New Jersey, have you? A. No, sir.

Q. And you have been a resident of the State of New Jersey all your life? A. Yes.

Q. When were you born? A. January 5, 1900.

Q. Where? A. At North Bergen.

30 Q. Now, as soon as—when you were advised by Dr. Quigley as to your condition and your husband's condition you left your husband? A. Well, I left him because Dr. Quigley advised me to.

Q. Have you lived with him since? A. No, sir.

Q. Have you lived with any other man since? A. No, sir.

40 Q. Have you had anything to do with any other man at any time? A. No, sir.

Ruth Susanna Gartner—Cross

Q. Where did you go to live? A. With my mother.

Q. After you left the Lincoln place, where did your mother live? A. At Grantwood—I don't remember where.

Q. Where has your mother lived since she left Grantwood? A. Woodcliff. 10

Q. Are they the only two places you have lived since parting from your husband? A. When we first went to live at Grantwood, she moved to another place in Grantwood, and then to Woodcliff.

Q. And you have lived with her all that time? A. Yes.

Q. And have been a resident all that time? A. Yes. 20

Q. Did you talk to your husband at that time when you were informed about this disease? A. I went to see him while he was at the hospital.

Q. Did you ask him about this disease? A. No, sir.

Q. Where did your husband go to live? A. With his mother.

Q. How long did he live there? A. He lived there about a year and a half, and he had another spell. 30

Q. Have you seen him since the time he left St. Mary's Hospital? A. No, sir, I have not.

Cross-Examination by Mr. La Porta:

Q. When was the time that you finally separated from your husband, can you fix the time?

A. When my husband came out of the hospital.

Q. When was that—you swore to it in the petition. A. It was in April, 1927. 40

Ruth Susanna Gartner—Cross

Q. April 10th? A. Around April 10th, 1927.

Q. When did you last have sexual relations with your husband? A. Just a few days before he was taken ill.

Q. Did you have any sores on your body? A. No, sir.

Q. Did you never have any sores? A. Never had any.

Q. Any skin eruptions? A. No, sir.

Q. When was the first time you were treated for syphilis? A. The first time was when Dr. Quigley sent me to Dr. Luippold.

Q. When was that? A. In 1927.

Q. What month? A. April.

Q. April 10th? A. I don't exactly remember the date, you see the blood test was taken while my husband was in the hospital, and I had to wait a week until the doctor got the report from the blood, and when he received the report, he referred me to Dr. Luippold, that was a week later.

Q. How did it come about that on April 10th, 1927, you went to a doctor? A. Dr. Quigley asked me to come down to his office, that he wanted to speak to me about my husband's condition.

Q. But you weren't sick, were you? A. No, sir.

Q. You never knew you were sick? A. No, sir.

Q. You never knew you were sick all the time you lived with your husband, from April 5, 1922, up to April 10, 1927, at which time you say you separated, for a period of five years? A. I suffered with pain every month.

Q. Where did you have pain? A. I had pain

Ruth Susanna Gartner—Cross
Mrs. Charles Michel—Direct

from my womb.

Q. You had pains? A. Yes, I had pains in the back and severe cramps.

Q. But you have never consulted any physician during these five years? A. No, sir. 10

Q. And you would never have consulted a physician unless your husband's physician had called you in, would you? A. No, sir.

Q. Did you know that your husband was being treated while he was living with you? A. No, sir, I did not.

Q. You didn't know that? A. No.

Q. Now, what made you give your husband up, was it his insane condition, or his syphilitic condition? A. His syphilitic condition. 20

Q. You would still have lived with him, even though he was insane? A. He was not insane at the time, he was not insane until a year and a half after he had left me.

MR. LA PORTA: I think that is all.

MRS. CHARLES MICHEL, called as a witness on behalf of the petitioner, having been first duly sworn, testified as follows: 30

Direct Examination by Mr. Harber:

Q. Where do you now live? A. No. 129-29th Street, Woodcliff.

Q. How long have you lived there? A. I moved there a few days before Decoration Day.

Q. Has your daughter been living with you all the time? A. Yes.

Q. Where did you live? A. Lawton Avenue, Grantwood. 40

Mrs. Charles Michel—Direct

Q. How long did you live there? A. Three years.

Q. Has the petitioner lived with you all that time? A. Yes.

10 Q. Did you live at any other place? A. Lincoln Avenue.

Q. Did your daughter live with you there, also? A. Yes.

Q. From the time she left her husband, has she lived with you continuously? A. Yes.

By the Master:

Q. When did she leave her husband? A. Some time in April.

20 *By Mr. Harber:*

Q. What year? A. About three and a half years ago—

MR. LA PORTA: In 1927?

THE WITNESS: Yes, sir.

Q. Has she lived with you since that time? A. Yes.

30 Q. She has lived with you on prior occasions, I mean before that with her husband? A. Yes.

By the Master:

Q. Where was she living at the time her husband left her? A. At Lawton Avenue.

Q. What place? A. I mean Lincoln Avenue.

Q. What place? A. Cliffside.

By Mr. Harber:

40 Q. How old was your daughter when she married? A. Twenty-two.

Mrs. Charles Michel—Direct.

Q. Where was she born? A. North Bergen, Fischer Avenue.

Q. Had she had any venereal disease or any disease from the time she was born until she was married? A. No, sir.

Q. No disease of any kind? A. No. 10

Q. Was she a virgin at the time she married Frederick Gartner? A. Yes.

Q. Was she ever married before? A. No.

Q. Had she ever had anything to do with any man before that? A. No, sir.

Q. What was her condition at the time? A. In good health.

Q. At the time she married this Gartner? A. Good health.

Q. Nothing the matter with her at all? A. 20
No, sir.

By the Master:

Q. Were you present at the marriage? A. Yes.

Q. Where was she married? A. Some German Church in Union City.

By Mr. Harber:

Q. Who was present besides you? A. My 30
hubby.

Q. Did you know that Mr. Frederick Gartner had a venereal disease? A. No, sir.

Q. When did you first ascertain that? A. When he got the spell—Dr. Quigley told us.

Q. Was that in April, 1927? A. Yes.

Q. That was the first time you knew about that? A. Yes. 40

Mrs. Charles Michel—Direct

Q. You never knew anything about it before?

A. No, sir.

MR. HARBER: That is all.

MR. LA PORTA: No questions.

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PETITIONER RESTS

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MR. LA PORTA: I move for the dismissal of both counts of the petition. There is no proof that the defendant had scienter of his venereal disease; no proof that he knowingly afflicted the petitioner with this disease. There is no proof that he had this particular venereal disease of syphilis at the time of his marriage. There was some evidence on the part of the defendant's sister that he got a disease in Mexico, but Your Honor knows that a man can get gonorrhoea as well as syphilis. She didn't mention this particular disease. There is nothing to show that the defendant knew at the time that he married this woman that he had syphilis. There is no evidence to show that the defendant knew at the time of his marriage that he was afflicted with this loathsome disease. There is no proof of fraud. There is not a single case in the State of New Jersey which holds that you can annul a marriage for fraud by reason of the infliction of a venereal disease where the party having the disease did not know it. He must know it at the time. A man may have syphilis and still have a right to a marriage. The marriage cannot be voided unless he knew at the time he had the disease. I think Your Honor has in mind, also, the contraction of

Testimony

syphilis from drinking cups. It has to be shown how the disease got into his blood. The marriage cannot be annuled because he had syphilis.

Now, extreme cruelty is not made out, because it is based upon the disease. But there is no evidence on the part of this petitioner that at the time she separated, or prior thereto, that she knew that her husband had this disease. She didn't even know it herself. Where has there been any testimony offered here that he ever told her he had syphilis? As I see the case, there is not any proof justifying this Court or to annul the marriage upon the ground of fraud, nor is there any proof to justify this Court in dissolving the marriage on account of extreme cruelty, because the element of scienter is necessary. A man is charged with the necessary consequences of his acts; that is true, but when it comes to crimes of this kind, that is, the infliction of disease, he has got to know that he has the disease. It is not like giving his wife a punch. That is a case where he knows. You have to show scienter.

I also wish to urge my previous point; that the petitioner elected to charge upon the cause for extreme cruelty, and the case has not been made out, as well as the case for annulment.

I therefore move for dismissal.

(Mr. Harber sums up on the motion to dismiss. Discussion off the record.)

THE MASTER: Mr. Harber, on which count is your case the stronger?

Testimony

MR. HARBER: On the count of annulment.

THE MASTER: You think so?

MR. HARBER: Yes, sir; I am absolutely stating that in all good faith to the Court.

10 THE MASTER: Suppose you address yourself for a while to the extreme cruelty question.

(Argument and discussion off the record, during which Mr. La Porta cites the case of *Daniels vs. Daniels*, 118 Atlantic Reporter.)

20 THE MASTER: The first question is: Is the wife's testimony competent, may she be sworn, in view of that provision of the Evidence Act?

Next, if she may not be sworn: Is there sufficient in the case from the mouths of witnesses to establish a right to a decree on either one of these two causes of action, and, if so, on which cause of action?

And in considering that, the important question is the scienter question, of course, which is involved in both causes of action.

30 Under the annulment cause of action: Is it necessary that the man should know that he had this disease at the time he married? What is extreme carelessness or recklessness in that connection, and would such be sufficient to constitute fraud or extreme cruelty? And next: Is such extreme carelessness or recklessness shown in the testimony of the witnesses? Look at the cases, gentlemen, and give me all the help you can.

40 Testimony closed, decision reserved, and briefs to be submitted.

Conclusions of Advisory Master

Filed November 10, 1930

(Conclusions to be included in State of Case
on Appeal.

Marshall Van Winkle, Advisory Master.)

(Not to be reported, printed or published.)

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IN CHANCERY OF NEW JERSEY

Between:

RUTH SUSANNA GARTNER,
Petitioner,

and

FREDERICK GARTNER, JR.,
Defendant.

73-676.

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SAMUEL HARBER, Esq., for Petitioner.
ANTHONY P. LA PORTA, Esq., for Clerk
in Chancery, Guardian ad litem of Defendant.

CONCLUSIONS OF VAN WINKLE, ADVISORY MASTER

The Amended Petition contains two Causes of
Action, the First, annulment, and the Second, ex- 30
treme cruelty. The Second Cause of Action sets
up that defendant was afflicted with "a serious
and incurable venereal disease, to wit: a serious
disease of internal syphilis, and that the said de-
fendant in that condition concealed and failed to
disclose the same to your petitioner," which dis-
ease he communicated to petitioner; that defend-
ant "wilfully and deliberately, and with inten-
tion of injuring your petitioner, committed the
aforesaid acts of cruelty to her * * * knowing at 40

Conclusions

all times that he had no right to cohabit with your petitioner * * * being all of said time afflicted with such disease."

10 The Answer filed by the Clerk of this Court as Guardian ad litem of defendant avers, among other things, that defendant was insane at the time of the acts of cruelty charged against him in the Second Cause of Action; and the Second Defense to the First Cause of Action is as follows:

20 " * * * By reason of the filing of the previous petition and the taking of the steps aforementioned by her," (namely, the taking of an order of publication, advertising and mailing thereunder) "the petitioner has thereby affirmed her marriage contract with defendant and has accordingly forever waived and abandoned her cause of action, which is alleged in the first cause of action, and she should not be permitted to disaffirm her marriage contract by reason of the fraud alleged."

30 On final hearing, counsel for the Guardian ad litem moved to strike from the Amended Petition the First Cause of Action, for the reasons stated in the Second Defense to the First Cause of Action.

40 I held this motion until the conclusion of the testimony, since any decree for petitioner under either count would be the same in effect, that is, a termination of the marriage relation. I thought the testimony should be taken before petitioner should be required to elect on which count she relied for a decree. However, on the conclusion of the testimony, petitioner's counsel voluntarily elected to proceed on the extreme cruelty Cause

Conclusions

of Action. I mentioned this as showing that the testimony on the part of petitioner was not at all restricted because of this motion.

Petitioner was offered as a witness on her own behalf, whereupon counsel for the Guardian ad litem objected that she could not be sworn because defendant was under "legal disability"; and he rested his objection on Section 3 of the Evidence Act (Revision of 1900, P. L. 1900, page 362, Compiled Statutes, page 2217), which section reads as follows: 10

"No person shall be disqualified as a witness in any suit or proceedings at law or in equity, by reason of his interest, in the event of the same, as a party or otherwise; but such interest may be shown for the purpose of affecting his credit; provided, no party shall be sworn in any case when the opposite party is prohibited by any legal disability from being sworn as a witness." 20

Any rights of defendant raised by the objection were expressly reserved to defendant, and petitioner was examined and cross-examined, subject to this objection. Thinking that petitioner might desire to have the question of her right to be sworn passed upon by the Court of Errors and Appeals, I deemed it best to permit her to be sworn, subject to this objection, so that should it ultimately be held that she had a right to be sworn, her testimony would be in the case for consideration on the merits. 30

No express evidence that defendant was insane before or at the time of final hearing appeared 40

Conclusions

or was offered; but petitioner's counsel stated on the hearing that defendant was insane, and in his belief he states that there is no dispute as to the sanity of defendant. There was no evidence that defendant had been formally adjudged insane, or had been legally committed to the hospital for the insane, where he now is. But he defends by Guardian ad litem, on the ground that he is insane. While there is no presumption that a party to a suit is under legal disability, in this case not only does the petitioner concede the insanity of the defendant, but I think the fact that the defendant was under "legal disability" by reason of his insanity at the time petitioner was offered as a witness sufficiently appears.

20 Chancellor Walker held in *Porter vs. Porter*, 82 N. J. Equity, 400, that the insanity of the defendant in that case was a complete defense to an action for desertion. The defendant in that case was confined in a hospital for the insane, and the Clerk of this Court had been appointed his Guardian ad litem, but no answer had been filed, and the suit had proceeded ex parte. Evidently, the confinement of the defendant in a hospital for the insane, together with the appointment of the Clerk of this Court as his Guardian ad litem was regarded by the Chancellor as sufficient proof of the fact of insanity, although it may be that the fact of insanity was the subject of express testimony.

30 In this case while the admission of petitioner, through her counsel, uncorroborated, might not prove defendant's insanity, if insanity is to be regarded as a fact in issue, yet the admission, with the appointment of the Clerk as Guardian
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Conclusions

ad litem of defendant on the ground that defendant is insane, the Answer filed by the Clerk as such Guardian, and the testimony of a witness for petitioner that defendant is confined in a hospital for the insane, all together, constituted sufficient proof of the fact of insanity, the "legal disability" of the defendant, at the time of the final hearing, for the purpose of dealing with the objection that petitioner should not be sworn. 10

By the Common Law those wanting in capacity of understanding were incompetent as witnesses. They were under "legal disability." Not only does Section 3 of the Evidence Act not lift the ban, but this section expressly declares the common laws; or if not exactly that, the section expressly provides with the same effect as the Common Law that some persons are incompetent as witnesses, because under "legal disability." 20

Petitioner's counsel argued that the petitioner might be sworn and might testify, at the least, to the extent provided in Section 6 of the Evidence Act (Compiled Statutes, p. 2223), despite the fact that the prohibition of Section 3 of the Act covers "any" case. Section 6 reads as follows:

"The complainant or petitioner in any action or proceeding of an equitable nature in any court shall be a competent witness to disprove so much of the defendant's answer as may be responsive to the allegations contained in the bill of complaint or petition." 30

It is to be noted that the Answer is really the Answer of the Guardian ad litem and not the

Conclusions

answer of defendant, except that the Guardian ad litem answers for defendant. Moreover, this matrimonial suit is not an "equitable" proceeding. The New Jersey Act Providing for Divorces (Revision of 1907), provides that "The Court of Chancery shall have jurisdiction of all causes of divorce, or nullity, and of alimony and maintenance by this act directed and allowed." This Court acquired its jurisdiction of this suit by virtue of this Statute. A statutory suit for divorce is entirely statutory. It does not belong to the equitable jurisdiction as such. It is wholly remedial. It is intended to dissolve the status of marriage. This remedy does not belong to the original jurisdiction of Chancery. (See Pomeroy's Equity Jurisprudence, 4th Edition, Section 112.)

It sufficiently appears that the defendant at the time of final hearing had no legal capacity to be heard in court; that he was then under "legal disability"; and, as Section 6 of the Evidence Act does not relate to matrimonial suits based on our Statute, this suit is to be decided as if the petitioner had not been sworn.

There is no precise proof as to when defendant became insane. The testimony indicates that the insanity came on gradually. Viewing the testimony most favorably to petitioner, what have we? Dr. Quigley testified that in March or April, 1927, he examined petitioner and found that she was syphilitic; that he advised petitioner not to live with defendant "because he showed mental aberration, and I felt that he might be a source of danger. When you have a case like that, of course when a person is mentally deranged, they

Conclusions

may show a homicidal tendency, and that was my reason for my advising her." Dr. Quigley had seen and examined defendant "probably a month or a month and a half before" he treated petitioner, at which time defendant "had evidently had some kind of convulsive seizure." The diagnosis was "neurosyphilis." 10

Defendant's sister testified that when defendant, who had been or was then in the Army, came back from the Mexican border in 1911, she "noticed that there were different salves and things in the bathroom"; and defendant "told me that he had gotten the disease from a Mexican girl," and that he was being treated by a Dr. Pixley at the time; that when defendant was about to be married to petitioner "I asked him if he was doing the right thing, getting married, and he said that Dr. Pixley told him he was all right, that he was cured, and so I took it for granted that he was all right and said nothing about it." 20

The parties were married in 1922—eleven years after defendant returned from the border. Dr. Quigley made his examination of defendant in 1927, five years after the marriage.

There is not the least proof that defendant had knowledge that he had the disease during the time that he sexually cohabited with petitioner. Rather, considering the sister's testimony, defendant thought and had been advised by Dr. Pixley that he was cured of the "disease" he had had. There is no proof that defendant knew that the disease was syphilis, or that he knew he still had the disease, whatever it was. 30

There is not the least proof that "the defendant wilfully and deliberately, and with the inten- 40

Conclusions

tion of injuring petitioner, committed the aforesaid acts of cruelty * * * knowing at all times that he had no right to cohabit with petitioner” as averred in the Amended Petition; nor is there any proof that “defendant was not in any way
10 insane or incapacitated for more than one year after April 10, 1927,” as averred in the Amended Petition.

Of course petitioner predicated her Cause of Action for extreme cruelty on the theory that defendant’s communication of the disease to petitioner was wilful, at least to the extent that wilfulness would be proved by, or should be predicated on, the fact that defendant knew he had the disease when he sexually cohabited with petitioner, and on the further fact that the defendant was not insane at that time. But Dr. Quigley testified that prior to March or April, 1927, defendant had had a convulsive seizure, and that defendant was then “mentally deranged.”
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Insanity is a complete defense to an action for desertion, as Chancellor Walker held in *Porter vs. Porter*, supra; and it is a complete defense to an action for extreme cruelty, for the same reason. Defendant was insane before petitioner
30 ceased to sexually cohabit with him. Moreover, the proof is to the effect that at the time of the marriage defendant believed that he did not have a venereal disease, and he gave a good reason for his belief. The proof does not establish that defendant knowingly communicated the disease to petitioner, for there is no proof that defendant

Conclusions

knew that he had a venereal disease during the time of the cohabitation.

(See *Allen vs. Allen*, 85 N. J. Eq. 58 at p. 59.

Danielli vs. Danielli, 93 N. J. Eq. 556.

Lazarwitz vs. Lazarwitz, 102 N. J. Eq. 132.) 10

This is a hard case for petitioner, but I am constrained to advise a decree dismissing the petition.

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Decree of Dismissal

Filed November 10, 1930

IN CHANCERY OF NEW JERSEY

73-676

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Between:

RUTH SUSANNA GARTNER,
Petitioner,

and

FREDERICK GARTNER, JR.,
*Defendant.*On Petition
for Divorce,
Etc.

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This cause coming on to be heard in the presence of Samuel Harber, Esq., of counsel with the petitioner, and Anthony P. La Porta, Esq., solicitor for the defendant and Ferd Garretson, his Guardian ad litem, assigned by the Chancellor, on the amended petition, answer and oral proofs taken in open court;

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And it appearing to the Court that the petitioner has elected to abandon the First Cause of Action for annulment, and the Second Cause of Action having been submitted and considered by the Court, and it appearing to the Court that the petitioner has not sustained the truth of the allegations of her amended petition as to the Second Cause of Action for extreme cruelty and is not entitled to the relief therein prayed;

It is thereupon on this 10th day of November, 1930, ORDERED, ADJUDGED and DECREED that the petitioner's amended petition be and the

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Decree of Dismissal

same is hereby dismissed with costs, and that the defendant have execution therefor according to the practice of this Court.

E. R. WALKER,
Chancellor.

Respectfully advised,

MARSHALL VAN WINKLE,
Advisory Master.

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Notice of Appeal

Filed December, 1930

IN CHANCERY OF NEW JERSEY

73-676

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Between:

RUTH SUSANNA GARTNER,
Petitioner,

and

FREDERICK GARTNER, JR.,
*Defendant.*On Petition
for Divorce,
Etc.
Notice of
Appeal.

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Appeal from Decree of Dismissal made by the Chancellor and advised by Marshall Van Winkle, Advisory Master.

The petitioner, Ruth Susanna Gartner, hereby appeals from the Decree of Dismissal made in the above entitled cause on November 10th, 1930, from the whole and every part thereof, to the Court of Errors and Appeals in the Last Resort in all causes.

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This is an appeal from a Decree of Dismissal made by the Chancellor upon the advice of Advisory Master, Marshall Van Winkle.

Dated: Union City, N. J., December , 1930.

SAMUEL HARBER,

Solicitor and of Counsel with Petitioner.

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

SAMUEL HARBER,

*Solicitor and of Counsel with Petitioner,
Ruth Susanna Gartner.*

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Petition of Appeal

Filed

NEW JERSEY COURT OF ERRORS
AND APPEALS

Between:

RUTH SUSANNA GARTNER,
Petitioner-Appellant,

and

FREDERICK GARTNER, JR.,
Defendant-Appellee.

On Appeal
from the
Court of
Chancery.
Petition of
Appeal.

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To The Honorable Court of Errors and Appeals in the Last Resort in all causes:

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The petition of appeal of Ruth Susanna Gartner, appellant in this cause, respectfully shows:

1. Your petitioner finds herself aggrieved by a Decree of Dismissal made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date the 10th day of November, 1930, which said decree of dismissal was advised by Hon. Marshall Van Winkle, Advisory Master, in a cause wherein Ruth Susanna Gartner was petitioner, and Frederick Gartner, Jr., was defendant, in this respect, to wit: That the said decree ordered, adjudged and decreed that the petitioner's amended petition be and the same is hereby dismissed with costs, and that the defendant have execution therefor according to the practice of this Court.

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2. The petitioner, therefore appeals from the said Decree of Dismissal of the said Chancellor,

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Petition of Appeal

which decrees a dismissal of the petitioner's amended petition with costs upon the ground that the same is erroneous for the following reasons:

10 (a) That there was no evidence at the hearing of said cause in the Court of Chancery to justify the making of said decree, there being no evidence at all given on the part of the defendant and in contradiction of the petitioner's proof.

20 (b) That there was sufficient evidence at the hearing of said cause to allow a decree in favor of the petitioner for divorce from the bonds of matrimony from the defendant on the ground of extreme cruelty, instead of dismissal of her petition, in that the testimony clearly indicated that the defendant had committed extreme cruelty by his course of conduct in communicating a venereal disease to the petitioner under the circumstances alleged in the petition.

30 (c) Because the issue of insanity on the part of the defendant subsequent to your petitioner's leaving him, had no bearing or force in the case, and should have been entirely eliminated from the hearing of the cause, there being no issue of insanity of the defendant in any way raised by the pleading or issue in the cause on the hearing thereof.

(d) Because the testimony of your petitioner was excluded and ruled out at the hearing of the cause when under the law it should have been admitted, she being capable and competent to testify under the circumstances at the hearing of this cause, under the rules of evidence.

40 (e) Because even without the testimony of the petitioner there was ample and sufficient evidence and proof to substantiate her petition on the

Petition of Appeal

ground of extreme cruelty to entitle her to a Decree of Divorce against the defendant.

(f) Because the cause of action on the ground of extreme cruelty and the acts of cruelty complained of and committed by the defendant as disclosed by the evidence, were prior to the defendant being in any way deranged or becoming insane. 10

(g) That the evidence produced by the petitioner and her testimony which should have been allowed could have sufficiently established a cause of action of extreme cruelty against the said defendant, and therefore there should have been a decree in favor of your petitioner against the defendant for divorce on the said ground of extreme cruelty. 20

(h) Because the answer of the defendant denied the allegations of the cause of action on the ground of extreme cruelty, which necessitated proof of the cause of action on the ground of said extreme cruelty, and therefore the petitioner's testimony should have been allowed as further proof of her cause of action, which would have been more than sufficient to establish her right to divorce on the ground of extreme cruelty.

(i) Because under the rules of law, there need be no actual proof of any wilfulness in communicating a disease in order to amount to extreme cruelty. 30

(j) Because even if the law does require proof of wilfulness, there was enough evidence submitted to substantiate that.

(k) That the Hon. Advisory Master requested a submission of memorandas for the purpose of

Petition of Appeal

10 a decision on two points, that is; one of wilfulness in committing extreme cruelty, and whether that was a necessary element and if so whether that had been proven, and secondly, whether the petitioner's testimony was admissible, and if it was not, whether there was enough testimony in the cause to substantiate a Decree, and that the Master's conclusions were largely based on insanity which was not gone into in the case, and the petitioner and her solicitor not given a chance to argue same.

3. Your petitioner therefore prays

20 That the said Decree of Dismissal of the said Chancellor may be in all things reversed and set aside and that it be decreed that your petitioner be divorced from the bonds of matrimony for the cause of extreme cruelty from the said defendant, and a counsel fee for prosecuting the same, and may have such other and further relief in the premises as to this Honorable Court may deem meet and proper.

SAMUEL HARBER,

Solicitor and of Counsel for Petitioner.

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New Jersey Court of Errors and Appeals

Between:

RUTH SUSANNA GARTNER,
Petitioner-Appellant,

and

FREDERICK GARTNER, JR.,
Defendant-Appellee.

On Appeal
from the
Court of
Chancery of
New Jersey.

BRIEF FOR PETITIONER-APPELLANT

Statement

This action was brought in the Court of Chancery of New Jersey for divorce on the ground of extreme cruelty, and on the Second Count for annulment. The annulment Count has been dropped, and the petitioner elected to stand on the cause of action based upon extreme cruelty. A hearing was duly held before Advisory Master Marshall Van Winkle who advised a Decree in favor of the Defendant. The decree appears on page 97 of the State of the Case. An appeal from this decree is before the Court here for determination.

Facts

On January 5, 1922, the petitioner was married to the defendant, Frederick Gartner, Jr.

That at the time of the marriage the petitioner was a virgin, never having associated herself with any man for the purpose of having sexual intercourse before her marriage, and never had any sexual intercourse with any man until she was

married to her husband, the defendant in this cause.

Some time in the year 1927, after the petitioner and the defendant had lived together as man and wife for a period of some five (5) years, the defendant, Frederick Gartner, Jr., suddenly took sick, was rushed to the hospital, and upon diagnosis made, it was found that he was suffering from neuro syphilis. (Case, page 55.)

The doctor who examined and took care of the defendant, Frederick Gartner, Jr., at the time of the aforementioned attack, advised a blood test of the petitioner, and subsequently within a period of one month after the illness of the defendant, took a blood test of the petitioner, Ruth Susanna Gartner, to see whether there had been any communication of the disease from the defendant to the petitioner, and the blood tests as taken showed "Positive," to wit, that the disease had been communicated from the defendant, Frederick Gartner, Jr., to the petitioner, Ruth Susanna Gartner, and the petitioner has since that date down to the present been treated in order to aid in the cure of the said disease.

The facts further show that the defendant, himself, knew he had the disease before he got married to the petitioner, and that he was treated therefor, and that he knew where he had contracted the same, to wit, from a Mexican girl while in the army, and stationed in camp at the border in Mexico. (Case, page 62.)

The facts further show that the defendant, Frederick Gartner, Jr., was cautioned by his sister, before he got married, not to get married, but nevertheless he did so.

There is also proof that the said Frederick Gartner, Jr., was asked by the petitioner whether he

was in good health at the time of the marriage, and he informed her that he was.

As soon as the petitioner found out that the defendant was suffering from syphilis, she withdrew herself from his company, and went to live separate and apart from him.

The proofs further show that after the defendant's release from the hospital about April, 1927, he went to live with his mother in New York, where he resided for a period of approximately one and one-half years, during which time he acted normal and worked continually, after which time the disease that he had, caused a softening of the brain, and he had an attack and was taken to the psychopathic ward in Bellevue Hospital, New York, and since that time the defendant, Frederick Gartner, Jr., has been institutionalized, and is at present confined in the Kings Park State Hospital, Kings Park, Long Island, which is admittedly a place for mental sufferers.

There is no dispute as to the syphilitic condition of the defendant, Frederick Gartner, Jr., nor is there any dispute as to his insanity at the present time, a guardian ad litem having been appointed by this Court to defend this cause for him.

The proofs clearly show without any attempt at rebuttal that the defendant, Frederick Gartner, Jr., was guilty of communicating the disease to his wife, your petitioner, Ruth Susanna Gartner, and that he acted reckless in this regard, having reason to have knowledge that he had this venereal disease of syphilis.

At the trial, the Master requested a submission of Briefs on two points, namely, whether the petitioner was permitted to give testimony in a cause of this kind where the defendant was under a legal

disability, and secondly whether or not scienter was a necessary element to establish sufficient cause of action in an extreme cruelty case based upon the communication of the venereal disease, no mention having been made nor any direction having been given to the respective Counsel in so far as the insanity question in the case, and the Master concluded adversely to the petitioner, wherefore this appeal is taken.

ARGUMENT

Point I.

The petitioner should have been granted a decree for divorce for extreme cruelty. The Court of Chancery erred in entering a decree in favor of defendant.

This suit is based upon the theory of extreme cruelty. It is uncontroverted, and the testimony stands un rebutted as to the fact that the defendant, Frederick Gartner, Jr., was afflicted with the venereal disease known as syphilis.

There is also the same degree and the same strength of proof to show that the petitioner, Ruth Susanna Gartner, is now afflicted with the same disease.

The evidence of the virginity of the petitioner at the time of the marriage, and her chastity after marriage is clearly testified to by the mother and the petitioner herself. (Case, page 83; Case, pages 73 and 74.)

The logical inference from the entire case weighing every word of the testimony of all the witnesses who testified is that the defendant communicated the disease to the petitioner.

A short review in brief of the testimony as given by the witnesses in the order they were

sworn in will clearly indicate that the decree as entered by the Advisory Master, Marshall Van Winkle, was clearly against the weight of evidence, and was clearly one in which the Honorable Advisory Master erred. The petitioner has substantiated her case well enough to be entitled to a Decree in her favor.

First we will take the testimony of Dr. Quigley, who not only treated the defendant, but also the petitioner, and was the family physician of both during the time that they lived as man and wife. The testimony shows that the defendant, Frederick Gartner, Jr., upon his being taken to the St. Mary's Hospital in Hoboken, New Jersey, in 1927, was examined and upon diagnosis shows that he was suffering from syphilis. (Case, page 55.)

“Q. Where did you treat him? At your office? A. My recollection is that I saw him once at my office, and then, about a week or ten days subsequent to that, I was called by his wife, and he had evidently had some kind of convulsive seizure and was seen by some physician in Cliffside, and he advised his removal to a hospital, and, as I had been their family physician for some time, they called me, and I arranged for his removal to St. Mary's Hospital, and I treated him there for about two or three weeks.

“Q. What disease did he have? A. Our diagnosis there was neuro-syphilis.”

He also testified that the defendant showed a degree of mental aberration. There is no adjudication or no proof that he was absolutely in-

sane at that time or prior thereto, and no proof that he ever had any convulsive attacks prior to the one in 1927.

Dr. Quigley further testifies that upon his examination of the petitioner immediately or a short time after the sickness of the defendant, showed that the petitioner had contracted syphilis. (Case, page 58.)

“Q. You didn’t personally perform the blood test? A. I did.

“Q. Did you? A. No. I took the blood. I had that sent to the Hudson County Laboratory.

“Q. I suppose you are satisfied from what you saw that it was syphilis, anyhow? A. I was satisfied from the Wasserman that she had syphilis alone.”

The next witness, Dr. Eugene John Luippold, testified that he had been treating the petitioner for syphilis since April 1927 down to date, the case being referred to him by Dr. Quigley.

The sister of the defendant, Minnie Kansky, a disinterested witness, in her testimony states that she has been and is on friendly terms with her brother, that she just comes to court merely for the purpose of seeing justice done in the case. (Case, page 66.)

“Q. You are friendly with your brother now? A. Yes, we were always the best of friends, and he offered no objection to my being friendly with his wife.

“Q. When did you first disclose these facts that your brother had a disease? A. Not at all, until I heard that at St. Mary’s

Hospital they didn't keep him on account of the disease, that they did not treat that disease.

“Q. How did you come into this case?

A. Oh, I didn't think it was square that she should be tied to a man that was diseased and have to live with him—that is why I came over.”

That before the marriage she had cause on one of the visits to her mother's home to see different salves in the bathroom, and that she inquired of her brother what they were for, and he informed her that he was using them to cure himself from a disease, and that he had contracted it from a girl in Mexico. (Case, page 62.)

“Q. When your brother came back from the army and lived with your mother, did you go to visit him? A. I did.

“Q. Very often? A. Yes.

“Q. You were on good terms with your brother? A. All the time.

“Q. Did you have occasion to talk to him while he was living with your mother? After he came back from the Mexican border? A. I did.

“Q. Did he tell you anything about himself? A. I came up to my mother's and I noticed that there were different salves and things in the bathroom, and asked my mother what it was.

MR. LA PORTA: I move that that be stricken out.

THE MASTER: Strike it out, that part about the salves being admitted.

“Q. As the result of what you saw, these different salves in that bathroom, and as

the result of the talk you had with your mother, did you talk with your brother?

A. I did, and he told me he had gotten the disease from a Mexican girl, and that he was being treated by a Dr. Pixley at the time, but I have since that time tried to find out about Dr. Pixley—”

The testimony of Minnie Kansky further shows that after the defendant's discharge from the hospital in April, 1927, that the defendant went to live at the home of his mother and stayed there for one and one-half years, after the first attack, when the petitioner was advised to leave the defendant, and that during the period he remained at the home of his mother he worked in the telephone company and did other jobs and was not out of work more than three or four weeks during the entire one and one-half years that he remained and lived with his mother, and that he acted perfectly normal during that time. (Case, page 64.)

“Q. During that year when he was with your mother, was he doing any work of any kind? A. Yes, in a garage for a time, washing cars, and for the telephone company.

“Q. During that time? A. Yes, I wouldn't say that he was not out of work more than three or four weeks during that whole time.

“Q. During that year and a half he was normal in every respect except this disease that he had? A. Well, I didn't find nothing the matter with him; I found him just the same; he conducted himself just the same as he did before.

“Q. The same as he did before? A. Yes.”

That she was told by her brother that he had a disease from a Mexican girl. (Case, page 68.)

Further testimony is that only after one and one-half years was he institutionalized, at which time he was taken to the Bellevue Hospital in New York, and has since been confined, which testimony clearly shows that after his discharge from St. Mary's Hospital in Hoboken, in 1927, he was perfectly sane and went about his business for a period of one and one-half years without showing any signs of mental derangement, and in fact acted perfectly normal.

Next we have the testimony of the petitioner herself, assuming for the moment that her testimony is admissible. She testifies that she was in perfect health at the time of her marriage. (Case, page 73.)

“Q. What was your condition at the time you were married to this defendant?
A. I was in a healthy, good condition.”

She further testifies that she never had any relationship with any other man. (Case, page 74.)

“Q. Had you had anything to do with any man at the time you were married?
A. No, sir.

“Q. You were a virgin at that time?
A. Yes, sir.

“Q. Did you have any disease of any kind at that time? A. No, sir.

“Q. Any venereal disease? A. No, sir.”

That petitioner lived with her husband, this defendant, as man and wife and had relationship with him as such. (Case, page 76.)

“Q. Did you have relationship with him? A. Yes.”

That a short while after the defendant was taken to the hospital for the first time, the petitioner was examined and was informed that she was also suffering from syphilis, and that she has been treated for this from that date down to the present time. (Case, page 80.)

We next have the testimony of the mother, Mrs. Charles Michel, who testifies that her daughter was in excellent health at the time of the marriage, and never was sick or suffered from any disease such as the one she has. (Case, page 83.)

“Q. Had she had any venereal disease or any disease from the time she was born until she was married? A. No, sir.

“Q. No disease of any kind? A. No.

“Q. Was she a virgin at the time she married Frederick Gartner? A. Yes.

“Q. Was she ever married before? A. No.

“Q. Had she ever had anything to do with any man before that? A. No, sir.

“Q. What was her condition at the time? A. In good health.

“Q. At the time she married this Gartner? A. Good health.

“Q. Nothing the matter with her at all? A. No, sir.”

All the aforementioned testimony clearly shows the allegations necessary to establish the case

based upon extreme cruelty, in so far as communication of the venereal disease is concerned.

There was no offer of any evidence on the part of the defendant to show that the petitioner had probably contracted the disease from any other source than the one as testified to. There is no evidence on the part of the defendant to show a state of insanity on the part of the defendant at the time of the communication of the disease and at the time of the alleged acts of extreme cruelty.

All these facts and proofs clearly substantiate the allegations of the petitioner, and should have entitled her to a decree in her favor, and not a decree against her, as given by the Master, for there is no scintilla of evidence upon which the decree as rendered could be based, whereas on the other hand we have the evidence as before outlined in favor of the petitioner. Therefore it can be seen that the decree was against the weight of evidence, and that the petitioner was greatly injured thereby.

Point II.

Issue of insanity should not have been a determining factor in the making of the decree against petitioner.

The Advisory Master in his conclusions, upon which the decree in this cause is based, proceeded to decide the case upon the theory that in view of the fact that the defendant was insane, there could be no decree of divorce granted against him, and based his ruling upon the case of *Porter vs. Porter*, 82 N. J. Eq., page 400, in which case it was held that insanity of the defendant was in that case a complete defense to an action for desertion.

Unlike desertion, extreme cruelty, once the same has been committed, vests with the person injured an immediate right of action, upon which a petition for divorce can be based, but postpones the right of action by statute for a period of six (6) months from the date of the last act of cruelty complained of.

Reference to Francis Child's book on Divorce, page 109, shows:

“The right of action for extreme cruelty vests at the moment of the commission of the act, and no act of the wrongdoer or expression of repentance will avail to bar the petitioner's right; it rests with the injured party to extend forgiveness.”

Medical science teaches us that the disease of syphilis is by nature very slow in its development, and that it takes at least several years before any objective symptoms are shown. This fact is also testified to in the instant case by Dr. Quigley. (Case, page 57.)

“Q. When does tertiary state arrive? After what period of time? What time usually? A. In some cases after two years.

“Q. And possibly more? A. Sometimes.

“Q. How much more? A. Oh, possibly thirty years; sometimes thirty years.”

The fact that syphilis is a slower developing disease, the further fact that the petitioner for the first time in 1927 was aware that she had it, shows that the acts complained of, that is to say, the communication of the disease, must have been

inflicted a long time before the separation, to wit: April, 1927, since they had been living together as man and wife for a period of five (5) years prior thereto.

Nowhere in the case does it appear that the defendant, Frederick Gartner, Jr., at the time of commission of the alleged acts of cruelty, was mentally deranged, so as not to appreciate the extreme cruelty that he was inflicting upon the petitioner. In fact, to the contrary, it appears that only in 1928, or more than one and one-half years after the separation, was he first institutionalized on account of any mental disability, and that during the intervening time, between the date that the petitioner separated herself from the defendant, and for one and one-half years after that, the defendant worked and conducted himself in an absolute normal condition and was not insane. (Case, page 64.)

A short review of the cases in the State of New Jersey, touching upon the issue of insanity as connected with divorce will clearly indicate that the issue of insanity should not have been considered in this case, since it was not a case based upon desertion, where such a defense would be available, but a case upon extreme cruelty, where a cause of action once having arisen it becomes absolute and any subsequent insanity on the part of the defendant, after commission of the acts, should not bar the injured party from pursuing her right of action that has already accrued.

The distinction can readily be shown, for as far back as the year 1880, in the case of *Smith vs. Smith*, 33 N. J. Eq., 458, the Court held, in an opinion rendered by the Chancellor, that even though that on the face of the bill insanity may

appear, that that fact, coupled with the fact that he continued to do business, and also coupled with the fact that there never was an adjudication, should not deprive the wife of her right for a divorce from bed and board. The instant case is somewhat similar, in so far as the question of insanity is concerned, for the defendant, Frederick Gartner, Jr., in 1927 was not adjudicated insane or prior thereto was never adjudicated, and that subsequent to the time the petitioner left him for a period of one and one-half years he continued to engage in work, and acted as a normal person. (Case, page 64.)

In the case of *Youmans vs. Youmans*, 3 Misc. 576, the Court held:

“That insanity is a defense which must be pleaded, and the burden of proof is on the defendant” (page 577).

In the instant case, although it may have appeared that at some subsequent time to the alleged acts the defendant became insane, there is no proper proof whatever before this Court; in fact, no proof at all, that the defendant, Frederick Gartner, Jr., was insane at the time of the commission of the alleged acts of extreme cruelty, and was not mentally aware of the acts of extreme cruelty that he was inflicting.

It is very well known, as was mentioned by the Court in the case of *Danielly vs. Danielly*, 118 Atl. Rep., 335, that one suffering from syphilis, or in a syphilitic condition, is presumed to be aware thereof. In the absence of any proof that the defendant was insane, the presumption still holds to charge the defendant with knowledge of extreme cruelty, and to have the right of action accrue to this petitioner.

The Advisory Master based his conclusion upon the case of *Porter vs. Porter*, 82 N. J. Eq., 400. That case was one based upon desertion, and the Court held that where subsequent to the desertion, the defendant had become insane, and that because desertion could not ripen into a cause of action unless there had been wilful, continued and obstinate desertion. That a period of two years confinement of the defendant in an institution broke the chain of continued desertion, and consequently the defendant was not guilty of desertion as required by statute. This same reasoning was also followed in the case of *Pipitone vs. Pipitone*, 97 Eq., page 35, which was also based upon desertion. However, the difference between such a line of reasoning in a desertion case and in extreme cruelty case can be readily distinguished. The obvious reason which distinguishes the two different causes of action in so far as the defendant's insanity is concerned is the fact that once the acts of extreme cruelty are committed it is the vesting of the right of action immediately, whereas in desertion there must be, according to the statute, *two years of wilful, continued and obstinate desertion*.

In the case of *Coe vs. Coe*, 97 N. J. Eq., page 57, in an opinion rendered by the Honorable Vice Chancellor Backes, the Court held on page 59:

“The right of action for extreme cruelty is vested with the offense as committed; the right of prosecution is postponed for six months. There is no period for repentance like in suits for constructive desertion based upon extreme cruelty, in which the sinner may relieve himself of the sentence of divorce, by contrition and assur-

ance of future conjugal conduct as pointed out in *Gordon vs. Gordon*, N. J. Eq., 535. The Court is powerless to relieve him even though it believes the repentance to be sincere and future good conduct is assured. The right of action is as fixed and absolute on the commission of the offense as in adultery. The postponement for six months of the right to sue, is to give the injured party time to calm down and reflect, put the offender on probation and to forgive if pardon is deserved. Condonation rests exclusively with the offended party.”

This case clearly shows the distinction of defendant’s insanity in a desertion case, and in one based on extreme cruelty as in the instant case.

The cases in New Jersey only allow the defendant’s insanity to effect the right of divorce where insanity existed at the time of the accrual of the right of action.

The case of *Kretz vs. Kretz*, 73 N. J. Eq., page 246, was a case where the husband sued for divorce on the ground of adultery, and the defense interposed was insanity. In that case there was absolute proof that the wife was insane, not only at the time of the trial, but also at the time of the alleged adultery. Therefore, the Court held that the divorce could not be granted and dismissed the bill; further evidencing the salient and most significant point, to wit: that insanity can only be interposed where it is proven that it existed at the time the defendant committed such acts as are grounds for divorce.

Therefore, in the instant case, taking into consideration the fact that syphilis is a disease that is very slow in development, and is very slowly

contracted, and that the petitioner showed only the first signs of the disease in 1927 when she left her husband, the defendant, there is clearly an inference that the disease was communicated quite a long time prior thereto, and that the cause of action accrued on a continued series of acts over a period of time, during which time they were living as husband and wife, and that the acts of extreme cruelty were inflicted by the defendant upon the petitioner herein a long time before April of 1927, when for the first time it is alleged that the defendant had somewhat of a mental aberration.

This, taken together with the fact that there is no proof of insanity at the time of the commission of the acts, and that cases hold that it must be affirmatively pleaded, and the burden of proof rests upon the defendant, should have entitled the petitioner to a decree in her favor, for any subsequent insanity on the part of the defendant should be no bar to the right of action once accrued. The distinction is clearly pointed out between the defense of insanity as interposed, to suits based upon desertion, and the defense of insanity as based upon extreme cruelty, as in the instant case, where the right of action has already vested, and cannot be divested unless at the option of the injured party.

Point III.

The testimony of the petitioner should have been allowed in the evidence.

In this case the petition sets up a valid cause of action which if proven would entitle the petitioner to a decree on the theory of extreme cruelty.

An Answer has been filed on behalf of the de-

fendant, Frederick Gartner, Jr., generally denying the allegations contained in the petition, and setting up a number of defenses thereto.

Counsel for the defendant interposed an objection at the trial that in view of Section 3 of the Evidence Act, which reads as follows:

“No party shall be sworn in in any case when the opposite party is prohibited or under legal disability from being sworn as a witness.”

that therefore the petitioner herein was not competent to give testimony in the cause, because the defendant admittedly at the present time is under legal disability, to wit: confined in an institution for demented people.

However, it is contended on the part of the appellant that the Evidence Act in all its sections must be read together, with Section 6 of Compiled Statutes, pages 22, 23, and makes an explanation to Section 3. Section 6 reads as follows:

“The petitioner or complainant in any cause or proceeding of an equitable nature in any Court shall be a competent witness to disprove a defendant’s answer as may be responsive to the allegations contained in the Bill of Complaint or Petition, and any defendant in any such cause or proceeding shall be a competent witness for or against any other defendant, not jointly interested with him in the matter in controversy.”

The Advisory Master in his conclusions (Case, page 92) stated as follows:

“Moreover, this matrimonial suit is not an ‘equitable’ proceeding. The New Jersey Act providing for divorces (Revision of 1907) provides that ‘The Court of Chancery shall have jurisdiction of all causes of divorce, or nullity, and of alimony and maintenance by this act directed and allowed.’ This Court acquired its jurisdiction of this suit by virtue of this Statute. A statutory suit for divorce is entirely statutory. It does not belong to the equitable jurisdiction as such. It is wholly remedial. It is intended to dissolve the status of marriage. This remedy does not belong to the original jurisdiction of Chancery.” (See Pomeroy’s Equity Jurisprudence, 4th Edition, Section 112.)

The question of whether or not the matrimonial suit based upon the statute is of an equitable nature has been considered many times by our Courts, and all the times that the same has been considered it has been decided that the proceeding is of an equitable nature.

In the case of *Rooney vs. Rooney*, 54 Eq., 231, a case in which the Advisory Master, Marshall Van Winkle, who rendered a decision in the instant case, was counsel for the complainant, and also contended that the proceeding was not of an equitable nature, the Court held, on page 242:

“There is authority for the proposition that suits for divorce in this Court, based upon purely statutory grounds, are of an equitable nature, and subject to the rules and maxims of Courts of Equity rather than those of the English ecclesiastical

Courts. It is evident that Chancellor Zabriskie was of that opinion from what he said in *Derby vs. Derby*, 6 C. E. Gr. 39, and the language of Vice Chancellor Van Fleet in *Woodward vs. Woodward*, 14 Stew. Eq. 224 is in the same direction. The very fact that the Legislature gave power in such cases to these Courts rather than to Courts of Law encouraged this view."

In the case of *Avakian vs. Avakian*, 69 N. J. Eq. 89, the Court also held that the jurisdiction of the Court of Chancery to annul a marriage for divorce is not derived from the divorce statute, nor by its terms as to residence, etc., but is based on the inherent jurisdiction of that Court over questions arising out of the contract, which clearly shows that it is not merely a statute remedy but is equitable in this nature.

In the case of *Gibbs vs. Gibbs*, 92 Eq. 542, on page 544, the Court, in one of the questions in issue as to whether equitable defenses can be interposed in a suit for divorce, held in this case that

"It is of the opinion that is not open to question as a broad general proposition in English and American jurisprudence, suits for divorce or nullification are deemed of an equitable nature, and as subject, to some extent at least, to equitable rules and principles."

There is no doubt about the fact that Section 6 applies to cases in equity or the Court of Chancery. *Black vs. Lamb*, 12 Eq., page 110.

References to 19 Corpus Juris, page 23, Section 26, shows as follows:

“Where Courts of Chancery are vested on statutes with divorce jurisdiction as is the case in many of the State’s divorce suits, are to be conducted according to the rules and practices prevailing in ordinary suits in equity, unless the statute otherwise provides.”

The cases further construing Section 6 permitting one party to testify where the other party is under a legal disability have even gone so far as to hold that even after death of a defendant greater than which disability there can be none, still the complainant may be a witness under this Section 6.

In the case of *Laning vs. Laning*, 19 N. J. Eq., page 228, in which case one of the parties to the action had died, the Court permitted the other party to give testimony relative to the transactions in dispute, due to the fact that the answer as filed by the defendant contradicted and assailed the allegations contained in the Bill of Complaint, basing its reason upon Section 6 of the Evidence Act.

This reasoning was also an authority in the case of *Warwick vs. Smith*, 19 N. J. Eq., 439.

In the case of *William’s vs. Vreeland’s Executors*, 30 N. J. Eq., page 576, in which Section 6 was construed, it was held that the complainant’s testimony, otherwise incompetent where the opposite party was under a legal disability or deceased, was, nevertheless competent to prove the allegations contained in the Bill of Complaint, where an Answer denied the same.

As late as the case of *Connors vs. Murphy*, 100 N. J. Eq., page 280, the Court cited Section 6

of the Evidence Act and permitted the complainant to testify to the transactions in the case, where the defendant had died before the trial, but nevertheless had filed an Answer contradicting the allegations contained in the Bill of Complaint filed in the cause.

In view of the fact that the aforecited cases clearly point out that in New Jersey divorce proceedings have been held to be of an equitable nature, and that in view of the fact that parties have been permitted to testify under Section 6 of the Evidence Act, where Answer denies allegations of complaint, where otherwise under a legal disability, is also brought out by cases aforecited, it was clearly an error on the part of the Master not to admit the testimony of the petitioner in this cause, which testimony is very vital in substantiation of the allegations of the petition, the allegations in the petition having been controverted by the Answer as interposed by the defendant.

Point IV.

If the testimony of the wife is not competent there is still enough proof in the case to warrant a decree under extreme cruelty.

For the sake of argument, assuming that the testimony of the wife is not admissible, by reason of Section 3 of the Evidence Act, and this is strongly contested as aforestated, we have the following facts, from which there can be easily deduced a substantial case in favor of the petitioner, there being no testimony to controvert any of the allegations of the petition or any of the proof offered by the petitioner.

First we have the evidence of the two doctors, one of whom, Dr. Quigley, examined the defend-

ant, Frederick Gartner, Jr., and found him suffering from syphilis (Case, page 55), and it is common knowledge that syphilis is a disease that is very easily contracted, and very slow in development, taking a long period of years to show positive signs thereof.

Then there is the evidence of the physician who examined the wife of the petitioner herein, immediately after it had been discovered that the husband of the petitioner in this case, and the defendant herein, was suffering from the disease, and his testimony shows that the wife's tests showed positive. (Case, page 54.)

Then follows the testimony of the sister of the defendant, Minnie Kansky, and shows that the defendant had knowledge of his disease (Case, page 62). That he was curing himself, because she (Minnie Kansky) had seen different salves about the bathroom before the defendant was married, and that she approached him, and asked him what was the matter with him, and she was told that he had contracted a venereal disease from a girl in Mexico down at the border during the war.

There is further testimony on the part of the mother of the petitioner, showing the good reputation enjoyed by her daughter, the petitioner in this cause, and that she was always a good girl, remaining at home, not bothering with any men, that she was always healthy, never had any sickness that would in any wise bear similar to any venereal disease, before the marriage; that she had never bothered with any men with knowledge to the mother, in any illicit relationships, and to the knowledge of the mother, the petitioner was a chaste girl at the time of her marriage. (Case, page 83.)

The aforementioned evidence, in conjunction with the fact that medical science informs us that it is hardly possible or probable that anyone could be suffering from the disease of syphilis without being aware of the same, clearly shows that the defendant must have committed the acts of cruelty, to wit: communicating the disease with knowledge thereof, and is guilty of the offense alleged in the petition.

It is therefore a logical inference that at the time of the examination of Frederick Gartner, Jr., in 1927, by Dr. Quigley, that the defendant must have been suffering from the disease of syphilis for a long period of time prior thereto, and in his cohabitation with the petitioner, his wife, must have inflicted and communicated a disease, which is the extreme cruelty alleged in the petition, a long time before 1927, the date when they parted. It is also logical to assume, there being no evidence to the contrary, that at that time the defendant was perfectly normal and sane and was chargeable with his acts.

Thus we see that the evidence in the cause, without taking into consideration the testimony given by the petitioner herself, which it is claimed on our part should be admissible, is nevertheless enough to establish a prima facie case, and without rebuttal thereof, should have entitled the petitioner to a decree in her favor.

Point V.

No actual proof of wilfulness is necessary in extreme cruelty.

The Advisory Master, in his conclusions, stated that there was no proof that the defendant had wilfully and deliberately committed the acts of

cruelty as alleged in the petition, and predicated his conclusions, and consequently his decree, upon the theory that any extreme cruelty, the nature of which is alleged in the petition, actual wilfulness and deliberate action must be shown before a bona fide cause of action can accrue.

He also stated that there had been no proof, as alleged in the petition, that the defendant was not in any way insane and incapacitated for more than one year after April 10, 1927. (Case, page 94.)

In so far as the latter point is concerned, that is to say, as to the insanity of the defendant after April 10, 1927, we have the absolute proof of a disinterested witness, the sister of the defendant, who testifies that the defendant after April 10, 1927, went to live at the home of his mother in Bronx, New York.

That after a further period after April 10, 1927, of one and one-half years, he behaved perfectly normal, showed no traces whatever of any insanity, and for not more than three weeks was out of work during that entire period. That he worked in a garage for a time washing cars, that he worked for the telephone company, and during the entire one and one-half years missed a short time during which period he did not work, and that he conducted himself just the same as he did before. (Case, page 64.)

Certainly this is proof enough, in the absence of any proof to the contrary or any adjudication of insanity, that the defendant was sane for a long period after April 10, 1927, and consequently chargeable with his acts.

In so far as the communication of the venereal disease itself from one spouse to another, that

fact has been long considered extreme cruelty, and all the cases bear this out.

Even as far back as 1880 the courts took cognizance thereof. In the case of *Cook vs. Cook*, 32 N. J. Eq., 475, the testimony shows that the petitioner had intercourse with her husband after their marriage, and that a venereal disease was communicated to her. The testimony also shows in that case that the husband or the defendant, had the disease before his marriage, and was treated therefor. There is also some evidence that he thought he had been cured, and that he did not have the disease any more, and therefore had relationship with his wife. The Court, nevertheless, held that the communication of the venereal disease through intercourse had with his wife, made the defendant guilty of extreme cruelty, and a divorce was granted therefor, and based its conclusions upon the reasoning, when having had the disease before his marriage, and having associations with women, and subsequently having intercourse with his wife, was a reckless disregard of his condition, having knowledge of his condition prior to the marriage, and went on further to say, on page 479:

“If the husband, knowing that he is in that state of health that by having intercourse with his wife he will run the risk of communicating the venereal disease to her, recklessly had communication with her, and thereby communicates the disease to her, he is guilty of cruelty in that he knows his own state of health, and the probable result of the communication. That the proof of wilfulness of the act may reasonably be sought in surrounding circumstances of the condition of the husband,

and the probabilities of the case after such explanations as he may offer.”

The Court goes on further, in the same case, and cites the testimony given by a doctor, in a certain case of *Ciocci vs. Ciocci*, 26 E. L. E., pages 604, 611, and quotes the Doctor Lashington in that case as follows:

“I hardly think it necessary to inquire whether there is evidence of his (the husband) having been warned of the danger if he married in the state in which he is clearly proved to have been, for I am of the opinion that common sense, ordinary experience—I speak not of higher motives—must have suggested to him the probable consequences, the consequences likely to result in the ordinary course of things, from marriage under the circumstances proved to have existed; and if this were a point necessary to be determined, I should hold, and without doubt, that if a man married under such circumstances (having had venereal disease for some time prior to the marriage, and though in a convalescent condition, not entirely cured) and communicated to his wife the venereal disease, it was, to use the mildest term applicable to such conduct, such utter recklessness of the health and comfort of his wife that if he did communicate such disease, he was guilty of cruelty in the eye of the law, and I should hold this upon the principle that whoever does an act likely to produce injury, and the injury follows, can never excuse himself by saying that

he hoped a probable consequence might, by some peculiar good fortune, not follow."

The above comments of the Court clearly, in comparison to the testimony adduced in the instant case, show very close analogies thereto, and goes further to show that scienter or wilfulness is not absolutely necessary to prove extreme cruelty could be necessarily imputed when a certain good set of facts are available, and certainly in the instant case such set of facts have been shown.

We have in New Jersey a later case of *Danielly vs. Danielly*, 118 Atl. Reporter, 335. This case is an opinion by the Honorable Edwin Robert Walker, Chancellor of the State of New Jersey, and is also similar somewhat to the instant case. The Honorable Chancellor, on page 336 of his decision, says that:

"It has been held that where the husband afflicted with a venereal disease having reason to know it, has communicated it to his wife, he is guilty of extreme cruelty. *Cook vs. Cook*, 32 Eq. 475. *Crane vs. Crane*, 62 Eq. 321-326. *Rogers vs. Rogers*, 81 Eq. 479. It is the greatest cruelty for a husband to communicate to his wife a venereal disease, and if he does it, his knowledge of his condition and the danger of the infection will be presumed. 1 Bish, M. D. S., Section 1581."

The case of *Danielly vs. Danielly*, above cited, also shows that actual knowledge is not necessary to substantiate a case of extreme cruelty, and the communication of the disease to the other spouse raises a presumption of the knowledge of

the condition of the one communicating the disease, and that element of scienter is not essential to prove the extreme cruelty.

The evidence in the instant case is very much similar with the evidence in the case of *Cook vs. Cook*, 32 Eq. 475, and *Danielly vs. Danielly*, 118 Atl. Rep. 335, in so far as the communication of the disease is concerned, there being no evidence to contradict the same, and there has been a clear, concise case of extreme cruelty shown.

See also 19 Corpus Juris, pages 47-48, and note 42 thereunder; also 19 Corpus Juris, page 55, Section 104, and note 30 thereunder, citing cases outside of the state, where the same principles have been upheld.

Therefore, although it is alleged in the petition that the defendant wilfully and deliberately communicated the disease, it was not absolutely essential that such wilfulness be actually shown, but that if enough facts were shown as to prove it, as in the case of *Cook vs. Cook*, 32 Eq. 475, and *Danielly vs. Danielly*, 118 Atl. Rep. 335, aforesaid, that there would be enough to warrant a decree in favor of the petitioner, notwithstanding the allegations contained in the petition, as long as the proper cause of action was made out, and certainly with all the testimony in the case, such cause of action without any contradiction thereof, has been made out.

There can also be deduced from the case the proposition that scienter is not necessary, but that one having the disease is necessarily charged with knowledge thereof, and there is the presumption to that effect in the eyes of the law, and therefore anyone having cohabitation or intercourse with his spouse, and causing the communication

of the disease to her as in the instant case, is charged with extreme cruelty.

Point VI.

Even if scienter is necessary the facts bear the same out.

For the sake of argument let us assume that scienter or wilfulness is essential to substantiate a decree of extreme cruelty.

There is the testimony of the physicians to the effect that the defendant, Frederick Gartner, Jr., was suffering from syphilis.

There is the testimony of the physicians to the effect that the wife, your petitioner, Ruth Susanna Gartner, immediately thereafter was afflicted with the same disease.

There is the testimony of the sister of the defendant, who besides giving other testimony, states that she still cares for her brother, and that she is merely testifying to do the right thing in the case, and that she is on friendly terms with her brother. Besides that, she spoke to her brother right after the war, when he was treating himself with different salves, and he told her that he had a venereal disease, that he had contracted on the border.

There is also testimony of the same sister to the effect that immediately before the marriage between the petitioner and the defendant she approached the defendant and warned him of the probable consequences of his cohabitation with his future wife, and he told her that he was cured, and in spite of the warning, the defendant married the petitioner.

That there is the absolute theory of medical science to the effect that one suffering from syph-

ilitic condition must be aware of the same, as symptoms and troubles one sustains, having this syphilitic condition must make one know that he has it, and the future scientific theory of syphilis being incurable.

All these facts tend to show and impute knowledge of scienter on the part of this defendant, or if it does not show actual knowledge of scienter, it clearly shows such reckless disregard of the health of his wife, in view of the fact that he knew he had the disease before marriage, as to subject himself to a cause of action for divorce on the basis of extreme cruelty.

Cook vs. Cook, 32 Eq. 475, and *Danielly vs. Danielly*, 118 Atl. Rep. 335.

Point VII.

Conclusion

There should have been a decree in favor of the petitioner.

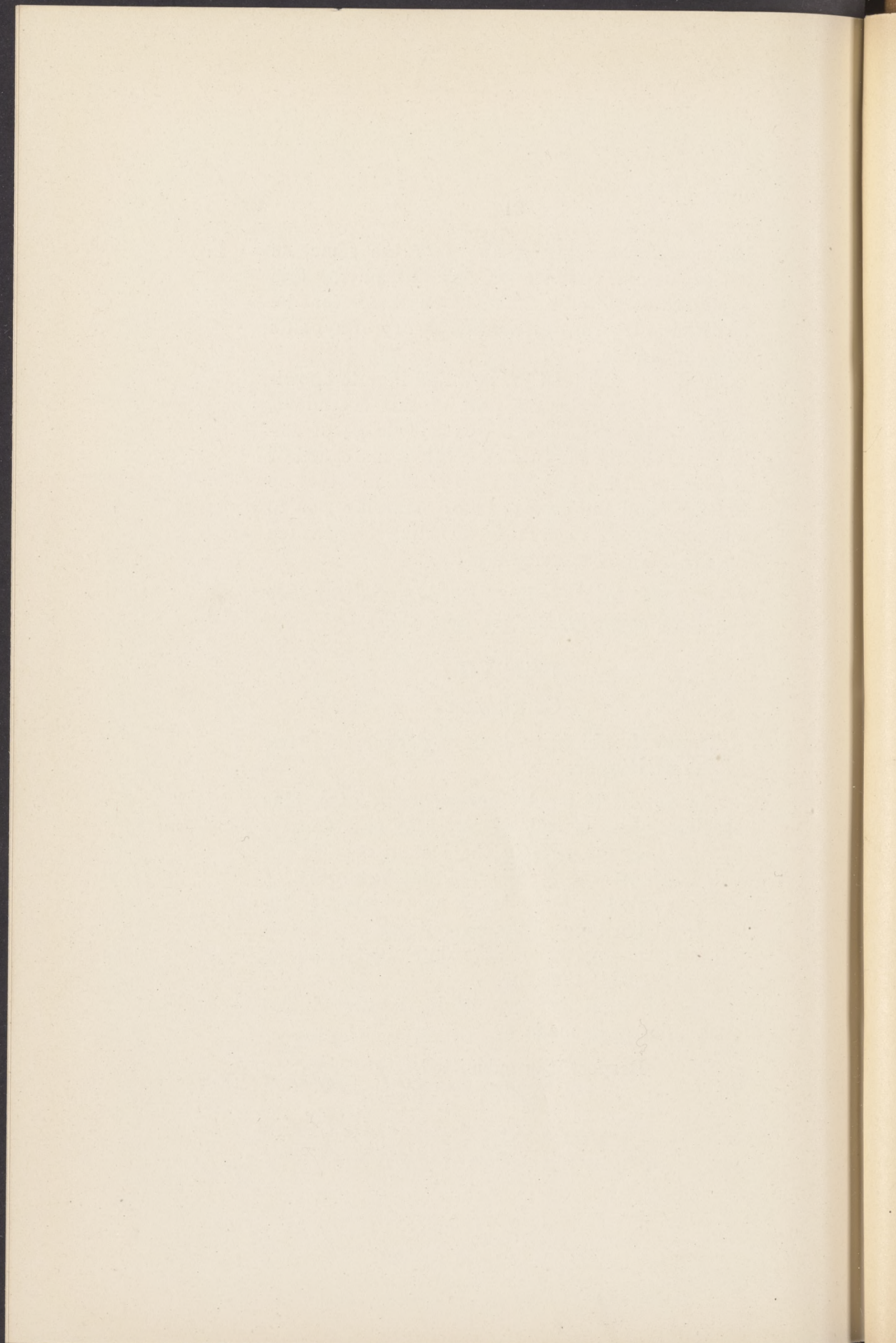
On the whole the testimony in the case, plus the law, plus medical science, bear out the conclusion that the wife in the instant case is entitled to a decree for divorce, on the ground of extreme cruelty, there being no evidence of insanity at the time of the commission of the acts of extreme cruelty, and the defendant is therefore chargeable therefor.

Wherefore it is respectfully requested that such a decree be made.

Respectfully submitted,

Samuel Harber
SAMUEL HARBER,

*Solicitor for and of Counsel
with Petitioner-Appellant.*



New Jersey Court of Errors and Appeals

Between

RUTH SUSANNA GARTNER,
Petitioner-Appellant,

and

FREDERICK GARTNER, JR.,
Defendant-Appellee.

On Appeal
from the
Court of
Chancery.

Brief.

**BRIEF OF ANTHONY P. LA PORTA, ES-
QUIRE, ON BEHALF OF FREDERICK
GARTNER, JR., DEFENDANT-APPEL-
LEE, AND THE CLERK IN CHANCERY
AS HIS GUARDIAN.**

Introduction.

The above named petitioner-appellant, whose age is thirty years, on July 18th, 1929, filed her petition for divorce against the defendant appellee, whose age is thirty-six years, upon the ground of extreme cruelty. On May 15th, 1930, she filed an amended petition, which contained two causes of action.

The first cause of action prayed that her marriage be annulled for the cause of fraud perpetrated upon her in that the defendant was at the time of his marriage afflicted with a venereal disease known as syphilis, which he fraudulently concealed from her and communicated to her after the marriage.

The second cause of action seeks a dissolution of the marriage upon the ground of extreme cruelty

for the reason that he *knowingly* communicated the venereal disease to her.

The case was submitted on the pleadings and oral proofs taken in open court before His Honor Marshall Van Winkle, Advisory Master. During the trial the petitioner abandoned her first cause of action for annulment and relied solely upon the second cause of action for extreme cruelty.

The learned Advisory Master held that the evidence submitted was insufficient to show that the defendant *knowingly* communicated the venereal disease (syphilis) to her. He also found that the defendant-appellee was insane and by reason thereof the testimony of his wife, the petitioner-appellant herein, should not be considered because the defendant-appellee was under "legal disability" by reason of insanity. However, he actually did consider the testimony of the petitioner-appellant, and held that it was nevertheless insufficient to show that the defendant-appellee *knowingly* communicated the disease to her. He also held that the alleged admission by the defendant-appellee made some years prior to his marriage to his sister to the effect that he had been venereally diseased by a girl while a soldier in the United States Army on the Mexican Border, did not establish the fact that the defendant-appellee was afflicted with syphilis at the time of the marriage (especially in view of the fact that no particular venereal disease was mentioned). In this we claim the Court did not err and the learned Advisory Master accordingly dismissed the petition and we contend legally so.

Statement of Facts.

It appears that the parties were married on January 5th, 1922. They separated April 10th, 1927.

On this day the testimony shows and (the petitioner-appellant says) her husband was ill and was brought to St. Mary's Hospital, Hoboken, New Jersey, for treatment. While he was so confined on that day she was sent for by her husband's physician for an examination when she was apprised, for the first time, of the fact that she was suffering with syphilis, as well as her husband, and she was then and there advised by the physician that she should desist from further cohabitation with her husband and separate from him at once, which advice she followed accordingly.

The defendant-appellee's sister, Mrs. Kanski, testified that her brother returned from the Mexican Border in 1911 as a soldier in the United States Army. He came back with the disease; he was using salve and other things. She fails, however, to specify whether that disease was gonorrhoea or syphilis; in fact, she says no mention of any particular disease was made to her by her brother except that the disease was one contracted from a woman prior to his marriage to the petitioner-appellant, while a soldier on the Mexican Border.

She further testified that she was surprised when he was about to be married in view of the fact that he had the disease and she told him not to get married. His reply is contained in answer to the following question:

"Q. What did you say to him and what did he say to you? A. I asked him if he was doing the right thing in getting married and he said that Dr. Pixley told him that he was alright, that he was cured, and so I took it for granted that he was alright and said nothing about it."

This witness was offered for the purpose of showing that the defendant-appellee, carried the disease with him from the Mexican Border from the year 1911 to the marriage and thru the marriage to the present day. In other words, for the purpose of showing scienter.

The petitioner-appellant herself takes the stand and says that she did not know that he was afflicted with syphilis until the day that she was separated; that she felt pains about her person and back but did not know the reason therefor; but she fails to say that her husband ever admitted that he had the disease; either prior to the marriage or since the marriage or that he in fact had the disease before his marriage.

The petitioner in an attempt to show a fraud of the defendant as to the false representation as to his health was asked the following questions (p. 74):

“Q. Did you talk to him about his condition? A. Before I married him I asked him if he was in good health, physical condition, and he said he was.

Q. How long before the marriage did you ask him that? A. Just a few weeks before.

Q. Before that? A. Yes, sir.

Q. Did you rely on that? A. Yes, sir.”

The defendant's representation, if it was ever made as testified to by the petitioner, finds no corroboration in the entire record of the case.

There isn't any evidence whatsoever tending to show the defendant's character, habits and disposition, from which it might be inferred that he illicitly contracted the disease. The evidence does show, however, that both petitioner and defendant are suffering with the venereal disease of syphilis.

It is common knowledge that syphilis can be contracted innocently, not only by the petitioner but by the defendant as well. The only semblance of evidence that was offered was that of the defendant's sister, showing that eleven years prior to his marriage the defendant had admitted that he had contracted a venereal disease. This is not evidence in law to establish such a fact as will hereinafter be shown.

It is also common knowledge that the United States Army will not take into its service a man with a venereal disease, nor will it discharge a man with a venereal disease. He must be cured before he can be discharged from the service; that venereal inspections are monthly made to ascertain the condition and health of each and every soldier; and that when a soldier is found to be afflicted with a venereal disease he is immediately placed in the guard house or court martialled for the offense.

It is also common knowledge that the United States Army keeps service records of persons who are or were in its military service, together with a statement as to the condition of health so that it may be in a position to discipline the soldier and meet any demand made by the soldier or his wife, or widow, after his discharge or death.

The petitioner has failed to account for the non-production of the soldier's military records to show whether or not he was ever afflicted with the venereal disease; nor does the petitioner produce the doctor who treated the defendant for the alleged venereal disease, which he is alleged to have contracted on the Mexican Border in the year 1911, although the *defendant's sister says that he was being treated by a certain doctor named Pixley at the time of his discharge in the year 1911.*

The defendant was served by publication because he resides out of the State of New Jersey, to wit: New York State in an Insane Asylum. The petitioner knew that he was insane and in order to secure complete jurisdiction over him for the purpose of this suit, she filed a petition verified by her for the appointment of a guardian ad litem. (See p. 17, and p. 18). Her petition prayed as follows:

“Your petitioner therefore prays that a guardian ad litem may be appointed for the said defendant, Frederick Gartner, Jr., by whom he may answer and defend this suit.”

She also procured an affidavit from Dr. Arthur P. Hasking in order that the prayer of her petition might be granted. For the affidavit of Dr. Arthur P. Hasking see page 23 wherein he says:

“It is my opinion that the said Frederick Gartner, Jr., is suffering from a mental disease, known as General Paresis, which is a disease affecting the central nervous system and is of syphilitic origin. This disease has affected his cerebrospinal system and impaired his mental process.”

And at page 25 Dr. Hasking said:

“* * * it is my opinion that he is not fully competent to manage himself, his estate or his affairs, and I also believe that the appointment of a guardian to look after any and all legal matters affecting the said Frederick Gartner, Jr., would be proper and advisable for his best interests.”

On the strength of her petition and the affidavit of Dr. Hasking, a show cause order for the ap-

pointment of a guardian ad litem was made by the Chancellor on the 21st day of December, 1929 (see p. 20); and on the 12th day of March, 1930, the Chancellor made an order appointing the Clerk in Chancery as Guardian Ad Litem for the defendant and Anthony P. La Porta, was thereby appointed by the Chancellor to represent the said guardian in this action and to represent the said lunatic defendant therein as solicitor (see p. 26).

The original files in Chancery will show that the petitioner's petition for the appointment of a guardian ad litem, the affidavit of Dr. Hasking, and the aforementioned orders appointing the guardian ad litem, together with the solicitor, were drawn by the petitioner's solicitor and it was upon the petitioner's own action, after she made it appear that the defendant was insane, that a guardian ad litem and a solicitor for the defendant was appointed.

The guardian ad litem filed an answer to the petitioner's amended petition leaving the petitioner to her proof as to the material allegations of her petition and setting up the defense of insanity.

The defendant at the trial, by reason of his insanity, was not produced. An attempt was made by the solicitor of the defendant to arrive at the facts of the defense and a letter was written by him to the defendant's sister, Mrs. Kanski, who ignored the letter and refused to say anything for or against the defendant until she was brought in by the petitioner at the trial.

It therefore sufficiently appears that the defendant is defending this case by his guardian ad litem by reason of his insanity; and besides petitioner introduced Dr. Frederick J. Quigley (see pp. 52-56) who testified in her behalf, among other things, that the defendant was insane so much so

that he advised her not to live with him as he had homicidal tendencies; and her counsel at the trial and in his brief furnished to the Advisory Master also admitted the insanity of the defendant, so it would seem that the burden of proof to prove insanity was well carried by the petitioner herself. A reading of the entire record will clearly show this and we are of the opinion that as petitioner has not questioned the defendant's insanity in the court below, but on the contrary has admitted his insanity, she cannot, therefore, raise the question in this court for the first time, for she is estopped. However, the record clearly shows the insanity of the defendant.

Law.

The fact that the defendant had a venereal disease prior to the marriage has not been established by competent proof. The proof relied upon is the alleged admission made by the defendant himself to his sister prior to the marriage. See *Allen v. Allen*, 85 N. J. Eq. 55; 95 Atl. 363, where the court held that the defendant husband, who was a physician, confessed to his wife after his marriage that he had concealed his affliction with a taint of hereditary insanity, does not establish such fact.

In *Garrett v. Garrett*, 86 N. J. Eq. 293; 98 Atl. 848, Chancellor Walker held:

“The defendant's confession of guilt in a divorce case must be corroborated as to the fact, or facts, confessed and not as to the confession being made.”

There is no proof in this case that the defendant, in fact, had the venereal disease in the year 1911 at the time he returned from the Mexican Border.

There is just a mere statement that the defendant said that he had a venereal disease.

Assuming that the defendant had contracted the venereal disease prior to his marriage, which he related to his sister as having been cured before his marriage, nevertheless he had a right to assume that he was cured.

There was no proof that the defendant deceitfully concealed the fact that he had a venereal disease at the time of his marriage and the evidence shows that he was informed by his doctor that he was cured. In *Buechler v. Simon*, 146 At. 420, Vice-Chancellor Backes held that:

“Silence, resting in honest belief of things false, is not actionable at law or in equity. All the cited cases of annulment rest on deceit.”

In the case *sub judice* there was no deceit as the defendant believed himself to be cured. Besides the doctor who was supposed to have treated the defendant prior to his marriage was not produced in court to contradict the statement of the defendant's sister of the fact that he was cured of the disease.

In *Kaufman v. Kaufman*, 86 N. J. Eq. 132; 97 Atl. 490, the suit was for annulment based upon the fact that the defendant was afflicted with a syphilitic lip, which fact he fraudulently concealed from the complainant when it was his duty to disclose it. The court dismissed the suit and held:

“It must therefore, in my judgment, appear by appropriate and sufficient proof that the defendant either represented to complainant that he was free from syphilis or that he con-

cealed the fact that he had syphilis when he was in duty bound to disclose it.”

We, therefore, respectfully submit that *scienter* was not sufficiently shown to make out a case of a fraudulent concealment of the disease constituting fraud as the basis for a decree of divorce for extreme cruelty.

With respect to the cause for extreme cruelty there is no proof that the defendant *knowingly* communicated the venereal disease to the petitioner. Again we contend that *scienter* is essential to make out a case for extreme cruelty. In *Lazarwitz v. Lazarwitz*, 139 Atl. 881, Vice Chancellor Berry held that an attempt of a husband *knowingly* suffering from syphilis to force his wife to have sexual intercourse with him, constituted extreme cruelty. So that, the element of *scienter* is an essential element.

In the communication of a venereal disease it must appear that the defendant must have reason to know that he is afflicted with a venereal disease, at least, before he can be charged with extreme cruelty. See *Danielly v. Danielly*, 93 N. J. Eq. 556; 118 Atl. 335. In this case Chancellor Walker said:

“It has been held that where a husband, afflicted with a venereal disease, having reason to know it, has communicated it to his wife, he is guilty of extreme cruelty.”

Unless the disease is, therefore, *knowingly* communicated a cause for extreme cruelty is not established. So it is held that the communication of a venereal disease to a wife must have been willful on the part of the husband to establish it as cruelty. See *Brown v. Brown*, L. R. 1 P. & D. 233; *Ciocci*

v. *Ciocci*, 1 Spinks 121; 26 Eng. L. & Eq. 604, 19 C. J. 55.

It appears by the petitioner's own testimony that she sexually cohabited with the defendant up to the time that he was taken to the hospital. At page 80 she testifies:

“Q. When did you last have sexual relations with your husband?

A. Just a few days before he was taken ill.”

It is contended by counsel for the petitioner that one who is afflicted with a venereal disease is presumed to know it. If this is so and if it is true that the defendant was afflicted with a venereal disease in the year 1911, which he still carries, then this petitioner must have known in the year 1922 (when she married this defendant), that she was afflicted with a venereal disease, and that this knowledge upon her part must have continued down to the present time; and if she knew that she was afflicted with a venereal disease and she continued to have sexual relations down to a few days before her husband was confined to the hospital, then it is plain that she either herself gave the disease to her husband, or that if she received it from her husband she has waived her rights thereunder by reason of her continuous sexual cohabitation. As a matter of fact, we contend that there cannot be any presumption in the light of the circumstances of this case.

If the defendant were of sound mind and able to attend to the trial and to testify in his own behalf, he might have testified to the fact that the marriage was never sexually consummated; or that his wife communicated the venereal disease to him; or that he procured it innocently without any illicit

relations, either before or since his marriage. He might have also testified that his venereal disease, if he ever had one on the Mexican Border in 1911, was merely gonorrhoea, or he might have testified that the petitioner consorted with other men and admitted having illicit relations and so procured it. He might have testified that the petitioner knew that at the time of his marriage he was afflicted with syphilis and that she nevertheless consented to marry him. If the Court had believed anything that he might have testified to, if he had been able to testify, then the petitioner's case would undoubtedly fall. By reason of the defendant's disability, we contend that under *Section 3 of the Evidence Act, 2 C. S. 2218*, the petitioner is disqualified as a witness in her own behalf and incompetent to prove her case in view of the fact that the defendant is admittedly a lunatic and is under "legal disability," and is prevented by reason of same from participating in the case. The Act provided as follows:

"INTEREST IN EVENT; DISQUALIFICATION OF ADVERSE PARTY.—No person shall be disqualified as a witness *in any suit* or proceedings at law or in equity by reason of his interest in the event of the same as a party or otherwise, but such interest may be shown for the purpose of affecting his credit; *provided, no party shall be sworn in any case when the opposite party is prohibited by any legal disability from being sworn as a witness.* (P. L. 1900, p. 362.)"

Therefore, her testimony as to the representation and communication of the disease should not be considered. See *Demarest v. Vandenberg*, 39 N. J. Eq. 130, *affirmed on the opinion of the Chan-*

cellor in 40 N. J. Eq. 341. In this case Demarest, the complainant (a lunatic), sought to foreclose a mortgage by his guardian. The defendant in his answer set up a defense of usury. On the taking of testimony before the examiner he offered himself as a witness to prove the usury. The complainant's counsel objected to his being sworn on the ground that he was incompetent to testify in his own behalf in the suit because the complainant was prevented by "legal disability" by reason of his insanity from testifying. The Court held in construing the *Statute of 1859* (Rev. p. 378, Section 3), 2 C. S. 2218, Section 3, that the defendant could not be sworn in his own behalf to prove the usury under his defense as the complainant was under "legal disability" by reason of his insanity. The Court said at page 32:

"In cases where one of the parties is under legal disability, which prevents him from testifying, the other party is still incompetent as a witness in his own behalf. Insanity is a legal disability. In some of the states a party is excluded from testifying in his own behalf, where his adversary in the suit is insane, by statute particularly designating that disability by name. Our statute employs a general term embracing it."

This case is in accord with the ruling of the learned Advisory Master in the case *sub judice* and supports him in every respect. It deals with the entire subject of insanity and covers a number of questions which have been raised by the appellant.

The defendant need not be a legally adjudged lunatic. His confinement to an insane institution is enough, when followed by the appointment of a

guardian ad litem. In *Porter v. Porter*, 82 N. J. Eq. 400; 89 Atl. 251, Chancellor Walker held that the insanity of the defendant was a complete defense to an action for desertion. The defendant in that case was confined to an Insane Asylum at Morris Plains, New Jersey, and the Clerk in Chancery was appointed as guardian ad litem. The defense of insanity was not even interposed as the matter proceeded ex parte.

If this Court finds that there was extreme cruelty then it must also find that the defendant was not insane at the time of the communication of the disease by the defendant to petitioner in order to render a decree for extreme cruelty; but the Court must also consider the testimony of the petitioner as competent before it can do so, as the testimony, whether or not the marriage was sexually consummated, emanates from the petitioner and her testimony would therefore seem to be absolutely essential to establish her cause for extreme cruelty.

The petitioner contends that the defendant was reckless in failing to ascertain his true physical condition prior to marriage and therefore this constitutes what is tantamount to scienter and cites the case of *Cook v. Cook*, 32 N. J. Eq. 475. However, in the *Cook* case it was established that the defendant's physician treated him before the marriage for syphilis and after the marriage as well; that he consorted with women and had immoral relations with them, and so on. The case is not on all-fours with the case *sub judice*, and we therefore respectfully submit that it should not be considered.

Conclusion.

In conclusion we wish to again call attention to the fact that the testimony of the petitioner-appellant herein was essential to complete the proof in her cause for extreme cruelty and inasmuch as she is disqualified from testifying under *Section 3 of the Evidence Act* it necessarily follows with the evidence submitted that she has failed to establish her cause.

Wherefore, we urge that the decree advised by the learned Advisory Master should be affirmed because she has failed to sustain the burden of proof as to the truth of the allegations of her petition, with costs.

Respectfully submitted,

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Solicitor for and of counsel with
Frederick Gartner, Jr., defendant-
appellee, by his guardian ad litem,
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