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PETITION.

Filed July 12, 1928.

In Chancery of New Jersey

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

The petition of Marion Waters Tupper, of the City of East Orange in the County of Essex, respectfully shows:

1. Your petitioner was lawfully joined in the bonds of matrimony to her present husband, Wilbur D. Tupper, the defendant in this suit, on the 4th day of November, 1918, by Rev. Dr. Blake, a minister of the gospel, at Washington 20
in the District of Columbia.

2. On or about the month of June, 1923, the defendant refused to have any further sexual intercourse with your petitioner and ever since that time and for more than two years last part he has wilfully, continuedly and obstinately failed and refused to have such intercourse and thereby within the meaning of the statute in such case made and provided, did desert your petitioner. 30

3. On or about June, 1923, and subsequent thereto the defendant has maintained an attitude of complete indifference to your petitioner, notwithstanding that your petitioner and defendant have lived together under the same roof. The defendant has made his associations entirely outside of her and her associations; has refrained absolutely from going anywhere with her under any circumstances; has carried on no conversation with her excepting when absolutely neces- 40

Petition.

sary, and then in the most formal manner; has refused any sexual intercourse with her at any time or under any circumstances; has eliminated her in every way possible from his life and excluded her therefrom; all of which said defendant has done wilfully, continuedly and obstinately and in complete disregard of your petitioner's rights as wife.

10 4. Petitioner and defendant have been bona fide residents of the State of New Jersey continually since the spring of the year 1919, always residing at 148 Halsted street, East Orange, in the County of Essex and State of New Jersey.

20 5. Petitioner has no means of support except from her own exertions; one child was born of the marriage aforesaid: Arthur Waters Tupper, aged 7.

6. Petitioner's maiden name was Marion Waters.

30 7. Your petitioner prays that the marriage between your petitioner and the defendant may be dissolved for the cause aforesaid, according to the statute in such case made and provided; and that the defendant may be compelled by the decree of this Honorable Court to support her and the said infant child of the marriage, and that she may be awarded the custody of said child, and that she may have such further relief as may be just, and your petitioner will ever pray, etc.

McCARTER & ENGLISH,
Solicitors of Petitioner.

ROBERT H. McCARTER,
Of Counsel.

Petition.

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

MARION WATERS TUPPER, being duly sworn according to law, upon her oath deposes and says:

That she is the petitioner named in the foregoing petition; that said petition is not made by any collusion between her and the defendant, but in truth and good faith, for the causes set forth in the petition. 10

MARION WATERS TUPPER.

Sworn to and subscribed before me,
at Newark this 6th day of July,
1928.

LOUISE T. GRUBREIT,
(SEAL) Notary Public of N. J. 20

30

40

ANSWER.

Filed August 6, 1928.

IN CHANCERY OF NEW JERSEY.

10

*Between*MARION WATERS TUPPER,
*Petitioner,**and*WILBUR D. TUPPER,
*Defendant.**On Petition
for Divorce.**Answer.*

20 The answer of Wilbur D. Tupper, defendant,
to the petition of Marion Waters Tupper, peti-
tioner, says:

1. Paragraph 1 is admitted.

2. Paragraph 2 is denied and the defendant admits that he and the petitioner have by mutual agreement refrained from having sexual intercourse since the summer of 1924.

30 3. Paragraph 3 is denied, but the defendant admits that he and the petitioner have refrained from having sexual intercourse since the summer of 1924, and the defendant denies that he has at any time refused to have sexual intercourse with the petitioner against her will.

40 4. Paragraph 4 is admitted, except defendant is informed that prior to filing the petition in this cause the petitioner removed to Washington in the District of Columbia with the intention of deserting the defendant and residing there permanently, and that at the time the peti-

Answer.

tion was filed, she was not a resident of the State of New Jersey.

5. Defendant has no knowledge or information sufficient to form a belief as to what means the petitioner has, but he says that she carried away with her when she left him considerable property of much value, and that she has been fully capable of earning her living by her own exertions. As to the child, Arthur W. Tupper, defendant says that the petitioner has openly declared that defendant is not his father. 10

6. Paragraph 6 is admitted.

7. Defendant denies that petitioner is entitled to a divorce and says that he has not at any time deserted her, and has not at any time even intended to desert her. 20

FRANK E. BRADNER,
Solicitor of Defendant.

30

40

ORDER AMENDING PETITION.

Filed December 18. 1928.

IN CHANCERY OF NEW JERSEY.

10	<p><i>Between</i></p> <p style="text-align: center;">MARION WATERS TUPPER, <i>Petitioner,</i></p> <p style="text-align: center;"><i>and</i></p> <p style="text-align: center;">WILBUR D. TUPPER, <i>Defendant.</i></p>	<p><i>On Petition for Divorce.</i></p> <p><i>Order Amending Petition.</i></p>
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20 This matter being opened to the Court by McCarter & English, solicitors for the petitioner, and it appearing that on December 17, 1928, in open court at the final hearing of this cause, the petition for divorce in this cause was amended by adding to the end of paragraph 2, page 1 of the petition, language charging desertion of the petitioner by the defendant in the words of the statute,

30 It Is, on this 18th day of December, 1928, ORDERED that the petition for divorce in this cause be and it is hereby amended by adding to the end of paragraph 2, page 1 of the said petition the following sentence "Defendant deserted petitioner on or about the month of June 1923; ever since which time and for more than two years last past he has wilfully, continually and obstinately deserted the petitioner."

E. R. WALKER,

C.

Respectfully advised,
JOHN H. BACKES,

40

V.-C.

Marian W. Tupper, direct.

TESTIMONY.

IN CHANCERY OF NEW JERSEY.

December 17, 1928.

Between

MARIAN WATERS TUPPER,
Petitioner,

and

WILBUR D. TUPPER,
Defendant.

10

Transcript of shorthand notes of testimony taken in the above-entitled matter before his Honor, John H. Backes, Vice-Chancellor, at the Chancery Chambers, in the City of Newark, New Jersey, in the presence of Messrs. McCarter & English (by Mr. Gerald McLaughlin) for petitioner; and Mr. Frank E. Bradner, for defendant. 20

MARIAN W. TUPPER, sworn for petitioner.

Direct examination by Mr. McLaughlin. 30

Q You are the petitioner in this case? A Yes, sir.

Q And were you married to the defendant, Walter Tupper? A Wilbur Tupper.

Q When were you married? A November 4, 1918.

Q Where were you married? A In Washington.

Q D. C.? A D. C. 40

Marian W. Tupper, direct.

Q By whom? A By Rev. Dr. Blake, Episcopal minister.

Q I show you what purports to be a certificate of marriage and ask you if that is the certificate of marriage which you received? A Yes, sir.

10

Mr. McLaughlin: I offer it in evidence. (Paper marked Exhibit P. 1.)

Q At the time of your marriage, Mrs. Tupper, what was the occupation of Mr. Tupper? A Mr. Tupper was lieutenant—second lieutenant in the Army.

Q Stationed where? A I think at that time he was stationed in Florida.

Q What was the situation regarding being married at that particular time? A We were at war then and Mr. Tupper was an officer and in the Army and he stressed on the fact of us getting married.

20

Q Why? A Because there were a great many soldiers going abroad at the time and he thought that we would get married first.

Q Do you know whether or not there was any preference being given to married officers in his unit as far as remaining in this country was concerned? A He told me that a great many officers were going abroad, were being sent over by the country, but they were mostly single men.

30

Q You were married on November 4th, were you, 1918? A Yes, sir.

Q Where? A In Washington, D. C.

Q And that day or night, Mrs. Tupper, immediately after the marriage, did anything happen regarding important things as to the war?

40

Marian W. Tupper, direct.

A Yes, sir; we had the first Armistice right after the wedding.

Q And where did you go after the wedding?

A We came to New York.

Q When was the first time thereafter that you and your husband had any sexual relations?

10

A Not for three days afterwards—three nights and days.

Q And at whose request were those first sexual relations? A At my request.

Q Talk up loud, Mrs. Tupper. Thereafter where did you go with your husband? A We went to Florida for two months.

Q Two months; and at the end of that time what, if anything, happened to you regarding your physical condition? A I was pregnant.

20

Q What did your husband say, if anything, regarding that? A He refused to let me keep it; he said he couldn't afford to have children.

Q "Keep it"; keep what, the child? A The child.

Q He said what? A Couldn't afford to have children.

Q What else? A He said he didn't want them.

Q What else; anything said regarding abortion? A Yes, sir.

30

Q What was said? A He said I would have to do away with it; that he couldn't afford to keep it; that I would have to get rid of it.

Q Tell us whether or not you wanted to keep it? A I did want to keep it.

Q What happened? A I had to have an abortion performed.

Q Where? A In Washington.

Q How long did you remain at Washington?

A Mr. Tupper came there shortly after I ar-

40

Marian W. Tupper, direct.

10 rived. I think I arrived in Washington the day after Christmas and I think he arrived the day before New Years or the day after New Years and when he arrived he stayed with my brother and sister-in-law, Mrs. Frank Walter, where I was staying, and we talked it over about my condition and he told me what I would have to do and the day afterwards he left me down there in Washington and he did not send me any money. He came up to his mother's.

20 Q Where was his mother? A His mother was in East Orange, New Jersey. He came up here with the idea of getting something to do or to getting a home, and I didn't hear from him for several days, and I wrote him and told him that I was sick and that to please let me know something. I didn't hear from him for several days, so when I did hear from him I received no money at all in the letter and he— I wrote again and told him that I would have to do something to live. There was no answer to the letter, so I had to go back to my old position that I was working at before I was married.

Q And you went back to work? A And I went back to work.

30 Q How long did you work this time? A I think about two months.

Q What happened regarding your husband after that? A I had to write to him—(interrupted).

The Court: What?

40 The Witness: I wrote to him and asked him if he didn't make a home or didn't come for me in Washington that I would have to do something in regard to it, that

Marian W. Tupper, direct.

my family and people were talking about the fact that he left me in Washington.

Q And as a result of that what happened?

A And as a result of that Mr. Tupper came down, I think, the next day after he got the letter, in order to get me and take me back to East Orange. 10

Q And did you go back to East Orange?

A I did go back to East Orange. I went back to East Orange and stayed with his mother for two weeks until the apartment which he and his brother had picked out for me was completed.

Q Where was this apartment? A 148 Halsted street.

Q And did you move into that apartment?

A Moved right into that apartment on the third floor, four-room apartment, I think it was. 20

Q And this was in 1919, was it? A Yes, sir

Q And about what time of the year, do you remember? A I don't know whether it was March or the latter part of February.

Q And you continued the home there? A Continued living in the same building for ten years.

Q In 1920, Mrs. Tupper, what, if anything, happened? A In 1920 Sonny was born. 30

Q You had had intercourse prior to that and after the abortion, with your husband? A I had intercourse, yes, sir, but—(interrupted).

Q When you became pregnant the second time did you tell your husband? A I waited for a little while before I told him, and then I told him that I was pregnant.

Q What did he say? A And he said that he couldn't afford to have children, that he didn't want them, and he told me I would have to go 40

Marian W. Tupper, direct.

back to Washington and have another abortion performed and he gave me sixty-five dollars in order to do so.

Q What was your attitude regarding this proposed abortion? A I didn't want it done, because I wanted a family and I wanted ten children and I think—(interrupted).

Q You say you wanted ten; what do you mean by that? A My mother had ten children.

Q You had ten brothers and sisters. He gave you sixty-five dollars to go to Washington to have this abortion performed. What did you do in Washington? A I went to my doctor, Dr. Howe, who is also the doctor of my brother and I stated the case to him and I told him that I wanted that baby, that I was very fond of children and that life would not be worth while living if I had no children and I got married for that special purpose, and he said, "Well," he said, "you just forget what your husband said and go right along with that."

Q Did you have the baby as a result of that? A And I had the baby, yes, sir.

Q And that baby is Wilbur Tupper, Jr.? A No; that is the baby, Arthur Walter Tupper.

Q I show you certificate of birth registration, what purports to be, and ask you is that the birth certificate for the baby? A Yes, sir.

Mr. McLaughlin: I offer it in evidence.
(Paper marked Exhibit P. 2.)

Q After that, Mrs. Tupper, did you come back to East Orange? A I stayed there, I think, for about three weeks and came back to East Orange. Meantime I wrote to my husband and told him what Dr. Howe had told me

Marian W. Tupper, direct.

and that I was glad of it, that I wanted the youngster and I came back to East Orange and stayed in the apartment alone, with no telephone or any medical assistance in East Orange.

Q Where was your husband? A My husband was going back and forth to work in New York.

10

Q Was he staying at night in the apartment? A Yes, sir; he was living in the apartment.

Q Thereafter, Mrs. Tupper, regarding sexual relations with your husband, that is, after the baby was born, were there any sexual relations? A Yes, sir; but as I say, it was very unnatural.

Q What do you mean by that? A I mean, that he wore protection.

Q Yes. At that time, Mrs. Tupper, what were the sleeping arrangements—what were the sleeping arrangements in the apartment? A At that time— You mean, before Sonny was born or after?

20

Q Yes. Start with that. A Mr. Tupper slept in the bed with me.

Q After the baby was born did that continue? A No; shortly afterwards it did, but within the year—(interrupted).

30

The Court: It was resumed?

The Witness: It was resumed for a while, very short while.

Q That is, staying—sleeping in the same bed together? A Yes, sir.

Q How long did that continue after that? A Only a short while.

Q Was it a matter of months, Mrs. Tupper, or weeks or what? A Well, I think it was months.

40

Marian W. Tupper, direct.

Q And then what happened? A And then Mr. Tupper went on the couch in the living room.

Q Where was the couch? A In the living room.

10 Q How many rooms in this apartment, did you say? A Four rooms.

Q One bedroom? A One bedroom, one living room, one dining room and one kitchen and bath.

Q Your husband went on the couch in the living room then you say these relations continued for some time after that? A Yes, sir.

Q After he was on the couch? A After he was on the couch.

Q And is it during that period that this protection you speak of was used? A Yes, sir.

20 Q What was your husband's attitude regarding you around that time, Mrs. Tupper? A Well, I shouldn't call it as a husband should be, Mr. McLaughlin.

Q Just what do you mean by that? A He wasn't as tender and as considerate of me as he should have been, I do not think.

Q After he went to the couch in the living room was he at all affectionate to you? A Well, I can't say that he was.

30 Q Would you say that he was not? A He was not, as I regard a man affectionate.

Q Was he out of the house during the day? A All day long.

40 Q When he would come home at night what would he do, if anything? A He would come in the house, sometimes he would speak to me at that period. Sometimes he would speak to me and sometimes he wouldn't. He would ask after the baby and the little girl that I had to help me with the baby and put dinner on the

Marian W. Tupper, direct.

table, and I would help, and sit down and eat dinner and he would either go to his mother's home afterwards or his brother would come for him to take him out for a walk.

Q Did he ever take you out? A No.

Q You spoke of a little girl who came in there to help you at that time. What was her name? A I do not recall her name, but she was a half grown girl at that time. 10

Q Was that Mary Van Dine? A No; that was a little girl, school girl.

Q How long did this intermittent intercourse, as you describe, continue, Mrs. Tupper? A It continued right straight along.

Q Until what time? The intercourse—the sexual intercourse with your husband? A I don't know just what you mean. 20

Q You said that after he went to the couch in the living room—(interrupted). A Yes, sir.

Q —that you did have some relations with him thereafter? A Yes, sir.

Q In which protection was used. Now how long did those relations continue?

The Court: Up until what time?

The Witness: Up until, I should judge, 1923. 30

Q What time of the year, Mrs. Tupper? A I think it was in the spring of 1923, the summer of 1923, we went down to Asbury Park and took a house there and I ran the house, his mother and brother came down as boarders.

Q What happened in 1923 with reference to sexual relations? That summer, did you have any sexual relations with your husband? A Yes, sir; several, unnatural. 40

Marian W. Tupper, direct.

Q What do you mean by that; you mean this protection? A No; I mean the protection and—
—withdrawing.

Q And did you return from Asbury Park or Ocean Grove in the fall of 1923? A Yes, sir.

10 Q And what happened, if anything, regarding your sexual relations with your husband after you came back from the seashore? A Mr. Tupper didn't seem inclined to have anything to do with me with regard to that.

Q When was the last? A The last time, I think, was in 1923.

Q And what part of the year? A I think it was in the spring of 1923.

20 Q I thought you said you had relations with him in the summer down at the shore? A No, not at the shore.

The Court: Did you not say that you had relations with him in the summer of 1923? Whether you did or not; did you?

The Witness: Well, I do not recall. I think it was the spring of 1923.

Q That was the last? A Yes, sir.

30 Q Before you went to the shore? A I do not recall whether I was at the shore or at home.

The Court: I understood your statement was you had relations with him in the summer, but it was very unnatural.

The Witness: Well, they were at the time unnatural.

The Court: But you said that was in the summer of 1923. Did you mean that?

40 The Witness: No; I meant in the spring.

Marian W. Tupper, direct.

Q The Vice-Chancellor refers to that part of your testimony where it may have been the fault of my question, where the inference was that during that summer you did have relations which were unnatural in the sense that there was protection and withdrawal. Was that before you went to Ocean Grove or Asbury Park in the summer of 1923, or was it during the time you were down there? A I do not recall, Mr. McLaughlin, whether it was the spring or the first part of summer. 10

The Court: Was it before you went to the shore?

The Witness: I do not think—I really do not know. I couldn't say whether it was just before we went to the shore or just after we were down there; it has been too long ago. 20

Q Mrs. Tupper, then you may have had some of the same sort of relations with Mr. Tupper at the shore in the summer of 1923? A Yes, sir; I may have.

Q Returning to East Orange. In the fall of 1923 did these same sleeping arrangements continue? A Yes, sir. 30

Q Mr. Tupper on the couch in the living room and you and the baby in bed? A Yes, sir.

Q Did you have relations with him after you came back from the shore in 1923, sexual relations? A No.

The Court: Did you speak to your husband about this at all?

The Witness: I spoke to him, yes, sir. 40

Marian W. Tupper, direct.

Q What did you say? A Several times.

Q What is that? A I spoke to him several times.

Q What did you say? A I told him that I didn't think we lived as man and wife.

10 Q What did he say? A He made no reply that I remember.

Q What else did you say regarding the resumption of relationship? A I told him that I thought we ought to live like man and wife and that we ought to have more children; there ought to be a regular family.

20 The Court: You know your own story. Tell me your own story without counsel bothering you from time to time. Tell me how you lived.

The Witness: From 1924?

The Court: Yes.

30 The Witness: Mr. Tupper—I asked him in regard to sexual relations and Mr. Tupper asked me to do it unnatural, and I didn't refuse, but I got up from the couch—I went to him myself, on the couch from the bedroom, and I didn't refuse him, but I got up and left him and went back to the bedroom, and there was nothing ever said by him about it after that. Several times during the month of April, 1925, and 1926 and 1927, and even up to 1928 I had spoken to him about it—spoken to him about having a family. I told him that if I lost my son we wouldn't have anything.

The Court: What did he say to you?

The Witness: And he refused to have anything to do with me at all.

40 The Court: From when on?

Marian W. Tupper, direct.

The Witness: From 1923 and '4 and he has constantly refused to have anything to do with me or treat me as a man should treat his wife.

The Court: Are you still living with him—still living together?

10

The Witness: I was living with him until he did away with the apartment. I went to Washington—(interrupted).

The Court: When was that?

The Witness: In July, the thirteenth, this past July thirteenth. The last time that I asked him to have anything to do with me was before that, in May.

The Court: What is that?

The Witness: The last time I asked him and spoke to him about it was in May.

20

The Court: What happened in July?

The Witness: In July I had consulted a lawyer about the conditions. I couldn't go on. I was a nervous wreck; I was unhappy, miserable, and they said—they told me to make the best of it and I tried to do that, and then I went back and consulted a lawyer again about it and they said, "I don't see how you could do anything, but try and ask the Chancellor to give you a divorce."

30

The Court: What about the house—what about the apartment? You say you lived with him until July?

The Witness: Yes, sir; my aunt died.

The Court: What happened then?

The Witness: My aunt died in July and I received a telegram saying she was very low.

40

Marian W. Tupper, direct.

The Court: What happened to your apartment at that time?

The Witness: Mr. Tupper did away with the apartment—gave it up while I was in Washington.

10 Q When you received this telegram about your aunt, Mrs. Tupper, where was your aunt living? A In Washington, D. C.

Q That had been your home? A Yes, sir; my aunt was my mother's sister and she had been like a mother to all of us.

Q You were down to Washington? A And I went to Washington. I took Sonny and went to Washington.

20 Q Did you tell your husband? A I told him and showed him the telegram.

Q Did he give you carfare to go down? A He gave me a check for fifty dollars to go down to Washington and buy some flowers for the funeral and pay some bills on Central avenue which I did.

Q And it was at that time or around that time that this threatened suit was brought for divorce, wasn't it? A Yes, sir.

30 Q You told us something about no sex relations, but general relations between your husband and yourself from early part of your married life, as your married life continued, will you tell the Vice-Chancellor briefly how that developed, regarding the treatment of your husband? A When we were first married he seemed to be entirely different from what he was in the latter years. Towards the last he wouldn't take me out; he wouldn't pay any attention to me and come in the house day after day and not speak to me. Not ask me whether

40

Marian W. Tupper, direct.

I was well or sick and he absolutely ignored me, just as if I was a piece of furniture or someone in the house that didn't amount to anything.

Q In later years, Mrs. Tupper, when he came in in the evening, what would he do? A He would walk in and take off his hat and coat, and I was then doing my own work, and he would sit down to the table, eat his dinner; sometimes he would speak to Sonny; and he would get up and leave the house, go to his mother's or go some place with his brother sometimes and sometimes alone. 10

Q Would he ever show any affection towards you at all? A No.

Q Ever kiss you? A I haven't kissed Mr. Tupper for years. 20

The Court: He didn't ask you that. He wants to know whether he kissed you.

The Witness: No, he didn't kiss me.

The Court: For years?

The Witness: For years.

Q After you had that half grown girl did you have anybody else helping around the house? A Yes, sir; about six months afterwards I got Mary Van Dine. 30

The Court: Six months after what?

The Witness: Six months after the baby was born I got Mary Van Dine to help me.

Q Mary Van Dine is a colored girl? A Yes, sir.

The Court: When did this incident of the lounge happen? 40

Marian W. Tupper, direct.

The Witness: I beg pardon?

The Court: When did this instance of the lounge—you said you went to him while he was on the lounge, do you remember?

The Witness: I think it was in 1924.

10 The Court: What did you go to the lounge for?

The Witness: I went to the lounge to have sexual intercourse.

The Court: And he denied you?

The Witness: He asked me to do it unnaturally.

The Court: What do you mean by that?

20 The Witness: He asked me to get down on him.

The Court: Well, he refused. He wouldn't grant you sexual intercourse?

The Witness: No.

The Court: Well, when you asked him—when he asked you to do that, you went back to your bed?

The Witness: Yes, sir.

30 The Court: After that did you ask him for normal—(interrupted).

The Witness: I repeatedly asked him.

The Court: For normal intercourse?

The Witness: Yes, sir.

The Court: And he always refused?

The Witness: He did.

40 Q How long did Mary Van Dine stay with you? A She has been with me ever since until I left.

Marian W. Tupper, direct.

Q How long was Mary Van Dine with you during the day? A She was with me all day long, she would come about eight o'clock.

Q For how many years? A For about eight years, I should say; six or eight years.

Q And after that, Mrs. Tupper, did she come in two or three times a week? 10

The Court: After eight years?

Mr. McLaughlin: I think she has got that wrong.

The Court: She came there shortly after the baby was born and the baby was born in 1920, it would make it about eight years.

The Witness: I beg pardon. She came to me twice a week in the last three years, but she has been with me, working for me until July. 20

Q This incident of this year, Mrs. Tupper, what was that? A In May I told Mr. Tupper that a friend of ours was pregnant.

Q Where was this conversation? A In the dining room.

Q Your apartment? A In my apartment.

Q Anybody else in the apartment at that time? A Yes, sir. 30

Q Who? A The janitor was fixing the pipe in the kitchen.

Q What was the janitor's name? A George Yancy.

Q About what time of the day or night was this? A It was about dinner time in the evening, somewhere along six o'clock or maybe after.

Q What was the conversation? A I told Mr. Tupper that a friend of ours was pregnant 40

Marian W. Tupper, direct.

and I told him that I would like to be pregnant; I would like a youngster. He made no remark. Sonny was sitting at the table at the time and he said, "Mother, what do you mean by that?" I said, "Sonny, wouldn't you like to have a little sister or brother?" And he said he would. Mr.
 10 Tupper has yet to answer me.

The Court: What is that?

Mr. McLaughlin: "Mr. Tupper has yet to answer me."

The Court: Meaning he made no reply?

The Witness: He made no reply.

Q What is Mr. Tupper's occupation, Mrs. Tupper? A He and his brother make furniture
 20 packing in New York.

Q What is that business, do you know the name of it? A Tupper Packing—S. W. Tupper Packing Company or S. W. Tupper Packing—furniture packing.

Q Have you been over there? A About three times.

Q What sort of a place is it, large or small?

The Court: Is that of any interest to us
 30 now?

Mr. McLaughlin: Only on the question of Mrs. Tupper's means.

The Court: Not now.

Q Mrs. Tupper, within the last three years did your youngster have any sickness? A Yes, sir.

Q What was that? A Sonny first had the chicken pox and then he had the measles and
 40 he had the flu and he had an infected ear.

Marian W. Tupper, cross.

Q At the time he had the measles and chicken pox, what happened, if anything, regarding Mr. Tupper? A Mr. Tupper went to stay with his mother.

Q And who did he leave in the apartment? A He left me, and I was alone.

Q Taking care of the boy? A Taking care of the boy. 10

Q When you and the baby had influenza what year was that? A I think that was 1927.

Q And what was the situation regarding Mr. Tupper at that time? A Mr. Tupper didn't pay any attention to it. I was very sick in bed, with a high fever and the only one I had to help me was Sonny or any neighbor that would come in and help me. Mr. Tupper got up in the morning and left for his work and came back in the evening. 20

Q After 1923 did anything happen to you regarding your physical condition? A Yes, sir; I was very nervous.

Q Why, Mrs. Tupper? A Because I was unhappy in the way I was living and I couldn't see any future at all to it.

Q What did that result in, that nervousness? A It was—resulted in a nervous breakdown and hysterics very often. 30

Q How long did that continue? A It continued right up to the present time.

Cross examination by Mr. Bradner.

Q Mrs. Tupper, before your marriage were you working? A I was. I worked six years before I was married.

Q At what? A In the Telephone Company.

Q And how long had you known Mr. Tupper before you married him? A Almost a year. 40

Marian W. Tupper, cross.

Q Did you know anything about him? A Yes, sir; I knew who he was.

Q Had you met—(interrupted).

The Court: What?

10 Mr. Bradner: She says she knew him about a year before she married him.

Q You knew who he was? A Yes, sir.

Q You knew his relatives, or of them in East Orange? A I met his mother and brother.

Q Where did you meet them? A I first met his brother down in Washington when he came down to see my husband, and I met his mother when I came to New York with my sister to call on her mother-in-law.

20 Q Your sister, Mrs. Smith? A No; my sister Mrs. Morris.

Q I am not quite sure I understand your testimony in relation to getting married. Was the marriage suggested by you or by him?

The Court: What difference does it make? They are married.

Mr. Bradner: Only she gave the impression that—(interrupted).

30 The Court: What difference does it make? They were married.

Mr. Bradner: It might account for their subsequent attitude towards one another, but I won't pursue it.

The Court: It would be so inconsistent. I see nothing to be gained by it.

Q Well, after you were married you went along as young people usually do, did you not?

40 A In a way, yes, sir.

Marian W. Tupper, cross.

Q You went out together? A Only when his brother was with us.

Q His brother went along? A Always.

Q The brother generally paid the bills, too, didn't he? A I don't know whether he did or not. I didn't take that much notice of it.

Q Where did you go when his brother went along? A Sometimes his brother would take us to the theatre, sometimes we would go to a friend of his in East Orange. 10

Q Well, after you went to East Orange to live and had your own apartment, did you have any friends there? A Only his friends; he had them.

Q Didn't you have any? A I had some friends of my own during the day.

Q Mr. Tupper had to go out very early in the morning, did he not? A Yes, sir; he left, I think, on the 7:10 train in the morning, but that was only within the last six years. 20

Q Well, during the last six years then he had to get up about six o'clock in the morning, did he not? A I should say half-past six.

Q He got his own breakfast, didn't he? A Which I prepared the night before and left in the ice box.

Q You used to leave it in the ice box for him, but he had to get it in the morning? A He only ate cold bread and drank milk; he doesn't drink anything hot. 30

Q He got back what time at night from New York? A Six o'clock. Six or half past six; sometimes later.

Q You spent the summer of 1923 in a house at Ocean Grove with your husband? A Yes, sir; next to Asbury Park.

Q At Asbury Park? A Next to Asbury Park. 40

Marian W. Tupper, cross.

Q Next to Asbury Park. Was that Mr. Arthur Tupper's house? A No; that was Mr. Wilbur Tupper's house, in 1923.

Q He rented it? A He did.

Q Was Mrs. Tupper, Sr., there? A She was.

10 Q Were Mr. and Mrs. Smith there? A Yes, sir.

Q In 1923? A In 1923.

Q Did you occupy the same house in the summer of 1924? A I did.

Q Were Mr. and Mrs. Smith there then? A Yes, sir, as boarders, both times.

Q Oh, yes; they were boarders and Mr. Arthur Tupper was there? A He was and his mother, too.

20 Q They all paid board? A Yes, sir.

Q And you ran the house? A And I ran the house.

Q And during this second summer you and your husband occupied the same bed, did you not? A Yes, sir.

Q Do you remember any occasion in the summer of 1924 when you made a statement to your husband that he had nothing to do with the boy, that he was not the boy's father? A I did not; I never said it.

30 Q You never said that? A Never said any such thing, never; I couldn't.

Q Did you go out in an automobile with Arthur Tupper? A Several times.

Q At that time with Arthur Tupper and didn't he ask you the direct question whether you had said that and you said "Yes" and repeated it? A I do not recall he took me out in an automobile and asked me that question or not, but I do know—(interrupted).

40

Marian W. Tupper, cross.

The Court: You don't know whether he asked you that question? You say you don't know whether Arthur asked you that question?

The Witness: In an automobile, no.

The Court: What?

10

The Witness: In an automobile, no. I don't recall whether he asked me that question in an automobile or not.

The Court: Did he ask you any other place?

The Witness: No.

The Court: Why do you emphasize not in an automobile; why do you emphasize that?

The Witness: Because Mr. Bradner asked me if he took me out in an automobile and asked me that question.

20

The Court: You would know whether a man asked you that question or not.

The Witness: Why, certainly; absolutely.

Q Did he ever ask you that question? A No, he did not ask me that question.

Q Did you ever say in his presence either at Ocean Grove or Asbury Park or at East Orange that Wilbur Tupper was not the father of the boy? A Absolutely no.

30

Q Do you recall going back to East Orange after the summer of 1924? A I do.

Q And you continued occupying the same bed there for some time after that summer, did you not? A No; we didn't continue to occupy the bed; Mr. Tupper was on the couch.

Q Yes. Did Mr. Tupper—(interrupted).

40

Marian W. Tupper, cross.

The Court: Let me know—when did your husband leave the bed and go on the couch, in 1923 or 1924, the first or second year?

The Witness: I think it was when Sonny was not a year old, in 1921. Sonny was born in 1920.

10

The Court: You told me before that in the spring of 1923—(interrupted).

The Witness: That I didn't have sexual relations with him, but he was sleeping on the couch then.

Q When you went to Ocean Grove in the summer of 1924 did you go there from your apartment in East Orange? A Yes, sir; I think I did.

20

Q And while you were at Ocean Grove you occupied the same bed, did you not? A Yes, sir; while down there in the summer.

Q How long were you there in the summer? A I think it was three or four months.

Q Up to the 1st of October? A I don't know whether it was the 1st of October, but it was around there, some time in September or October.

30

Q When you went back to East Orange after the summer of 1924 did you leave the bed and go to the couch? A No.

Q Did you ever leave the bed and go to the couch? A Never. I have always been in the bed.

Q Didn't you tell your brother-in-law, Arthur Tupper, that you left the bed and went to the couch? A No.

Q And after a short time your husband—told you that you would be more comfortable in the

40

Marian W. Tupper, cross.

bed with the boy and he would go to the couch, and you took the bed? A No.

Q That did not occur? A I do not recall him ever saying that to me.

Q Never told you that?

The Court: You say you didn't or you didn't recall? 10

The Witness: I do not recall him ever saying such a thing to me.

The Court: Not he to you, but you to him, was the question.

The Witness: No; I never did; I never told him that.

Q Did you go to Washington quite frequently? A Once a year. 20

Q What time of the year? A Towards the latter part of my married life I went there in the summer, after 1924.

Q Did you go there in 1925? A I think I did.

Q Where did you go in Washington? A To my sister's.

Q What sister? A My sister, Mrs. Smith, Mrs. German Smith.

Q Did you go there in 1926? A Yes, sir. 30

Q Where did you go then? A I went to Mrs. Smith's and then I went to Mrs. Miller's, my sister in Winchester, Virginia.

Q And in both those years, in 1925 and 1926, you were separated from your husband in your own home, is that the fact? A Yes, sir.

Q What was your feeling towards him then? A I felt towards him like I had always felt, only I was very unhappy that the circumstances existed as they were. 40

Marian W. Tupper, cross.

Q You continued to live with him and put up with it, didn't you? A I did, because I couldn't do anything else. I wasn't financially able to do anything; Sonny was a baby.

Q Did you lose affection for him? A I have never lost affection for him.

10 Q You still have that? A I still have that in one sense of the word, yes, sir.

Q When did you finally determine that you would no longer put up with it? A I determined that this summer.

Q This summer? A This fall, or, this spring, I mean.

Q This spring? A Yes, sir.

Q That is after you had seen some lawyer, you then determined that you would no longer put up with the conditions. A I couldn't see
20 any future to it and I was getting so nervous and upset over the way things were going.

Q But up to that time you had to a certain extent assented to it, hadn't you? A In a way. I tried to make the best of it and tried to give him a chance to see if he wouldn't do better or do some way—make some amends.

Q You used to leave a note for him when you went to Washington, did you not? A Yes,
30 sir; I left a note for him.

Q You would come and go without his having any knowledge of it? A No, never. I have always told him. I have always asked his consent to go. Sometimes he would threaten—several times, if I went, that he would take Sonny away from me and he would say I was going to stay, which I didn't do, and I therefore left a note for him to let him know that I wasn't going to desert him as he accused me of
40 doing.

Marian W. Tupper, cross.

Q Those notes generally expressed your feeling towards him or what? A Yes, sir; they did express the feeling towards him.

Q Is that your writing, Mrs. Tupper? A Yes, sir.

Q I would like to read that to you: "Saturday, July 10, 1926. Dear Wilbur: I wrote you at the office and told you in my letter. Sonny and I are leaving at noon on the ten train to visit my aunt, sisters and brothers for a few weeks, and under the conditions at my home there, I feel as if I must go to see them. They want to see Sonny and I as much as you do. We don't go there but once a year, and as things are one can never tell if it will be your last visit with them or not. They will be very glad to see you, too, if you could come, as they have asked you many times to come. Take good care of yourself and write us often. Love and kisses from both (with four crosses) Marian. P. S. I have put the silver in the bank. Am sorry you couldn't go to the train with us." 10 20

Mr. Bradner: I offer it in evidence.

(Paper marked Exhibit D. 1.)

Q Do you remember writing that? A I remember writing that; I remember it very distinctly. 30

Q You didn't feel much resentment for him at that time, did you? A Well, I didn't like his actions. We had had an awful argument about going to Washington and he—he didn't want me to go away at all to Washington, and I thought that Sonny should have a vacation and my aunt was very sick at the time, and while it didn't cost Mr. Tupper but my car 40

Marian W. Tupper, cross.

fare there, I thought that I would see my aunt and give Sonny a vacation, too.

Q He objected to your going? A He certainly objected to my going.

Q And that is the reason you sent him love and kisses? That was a lot of kisses, the crosses? A No; that is the only way I could ever express my affection for Mr. Tupper.

Q Well, this continued right up until you went away last summer, did it not? A The disagreeable feeling, yes, sir, between us.

Q When you went to Washington this last spring or summer did you intend to stay away? A I did not. In fact, I had asked the janitor if he wouldn't ask the landlord to have my apartment done all over.

20 The Court: You filed your petition in July. Was that before or after you went?

The Witness: That was just before I went.

The Court: Still you expected to come back and live with your husband?

The Witness: I expected to come back to the apartment.

30 The Court: And live with your husband after filing this suit?

The Witness: Not exactly live with him, no.

Q You expected to come back and continue the same relations? A I did not, no. I expected to come back and to get what belonged to me.

40 Q What do you mean by that, your property there? A My furniture and my things—personal things and things that I had left there.

Marian W. Tupper, cross.

Q After bringing your suit, then you intended to come back and take what belonged to you? A Yes, sir.

Q Didn't you clear out the house pretty well before you left? A I did not.

Q Didn't you take some things? A I did. I took some of my personal things. 10

Q And you took the boy with you? A I did, with his consent.

Q Did your husband know that you were going? A He did.

Q Did he object to your going? A He gave me a check to go.

Q What did you tell him you were going for? A I told him I was going down to the funeral, to my aunt.

Q You told him the truth about it, did you? A I did. 20

Q Was there a funeral? A Absolutely.

Q But you didn't intend to come back? A I did intend to come back.

Q Then when did you go, before or after you filed your petition? A I went after I signed my petition.

Q You filed your petition in July? A Yes, sir; just before I went. I didn't know how long I was going to be at that time. 30

Q Well, you swore to the petition; you knew about that? A Yes, sir; I knew about that.

Q You knew about that? A Yes, sir.

Q You also knew that Mr. and Mrs. Smith had made affidavits about your petition for alimony at Washington; you knew that, didn't you? A Yes, sir; I did.

Q Were you there at the time they made them? A I did not—I was not. 40

Marian W. Tupper, cross.

Q You were not there? A No.

Q You said in your direct examination that Mr. Tupper had given up the apartment. How do you know that? A Because you wrote to my lawyer and told them that you had advised him to give it up.

10

Mr. Bradner: May I have that letter?

Q You heard from your lawyer that Mr. Tupper—something to this effect, wasn't it, that Mr. Tupper said that he didn't know what to do, and as the lease would expire the 1st of October he wanted to be advised what was to be done or he would have to give up the apartment then, isn't that so? A The letter was along those lines, yes, sir.

20

Q Did your counsel also notify you that they had heard from me that Mr. Tupper would like to see the child? A I took the child to see Mr. Tupper.

Q I am not asking you when you took it. At that time, that was some time ago, wasn't it, that you heard from your counsel about seeing the child? A No; not some time ago. It was within the last month.

30 Q You hadn't heard before that? A I hadn't heard before that.

Q Didn't you hear last September? A Last September?

Q Yes. A In regard to seeing the child?

Q Yes. A No.

Q Did you put that boy in a boarding school in Washington? A What else could I do? He had to go to school.

Q Did you? A Yes, sir; I put him in the school.

40

Marian W. Tupper, cross.

Q And in Miss Tuthill's school? A In Miss Tuthill's school.

Q Did you put him there for a year? A I put him there for a year. You have to enter for a year when you put them in the school.

Q How much a year? A Five hundred and twenty-five dollars. 10

Q How did you expect to pay it? A I expected to work and I expected my family would help me.

Q What family, you mean in Washington? A My sisters and brothers. I had no mother and father.

Q Would they participate in that, to have you put the child in the boarding school and say they would help you? A He had to go to school and I had to work as long as Mr. Tupper didn't give me any money. 20

Q You certainly didn't intend to come back when you put him in school there, did you? A I did come back.

Q Come back to East Orange? A I came back to East Orange and came back to New York. I visted my sister and also visited my friends in East Orange.

Q When? A After. 30

Q Where did you live in New York? A I was over in Bronxville with my sister.

Q Did you live at the Ansonia Hotel for a while? A I stayed there a time.

Q Who was there? A My son.

Q Who else? A Nobody else.

Q How did you get your son there, bring him out of school? A When Mr. Tupper went to Washington and made such a scene at the school that I had to take him—he tried to kidnap him. 40

Marian W. Tupper, cross.

Q Who told you he tried to kidnap him? A He asked to have Sonny and he wanted Sonny—the teacher told me that; he asked to take Sonny with him.

10 Q Didn't she tell you that she refused to let him see the boy? A She didn't know who Mr. Tupper was; she hadn't seen him.

Q Didn't she tell you he showed his railroad ticket and things of that kind—things of that kind—identification cards? A He—she did tell me that Mr. Tupper made such a scene and threatened to have her arrested—(interrupted).

Q Did she tell you that she had heard from me? A Later, after Mr. Tupper had been there.

20 Q And she had sent me a copy of the application to put the boy in the school? A Yes, sir; you requested it.

Q Well, you had given some reference when you made that application? A I did.

Q You didn't give Mr. Arthur Tupper as reference, did you? A Why should I?

Q You gave a Mr. Parham, is that the name? A Mr. Parham is my counsel.

Q He is your counsel? A Yes, sir.

30 Q You gave him as a reference? A I did.

Q He is a member of the Bar in New York?

A He is.

Q I show you what purports to be a copy of the school application certified by Miss Tut-hill. Do you recognize that as a copy? A Yes, sir.

Mr. Bradner: I offer it in evidence.
(Paper marked Exhibit D. 2.)

Marian W. Tupper, re-direct.

Re-direct examination.

Q Mr. Bradner asked you about your husband going out early in the morning and coming back at night and about breakfast and then he said to you, "And you assented to it to some degree" and you said, in effect—(interrupted). 10

The Court: We understood that—tolerated it. I supposed.

Mr. McLaughlin: I don't want any inference that she assented to the non-intercourse.

The Court: I did not gather that impression at all.

Q While you were in East Orange did you know Mrs. ? A Very well; she was my next-door neighbor. 20

Q For the period while you lived there, and Mr. and Mrs. Silk who have made affidavit in this case? A Yes, sir.

Q Where are they now? A They are in Australia.

Q Is that the reason they are not in court today? A Yes, sir.

Q After 1924, which, as I understood you, was the last summer your husband took you away— A Yes, sir. 30

Q —did he ever take you away after that? A No; he has never taken me away. We have never been anywhere alone.

Q This going to Washington in the summer about once a year, what was that for?

The Court: A visit.

George W. Yancey, direct.

GEORGE W. YANCEY, sworn for petitioner.

Direct examination by Mr. McLaughlin.

Q Where do you live? A 152 Halsted street, East Orange.

10 Q What is your occupation? A Superintendent of the apartment.

Q Mr. Yancey, please talk out loud. A All right.

Q You said you were superintendent of the apartment house at Halsted street? A Yes, sir.

Q Is that where Mr. and Mrs. Tupper lived? A Yes, sir.

Q How long have you been superintendent? A Three years.

Q And have you charge of the whole building? A Whole building, thirty-two families.

Q And do you make your own repairs? A Yes, sir.

Q Do you know Mr. and Mrs. Tupper? A Since they have been there.

Q What was that for, about two years? A Three years the first day of December.

Q Were you ever in that apartment, the Tupper apartment? A Frequently, every other day anyhow.

Q Why? A For repair work, plumbing or electric or painting or paper hanging.

Q Did you ever see Mr. and Mrs. Tupper there? A Yes, sir.

Q What, if anything, did you notice regarding the two while you were there? A Well, I noticed in the evening while I was there working—I noticed him come home from New York, from his business, get in about six to half past,

George W. Yancey, direct.

and I have noticed that when he come into the house that he did not speak to his wife or his boy as usually a husband should do and greet her and ask her how she would feel or anything of that kind.

The Court: What is that? 10

The Witness: Greet her and ask her how she feels or kiss her—I never seen that, but he always spoke to me, and he pulled off his coat and hat and sat and eat his supper and I never noticed him say anything to her.

Q What would he do after that that you have seen? A If I was still there he would put on his coat and hat after his supper and walk out. 20

Q Did you ever see him talking to Mrs. Tupper at all? A Once in a while.

Q What would he say, if anything? A Well, that is part of the conversation that I don't know much about, only one time that I remember she asked him a question.

Q When was that? A On the 15th day of May. I was there fixing—(interrupted). 30

Q This year? A This year. I was there fixing her washer on the hot water faucet in the sink, to open the bath tub so as to get the water out there so that they could take a bath, it had plugged up, and when he came in she had his supper all ready and he sat down, spoke to me and he sat down and commenced to eat his dinner, and a conversation arose between the two of them—I didn't catch exactly the first word that she spoke to him, but I wasn't ten feet away from them. 40

George W. Yancey, direct.

Q Where were you, in the pantry or something? A In the kitchen; and he sat right inside of the dining room, not over ten feet away from him, at the table.

Q What was said that you heard? A And I heard her ask him—said to him—she says,
 10 “Wilbur, Mable is pregnant.” Mr. Tupper replied, “Yes; I know it.” Well, Mrs. Tupper then said, “What do you think about me?” He shrugged his shoulders and kept his head down and still eating. I was looking direct at him and she said, “Wilbur, I mean, what do you think about me. Don’t you think it is time for me?” The boy says, “Mother, what is pregnant?” Mrs. Tupper sat for a moment and she says, “Oh, Sonny,” she says, “I am just only
 20 saying how would you like to have a little sister or brother; we were just talking that.” So then she continued and asked him again and he didn’t answer her from the time she asked him until he got through eating, and when he spoke he come, stepped to the kitchen door and he said, “George, there is always something, ain’t it? Something going on always.” I said, “Yes; plenty of work.” He says, “Yes, there is always something or other.” I don’t know what
 30 way he meant that, but that is what he said to me.

Q You are still the superintendent of—(interrupted). A I am still the superintendent of those apartments.

Q When you would go in the apartment of the Tupper’s, Mr. Yancey, during the times you did go in, how did the manner of keeping the apartment seem to you as far as Mrs. Tupper was concerned? A Well, it was always clean.
 40 You mean—clean and kept in good order.

Mary Van Dine, direct.

Q Looked like a home? A Looked like it would be a nice home if everything was all right.

Q What was Mrs. Tupper's manner with the child? A Mrs. Tupper? She truly loved her child and she always kept him and made him mind and looked like she tried to raise him as he ought to be raised, mannerly to everybody. 10

Cross examination by Mr. Bradner.

Q You made an affidavit in this case, didn't you? A Yes, sir.

Q Do you remember making the affidavit? You went down to the office in the Prudential Building to make an affidavit? A Yes, sir.

Q And did you tell the whole story then of what occurred on that occasion? A Just the same. 20

Q At that time why didn't you tell about your subsequent conversation with Mr. Tupper in which he said "There is always something"?

A That is what I did say, sir.

Q Did you put that in your affidavit? A I did, sir.

Q Now, let's see if you did.

The Court: Never mind that. The lawyer didn't think it was important and didn't put it in. 30

MARY VAN DINE, sworn for petitioner.

Direct examination by Mr. McLaughlin.

Q Where do you live? A 9 Columbus street, Bloomfield, New Jersey. 40

Mary Van Dine, direct.

Q What is your occupation? A Domestic.

Q Mrs. Van Dine, you were the girl who was employed by Mrs. Tupper for the last five or six years? A Yes, sir.

10 The Court: Last eight years is the testimony.

Q How long was it, Mrs. Van Dine? A Well, I guess it has been about seven years.

Q Right after the baby was born? A Yes, sir.

Q And for the first few years you came there daily, did you? A Yes, sir; I came at eight and left after dinner.

20 Q The last two or three years you came there at intervals during the week? A Yes, sir; I came twice a week to wash and clean.

Q Do you remember what the sleeping arrangements were at the Tupper apartment? A Yes, sir; Mr. Tupper slept in the living room and Mrs. Tupper slept in her bedroom.

Q How do you know Mr. Tupper slept in the living room? A Because I made his bed up every day and moved his pajamas.

30 Q They were out in the living room or on the couch? A Yes, sir, on the bed.

Q During that time while you were there, Mrs. Van Dine, what did you observe, if anything, as between Mr. and Mrs. Tupper? A Why, I think it was last fall I came to work one morning, last year, 1927, and Mrs. Tupper was very sick, and I asked her what was the trouble and she said that she was so unhappy.

40 Mr. Bradner: I object to the conversation with Mrs. Tupper. I do not think she

Mary Van Dine, direct.

ought to be allowed to make evidence for herself.

Mr. McLaughlin: This part of this young lady's testimony is a little ahead of the story, but it can go in now as far as I am concerned. It is a part of our case which is corroboration under the Haskill case. 10

The Court: I am not going to permit it. I do not think the Haskill case is intended to go to the extent of permitting you to make testimony for yourself. Go on with the testimony.

Q During the period you were there, not just the specific instance in 1927, what were the relations between Mrs. Tupper and her husband that you observed? A Well, it was very indifferent. 20

Q On whose part? A Why, on Mr. Tupper's part. For this reason: He would come in, wouldn't ask her how she felt or anything like that, and I asked Mrs. Tupper why was it he acted so indifferent.

The Court: You asked what?

The Witness: I asked Mrs. Tupper why was it he was so indifferent. 30

Q Never mind the conversation with Mrs. Tupper. I want what you saw during the years you were there regarding Mr. Tupper's conduct towards his wife. Did you ever see him kiss her? A No; I never saw him kiss Mrs. Tupper the whole time I have been working for them.

Q Did he talk to her while you were there? A Never had anything to say; I never heard him. 40

Mary Van Dine, direct.

Q Did you ever see him come in the house?

A Yes, sir; sometimes I would see him come in.

Q When he would come in what would he do?

A Hang up his coat and hat and sit down and would have his dinner.

10 Q Was there any conversation, any talk between him and his wife? A Never.

Q And when he would eat his dinner what would happen, as you saw? A Why, there wasn't any conversation at all between the two.

Q Would he stay in? A There was no conversation at all between the two.

Q Would he stay in or go out or what? A Sometimes he stayed in and then again he would eat and go out.

20 Q In 1927, at a time when you said that Mrs. Tupper was feeling badly, what happened then?

A When she was feeling bad?

Q Yes. Did you have a talk with Mrs. Tupper? A Yes, sir. I came in to work on that morning and she was in bed.

Q Did she tell you something, yes or no? A Yes, sir.

30 Mr. McLaughlin: Now, your Honor, I respectfully submit that this girl's testimony is that she was employed by the Tupper—(interrupted).

The Court: Ask your question.

Mr. McLaughlin: I do not want to ask the question. It is going to be what the conversation was.

The Court: I cannot rule unless you do.

40 Q What was the talk of Mrs. Tupper?

Virginia J. Smith, direct.

Mr. Bradner: I object.

The Court: Objection sustained.

Mr. McLaughlin: Now, may I respectfully urge that here is this girl who was employed in the Tupper household—(interrupted).

10

The Court: I understand the situation, Mr. McLaughlin: I do not think the testimony is competent. I do not think the Has-kill case was intended to introduce testimony of this character.

(No cross examination.)

VIRGINIA J. SMITH, sworn for petitioner.

20

Direct examination by Mr. McLaughlin.

Q Where do you live? A 1416 Decatur street, Washington, D. C.

Q What is your occupation? A I have none; I am a wife.

The Court: You must have some occupation.

30

The Witness: Keeping house, probably.

Q You are a sister of Mrs. Tupper? A I am.

Q And are you the lady that she would go to visit in Washington? A I am.

Q Since she has been married, Mrs. Smith, have you observed any changes in Mrs. Tupper?

A I have observed that she has been extremely nervous, unhappy.

40

Virginia J. Smith, direct.

Q When she was at Washington at your place in 1924, did you—whatever date it was—did you have any talk with your sister regarding her married life? A Yes, sir.

Q What was that talk?

10 Mr. Bradner: I object.

The Court: Objection sustained.

The Witness: My sister told me—(interrupted).

Mr. McLaughlin: Your Honor—(interrupted).

The Court: Do not argue with me. Even now you haven't brought the situation within the Haskill case. If you bring it within the situation in the Haskill case I will sustain the objection and let you put the testimony on the record.

20

Q In Washington, Mrs. Smith, prior to this talk, what was the condition of your sister at that time?

The Court: Do you mean back at the beginning of her married life?

Mr. McLaughlin: I mean at that time. Her condition regarding her physical well being, was it upset or what?

30

The Witness: Prior to 1924?

Q No; at the time you talked with her? A Yes, sir, she was decidedly so.

Q And had you, as her sister, been very close to her? A Yes, sir; I think closer than any one of our family.

Q Did you ask her what was the matter? A I did.

40

Virginia J. Smith, direct.

Q And what was her attitude, Mrs. Smith, in revealing to you what she did say about it? A She seemed extremely unhappy, extremely nervous.

Q I want to know whether or not she was reluctant to tell you what she did tell you? A Yes, sir; she was. 10

Mr. Bradner: I object. It seems to be leading up to the same situation.

The Court: Perfectly proper. Go on.

Q And did you persist in finding out what was the matter with her? A I did. I have always had my sister's welfare at heart.

Q And finally she did tell you? A She did tell me. 20

Q What did she tell you?

Mr. Bradner: I object.

The Court: At that time did you notice her condition—her changed condition?

The Witness: You mean— Yes; I did. I noticed she was extremely nervous and unhappy.

The Court: And was it with reference to that that you asked her? 30

The Witness: Yes, sir; it was.

Q What did she tell you about it?

The Court: Objection sustained. Now you can put it on the record. Put it on the record under objection. I do not think in a contested case that the Court ever intended that it should be permitted. 40

Wilbur D. Tupper, direct.

Q Answer the question. A What was your question?

Q What did she tell you about it? A She told me she was extremely unhappy, that she and her husband—that her husband had refused sexual intercourse with her, made her extremely unhappy. She wanted a family, she would like to have another child.

(No cross examination.)

Mr. McLaughlin: I have Mr. Smith and Mrs. Cornish who will give the same testimony.

The Court: Will you agree they will, if called, give the same testimony?

Mr. Bradner: Yes, sir. Mr. Smith has made an affidavit, but Mrs. Cornish has not. I will admit that they will swear to the same thing.

PETITIONER RESTS.

WILBUR D. TUPPER, sworn for defendant.

Direct examination by Mr. Bradner.

Q Where do you live? A 79 Chestnut street, at the present time, East Orange.

Q What is your occupation? A I am a manufacturer.

Q You are the defendant? A I am.

Q How old are you? A Thirty-eight.

Q How old is your wife? A Same age, within a couple of months, supposedly.

Q You were second lieutenant in the Army, weren't you, just before you were married? A Yes, sir.

Wilbur D. Tupper, direct.

Q After your marriage, where did you go to live? A We set up our home in East Orange, 148 Halsted street.

Q In an apartment there? A Yes, sir.

Q Have you given up the apartment? A Yes, sir.

Q When? A When the lease expired. 10

Q When? A This year, 1st of October.

Q When did your wife go to Washington this last time, this year? A On Friday, the 13th day of July.

Q Did you know she was going? A Yes, sir.

Q And for what purpose was she going? A Supposedly to attend the funeral of her aunt.

Q Did you know that she contemplated bringing the suit against you? A I did not. 20

Q Had anything ever been said to you in that direction? A She has said several times she would like to, if that is the answer to the question.

Q And when did she say that? A At various times.

Q And what did she say in connection with it, bringing suit against you? A Well, she said if I was a gentleman I would give her cause for divorce. 30

Q Do you recall the last time she said that? A Not the exact date, no, sir.

Q Or how long ago? A Why, I should say it has easily been said within the last two years, possibly within the last year. She said it several times.

Q When she left the last time were you in the house at the time she actually went out? A No, sir; she left in the morning. I was in New 40

Wilbur D. Tupper, direct.

York at that time. That is the time she left by train.

Q And at what time did you usually go to New York to your business? A I left regularly on the 7:13 train from East Orange, that is, from Brick Church.

10 Q And what time did you get back? A Just a few minutes after six.

Q And what is your occupation? A I am practically superintendent for my brother in the manufacturing business, which is his and which he conducts in New York.

Q You receive a salary? A I do.

Q Your wife, of course, knew what salary you received? A Supposedly, yes, sir; she mentioned it.

20 Q Did you have any knowledge of any abortion having been performed on your wife at the time? A No, sir.

Q When did you first hear about it? A She told me—related that such a case had been done probably just after the child was born, that is, Arthur.

Q The present child? A Yes, sir.

30 Q And what was the occasion for her telling you that? A I cannot recall the exact circumstances of that.

Q And after this boy was born in 1920 were you living together as man and wife and occupying the same bed and having marital relations? A At the time he was born?

Q After he was born? A Yes, sir.

Q Up until what time? A Up until the summer of 1924.

40 Q What part of the summer? A Approximately the middle of July.

Wilbur D. Tupper, direct.

Q And what occurred then? Now, you can tell your recollection of just what it was in your own way. A Why, in regard to what occurred, my wife and I and a couple of other parties were sitting on the porch of the cottage at Ocean Grove and just how the conversation started I do not remember, but there is one thing, one part of the conversation I never will forget, and that was the flat statement of my wife that I was not the father of her child who was named Arthur Waters Tupper. My wife was present and two other parties which I can name if your Honor wishes. 10

Q Who were the other parties who were present? A Her sister, Mrs. Smith, and her brother-in-law, Mr. Smith.

Q Did her sister at the time make any remark? A She most certainly did. 20

Q What did she say? A She said—I will attempt to give this just as correct as I can in her own words—I think—I am sure the substance of what she said was that she never expected to hear a sister of hers pass such a remark, true or false, and she was horrified at it.

The Court: Is that the same Mrs. Smith who was on the witness-stand? 30

The Witness: Yes, sir.

Q What was the occasion of making that remark?

The Court: How did it come about?

The Witness: That is a mystery to me as to how it came up, the subject of that conversation. There had been small quarrels and such things. It came up primarily, to 40

Wilbur D. Tupper, direct.

the best of my recollection, in the fact that nobody would ever take that child away from her and she would go to any length to prevent it. That I cannot swear to, but to the best of my knowledge and belief, that was the start of the conversation.

10

Q Was it said in anger or—(interrupted).
A No, sir; it wasn't said in anger.

The Court: In acrimony?

The Witness: No; it was not. It was said—(interrupted).

Q Had you made any threats to take the child away? A I had not.

20

Q Was it said jocularly? A No, it was not.

Q Give us the atmosphere, under what circumstances? A It came out of a clear sky, your Honor.

The Court: How could a thing of that kind come out a clear sky?

The Witness: It came out probably with regard to the conversation that was previous.

30

The Court: What was it?

The Witness: Simply that she would go to any length to keep the child; that the child was hers.

The Court: What prompted that?

The Witness: That I do not recollect. I do not recollect all of the conversation. I was as much thunderstruck as the others were to have such a conversation come up.

40

The Court: Was there quarrelling going on?

Wilbur D. Tupper, direct.

The Witness: There probably was.

The Court: Not probably; you know.

The Witness: Undoubtedly there was.

Q What do you say the quarrelling was about? A That I do not recall.

Q Who had been quarrelling? A My wife and I, very evidently. 10

The Court: There had been a discussion that evening?

The Witness: Yes, sir; Mr. and Mrs. Smith happened to be present, possibly one word brought on another, but that part of the conversation I never would forget, and I haven't.

20

Q Well, did you report to your brother anything about it? A I did. I repeated that part of the conversation to him.

Q Do you know whether your brother saw your wife after that? A He told me afterwards that he had.

Q Never mind what he told you. What you know. A Yes, sir.

Q Did you see him go out with her anywhere at that time? A I don't know as I could swear—I couldn't swear to that. I possibly did, but I do not recollect it that vividly. 30

Q Well, after that had occurred did you remain there at Ocean Grove? A Yes, sir; for approximately a month, until we went home that summer.

Q And who were in that house at the time; who were stopping there? A My mother was there, my brother and Mr. and Mrs. Smith for a short time after that conversation. 40

Wilbur D. Tupper, direct.

Q They went home, I believe, approximately the first of August? A The conversation took place just shortly before they left.

Q Did you go to Washington that summer or fall? A No, sir; I have no recollection of having gone.

10 Q You continued to sleep in the house with your wife after that occurred? A As long as we kept that house, for the rest of the season, yes, sir.

Q Did you have sexual relations with her? A No, sir.

Q After that occurred? A No, sir.

Q Have you ever had? A Not since that time, no, sir.

Q When did you get back to East Orange? A It was probably about during the second week of September.

20 Q And then what happened after you got back to East Orange? A After we got back to East Orange my wife went on the couch, which was back of the living room, with the youngster. He had been sleeping on that as that was his regular bed at that time, and I occupied the bedroom. She left the bed.

30 Q How long did that continue? A Possibly for a matter of a couple of nights. I told her "If you look at things that way," I said, "you might better be comfortable with the youngster, and," I said, "you take the bed and I will take the couch." That is the condition that existed from that day to this with the exception of when we took the larger apartment there was a room provided for the youngster which he was supposed to occupy.

40 Q What do you mean by that, larger apartment? A That year when we came back, first

Wilbur D. Tupper, direct.

of October we went into a larger apartment; that was the fall of 1924. The youngster was provided in that larger apartment with a room of his own and provided with a bed which he was supposed to occupy. As a matter of fact, for about six months he did not. He occupied the bed together with my wife, in spite of my objections. I didn't think it the proper thing for him to sleep with his mother regardless of the conditions between my wife and myself. 10

Q Did he have a full bed? A He had a three-quarter size bed, yes, sir; it was a small room.

Q What was the size of this lounge? A It was a full couch; it was probably three and a half feet wide and full length.

Q Not the width of a full bed? A Oh, no, sir. 20

Q As wide as the boy's bed? A No, not quite, no.

Q Did you know why your wife didn't go into the boy's bed instead of the couch? A She did occasionally.

Q I mean when you suggested that she return to the full bed? A At that time—(interrupted). 30

Q The two nights that she was on the lounge? Did she say why she wasn't in the boy's bed which was larger? A That occasion took place before we moved in. You see, there was an interval in there that we were in that apartment; the change took place at that time. We were in our back apartment for possibly a period of two weeks from the time we left Ocean Grove until the first of October when we took the lease on the new and larger apartment. 40

Wilbur D. Tupper, direct.

Q When you went to the larger apartment she went to the bed? A Yes, sir.

Q Now, did you have any conversation with your wife in your brother's presence in East Orange after the occurrence at Ocean Grove?

A Well, I had a great many conversations with her, yes, sir.

Q Did you have any conversation with relation to what had been said down there in his presence? A You mean regarding the statement she had made?

Q Yes. A Why, yes, the conversation came up between my brother and myself when my wife was present. She repeated the conversation again in both our presence. Whether it was—it was about that time—whether we had returned to East Orange or whether it was down to Ocean Grove I do not remember, but I remember positively that the conversation took place at that time, but just where I couldn't absolutely say. My impression was that it was while we were down at the shore.

Q Did you go to Washington this fall? A Yes, sir; I did.

Q Did you know that the boy had been put in a school? A I had reason to believe he had been put in a school, yes, sir.

Q Where did you get the information? A It came to me confidential, unsolicited.

Q How, by telephone or letter or what? A By letter.

Q Signed by anybody? A No.

Q Anonymous? A Anonymous, yes, sir.

Q And you went to Washington? A I went to Washington and confirmed the information.

Q And you went to the school? A Yes, sir.

Wilbur D. Tupper, direct.

Q And asked for the application? Who did you see there?

The Court: Keep to the main issue.

Q Your wife has never returned to the home, has she? A No, sir.

Q Have you and she had any discussions about your relations? A Yes, sir; we have. 10

Q Have you ever told her why you didn't wish to have sexual intercourse? A I don't think I have out flat flooted, to use a poor expression. I think she knew it. Undoubtedly she did. I think there were a lot of things that were unnecessary to say.

Q Did you ever have any unnatural relations with her such as she stated, French style or going down on her? A I did not; most assuredly. 20

The Court: She didn't say that she did.

Mr. Bradner: I understood her to say— she said it in her affidavit.

The Court: I am calling your attention to the fact that she did not say that, so that you may frame your question properly. His answer does not meet it.

Q Did you ever make any such suggestion to her? A I did not. 30

Q Has she ever asked you why you did not have connection with her? A Not to my recollection, no.

Q You would know whether she has or not? A I would say no.

Q Do you know anything about her being sick and having the flu, as she testified to? A I wasn't aware that she ever had what I would know or what is commonly known as the flu. I have no recollection of that. 40

Wilbur D. Tupper, cross.

Q Was she at home sick for any length of time? A She possibly has had a sick day or two, but not over any period that I remember.

Q Well, now, Mr. Tupper, what has been the reason for your attitude of coolness and indifference towards her? A The statement re-
10 regarding the child.

Q That is the only reason? A Absolutely.

Cross examination by Mr. McLaughlin.

Q And was that the reason you refused to have sexual relations with her, Mr. Tupper? A Yes, sir.

Q Did you ever tell her that point blank? A I don't know as I told it out in plain words.
20 It was understood.

Q Understood? A Yes, sir.

Q And when she would request sexual relations you would ignore her, is that it? A She has never made any request to the best of my recollection.

Q Never since 1924? A With the exception of one occasion that you could twist into it and that was the conversation which Mr. Yancey referred to; that was the one and only
30 time.

Q There was such a conversation? A Absolutely.

Q And what did you say in reply? A I said nothing.

Q Since 1924, Mr. Tupper, have you slept on the couch? A Yes, sir; I have.

Q Did Mrs. Tupper ever come to you on the couch? A I have no recollection of it, no, other than the couch is in the living room and
40 we have used it at times for sleeping in the eve-

Wilbur D. Tupper, cross.

ning or something like that, but as for ever occupying the bed with me as a bed, she has not.

Q Will you deny that she ever came to you after you went to the couch with the request for sexual intercourse? A I have no recollection of her having done it. 10

Q You won't say that she did not? A I do not say that she has not come in there of an evening or something like that and sat on the edge of the bed and chatted, no; that is very possible.

Q And if she did come you refused, is that right? A The question didn't come up; it was not a case of refusal. That question never entered into it. 20

The Court: You would have refused had she requested?

The Witness: Why, naturally, to be consistent, I would have.

Q After this conversation that you tell us about in Ocean Grove in 1924? A Yes, sir.

Q When was that, approximately, in the middle of the summer? A It was probably the second or third week in July. 30

Q And you stayed there until October? A Yes, sir.

Q Occupying the same bed? A Yes, sir.

The Court: The conversation was in July.

The Witness: Yes, sir; it was between the middle and latter part of July, your Honor. 40

Wilbur D. Tupper, cross.

The Court: Didn't I understand you to say it was in August and the Smiths left shortly after?

The Witness: Yes, sir; they did, yes, sir; the Smiths left shortly after—the Smiths left before the season closed.

10 The Court: Didn't you say that this conversation took place in August.

The Witness: No, your Honor, not intentionally, no. My evidence was that it happened between the middle and probably the second or third week of July. I mis-spoke evidently if I did say that.

Q In any event for some period after that in Ocean Grove you and your wife occupied the same bed together, is that right? A Yes, sir; we did.

Q And if she made any request for intercourse during that period it was refused, was it? A Yes, sir; if she made any request, but she didn't.

Q Now you say that out of a clear sky this talk—(interrupted). A Yes, sir.

Q Out of a clear sky she said no one would ever take the child away from her, is that right? A Yes, sir.

Q In your presence and Mr. and Mrs. Smith's presence? A Yes, sir.

Q What was the talk just before that? A I do not recollect just what led up—one thing led on to another, but as for having a stenographic mind and remembering all the conversations, that I cannot do.

Q This is not the opening ball of the conversation.

40

Wilbur D. Tupper, cross.

The Court: He said that before.

The Witness: No; I didn't say it was.

Q Then she followed that up with saying that you were not the father of her child? A Yes, sir.

Q Is that right? A That was the bold statement. 10

Q And you haven't any idea what the conversation was about at all? A I cannot say what led up to that, no.

Q You people were talking about the Stillman case, weren't you? A I have no recollection of this talk coming over that at all. I would say it was not, but I have absolutely no recollection of that starting of the conversation.

Q Do you remember the Stillman case? A No; I don't say that I do. 20

Q Did you ever hear of the Stillman case? A Naturally; who hasn't.

Q Will you say that was not in the conversation that day? A I will not say it.

Q Didn't you say that no matter what happened Mr. Stillman would retain the baby? A I have no recollection of any such thing.

Q And didn't Mrs. Tupper on or about that time in reply to that say that Mrs. Stillman sooner than have that happen had better say that Stillman was not the father of the child? A I have no recollection of that having been the conversation. 30

Q And wasn't that the substance of the talk which you are twisting into this supposed declaration of Mrs. Tupper now? A I am not twisting anything.

Q Later on you say there was a talk along the same lines between Mrs. Tupper, your brother and yourself? A Yes, sir; there was. 40

Wilbur D. Tupper, cross.

Q In East Orange? A In East Orange or down at Ocean Grove shortly after—it was either shortly after we reached home or shortly before.

Q And she again made this statement? A She made the statement.

10 Q That you were not the father of the child? A Yes, sir; she did.

Q In the presence of your brother? A Yes, sir.

Q And your brother is ready to tell about that? A He surely is.

Q Did you ever make any investigation? A No; I never did.

20 Q You knew it was not so? A I am not saying what I knew.

Q You knew that the boy was the image of you? A I did not—I am not saying anything regarding that.

Q You know now he is your youngster? A I am not saying anything.

The Court: Answer the question instead of “not saying anything.”

30 The Witness: Will you repeat his question again?

Q I think the question was that you know now you are the father of this boy, don't you? A I have never denied it.

Q And that was the only basis of your denial of sexual intercourse to your wife from that period on?

40 The Court: You never had any belief, had you, but what the boy was yours?

Wilbur D. Tupper, cross.

The Witness: No, sir; I did not. That I will have to admit. I wouldn't allow myself to admit it.

The Court: You firmly believe that he is your boy?

The Witness: Yes, sir; I did.

10

The Court: You do now?

The Witness: Yes, sir; I do.

The Court: And always have? And always have?

The Witness: Well, possibly at times, no.

Q Even before that period, Mr. Tupper, you were tired of Mrs. Tupper, weren't you?

A Not that I was aware of.

Q Yes or no. A No.

20

Q Were you in love with her? A I was.

Q When did that end, your affection for her? A I don't know as it has altogether ended now.

Q You care for her now? A In a way, yes, sir.

Q What do you mean "in a way?" A Well, I have a certain amount of regard for her.

Q And this talk in Ocean Grove was a convenient peg for you to hang the discontinuance of all relations with her on, is that it? A I didn't consider it so at all, no.

30

Q You say that you had some knowledge of the abortion on your wife, that is right, isn't it? A Afterwards; yes, sir.

Q And how long afterwards? A Possibly a period of a couple of years.

Q You knew that your wife had become pregnant in Florida, did you? A I did not.

40

Wilbur D. Tupper, cross.

Q Nothing at all about that? A No.

Q You sent her to Washington to have an abortion? A I did not.

Q Just before the present child was born you sent your wife again to Washington, didn't you? A I surely did.

10 Q And gave her money to go? A I surely did.

Q To have an abortion performed? A Not so.

Q Say anything about that at all? A No, sir.

The Court: How long before the boy was born did you send her to Washington?

20 The Witness: When she was pregnant she went—(interrupted).

The Court: How long before?

The Witness: Approximately eight months, your Honor.

The Court: She was in the family way about a month then?

The Witness: Yes, sir. I don't remember the exact length of time, but I can tell you the history of it, if you wish.

30 Q When your wife went to Washington last July you saw that telegram about her aunt dying, didn't you? A She showed me the telegram.

Q You gave her the money to go? A I did.

Q When was this talk that your wife—your wife said she would like to bring a divorce action? A When was that?

Q Yes.

40 The Court: When she said if you were a gentleman you would give her cause?

Wilbur D. Tupper, cross.

The Witness: I couldn't say the exact time, but possibly it would be within a period of possibly two or three years. The exact time of that I do not know; as a matter of fact. I believe the statements have been expressed several times.

10

The Court: While in anger?

The Witness: The result probably of argument.

Q Did the fact that you were not living with her as a husband lead up to these talks about divorce? A That I couldn't say. As far as she was concerned I don't know her mind regarding that.

Q Did she say anything regarding that? A No. I do not recollect her referring to it on that basis. 20

Q Never at all referred to your not having sexual relations with her? A I couldn't put—remember a conversation that you could turn into that, no.

Q And was it your refusal to have sexual relations with her that led about her talking to you concerning divorce? A No, I wouldn't say it was, no.

Q Would you say it wasn't? A Yes, sir, 30
I rather think I would prefer to say it was not.

The Court: Prefer to say it wasn't because it is the truth or it is not the truth?

The Witness: Well, I think probably the conversation came up over other things, your Honor.

40

Arthur Tupper, direct.

ARTHUR TUPPER, sworn for defendant.

Direct examination by Mr. Bradner.

Q Where do you live? A East Orange, 179 Chestnut.

10 Q What is your occupation? A Manufacturer, packing.

Q You are a brother of Wilbur? A I am a brother of Wilbur D. Tupper.

Q Where is Wilbur living now? A He is living home with my mother and myself.

Q Do you recall anything that occurred in the summer of 1924 at Ocean Grove with relation to something that Mrs. Tupper had said, your brother repeating to you? A Yes, sir.

20 Q And what did you do? A I was out riding with Mr. and Mrs. German Smith and my sister-in-law in the car.

Q Your sister-in-law being— A Mrs. Marian Tupper, my brother's wife; and I don't know how the subject was brought up, but I think it was probably some trivial thing started it about the management of the child, and I spoke of how it was brought up, and I mentioned the remark that my brother had passed to me that his wife had said.

The Court: Tell us what you said.

The Witness: My brother had said that his wife said he was not the father of the child and speaking about things that were said, I thought that it might give her a chance to deny it or not, and she not only did not deny it, but she asserted it again in our presence in the car.

40

Arthur Tupper, direct.

Q What did she say? A She said my brother was not the father of the child.

Q When was that? A That was while Mr. and Mrs. German Smith were at the cottage I had for the summer as my guests.

Q They were in the car? A They were in the car, but they were down as my guests at Ocean Grove and I had taken them out for a ride in my car. 10

Q Now after that did anything of that nature occur again at any other place? A It did. She made the assertion in my brother's presence and my own later on.

Q Where was that? A I am very sure it was the latter part of the summer before we left the shore, down at Ocean Grove. 20

Q Only three of you present then? A Only three of us present.

Q What did she say then? A She made the same assertion again.

Q How did it come about? I cannot understand it. Your brother said he didn't believe it, don't believe it today. How did it come about? A My sister-in-law—(interrupted).

Q Was it by way of boasting or—(interrupted). A No. I heard her say that nobody would ever take the child away from her and things like that. She always seemed to have the idea that she was absolutely the only one that had any say over the child or any reason to correct him or had any interest. If anybody showed any interest in the child she immediately was jealous. 30

The Court: Now, how did these talks come around?

Arthur Tupper, direct.

10 The Witness: Well, she wouldn't—she was jealous, and naturally started to squabbling about the child. We couldn't show affection for him in any way or correcting him. Then I suppose I may have said something, that I thought we had the right to take a little interest. One time she raised the Old Harry with me because I took the child's picture without asking her permission, which I thought was natural seeing the child was my nephew and name sake.

The Court: Then what?

20 The Witness: She went on and told me I had no business to take the child's picture. I ought to ask her. It was simply that idea; nobody could do anything for the child without asking her. That brought it on. She came out with the statement that my brother was not the father of the child, I suppose for the reason nobody would have anything to say about him but her.

The Court: That is the way it was said?

The Witness: Yes, sir.

30 The Court: It was in defense of the mother's domination of the mother's child that she said he was not the father, is that what you mean? She wanted to dominate.

The Witness: She always said she did.

The Court: And it was in that sense she said it, as you understood it?

The Witness: No. Unless it was so I can't imagine a mother making such a statement about a child to begin with.

40 The Court: Can you imagine a mother making such a statement?

Arthur Tupper, direct.

The Witness: I cannot. I cannot imagine her making it in any particular.

Q Did you notice what effect it had on your brother? A Well, he seemed to lose all interest in everything; the bottom had gone out of his world.

10

Q The bottom hadn't gone out before that as far as his wife was concerned? A No, sir.

Q Affectionate towards her up to that time? A He certainly was.

Q Do you know anything about their sleeping arrangements as the result of conversation with her? A You mean in the fall after they went back?

Q Yes. A In the fall when they went back they moved into a larger apartment.

20

The Court: Immediately?

The Witness: Well, we went back, I think, about the middle of September; they moved in the larger apartment the first of October—the lease began the first of October.

Q You didn't live with them? A No; I lived within two or three blocks of them, right around the corner and—well, the first thing the baby—they got a larger apartment with an extra room for the child, and so they had to get a bed for the child—bed in it. Meantime the child had been sleeping out in the couch before this, out in the living room and when they went back I noticed, in fact, my sister told me, that she went out to the couch in the living room—left the bed.

30

Q Your sister-in-law? A My sister-in-law told me, and my brother slept in the bed, and

40

Arthur Tupper, cross.

later on I noticed that my brother slept out in the couch and she and the child slept in the bed, and the child slept with her in the bed even after the child had his own bed and his own room.

10 *Cross examination* by Mr. McLaughlin.

Q Your family never had much use for Mrs. Tupper, did they? A Had great affection for her.

Q You did? A I did. I thought she was the ideal sister-in-law when they first married; I was very fond of her.

Q And in 1924 when this incident happened, which you did not think was true and your brother did not think was true, did you permit that to break up this ideal affection? A I didn't say I didn't think it was true.

Q Did you think it was true? A I didn't know what to think of it.

Q Of late years your brother hasn't been staying home with his wife at all, has he? A I don't know what you mean by "staying home."

Q I mean he has been around to your place every night or going out with you every night? A No, he has not, because I often was around there and he couldn't go out because my sister-in-law was out with friends of hers.

Q How often was that? A Well, it was over half the time.

Q You mean more than two or three times a week? A More than half the time I went around I found he couldn't go out.

Q How often would you go around? A I don't know; two or three times a week.

40

German Smith, direct.

The Court: Was that before the break?

The Witness: What do you mean, before the break?

The Court: You know what I mean.

The Witness: Oh, in the summer down there?

10

The Court: Was it before or after the break?

The Witness: Well, the conditions were—well, I suppose I have been going around there more the last couple of years, and conditions—(interrupted).

The Court: No. You said when you went there half the time he had to stay home because your sister-in-law was out. I want to know whether that was before or after the break that you are referring to?

20

The Witness: This was after the break; after the summer of 1924, I refer to.

DEFENDANT RESTS.

GERMAN SMITH, sworn for petitioner.

Direct examination by Mr. McLaughlin.

30

Q Where do you live? A 1416 Decatur street, Northwest, Washington, D. C.

Q What is your occupation? A Retired business man or manufacturer.

Q Mr. Smith, you are the brother-in-law of Mrs. Tupper? A I am.

Q And were you in Ocean Grove in 1924? A I was.

40

German Smith, direct.

Q Who was in that household? A Well, in 1924, Mr. Wilbur Tupper, Mr. Arthur Tupper— (interrupted).

The Court: We have all that.

10 Q Do you remember any talk between you and your wife and Mr. and Mrs. Tupper with reference to the Stillman case? A Yes, sir.

Q What was that talk?

The Court: I am not interested in the Stillman case.

Q Did you ever hear Mrs. Tupper say that Mr. Tupper was not the father of her child? A Absolutely no.

20 Q Did you hear anything of that kind? A No, sir.

Q Were you present with your wife and Mr. Tupper when any talk of that kind occurred? A There was some conversation down there on the porch, but it started, as I remember, about the Stillman case, but that remark was never made in my presence or in the presence of my wife, or never do I ever remember Mrs. Tupper ever making such a remark.

30 Q Did you ever hear of it being made while you and your wife and Mrs. Tupper and the defendant Tupper's brother were in the automobile? A I did not.

Q You say it was not made there? A Absolutely no. I never remember hearing that remark made. It was not made to the best of my knowledge.

40 Q You would recall it, would you not, if it had been made? A You bet I would. Anyone would recall a remark like that, I should think.

Marian Tupper, direct.

Cross examination by Mr. Bradner.

Q Did you hear your wife make a remark like this, Mr. Smith, that she was surprised to hear a sister of hers make such a statement?

A No, I did not, because I never—as I say she never made that statement in my presence or in my wife's presence. 10

Q Then you don't recollect whether you heard it or not? You are only arguing that you did not hear it because—(interrupted). A I am not arguing about it. I say I never heard her make it in my presence or in the presence of myself and any other assembled when I was there.

20

MARIAN TUPPER, recalled for petitioner.

Direct examination by Mr. McLaughlin.

Q Did you ever say to Mr. Tupper or to anyone else—did you ever say to Mr. Tupper in the presence of Mr. and Mrs. Smith in the home at Ocean Grove that your husband was not the father of your child? A Absolutely not. I never made that statement. 30

The Court: Did your sister-in-law, Mrs. Smith say to you that she was surprised that a sister of hers would say anything like that?

The Witness: Absolutely not. I never heard her say that.

The Court: Or in an automobile, Mrs. Tupper, did you repeat such a statement?

The Witness: No, I couldn't. 40

Virginia Smith, direct.

Q Or in East Orange, in the presence of your husband and his brother did you ever make such a statement? A I couldn't, Mr. McLaughlin. It isn't true.

Q Did you? A No; it is not true.

10 (No cross examination.)

VIRGINIA SMITH, recalled for petitioner.

Direct examination by Mr. McLaughlin.

20 Q Mrs. Smith, did your sister, Mrs. Tupper, ever say to her husband, in the presence of you and your husband, or say that he was not the father of her child? A Most emphatically not.

Q Did you ever say to her in reply to any such statement that you were surprised that a sister of yours would say that? A I certainly did not.

The Court: How about the automobile?

The Witness: No, sir; not in the automobile or anyone else.

30 The Court: While out riding with the brother of your husband?

The Witness: No, sir.

Q While riding with your husband's brother in an automobile did you ever hear your sister make a similar statement? A No, sir; I have never heard my sister make that statement.

TESTIMONY CLOSED.

40

EXHIBIT D. 2.

COPY

Note:—This is a true copy of the application you asked me for.

CONSTANCE C. TUTHILL. 10

Nov. 18, 1928.

520.00

90.00 rec'd. Sept. 29

430.00

APPLICATION FOR ENROLLMENT

in

THE SERVICE SCHOOL 20

Winter Session

Constance C. Tuthill, Principal

I wish to enroll my Son in the 3rd Grade Department for the school year beginning September 20, 1928, and ending June 7, 1929, for which I agree to pay the full tuition of 520 dollars, thus: twenty-five dollars with this application, and 65.00 dollars monthly.

I understand that no reductions whatever are made for extended absences. 30

I understand that notification of removal of a pupil from the School must be made in writing, signed by the one enrolling the child, and must state plainly the removal, the reason, and when it is to occur.

I understand that a registration fee of twenty-five dollars must attend this application, and that the fee and the tuition are not refunded.

Signed MARION WATERS TUPPER. 40

Exhibit D. 2.

Dated Sept. 29, 1928.

Father's full name: Mr. Wilbur Drake Tupper

Member of what Church? Episcopal Church

Mother's full name: Marion Waters Tupper

Member of what Church? same

Their residence address: 148 Halsted St. East
10 Orange, N. J.

Father's business: Flax Packing

Business address: 173 Mercer St., N. Y. C.

Phone

Mother's business:√.....

Business address:√.....

Phone

Child's full name: Arthur Waters Tupper

Attends what Sunday School? Episcopal

Born When? Aug. 21, 1920 Where? Wash. D. C.

20 References:

1. Name Mr. & Mrs. German Smith

Occupation None Col. 4189

Address 1416 Decatur St. N. W., Wash.,
D. C.

2. Name. Mr. John M. Waters

Occupation C. & P. Tel. Co.

Address 3110 45th St. N. W. Clev. 140

3. Name Rev. J. J. Qusally

Occupation 1419 Gallatin St. N. W.

30 Adams 2380

Address

Signed MARION WATERS TUPPER

Dated Sept. 29, 1928

Mr. Frank E. Parham Lawyer)

141 Broadway, New York City Rector 5432

DECREE NISI.

IN CHANCERY OF NEW JERSEY.

<i>Between</i>			
	MARION WATERS TUPPER, <i>Petitioner,</i>	}	<i>On Petition for Divorce.</i>
	<i>and</i>		
	WILBUR D. TUPPER, <i>Defendant.</i>	}	<i>Decree Nisi.</i>

10

20

30

40

This cause coming on to be heard in the presence of Gerald McLaughlin, of counsel with the petitioner, and Frank E. Bradner, of counsel with the defendant, on petition, answer and oral proofs taken in open court; whereupon, and upon duly considering the said pleadings and upon hearing and considering the proofs and arguments of counsel; from all of which it now appears satisfactory to the Chancellor that the petitioner and defendant were lawfully joined in the bonds of matrimony on or about the 4th day of November, 1918, and that the said defendant has been guilty of wilful, continued and obstinate desertion of the said petitioner as alleged in the said petition, and that at the time the cause of action for the divorce for the said desertion arose the petitioner and defendant were bona fide residents of this State and that the said petitioner and defendant have continued so to be down to the time of the commencement of this action and that the petitioner and defendant have been for the two years next preceding the commencement of this action bona fide residents of this State, and it further ap-

Decree Nisi.

pearing that jurisdiction herein has been acquired by personal service of process upon the defendant within this State, as well as by his appearance and answer filed herein,

10 IT IS THEREUPON, on this 18th day of December, 1928, by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, ORDERED, ADJUDGED and DECREED, and the said Chancellor, by virtue of the power and authority of this court and the acts of the Legislature in such case made and provided, doth hereby ORDER, ADJUDGE and DECREE that the said petitioner, Marion Waters Tupper and the said defendant, Wilbur D. Tupper be divorced from the bond of matrimony for the cause aforesaid, and the said parties and each of them be freed and discharged from the obligations thereof, unless
20 sufficient cause be shown to the Court why this decree should not be made absolute within three months from the date hereof,

AND IT IS FURTHER ORDERED, ADJUDGED and DECREED that the said petitioner have the exclusive custody, care and education of Arthur Waters Tupper, infant child of the said petitioner and defendant, subject nevertheless to the right of the defendant to visit said child
30 at Washington, D. C., or such other place as said child may be, at any time convenient to the said defendant, during which visits said defendant may have said child for the period of three hours in the afternoon, and in addition thereto, said defendant may have said child at the home of his, the defendant's mother in New Jersey for the month of August of each year; said defendant, to bring said child from Washington, D. C., or wherever said child may be
40 and return said child to said petitioner on the

Decree Nisi.

completion of the time allowed for said child's visit to the defendant,

AND IT IS FURTHER ORDERED, ADJUDGED and DECREED that the said defendant do pay to the said petitioner, or her solicitors, the sum of thirty (\$30.) dollars per week, at the beginning of each and every week from the 6th day of August, 1928, for her support and maintenance, and for the support and maintenance of Arthur Waters Tupper, the infant child of the petitioner and defendant above mentioned. Nineteen weeks of alimony from August 6, 1928 to December 17, 1928 are now due and amount to \$570., and this sum of \$570. is ordered to be paid by the defendant to the petitioner, or her solicitors, within seven (7) days of the service of copy of this decree upon the solicitor for the defendant, with the weekly payments thereafter to be paid on the Monday of each week, with the first payment to be made to the petitioner, or her solicitors, on Monday, December 24, 1928,

AND IT IS FURTHER ORDERED, ADJUDGED and DECREED that the said defendant do pay to the petitioner, or her solicitors, her costs of this suit to be taxed, in which shall be included a counsel fee of \$200. and that the petitioner have execution therefor according to the rules and practice of this court.

Respectfully advised,

JOHN H. BACKES,
V.-C.

NOTICE OF APPEAL.

Filed December 28, 1928.

IN CHANCERY OF NEW JERSEY.

10	<i>Between</i> MARION WATERS TUPPER, <i>Petitioner,</i> <i>and</i> WILBUR D. TUPPER, <i>Defendant.</i>	}	<i>On</i> <i>Petition,</i> <i>&c.</i> <i>Notice of</i> <i>Appeal.</i>
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20 Notice is hereby given that Wilbur D. Tupper, the defendant in the above-stated cause, hereby appeals to the Court of Errors and Appeals in the last resort in all causes, from the whole of decree made by the Chancellor on the advice of Vice-Chancellor John H. Backes; which decree bears date December 18, 1928.

Dated December 27, 1928.

FRANK E. BRADNER,
Solicitor of Defendant.

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

FRANK E. BRADNER,
Of Counsel with Defendant.

PETITION OF APPEAL.

Filed January 17, 1929.

New Jersey Court of Errors and Appeals

<p><i>Between</i></p> <p style="text-align: center;">MARION WATERS TUPPER, <i>Petitioner-Respondent,</i></p> <p style="text-align: center;"><i>and</i></p> <p style="text-align: center;">WILBUR D. TUPPER, <i>Defendant-Appellant.</i></p>	}	<p><i>On Appeal</i></p> <p><i>from</i></p> <p><i>Court of</i></p> <p><i>Chancery.</i></p> <p><i>Petition</i></p> <p><i>of Appeal.</i></p>	10
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To the Honorable the Court of Errors and Appeals in the last resort in all causes. 20

The petition of Wilbur D. Tupper, the defendant in the above-stated cause, respectfully shows:

1. Petitioner finds himself aggrieved by a decree made in the Court of Chancery by his Honor Edwin Robert Walker, Chancellor of the State of New Jersey, which decree bears date December 18, 1928, and does order, adjudge and decree that the said petitioner Marion Waters Tupper and the said defendant Wilbur D. Tupper be divorced from the bonds of matrimony and the said parties and each of them be freed and discharged from the obligation thereof unless sufficient cause be shown to the Court why the said decree should not be made absolute within three months from the date thereof, and which said decree gives the custody of Arthur Waters Tupper, infant child of the said petitioner and defendant, to the petitioner. 30

Petition of Appeal.

2. Petitioner appeals from the said decree and from the whole and every part thereof, upon the ground that the same is erroneous, for these reasons:

10 First: The petitioner-respondent failed to prove that the defendant-appellant had wilfully, continuedly and obstinately deserted her for more than two years.

Second: The evidence in the cause established the defence that the petitioner and his wife had lived apart and had not had marital relations by mutual consent.

20 Third: The award of custody of the infant child to the petitioner-respondent with leave to take the child out of the State of New Jersey, thereby forcing the defendant-appellant to visit him at Washington, D. C., is inequitable.

Fourth: The petitioner-respondent was not entitled to a divorce and was not entitled to an award of alimony.

3. The defendant-appellant therefore, prays that the said decree of the Chancellor may be reversed, set aside and for nothing holden and that petitioner may have such other relief as to the Court may seem equitable.

30 FRANK E. BRADNER,
Solicitor for and of Counsel with Appellant.

Filed January 17, 1929.

JOSEPH F. S. FITZPATRICK,
Clerk.

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

Between

MARION WATERS TUPPER,
Petitioner-Respondent,

and

WILBUR D. TUPPER,
Defendant-Appellant.

*On Appeal
from Court
of Chancery.*

BRIEF FOR APPELLANT.

Abstract of the Case.

The parties to this suit were married on November 4, 1918. A child was born to them, named Arthur Waters Tupper, on August 21, 1920. They lived together without any serious difficulties, so far as the evidence shows, until about August, 1924. At that time, the wife according to the testimony of her husband and his brother, made a statement to the effect that the husband was not the father of the child. After this occurrence, the parties ceased to have sexual relations. They continued to live in the same apartment and nothing seems to have occurred to call attention to the fact that they were living apart until about May 15, 1928; at which time, Mrs. Tupper, according to the testimony of George W. Yancy (p. 42) said in the presence of Yancy, who is the janitor of the building, "Wilbur, Mabel Blank is pregnant." Mr. Tupper replied, "Yes, I know it." "Well," Mrs. Tupper then said, "What do you think about me?" He shrugged his shoulders and kept his head down, still eating and she said, "Wilbur, I mean, what do you think about me; don't you think it is time for me?" "The boy says" (meaning the

son, Arthur): "Mother what is pregnant?" And Mrs. Tupper said: "Oh, sonny, I am just only saying how would you like to have a little sister or brother. We were just talking that."

On July 12, 1928, Mrs. Tupper filed a petition for divorce which was verified on July 6, 1928. She alleges that defendant deserted the petitioner on or about the month of June, 1923, ever since which time and for more than two years last past he has wilfully, continuously and obstinately deserted the petitioner. Order amending petition, p. 6.

The defendant-appellant denies the desertion but admits that he and the petitioner have refrained from having sexual intercourse since the summer of 1924, and denies that he has at any time refused to have sexual intercourse with the petitioner against her will; and he also asserts that the parties refrained from having sexual intercourse by mutual agreement (p. 4). It was not asserted at the hearing that there was any express agreement between the parties, but manifestly, an agreement could be implied from their mutual acquiescence in the situation.

An application made by the wife for alimony *pendente lite* was denied, upon the ground that there was no corroboration of her affidavits.

At the hearing, the Vice-Chancellor permitted testimony of witnesses to be given relating to statements made by Mrs. Tupper to them over the objection of appellant, it appearing that the statements were not made in the presence of the appellant and were purely self serving. At the conclusion of the hearing, the Vice-Chancellor advised a decree for divorce, and since the case has been printed on appeal, he has written an opinion, which was received by counsel for the

appellant on April 24, 1929, and is printed separately.

SPECIFICATION OF ERRORS.

1. Admitting testimony of self serving declarations made by the respondent.
2. The determination of the Court that the respondent did not say in 1924 that the appellant was not the father of her child.
3. Determination of the Court that the appellant wilfully and obstinately deserted his wife.
4. Awarding the custody of the child to the respondent with leave to take him to Washington, D. C., permanently, with limited right of visitation there.

ARGUMENT.

POINT I.

The self serving declarations made by respondent were incompetent.

The case of *Haskell v. Haskell*, 99 N. J. Eq. 400, was relied upon by respondent as authority for the declarations. The Vice-Chancellor stated (p. 49): The Court: "Objection sustained. Now you can put it on the record. Put it on the record under objection. I do not think in a contested case that the Court ever intended that it should be permitted."

His opinion was that the Haskell case was not applicable, but he permitted the testimony to go in over objection. The Haskell case was an *ex parte* case, and in that case, the wife had refused from the time of the marriage to have sexual intercourse. The testimony is clearly hearsay and is inadmissible. In the Haskell case, the

Special Master, on the reference to him, could have refused to hear the testimony, and the result would have been a denial of the divorce. Under the peculiar circumstances of that case, it may have been considered appropriate to accept the testimony. The Court was divided in opinion on the appeal; four justices dissenting.

POINT II.

The clear weight of the evidence proved that the statement was made by the respondent, that her husband was not the father of her child.

The appellant testified (p. 53, l. 1): "Q What occurred then; now you can tell your recollection of just what it was, in your own way. A Why in regard to what occurred, my wife and I and a couple of other parties were sitting on the porch of the cottage at Ocean Grove, and just how the conversation started I do not remember, but there is one thing, one part of the conversation I never will forget and that was the flat statement of my wife that I was not the father of her child, who was named Arthur Waters Tupper."

The appellant further testified that on a subsequent occasion the statement was made (p. 58, l. 11). "Did you have any conversation with relation to what had been said down there in his presence? A You mean regarding the statement she had made? Q Yes. A Oh, yes, the conversation came up between my brother and myself when my wife was present. She repeated the conversation in both our presence. Whether it was—it was about that time—whether we had returned to East Orange, or whether it was down at Ocean Grove, I do not remember, but I remember positively that the conversation took place at that time, but just where I could not

absolutely say, my impression was that it was while we were down at the shore.”

Arthur Tupper testified (p. 68) that his brother had told him what the wife had said and that he took her out in the car and also Mr. and Mrs. Smith. At the top of p. 69, he testified: “Q What did she say? A She said my brother was not the father of the child.” At l. 13: “Q Now, after that did anything of that nature occur again at any other place? A It did. She made the assertion in my brother’s presence and my own later on. Q Where was that? A I am very sure it was the latter part of the summer before we left the shore, down at Ocean Grove. Q Only three of you present then? A Only three of us present. Q What did she say then? A She made the same assertion again. The Court. How did it come about, I cannot understand it. Your brother said he didn’t believe it, don’t believe it today. How did it come about? A My sister-in-law—(interrupted) Q Was it by way of boasting? A (interrupted) No. I had heard her say that nobody would ever take the child away from her and things like that. She always seemed to have the idea that she was absolutely the only one that had any say over the child or any reason for correcting him, or had any interest. If anybody showed any interest in the child she immediately was jealous.”

And on p. 70, l. 15. The witness: “She went on and told me I had no business to take the child’s picture. I ought to ask her. It was simply that idea, nobody could do anything for the child without asking her. That brought it on. She came out with the statement that my brother was not the father of the child.”

It is true that Mr. and Mrs. Smith deny that any such statement was made in their presence, *but it cannot be controverted that the statement was made in the presence of the husband and his brother without other witnesses and that unless the brother's testimony is to be disregarded entirely, it proves conclusively that the statement was made and made coldly and deliberately.* There is some indirect evidence which tends to prove that such a statement was made in the summer of 1924.

Virginia Smith testified (top of p. 48): "Q When she was at Washington at your place in 1924, did you—whatever date it was—did you have any talk with your sister regarding her married life? A Yes. Q What was that talk?" This was objected to and the objection was sustained. At the top of p. 50, she was asked: "Q What did she tell you about it? A She told me she was extremely unhappy; that she and her husband, that her husband had refused sexual intercourse with her, made her extremely unhappy. She wanted a family, she would like to have another child."

The significance of this testimony is that the conversation between the sisters occurred probably shortly after the incident at Ocean Grove and is the first and only complaint that the wife seems to have made. There is no evidence whatever in the case in explanation of his conduct and hers, except that which relates to this unfortunate statement. There is nothing whatever to show that he was interested in anybody else and it seems that it must be assumed that this serious situation did come about as he and his brother have stated in their testimony.

POINT III.

The respondent failed to prove either wilfull or obstinate desertion.

“An actual desertion under our statute must be (1) wilfull, that is intended by the deserter; (2) obstinate, that is persisted in against the will of the deserted; and (3) continued, that is without interruption for the statutory period.” *Danielly v. Danielly*, 93 N. J. Eq. 556, at p. 558.

When this unfortunate statement was made, what effect did it have upon the appellant? His brother's testimony is very suggestive at p. 71, l. 8: “Q Did you notice what effect it had on your brother? A *Well, he seemed to lose all interest in everything, the bottom had gone out of his world.*” When he and his wife returned to their apartment at East Orange, they slept in separate rooms but it seemed that they had been doing so before that time.

Mr. Tupper was asked at p. 60, l. 7: “Q Well, now, Mr. Tupper, what has been the reason for your attitude of coolness and indifference towards her? A The statement regarding the child. Q That is the only reason? A Absolutely.” He was horrified and humiliated. He did not contemplate actually leaving his wife, “quit her” as the Vice-Chancellor suggests. He did not believe what she said, but he was crushed by it and he acted like a broken man. *His state of mind seems to have been this: she has made this terrible statement and she ought to give some indication that she regrets it.* Certainly, if she was conscious of making the statement, she understood very clearly that her husband was offended and was showing his resentment. If he had intended to desert his wife, he would as the Vice-Chancellor said, have left

the house. The fact that he remained, leads to an inference that he did not intend to actually desert, but that he was striving to become reconciled to the situation and hoping that she would make some retraction. *A few words from her would have satisfied him.* It is submitted that there was no intent to desert. His testimony is that there was never any solicitation on her part and he very frankly says that if there had been, he would have refused. The question is, whether there was acquiescence on her part. There is no evidence that she complained to anybody after 1924.

On July 10, 1926, Mrs. Tupper went to Washington, D. C., and she left a letter for her husband, which is printed on p. 33. Attention is called to the latter part of that letter, l. 21: "Take good care of yourself and write us often. Love and kisses from both. (with four crosses) Marion."

That certainly is not indicative of any feeling of resentment; the inference is that she acquiesced. On p. 32, l. 12, she is asked: "Q When did you finally determine that you would no longer put up with it? A Determined that this summer (meaning 1928). Q This spring? A Yes. Q That is, after you had seen some lawyer, you then determined you would no longer put up with the conditions? A I could not see any future to it and I was getting so nervous and up-set over the way things were going. Q But up to that time you had to a certain extent assented to it, hadn't you? A In a way I tried to make the best of it and tried to give him a chance to see if he wouldn't do better or do some way, make some amends."

She then evidently arranged to have the janitor in the apartment, so that she could have a witness.

It seems that these parties ceased sexual relations by mutual consent, whatever the cause, and it was the wife's duty to put an end to that relationship by some action on her part. She says that she did make requests, but she is not corroborated except at the time the janitor was present, if that can be considered a request. Her testimony fails to prove either wilful or obstinate desertion, and on her own case, there would be no ground whatever for a decree. The admission by the defendant, standing alone would not be sufficient corroboration. *Hague v. Hague*, 85 N. J. Eq. 537.

In this case, the defendant does admit under oath that he has not had sexual intercourse with his wife, but he denies any intent to desert her and he denies that the separation was against her will. His admission is taken by the Vice-Chancellor as conclusive evidence both of wilful and obstinate desertion, but the qualification of his admission is rejected. The ordinary rule is the whole of an admission must be put in evidence. If the fact alleged by the defendant, that the wife made a statement that he was not the father of the child, is found against him, the admission should be excluded in its entirety, and that would leave the petitioner without any corroboration. If this defendant had desired to be rid of his wife, he would not have made any contest. It is apparent therefore, that the respondent failed to prove by legal evidence wilful and obstinate desertion on the part of the husband.

POINT IV.

The right of visitation to go to Washington, D. C., to see the child for three hours, is inequitable.

This wife on a pretence of going to a funeral in Washington, D. C., took the little boy with her, and she had at that time actually verified her petition for divorce and had actually filed it. She put the boy in school at Washington without consulting with her husband and contracted to pay for his tuition and board the sum of \$520.00 per annum. Ex. D. 2, p. 77. She had no legal right to put the boy in the school. Mr. Tupper has acquiesced in it for the boy's sake, and he is still at the school. There does not seem to be any reason for keeping the boy in the school at Washington, nor for the wife living there, and it is respectfully contended that the decree is unjust insofar as it requires the appellant to travel all the way to Washington to see the boy for a few hours.

If the decree of the Court below is sustained on the merits, it is submitted that it should be modified in respect to the custody of the child. It is respectfully submitted however, that the decree should be reversed and the petition for a divorce dismissed.

FRANK E. BRADNER,
Of Counsel with Appellant.

New Jersey Court of Errors and Appeals

Between

MARION WATERS TUPPER,
Petitioner-Respondent,

and

WILBUR D. TUPPER,
Defendant-Appellant.

*On Appeal
from the
Court of
Chancery.*

REPLY BRIEF FOR APPELLANT.

The brief of respondent contains some statements which seem to require explanation, and in reply the attention of the Court is called to the following:

1. The respondent elaborates the story told by Mrs. Tupper relating to the marriage and to her relations with her husband prior to 1924. The Vice-Chancellor makes no comment upon the fact that the marriage took place just before the Armistice was declared in the World War. And he makes no comment upon the testimony relating to the abortions. The defendant denied explicitly that he had anything to do with the alleged abortions or suggested abortions. There was no corroboration whatever of her testimony in that respect. When the defendant attempted to go into the circumstances concerning the marriage, the Court stated: "What difference does it make, they are married," p. 26, beginning at line 22. It will be observed that the Court excluded any cross examination, and of course the defendant did not make any explanation.

2. The respondent also gives the impression in her brief that the defence made at the hearing, was a surprise to her. When she made a motion

for alimony *pendente lite* in the Court of Chancery, the defendant filed an affidavit made by himself, and another by his brother, setting up substantially the facts afterwards testified to by them at the hearing. No affidavits in rebuttal were filed by the respondent. The Vice-Chancellor sent me a memorandum endorsed on the back of one of the papers in the cause, after the motion had been made, as follows: "Denied—subject to renewal as of this time at final hearing, Backes, V.-C." Those affidavits are on file with the papers in the cause, and presumably have been transmitted by the Clerk in Chancery to this court.

3. The respondent also states in her brief that after the final hearing, counsel for the appellant in an effort to avoid payment of alimony, suggested that the respondent was able to work and should get her old job back in Washington. No objection has been made at any time to the amount of alimony. After the testimony had been closed at the hearing, the Vice-Chancellor asked some questions relating to the defendant's faculties, and asked Mrs. Tupper what her occupation had been and whether she thought she could get her old job back in Washington. She said she thought she could. The Vice-Chancellor then made the remark: "You had better get it," or words to that effect.

When a motion was made in this court for alimony *pendente lite*, Mr. Tupper made an affidavit setting out those facts, and no affidavit was filed in rebuttal. In her moving affidavit made on January 26th, Mrs. Tupper stated that she had not yet been successful in obtaining work. This Court made an order for the payment of alimony for the maintenance and support of the wife and child, pending the appeal. That order has been

strictly complied with and no objection is made to it.

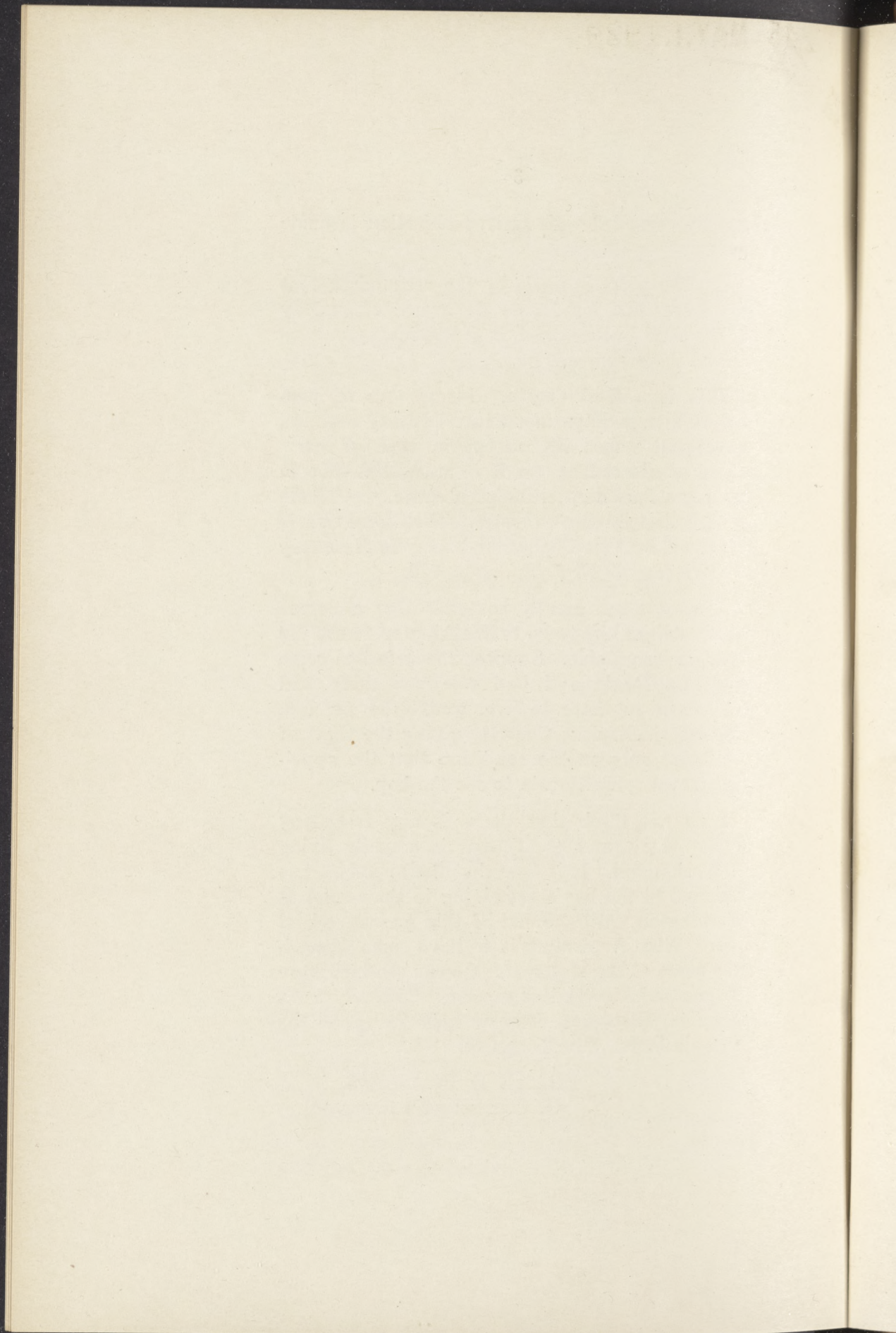
4. The point is made by the respondent that the decree nisi insofar as the award of custody of the child is concerned, is discretionary and no appeal therefrom will lie.

This is a final decree. In matters of procedure and perhaps in all interlocutory matters, no appeal would lie, except in case of clear abuse of discretion; but it is submitted that in making a final disposition of a cause, the decree must be based upon evidence. The distinction is explained by Vice-Chancellor Pitney in *Hennesy v. Carmony*, 50 N. J. Eq. at p. 625.

The appellant merely contends that a decree which obliges him to go to Washington to see the child, is inequitable. Suppose the wife had come from California and had relatives there and wished to go there to live, would the facts in this case justify the Court in giving the right of visitation only on the condition that the appellant travel to California to see the boy.

I do not think that there is any testimony in the case that Mrs. Tupper is actually living in Washington. It is true that the appellant has assented to the boy's remaining in the school at Washington until the end of this present school year. What he desires is to have some disposition made of the boy so that he can see him more frequently and with less expense. The only testimony is, that Mrs. Tupper was living at the Ansonia Hotel, New York Cty.

FRANK E. BRADNER,
Of Counsel with Appellant.



OPINION OF VICE-CHANCELLOR.

IN CHANCERY OF NEW JERSEY.

<p><i>Between</i></p> <p>MARION WATERS TUPPER, <i>Petitioner,</i></p> <p style="text-align: center;"><i>and</i></p> <p>WILBUR D. TUPPER, <i>Defendant.</i></p>	}	<p><i>On Petition,</i> <i>&c.</i></p>	<p>10</p>
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THE COURT: Wilful, continued and obstinate denial of sexual intercourse for two years constitutes cause for divorce. The wife testified that from 1923, the fact is from 1924, her husband refused her marital rights against her protest and solicitations. The defendant admits that from 1924 he refused to take her to his embrace, denied her sexual intercourse, and his reason is that she had said he was not the father of her child. He denies she ever sought intercourse but admits, had she, he would have refused. It is proved she did and that his attitude was against her will. 20

They summered, in 1923 and 1924, in a cottage at Ocean Grove. The defendant's story is that while sitting on the porch of the cottage with his wife, her sister, Mrs. Smith, and the latter's husband, his wife remarked, during the course of conversation, that he was not the father of her child; that her sister was horrified and rebuked her. The petitioner denies it occurred and so do Mr. and Mrs. Smith. The defendant is unable to give the cause or provocation or purpose of the remark or its context or relation to 30 40

Opinion of Vice-Chancellor.

the discussion. The circumstances are hazy. He says it was probably made in connection with an outburst that "Nobody would ever take that child away from her and she would go to any length to prevent it." They were discussing the Stillman case, then on everyone's tongue. The
10 defendant's brother says she repeated the statement to him in the presence of the Smiths while out automobiling at the shore. She denies it, and the Smiths say it did not happen. The defendant and his brother say she again said it after they returned to East Orange. The petitioner denies it. I cannot accept the testimony of these brothers that the petitioner repeatedly proclaimed herself an adulteress—shamelessly dishonored herself. A self-respecting woman does not defame
20 herself—outcast herself. Believing, an outraged husband would put her aside, quit her. This one did not. The testimony is utterly at odds with common experience and is incredible. Further, it stands refuted by the testimony of the wife and the Smiths. The repudiation of paternity as a justification for the desertion is not made out.

The defendant admits he had no belief in his wife's statement, then, since or now, and he says
30 he still has affection for her, and his counsel argues that, nevertheless, he was justified in refusing to be a husband until she retracted. The answer to that is, as I have found the fact to be, she never accused herself of perfidy or mortified him in this respect by even lip talk. How then could she retract or apologize if she did not know the cause, for he admits he never told her or intimated the reason for his refusal. He says, she understood. If the flimsy excuse he now offers—if he believed she made the offending re-

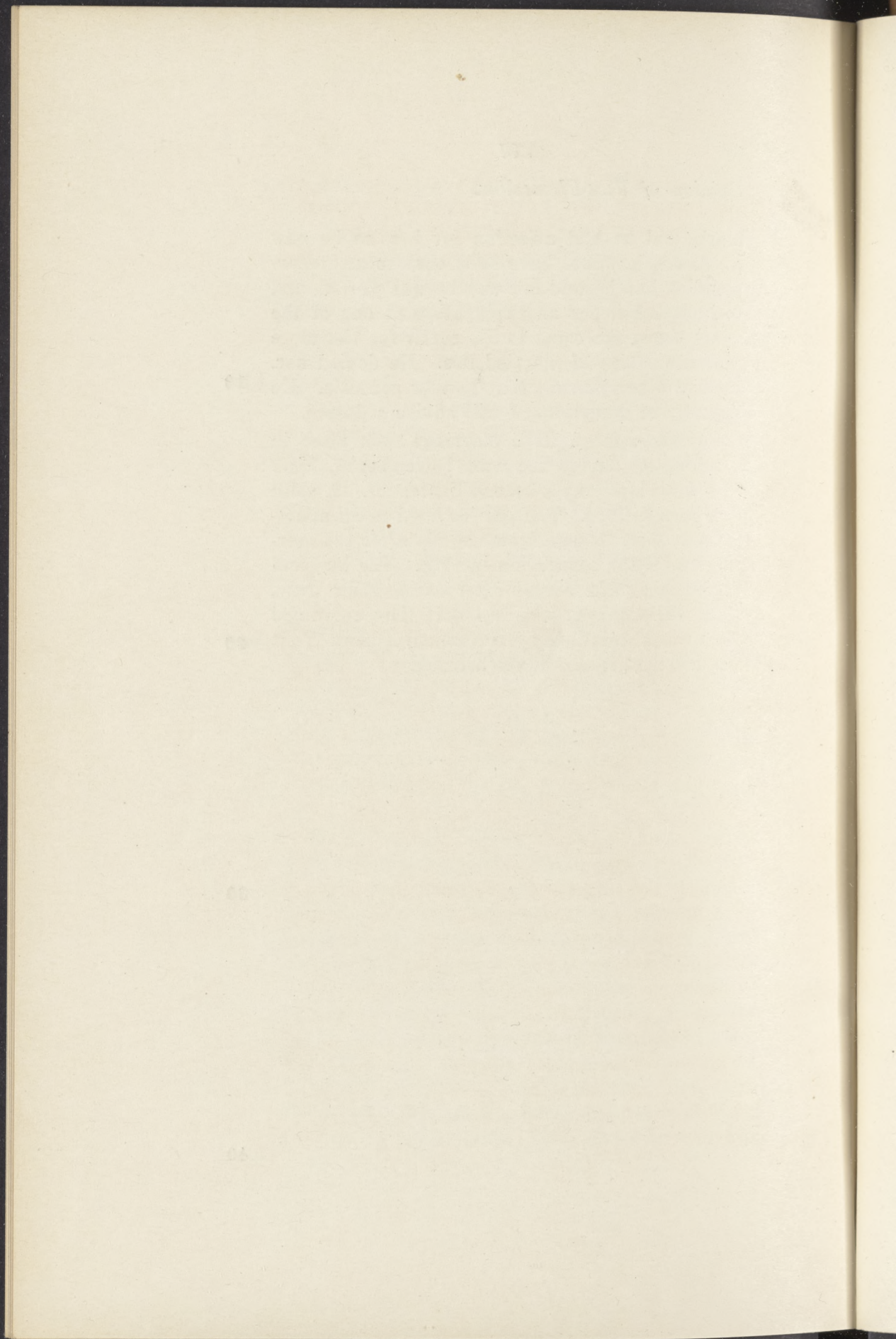
Opinion of Vice-Chancellor.

mark, and he had affection for her, as he now professes, it would have been easy to an understanding had he told her why he was peeved, and to have asked for an explanation at one of the many times she came to his couch for the more intimate solace of married life. He denied her. He had other reasons that he now conceals. He is guilty of desertion. I will advise a decree. 10

For the appeal. The marriage took place in Washington during the war, November 4, 1918. The defendant was a second lieutenant. A child was born in 1920. The parties lived in an apartment in East Orange from shortly after the marriage until the separation in 1928. The husband denied his wife sexual intercourse after July, 1924. The answer sets up that they refrained from sexual relations by mutual agreement. That was not the defense at the hearing. 20

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New Jersey Court of Errors and Appeals

Between

MARION WATERS TUPPER,
Petitioner-Respondent,

and

WILBUR D. TUPPER,
Defendant-Appellant.

*On Appeal
from the
Court of
Chancery.*

BRIEF OF RESPONDENT.

Statement of Facts.

This is an appeal from a decree nisi for divorce advised by Vice-Chancellor Backes, in favor of the petitioner-respondent wife, on the ground of desertion. As the appellant has not printed the Vice-Chancellor's opinion with the State of the Case, but separately, it has also been printed at the end of this brief in order to avoid any possibility of its being mislaid, etc. The basis of the action was the wilful, continued and obstinate refusal by the husband defendant-appellant of sexual intercourse to his wife, the petitioner-respondent.

The respondent wife and appellant husband were married November 4, 1918 at Washington, D. C. The appellant was a second lieutenant in the United States Army at the time and it was during a period when mostly single officers in his unit were being sent to France (p. 8, ll. 20-35). News of the first or false Armistice came most unexpectedly the very evening of the marriage day. The appellant had no sexual relations with his wife for three days following the ceremony and then at the request of his wife (p. 9, ll. 8-14).

At the end of two months the respondent was pregnant. The appellant insisted that she have an abortion performed, saying he could not afford children (p. 9, ll. 20-38). He then came to East Orange, N. J., leaving her in Washington without funds. She obtained a job and after two months finally advised the appellant that her family and other people were talking about the fact that he had left her and that he would have to make a home for her (p. 10, l. 37). As a result, the appellant took her to East Orange to live in February or March, 1919. Thereafter, respondent again became pregnant and again the appellant insisted on an abortion (p. 11, l. 38). The respondent refused and the child of the marriage was born in 1920.

After the birth of the child the appellant's sexual relations with respondent were unnatural, he wearing protection, etc. (p. 13, l.13). Within a period of months he discontinued sleeping in the same bed as respondent and thereafter slept on a couch in the living room. This sort of sexual relations continued intermittently till 1923 or 1924. The appellant's general attitude towards his wife, even then, was cold and heartless. He virtually ignored her presence in the house. Around that time the respondent went to appellant's couch requesting normal intercourse. The appellant refused and instead, made a revolting, unnatural sexual request of respondent (p. 22). Thereafter, down to and including 1928, respondent repeatedly asked appellant for normal sexual intercourse and appellant refused (p. 17, l. 38; p. 18; p. 22, ll. 29-38).

The appellant admits he has refused to have sexual relations with respondent since 1924 (p. 60, l. 14). In his answer he alleged that this was by mutual agreement. He abandoned that

defence at the trial and there stated it was because his wife had told him in the Summer of 1924 that he was not the father of her child. He admitted on the stand that he has always firmly believed that the child is his (pp. 64-65). The alleged statement was denied by the respondent and that denial was corroborated by witnesses supposed to have been present when the statement was made. *The Vice-Chancellor found as a fact that the statement had never been made.*

On page two, third paragraph, of appellant's brief, it is asserted that the respondent's application for alimony *pendente lite* was denied. This, while unimportant, is not the fact. It was merely continued until final hearing at which time alimony was allowed the respondent from the date of her first application for same.

On page two, last paragraph, appellant's brief, the statement is made that "At the hearing the Vice-Chancellor permitted testimony of witnesses to be given relating to statements made by Mrs. Tupper to them over the objection of appellant, it appearing that the statements were not made in the presence of the appellant and were self-serving." This is not the fact. *The Vice-Chancellor sustained the appellant's objection to the said testimony* and then merely allowed it spread on the record for the information of this Court, as otherwise there would have been nothing before this Court to enable it to pass on the propriety of the exclusion of the testimony in the event such exclusion became important to the respondent (p. 49, l. 34; p. 35). There was, however, ample corroboration of the respondent's story without such testimony. As is seen from a reading of it, *the Vice-Chancellor's opinion is in no way based upon said testimony—indeed he does not even mention it.*

I. The testimony referred to by the appellant in his first specification of error **WAS NOT ADMITTED BUT SPECIFICALLY EXCLUDED** by the Vice-Chancellor.

The testimony referred to by appellant in his first point is that of respondent's witness, Mrs. Smith. She had already stated that in 1924 she had had a talk with respondent who is her sister and very close to her. At that time respondent seemed extremely unhappy, extremely nervous. Because of that, Mrs. Smith pressed respondent to tell her what was the matter. Finally respondent reluctantly did so. Then came the following (p. 49, ll. 34-40; p. 50, ll. 1-20)—

“Q What did she tell you about it?

The Court: Objection sustained. Now you can put it on the record. Put in on the record under objection. I do not think in a contested case that the Court ever intended that it should be permitted.

Q Answer the question. A What was your question?

Q What did she tell you about it? A She told me she was extremely unhappy. that she and her husband—that her husband had refused sexual intercourse with her, made her extremely unhappy. She wanted a family, she would like to have another child.

(No cross examination.)

Mr. McLaughlin: I have Mr. Smith and Mrs. Cornish who will give the same testimony.

The Court: Will you agree they will, if called, give the same testimony?

Mr. Bradner: Yes, sir. Mr. Smith has made an affidavit, but Mrs. Cornish has not. I will admit that they will swear to the same thing.”

This speaks for itself. The said testimony was specifically barred and the Vice-Chancellor's thought regarding it is tersely stated in his above

comment. That testimony was not considered by the Court in arriving at its decision and is not even referred to in the opinion.

Because of the ample corroboration on every important point by evidence concerning which there was no dispute, the question as to the above testimony became academic. It simply further supported the respondent's case which was fully established without it. Even so, it is competent evidence on the particular point, namely—the refusal of sexual intercourse. This is in accord with *Haskell v. Haskell*, 99 N. J. E. 400, where this Court said—

“The ground, however, upon which the advisory master based his conclusion was that there was no corroboration whatever of the petitioner's testimony that the defendant refused to have sexual intercourse with the petitioner.

“From the circumstances in this case it could not be inferred that there was collusion between the petitioner and defendant. The matter of corroborating the refusal of a wife to carry out the proper marital relations which are expected of her by her husband in most instances is likely to be quite difficult. They are guarded and surrounded with the greatest secrecy, and regarded as sacred. A man and his wife are not likely to approach each other in such matters through third persons, not even through members of the other's family, nor through their family physician. It is evident in this case, the petitioner was loath to tell his most intimate friends of his trouble, and it was not until he had been pressed for an answer by them on several occasions that he finally unburdened his mind to them.

This it seems was the most natural thing for the petitioner to do. He had known his family physician intimately for a number of years; he had made his home with Mrs. Wade and her son, and these being his closest friends, were the people in whom he

would confide with the hope that he might obtain some assistance in bringing about a happier relation between himself and his wife.

Vice-Chancellor Leaming, commenting upon the subject of corroboration, in the case of *Robinson v. Robinson*, 83 N. J. E. 150, (affirmed by this court in 84 N. J. E. 201) said: 'Surrounding circumstances, adequately established, may be of a nature to fully supply the office of corroboration which the law requires in matrimonial cases.'

We are therefore of the opinion that the circumstances surrounding this case, as evidenced by the testimony of the witnesses as to the mental and physical condition of the petitioner, and the matters which he confided to them, were sufficient corroborating circumstances to justify granting a divorce.

The order of the court of chancery dismissing the petition is therefore set aside, to the end that a proper decree may be entered for the petitioner, granting the relief asked for in the petition."

The testimony here offered was that of respondent's sister, her brother-in-law, and her friend and next-door neighbor, Mrs. Cornish (p. 39, l. 20). With great reluctance respondent had told these people, near and dear to her, of the wretched, existing situation which was wrecking her life and ruining her health. A natural, human thing to do. If anyone could help, they would. And she wanted help. A normal, decent woman, desiring a family, she found herself repeatedly repulsed by her husband without any reason being advanced. Admittedly a good wife, a fine mother, she was being utterly ignored by her husband. Nervous and miserable she turned to the Smiths and her friend, Mrs. Cornish, and confided in them in the hope they might be of some assistance in her great trouble.

If anything the facts here are stronger than in the Haskell case. There, it will be remembered that the petitioner, whose statements to third persons were accepted in evidence, was the husband. In this case it is the wife who made the statements. Here, too, the appellant took the stand and deliberately stated that he had refused the respondent intercourse since 1924 (p. 60, ll. 15-40; p. 61, ll. 1-24). This was the very fact respondent had told her sister and her friend. True, the Haskell case was uncontested. That does not change the reasons of this Court for allowing the testimony. The difficulty of corroborating the intimate, private fact involved remains the same. Appreciating this fact this Court has said that in a proper case such evidence is admissible. Under all the facts this is such a case and it is submitted that the evidence offered should have been accepted in evidence.

II. The respondent never said appellant was not the father of her child.

The appellant testified that in the Summer of 1924 at Ocean Grove, his wife on two occasions stated in the presence of himself and Mr. and Mrs. German Smith that he was not the father of her child and later repeated the statement to him in the presence of his brother. This monstrous assertion came out of a clear sky, according to appellant on direct examination (p. 54, l. 22). On cross examination he does not deny that they had been talking about the Stillman case and merely states he has no recollection of saying that Mr. Stillman would retain the baby; to which respondent replied, that sooner than have that happen, Mrs. Stillman had better say that Stillman was not the father of her child (p. 63, ll. 23-35). He frankly admits that he has

never had any belief but that he is the father of the child (p. 64, l. 40; p. 65, ll. 1-12). The respondent denied the statement attributed to her (p. 28, ll. 25-40; p. 29; p. 75, l. 25; p. 76, ll. 1-10). Mr. and Mrs. Smith deny that petitioner made any such statement (p. 74; p. 76).

In a palpable effort to get away from the effect of the testimony of the Smiths on this point, appellant says there was a third statement by petitioner made to himself and his brother alone. This is denied by petitioner. Again both appellant and his brother are vague regarding it. Though supposed to be the most terrible thing that ever happened to him, appellant doesn't remember how it came to be said, where it was said or when it was said (p. 58, ll. 19-25; p. 64, ll. 1-8). He just recalls that the statement was made with no one else but his brother present. He, on his own testimony, didn't believe the statement and does not believe it now. He never asked his wife for an explanation regarding it. He states that he refused her sexual intercourse since 1924 because of it and yet during all those years never even bothered telling her his reason.

This is a last desperate attempt to hurt his wife, defeat her just suit and to keep from supporting her. It is a concocted, vicious, stupid story, quite in line with the sort of person he has shown himself to be throughout his married life. Obviously, from the very beginning, he has been sorry he married respondent and so, has been taking out his spite on her through the years. Fearful that she might obtain some sort of a hold on him through children he did his worst to prevent her having any and when she disobeyed him and gave birth to a son he made sure that there would be no others. He has forced his wife to seek a divorce. He has no real

defence to her action. In his frantic effort to weaken her case, to hurt her more terribly, if that were possible, above all to keep from supporting her, he testifies that his wife, not once, but three times; not in the heat of anger but coldly and deliberately; not in secret, but in the presence of people whose respect meant everything to her, brazenly proclaimed that she was no better than a woman of the streets.

Such statement he admits, was and is not true and was and is not believed by him. He never even discussed it with his wife during the four years which have intervened. The true reason why he did not is because his wife never made such statement. It is utterly opposed to human experience. It is denied by the respondent. It is denied by Mr. and Mrs. Smith. The testimony of the appellant and his brother regarding it is not only unbelievable but sickening. The Vice-Chancellor found as a fact that the respondent had never made such statement.

III. The desertion was wilful and obstinate.

The appellant throughout this point assumes the statement, referred to in II of this brief, was made. On such assumption he states that the desertion here was not wilful and obstinate. He admits in his brief as he did on the stand that it was continued for the four years preceding the filing of the petition.

He quotes the *Danielly case* definition of wilful, namely—"that is, intended by the deserter" but fails to point out wherein the desertion here was not intended by the appellant. He cannot do this for appellant's own testimony was that he deliberately refused to have intercourse with the petitioner (p. 60, l. 14). He does not deny that

his wife sought intercourse (p. 61). In answer to the direct question by the Court he says he would have refused if she had so requested (p. 61, l. 21).

Then appellant says the desertion was not obstinate because respondent acquiesced in appellant's decision. The statement is made (p. 8, l. 12) appellant's brief, that "There is no evidence that she complained to any body after 1924." This is not true. The fact is and the testimony is that from the beginning down to and including 1928 she persistently complained to the person most concerned—her husband, the appellant (p. 17, l. 38, pp. 18 and 19). Appellant did not deny this, merely did not recall it (pp. 60, 61 and 67). He did specifically admit that in 1928 his wife requested him for intercourse and that he never even answered her but walked into an adjoining room where the janitor, Yancy, was fixing some plumbing and said to Yancy "George, there is always something, ain't it" (p. 6, ll. 26-30; p. 23, l. 39; p. 24, l. 1; p. 42). Appellant makes the bald statement in his brief (p. 9, l. 1) that respondent "evidently arranged to have the janitor present so she could have a witness." There is not a word of testimony to support this. The fact is that the janitor was in and out of the apartment frequently, doing odd jobs and this particular evening was fixing a faulty faucet (p. 41, l. 30). It is interesting to observe that no fault is found as to the truth of the janitor's entire evidence but merely because he was present at all.

There is nothing in the case to show that the respondent consented to marital separation. Nothing to show that respondent did not wish sexual intercourse. Affirmatively, her entire case shows that she did. Appellant refers to petitioner's

letter of July 10, 1926 (p. 33). It is the sort of a letter any wife worthy of the name would write, no matter how pitiful were the conditions under which she was living and was written to a husband and father who hadn't even bothered to say good-bye to his wife and child who were going to be away for weeks.

Supplementing the testimony quoted at the bottom of p. 8 appellant's brief, is the following testimony (p. 39, ll. 1-20)—

“Q Mr. Bradner asked you about your husband going out early in the morning and coming back at night and about breakfast and then he said to you, ‘And you assented to it to some degree’ and you said, in effect—(interrupted).

The Court: We understood that—tolerated it. I supposed.

Mr. McLaughlin: I don't want any inference that she assented to the non-intercourse.

The Court: I did not gather that impression at all.”

Even if the wife had acquiesced to the non-intercourse, which she did not, it was appellant's duty under the facts to make a sincere effort to restore relations. *Shaw v. Shaw*, 89 N. J. E. 214; *Sargeant v. Sargeant*, 36 N. J. E. 644.

The testimony is that he made no such effort. He did not even tell her his now alleged reason which even then he did not believe to be the truth.

Even if respondent had made the unthinkable statement attributed to her, which appellant has always known was not true, that would be no justification for his desertion. In *Arnaboldi v.*

Arnaboldi, 101 N. J. E. 126 (aff'd Ct. E. & A. 144 Atl. 917) Bentley, V.-C., said—

“The state has said that if either of the parties be guilty of extreme cruelty, adultery or desertion the other may, upon meeting certain safeguards, secure a divorce, either absolute or limited. For less than this, no such decree shall be made, and it therefore follows that no separation shall occur. Having taken each other for better or worse, anything less than the state has declared to be a ground for divorce must be borne or overcome.”

In *Rogers v. Rogers*, 81 N. J. E. 479, at p. 483, Chancellor Walker for this Court said—

“Under our statute desertion is justified when the deserting party has been so offended against as to authorize at his or her instance a decree for divorce or judicial separation, but the guilt of the offending party must appear by clear and satisfactory proof. *Drayton v. Drayton*, 54 N. J. E. (9 Dick.) 298, 301; *Suydam v. Suydam*, 79 N. J. E. (9 Buch.) 144, 146.”

Any number of our decisions are in accord with these cases.

The appellant, p. 9 of his brief, talks about the lack of corroboration of the respondent's story. True, the appellant's admission of refusal of intercourse is important but in addition thereto a careful reading of his testimony will show that though he makes a few unimportant denials, practically the whole course of his peculiar attitude towards, and his shameful treatment of, his wife stand uncontradicted. Appellant further conveniently forgets the vitally important evidence of the janitor, Yancy, not only on appellant's denial of intercourse to respondent, but on his manner towards her for three years. Appellant forgets the unimpeached testimony of the maid,

Mary Van Dine, who was in his home for eight years. She told of appellant's treatment of petitioner and, among other things, knew that appellant slept in another room, apart from respondent. For eight years this witness, in intimate association with the parties, never saw appellant kiss his wife. She noticed that he never even bothered talking to his wife (p. 45, ll. 31-40). On the testimony of this witness alone, it was reasonable to infer that the appellant was not having sexual relations with his wife. The witness, Virginia Smith, substantiated respondent's story as to the latter's physical condition, the result of appellant's refusal of intercourse and other cruel treatment of her (p. 49, l. 1). That witness and her husband, German Smith, testified that respondent had not made the statement laid to her by appellant and alleged to have been made in their presence. The only witness in appellant's case, other than himself, was his brother, Arthur, who bore out respondent's evidence to the effect that appellant had slept apart from her since after the child was born (p. 71, ll. 28-40; p. 72, ll. 1-7).

It follows that appellant's story was not only corroborated by the necessary atmosphere of the case and circumstances as in *Parmly v. Parmly*, 90 N. J. E. at 497, but by the testimony of every witness in the case. In finding the appellant guilty of desertion the Court of Chancery reached the only possible conclusion under the evidence. The decree of that Court should be affirmed.

IV. That part of the decree regarding the custody of the child is equitable and should be affirmed.

The decree reads—

“AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the said petitioner have the exclusive custody, care and education of Arthur Waters Tupper, infant child of the said petitioner and defendant, subject nevertheless to the right of the defendant to visit said child at Washington, D. C., or such other place as said child may be, at any time convenient to the said defendant, during which visits said defendant may have said child for the period of three hours in the afternoon, and in addition thereto, said defendant may have said child at the home of his, the defendant's mother in New Jersey for the month of August of each year; said defendant, to bring said child from Washington, D. C., or wherever said child may be and return said child to said petitioner on the completion of the time allowed for said child's visit to the defendant.”

The respondent is originally from Washington, D. C., where her relatives still reside. Prior to her marriage and during part of her marriage she was employed in Washington. The appellant brought her to New Jersey and there deserted her. It seems reasonable that the respondent go back to her old home, to her relatives and friends and take the child with her. Due to the fact that her husband would not support her or the child, until he was ordered to, respondent was forced to seek employment, staying with relatives meanwhile. To be free to work, she had to put the child in boarding school. As appellant's brief states, appellant acquiesced in this but appellant never offered to contribute a cent towards the school bill.

Counsel for the appellant after the trial and in an effort to avoid payment of alimony, himself suggested that respondent was able to work and *should get back her old job in Washington.*

The decree as to custody is more than fair to appellant. He can see the child whenever he likes and as often as he likes. He does not have to go to Washington just to see the boy for a few hours. He can go down over Sunday or for a week or longer if he sees fit and on every such visit see the child for three hours each day. True, the boy to be near his mother is in school in Washington. He is only nine years old and in her keeping. Washington is reasonably near. Appellant is not tied down. He said he is general manager of his brother's company. The contention of respondent was and is that he is part owner of said business. In addition, he has the right to have the child at his mother's home for the month of August each year.

This matter of visitation is one for the discretion of the Chancery Court. In *Welch v. Baker*, 83 N. J. E. 330, this Court said—

“VREDENBURG, J. This appeal brings up a very narrow subject for determination. It is from an order of the court of chancery made December 16, 1913, directing that the respondent during the approaching year of 1915, and the succeeding summers, should be entitled to have her child, Henry Martyn Baker (a boy at school, between thirteen and fourteen years of age), given into her custody for one-half of the summer vacation, with a prohibition that she should not take him outside of the United States.

* * * * *

“No useful purpose can be served by specific references to the proofs before the learned Vice-Chancellor which led him to make the order in question. The propriety

of such orders for the custody of infant children of divorced and separated parents is necessarily committed very largely to the discretion of the court of chancery.’’

This like all questions of discretion are not disturbed unless there is a clear abuse of discretion. As Chief Justice Beasley, in the Court of Errors in the *matter of Anderson*, 17 N. J. E. 536, says—

“An order or decree of the court of chancery, in a matter resting entirely in discretion, is not the proper subject of an appeal. The rule is much too well settled to justify the tedium of a superfluous argument in its support.”

It is evident that there has been no abuse of discretion here by the Chancery Court. Vice-Chancellor Backes has, if anything, allowed the appellant greater visitation rights than he is entitled to particularly in view of his attitude towards the child.

It is respectfully submitted that the decree of the Court of Chancery be affirmed in all respects.

McCARTER & ENGLISH,
Solicitors of Respondent.

GERALD McLAUGHLIN,
Of Counsel with Respondent.

OPINION OF VICE-CHANCELLOR.

IN CHANCERY OF NEW JERSEY.

Between

MARION WATERS TUPPER,

Petitioner,

and

WILBUR D. TUPPER,

Defendant.

*On Petition,
&c.*

The Court: Wilful, continued and obstinate denial of sexual intercourse for two years constitutes cause for divorce. The wife testified that from 1923, the fact is from 1924, her husband refused her marital rights against her protest and solicitations. The defendant admits that from 1924 he refused to take her to his embrace, denied her sexual intercourse, and his reason is that she had said he was not the father of her child. He denies she ever sought intercourse but admits, had she, he would have refused. It is proved she did and that his attitude was against her will.

They summered, in 1923 and 1924, in a cottage at Ocean Grove. The defendant's story is that while sitting on the porch of the cottage with his wife, her sister, Mrs. Smith, and the latter's husband, his wife remarked, during the course of conversation, that he was not the father of her child; that her sister was horrified and rebuked her. The petitioner denies it ever occurred and so do Mr. and Mrs. Smith. The defendant is unable to give the cause or provocation or purpose of the remark or its context or relation to the discussion. The circumstances are hazy. He

says it was probably made in connection with an outburst that "Nobody would ever take that child away from her and she would go to any length to prevent it." They were discussing the Stillman case, then on everyone's tongue. The defendant's brother says she repeated the statement to him in the presence of the Smiths while out automobiling at the shore. She denies it, and the Smiths say it did not happen. The defendant and his brother say she again said it after they returned to East Orange. The petitioner denies it. I cannot accept the testimony of these brothers that the petitioner repeatedly proclaimed herself an adulteress—shamelessly dishonored herself. A self-respecting woman does not defame herself—outcast herself. Believing, an outraged husband would put her aside, quit her. This one did not. The testimony is utterly at odds with common experience and is incredible. Further, it stands refuted by the testimony of the wife and the Smiths. The reputation of paternity as a justification for the desertion is not made out.

The defendant admits he had no belief in his wife's statement, then, since or now, and he says he still has affection for her, and his counsel argues that, nevertheless, he was justified in refusing to be a husband until she retracted. The answer to that is, as I have found the fact to be, she never accused herself of perfidy or mortified him in this respect by even lip talk. How then could she retract or apologize if she did not know the cause, for he admits he never told her or intimated the reason for his refusal. He says, she understood. If the flimsy excuse he now offers—if he believed she made the offending remark, and he had affection for her, as he now professes, it would have been easy to an understanding had he told her why he was peeved, and

to have asked for an explanation at one of the many times she came to his couch for the more intimate solace of married life. He denied her. He had other reasons that he now conceals. He is guilty of desertion. I will advise a decree.

For the appeal. The marriage took place in Washington during the war, November 4, 1918. The defendant was a second lieutenant. A child was born in 1920. The parties lived in an apartment in East Orange from shortly after the marriage until the separation in 1928. The husband denied his wife sexual intercourse after July, 1924. The answer sets up that they refrained from sexual relations by mutual agreement. That was not the defense at the hearing.