

INDEX

	PAGE
Summons	1
Complaint	2
Answer	5
Reply	7
Postea and Judgment.....	8
Notice of Appeal to Supreme Court.....	10
Grounds of Appeal in Supreme Court.....	11
Motion for Direction of a Verdict.....	131
Charge to Jury.....	133
Exceptions to Charge.....	142
Plaintiff's Requests to Charge.....	143
Defendant's Requests to Charge.....	145
Opinion in Supreme Court.....	147
Order of Reversal.....	150
Notice of Appeal to Court of Errors and Appeals	151
Grounds of Appeal in Court of Errors and Appeals	152

TESTIMONY.

Plaintiff's Witnesses.

Pearl Leavitt,		
direct examination		18
cross "		28
re-direct "		44
re-cross "		46
Bertha Wagman,		
direct examination		47
cross "		53
re-direct "		60
re-cross "		60
Michael Brenner,		
direct examination		61
cross "		64
re-direct "		66
re-cross "		66

	PAGE
Irving M. Bierman,	
direct examination	67
cross "	69
re-direct "	70
Nettie Wagman,	
direct examination	70
cross "	72

Defendant's Witnesses.

Moses Leavitt,	
direct examination	73
cross "	80
re-direct "	95
Ronald Kenschalk,	
direct examination	95
cross "	98
Wilfred Jarvis,	
direct examination	100
cross "	103
re-direct "	104
Louis Leavitt,	
direct examination	105
cross "	110
Arthur Arkus,	
direct examination	115
Joseph Leavitt,	
direct examination	116
cross "	122
re-direct "	131
re-cross "	131

SUMMONS.

The State of New Jersey to Moses Leavitt, YOU ARE SUMMONED to answer (SEAL) the annexed complaint of Pearl Leavitt, in an action at law in the Essex County Circuit Court. And take notice that unless you file your answer to said complaint with the Clerk of the Essex County Circuit Court at Newark, within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you. 10

WITNESS, WILLIAM A. SMITH, Judge of the Essex County Circuit Court, at Newark, this 12th day of August, nineteen hundred and twenty-seven. 20

JOHN H. SCOTT,
Clerk.

MEYER C. ELLENSTEIN,
Attorney.

30

40

COMPLAINT.

Essex County Circuit Court

10

PEARL LEAVITT,

*Plaintiff,**Action
at Law.**vs.*

MOSES LEAVITT,

*Defendant.**Complaint.*

Plaintiff, Pearl Leavitt, residing in the City of Newark, County of Essex and State of New Jersey, complaining of the defendant, says that:

20

1. Plaintiff was legally married to her husband Joseph Leavitt on or about August 25, 1926, by the City Clerk of the City of New York, and that from the date of their marriage to the time of the acts of the defendant hereinafter complained of, plaintiff and her husband did live happily together in marital relationship.

30

2. At various times hereinafter mentioned the defendant Moses Leavitt contriving wilfully, knowingly, wrongfully, unjustly and maliciously, and intending to prejudice and aggrieve the plaintiff in the enjoyment and companionship, aid, society, protection and happiness derived from her husband did perform the acts hereinafter charged, and did thereby alienate her husband's affections.

40

3. In the latter part of November, 1926, the defendant Moses Leavitt, father of Joseph Leavitt, did learn of the marriage of the plaintiff to his son and did threaten to interfere with plain-

Complaint.

tiff and her husband in their marital relationship stating that the marriage had greatly displeased him; that from the time defendant learned of said marriage, the defendant did most hostilely, wickedly and maliciously attempt to break up the marital relationship between his son and the plaintiff; did constantly make things unpleasant for the plaintiff who had been employed by the defendant since August, 1925, and he did often scold and upbraid her and charge her with having married his son for his money, in the presence of plaintiff's husband, Joseph Leavitt, thereby causing the plaintiff to leave defendant's employ; that the defendant did often allege in the presence of plaintiff's husband that the plaintiff and her husband ought to abstain from sexual intercourse, since the defendant considered their marriage illegal; and the defendant threatened to disinherit his son, plaintiff's husband, if he continued his marital relationship with plaintiff.

4. That the defendant by means of the acts hereinbefore complained of did wilfully, knowingly, wrongfully, unjustly and maliciously induce plaintiff's husband to leave her and did and still does up to the present time persuade him not to return to the plaintiff, his wife, and to leave her without his affection, support, protection and consort.

5. That by reason of the wilful, improper, malicious, unjust and evil acts of the defendant hereinbefore complained of, the defendant Moses Leavitt has prejudiced and aggrieved plaintiff in her enjoyment of the companionship and society, protection and happiness derived from her husband Joseph Leavitt, and has alienated

Complaint.

the affections of plaintiff's husband and has induced plaintiff's husband to violate his conjugal duties and has deprived plaintiff of her right of consortium with her husband; of her comfort in his society and that respect in which her right is peculiar and exclusive.

10 6. That by reason of the defendant's acts plaintiff has suffered and will suffer untold mental agony and wounded sensibilities.

7. By reason of all of which as aforesaid, plaintiff has been damaged by the defendant in the sum of Fifty Thousand Dollars (\$50,000.00).

Wherefore plaintiff demands as damages against the defendant the sum of Fifty Thousand Dollars (\$50,000.00), together with all costs and
20 disbursements in this suit.

MEYER C. ELLENSTEIN,
Attorney of Plaintiff.

ANSWER.

ESSEX COUNTY CIRCUIT COURT.

PEARL LEAVITT,

*Plaintiff,**vs.*

MOSES LEAVITT,

*Defendant.**Action
at Law.*

10

Answer.

Defendant, Moses Leavitt, residing in the City of Newark, in the County of Essex and State of New Jersey, in answer to the plaintiff's complaint, says that:

1. He neither denies nor admits the allegations contained in paragraph 1 of the complaint, but leaves the plaintiff to her proof.

20

2. He denies paragraph 2 of the complaint.

3. He admits paragraph 3 of the complaint insofar as he alleges the date when the defendant learned of the alleged marriage between the plaintiff and one Joseph Leavitt, but he denies each and every allegation contained in the remainder of paragraph 3 of the complaint.

30

4. He denies each and every allegation contained in paragraphs 4, 5, 6 and 7 of the complaint.

FIRST SEPARATE DEFENSE.

1. The defendant had no knowledge of the alleged marriage between the plaintiff and the defendant's son, Joseph Leavitt, until the later period of November, 1926. From the time the

40

Answer.

defendant learned of the alleged marriage between the plaintiff and Joseph Leavitt, he did not in any way interfere nor hinder the continuance of the aforesaid marriage.

10 2. The defendant affirmatively denies that he in any way attempted or prejudiced or aggrieved the plaintiff in the enjoyment and companionship and happiness from her husband.

3. The defendant further says that he in no way alienated the affection of the plaintiff's husband.

4. The defendant further says that the plaintiff has not suffered damages.

20 WHEREFORE judgment should be entered in favor of the defendant together with costs of this suit.

FREDERICK JAY,
Attorney of Defendant.

30

40

REPLY.

ESSEX COUNTY CIRCUIT COURT.

PEARL LEAVITT,	}	<i>Plaintiff,</i>	<i>Action</i>	10
<i>vs.</i>				
MOSES LEAVITT,		<i>Defendant.</i>	<i>Reply.</i>	

Plaintiff, Pearl Leavitt, as and for a reply to the answer of the defendant filed herein, says that:

Plaintiff joins issue with the defendant thereon. 20

REPLY TO FIRST SEPARATE DEFENSE.

1. Plaintiff denies that part of the First Separate Defense contained in defendant's answer as alleges that the defendant did not in any way interfere or hinder the continuance of plaintiff's marriage with Joseph Leavitt.

2. Plaintiff denies the remaining allegations contained in defendant's First Separate Defense. 30

MEYER C. ELLENSTEIN,
Attorney of Plaintiff.

POSTEA AND JUDGMENT.

ESSEX COUNTY CIRCUIT COURT.

170—43814

10	PEARL LEAVITT,	<i>Plaintiff,</i>	} <i>Action</i>
	<i>vs.</i>		} <i>at Law.</i>
	MOSES LEAVITT,	<i>Defendant.</i>	} <i>On Verdict</i>
			} <i>by Jury.</i>

Judgment entered February 16, 1928.

20	Damage	\$10,000.00
	Costs	93.39
	Total.....	\$10,093.39

Meyer C. Ellenstein, Attorney of Plaintiff:

This action was tried before Judge Worrall F. Mountain with a jury at the Essex County Circuit Court on February 16, 1928.

30 The cause having been heard and submitted to the jury they return their verdict as follows:

They find in favor of the plaintiff Pearl Leavitt and against the defendant Moses Leavitt for the sum of Ten Thousand dollars (\$10,000.00) damage.

40 Whereupon it is adjudged that the plaintiff recover of the defendant the sum of Ten Thousand dollars (\$10,000.00) damage and costs which are taxed at Ninety-three dollars and thirty-nine cents, making in the whole the sum of Ten Thousand Ninety-three dollars and thirty-nine cents.

Clerk's Certificate.

Judgment entered and signed February 16, 1928.

WILLIAM S. GUMMERE,
Chief Justice.

Book C. C. 104, page 170.

JOHN H. SCOTT,
Clerk.

10

March 30, 1928.

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

I, JOHN H. SCOTT, Clerk of the County of Essex in the State of New Jersey,

Do HEREBY CERTIFY that the foregoing is a true and correct copy of all the pleadings in the case of Pearl Leavitt, plaintiff, vs. Moses Leavitt, defendant, together with a copy of the judgment record entered in Book 104, Circuit Court Judgments, page 170.

20

and the same is taken from and compared with original copies of all records and judgment record and as the same now remains on the files of said office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the official seal of said County at Newark, N. J., this second day of April, A. D. 1928.

20

(SEAL)

JOHN H. SCOTT,
Clerk.

40

NOTICE OF APPEAL.

ESSEX COUNTY CIRCUIT COURT.

10	PEARL LEAVITT, <div style="text-align: center;"><i>vs.</i></div> MOSES LEAVITT,	<i>Plaintiff,</i> <i>Defendant.</i>	}	<i>Action at Law. Notice of Appeal.</i>
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To: MEYER C. ELLENSTEIN, attorney of the above-named plaintiff-appellee:

20 TAKE NOTICE that the above-named defendant, MOSES LEAVITT, appeals to the Supreme Court of the State of New Jersey, from the whole of the judgment entered in the above-entitled cause in the Essex County Circuit Court.

Dated February 27, 1928.

FREDERICK JAY,
Attorney of Defendant.

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GROUNDS OF APPEAL.

NEW JERSEY SUPREME COURT.

PEARL LEAVITT, <i>Plaintiff-Appellee,</i>	}	<i>Action</i>	10
<i>vs.</i>		<i>at Law.</i>	
MOSES LEAVITT, <i>Defendant-Appellant.</i>		<i>On Appeal.</i>	
		<i>Grounds of Appeal.</i>	

To: MEYER C. ELLENSTEIN, Esquire, attorney for plaintiff-appellee.

SIR:

PLEASE TAKE NOTICE of the Grounds of Appeal in the above-stated appeal from the judgment of the Essex County Circuit Court: 20

1. The learned trial judge erred in admitting, over objection and exception by counsel for the defendant, the line of examination and the testimony of the witness for the plaintiff, Bertha Wagman, following:

“Q Did he ever say anything to you?

Mr. Jay: I object unless it was in the presence of the defendant. What conversation she had with the husband has no bearing on the action in this case against the defendant, unless the defendant was present. 30

(Argument.)

The Court: I will admit it.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal. 40

Grounds of Appeal.

Q (Question read.) During the first half of the year 1926? A Yes, of course, he told me that he loved my sister and that he had intentions of marrying her; he was keeping company with her.

10 Q (By Mr. Jay.) I could not hear you. A He came into the house and of course—

Q When? A Around January, 1926, when he first started to come into the house, and of course, immediately after he was coming there for awhile I wanted to know what his intentions were, coming there two or three times a week and he told me that he loved my sister and that his intentions were marriage, and he asked me to please keep it a secret because he did not want anyone to find out about it just yet.

20 Q (By Mr. Ellenstein.) Why? A Of course, I questioned him and asked him why he wanted it to be kept a secret, there was nothing to be ashamed of. 'Well,' he said, his father wanted him to marry a girl with lots of money and had promised him share in the business at the end of the year and he thought that he would keep it a secret until he got the share of the business because if he didn't he thought his father would raise objections because my sister was a poor girl."

30 2. The learned trial judge erred in admitting, over objection and exception by counsel for the defendant, the line of examination and the testimony of the witness for the plaintiff, Bertha Wagman, following:

40 "Q What did he say? A He told me that his father carried on quite terribly, he was not at all pleased with it and he said—

Grounds of Appeal.

Mr. Jay: I object. I do not desire to interrupt the thought, but it seems to me that this testimony is entirely immaterial and irrelevant. It is not evidential what his father said to him and he repeats to this witness. We have no way of reviewing that testimony on the defense. 10

The Court: Yes, I think we have.

(Argument.)

The Court: I am afraid I do not agree with you.

Mr. Jay: I respectfully ask for an exception to this entire line of testimony so far of this witness on the ground it is hearsay evidence.

Exception noted as ground of appeal. 20

Q (Question and answer read as follows:) Question. What did he say? Answer. He told me his father carried on quite terribly, he was not at all pleased with it and he said— A (Continuing) And he said he would try to win his father over and perhaps reconcile him by the end of the year and then he would get a share in the business and then he would set up housekeeping with my sister.” 30

3. The learned trial judge erred in admitting over objection and exception by counsel for the defendant, the line of examination and the testimony of the witness for the plaintiff, Michael Brenner, following:

“Q Tell us the conversation you had with him. A Yes, sir; I asked Mr. Leavitt—

Mr. Jay: I pray an exception to this line of testimony as having no bearing on the defendant. 40

Grounds of Appeal.

The Court: I will admit it.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

10 A I asked Mr. Leavitt—I saw the marriage license and everything and I wanted to go and see his father. After I found out they were married I talked to Mr. Joseph Leavitt, my son-in-law, that I wanted to speak to his father to have them married in the Jewish faith but he told me, 'Pop, don't go down to my father, he is a hasty man and wants I should marry a girl with money but I like your daughter Pearl and he promised me a share in the business and after Christmas I will talk to my father on the quiet and save you the trouble.' "

20

4. The learned trial judge erred in overruling the line of examination by the defendant's counsel of the defendant's witness Louis Leavitt, following:

"Q What did he say? A He always thought—

Mr. Ellenstein: I object to that as being hearsay.

(Argument.)

30 The Court: I admitted the testimony of Mrs. Bertha Wagman as to the conversation she had with Joe Leavitt, but when you ask as to what Moses Leavitt said to Louis I would not admit that.

(Argument.)

The Court: This is directed to the time previous to the marriage?

Mr. Jay: Yes.

Grounds of Appeal.

The Court: I will not admit that testimony. He may tell how his father acted, not as to conversations his father had with him concerning the plaintiff."

5. The learned trial judge erred in overruling the line of examination by the defendant's counsel of the defendant's witness, Louis Leavitt, following: 10

"Q Did your father consult with you about it? A Yes, he did; in this way. He said, 'The thing is done now,' and he liked Pearl—

Mr. Ellenstein: I object to that on the ground it is hearsay.

The Court: Do not tell us what he said." 20

6. The learned trial judge refused to grant defendant's motion for a directed verdict.

7. The learned trial judge erred in charging the jury that the defendant told the plaintiff's sister that his boy could marry a girl with money.

8. The learned trial judge erred in charging the jury that the "public policy favors marriage. A contract of marriage usually brings to the wife the affection of her mate and his conjugal society." 30

9. The learned trial judge erred in charging the jury that "It makes no difference if there is no love between a husband and wife, but if a third party interferes, he must account for such action."

Grounds of Appeal.

10. The learned trial judge erred in refusing to charge the defendant's second request to charge, as follows:

10 "Since the acts of the defendant must be the procuring cause for the loss of affection between husband and wife, there can be no recovery for alienation occasioned or brought about by the mistreatment of the wife by the husband, particularly, if the entire affection between the husband and wife had been thus destroyed."

11. The learned trial judge erred in refusing to charge the defendant's third request to charge, as follows:

20 "If the wife's affections had been lost or withdrawn from her husband for other reasons, or through other causes than the defendant's cause of conduct, plaintiff should not recover. The plaintiff must show that the defendant wrongfully and wilfully attempted to alienate the husband's affections and if you are not satisfied that defendant wilfully and in bad faith to the plaintiff alienated the affections of her husband, your verdict should be for the defendant."

30

Respectfully submitted,

FREDERICK JAY,
Attorney for Defendant-Appellant.

40

TESTIMONY.

ESSEX COUNTY CIRCUIT COURT.

February 14, 1928.

PEARL LEAVITT, <div style="text-align: center;"><i>Plaintiff,</i></div> <div style="text-align: center;"><i>vs.</i></div> MOSES LEAVITT, <div style="text-align: center;"><i>Defendant.</i></div>	}	<i>Action at Law.</i>	10
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Before Hon. Worrall F. Mountain, *J.*, and a jury.

For the plaintiff appears Meyer C. Ellenstein. 20

For the defendant appears Frederick Jay.

(A jury is called and sworn.)

Mr. Ellenstein opens for the plaintiff.

Mr. Jay opens for the defendant.

Adjourned to Wednesday, February 15, 1928,
at 10 o'clock, A. M.

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Pearl Leavitt, direct.

SECOND DAY.

February 15, 1928.

Continued pursuant to adjournment.

10 Present, counsel as before stated.

PEARL LEAVITT, plaintiff, sworn in her own behalf.

Direct examination by Mr. Ellenstein.

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

Q Where do you reside? A 15 Nye avenue, Newark.

20 Q With whom? A With my sister.

Q Is your sister single or married? A Married.

Q How long have you been living there? A About a year and a half, two years.

Q Two years? A About two years.

Q When did you enter the employment of the defendant? A August 11, 1925.

Q In what capacity? A As a bookkeeper.

30 Q Did you continue in that capacity during 1925? A Yes, sir.

Q The balance of the year? A Yes, sir.

Q About January, 1926, did you start to keep company with your husband?

Mr. Jay: I object as leading.

Q When did you first begin to keep company with your husband? A January, 1926.

40 Q How many nights a week did you see him through the month of January? A About two or three nights a week.

Pearl Leavitt, direct.

Q How many nights a week during the month of February? A Two or three nights.

Q How about March and April? A After that he started seeing me more often; about three or four nights a week.

Q And through June and July? A Yes, the same thing, three or four times a week. 10

Q During the time that you were keeping company with him did you have an understanding with your husband that you were to keep that a secret? A Yes.

Mr. Jay: I think this is very leading.

The Court: Do not lead the witness. On your direct case you cannot lead her.

Q During that period did you have any understanding with your husband? A Yes, sir. I often spoke to him and asked him why he wanted to keep it a secret; he had mentioned the fact that he wanted it kept a secret. 20

Q (By Mr. Jay.) Will you speak louder, please?

Q (By Mr. Ellenstein.) When did you marry your husband? A I married him on August 25, 1926.

Q Where? A In the City Hall, New York. 30

Q At whose suggestion did you marry him?

A It was at the solicitation of my husband.

Q At the time you married him did you have some understanding with him? A Yes, I had an understanding with him. I asked him—he had told me to keep this all a secret and I asked him why he wanted to keep it a secret. He said that the reason was his father wanted him to marry a girl with money and his father promised him a share in the business, and if he did not 40

Pearl Leavitt, direct.

comply with his father's wishes he would not get a share in the business.

Q When did he say his father promised him a share in the business? A At the end of the year when they would take inventory.

10 Q What year? A 1926.

Q He asked you to keep that a secret? A Yes, sir.

Q What did you say to him? A I really did not want to keep it a secret. I said to him that if he felt as though he wanted to keep it a secret as far as his father was concerned, I had to tell my people because there wasn't anything I ever kept from them.

20 Q Did you tell your people? A Yes, I told my father and sister.

Q After you were married did you assume the marriage relationship with your husband as man and wife? A Yes, sir.

Q How many times a week did he see you during the months of August, September and October? A Every night in the week except Saturday night. That night he worked late and when he managed to get away he would come over on a Saturday night.

30 Q Where did he see you? A At my home.

Q Whom do you mean, your sister's home? A Yes, sir.

Q Did he stay all night at your sister's home? A Yes, sir. On various occasions he stayed all night at my sister's home.

Q How many times approximately did he stay all night at your sister's home during the month of August, September and October after you were married? A I should judge about eight or ten times.

40

Pearl Leavitt, direct.

Q During all this period, August, September, and October was the defendant, your father-in-law, aware of your marriage? A No, sir.

Q When did he first find out that you were married? A He found out about the middle of November.

Q The middle of November? Prior to the middle of November what was the attitude of your husband towards you? A Well, he was always very affectionate, treated me very nicely.

Q Did he say anything to you as to his love for you? A He always said he loved me.

Q After your father-in-law, the defendant, found that you were married, you say that was in the middle of November? A Yes, sir.

Q Tell us how and under what circumstances you learned that he knew you were married? A I usually got to the store about 9 o'clock. This particular morning when I was in the store Mr. Leavitt walked into the store and he looked quite excited, in fact very excited.

Q By Mr. Leavitt, do you mean the defendant, or your husband? A Yes, Moses Leavitt. He walked into the store and was very excited, and walked up to me and said "I found everything out about you and Joe. Don't think you can keep anything from me. I found out that you were married." He said, "Joe could have gotten a girl with ten or twenty thousand dollars. Joe could have gotten a share in the business," he said, "Do you think because you were married in the City Hall that goes? That doesn't count at all." He said as long as I keep away from Joe and not live with him as man and wife that I could work in the store, but as soon as he found out that I was living with him he would throw me out and then he would throw Joe out,

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30

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Pearl Leavitt, direct.

he said, "And then you can both starve and Joe won't get a share in the business either."

Q Did he say anything about divorce? A Yes, he said he wanted me to get a divorce. I could work in the store, but I would have to get a divorce.

10 Q Was that the understanding upon which you remained there?

Mr. Jay: I object as leading.

The Court: I will admit it.

A After the conversation with Moses Leavitt, Joe Leavitt, my husband, walked into the store and I spoke to him about what his father had said. He said, "You stay there and I will try
20 to reconcile my father and see what I can do. When he talks don't answer him so he doesn't get excited and I will see what I can do about it."

Q Your husband said that? A My husband said that to me.

Q As the result of that conversation with your father-in-law, the defendant, you remained in his employ in the latter part of November and December, is that right? A Yes, sir.

30 Q What was his attitude towards you at that time? A During that period he would often say to me, he would often ask me what I was doing about it, whether I had started proceedings for a divorce and whether I was seeing Joe. He often questioned with whom I went out, that is, whether I went out with Joe.

Q I take you back to the time when your husband stayed over night at your sister's home with you. Did you two occupy the same room?

40 A Yes, sir.

Pearl Leavitt, direct.

Q Was there one bed in that room? A Yes, sir.

Q You both slept in that bed? A Pardon?

Q You both slept in that bed? A Yes, sir.

Q You say his attitude at that time, he was continually asking you whether you were proceeding to get a divorce, that is, Moses Leavitt? 10

A Yes, sir.

Q How often would he talk to you about that?

A Every time he could get me alone, in fact, two or three times a week, perhaps oftener.

Q Were you seeing your husband during that period? A Yes, sir, surely I saw my husband during that period.

Q How often did you see him then? A About two or three nights a week.

Q Would he be in your company very late? 20

A No, he would usually stay—if we went to a show he would bring me home after that which would be about eleven-thirty, but he hardly ever stayed later than twelve.

Q Did he give any reason? A Yes, he said he wanted to get home early.

Q Why? A So that his father would not have any suspicions.

Q Did he show the same feeling toward you as he did prior to the defendant finding out that you were married? A Oh, yes, he was always very affectionate to me and treated me very nicely. 30

Q Then you proceeded to work until January, 1927, for the defendant? A That's right.

Q What happened during the month of January? A In the month of January Joe stayed, my husband stayed over at my house one particular night, and the next morning when I came in his father was in the store, and before I even 40

Pearl Leavitt, direct.

had a chance to take my hat and coat off his father said to me, "I know Joe stayed at your house last night and you are fired, I won't have you here under any circumstances," and he said, "Don't think Joe is going to get a share in the business and if Joe continues to see you I will throw him out with you; I don't want you here." I said, "I will leave right now, if you want me to." He said, "No, don't leave now, work out until the end of the week." At that time my husband walked into the store and his father started to upbraid him and repeated the same conversation to him that he would throw him out and would not give him a share in the business if he continued to see me and all Joe answered was, "All right, all right."

10 Q What day of the week was that? A
20 When his father spoke to me?

Q Yes. A On a Thursday morning.

Q When did you husband stay overnight at your sister's home with you? A Wednesday night.

Q The night before? A The night before.

Q Did he stay at your sister's house any other time between the period when he found out, he first found out that you were married and the time he spoke to you? A No, he did not stay over at my house.

30 Q What happened on Saturday night? A The Saturday night when I left?

Q Yes. A When I left?

Q Yes. A Well, I left that night, there wasn't anything left for me to do.

Q When did you see your husband after that? A The next day, that was Sunday.

Q Where did you see him? A I met him downtown and we went to a restaurant and

40

Pearl Leavitt, direct.

while we were at the restaurant eating he said to me, "I don't know what I am going to do," he says, in fact he really came out with it and says he wanted a divorce, he said, "I will give you cause for a divorce and I will get the lawyer for you and pay you \$10 a week, but we must get a divorce and after we get a divorce and my father gives me a share in the business, why, we can get married again." 10

Q What did you say? A Well, I was very much excited, I felt very badly. I cried during the whole conversation. It seems as though I couldn't say much. I was almost hysterical.

Q Did you say anything to him in reference to about you seeing his father? A I told him that I would try to go up and talk to his father and see what I could do about it and I went up there the next day, which was a Monday, and I spoke to his father and I asked him, I said to him, I pleaded with him, I said, "You have daughters, how would you feel if anything like this would happen to you?" I said, "Can't you consider my feelings at all, is it just because I have no money you don't want me. I have worked here a long time and you know the character of person I am, it isn't as though I had done anything I should not have done." He said, "I don't want to listen to anything; all I want is that you should get a divorce," and at that particular moment we could not say anything more because a salesman came into the store. 20 30

Q Who? A One of the salesmen came in and said to me, "Are you going downtown?" And Mr. Leavitt said, "Yes, yes, she is going", as though he was dismissing the conversation as far as he was concerned, there wasn't anything more to say. 40

Pearl Leavitt, direct.

Q Prior to the time that the defendant found out that you were married did you have any occasion to have a conversation with him as to giving your husband a share in the business? A Well, yes, going over the books, which we quite often did we would often go over the sales and
10 different profits and losses of the business and he would often say, "Well, at the end of the year, we have done a little business, I will give Joe a share in the business, I am getting a little older and I have about \$75,000 and I can afford to take it easy."

Q He said, "I have about \$75,000"? A He said, "I have about \$75,000," and he could afford to take it easy.

Q You were acquainted with the financial
20 condition of that business, were you not? A Yes, sir.

Q What would you say the net worth of that business is? A Right now or at what time?

Mr. Jay: I object.

The Court: Sustain the objection.

Mr. Ellenstein: I want to show the net worth of the defendant, which is admissible on the ground of punitive damages.

30 The Court: It is admissible under certain conditions, but those conditions have not as yet arisen.

Q After you had that conversation with the defendant did you make an effort to communicate with your husband? A Yes, I tried to get in touch with him on the 'phone.

Q How many times? A How many times?

Q Yes. A Well, quite a few times. I called
40 him on the 'phone and tried to see whether I

Pearl Leavitt, direct.

could talk to him, but he refused to talk to me after that.

Q Did you call him some time in July? A Yes, I called him some time in July.

Mr. Jay: I object. Who? And the question is leading. 10

Mr. Ellenstein: The husband in July, 1926.

The Court: You had better ask when she called him again and if she cannot remember then you can ask her if she called him in July.

Q When was the last time you called your husband? When was the last time you called your husband? A It was during July.

Q What year? A 1927. 20

By the Court.

Q By telephone? A Yes, sir, I called him by telephone.

By Mr. Ellenstein.

Q You say you asked for Mr. Leavitt. Did he hire you, the defendant in this case? Did he? A Employed me, yes. 30

By the Court.

Q When was it you left his employ? A The early part of January, 1927.

Q What did he say at that time? Was that the incident you refer to where he told you to wait until the end of the week? A He just told me that I was fired at the time because his son had stayed over and because we had not complied with his wishes. 40

Pearl Leavitt, cross.

By Mr. Ellenstein.

Q Did your husband's attitude toward you change at any time from the time he kept company up to the time the defendant fired you? A No, it had not changed at all.

10 Q Did his attitude change after that, after the time he was fired? A It changed completely, in fact, the next day I just didn't know it was the same person. He just said he wanted a divorce.

Q Do you know whether or not the defendant was living with his people? A Oh, yes, he lived with his people.

Cross examination by Mr. Jay.

20 Q Did I understand you to say that when Moses Leavitt engaged you that you were engaged for the position in his store? A You mean when I was engaged as a bookkeeper there?

Q Yes. Who engaged you? A Mr. Leavitt.

Q Moses Leavitt? A Yes, sir.

Q He made all the arrangements with you? A No; he did not make all the arrangements with me.

30 Q Who did? A Joseph Leavitt made the arrangements with me.

Q How did you come to get this position? A How did I come to get this position? There was a girl friend of mine who worked in Orange and at the time I got this position I was employed in Newark, and she explained to me that she went into the Leavitt Supply Company to purchase something and they asked her whether she knew of a good bookkeeper and she said she did and immediately called me up.

40

Pearl Leavitt, cross.

Q When you went up to see Mr. Leavitt whom did you see first? A I saw Joseph Leavitt.

Q Did he introduce you to his father? A Yes, he introduced me to his father.

Q Who arranged the salary proposition with you? A Joseph Leavitt. 10

Q Who arranged the hours regarding working? A Well, when I got in I asked what the hours were.

Q Whom did you ask? A Moses Leavitt.

Q He told you what time you had to come to work and what time you were through? A Yes, sir.

Q Was anybody else in the office beside you? A You mean anyone that was employed at the time? 20

Q Yes. A No, sir.

Q You were in there most of the time alone? A The office and the store are combined, it is a large store and the office is in the back. It is not a private office, it is just a railing like this (indicating) that separates the office from the store.

Q Are you using the name Leavitt? A Right now?

Q Yes. A My friends all know me by the name of Leavitt. 30

Q I say, are you using the name of Leavitt?

A In what capacity?

Q All that question requires is a yes or no answer.

Mr. Ellenstein: I object.

The Court: Objection overruled.

Q Are you using now the name of Pearl Leavitt? A Do you mean when I work or outside of work? 40

Pearl Leavitt, cross.

Q Make it as you like? A I have to answer you in the proper way.

Q Do you use at any time the name of Brenner, your maiden name? A Yes, while I am employed.

10 Q Where they employ you you use the name of Pearl Brenner? A That's right.

Q Not Pearl Leavitt? A No.

Q Only when you are employed you use the name of Brenner? A Yes, sir.

Q Did you take part in any performance of the Young Men's Hebrew Club? A Yes, sir.

Q What name did you go under when you took part in this performance or this entertainment? A You are referring to—

20 Q I am asking you now what name you used? A The name I used was Leavitt, but the name they got in the paper was Brenner for the simple reason all the people did not know of my marriage.

Q Then, they used the name of Brenner and you gave the name of Leavitt; you want the jury to understand that? A Not all my friends know I am married; all the people in Newark that know me do not know my name is Leavitt.

30 Q Didn't you give your name when you went into this? A When I belonged there I was under the name of Pearl Brenner.

Q You never told most of your friends that you were married? A Most of my friends know I am married.

Q You just said most of your friends did not know it? A I am just saying that not everyone who knows me knows my name is Pearl Leavitt.

40 Q The relationship between employee and employer was very pleasant between you and Moses Leavitt? A Before he found out I was married.

Pearl Leavitt, cross.

Q He saw fit to invite you to his house during the Passover Festival? A Yes, sir.

Q He also saw fit to take you home from business every night? A Yes.

Q Sometimes he would meet you in the morning, and take you up to business, at Avon avenue? A Yes, but that was all before I was married. 10

Q He also took out some building and loan shares in your name? A That was in the way a raise.

Q He took it out, didn't he? A It was part of my raise.

Q You are bright enough. Just answer my questions. He took out the building and loan shares in your name? A Yes, sir. 20

Q Why did you leave the employ of Mr. Leavitt in August, 1926? A Why did I what?

Q Why did you leave Mr. Leavitt's employ in August, 1926? A I did not leave the employ of Mr. Leavitt in 1926, August.

Q You did not leave? A No, sir.

Q You went back the following Monday morning and asked Mr. Louis Leavitt to re-employ you? A Positively not.

Q Was Mr. Moses Leavitt on his vacation in 1926 in the month of August? A He took a vacation, I cannot recall just when it was, it might have been August. 30

Q You remember everything so very specifically. Weren't you married during the time Mr. Moses Leavitt was on his vacation? A Was I married when Mr. Moses Leavitt was on his vacation?

Q Yes. A During the time, yes.

Q That was August, 1926? A Yes. 40

Pearl Leavitt, cross.

Q About the 18th of August, 1926, did anything unusual occur in the store between you and Mr. Joseph Leavitt about six or half-past six at night? A Anything unusual?

Q Yes. A Not that I can recall.

10 Q Now, weren't you caught in a compromising position in the back of that store that evening by Mr. Louis Leavitt?

Mr. Ellenstein: I object to that as being immaterial.

(Argument.)

The Court: I will admit it.

Plaintiff's counsel prays an exception to this ruling of the Court.

20 Exception noted as ground of appeal.

Q (Question read.) A That was not before I was married.

Q When were you married? A August 25th.

Q This was not a week prior? A No, sir.

Q You did not go to Mr. Louis Leavitt on August 19, and say that you did not want Mr. Moses Leavitt to know anything that happened and that you were going to leave? A No, sir.

30 Q Did you leave? A No, sir.

Q You did not go back the following Monday morning and ask Mr. Louis Leavitt to take you back so the old gent wouldn't know anything about it? A No, sir.

Q Are you sure? A Positively not.

Q So, your feeling between Mr. Leavitt, Sr., and yourself was most pleasant during the entire time you worked there until Mr. Leavitt found out in November, 1926, that you were married?

40 A Yes, sir.

Pearl Leavitt, cross.

Q Didn't Mr. Moses Leavitt say to you, after he was apprised of the fact that you were married, wanted you to do him a favor and be married by a Jewish Rabbi? A No, sir, he did not. I am of orthodox faith and had he asked me to marry that way I certainly would have been married. 10

Q Did he say he wanted you married according to the Jewish faith by a Jewish Rabbi? A No, sir.

Q Are you beginning divorce proceedings at this time? A At this time?

Q Yes. A No, sir; what I really started out to do—

Q I asked you were you beginning divorce proceedings at this time? Do not volunteer. Have you begun a divorce action? A The divorce action has not been started. 20

Q Have you begun a maintenance action against your husband? A Yes, sir.

Q Did you read that paper (indicating) before it was signed in the Clerk's office in the Court of Chancery? A Yes, sir.

Q Do you remember in that paper it stated specifically that Mr. Leavitt wanted you to get married according to the Jewish faith by a Jewish Rabbi? A No, sir; I do not remember. 30

Q That is not in those papers? A I do not remember.

Q Will you say it is not? A I don't remember, that's all I can say.

Q After Mr. Leavitt knew of your marriage to his son Joe you do not know what he said in regard to the Jewish faith? A He did not say that.

Q Didn't he say to you, "This is our busy season, Christmas, wait until after the holidays 40

Pearl Leavitt, cross.

and then take three or four rooms and pick it out from the store here." A If he said what?

Q Didn't he say to you, "This is our busy season, Christmas, wait until after the holidays and then take three or four rooms and pick the stuff out from the store here"? A No, sir.

10 Q Then, why did you work until January, 1926, knowing the relationship then continued between you? A My husband said—

Q Why did you continue to work? A My husband said that I should stay there and he would see what he could do, he was still trying to reconcile his father.

Q Then, you mean to tell us that with that terrible feeling that existed, between you and Mr. Louis Leavitt, that he would have allowed
20 you to work six or seven weeks longer in that store, is that true? A He said that I should work there if he did not find out that Joe and I were living together as man and wife and he did not know until the night Joe stayed over.

Q Did he promise you a present or a Christmas gift? A Of what year?

Q 1926? A No, sir.

Q He did not promise you a Christmas gift?

30 A I did not get any Christmas gift.

Q Did he promise you any? A No, sir.

The Court: Do you mean the defendant?

Mr. Jay: Yes.

Q He did not promise you anything? A No, sir.

Q He did not tell you that he would give you furniture for a Christmas gift? A Positively
40 not.

Pearl Leavitt, cross.

Q What were his actions towards you until when he found out you were married, until the time you left? A Until the time I was fired?

Q All right. A Every chance he had he would often upbraid me and ask me if I was getting a divorce from my husband; whether I was seeing him. 10

Q What do you mean by "upbraiding"? A He would say, "Are you seeing Joe? Are you starting proceedings for a divorce? Well, don't forget, Joe is not going to get a share of the business and if you continue to see him I will throw you out with him and you can both starve."

Q He drove you home for six or seven weeks at night? A He drove me home?

Q Yes, after work. A Well, Louis Leavitt was driving the car if they went down in the car otherwise I went down in the trolley. 20

Q Please answer the question. After he found out you were married didn't he take you home in the same manner as he did before you were married? A Louis Leavitt always drove.

Q Did he or did he not? A Pardon me?

Q I am asking you in plain English whether when Moses Leavitt, with Louis Leavitt driving as you have stated, and another salesman with you in the back seat with Mr. Moses Leavitt and Louis in the front seat, didn't he continue to drive you home evenings after office hours after your marriage the same as before? A I think probably once or twice he drove me home. 30

Q He drove you home once or twice? A That's all.

Q Did he ever meet you in the morning at Avon avenue after the marriage? A Did he meet me in the morning after the marriage? 40

Pearl Leavitt, cross.

Q Yes. A No, I don't think he did, that was at the latter part of the year.

Q At any time after Mr. Moses Leavitt had knowledge of your marriage did he call for you and meet you in the morning and take you up to Orange to business? A No, it was during the
10 summer months he called for me.

Q You stated you married at Mr. Joe Leavitt's request? A Yes, sir.

Q Why? A He asked me to marry him.

Q Why? A Why he asked me to marry him?

Q Yes. A He was in love with me and he asked me to marry him and I loved him and I did.

Q Weren't you in difficulties? A What kind
20 of difficulties?

Q A delicate condition? A No, sir.

Q You were not? A No.

Q Are you sure? A Positively.

Q You were not in a delicate condition and that is why you went to New York and got married? A No, sir.

Q Are you sure of that? A Yes, sir.

Q Do you wear a wedding ring? A No, sir.

Q Mr. Leavitt presented you with one when
30 you got married? A Yes, sir.

Q Why don't you wear a wedding ring? A I go to business every day.

Q You are ashamed of your marriage? A I am not ashamed I was married. Various times when I tried to get a position when I gave my marriage name they would not employ me because they thought I would not stay there.

Q Do you wear a wedding ring when you leave your house to go to your employment? A
40 Do I?

Pearl Leavitt, cross.

Q Yes. So your friends know that you are married? A My friends know it; the ring doesn't say that I am married.

Q Do you wear it among your friends? A No, sir.

Q Are you employed now? A Yes, sir.

Q In July; you said the affectionate feeling toward you on the part of your husband lasted up until July, 1926. A Up until July, 1926? 10

Q Yes, that was your testimony on direct examination? A No, sir.

Q Tell us the correct testimony, how long did it last? A It lasted until January, 1927, not July, 1926.

Q January, 1927. You said July, 1927, before. A That was the time I called my husband up last. 20

Q His affection for you then was just as strong as it was prior? A When I called him up?

Q Yes. A No, sir, it was different.

Q You began a maintenance suit against him in August, 1927, is that correct? A Yes, sir, about that time.

Q Did your husband, Mr. Joe Leavitt, give you any money after you were married? A Did he give me money? 30

Q Yes. A What do you mean, when I first left the employ of the Leavitt Supply Company?

Q At any time. A Yes, I received a money order every week for ten dollars.

Q Why didn't he give it to you in person? A I never saw him only the Sunday after I was fired.

Q Did he always send you a money order after your marriage? A Yes, sir.

Q If he saw you three or four times every week why didn't he give it to you in cash instead 40

Pearl Leavitt, cross.

of sending a money order? A Do you mean after I left there, after I was married; I don't understand you.

Q I am asking you— A I did not get any money before I was married to him.

10 Q I am asking you after your marriage did your husband give you any money? A No, sir, he did not, I was making my salary each week and he said I should live on what I was getting and the money he got he would save so we could go into housekeeping.

Q Then, you want us to understand the \$10 a week which you have testified to was given to you prior to your marriage? A It was given to me after January, 1927.

20 Q Then he gave it to you after you were married. I asked you that before. A After I left the employ of his father, yes.

Q You were married then, weren't you? A Certainly.

Q Did he give you any money before you married? A After January, 1927, I received money orders from him.

Q You were married then? A Positively.

Q Did you succeed in getting Joe Leavitt on the telephone in July, 1927? A Yes, sir.

30 Q What did he say? A At the time I called him he had reduced my allowance, he always sent \$10 a week and he had reduced it to \$5 and I called him to find out why he had reduced it to \$5, and all he said was that he wanted me to get a divorce, to start proceedings that he would pay the lawyer's fee and give me cause for divorce.

Q Are you getting any money now? A No, sir.

40 Q Do you know why? A Do I know why?

Pearl Leavitt, cross.

Q Yes. A Perhaps my lawyer can answer that.

Q Did your lawyer tell you why? A I know it stopped; I asked him why it was stopped.

Q Didn't he tell you that the Court of Chancery ordered the payments stopped?

10

Mr. Ellenstein: I object to that as immaterial.

The Court: Sustain the objection.

Q During the months of August, September and October, 1926, approximately how many times did Joe see you? A How many times did Joe see me in August, September and October, 1926?

Q Yes. A Well, he was at the house most every night but Saturday nights when he worked late.

20

Q Didn't you work Saturday nights? A No, only on very rare occasions when they were a little busy I worked on Saturday nights, but it was not often.

Q But you did work on Saturday nights? A Yes, towards the end of the year, around the Christmas period.

Q How many times did he stay at your house in the three months I just mentioned, over night?

30

A About eight or ten times, if I judge correctly.

Q In twelve months eight or ten times? A Yes, sir.

Q Stayed there all night? A Yes, those are the nights he stayed all night.

Q In about ninety days he stayed eight or ten times? A Yes, sir.

Q What excuse did he give you for the other times he did not stay there? A He said that he

40

Pearl Leavitt, cross.

was accustomed to being home every night and his father would expect to see him home.

Q Couldn't he call on you and go home at ten or eleven o'clock? A Oh, he saw me evenings during all that period.

Q He only saw you evenings, after I led you up to it? A You asked me how many times—

Q First, I asked you how many times during the months of August, September and October your husband saw you? A And I answered most every night but Saturday night.

Q At your home? A At my home.

Q And eight or ten times he stayed over night? A Yes.

Q Did your husband ever take you out to places of enjoyment after you were married?

A Yes.

Q Where? A We went to various places.

Q Where? A We went on one occasion to Sea Gate.

Q Who is in Sea Gate? A Who is in Sea Gate?

Q Yes. A We went there one week-end with my brother-in-law and sister.

Q He stayed the whole week-end? A Yes, sir.

Q Joe stayed with you during the week-end? A Positively.

Q You did not tell us that before. What theatres did you go to? A Pardon?

Q What theatre did you go to? A Any theatre in Newark. We did not specialize in any.

Q Mention one or two and the shows you saw with Joe? A I cannot just recall now the shows, but I have been to the Shubert with him and various moving pictures.

Pearl Leavitt, cross.

Q You cannot remember now the pictures or the shows you saw at all? A We saw so many in our days I cannot remember which ones they are.

Q Who was present at the time the conversation took place between Mr. Moses Leavitt and yourself in which Mr. Moses Leavitt stated to you that if he did not part from you he would lose his share in the business. Was anyone there beside you and Mr. Leavitt. A When we started the conversation his father said that he had pumped Joe and found out that we were married. 10

Q Was anybody present at any time of the many times when Mr. Leavitt told you that he would lose his interest in the business? A Yes.

Q Who was that? A Louis Leavitt was there. 20

Q He heard Mr. Moses Leavitt say that "Joe will lose his interest in the business?" A Yes, sir.

Q Was anyone else there? A No, sir, no one else; Joe was there at times.

Q When was it you left the employ, or got fired as you stated, what day of the week? A It must have been either the 14th or the 19th of January. 30

Q What day of the week? A I left on a Saturday night.

Q What time was this? A Six o'clock.

Q Mr. Moses Leavitt said, "You are fired?" A No, not that Saturday night, no. He said I was fired on Thursday morning, but Moses Leavitt was not there when I left on Saturday.

Q He was not there? A No, he did not come to business on Saturday.

Q Who fired you? A Moses Leavitt. 40

Pearl Leavitt, cross.

Q On Thursday? A Yes, he said I was to work until the end of the week.

Q You told him in the early part of the week that you were going to leave? A I did not say that I was going to leave.

10 Q You stayed there and continued to finish out the week? A I stayed there until I was fired; I couldn't stay there after he went and fired me.

Q You stayed two or three days after he fired you? A No, on Thursday he told me I was fired.

Q And you left Saturday night? A Yes, sir.

20 Q That is two days you worked from Thursday, Friday and Saturday? A Yes.

Q Why doesn't Mr. Moses Leavitt come to his business on Saturday? A Well, he is supposed to be a religious man and he leaves Friday night at sundown and does not come in until Monday.

Q That is why he wanted you to be married by a Jewish rabbi?

Mr. Ellenstein: I object.

30 The Court: Sustain the objection.

Q What restaurant was that your husband took you to? A When?

Q When he told you that he was through with you? A The World Restaurant on Market, Market and Halsey.

Q What time of day? A It was in the evening.

Q What day of the week? A On Sunday.

40 Q You became hysterical? A Yes, sir.

Pearl Leavitt, cross.

Q Did he drive you home? A He sent me home in a cab, put me in a cab and sent me home.

Q Who paid for the cab? A He gave me the money for the cab.

Q Did you ever have a home of your own since you were married? A No, sir. 10

Q Did you live together as man and wife? A I never had a home where I lived as man and wife although we lived together as man and wife.

Q You never had a home whatsoever? A Always lived with my sister.

Q Who were the witnesses when you got married? A We didn't have any witnesses, only two men from the City Hall, but we did not bring any along with us.

Q Did you take out a license? A Yes, we have a license right there. 20

Q The same day? A Yes, in New York you do not have to wait.

Q You got a license the same day? A Yes, sir.

Q You live with your brother-in-law and sister? A Yes, sir.

Q Have they any children? A No, sir.

Q Why did you go to New York and get married? A Why did I go to New York to get married? 30

Q Yes.

Mr. Ellenstein: I object to that as being immaterial.

The Court: I will admit it.

A Well, Joe Leavitt said that if we got married in Newark it would come out in the papers, they usually do print marriages in Newark and 40

Pearl Leavitt, re-direct.

if we got married in New York it would not be in the paper and they would not have a chance of finding out that he was married.

Q That is the only reason? A That is the only reason.

10 Q Isn't it a fact that this marriage was agreed upon and hurried on account of your condition? A No, sir.

Q Were you being attended by a physician prior to your marriage? A Attended by a physician?

Q Were you being attended by a physician prior to your marriage? A Prior?

Q Yes.

20 Mr. Ellenstein: I object to that as being immaterial.

The Court: How is that material?

Mr. Jay: Nothing more than to show why they got married in a hurry in New York City.

The Court: That hasn't anything to do, if it is true, why the defendant alienated the affections of his son from this woman; that is the gist of the action.

30 Mr. Jay: We are trying to show affection.

The Court: There may not have been any affection.

(Argument.)

Re-direct examination by Mr. Ellenstein.

40 Q Tell us why you used the name of Brenner? A Yes. I can state that. I tried to get a position after I left the position with the Leavitt Supply Company and wherever I tried

Pearl Leavitt, re-direct.

to go the employers seemed to think that because you are married you are not going to stay at a place any length of time, and they felt that they want permanent help. This happened quite a number of times and I was out of work and I had to go to work, and I could not afford to stay out of work and I went under my maiden name and I found that I could obtain a position more easily with my maiden name than by using my marriage name. 10

Q The building and loan shares you speak of; did you pay for those building and loan shares or did the defendant? A The building and loan shares at the time were \$20 a month, they gave me a \$10 a month raise and asked me if I wanted the money or building and loan shares, because they were very much interested in a building and loan in as much as Louis Leavitt was one of the directors. I said that it would start a means of saving for me in as much as it was a raise I would let them take out \$10 a month of my salary and use it for the building and loan and I pay the other \$10 myself; there was \$10 a month I paid at the time. 20

Q In whose building and loan was that? A The name of the building and loan? 30

Q Yes. A The Flag Building and Loan.

Q Was Louis Leavitt a director in that building and loan? A Yes, sir.

Q The Sea Gate trip you speak of; when did you take that Sea Gate trip? A The week-end after I was married.

Q Who went on that trip? A My sister and brother-in-law went with us.

Q Whom do you mean by us? A My husband and myself. 40

Pearl Leavitt, re-cross.

Q How long did you stay in Sea Gate? A Saturday and Sunday and Monday night, if I recall correctly; it was two or three nights.

Q Did you and your husband occupy the same room? A Yes, sir, we did.

10 *Re-cross examination by Mr. Jay.*

Q Where did you stop in Sea Gate? A Where we stopped?

Q Yes. A Inside the gate, I think the people's name was Millman.

Q A hotel? A No, a private home.

Q Friends of yours? A My brother-in-law had heard of this place through his business dealings with people.

20 Q Who paid the bill? A Who paid the bill?

Q Yes. A I don't know, I know they divided evenly afterwards.

Q Did you see them divide? A No, I have been told so by each party.

Q How soon after you left Leavitt's did you get your new position? A How soon after I left Leavitt's did I get a new position?

Q Yes. A About three weeks, I should judge.

30 Q Then, there wasn't so much difficulty in getting a position on account of your marriage and wearing a wedding ring? A During the three weeks I tried and I could not afford to stay out longer than that.

Bertha Wagman, direct.

BERTHA WAGMAN, sworn in behalf of the plaintiff.

Direct examination by Mr. Ellenstein.

Q You are a sister of the plaintiff in this case? A Yes, sir. 10

Q Where do you live? A 15 Nye avenue, Newark.

Q Who lives there with you? A My father and my sister-in-law; of course, my husband.

Q When did you first make the acquaintance of your brother-in-law, Mr. Joseph Leavitt? A I think it was around January, 1926.

Q During the first half of the year January, 1926? How many times did you see your brother-in-law, Joseph Leavitt? A Oh, about two or three times a week. 20

Q Under what circumstances? A Well, he would call up on the 'phone, and of course I spoke to him on the 'phone and he would call for my sister and take her out, or spend the night at home at times.

Q Did you have any conversation with your brother-in-law, Joseph Leavitt, during that period? A Yes, sir.

Q Did he ever say anything to you? 30

Mr. Jay: I object unless it was in the presence of the defendant. What conversation she had with the husband has no bearing on the action in this case against the defendant unless the defendant was present.

(Argument.)

The Court: I will admit it.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal. 40

Bertha Wagman, direct.

Q (Question read.) During the first half of the year 1926? A Yes, of course, he told me that he loved my sister and that he had intentions of marrying her; he was keeping company with her.

10 Q (By Mr. Jay.) I could not hear you. A He came into the house and of course—

Q When? A Around January, 1926, when he first started to come into the house, and of course, immediately after he was coming there for a while I wanted to know what his intentions were, coming there two or three times a week and he told me that he loved my sister and that his intentions were marriage, and he asked me to please keep it a secret because he did not want anyone to find out about it just yet.

20 Q (By Mr. Ellenstein.) Why? A Of course, I questioned him and asked him why he wanted it to be kept a secret, there was nothing to be ashamed of. "Well," he said, his father wanted him to marry a girl with lots of money and had promised him share in the business at the end of the year and he thought that he would keep it a secret until he got the share of the business because if he didn't he thought his father would raise objections because my sister was a poor girl.

30 Q About August, 1926, did he apprise you of the fact that he was married or was going to be married? A No, he did not tell me, because my sister told me because she always tells me everything; we have no mother and we have been more like mothers to each other.

40 Q Did you see your brother-in-law, Joseph Leavitt, during August? A Yes, certainly. After August he started to come to the home almost every night in the week.

Bertha Wagman, direct.

Q How long would he stay? A Until about two o'clock in the morning, three o'clock in the morning, not much later than three. At times he went home earlier, but usually stayed until two or three in the morning.

Q Did he stay all night at your home? A Yes, on Saturday night only, but, of course, not every Saturday. 10

Q Did he retire when he stayed all night? A Yes, certainly, my father gave him his bedroom and he took my sister's bed.

Q Would he retire with his wife? A Yes, certainly.

Q Did this happen during August, September and October? A Yes, sir.

Q About the middle of November, 1926, did you see the defendant, or rather Joseph Leavitt? A Did I see him? Of course I saw him, he came to the house. 20

Q Did he have any conversation with you? A Well, he told me that his father had discovered about it, if that is what you mean, around November.

Q About what? A About that marriage; it had come out that they were married.

Q What did he say? A He told me that his father carried on quite terribly, he was not at all pleased with it and he said— 30

Mr. Jay: I object. I do not desire to interrupt the thought, but it seems to me that this testimony is entirely immaterial and irrelevant. It is not evidential what his father said to him and he repeats to this witness. We have no way of reviewing that testimony on the defense.

The Court: Yes, I think we have. 40

Bertha Wagman, direct.

(Argument.)

The Court: I am afraid I do not agree with you.

Mr. Jay: I respectfully ask for an exception to this entire line of testimony so far of this witness on the ground it is hearsay evidence.

10

Exception noted as ground of appeal.

Q (Question and answer read as follows:)

Question: What did he say? Answer: He told me his father carried on quite terribly, he was not at all pleased with it and he said— A (continuing). And he said he would try to win his father over and perhaps reconcile him by the end of the year and then he would get a share in the business and then he would set up housekeeping with my sister.

20

Q Did you see your brother-in-law between the period of 1926, and January, 1927? A Yes, sir, certainly.

Q Have you attended places of amusement with your brother-in-law and sister? A Yes, sir.

Q What has his attitude been towards your sister? A He has always shown his affection, always shown his love for her.

30

Mr. Jay: I object as to the attitude.

The Court: That is for you to find out on cross examination.

Q (Question read.) A He always showed his love and affection in my company. I always saw him showing evidence and being very, very nice and cordial to her.

40

Bertha Wagman, direct.

Q Then during January, 1927, did you have any conversation with your sister, yes, or no?

A Yes.

Q Do you remember a particular Sunday in January you had such a conversation with your sister? A Yes, sir.

10

Mr. Jay: I object.

The Court: That is out.

Mr. Ellenstein: Withdraw it.

Q As a result of that conversation what did you do? A I went up to see Moses Leavitt at his business.

Q When? A That was about a few days after that Sunday when she came home and told me about what Joe had told her and she was hysterical and carried on.

20

Q Did you see him there? A See who?

Q The defendant, Moses Leavitt? A Yes, sir, certainly.

Q Did you have a talk with him? A Yes, sir, I came up to plead with him.

Q Tell us what you said to him and what he said to you. A I came up and asked him, I told him I was quite surprised he should come between a couple whom I knew were very contented and in love with each other and I asked him why he had separated them and why he should not be reconciled to the marriage, what he had against my sister, and he told me, "Well, Joe could have married a girl with lots of money, he didn't have to go off and get married secretly. Did she think she would get somemoney out of me? He won't get anything out of me."

30

Q What did you say? A I said I could not see his point of view at all, they loved each

40

Bertha Wagman, direct.

other so dearly, what difference did money make; in time he could work his way up and in later years have the money.

10 Q What did the defendant say? A He said he would not hear anything about it, he made up his mind and he wanted her to get a divorce and he would not have anything more to say to me and of course I had to leave, and I told him, I pleaded with him, "You are an older man, I am surprised you act that way. Haven't you children of your own?" Because I knew my sister did not have a mother and I would have to plead for her.

Q Your sister has been living with you since January, 1927, has she not? A Yes, sir.

20 Q Have you noticed her mental attitude since then? A Yes, sir.

Mr. Jay: I object. There is a better way of proving mental attitude than by a non-expert witness.

The Court: I will admit the question.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

30

Q What was the state of her health—

Mr. Jay: I object.

The Court: She can tell how her sister acted and let the jury decide what the state of health was.

A After that Sunday?

40

Mr. Jay: One moment.

Bertha Wagman, cross.

A After that Sunday she came home that Sunday, the middle of January and she came home in a very hysterical condition and she carried on terribly and I could not understand it, and I tried to pump her and make her talk and she could hardly talk and she explained to me that Joe had asked for a divorce and she said she did not know what to make of it, he wanted a divorce, and she carried on terribly and I could not stop her and several times after that she got carrying on and at night I would walk into her bedroom, because I knew of her condition, and I would find her crying very bitterly and that is what induced me to go up and see his father. 10

Q How have her actions been since then? A She has been very nervous since, she has never been the same; she was never a nervous girl before that. 20

Mr. Jay: I pray an exception to all this line of testimony.

Exception noted as ground of appeal.

Cross examination by Mr. Jay.

Q Did you ever visit Mr. Louis Leavitt at his home? A No, sir. 30

Q Where did you see him? A At his place of business.

Q Of your own knowledge did your father ever go to see Mr. Leavitt at his own home? A Yes, sir.

Q With some other person? A Yes, my mother-in-law.

Q But you went to see him at his place of business in Orange? A (No answer.) 40

Bertha Wagman, cross.

Q When? A A couple of days after the middle of January when my sister told me he wanted a divorce.

Q About the 17th of January? A Approximately.

10 Q What time of day was it? A Around noontime.

Q Do you know what day of the week it was? A It might have been a Wednesday or a Thursday, I couldn't say; it was in the middle of the week some time.

Q You do not remember the date, the month? A Yes, the month was January; I know it was around the middle of the month.

20 Q You said two or three days after the middle of January? A No, after my sister told me about it.

Q What day was it your sister told you? A Some time in the middle of January and that Sunday night she came home and told me.

Q Did your sister ask you to go up and see Mr. Moses Leavitt? A No, she was in no condition to ask anything.

Q Was your sister employed at that time? A No.

30 Q She was not working? A No.

Q In January? A No, not that time. She had been fired the Saturday before.

Q That is what she told you? A That is what I know.

Q She did not tell you she was fired the Thursday before? A She told me she was fired the Thursday before, she told me that, but on Saturday she left.

40 Q Did Mr. Joe Leavitt call at your home prior to the marriage? A Yes, sir.

Bertha Wagman, cross.

Q Your sister did not testify to that effect?

A I don't know what she testified to.

Mr. Ellenstein: I object.

The Court: Sustain the objection.

Q You say he left at two or three o'clock in the morning? A That was after they were married. 10

Q He did not stay all night? A Except on Saturday nights.

Q He stayed then? A Yes, sir.

Q Did you hear your sister testify that Saturday nights were the only nights he worked late and she did not see him? A Yes, but when he worked late he would come up to the house.

Q Your sister said that Saturday nights were the only nights she did not see him she saw him three or four times during the week? A If I am not mistaken I believe she said he stayed every Saturday night. 20

Q She did not testify to that. A I know that.

Q How do you know he left at two or three o'clock in the morning? A Because I could hear him. Our front room, instead of being a regular living room has been made into a bedroom and the dining room has been made into a living room and it has quite a large door and anybody going out of the house would have to go through the living room and I could see them. 30

Q They would have to pass your bedroom door? A Yes, it is a very large door and it has no door on it, just an opening.

Q Sort of an arch like? A No, a regular door between the living room and the dining room. 40

Bertha Wagman, cross.

Q With the doors always open? A Yes, sir.

Q Is your bedroom dark at that hour of the morning? A Yes, except for the moonlight that comes into the room.

Q We haven't moonlight every night, have we? A No, sir.

10 Q You could see him go out at two or three o'clock in the morning probably two or three times a week? A Yes, sir.

Q Your room being dark and taking chances that the moon was shining brightly? A Yes, and we have a radium clock and I could see the time from the radium clock.

Q So, it was not from the moonlight you saw the time? A It might have been from the moonlight.

20 Q Now, what was it? Was it from the moonlight or did you look at the clock? A Does it matter?

Q Yes, it means a great deal whether you saw this man go out as often as you did. Did you look at the moonlight or did you look at the clock? A The clock is opposite me.

Q What did you look at when you saw him going out of your place? A What do you mean?

30 Q Did you look at your clock? A I would hear him every time he went out.

Q How do you know he stayed there until two or three o'clock in the morning as you testified on direct examination? A He did not stay every night until two or three o'clock in the morning.

Q Well, you said by the moonlight you could tell when he left. You did not mean that? A I knew it was him.

40

Bertha Wagman, cross.

Q Do not answer so quickly. If you testified that first, before the radium clock came to your thought, you stated you could see by the moonlight as he left your house, that is not true?

A It is true. I could see his form when he left the house, I knew it was him and perhaps the moonlight, would assist me. 10

Q A night like last night we had a beautiful moonlight, didn't we?

Mr. Ellenstein: I object.

The Court: Sustain the objection.

Q So, he did not stay all night? A No, sir, except on Saturdays.

Q Then, when your sister testified that he remained over night eight or ten times during that period is that true or isn't that true? 20

Mr. Ellenstein: I object.

The Court: Sustain the objection. That is not proper.

Q Then, he did not stay all night at any time with the exception of Saturday night? A Saturday night and one Wednesday night I remember. 30

Q Now, there is one Wednesday night? A That was the only Wednesday night he stayed.

Q How often did he leave at two or three o'clock in the morning during the week? A Three or four times.

Q Each week? A Yes, sir.

Q For how long? A Up until about November.

Q November what year? A 1926. 40

Bertha Wagman, cross.

Q He stopped coming there in November, 1926? A No, he did not stop coming.

Q What did he do after November, 1926?

A He was coming, but would not stay as late. After he would go home at times at ten or eleven or sometimes twelve o'clock.

10 Q Were you in the same room with your sister and Joe at all times? A Not at all times.

Q Did you and your husband go out and leave them alone? A Occasionally.

Q How often did you go out with them to the pictures? A With them or with my husband?

Q With the young couple? A I would say about four or five times.

20 Q What theatres did you go to? A We have some moving pictures around our way.

Q Do you remember any of the pictures you saw? A No.

Q It was not impressed upon your mind? A No, I am very fond of moving pictures and go very often, therefore, I cannot keep track of a year ago what pictures I saw.

Q This visit to Sea Gate, who were the people you visited? A They were strangers to me.

30 Q How did you find out about this place? A My husband recommended it.

Q Are there any people in court this morning from Sea Gate? A I don't know any one.

Q I was wondering whether you had not subpoenaed them? What was the condition of your sister's health immediately after the marriage? A Immediately after the marriage?

Q Yes. A She was in good health.

40 Q Was she being treated by a physician? A Not that I know of.

Bertha Wagman, cross.

Q You know Dr. Bierman, don't you? A Yes, sir.

Q Dr. Bierman was not treating her? A Not right after she was married.

Q When was he treating her? A Around January.

Q Of what year? A 1927. 10

Q Who was in Mr. Leavitt's place of business when you went to see him? A He was alone.

Q You didn't see Louis around? A No, sir.

Q Joe? A No, sir.

Q Nor any salesmen? A No, sir, he was the only one in the store; it was during noon hour.

Q Mr. Louis Leavitt was not there? A No, sir.

Q You did not see Joe? A No, sir. 20

Q You did not see this young man (indicating)?

Mr. Jay: Stand up.

(A man in the audience arises.)

A No, sir, I have seen that gentleman before, but I did not see him on that particular day.

Q Where did you see him before? A I used to call for my sister when she worked there. 30

Q When? A On Saturday afternoons at times.

Q What time? A Two or three o'clock I used to get through at business at twelve o'clock.

Q Are you employed? A Yes, sir.

Q You called for your sister on Saturdays at one or two o'clock? A Yes, sir.

Q Didn't she work until six o'clock in the evening? A She might work, but I spent the afternoon with her. 40

Bertha Wagman, re-direct—re-cross.

Q You spent the afternoon there with her after her marriage? A After her marriage, yes.

Q What was Mr. Leavitt's actions towards her? A Do you mean after her marriage?

10 Q Yes. A Up to the time he was acquainted with the facts he was very cordial to her, very nice to her.

Q He brought her home evenings in his car? A Not all the time, of course.

Q The Saturday afternoon you spent with your sister at Mr. Leavitt's store whom did you find there besides your sister? A At times I would find Louis there; he went up there the same time; they have three stores.

20 Q Was it on a Saturday you went to see Mr. Leavitt? A No, sir.

Re-direct examination by Mr. Ellenstein.

Q In reference to the treatment by Dr. Bierman. When did he start treating your sister?

A By treatment, what do you mean. I went to see him after January.

Q You went to see Dr. Bierman? A Yes, sir.

30 Q After January? A Yes, sir.

Q For what purpose? A She was hysterical and in a nervous condition and she carried on so terribly I took her to the doctor.

Q Has Dr. Bierman been treating her since then? A Yes, ever since then.

Re-cross examination by Mr. Jay.

40 Q How long has your sister been living with you? A About two years.

Michael Brenner, direct.

Q Was your sister operated upon in January, 1927? A Not that I know of. I do not know of any operation my sister has ever encountered.

Q You were living with her and she was living with you? A Yes, sir.

Q You know of no operation? A No, sir, I do not. 10

MICHAEL BRENNER, sworn in behalf of the plaintiff.

Direct examination by Mr. Ellenstein.

Q You are the father of Pearl Leavitt, the plaintiff in this case? A Yes, sir. 20

Q Where do you live? A 15 Nye avenue, Newark.

Q How long have you been living there? A Well, pretty close to two years.

Q Did you live there with Mrs. Wagman your married daughter? A With my two daughters, yes, sir.

Q When did you first become acquainted with your son-in-law, Joseph Leavitt? A That is four or five months before they got married. 30

Q Did you see him at your residence very often? A Two or three times a week.

Q When were you apprised of the fact that your daughter was married to Mr. Joseph Leavitt? A It was after August 25th.

Q Did you have any conversation with your son-in-law at that time? A Yes, sir, I did.

Q Tell us the conversation you had with him. A Yes, sir, I asked Mr. Leavitt— 40

Michael Brenner, direct.

Mr. Jay: I pray an exception to this line of testimony as having no bearing on the defendant.

The Court: I will admit it.

Defendant's counsel prays an exception to this ruling of the Court.

10

Exception noted as ground of appeal.

A I asked Mr. Leavitt—I saw the marriage license and everything and I wanted to go and see his father. After I found out they were married I talked to Mr. Joseph Leavitt, my son-in-law, that I wanted to speak to his father to have them married in the Jewish faith but he told me, “Pop, don't go down to my father, he is a hasty man and wants I should marry a girl with money but I like your daughter Pearl and he promised me a share in the business and after Christmas I will talk to my father on the quiet and save you the trouble.”

20

Q After your daughter's marriage to Joseph Leavitt did you see him at your home? A Positively.

Q How often? A Three or four times a week sometimes.

30

Q After you learned that your daughter was discharged from her employment did you go to see the defendant Mr. Moses Leavitt? A I went to see him five or six weeks later after that.

Q Did you go with anybody? A I went down with Mrs. Wagman, my son-in-law's mother.

40

Q Tell us what conversation you had with the defendant at that time? A Yes, sir. I came in there on a Saturday around eleven or twelve o'clock because I knew I am going to find

Michael Brenner, direct.

him on a Saturday at home, and of course, my daughter told me he never comes in Saturdays to business, so I went Saturday to see him with Mrs. Wagman to his home. I didn't know him and Mrs. Wagman knew him and she invited me that I should go with her to talk matters over and after coming there Mr. Leavitt said, "Hello, Mrs. Wagman," and she said, "By the way, this is Mr. Brenner." "What did you come up for, Mr. Brenner, money question, or what?" I said, "Mr. Leavitt, I have been a man here a good many years, a business man with a good reputation and I am not here for money, but why go to work and break up a couple that just got married?" And he says, "My son was too young to get married and my son should stay with me, because business is business."

Q Now, you will have to repeat that. Talk slower.

By the Court.

Q Tell us again what he said, and talk slower and a little louder. A I asked him is that the right way to do, to break up a young couple.

Q A little louder. A I asked him, "Is that right to break up a young couple; I understand you are a religious man and it is a sin to do a thing like that." He says, "My son was too young to get married and he should get a girl with money and after January 1st I will give him a share of the business providing—" "No," he said, "You know has my Joe sent money home?" I says, "He used to send money home before, I don't know." He said, "I will see that he sends \$10 every week, and stand the consequences of the lawyer's expenses providing

Michael Brenner, cross.

he divorces your daughter", then—but I could not say any more.

Cross examination by Mr. Jay.

Q Is that the only time you saw Mr. Leavitt?

10 A The only time.

Q Those are the words he said to you, as you have repeated? A Yes, sir.

Q Isn't it a fact, Mr. Brenner, that when you went there the first conversation you had regarding the marriage was by a Rabbi? A I don't think he asked me anything like that; he did not.

Q Didn't Mr. Leavitt tell you that they ought to be married by a Jewish Rabbi? A He did not.

20 Q Didn't you shake hands with Mr. Leavitt when you left the house? A I shook hands with everybody.

Q Didn't you shake hands with Mr. Leavitt when you left his house? A I do not remember.

Q You do not remember? A No.

Q Is it possible that you shook hands good-bye when you left? A It may be, I don't know, I can't remember.

30 Q Didn't you say to him, "Mr. Leavitt, you are a very fine gentleman, if I had known the circumstances I would certainly have come to you before?" A I did not say so.

Q You remember that? A Yes, sir.

Q You do not remember that you were shaking hands with him and saying, "You are a fine gentleman"? A I don't think I shook hands with him, maybe I did, I don't remember.

40 Q You knew your daughter was working for Mr. Leavitt in the Leavitt Supply Company? A Yes, sir.

Michael Brenner, cross.

Q Didn't she come home and tell you time and time again what an elegant job she had? A I know she always had a good job.

Q Did she tell you how good Mr. Leavitt was to her? A Yes, sir.

Q She said that he was as good to her as a father? A She did not tell me he is like that, she has a very fine boss she told me. 10

Q Mr. Leavitt was very nice to her? A I don't know, I didn't work for Mr. Leavitt.

Q You knew that once in a while he met her in the morning and took her up to her place of business? A Never, I never saw her.

Q You know he brought her home in the evening? A She told me her boss brought her home once in a while.

Q What is your business? A Sheet iron worker. 20

Q What time in the evening do you get home? A I was laid up sick for eight months steady.

Q So, you do not know whether your daughter came home by automobile or not? A She told me, I didn't see it.

Q When did you find out first about the marriage? A I found out on January; in November even when she came home from New York she told me she was married. 30

Q Now, if I understood you correctly you said you had a conversation with Joe Leavitt about a divorce, or something? A That is true, yes, sir.

Q Where was that? A It was about after they were married two or three months, in his own home on Belmont avenue.

Q Whose own home? A Mr. Leavitt's home.

Q Did you talk to Joe Leavitt, your son-in-law? A Yes. He told me that I should not 40

Michael Brenner, re-direct—re-cross.

talk to his father until about two months after January 1st because they are taking a trial balance and when they get through his father promised him a share in the business and then he will talk to his father himself. He says, "Pop, you should not bother, everything is all right."

10 Q You should not talk to his father until after New Year's, until your daughter was going to housekeeping? A No, when he said he was going to get a share in the business.

Q And Mr. Leavitt was to furnish the home from his own store? A That I don't know.

Mr. Ellenstein: I object to that.

The Court: I will admit it.

20 Q Was anything said? A To whom do you mean?

Q About the furnishing of a home after January 1st when Joe Leavitt was to get an interest in the business? A Joe Leavitt told me—

Q Was there anything said? A Yes, he is going to take rooms in Orange and live together near his store or business after his father should be satisfied, but I should not tell him.

30 *Re-direct examination* by Mr. Ellenstein.

Q You testified that Mr. Joseph Leavitt, your son-in-law, addressed you by "Pop." Is that the term he used? A After they got married, yes.

Q Is that the term he used? A Yes, sir.

Re-cross examination by Mr. Jay.

40 Q Did you see Joe Leavitt at the house before they were married? A Yes, positively. He

Irving M. Bierman, direct.

used to come up and take her out for four or five months.

Q Four or five months before the marriage?

A Every night.

10

IRVING M. BIERMAN, sworn in behalf of the plaintiff.

Direct examination by Mr. Ellenstein.

Q You are a practicing physician in the City of Newark? A Yes, sir.

Q Do you recall treating Mrs. Pearl Leavitt?

A Yes, sir.

20

Mr. Jay: The qualifications of this physician as an expert has not been asked, but knowing him as well as I do I will admit them at this time.

Q Do you recall treating Mrs. Leavitt in January, 1927? A Yes, sir.

Q Tell us of her condition as you found it?

A I found that her condition was entirely of a nervous disturbance. It is a nervous dyspepsia characterized by an affectation of the stomach, that is the coming up of the food into her mouth and also a burning, a heartburn coming on at intervals between meals. She also has nausea and an occasional vomiting; twitching of the back and pain, sharp pain running through her shoulder. I also noticed a twitching of the fingers and hands.

30

Q How long did you treat her, for what period of time? A Well, in fact she still comes to my office.

40

Irving M. Bierman, direct.

Q Did you get the history? A Yes.

Q What would you say in your opinion is the cause of that condition? A Well, the cause of her condition, the nervous dyspepsia is naturally a functional disease without local lesion, and I asked her, after making a physical examination, as to whether there was anything in her family life which disturbed her in any way, but it was of a nervous nature and she told me the history.

Q What do you mean by that? A By that she told me that her husband had left her and she was excited and nervous.

Q Do you attribute that as the cause of her nervous condition? A Well, that I won't say. I do not know whether it was the cause of her condition.

Q What is that? A I wouldn't say that is the cause of her condition.

Q Would you say that could cause that condition? A Yes, it could cause it.

Q On your examination and obtaining her history did she say anything to you about having had a condition like that prior to January, 1927?

Mr. Jay: I object.

The Court: If he used the history given him for the purpose of making a diagnosis I think he can tell us what she said.

Q Did you make a card of the history of this case? A Yes, sir.

Q Have you the card here? A No.

Q I think the card should be here.

The Court: The card can only refresh his recollection; it is not evidential.

Irving M. Bierman, cross.

Mr. Jay: That is very important.

Q (Question read.)

The Court: I think it would be more proper if you wanted to ask that question to ask the doctor what she said rather than to point out first, or refer to that particular condition. 10

Mr. Ellenstein: Withdraw the question.

Q What did she tell you at the time you first saw her? A She told me that all her symptoms from which she suffered and after taking the symptoms down and making an examination in which I found no local lesion and then asked her about a condition which brought out the fact that I made a diagnosis of. 20

Q How long did she say she was suffering these ill effects or symptoms? A A few months.

Q When did you see her first? A I first saw her some time in September; I think the middle of September, 1927.

Q (By the Court.) That was the first time you saw her September, 1927? A Yes, sir.

Cross examination by Mr. Jay. 30

Q Are you sure you saw her for the first time in September 27, 1927, last year? A That is when I saw her for the purpose of medical treatment.

Q That is last year? A 1927.

Q That was the month after she was married? A Yes, sir.

Q Did you ever operate on this young lady? A No. 40

Nettie Wagman, direct.

Q You never heard of her before September, 1927? A Not for medical treatment; I have seen her.

Q She still comes to your office? A Yes, sir.

Q These conditions you found in this young lady could come from many, many causes, couldn't it? A Yes, it could.

Q Could it come from a young woman becoming married and carrying out her marriage vows, cohabitation in a young woman? A Could it come?

Q Could that condition exist in a young woman, as you found, possibly from cohabitation, a young woman carrying out her marriage vows? A Well, hardly. I wouldn't say. But most usually nervous dyspepsia is evidenced by shock or excitement.

Q Or accident? A Yes.

Q Witnessing an accident, for instance? A Yes.

Q You did not see her until September, 1927?

A No.

Re-direct examination by Mr. Ellenstein.

Q Did you see her father prior to September, 1927, for the purpose of treatment? A No.

NETTIE WAGMAN, sworn in behalf of the plaintiff (through the interpreter.)

Direct examination by Mr. Ellenstein.

Q Where do you live? A 708 High street.

Q Do you know the defendant in this case, Moses Leavitt? A I do.

Nettie Wagman, direct.

Q How long have you known him? A Eight years.

Q Do you know Michael Brenner? A Yes, sir.

Q Do you remember going to see Mr. Moses Leavitt some time in January with Mr. Brenner? A Yes, sir. 10

Q Did you see Mr. Leavitt at that time, Mr. Moses Leavitt? A Saturday I had seen him.

Q Was that Saturday in January, 1927? A Yes, sir.

Q Who was there when you got there to the house with Mr. Brenner? A His wife and he.

Q Tell us of the conversation you had with Mr. Moses Leavitt on that day. A I begged him to make peace with the couple.

Q What did he say? A He said he was too young to be married. 20

Q Whom did he mean by that? A His son was too young to be married.

Q Did Mr. Moses Leavitt say anything about a divorce? A I told him they were already married, why does he do it.

Q What did he say? A He said he is going to send every week ten dollars.

Q Ten dollars to whom? A To the girl.

Q Did he say anything at that time of being opposed to the marriage of his son and Miss Brenner? 30

Mr. Jay: I object as leading.

The Court: Sustain the objection.

Q Was there any other conversation you had with him at that time? A I told him I did not feel well the way he talks. A fine man would not do it. 40

Nettie Wagman, cross.

Q What do you mean when you say "By the way he talks?" A Because he did not let the son live with the wife.

Q Is there anything else you remember about the conversation you had with him on that day?

A I asked him, "Now, it is too late; they are
10 already married. Why do you do that?"

Q What did he say? A He said, "They are only married in court, that doesn't matter."

Cross examination by Mr. Jay.

Q What did Mr. Leavitt say in addition to "they were only married in court?" A He said he is going to pay her \$10 a week and he wants that they get a divorce.

Q Was anything said at that time about a
20 Jewish rabbi marrying them? A He didn't say anything; he was mad.

Q He said simply "I will send her \$10 a week"? A Every week.

Q You, Mrs. Wagman, are the mother-in-law of the sister of this plaintiff in this case? A My son is married to her sister.

Q Did Mr. Leavitt and Mr. Brenner shake hands after you and Mr. Brenner left that Saturday afternoon? A I didn't want to talk to
30 him because he is such a man.

Q (Question read.) A I went away mad.

Q Did Mr. Brenner leave with you? A Mr. Brenner went home with me.

Q But you do not remember whether they shook hands or not? A I didn't want to look at him because he is such a man.

PLAINTIFF RESTS.

Moses Leavitt, direct.

Mr. Jay: I would like to recall the plaintiff herself for the purpose of verifying an affidavit.

The Court: As your own witness?

Mr. Jay: Yes, I will make her my own witness.

The Court: You may take the stand, Mrs. Leavitt. 10

Mr. Jay: Well, never mind for the present.

MOSES LEAVITT, defendant, sworn in his own behalf.

Direct examination by Mr. Jay. 20

Q You are the defendant in this case brought by Pearl Leavitt? A Yes, sir.

Q You are the man being sued? A Yes, I am the man.

Q You are also a half owner of the Leavitt Supply Company that is in business in Orange?

A Yes, sir.

Q Do you know this young lady? A Yes, sir. 30

Q Mrs. Joseph Leavitt? A Yes, sir.

Q When she came to work did you engage her? A Well, my son went to meet her and engaged her there at her sister's store. There was a lady came into the store and said, "Do you want a bookkeeper, a good, nice girl; I got a girl?" I said to her, "All right," and she said, "I will call her up and ask her," and she asked her if she would take a position, so she called back at the store or my son went to meet 40

Moses Leavitt, direct.

her at night and he spoke to her and made all arrangements.

Q You did not engage her? A No.

10 Q When did she come to work for you? A She came, I think it was—really, I am getting old, I don't remember the date. But she came, it was on a Monday.

Q Was it 1925? A I am getting old.

Q How long was she working for you? A A couple of years; but I am getting old and I can't get the dates.

Q Don't get upset that you are getting old, we are all getting old. A I can't remember dates.

Q What position did she hold, bookkeeper? A Bookkeeper.

20 Q She did all your confidential work? A Everything.

Q Did you take her home evenings? A Well, we used to. I lived on Belmont avenue and she lived on Nye avenue so when we went home we drove a little out of the way and brought her home, just like a daughter of mine.

Q Did you do that in November and December, 1926? A Up to the date she left.

30 Q When did you first find out about this marriage? A In August.

Q Weren't you on a vacation in August, 1926? A Yes, I was on a vacation away in August.

Q When were you first apprised of the fact that your son Joe was married? A In November.

Q November, 1926? A Yes, sir.

40 Q What did you do when you heard of this marriage? A I just spoke to my son first, I asked Joe, he says to me, "Pop, I am married."

Moses Leavitt, direct.

I said, "Joe, here's luck, I wish you luck, and now," I said, "You are getting \$35, I will raise you to \$50 and you take three rooms of furniture from the store, anything you want, and let your wife stay home and make your meals, but I have one favor I want from you, that you should go through the Jewish ceremony, because I am an orthodox Jew and I want you to go through a Jewish ceremony." Then, I left him and Miss Pearl came in. I didn't say anything. I said to her, "Pearl, I know everything all right," and gradually I spoke to her the same words, I said, "Pearl, it is done and I am satisfied because I always liked you. You work here until after Christmas and then you will take three rooms, nice rooms, and any furniture you want from the store, and I will raise Joe to \$50, but you cannot work, you must make his meals and you are better off. I wish you luck."

Q Did you raise his salary to fifty dollars?

A Yes, sir.

Q Was he drawing \$50 then in December, 1926? A After, I tell you.

Q Yes. A In a week or so he started.

Q After you knew they were married? A Yes, after we took stock.

Q Mrs. Leavitt, Jr., continued to work in your place until January, 1927. At whose request did she stay there? A It was understood when I told her at the time she should take the rooms.

Q Who asked her to stay there? A Nobody asked her. We made arrangements that she will stay up to after Christmas and then they will go through the Jewish ceremony and they will furnish a house and that's all.

Q And you were to give him the furniture?

A Yes, sir.

Moses Leavitt, direct.

Q Did you go to her in the month of January, about Thursday, and say, "You are fired"? A No, sir. It remained that way. I didn't talk must I just said to her—we made arrangements that this thing should be done after Christmas and I forget about it.

10 Q Was anything said by you to her regarding a divorce? A Never.

Q Did you ever say to her that Joe cannot live with her? A Never.

Q You remember Mrs. Wagman and Mr. Brenner coming to your home some time in January, 1927? A Yes, it was a Saturday. Do you want me to tell the story?

Q You have answered the question. You do not go to business on Saturday, do you? A No.

20 Q You attend synagogue? A Yes.

Q What time did they get there? A Nearer noontime.

Q You were home? A I came home from the synagogue.

Q Were they there when you got home? A When I got there they were there talking to my wife.

Q Then you were not home when they got there? A No, they were there a long time before I came home.

30 Q What conversation took place at that time between Mrs. Wagman, Mr. Brenner and yourself? A Yes.

Q What was said? A When I came I was surprised to see Mrs. Wagman, I didn't notice Mr. Brenner. I never saw him and she at once said to me, "Hello, Mr. Leavitt," I said, "Hello." She said, "Here is Mr. Brenner, Pearl's father," and right away I sat down and talked to him. I said, "Mr. Brenner, I am very

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Moses Leavitt, direct.

glad to see you," and we talked for awhile, then I talked to him, "Mr. Brenner, a father cannot control a child; five years in this country how can I control a boy twenty-seven years. I am willing we should come together and stay, it would be a pleasure to me, but," I said, "I cannot help it; all at once they decide—I don't know what it was, I cannot pull them together. Mr. Brenner I should be willing you should come by me say, 'Pop, we are married, and we should go through a ceremony,' and I am the best man living," and when he went out he said, "Mr. Leavitt, I never saw a gentleman like you. If I knew that before I would come to you sooner." That was the conversation. I sat down there about an hour and talked to them, Mrs. Wagman started to talk like a woman about shooting and those things.

Q What was your conversation, in English?

A In Jewish.

Q Did you see Mrs. Wagman? A This lady sitting there (indicating).

Q It was in your store? A No, sir.

Q Did she come to see you? A She used to come before last year, but I never see her after.

Q Did she ever come to your store and ask—
A Never.

Q One minute. I want to know from you whether Mrs. Wagman, who has testified a few moments ago, ever came to your store since the marriage of her sister to your son? A No, sir.

Q Did she ever come up and talk to you about your son and this girl living together? A No, sir.

Q Did you see her at any time? A I seen her.

Moses Leavitt, direct.

Q One moment. Did you see her at any time since the marriage of this girl to your son? A Did I see her since the marriage?

Q Did you see her since the marriage? A When I knew, I never see her after.

10 Q Did Mrs. Wagman call on you at your store after the marriage of your son? A No, sir, I never seen her.

Q What about the building and loan shares you took out in the name of Pearl Brenner? A I will tell you the thing was so—

20 Q Tell us briefly. A She pleased me so, I was so pleased with that girl I used to go around and tell people that I have a bookkeeper really, and she comes to me and says, “My father is jealous of me because I talk always about Pop,” so she was—I say, “Pearl, I would like to raise you the wages, what do you want, do you want the money or better take building and loan out and you will have something coming to you in years to come?” So, she said she wanted building and loan, so we took out building and loan of \$10 a month in the Flag Building and Loan.

Q Did you take out building and loan shares in her name? A Yes.

30 Q How many? A Ten dollars a month.

Q You paid it? A We paid it from the store.

Q Did you at any time in conversation with Mrs. Pearl Leavitt make any threat regarding throwing her out of the store? A No, sir.

Q Did you ever say to her that “I will throw Joe out as well”? A No, I had more respect for that girl to say that.

40 Q You have answered the question. Did you, during the Passover festival take her to your

Moses Leavitt, direct.

home to dine with your family? A With my family, with my own daughter.

Q Did she visit your home at any time before that? A At another time before Yom Kippur.

Q On the eve of the Day of Atonement? A Yes, sir.

Q Did you tell Mr. Brenner or Mrs. Wagonman that you would send \$10 a week and that Pearl Leavitt should get a divorce? A No, sir. I didn't say that. He said to me—

Q You did not say that, did you? A No, sir.

Q While she was in your employ did she have entire charge of the place? A Nearly.

Q Could she give orders to other employees of yours? A Yes, she was all the boss.

Q She had full power. You thought so much of her you gave her full power? A Anything she wanted to do.

Q After you found out about the marriage what way did you treat her then? A The same thing, same thing. She was just as happy and whistled and sung and danced, and I was being the same; I forgot all about it.

Q Did you at any time fire her in the month of January? A No, sir. She went herself. She said, "Pop, I am leaving Saturday night." I didn't say anything and she left Saturday; I wasn't there.

Q She left that Saturday when you were not there? A Yes.

Q You never went to business on Saturday? A No. I thought she was leaving to prepare for the wedding.

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Moses Leavitt, cross.

Cross examination by Mr. Ellenstein.

Q Do you realize you are under oath? A
What?

Q Do you realize you are under oath? A
Yes, sir.

10 Q Do you realize that the method of swear-
ing you in is just as effective as though it had
been done— A Yes, sir, at any time.

Q Do you realize that swearing in here is
just as effective as though it was done by a
rabbi? A I realize that one word is just as
good.

Q Your daughter-in-law worked for you as a
bookkeeper, did she not? A Yes, sir.

20 Q Did you always find her truthful and honest
in every respect over the period she worked for
you? A Yes, sir.

Q When did you find out about the marriage?
A I found out in November. Of course, dates
I can't remember. About November.

Q You found out in November? A I don't
know. I found out at a time, I don't remember
no dates.

30 Q November what year did you find out? A
I really—I am telling you before, I don't take
notice of years or dates.

Q Was it last year or last November? The
November just past? A No.

Q It was a year before that? A Yes.

Q When you found out in November was it
cold or warm? Do you remember that? A
How can I remember that?

40 Q I don't know, I am asking you. You do
not remember when you found out that your son
was married, whether it was warm or cold? A
I don't remember whether it was warm or cold.

Moses Leavitt, cross.

Q You don't remember whether it was warm or cold or hot? A November is fall, it can't be July.

Q Did you know at that time they had been married since August? A Did I know?

Q Yes. A I just found out, my son told me.

Q Your son told you in November that they were married in August? A Yes, sir. 10

Q Why didn't he tell you in August? A What can I tell? What I know why?

Q You don't know why? A What can I tell?

Q Did you ever ask him? A I asked the question, too. I asked this young lady a question, too.

Q What did your son say when you asked him why he did not tell you in August that he was married at that time instead of waiting until November? A He didn't want to tell me that's all. 20

Q Why? A Why should you ask me such questions? He didn't tell me.

Q Didn't you just testify on direct examination that you were on a vacation in August and for that reason your son could not tell you that he had been married until you returned from your vacation? A No, I beg your pardon. 30

Q He did not testify to that? A I didn't say that.

Mr. Jay: I object. There is no use trying to make a witness say something he did not say; he said nothing of the kind.

The Court: I will admit the question.

Q You say you did not testify to that? A What testify? I didn't know anything until No- 40

Moses Leavitt, cross.

vember. When I came back everything went smooth and nice. I don't remember.

Q Didn't you testify on direct examination—

A What?

Q That you were on a vacation when your son was married and you were not made aware
10 of it until you returned from your vacation? Did you or not? A I was on a vacation two weeks and I knew in November. How can that be?

Q Then, why did you testify about your vacation, do you know? A Why did I testify?

Q Yes. A Because I was away at that time and I didn't know it.

Q What bearing did your vacation have upon the fact that your son was married? A What
20 do you mean what bearing?

Q Yes, what bearing did the fact that you was on a vacation have in regard to your son being married? A Can't I say I was on a vacaiton when they claimed they got married in August? I was on a vacation at that time. I can say that.

Q Do you say that is why you know your son was not married? A No; because the boy told me any way; I was away and I didn't know it.

Q You were away at the time and didn't
30 know it and they did not tell you? A I didn't know until November.

Q You do not know any reason for them keeping it a secret? A What reason can you tell for some one that is in his heart? I can give my own reason.

Q You did not suspect? A I did not suspect. Everything ran smoothly; she came into the store.

Q You did not suspect that they were keeping company in January, 1926, until August, 1926,
40 the date of their marriage, did you? A What?

Moses Leavitt, cross.

Q I say you did not suspect that they were keeping company from January, 1926, until August, 1926, the date of their marriage? A No. What can I tell for children. Small children get run over, I can't put it in my pocket; I don't know.

Q Answer my question. A This is the question. 10

Q You did not suspect that they were keeping company? A They were in the store, everyone saw them.

Q You did not know anything about it and did not suspect it? A I didn't know anything about it until the time Joe told me.

Q Wasn't that a shock to you? A It was a surprise, that's all.

Q It was just a surprise, not a shock? A I had a girl, the same thing as my daughter, and if he came to me before and asked me, "Please," I wouldn't hesitate too much, and she knows that, too. 20

Q When you found out that your son was married what were the circumstances and what time of day did he tell you that? A It was in the morning. My son and I were talking and talking and he came out with it.

Q You were talking and talking about general things? A About other things, and he came out that he is married, that's all. 30

Q You were talking of other things? A We were talking and he came out and he said he was married.

Q What time of the morning was that? A About half-past eight or so when we opened the store.

Q What time did Mrs. Leavitt, your daughter-in-law, come in? A She comes in generally 40

Moses Leavitt, cross.

about nine, sometimes quarter-past nine or half-past nine. There was no clock on the daughter, any time she wants she comes in.

Q You saw your son every night with her, didn't you? A My son was home since he was a child, so, of course, sometimes he goes out, but
10 he has always been home.

Q He never said anything to you about his marriage before this to you, did he? A No, sir.

Q Did he wait until 8:30 in the morning and then tell you in your store? A Talking in the store. Talking and talking I found out it is so, that's all.

Q You know what a dowry is? A Do I know what a dowry is?

Q Yes. Isn't it a fact that it is a custom
20 among the orthodox Jews for the husband to receive a dowry from the wife? A Yes.

Q That is a fact? A Sometimes it is and sometimes it ain't. If anyone has money they give; if you don't have money you don't give.

Q Is it a fact that it is a custom among the orthodox Jews to receive a dowry from their wife? A I answer you a plain question. Some give and some don't give. If there is money you
30 get and if there isn't money you don't get.

Q I ask you whether it is or it is not a custom among the orthodox Jews to receive a dowry? A It is not a custom. If anyone has the money he gives his child if he has it.

Q You say it is not a custom? A I can't understand if you ask me a question like that.

Q (By the Court.) He asked you, is it or is it not a fact? A It is among the Jewish people if they got money they give it, and if they ain't got no money they don't give it.
40

Moses Leavitt, cross.

Q It is a custom they give it if they have it?

A Yes, if a daughter gets married and he wants to give a little money to have a home started they have something to start with and when they get it they give, and when they don't get it they don't give.

10

By Mr. Ellenstein.

Q You found out about your son's marriage in November, 1927. When did you first meet Mr. Brenner? A I can't remember the date, but he came to my house.

Q How long after? A I really couldn't tell.

Q Would you say it was four months afterwards? A It was something, he came in with Mrs. Wagman.

20

Q Was that in the latter part of January or February? A I can't remember those days, but he came in, I don't deny it, but I couldn't say the date there, because I don't remember.

Q Listen to the question. A He came in with Mrs. Wagman.

Q How long after you learned of your daughter's marriage did you first meet Mr. Brenner? A That was in November and he came after Pearl left.

30

Q How long after? A I don't remember. To tell you exactly I couldn't do it.

Q It was after Pearl left? A Yes, sir.

Q She left January 14th? A Yes, it was after.

Q A good while after? A Yes.

Q You never met Mr. Brenner? A I can't remember the date.

Q You did not meet Mr. Brenner? A I never saw him before.

40

Moses Leavitt, cross.

Q Isn't it a custom among the orthodox Jews that the very first thing you do when two young people get married is that the parents visit each other just as soon as that fact is known? A Want me to answer that question?

Q Yes or no. Isn't it the custom? Answer
10 yes or no? A A custom?

Q Yes. A What do I know. It is a custom. Some visit and some don't visit. It depends how circumstances are.

Q You did not care who Pearl's parents were, did you? A What has that to do with me?

Q You did not seek her parents. A I knew Pearl and she married to my son and that's all there is to it.

Q You say it is not the custom? A I don't
20 say it is a custom; it is a custom and it is not a custom, it depends on how people do. Some do and some don't. What is a custom? It ain't a law. I must do it?

Q Do you remember December, 1925? The first year Pearl worked for you. A Do I remember the first year.

Q Yes. A She worked for me; I know she worked there.

Q Do you remember she came in the summer
30 of 1925? A That is blank to me, the dates I don't remember, I don't know my birthday or my children's birthdays; I never kept that.

Q Do you remember giving Pearl a bed and mattress and a humidor and— A Yes.

Q A floor lamp and a card table, Christmas presents in December, 1925? Do you remember giving her that? A Yes, sure.

Q Do you remember around Christmas say-
40 ing to her, "Pearl, I am going to give you \$50

Moses Leavitt, cross.

for Christmas, you can either have it in merchandise or cash," and she said, "Well, I will take it in merchandise." Do you remember giving her those things? A I knew it was said, but I couldn't say who. My son said that question.

Q Your son did not own the store, did he? 10

Mr. Jay: Which son do you mean?

Q Joe. Did your son Joe own the store? A No, he had nothing to do with the store.

Q Then, your son did not give Pearl the Christmas presents, did he, your son Joe? A It did not make any difference who gave, we are like one. If anyone gives it is given, because we are like one. Me and him are partners 20 and Joe works for us as an employee.

Q Did you permit him to give stuff away? A What stuff?

Q These Christmas gifts? A All our employees we give them presents every one went out satisfied and "Mr. Leavitt" they said, "Thank you." We are dealing with people on a different scale. All employees of ours are one. We sit down with them together, play together and sing together. 30

Q Do you remember her getting that as a Christmas present? A Yes, we even took her down in our car.

Q I am asking you do you remember her getting Christmas presents? A Yes, like everybody gets.

Q Do you remember she did get a Christmas present in December, 1926? A Yes, I left her a silk quilt, I say to her, "Here is a quilt for you, you take it," it was lying in the store. Be- 40

Moses Leavitt, cross.

fore Christmas I saw it there and I came to her and I said, "You are married now, you take it." We always called a quilt a satin quilt, and if she did not take it it ain't my fault.

10 Q Answer my question and we will get along faster. That was in December, 1926, you gave her the quilt? A When she left after Christmas.

Q After Christmas. A That same year, Christmas.

Q What same year Christmas? A When comes January she left.

20 Q Then, you did not give her any Christmas present? A I gave her a Christmas present. I said, "Take it" and when she went home I wasn't there and she did not take it. I gave her a present of a quilt. She thanked me for it and it was laying there on the shelf and she was supposed to take it, but she did not take it.

Q You gave it to her but she did not take it home? A Yes, it was there for her.

Q Did you give her anything else at Christmas? A No, because I will tell you why.

Q Just answer my question. Did you give her anything else? A There is a reason for it.

30 Q You did? A No.

Q In December, 1925?

Mr. Jay: I object: There is a question to which he said "There is a reason for it."

The Court: You can bring that out on re-direct examination.

40 Q Didn't you think after you heard they were married that they were? A I took their word. She never showed me no written or no paper. I never asked her. I took their word.

Moses Leavitt, cross.

Q You took their word that they were married? A Yes, sir.

Q Why did you ask them to be married again?
A Not married again. I just wanted them to go through the ceremony, just finish up. They were married. I just wanted them to go through the ceremony on account of my sisters and my brothers. Just to have a Jewish ceremony. 10

Q Did they both refuse to do that? A They were supposed to go after Christmas and we got so busy we made all our arrangements that they should go both and even I asked my son-in-law and daughter to go to a Rabbi and to go just through the ceremony.

Q What ceremony? A The Jewish ceremony.

Q Of what? A You know, you know. 20

Q I don't know anything about it? A They make a blessing.

Q What kind of a ceremony is it? It is a sacrificial ceremony, is it? A No, just like—

Q What do you call it? Tell the jury. A A Jewish ceremony, a Rabbi says a blessing and they use wine.

Q What do you call it? A It is religious.

Q Well, what do you call it outside of being religious? A In Jewish it is "Chasuna." 30

Q What does that mean? A It is a blessing from God on the people.

Q Do you have that same ceremony when a child is born? A It is a different ceremony.

Q What kind of a ceremony is it that you have when they are married; describe it or don't you want to tell us? A I can't tell you.

Q You told us you gave the girl a quilt she hasn't got, and she has that in her possession. What is the name of this ceremony? A This 40

Moses Leavitt, cross.

ceremony is the name of the Jewish people when they get married they go through.

Q Yes, when they get married. A A Rabbi is there and they say a blessing and the Rabbi is there.

10 Q Weren't you going to recognize this marriage unless they went through this ceremony?
A No. I knew they were married but just asked them to do me that pleasure for the sake of my people. They should go through the Jewish ceremony. If I did not think of the marriage I would not say that, I just wanted them to go through the Jewish faith, because I am an orthodox Jew for years and live it.

20 At one o'clock, P. M., the Court takes a recess for one hour.

AFTER RECESS

MOSES LEAVITT, defendant, recalled.

Cross examination (continued) by Mr. Ellenstein.

30 Q This morning you testified that you gave a quilt to your daughter-in-law at Christmas, 1926, but she did not take it. It is still on your shelf, is that right? A Yes.

Q Is that all you offered her for Christmas? A Yes.

40 Q Why at Christmas, 1925, when Mrs. Leavitt was simply in your employ did you give her all this furniture as a Christmas present and then after learning of her marriage in November, 1926, you only offered her a quilt for a Christmas present. Can you explain that? A Yes,

Moses Leavitt, cross.

because the first year she was an employee and the second year she was supposed to be my daughter-in-law and I was supposed to furnish her a house after she started housekeeping, so what is the use of giving her presents, but the quilt I liked, it was so large; she could always carry it home when she started housekeeping, so what is the use of giving her presents? 10

Q That is the only reason you offered her a quilt? A That is the only reason.

Q How long had you been paying your son Joe \$50 a week? A Just after New Year's, I think.

Q After New Year's? A After the time.

Q When Mrs. Leavitt left? A I think so.

Q How much was he getting before that? A \$35.

Q How long had he been getting \$35? A Since she has been working with me. 20

Q After Mrs. Leavitt was discharged he was getting \$50? A She was not discharged.

Q She was not discharged? A She was supposed to take a house after they took stock, keep house; she was not discharged.

Q All right. Then, after she ceased working for you you gave Joe \$50? A Because I told him—

Q Just answer the question. A Yes. 30

Q It was after she stopped working for you? A After the books started he was getting \$50.

Q After she left, isn't that right, he got \$50 a week? A It was at the time they were taking stock.

Q Was it after she left he received \$50 a week? A I don't remember very well.

Q You don't remember now? A I don't remember very well, but I know he started in with \$50 after two years because I promised him. 40

Moses Leavitt, cross.

Q You do not remember that? A Sure.

Q Do you remember in November previous to that you found out your son was married? Remember that, don't you? A Sure.

10 Q How did you account for that? How did you account for remembering what happened in November previous and you cannot remember what happened in January three or four months later? A I can't remember the date, but when they started to take inventory. We have the books here and they show. I didn't keep no books and I couldn't remember when it started.

Q How long has Joe been getting \$35 a week up to the time you raised him to \$50? A Since he started with us.

20 Q How long ago is that? A I think three or four years.

Q He was getting \$35 a week for three years? A Three or four years.

Q After Miss Brenner ceased to work for you he was getting \$50 a week? A I was supposed to raise him. They started to keep house and I raised him \$50 a week they should be able to keep house.

30 Q That was after Mrs. Leavitt left or was discharged? A I don't remember.

Q As a matter of fact, wasn't it a case of a reward that you gave to your son so that he would not live with Mrs. Leavitt, that you raised his salary to \$50 a week? A A reward, no, sir.

Q It was not that? A It was for the cause that he should stay with her, that they should take house, he should have his own home, for housekeeping expenses. There was no reward. It was just on account of him making a living; the first thing he has to make a living.

40

Moses Leavitt, cross.

Q You do not know of any house they contemplated moving in, do you? A No, but they were supposed to take a house as soon as they took stock to start housekeeping.

Q How much board did Joe pay? A Well, he gives his mother sometimes something; I don't know. I don't count that end. 10

Q You do not know whether he pays board or not? A No, nothing about the house.

Q Do you know whether he pays \$20 a week for board in the house? A I did not fix this much in the house. Whatever he does with his mother I don't know.

Q You said on direct examination that you spoke to Joe once about the marriage? A That was all right. I spoke to him once when I found out, I spoke to him once and that's all; we arranged he should take a house and that's all. 20

Q That's all you ever spoke to him about it? A Yes.

Q Do you remember saying, "I just said to Joe and arranged about the marriage and they should take three rooms" and that's all you ever said to him about the marriage? A Yes.

Q You added, "I don't talk much." A I cannot repeat again the same words that were said between us. They should take a house. 30

Q You remember testifying to that, that you just said you spoke to Joe? A I cannot repeat the same things over and over again.

Q You say you do not know why she left the employment in January, you said on direct examination. A Well?

Q Just answer my question. A Sure, I don't know why.

Q When you came in on that Monday morning you were surprised to find her not there? A 40

Moses Leavitt, cross.

No, because she told me Thursday that she was leaving, she said, "Pop, I am leaving."

Q Why did she tell you on Thursday? A I don't know. All at once she said she was leaving.

10 Q Did you ask her why? A No, I didn't say anything.

Q Do you mean to say you did not ask her why she was leaving. Your daughter-in-law, employed by you for almost two years, and you did not ask her the reason? A No.

Q You did not ask her the reason at all? A No, because—

Q Just answer the questions. You did not ask her? A No.

20 Q What time did she usually come to business? A We have no regular time, sometimes an hour later.

Q Usually? A Eight o'clock, half-past eight.

Q How many times a week does she come to business at eight o'clock? A Most generally; sometimes more.

30 Q You say Bertha Wagman, that is the young Mrs. Wagman, never came to your store after the marriage, but she had been to your store on other occasions before the marriage, is that right? A Yes.

Q Do you know why she never came to your store after the marriage? A I don't know why. How can I tell? I don't know.

Q Don't that come back to you? A No, why should she come to me?

40 Q You do not think far back at all? A She used to come to see her sister some times. If I have an employee and friends come in to talk to her, I ain't going to ask her why she comes.

Ronald Konschalk, direct.

Q You remember distinctly after the marriage that she never came to your store? A Never.

Q You are too old to remember that? A That is a thing you cannot forget, if some one comes.

Re-direct examination by Mr. Jay. 10

Q What was your thought when Pearl Leavitt told you regarding her leaving when she informed you Wednesday or Thursday before the Saturday night she left?

Mr. Ellenstein: I object as calling for a conclusion.

The Court: Sustain the objection.

20

RONALD KONSCHALK, sworn in behalf of the defendant.

Direct examination by Mr. Jay.

Q Where do you live? A 516 Lincoln Place, Orange.

Q Do you know Mr. Moses Leavitt? A I do.

30

Q Do you know Mr. Louis Leavitt? A I do.

Q Are you employed by them? A I am.

Q Where? A At 264 Main street, Orange, furniture store.

Q What is their business? A Furniture.

Q In what capacity do you work there? A Salesman and collector.

Q Do you know Pearl Brenner, now Mrs. Leavitt? A I do.

40

Ronald Kenschalk, direct.

Q How long have you known her? A From the time she was employed there.

Q Were you employed at that place before she was? A I was.

Q After she got there her position was what? A Bookkeeper.

10 Q In the office? A Yes, sir.

Q Do you know at any time her power as a bookkeeper in the firm? A Well, she acted along other lines in the way of giving orders; if there was anything to be done she gave orders for any deliveries to be made she gave those.

Q Do you know at any time when Moses Leavitt was alone in the store? A No, to the best of my knowledge it is a place that cannot be left alone.

20 Q How often every day were you in there?

A In the morning between 8 and 8:15 three days a week. I left about quarter to nine or nine o'clock and would get back on Saturday, I wouldn't get back to the store until about five and the rest of the days about 2:30 to 3.

Q And then remained in the store? A Yes, sir.

Q And act as a salesman as well? A Yes, sir.

30 Q Did you at any time drive Mrs. Leavitt, Junior, and Mr. Moses Leavitt after business hours to their homes? A Several times.

Q Were you driving? A I was.

Q Your car? A My car.

Q Who was seated in the rear seat? A In the rear seat was Joseph and Pearl and as we called him "Pop," Mr. Leavitt. Everyone calls him Pop at the store, and in the front seat was Mr. Jarvis.

40 Q And yourself? A Yes.

Ronald Konschalk, direct.

Q How often did that happen as far as you are concerned, driving him home. A How often in the length of her employment, you mean?

Q Yes. A Well, I could safely say ten or twelve times.

Q When did you have the first knowledge of the marriage between Joe and this young lady? 10

A I had no knowledge until I saw the announce-
ment in the paper concerning the suit.

Q This suit in question? A Yes, that is the first I knew of it.

Q Was Pearl still employed? A She was not.

Q Did you drive her home between August, 1926, and January, 1927? A I did.

Q Was Mr. Moses Leavitt in the car at the time? A He was. 20

Q Was there ever any conversation regarding marriage? A Well, at one particular time, that is the only time I can remember, because they were always discussing different matters in the car, but at one particular time there was some mention about marriage, and if I am not mistaken I think it was about what I thought of Miss Brenner at the time and all Pop said in a laughing way he said, "Do you think she will make a bad daughter-in-law?" He said, "She will make a good daughter-in-law." 30

Q Do you remember at any time when Mr. Leavitt brought her to work in the morning? A Yes, sir, I saw her on several occasions; I cannot say how many times because a lot of those that would be there would be there before I was.

Q From your observation what did you notice about Mr. Moses Leavitt toward Mrs. Pearl Leavitt? A Very good. 40

Ronald Korschalk, cross.

Mr. Ellenstein: I object:

Q How long did those actions as you have just stated towards her last?

Mr. Ellenstein: I object.

10 The Court: I will admit it.

(Question read.)

A Until she left, to the very day.

Q Did you ever see Mr. Leavitt take this young lady home in his own car? A Yes, sir.

Q How often? A Every night when they were going to Newark and the only time they did not go to Newark was when Mr. Louis Leavitt would go to Paterson and that would be probably
20 two nights a week, but the rest of the time we go home to Newark in the car and she went along with them; to the best of my knowledge.

Q Until the time she left? A Yes, until the time she left.

Cross examination by Mr. Ellenstein.

Q Where do you live? A 516 Lincoln Place, Orange.

Q You do not know about the marriage of
30 the Leavitts until you saw it in the newspapers in August, 1927? A I didn't know it in August, 1927, I didn't know it until it was printed of this suit; I don't know when it was.

Q Can't you refresh your recollection as to whether it was last summer or not? A No, I think it was somewhere along towards fall. No, I know it wasn't. I couldn't say. I can't answer that question.

Q Would you say it was more than a year
40 ago? A No.

Ronald Konschalk, cross.

Q Would you say more than six months ago?

A No.

Q The first you learned of the marriage was after they were actually married? A I didn't learn of it until it was in the paper.

Q You are quite confidential with Mr. Leavitt, aren't you? A Confidential? In what way? No more than any other employee. 10

Q Does he tell you anything about his personal matters? A Absolutely not.

Q Everything is relating to business? A There are times when you are kidding and joking you get things that way, but there was nothing pertaining to his personal matters or business.

Q This conversation you say Moses Leavitt said, "Do you think she would make a bad daughter-in-law; she would make a good daughter-in-law." How did that come about? A That is, we were talking and anybody talked— 20

Q I didn't ask you that. A We were always talking and kidding about things and there was something said I believe by Pearl about marriage and I laughed about her getting married and Pop said, "Do you think she will make a bad daughter, well, she will make a good daughter-in-law," that is the very words that were spoken. 30

Q Were you laughing because of the remoteness of the possibility? A It was not the possibility of whom she was going to marry, it was not mentioned who she was going to marry or who she had married.

Q What made you laugh? A Because I had often kidded her about things of that sort before.

Q You remember you laughed? A All of us were talking and laughing; we were not sad about anything. There was no reason to be. 40

Wilfred Jarvis, direct.

Q Then, suddenly something was said about marriage? A It was not suddenly, it came along with the rest of the conversation.

Q What was the conversation? A I can't repeat every word of it.

10 Q Can you remember any part of it? A I told you the part I should think would interest you.

Q All you remember is this remark made by Mr. Moses Leavitt, "Do you think she would make a bad daughter-in-law, she would make a good daughter-in-law"? A Oh, there were things said pertaining to marriage before that.

Q That is all you remember of that conversation? A That is the only thing, yes.

20 Q You do not remember anything else of the conversation, do you? A No.

WILFRED JARVIS, sworn in behalf of the defendant.

Direct examination by Mr. Jay.

30 Q Where do you live? A 100 Pacific street, Newark.

Q Do you know Mr. Moses Leavitt? A Yes, sir.

Q Do you know Louis Leavitt? A Yes, sir.

Q Do they comprise the firm of the Leavitt Supply Company? A Yes, sir.

Q With a place of business in Orange? A Yes, sir.

Q Where? A 264 Main street.

40 Q How long have you been with them? A Ever since they opened the place.

Wilfred Jarvis, direct.

Q What is your work? A I had charge of the store in 19-21 Center street connected with the Orange store; really one store.

Q Does that connect with the main store? A No, you have to go through the yard.

Q Does that take you into the store? A On business. 10

Q How often, every day? A Oh, yes, I am over there every day, I make sales and I have to take the money.

Q Then, you know Mrs. Pearl Leavitt? A Yes.

Q Known her ever since she came to work there? A Yes, sir.

Q Do you know in what capacity she acted? A Bookkeeper.

Q Did she ever give you any orders? A Yes, she used to give me orders pertaining to the business. 20

Q At any time was Mr. Moses Leavitt alone in the store, of your knowledge? A Not to my knowledge, no, sir.

Q Did you ever notice his actions and feelings toward Miss Brenner? A Very good, as far as I know.

Mr. Ellenstein: I object as calling for a conclusion. 30

The Court: I will admit it.

Q Did you ever ride home at night with them? A Yes, sir.

Q How often? A Every night Mr. Louis Leavitt was going to Newark.

Q How often during the week? A Generally five nights a week, six weeks.

Q Was Moses Leavitt in the car? A Yes, sir. 40

Wilfred Jarvis, direct.

Q Do you ever remember whether she was brought to business in the morning by automobile? A That I couldn't answer.

Q Were you present the night this conversation took place about being a good daughter-in-law? A Yes, sir.

10 Q What was said? A I think Mr. Leavitt said, "If you think she would make a bad daughter-in-law?"

Q How did the conversation lead up to that? A There was something said about getting married. They were joking and through it all it came up and he said, "Do you think she would make a bad daughter-in-law?" And he said, "I do not."

20 Q Where were you sitting? A In the front seat.

Q With whom? A Kanschalk.

Q Where was Mrs. Leavitt sitting? A In the back.

Q Who else? A Mr. Leavitt and I think Joe was there in the back seat.

Q When did you first learn of this marriage? A At the time it was in the paper.

30 Q Can you testify from your own knowledge whether you took Mrs. Leavitt home between the month of November, 1926, and January, 1927? A Oh, yes.

Q Until the time that you left? A Oh, yes, yes.

Q Was there any change in Mr. Leavitt's actions toward Mrs. Leavitt from November, 1926, to January, 1927?

Mr. Ellenstein: I object.

The Court: I will admit it.

(Question read.)

Wilfred Jarvis, cross.

A Not that I could see.

Q They were joking and laughing in the car when you went home? A Just the same as ever, yes.

Cross examination by Mr. Ellenstein.

Q You are another employee of Leavitts? A Yes, sir. 10

Q What is Mrs. Leavitt's reputation for honesty and truthfulness?

Mr. Jay: I object.

The Court: That is not cross examination.

Q As far as you know during Mrs. Leavitt's employ was she honest and truthful? A Yes, sir. 20

Mr. Jay: I object. How can this man testify to that.

The Court: I do not think that is a proper question although it has been answered.

Q During all this period you say you went down five or six times a week? A Yes, sir.

Q On this particular occasion Mr. Korschalk was in the car? A Yes, sir. 30

Q There was never anything like this said at any other time, was there? A I have heard it said before, yes.

Q Under what circumstances? A On other occasions when we were going down with Mr. Leavitt and Mr. Louis Leavitt and myself.

Q What did you hear? A Well, I heard the same thing, that he would not mind having her for a daughter-in-law. 40

Wilfred Jarvis, re-direct.

Q He said that? A Yes, he thought she was a very nice girl and always spoke very good of her.

Q You are a canvasser? A I have charge of 19-21 Center street.

Q Do you canvass? A No, sir, no more.

10 Q When did you last do canvassing for Leavitts? A A year ago.

Q Now you manage one of their stores? A Yes, sir.

Q When Mr. Korschalk was with you was anything else besides the conversation that you testified to that Mr. Leavitt, the defendant, said, "Don't you think she would make a good daughter-in-law?" Do you remember? Was there anything else besides that said? A No, I couldn't say there is any other subject, only that happened to impress my memory on account of it being something we were kind of looking for because Mr. Leavitt used to be so good to her.

20

Q You were kind of looking for that? A Well, I was kind of interested.

Re-direct examination by Mr. Jay.

30 Q You simply manage the storehouse? A No, sir, I have charge of the store at Center street, 19-21.

Louis Leavitt, direct.

LOUIS LEAVITT, sworn in behalf of the defendant.

Direct examination by Mr. Jay.

Q You are a son of Mr. Moses Leavitt? A Yes, sir. 10

Q And a brother of Joseph Leavitt? A Yes, sir.

Q A member of the firm of the Leavitt Supply Company? A Yes, sir.

Q Comprised of you and your father, Moses Leavitt? A Yes, sir.

Q In what capacity do you act in this partnership? A Co-partner.

Q What is your work, what is your part of the work? A Why, general work. 20

Q General manager? A Yes, and I am outside most of the time.

Q Do you know Mrs. Pearl Leavitt? A I do.

Q When did she come to work for you? A August, 1925.

Q Who engaged her? A Joseph Leavitt.

Q Do you know how Joseph Leavitt knew where to find her? A Not particularly. I know it was made through an outside engagement somehow. 30

Q In what capacity was Mrs. Leavitt, Jr., engaged? A As a bookkeeper.

Q What else? A Well, nothing else that I know of.

Q Was she given authority to give orders to the men? A She never had authority, because if there were any orders to send out she had them. 40

Louis Leavitt, direct.

Q Did your father ever talk to you about Mrs. Leavitt, Jr.? A Yes, the discussion of marriage came up.

Q I mean prior to that time, regarding her qualifications, the qualifications of Miss Brenner?

A Yes, he did.

10 Q What did he say? A He always thought—

Mr. Ellenstein: I object to that as being hearsay.

(Argument.)

The Court: I admitted the testimony of Mrs. Bertha Wagman as to the conversation she had with Joe Leavitt, but when you ask as to what Moses Leavitt said to Louis I would not admit that.

20 (Argument.)

The Court: This is directed to the time previous to the marriage.

Mr. Jay: Yes.

The Court: I will not admit that testimony. He may tell how his father acted, not as to conversations his father had with him concerning the plaintiff.

30 Q What were your father's actions or attitude towards Pearl Brenner up until August, 1926? A Always pleasant and I thought he thought a whole lot of her all the time, which he did.

Q Did you drive her home evenings? A Well, the majority of the evenings during the week when I was going down that way I generally took her home or left her at Avon avenue and Bergen street.

40 Q And your father was always in the car? A At the time he was in the store.

Louis Leavitt, direct.

Q During the month of August was he at any time in the store or was he on a vacation?

A Part of August he was on a vacation in Rockaway.

Q About the month of August did anything unusual occur in the store that was brought to your attention? A Yes. 10

Q What was that? A After closing hours.

Q What time are the closing hours? A Six o'clock sharp, unless something unusual happens. I was to the doctor that afternoon and I came up and went in the store to see if everything was all right and when I got to the rear of the store I heard a noise and I ran back there to see what was going on and as I ran back there to see what was going on and as I got there I saw the door slam and Joseph comes out. Of course, I seen the situation and I didn't bother questioning anybody. I just went out, and that's all there was to it. 20

Q Who was there? A Joseph, and I saw Mrs. Leavitt now, going into the lavatory door and some of her things were on the table there, on the bench.

Q Did she come to work the next day? A Yes, sir.

Q Did she say anything to you? A Not the next day, no, nothing was mentioned. 30

Q When did she say anything in particular to you? A On Saturday afternoon of that week.

Q What did she say? A She said that I had it on her now and she did not feel as though she wanted to stay there any more and she left.

Q Then, what happened? A The next Monday morning she came back and begged me to take her back and not tell my father anything 40

Louis Leavitt, direct.

about it because he had such a high opinion of her.

Q Did you tell anything to your father about it? A I did not.

Q Did you have any conversation with Joe after that? A Very seldom. I never brought
10 the subject up at all.

Q Did you take her back the following Monday morning? A I did with the promise from her to attend to her business only. The following Wednesday she came in in the morning telling me that her aunt was very sick and she had to meet her father at the tubes; that was August 25th, the day of the marriage, which was not learned until it was published in the paper.

Q Did she tell you that she was going over to get married? A No, she told me that she
20 was going to see a sick aunt with her father.

Q When did you find out about the marriage? A When I read it in the paper.

Q When suit was started? A No, I learned about it in November when my brother had told my father about it.

Q Was this the first you knew of the marriage? A Yes, sir.

Q Did your father consult with you about it? A Yes, he did, in this way. He said, "The
30 thing is done now," and he liked Pearl—

Mr. Ellenstein: I object to that on the ground it is hearsay.

The Court: Do not tell us what he said.

Q After the marriage. A After the marriage it was arranged that after the first of the year, after we would take inventory that we would have a wedding ceremony by a Jewish
40

Louis Leavitt, direct.

Rabbi and that they would go housekeeping. That was his suggestion and if I objected to giving them the furniture.

Q How much did you pay Joe after that?

A It was arranged between my father and Joe and Mrs. Leavitt that they were to get fifty dollars a week after the marriage, after the first of the year. 10

Q What do you mean by a Jewish ceremony?

A I mean it has been the custom according to the Jewish faith outside of the marriage by legal law to have a Jewish ceremony which is performed by a rabbi, just the same as any Catholic would have if they were married by a Justice of the Peace or so.

Q (By the Court.) It is not really the marriage, it is the ceremony attached to the marriage? A It is a custom of the faith more than anything else. 20

Q (By Mr. Jay.) After November when you and your father knew of the marriage what was your father's attitude towards Pearl? A I never saw no difference in his attitude at all, he was always very kind to her and always talked well of her.

Q Did he continue to take her home? A Why, certainly. 30

Q And called for her in the morning, occasionally? A We never called at her home for her, but we would meet her say at Avon avenue and Bergen street several times, but I have taken her to her home in the evening on several occasions.

Q Do you know anything about this Christmas present in 1926 of a quilt? A Yes, sir.

Q Tell us about it? A My father was over in New York and we bought two silk comforters. 40

Louis Leavitt, cross.

Q What is the value of them? A The retail price?

Q Yes. A About \$29.50.

Q Go ahead. A Sir?

Q Tell us about this Christmas present? A Well, he bought two, one we sold and one we
 10 had in stock, so he gave Pearl one as a present as I understand at the time as a Christmas present, when we usually give gifts to our employees at Christmas time and we decided not to give Pearl anything else on account of her getting the furniture after the first of the year which I thought was no more than right and that's all I know as far as that is concerned.

Q Did she ever give any reason as to why she left? A I told you I never interfered in Joe's
 20 affairs at all.

Q Did she tell you any reason? A No reason at all. I never saw her and she has never mentioned anything to me; the only time was in August.

Cross examination by Mr. Ellenstein.

Q Who does the hiring of help in your place of business? A Why, this particular time?

Q At any time? A Nobody in general,
 30 either my father or my brother.

Q Your father or your brother? A Yes, or myself sometimes if it is necessary.

Q Didn't you just a minute ago testify that you did not interfere in such things as the hiring of help? A My work was—

Q Did you or did you not so testify? A I did not interfere with the hiring of her. I did not interfere with the hiring of Mrs. Leavitt.

Q Who hires all the other help, Jarvis and
 40 Kanschalk and your present bookkeeper. Who

Louis Leavitt, cross.

hired her? A Joseph hired her, too, but I hired Mr. Jarvis. Sometimes according to how the person comes in. If we are all there we all talk to her. Anybody who is in there hires a party. Joseph has authority to hire help the same as anyone else.

Q You discharged her in August? A Who? 10

Q I say you discharged her in August? A I did not discharge her at all.

Q Didn't you testify that you caught her in a compromising position and discharged her?

A No, I did not say I discharged her.

Q Did she leave of her own volition? A She left on Saturday afternoon.

Q I am talking of the time in August you speak of? A I didn't see her then. I was in the lavatory and then I went out. She left of her own accord. 20

Q And then she came back on Monday after her position? A Yes.

Q After leaving of her own accord? A Yes.

Q The reason you did not give Christmas presents in 1926 was because you anticipated furnishing three rooms for her in January, isn't that right? A She did get a Christmas present of a quilt. 30

Q I am asking you a question. She never has received the quilt, has she? A I don't know, she has never taken it.

Q Then, she has never gotten a quilt. A It was given to her. If she did not take it it is up to her.

Q Don't you know as a matter of fact she never had the quilt in her possession. It never left the possession of your business? A I don't know whether it was with the understanding 40

Louis Leavitt, cross.

to leave it there and take it with the rest of the furniture or not.

Q Has that quilt ever left your possession?

A Not that I know of.

Q She received no Christmas present in 1926?

A It was given but was not taken.

10 Q The explanation you give why you did not give her a Christmas present is because you anticipated setting her up in three rooms and you thought it was no more than right? A I said that the quilt was given as a Christmas present at the time because we had it in stock and we thought she could use it, and about any further Christmas presents we thought if she was furnishing her home it would answer the same thing.

20 Q You thought the furniture that you were giving—you were giving furniture in January?

A We thought it was a good gift.

Q That is why you did not give her a Christmas present? A She got a comforter as a Christmas present.

Q She got it but never received it? A It was left in the store; it was given to her.

Q When did you first learn of the marriage?

A In November.

30 Q What year? A 1926.

Q A year ago last November? A At the time it came out for publication. At that time.

Q The publication of what? A I am confused. I will take that back. I heard of it in November when my brother told my father.

Q Then it was not in a newspaper publication at all, was it? A I was thinking of the trial.

Q Why did you testify on direct examination that the first you knew of the marriage was after there was a newspaper publication of it?

40

Louis Leavitt, cross.

Mr. Jay: I object. He said it was after his father informed him of the marriage.

The Court: I will admit it.

Q Why did you on direct examination say that the first you learned of that marriage was when you read about it in the newspapers? A 10
That was a slip of the tongue, that's all.

Q A slip of the tongue. You want to change that now, don't you? A The only thing I care to change is that I knew of it after my brother told my father.

Q When was that? A November.

Q What year? A 1926.

Q Who told you about the marriage? A My father talked about it to me.

Q He was pleased with the marriage? A 20
He was not against it.

Q Do you know of any reason why your brother Joe should have kept the marriage from you in August when he was married until November when you and your father learned of it? A I was asked by Mrs. Leavitt to keep the marriage a secret myself.

Q Do you know of any reason? Is that the reason you give that you were asked by Mrs. Leavitt? A I was asked not to say anything 30
myself.

Q You were asked by Mrs. Leavitt to keep the marriage secret? A At the time she came back on Monday morning.

Q What Monday morning? A The following Monday morning after she left the employ.

Q When? A That was in August.

Q Then, you knew about the marriage? A No, I did not. That was before the marriage on the 23rd of August. 40

Louis Leavitt, cross.

Q On the 23rd of August she came back and told you to keep the marriage a secret? A She left on the 21st.

Q She was fired on the 21st and left on the 23rd and told you to keep the marriage a secret?

A Not the marriage, about what happened in the rear of the building.

10 Q You heard me ask you these questions about marriage? A I am confused. I will tell you that.

Q Then, really the first you learned about the marriage was in November, 1926? A Yes, sir.

Q You are certain of that now, aren't you?

A As far as the date I remember my father spoke to me about it after he heard it.

Q When was it Mrs. Leavitt told you to keep the marriage a secret? A She never told me to keep the marriage a secret.

20 Q You just testified that Mrs. Leavitt told you to keep the marriage a secret. A No, she told me to keep the embarrassing position a secret and not to say anything to my father and to take her back to work because she did not want him to know anything about it.

Q Didn't you say these identical words that Mrs. Leavitt told you to keep the marriage a secret? A She never told me to keep no marriage a secret because I didn't know of any.

30 Q Will you say now you do not remember having testified to that? A I will admit I am confused, but I don't remember the question.

Q You think you are confused on that, that you saw Mrs. Leavitt in that compromising position, do you? A No.

Q You were not confused? A I saw her.

Q But now, in telling about the incident you are confused? A I am on the dates, on this particular question.

40

Arthur Arkus, direct.

Q How about the conversation you had with her? You say you very seldom spoke to Joe. Were you on good terms with him? A That is affairs I seldom spoke to him about; his affairs.

ARTHUR ARKUS, sworn in behalf of the defendant.

10

Direct examination by Mr. Jay.

Q Where do you live? A I live in Bayonne, New Jersey.

Q I have just been informed that you are a son-in-law of Moses Leavitt? A I am.

Q Do you know anything at all about this case? A With the exception of the conversation I heard in the family affairs.

20

Q When was that? A Whenever I came down to visit the Leavitts and I came down once a week.

Q You mean when you visited your father and mother-in-law? A Yes, sir.

Q Did you ever see this young lady there (indicating)? A I saw her a few times.

Q At the house? A One time at the house. I think it was at Passover and one time I saw her at the store, at my store. I am in the clothing business and when she first got her position she came down to see about a coat.

30

Q Were you present at any conversations which were held regarding the marriage of Joe and Pearl? A After the marriage was known I often heard conversations between the folks and myself and my wife about this marriage. Do you want me to tell about the conversation?

Q Yes.

40

Joseph Leavitt, direct.

Mr. Ellenstein: I object to that as being hearsay.

The Court: Was Mrs. Leavitt there?

The Witness: No, not this young lady.

10 Q Did you ever go and visit the store of Mr. Leavitt, your father-in-law, in Orange? A Yes, sir.

Q When you got there was Mrs. Leavitt, Jr. there? A Several times.

Q Moses Leavitt there? A Yes, sir.

Q What was the attitude of Moess Leavitt toward this young lady? A Wonderful.

Q In August, 1926, were you in your store in Bayonne? A No, sir.

20 Q Where were you? A My wife minded the baby and Mr. and Mrs. Leavitt, my father-in-law and mother-in-law were on a vacation for two weeks with me.

Q Where? A In Rockaway.

Q How long did you stay there? A Two weeks.

Cross examination waived by Mr. Ellenstein.

30

JOSEPH LEAVITT, sworn in behalf of the defendant.

Direct examination by Mr. Jay.

Q You are the husband of Pearl Leavitt? A Yes, sir.

Q You are employed by the Leavitt Supply Company? A Yes, sir.

40 Q In Orange? A Yes, sir.

Joseph Leavitt, direct.

Q They are in the furniture installment business? A Yes, sir.

Q How old are you? A Twenty-seven.

Q Who engaged Miss Pearl Brenner? A I did.

Q What position did she hold? A Bookkeeper. 10

Q What year did you engage her? A 1925.

Q How did you come to engage her? A My father told me that a young lady was in the store and at that present time we needed a bookkeeper.

Mr. Ellenstein: I object to what his father told him.

A I am just giving you the incident of how I came to employ her. And I made an appointment to meet her— 20

Q After her employment did she have charge of the store and giving orders and so forth? A Yes, she was supposed to take care of it when I wasn't there.

Q Did you ride home with her evenings? A Yes, sir.

Q Before your marriage? A Yes, sir.

Q How often did that happen? A Every time I went down home; if I didn't go home I didn't ride with them. 30

Q Did your father go with them when you were there? A Yes, sir.

Q Where were you married? A City Hall, New York City.

Q By whom were you married? A By the clerk.

Q One evening in the month of August, 1926, did your brother catch you and Miss Brenner in a compromising position in the rear of the store? A Yes, sir. 40

Joseph Leavitt, direct.

Q Did Miss Brenner come back to work the following morning? A Yes, sir.

Q How soon after the compromising position did you get married? A The following week.

Q When did your father first become acquainted with these facts? A How did my
10 father first become acquainted with the facts?

Q When? A Around November, 1926.

Q Did you tell him? A Yes, sir.

Q What did your father say? A He said, "You are married, Joe. I want you to get married in the Jewish religion out of respect to me."

Q What did he agree to do for you? A He said, "Wait until after the season and you can furnish up a home and live together as man and
20 wife in the Jewish faith."

Q After your marriage did you give Pearl any money? A Yes, off and on.

Q How much? A Off and on I used to give her money, bought her clothes.

Q Did you ever go to her home before your marriage? A No, sir.

Q When was the first time you visited her home? A The day after my marriage.

Q How did you happen to go up there then?
30 A Well, we were supposed to keep our marriage a secret, but on the way back from New York she said, "Joe, I told my father of our going to get married," and I figured the best way to keep everything quiet was to go up to the house and meet the family, under those conditions.

Q Did you go to her home on Friday, two or three times a week prior to your marriage? A I was never in her home before our marriage.

Q The very first time was the day after your marriage when you spoke to her father? A
40 That is the first time he ever saw me.

Joseph Leavitt, direct.

Q Did you ever have a conversation with Mr. Brenner regarding the marriage, or did you ever have a conversation after you were married what you were going to do? A Yes, sir.

Q What was it? A The first time I met him he says to me, "Joe, what do you intend to do now that you are married?" I said, knowing that the marriage was in a hurry, "I cannot say; we will have to wait until after January when the season is over and I will furnish a home and do as I think best." 10

Q What did Pearl say? A Pearl was satisfied to that.

Q After your marriage how often did you go up there during the week? A Well, after I was married her father took sick.

Q Well, after your marriage how often did you go up there during the week? A Immediately after we were married and under those conditions I visited there and then at the start I never stayed late at the beginning and after he got better my visits were less frequent. 20

Q Was there any reason for that? A Well, the reason was because the family—I did not like to talk to them about my affairs and they were all talking to me about my affairs.

Q The family butted into your affairs? A Yes, sir. 30

Q Did you tell that to Pearl? A Yes, sir.

Q What was her answer? A Her answer was, "They are my people and they are taking care of me and your people take care of you; mine are taking care of me."

Q Did you ever live with her as man and wife in the respect that you stopped at her home every night? A Yes, I did.

Q How many times? A A few times, maybe three or four times. 40

Joseph Leavitt, direct.

Q Did you ever establish a home for her prior to January, 1927, up to the time you were married in January, 1927?

Mr. Ellenstein: I object as being immaterial.

10 The Court: I will admit it.

A We never had a home.

The Court: It is material, because I think in very fact of marriage on the part of the woman there goes with it certainly that she wishes to have a home.

20 Q Did your father ever say to you that he wanted you to marry a rich girl? A My father never butted in my personal affairs.

Q Did your father ever prevent you from living with this girl? A No, sir.

Q Did your father ever suggest that you get a divorce? A No, sir.

Q What was the purpose of taking Pearl down to the restaurant, I understand she said the World Restaurant? A It was the Paris Restaurant.

30 Q Where was that? A On Market street.

Q What was the purpose of that meeting? A So we could come to a better understanding between the two of us.

Q What was said between you? A The question was just that I said, "The way things are now I cannot furnish up an elaborate home, I can start very small," and she was not satisfied, and I said, "We will wait awhile and you go home and think it over and see how things stand."

40

Joseph Leavitt, direct.

Q Did she become hysterical? A No, sir.

Q Did she cry? A No, sir.

Q At any time since that affair, or that meeting, has she made any attempt to get you to establish a home? A No, sir.

Q Or told you what she would do? A No, 10
sir.

Q Did your father ever threaten to disinherit you if you lived with this girl? A No, sir.

Q Did your father ever suggest to you to get married according to the religious ceremony of the Jewish faith and establish a home? A Yes, sir.

Q Would you live with her today if conditions were such that she would meet you halfway? A 20
Yes, sir.

Q If she had a religious ceremony performed?
A Yes, sir.

The Court: You mean that is a condition precedent to your living with her?

Mr. Jay: No.

The Witness: Respect for my folks.

Q (By the Court.) Is that a condition precedent to your living with her? A I don't understand the question. 30

Q I mean you would not live with her unless she had that religious ceremony you spoke of?
A No, sir.

Q Did you think of that at the time you married her? A At the time, I married her under adverse conditions.

Q Did you think of this ceremony at that time? A I had full intentions of getting married in the Jewish faith when the time came. 40

Joseph Leavitt, cross.

Q (By Mr. Jay.) Did you ever lend any money to any of her folks, her father? A Well, when I went there her father was sick and he was out of work and didn't have any physical means of support and I helped him out with money.

10 Q In cash? A Yes, sir.

Cross examination by Mr. Ellenstein.

Q You say you never visited your wife's home before the marriage? A No, sir.

Q The primary reasons for visiting her home after the marriage were because her father was sick, is that right? A No, sir.

Q Didn't you so testify? A You skipped a question.

20 Q Just answer my question. Didn't you testify that the reason you went to Mrs. Leavitt's home was because her father was sick and you went very often after your marriage? A No, sir, that is not the reason.

Q Did you testify to that? A I will tell you the testimony.

Q Answer the question. A I said, no, sir.

30 Q What was the reason for your going to her house? A The reason was, the morning we were married she had told her father that we were going to be married.

Q Yes, and then? A The next day we spoke it over in the store and her and I went to the house the next night.

Q What for? A To meet the folks.

Q Weren't you interested in meeting her folks before you were married to her? A No, sir.

Q You didn't care about that? A I never had occasion to meet them.

40 Q You did not care about her folks before you were married? A No, sir.

Joseph Leavitt, cross.

Q You went up and told her folks to keep the marriage a secret? A Yes, sir.

Q And they did keep it a secret at your suggestion? A Yes, sir.

Q Then, you went up there frequently to visit Mr. Brenner and suddenly became very much interested in him, is that right? A I didn't get your question. 10

Q I say, you went up very frequently to visit Mr. Brenner and you became very much interested in him? A I visited the home at the time because he was sick.

Q You were interested in him, weren't you? A Well, you put it that way. I was interested in keeping peace.

Q You testified to that, didn't you? A No, sir. 20

Q Didn't you testify on direct examination that you went up there after the marriage quite frequently because Mr. Brenner was sick? A Yes, because he was sick. Not to see him.

Q You went up there because he was sick, but not to see him? A Yes, sir.

Q You did not go up there to see your wife, did you? A Yes.

Q You love your wife, don't you? A Yes, sir. 30

Q You did love her? A Yes, sir.

Q You loved her all the way through November, didn't you? A Yes, sir.

Q You loved her from November to January? A Yes, sir.

Q You were perfectly willing to live with her providing she would go through a ceremonial marriage with you? A Yes, and conditions were as I said they were.

Q Provided she would go through the ceremonial marriage? A Yes, sir. 40

Joseph Leavitt, cross.

Q And she objected? A She did not object.

Q Why didn't you have a ceremonial marriage? A She objected to the conditions under which we were to be married; she wanted too much.

Q You were already married, weren't you? A
10 Under the religious belief?

Q You were married legally? A Yes, sir.

Q You know that? A Certainly.

Q She had no objection of going through a ceremonial marriage, did she? A Not that I know of.

Q You know her people are orthodox the same as your people? A Yes.

Q She had no objection to going through a ceremonial marriage with you, did she? A No,
20 sir.

Q What was her objection? A Her objection?

Q Yes, why didn't you live with her? A Because in the first place when I started going up there her people started butting into my affairs and conditions I could offer were not enough for her.

Q Go ahead. A As we started out we talked it over and she wanted to do this and that and her family said this and that and furthermore she
30 said her father was a sick man and had no visible means of support and she asked me to come and live with them and I objected, and I told her to go home and wait awhile until things got clearer, but I never heard from her since in reference to that.

Q You never heard from her since in reference to that? A No.

Q You say her people butted into her family affairs? Who were the people? A Her father
40 and sister.

Joseph Leavitt, cross.

Q Did her father personally tell you he wanted to live with you? A No, sir.

Q Did the sisters demand anything from you? A She said that she kept her father long enough and thought her sister should keep her father.

Q Who said that, the married sister? A Yes, sir. 10

Q They were going to shift the burden on to you? A Yes, sir.

Q You objected to that? A Yes, sir.

Q You told that to Mrs. Leavitt? A Yes, sir.

Q She wanted to live extravagantly, you said? A That's right.

Q And you could not furnish an elaborate home? A No, sir.

Q She demanded that, is that right? A She demanded more than I could give her. 20

Q You have been in her home? A Yes, sir.

Q Are there any elaborate furnishings in her home? A No, sir.

Q There isn't anything lavish about her home? A No, sir.

Q Still you say she made demands that you could not meet? A She wanted what her friends had.

Q What friends? A Well, friends she had; nice homes and swell apartments. 30

Q She travels in a high social sphere? A I guess she does.

Q Haven't you been with her and met any of her friends? A I only met one of the friends of hers.

Q That is all? A That is all.

Q You stayed over in her home, did you? A Yes, sir.

Q Lived with her in marital relationship, that is, as husband and wife? A Yes, sir. 40

Joseph Leavitt, cross.

Q Do you remember making an affidavit? A Yes, sir.

Q In the action for separate maintenance? Do you remember that? Do you remember signing the affidavit? A Yes, sir.

10 Q In the action for separate maintenance? A Yes, sir.

Q Do you remember this in the affidavit, "On the 25th day of August, 1926, I secretly entered into marriage relationship with Pearl Leavitt, the petitioner in the above-entitled cause in the City of New York. The said marriage was never properly fulfilled so far as the petitioner and I never assumed the marital relationship of husband and wife. The petitioner continued to live with her sister, Bertha Wagman at 15 Nye avenue at Newark, New Jersey, as she had previously lived prior to said marriage and has continued to use her maiden name and I continued to live home with my parents where I am residing at present." Did you say that? A Living as man and wife and never established a home.

20

Q Isn't it true that "said marriage was never properly fulfilled in so far as the petitioner and I never assumed the marital relationship of husband and wife?" Is that true? A We did live as man and wife.

30

Q Then this affidavit is untrue, isn't it? A I do not know what the affidavit means.

Q (By the Court.) What do you say today about consummating the marriage relationship, whether you did or you did not? A We did. The affidavit must be wrong.

Q Did you read it before you signed it? A I must have or else I would not have signed it. Maybe I had a different interpretation on it, I don't know.

40

Joseph Leavitt, cross.

Q (By Mr. Ellenstein.) You had a different interpretation on it?

Q (By the Court.) Suppose you read that now and tell us what your interpretation is.

Q (By Mr. Ellenstein.) (Handing witness affidavit.) Read just that part of it. A I must have just read marriage relationship. 10

Q You must just have read marriage relationship? A Maybe I didn't read it, that's all I mean.

Q This affidavit is untrue? A If it says that.

Q It does say that, doesn't it? A I entered into marriage relationship as man and wife.

Q Then the affidavit is untrue? A Put it your way. I don't know. I explained that in your office. 20

The Court: Where is the original of that affidavit?

The Witness: I must have mistaken the affidavit.

Q You say here in the affidavit, "I have paid her building and loan installments from month to month until the time that she left my father's employ." A Yes, sir.

Q Did you hear your father say that your brother, Louis Leavitt, paid the building and loan? A He gave her the ten dollars she was supposed to pay. 30

Q Did you personally pay her building and loan? A Yes, sir, sometimes, most of the times; I never counted what I gave her.

Q Are you an employee of your father's? A Yes, sir.

Q When Mrs. Leavitt, your wife, executed those elaborate demands upon you you could get 40

Joseph Leavitt, cross.

the furniture, couldn't you and set up a home for yourself. Your father has a large establishment. Couldn't you get the furniture? A No, sir.

Q You could not get the furniture from your father? A I told you the arrangement.

10 Q You heard your father testify this morning that you gave her a Christmas present in December, 1925, consisting of a bed, mattress, humidor, floor lamp and card table, and that he permitted you to give it, and he said, "We like her."

A I have full charge of the store.

Q Then you were able to get furniture out of it? A In regard to the help.

Q Weren't you able to get furniture out of there? A Not for my personal use.

20 Q You were permitted to give furniture away? A As a Christmas present.

Q You could give it away for a Christmas present, but you could not take any for your own personal use? A No, sir.

Q How much salary were you getting at the time you married your wife? A Thirty-five dollars a week.

Q Did you pay any board at home? A At that time?

Q Yes. A Ten dollars a week.

30 Q How much do you pay now? A Twenty dollars.

Q How much did you pay at the time you made this affidavit? A Twenty dollars a week.

Q When did you stop paying \$10 a week? A When I started getting the \$50 a week.

Q When did you start to get the \$50? A January, 1927.

Q You started getting \$50 a week in January, 1927? A Yes, sir.

40 Q Do you know when this affidavit was made? A Do I know when it was made?

Joseph Leavitt, cross.

Q Yes. A I don't know when it was, I couldn't tell you.

Q Who did you pay board to? A My mother.

Q You paid it to your mother? A Yes, sir.

Q Doesn't your father know anything about it? A He doesn't bother with the affairs of the house; he never counts my mother's money. 10

Q Here is another part of this affidavit which says, "I have never lived together with petitioner although I have provided for her from time to time," what do you mean by that? A I never lived with her and had my own home.

Q You did not mean you did not live with her as man and wife? A No, I told you that before.

Q Do you remember your wife called you up on January 1, 1927, on the telephone? A She called me in July. 20

Q Do you remember her calling you before July? A No, sir.

Q Don't you answer the telephone calls? A No, sir.

Q Why did she call you in July? A When I reduced my allowance from ten to five she asked me why I reduced it.

Q What did you tell her? A I had expenses and I could not afford any more. 30

Q You were still getting \$50 a week, weren't you? A Yes, sir.

Q What were these expenses you could not afford? A Personal expenses.

Q Consisting of what? A Well, I had my doctor's fees, I was being treated.

Q For what? A Sinus treatments.

Q What sinus? A Sinus is pus in the nose causing headaches.

Q How many times a week were you treated for that? A One time a week. 40

Joseph Leavitt. cross.

Q How much was that treatment? A Five dollars.

Q Because of that you cut down the amount to your wife to \$5. A I had to go to New York every week. The doctor is in New York.

10 Q What part of New York? A Fifty-eighth street and Park avenue.

Q When did your father raise you to \$50 a week? A He raised me when I told my father we were going to keep house.

Q He raised you when you told him you were going to keep house? A It was understood I was going to keep house in January and he raised me.

Q Who understood that? A My father and I.

20 Q He is still paying you \$50 a week? A Yes, sir.

Q He knows you are not keeping house, doesn't he? You know you are not keeping house? A Yes, everybody knows it.

Q Still you received \$50 a week? A Yes, sir.

30 Q Isn't it a fact that you were raised from \$35 a week to \$50 a week as a reward for keeping away from your wife? A Nobody stopped me from keeping away from my wife.

Q You loved her up to January, the time when she was discharged or left your father's employ? A I never said I didn't love her.

Q And nobody is keeping you away? A No.

Q (By the Court.) Do you pay her anything now? A No, sir, the Chancery Court said I didn't have to give her anything.

The Court: Where is the original of that affidavit?

40 Mr. Ellenstein: Mr. Jay has it.

Motion for Direction of a Verdict.

Re-direct examination by Mr. Jay.

Q Why have you stopped giving your wife money? A I told the Judge.

Mr. Ellenstein: I object.

The Court: I will admit it. 10

A I was being sued for temporary alimony and Vice-Chancellor Berry decided no alimony.

Q You are being sued at the present time? A Yes, for maintenance.

R-cross examination by Mr. Ellenstein.

Q Do you know why Vice-Chancellor Berry decided that way? A I don't know what the Judge thinks. 20

Mr. Jay: I offer in evidence an affidavit also made by the plaintiff in this case.

Mr. Ellenstein: I object to it at this time on the ground it is belated.

The Court: Sustain the objection.

DEFENDANT RESTS.

Mr. Jay: I should like to move for the direction of a verdict on the ground there is absolutely no evidence in this case to show that the defendant alienated the affections of plaintiff's husband. 30

2. The acts of the defendant that have been alleged do not show by the evidence that these acts were the proximate cause of the alienation of the husband's affections.

3. The burden of proof being on the plaintiff she has not sustained the burden of 40

Motion for Direction of a Verdict.

proof and has shown no damages whatsoever.

10 The Court: Then the question of damages is a question for the jury to decide and if no damages were proved still damages could be brought in for six cents. That is not a reason for directing a verdict.

Mr. Jay: How about the burden of proof being on the plaintiff?

The Court: Yes, it is, but that is not a reason.

Mr. Jay: There is no evidence before your Honor to show at all, outside the evidence of the plaintiff herself, that the father was the cause of the parting of this couple.

20 The Court: Well, I remember, by referring to my notes in the testimony of the plaintiff's sister to this effect, that the defendant said, "Joe, could have married a girl with money. He said he wanted her to get a divorce." That is testimony outside of the plaintiff's story, and the testimony of Michael Brenner was testimony of a witness called by her; I think he was her father and he said the defendant told him that his son was too young to get married and he should have married a girl with money and that he would stand the consequences of the expenses provided he divorced the plaintiff. That is testimony outside of the plaintiff's story. Then, Nettie Wagman took the stand and she told us that the defendant said that, "His son was too young to be married and he would send \$10 a week to her but he preferred that they be divorced and she said that the defendant testified they were only married in court and it did not matter."

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Charge to Jury.

That answers your argument.

(At this point in the case Juror No. 9 is excused by consent of both sides.)

Adjourned to Thursday, February 16, 1928 at ten o'clock, A. M.

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THIRD DAY.

February 16, 1928.

Continued pursuant to adjournment.

Present, counsel as before stated.

Mr. Jay sums up for the defendant.

Mr. Ellenstein sums up for the plaintiff. 20

CHARGE.

The Court charges the jury as follows:

MOUNTAIN, J.:

The plaintiff in this case is a young girl who has brought her action against the defendant alleging that the defendant, who was her father-in-law, alienated the affections of her husband. When you retire to the jury room your decision in this case must rest and should rest, in accordance with your oaths, entirely upon what testimony you have heard the witnesses give and whatever inferences you may have drawn from that testimony.

30

This action was not brought by the wife against her husband, it was brought by the wife against her father-in-law. The action accuses him of willfully and maliciously interfering with the relations existing by virtue of the marriage 40

Charge to Jury.

of this young girl and her husband so that her husband's affections were alienated. The Court will charge you exactly as to what is meant by alienation of affection a little later; the term is a trifle ambiguous, but for the purposes of considering first her case and then her father-in-law's case I will utilize that term and then further define it.

10 What has she proved? What testimony has she given showing that these relations, martial in their character, were disturbed by the efforts, or the activities, or the malicious influence of her father-in-law? The story she has told indicates that she was in the employ of her father-in-law who operated a furniture store in the City of Orange. She was a bookkeeper. She said
20 that during the course of her employment one of the sons of the defendant became attentive to her and that this attention finally ripened into a proposal of marriage which was accepted. At about that time the aforesaid defendant's son, Joseph Leavitt, insisted that the engagement as well as the marriage be kept a secret and he gave as his reason that his father had promised him a share in the business if he would marry a girl with money. After the marriage, there was
30 testimony to the effect that he called on her frequently and she told us that during the ninety days which intervened between the time of the marriage and the time when the father-in-law learned of it, that her husband stayed with her eight or ten times. She was married, she said, on August 25, 1926, at the City Hall in New York City and she said the ceremony was performed there because her husband thought that if it was solemnized in the State of New Jersey there would be such publicity that it would come to the
40 ears of his father. She told us that during the

Charge to Jury.

remainder of that month and September and October of that year her husband saw her almost every night in the week, but that in January, 1927, one night her husband stayed at her home all night. She lived with her sister and her father, as I understood her. The defendant, when she came to the store the next morning to take up her duties, told her, she said, that he knew that Joe had stayed with her overnight and discharged her, and told her that her husband would get no share in the business. I think she remained a few days and then left. She told us that the Sunday following this her husband told her that he wanted to get a divorce and that after he got it and his father gave him a share in the business he would marry her again. She said that after she was discharged her husband's attitude changed completely. It appears that she was receiving some money from her husband; and that the defendant was alleged to have learned of this and she received this money for a while and then it was reduced; the amount at first was \$10 a week and then it was reduced to \$5 and in July, 1927, she said she called her husband up by telephone to inquire about the situation. She denied that the defendant had asked her to have the marriage consummated by a Jewish rabbi. As I understand the testimony given by the defendant the Jewish ceremony referred to by him is not a marriage ceremony, it is a ceremony that follows a marriage ceremony, but if you have a different impression about that you must adopt your conclusion and not mine.

She said that the defendant told her that he wanted her to get a divorce and that if they lived together he would throw both the plain-

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Charge to Jury.

tiff and her husband "out of the business" as she expressed it. There was other testimony given on behalf of her by her sister. Her sister said that she visited the defendant and the defendant told her that his boy could have married a girl with money and that he wanted the plaintiff to
 10 get a divorce. Her sister also said that she had inquired of Joe Leavitt, the plaintiff's husband, when he came to visit her sister, as to his intentions and was told by him that he intended to marry her sister. She said he wanted to have it kept a secret until his father gave him a share in the business. The father of the plaintiff testified that he visited the defendant after the marriage and that the defendant said to him that his son was too young to marry; that he could get a
 20 girl with money and that he would "stand the consequences of the expenses," as he expressed it, provided the plaintiff got a divorce. Another witness who testified on behalf of the plaintiff said that she talked with the defendant and that he told her that his son was too young to be married and he sent \$10 a week to the girl and wanted them to get a divorce, that they were only married in court and that did not matter.

Now, let us turn to the defense, because the
 30 testimony I have attempted to quote to this time relates to the plaintiff's case. The defendant took the witness-stand and testified that he did not know of the marriage until December, 1926; I think he took a vacation in August of that year, and he said that he wanted the plaintiff to go through the Jewish ceremony following the marriage and he was willing then that his son and the plaintiff should live together and he wanted them to furnish three rooms, the furniture to come from the store and he said he told
 40

Charge to Jury.

the plaintiff to work in the store until Christmas and he said he wanted her to, as he expressed it, "cook for his son." He denied that he said anything to her about divorce. He said he increased his son's salary so that his son could take a house and start housekeeping. He denied that he discouraged them from living together. He told us of his offers of presents and of his attitude of mind toward the plaintiff. 10

The husband of the plaintiff was called to the stand and he testified that he and his wife were caught, before she was his wife, in a compromising position in the rear of the store by his brother and then they were married one week after that and that when his father found it out he wanted them married in accordance with the rites of the Jewish faith. He said his father never threatened to disinherit him at any time if he lived with the girl. He was asked why he did not live with her and he told us that his present reasons, as I understood him, were that she would not perform the Jewish ceremony I have referred to, and that she was too extravagant. So much for the testimony. 20

The burden of proof is upon the plaintiff to prove by the greater weight of the evidence that the defendant interfered with the marital relation existing between the plaintiff and her husband in accordance with the charge made by the plaintiff in the complaint. I say the burden is upon the plaintiff because she has alleged that the defendant was derelict and committed a tort and she must prove it and she charges in the complaint that the defendant willingly, knowingly, lawfully, unjustly and maliciously interfered with the marital relations between her and her husband and alienated the affections of her hus- 30
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Charge to Jury.

band and deprived her of the conjugal society of her husband.

10 Gentlemen of the jury, public policy favors marriage. A contract of marriage between a man and a woman usually brings to the wife the affection of her mate and his conjugal society. The wife is entitled to the support and protection of her husband and this is true whether there is affection or is not affection; it is even true if they live in a state of separation because in that state there is always a possibility of a reconciliation and a coming together which the law encourages and with which outsiders should not interfere. I say that it even makes no difference if there is no love between the spouses because public society plainly requires that a husband and wife should
20 live together and if a cessation of that status is caused by a third person it is wrong, even though the union be without affection. Loveless marriages are by no means uncommon and among these are many where the parties live contentedly together and perform there duties to each other and to society, tolerating the conditions under which they live.

30 Actions of this kind have been referred to and are referred to in this state as alienation of affections. The law presumes that the husband had affection for his wife, but if this be rebutted such rebuttal is no bar to an action, for two reasons: First, if the husband had no affection for his wife another person has no right to interfere and to cut off the chances of its springing up in the future. Second, because the alienation or loss of affections is not the substantive cause of action, but a matter of aggravation of damages, the gist of the action being the support, protection,
40 comfort and society of her husband, which later

Charge to Jury.

she may have even though he no longer loves her. If you find that the affections of this young lady's husband were alienated by the defendant, if you find that the defendant by his wilful conduct caused a loss of consortium or loss of the conjugal society of her husband with its mutual rights and duties, you may find that there was a legal injury for which the defendant is responsible and for which damages can be recovered. In justice to the defendant you should not forget that this action is not brought by the plaintiff against her husband for whatever he did, or for his actions, but is against her father-in-law, alleging what I have said she has alleged, to prove her case and the testimony you heard given in her behalf. 10

He denies that he alienated his son's affections —I will still use the general term—and if you find he did not your judgment should be for the defendant. If you find that he did, then what damages will you award this plaintiff? 20

I do not know whether all of you have served on juries before but you may find if you have not that during the course of your services in the Court House in a negligence case you are instructed by the Court that you may bring in damages for pain and suffering and when you retire to the jury room after having heard that instruction it may seem to you that that is very abstract, that it does not give you much to tie to. Well, it is impossible for the Court, to say how much pain and suffering one should get for a dollar and yet, that is the method you have to use in assessing damages in cases of that kind. 30

In this case I have to charge you in the same abstract manner. If you find for the plaintiff, if you find she has proved her case by a preponder- 40

Charge to Jury.

ance of the evidence she is entitled to damages to compensate her for the loss of her husband's conjugal society, comfort, protection and support and compensation for her wounded feelings and mental anguish.

10 The complaint in this case alleges that the actions of the defendant were malicious. The contention of the plaintiff is that she is entitled to punitive damages. Whether the actions of the defendant were malicious or not is a question of fact. I call your attention to that phase of the case because punitive damages are only awarded by a jury when they find that there is malice and never at any other time. They are damages which the name suggests in the nature of a punishment or to indicate the disapprobation by a
20 jury of an act, or to hold the case up as an example or disapprobation of what was found by a jury to be a fact, but they cannot be awarded unless malice is found. Now, then, what is malice? The legal definition of malice in this State is that it is a wrongful act done intentionally without just cause or provocation. If you find there was no malice in this case you cannot award any punitive damage. If you find there was malice, then, you may consider the
30 question of punitive damages. Counsel have asked me separately to charge you as follows:

The plaintiff's first request is denied. The second request I have charged; the third request I have charged. The fourth request I will charge although I think I have.

4. If you find from the evidence that the defendant wrongfully and unjustly by any of the acts complained of had an influence in alienating the affections of the plaintiff, your verdict should
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Charge to Jury.

be for the plaintiff, and your measure of damages should be such that you reasonably believe would compensate the plaintiff for the injury to her feelings for the loss of her husband's comfort and society and for the loss of his support and the distress and anxiety of mind occasioned thereby.

The fifth I have charged you and the sixth request is denied.

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On behalf of the defendant I am asked and do charge you the first request.

1. The defendant, of course, is not liable if the acts complained of did not alienate the affections of the plaintiff's husband. The acts of the defendant must have been the controlling cause that destroyed the affections.

In connection with that you will recall, of course the manner in which I defined this action, indicating as I did that perhaps the name was a misnomer and that as far as the alienation of affection was concerned it was not the substantive cause of action, but as has been said in Supreme Court cases a matter of aggravation of the damages.

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The second and third requests I will refuse to charge.

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The fourth I will charge.

4. In this action for enticement, or alienation of the affections of the husband, the plaintiff has the burden of showing all the essential elements of his or her cause of action. The plaintiff has the burden of proving that the affections of the husband were alienated from the plaintiff by the wrongful cause or conduct of the defendant.

The fifth I will charge. In consideration of the elements of damage, the jury must consider the

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Exceptions to Charge.

condition of the affection that existed between husband and wife before the wrongful acts complained of.

The sixth I will charge. The jury may bring in a verdict of damages for the plaintiff in the amount of six cents.

10 I charge you that if you find there are no damages and that a wrong was done that a verdict which is known as nominal damages can be brought in; that would indicate that you found that the defendant had committed a wrong but no damages had resulted from it.

(The jury retires.)

20 Mr. Ellenstein: I respectfully pray an exception to your Honor's refusal to charge the plaintiff's first and sixth requests to charge.

Exception noted as ground of appeal.

Mr. Ellenstein: I respectfully pray a general exception to the charge.

Exception noted as ground of appeal.

30 Mr. Jay: I respectfully pray an exception to that part of your Honor's charge where your Honor stated that the defendant told the plaintiff's sister that his boy could marry a girl with money. I do not think that was brought out in the evidence.

Exception noted as ground of appeal.

Mr. Jay: I respectfully take an exception to that part of the charge that states that public policy favors marriage and a contract of marriage usually brings to the wife the affections of her mate.

Exception noted as ground of appeal.

40 Mr. Jay: I respectfully pray an exception to that portion of the charge which says, "It makes

Plaintiff's Requests to Charge.

no difference if there is no love between a husband and a wife, but if a third party interferes he must account for such action."

Exception noted as ground of appeal.

Mr. Jay: I respectfully pray an exception to that portion of the charge which says that the law presumes a husband loves and has affection for his wife and even if rebutted it is no bar to an action.

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Exception noted as ground of appeal.

Mr. Jay: I respectfully pray an exception to your Honor's refusal to charge the second and third requests to charge made by the defendant.

Exception noted as ground of appeal.

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PLAINTIFF'S REQUESTS TO CHARGE.

1. Although you find that the defendant is the father of the plaintiff's husband, still if you believe from the evidence that the defendant interfered in the domestic affairs of the plaintiff and her husband, and that the defendant is guilty of procuring or bringing about the separation of the plaintiff's husband from her and causing him to remain apart from her, your verdict should be in favor of the plaintiff.

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Denied.

2. Unhappiness or even separation between the plaintiff and her husband, or the fact that he had little affection for her is no defense to an action of alienation.

Charged.

3. The law presumes the husband had affection for his wife, but if this be rebutted such refusal is no bar to the action for two reasons:

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Plaintiff's Requests to Charge.

(1) Because even if the husband had no affection for his wife another person has no right to interfere and cut off all chances of its springing up in the future.

10 (2) Because the alienation or loss of affections is not the substantive cause of action, but a matter of aggravation of damages, the gist of the action being the support, protection, comfort and society of her husband, which later she may have even though he no longer loves her.

Charged.

20 4. If you find from the evidence that the defendant wrongfully and unjustly by any of the acts complained of had an influence in alienating the affections of the plaintiff, your verdict should be for the plaintiff, and your measure of damages should be such that you reasonably believe would compensate the plaintiff for the injury to her feelings for the loss of her husband's comfort and society and for the loss of his support and the distress and anxiety of mind occasioned thereby.

Charged.

30 5. If you find from the evidence that the defendant's conduct was effected in causing the alienation of affection of the plaintiff's husband, and that such conduct was wanton and malicious towards the plaintiff, you may in such event at your discretion award exemplary or punitive damages in addition to the compensatory damages. To justify exemplary or punitive damages there must be some wrong motive accompanying the wrongful act or a reckless disregard for the plaintiff's right.

Charged.

40 6. Even though you find from the evidence that the father's only objection to the marriage of his son was that they had not been married by

Defendant's Requests to Charge.

a Jewish Rabbi and Jewish ceremony, still if you further find from the evidence that the father did cause the separation of the defendant and her husband, and if you further find that this objection to the marriage was not of such a nature as would be for the health or moral welfare of son of the defendant, your judgment should be for the plaintiff. 10
 Denied.

DEFENDANT'S REQUESTS TO CHARGE.

The defendant requests the court to charge the jury as follows:

1. The defendant, of course, is not liable if the acts complained of did not alienate the affections of the plaintiff's husband. The acts of the defendant must have been the controlling cause that destroyed the affections. 20
 Charged.

2. Since the acts of the defendant must be the procuring cause for the loss of affection between husband and wife, there can be no recovery for alienation occasioned or brought about by the mistreatment of the wife by the husband, particularly, if the entire affection between the husband and wife had been thus destroyed. 30
 Denied.

3. If the wife's affections had been lost or withdrawn from her husband for other reasons, or through other causes than the defendant's cause of conduct, plaintiff should not recover. The plaintiff must show that the defendant wrongfully and wilfully attempted to alienate the husband's affections and if you are not satisfied that defendant wilfully and in bad faith to the 40

Defendant's Requests to Charge.

plaintiff alienated the affections of her husband,
your verdict should be for the defendant.

Denied.

10 4. In this action for the enticement or alienation of the affections of the husband, the plaintiff has the burden of showing all the essential elements of his or her cause of action. The plaintiff has the burden of proving that the affections of the husband were alienated from the plaintiff by the wrongful cause or conduct of the defendant.

Charged.

20 5. In consideration of the elements of damages, the jury must consider the condition of the affection that existed between husband and wife before the wrongful acts complained of.

Charged.

6. The jury may bring in a verdict of damages for the plaintiff in the amount of six cents.

Charged.

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OPINION OF SUPREME COURT.

Filed January 16, 1929.

NEW JERSEY SUPREME COURT.

No. 86, May T., 1928.

PEARL LEAVITT,

vs.

MOSES LEAVITT.

} *Appeal from*
Essex
Circuit.

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Argued before Gummere, Chief Justice, and Justices Parker and Katzenbach.

For the appellant, Joseph Kraemer.

For the respondent, Wolber & Gilhooly.

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PER CURIAM:

The present suit was instituted by the plaintiff to recover damages from the defendant for his wrongful act in alienating the affections of her husband and persuading him to desert her.

Plaintiff's husband is the son of the defendant. The marriage took place in August, 1926, and was a secret one. The basis of her suit is that after the defendant learned of their marriage, he, as she asserts, not only disapproved of it but used every effort to bring about a separation between her and her husband, and that he succeeded in doing so.

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When the case came on to be tried, the plaintiff, in support of her claim, called two witnesses, each of whom testified as to conversations had with the plaintiff's husband, the purport of which was that he desired to have the wedding kept secret because of the effect it would have on the

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Opinion of Supreme Court.

10 father, who would have been very much opposed to the son's marrying this girl if he had had any idea that such a thing was likely to happen; and that after the marriage had taken place and the defendant had learned of it "he carried on quite terribly about it." The trial resulted in a verdict in favor of the plaintiff, and from the judgment entered thereon the defendant has appealed.

20 The testimony above referred to was admitted over the objection of the defendant, the ground of the objection being that it was incompetent because the conversations referred to did not take place in the presence of the defendant; and the principal ground upon which the appellant relies for a reversal is based upon this alleged error of the trial judge.

30 In our judgment these conversations were improperly admitted. As was stated by Hiscock, *J.*, delivering the opinion of the New York Court of Appeals in *Cochran v. Cochran*, 196 N. Y. pp. 86-91, in dealing with the competency of testimony almost identical with that above referred to, and which was admitted in a suit brought by a wife to recover damages from the defendant for alienating the affections of the former's husband: "This evidence was very prejudicial to the defendant and we know of no authority which justified its introduction. While, of course, plaintiff was required to prove the unlawful conduct of the defendant, and while such unlawful conduct might be evidenced by such acts as were outlined in the evidence referred to, it was incumbent upon her to prove the same by competent testimony, and it was not proper to give evidence of her husband's declarations on the subject. Such evidence offended against the

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Opinion of Supreme Court.

general rules of evidence, and has been specifically condemned in actions similar to this one." The opinion then goes on to cite the decisions of some of our sister states condemning the admission of such evidence. We are entirely satisfied with the soundness of the legal rule thus declared.

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The only other ground of reversal argued before us is the refusal to charge a request submitted by the defendant, the pith of which was that the burden rested upon the plaintiff to show that the defendant wrongfully and wilfully attempted to alienate the husband's affections and that if the jury were not satisfied that the defendant wilfully and in bad faith to the plaintiff alienated the affections of her husband their verdict should be for the defendant. Our examination of the charge as delivered satisfies us that it contained the request submitted, in effect; and it is hardly necessary to say that this is all that the trial court is required to do in dealing with the requests to charge submitted by the respective litigants.

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Our conclusion is that the judgment under review should be reversed upon the sole ground that there was injurious error in the admission of the testimony which has been heretofore discussed.

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ORDER FOR REVERSAL.

NEW JERSEY SUPREME COURT.

10	PEARL LEAVITT, <i>Plaintiff-Appellee,</i> <i>vs.</i> MOSES LEAVITT, <i>Defendant-Appellant.</i>	}	<i>Action at Law.</i> <i>On Appeal.</i> <i>Order for Reversal.</i>
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20 This cause having been duly argued at the May Term of this court by Joseph Kraemer, of counsel for the appellant, and Wolber & Gilhooly, of counsel for the appellee, and the Court having considered the same, it is thereupon

ORDERED, that the judgment of the Essex County Circuit Court be in all things reversed, set aside and for nothing holden, and the record be remitted to the Court below to be proceeded with according to law and the practice of said Court.

On motion of

30 KRAEMER, SIEGLER & SIEGLER,
Attorneys for Appellant.

Entered: February 1, 1929.

NOTICE OF APPEAL.

Filed February 27, 1929.

NEW JERSEY SUPREME COURT.

PEARL LEAVITT, <i>Plaintiff-Appellee,</i> <i>vs.</i> MOSES LEAVITT, <i>Defendant-Appellant.</i>	}	<i>Action at Law.</i>	10
		<i>On Appeal from New Jersey Supreme Court.</i>	
		<i>Notice of Appeal.</i>	

To Frederick Jay, Esq., attorney for defendant-
appellant, or to whom it may concern: 20

DEAR SIR:

PLEASE TAKE NOTICE that the plaintiff in the above-entitled cause appeals to the Court of Errors and Appeals in the last resort in all causes in New Jersey from the whole of the judgment entered in this cause.

Respectfully yours,

MEYER C. ELLENSTEIN, 30
Attorney of Plaintiff.

Dated: February 27, 1929.

Service of the within notice is hereby acknowledged this 27th day of February, 1929.

FREDK. JAY,
Attorney for Defendant.

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GROUND OF APPEAL.

Filed February 28, 1929.

NEW JERSEY COURT OF ERRORS AND
APPEALS.

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PEARL LEAVITT, <i>Plaintiff-Appellant,</i>	}	<i>Action at Law.</i>
<i>vs.</i>		<i>On Appeal from New Jersey Supreme Court.</i>
MOSES LEAVITT, <i>Defendant-Appellee.</i>		<i>Ground of Appeal.</i>

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The appellant states the following ground of appeal to wit:

The Supreme Court erred in giving judgment to the defendant-appellant instead of the plaintiff-appellee.

MEYER C. ELLENSTEIN,
Attorney for Plaintiff-Appellant.

30 WOLBER & GILHOOLY,
Of Counsel with Plaintiff-Appellant.

Service of the within ground of appeal is hereby acknowledged this 27th day of February, 1929.

FREDK. JAY,
Attorney for Defendant-Appellee.

New Jersey Court of Errors and Appeals

PEARL LEAVITT, <i>Plaintiff-Appellant,</i> <i>vs.</i> MOSES LEAVITT, <i>Defendant-Respondent.</i>	}	<i>Action at Law.</i> <i>On Appeal from New Jersey Supreme Court.</i>
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BRIEF OF APPELLANT.

Facts.

The plaintiff and Joseph Leavitt, a son of the defendant, were married on or about August 5, 1926. Prior to the marriage of the plaintiff to the said Joseph Leavitt, she was employed by the defendant, Moses Leavitt, at Orange, New Jersey, being there engaged as a bookkeeper. Joseph Leavitt was also employed by his father in the same establishment and a close friendship sprung up between the plaintiff and the said Joseph Leavitt which culminated in their marriage as aforesaid. The marriage was performed in the City of New York and both the plaintiff and her husband refrained from informing the defendant of the marriage at the instance and request of the said Joseph Leavitt. In the month of November, 1926, the defendant was informed of the marriage and he at once manifested his displeasure and from thenceforth on, according to the contention of the plaintiff, made strenuous efforts to bring about a dissolution of the marriage. The plaintiff contends that he threatened to disown his son and to discharge him and her from their employment unless she would consent to procure a divorce. The plaintiff contends that the defendant offered to bear the expense

of a divorce and to provide for weekly payments to her in the future. The plaintiff contended that such a course of action was distasteful to her inasmuch as she was in love with her husband and she thought that her husband was in love with her. In the course of the trial evidence was introduced tending to show that the said Joseph Leavitt for a considerable time prior to the marriage and until January, 1927, manifested considerable affection for the plaintiff and that in the early part of January, 1927, the plaintiff was discharged from her employment by the defendant because of her refusal to procure a divorce, and because of the fact that the said Joseph Leavitt, in the face of the defendant's express admonition, had spent the night with the plaintiff. The defendant denied the allegations made by the plaintiff, but on the contrary introduced testimony to establish the fact that he was satisfied with the marriage and that he desired his son and the plaintiff to commence housekeeping, and the defendant further urged that the separation between the plaintiff and her husband was brought about by the plaintiff's refusal to live with her husband on a modest scale in keeping with his income. On the factual questions involved the jury found in favor of the plaintiff and assessed damages against the defendant in the amount of ten thousand (\$10,000.00) dollars.

No effort was made by the defendant to obtain a rule to show cause on the ground that the verdict was against the weight of the evidence or that the damages were excessive, but appeal was made to the Supreme Court based upon the alleged errors of the learned trial judge in permitting Bertha Wagman and Michael Brenner, sister and father respectively of the plain-

tiff, to testify to declarations made to them by the husband, and which declarations were not made in the presence of the defendant. Error was also alleged that the learned trial judge refused to charge the third request presented by the defendant.

The appellant there presented eleven reasons in the Supreme Court for reversal in the grounds of appeal served upon the respondent, but in his brief only urged numbers one, two, three and eleven, and consequently abandoned the remaining grounds of appeal. The first, second and third reasons for reversal dealt with the testimony of the said Bertha Wagman and the said Michael Brenner as to declarations made by the alienated spouse to them and which declarations were not made in the presence of the defendant. The eleventh reason for reversal pertains to the refusal of the trial judge to charge the third request presented to him by the defendant.

The first, second and third grounds of appeal of the appellant in the Supreme Court were argued under one point and the eleventh ground of appeal was argued under another and the remaining grounds of appeal were abandoned, so the Supreme Court had only to pass upon for its consideration the question of the admission of testimony hereinafter set forth and the refusal of the trial judge to charge a certain request submitted by counsel for the defendant.

The judgment in favor of the plaintiff was reversed by the Supreme Court. The Supreme Court held that the conversations had with the son of the defendant were hearsay and were not binding on the defendant. The remaining ground of appeal urged by the defendant; viz:

that the trial judge erred in refusing to charge a request submitted, was passed upon by the Supreme Court, and the court held that no error was committed by the learned trial judge in refusing to charge the request.

It is urged on this appeal that the Supreme Court erred in reversing the judgment of the Essex Circuit and it is herein contended that the conversations were admissible for the reasons hereinafter set forth.

It is also herein contended that there was no error in the trial judge's refusal to charge the request submitted by the defendant, and these questions will be presented as hereinafter set forth.

POINT ONE.

On page forty-seven of the state of the case it will appear that the following question was directed to Bertha Wagman:

“Q Did you have any conversation with your brother-in-law, Joseph Leavitt, during that period? A Yes, sir.

Q Did he ever say anything to you?”

To the foregoing question an objection was interposed and after argument the Court permitted the witness to answer. The question was directed to conversations had with the said Joseph Leavitt prior to the marriage.

The second ground of appeal dealt with a question propounded to the same witness pertaining to the conversation which she had with the said Joseph Leavitt after the marriage. This appears on page forty-nine of the state of the case. Bertha Wagman was asked if she had any conversations with Joseph Leavitt about

the marriage and when she answered that she did, the following question was asked of her:

“Q What did he say? A He told me that his father carried on quite terribly. He was not at all pleased with it, and he said—”

An objection was interposed and after argument the Court permitted the witness to answer. The answer appears on page fifty of the state of the case. The witness answered as follows:

“A He told me his father carried on quite terrible, he was not at all pleased with it and he said—”

“A (Continuing.) And he said he would try to win his father over and perhaps reconcile him by the end of the year and then he would get a share in the business and then he would set up housekeeping with my sister.”

The third ground for reversal pertained to the testimony of Michael Brenner, the father of the plaintiff, as to the conversation which he had with the defendant after the marriage occurred. Mr. Brenner was asked the following question:

“Q Did you have any conversation with your son-in-law at that time? A Yes, sir, I did.

Q Tell us the conversation you had with him. A Yes, sir, I asked Mr. Leavitt—”

And objection was interposed and after argument the Court permitted the witness to testify to the conversation. The witness answered as follows:

“A I asked Mr. Leavitt—I saw the marriage license and everything and I wanted to go and see his father. After I found out they were married, I talked to Mr. Joseph Leavitt, my son-in-law, that I wanted to speak to his father to have them married in the Jewish faith but he told me, ‘Pop, don’t go down to my father, he is a hasty man

and wants I should marry a girl with money but I like your daughter Pearl and he promised me a share in the business and after Christmas I will talk to my father on the quiet and save you the trouble."

The trial judge admitted the foregoing testimony and this was held to be error by the Supreme Court. The Supreme Court followed the case of *Cochran v. Cochran*, 196, N. Y. 86 (89 N. E. 470), but as we will express herein, it is our opinion that this case is not controlling on the testimony admitted in the case at bar. And it is herein respectfully submitted that the Supreme Court failed to distinguish the difference between the declarations introduced for the purpose of establishing alienation of affections and declarations of the husband introduced for the purpose of evincing his state of mind produced by the conduct of the defendant.

The appellant urges herein that it was proper for the trial judge to permit declarations of the alienated spouse to go in evidence for the purpose of evincing his state of mind as the result of the conduct of the defendant. The appellant urges that the testimony introduced was intended for no other purpose and that no error was committed by the trial judge in permitting such testimony to go in. It is contended herein that the testimony was proper for that purpose and if the respondent had desired the testimony to be so limited he should have made a proper request to the trial judge that the jury be so instructed. It is also contended herein that irrespective of any legal merit that there might have been to any objections interposed by the defendant that no prejudicial error was suffered by him at the trial. The learned trial judge in his charge to the jury pointed out that public policy

favors marriage; that a contract of marriage between a man and a woman usually brings to the wife the affection of her mate and his conjugal society; that the wife is entitled to the support and protection of her husband and that this is true whether there is affection or whether there is no affection, but no person has the right to interfere with the affection of the husband for his wife, nor has any person the right to interfere with the chances of affection springing up in the future in those cases where the husband has lost his affection for his wife. The trial judge pointed out that alienation or loss of affection is not the substantive cause of action, but a matter of aggravation of damages, the gist of the action being the support, protection, comfort and society of her husband, which latter she may have even though he no longer loves her.

The burden of proof was upon the plaintiff to establish two things in order to maintain her action, to wit: That the defendant was the procuring cause of the alienation or separation; and that by reason of the actions and conduct of the defendant the mental attitude of the husband was so changed that he ceased to have affection for his wife, or that by reason of the acts or conduct of the defendant he separated himself from her. The plaintiff charged that the acts and conduct of the defendant were malicious and wanton and therefore it was incumbent upon her to prove the character of the defendant's conduct. The jury's verdict is a clear indication that the plaintiff did not fall short in her proofs and our present inquiry leads us to an examination of the evidence to ascertain whether or not these proofs were adduced by proper and competent testimony.

On behalf of the plaintiff the conduct of the defendant which amounted to the wilful alienation of the affection of the husband of the plaintiff was established by the plaintiff and two other witnesses by proofs other than the declarations complained of. The plaintiff's testimony appears on pages 22, 23 and 24 of the state of the case. It should be borne in mind in examining this testimony that the plaintiff testified to conversations which she had with the defendant. There could possibly be no objection to this line of testimony, and if the jury believed her testimony which we must assume that they did, it establishes an unlawful and malicious interference with the marital relations of the plaintiff and her husband.

The testimony of Bertha Wagman appears on pages 51 and 52 of the state of the case and there she testified to a conversation which she had with the defendant wherein the latter expressed animosity towards the plaintiff and expressed a keen desire that a divorce be procured. No objection could have been interposed to this testimony as it came direct from the lips of the defendant.

The witness, Michael Brenner, testified also as to a conversation which he held with the defendant. His testimony in this regard appears on pages 62, 63 and 64. His testimony is practically to the same effect as Mrs. Wagman, and the effect of this testimony was to establish the conduct and actions of the defendant to bring about a separation of the plaintiff and her husband. Thus it will be seen that the plaintiff introduced evidence which was admittedly, and beyond a doubt, proper and competent to establish the malicious conduct and actions of

the defendant without any resort to any declarations of the defendant.

It was obligatory on the plaintiff to establish to the satisfaction of the jury that not only did the defendant attempt to alienate the affection of his son, but that his course of conduct had an effect upon the mind of his son. If the efforts of the defendant were futile then no cause of action would have arisen, but if his actions did have a bearing and effect upon the mental attitude of the alienated spouse towards his wife, then the attempts made by the father, plus the result obtained gave the plaintiff a cause of action against him. It is respectfully contended that the only manner in which the mental state of the husband both before and after the marriage could be ascertained was by his declaration. The Supreme Court has passed on this very question in the very late case of *Renner v. Renner*, 5 Misc Rep., page 411 (136 Atl. 707). In that case it was alleged, on appeal, that the Court erred in admitting in evidence conversations and a written statement of plaintiff's husband not in the presence of the defendant. That court held as follows:

“These conversations were competent as evincing the state of mind of the husband towards the plaintiff, and the statement was properly received in rebuttal as affecting the credibility of the husband, who had been a witness called by the defendant.”

The respondent, in his brief in the Supreme Court, sought to limit the effect of the foregoing decision by saying that the admission of this testimony was introduced in rebuttal for the purpose of destroying the credibility of the husband. We do not so understand the opinion, but on the contrary it appears to us that this court expressly held that the conversations were

competent as evincing the state of mind of the husband towards the plaintiff. We construe the opinion to mean that the conversations were introduced by the plaintiff in her direct case and that the statement was introduced in rebuttal to attack the credibility of the husband, but we do not understand that this court meant to say that the declarations and the statements were only admissible for the purpose of affecting the credibility of the husband. This last mentioned case appears to us to be on all fours with the question presented herein and seems to us to be sound law.

It seems to us that a tort action for the alienation of the affection of one of the parties to the marriage is similar from a legal standpoint to an action to set aside a will upon the ground of undue influence. The two actions seem to us to be somewhat analogous. In an action for alienation of affections the plaintiff must establish the conduct of the defendant and its effect upon the alienated spouse. Where one seeks to set aside a will on the ground of undue influence two things must clearly be established, to wit: the conduct of the person exercising undue influence and, secondly, the effect which this undue influence had upon the mind of the testator. In a suit for the alienation of affections the conduct of the defendant must be established by competent evidence and which is exclusive of any declarations made by the alienated spouse. There must be direct evidence of the conduct of the defendant. Where undue influence is alleged the conduct of the person exercising such influence must be clearly established and it cannot be established by the declarations of the testator. In a suit for alienation of affections the effect upon the mind of the alienated spouse by the

conduct of the defendant must be established. In the second case the effect upon the mind of the testator must also be established. In both cases the conduct and the effect upon the mind of the party must be established. Thus the two actions seem to us to closely parallel each other. There is a paucity of judicial opinion dealing with questions of evidence arising out of suits for alienation of affection but we submit that the case of *Renner v. Renner*, *supra*, is directly in point. In addition thereto we respectfully urge that this court has passed upon the question at issue herein in the case of *Rusling et al. v. Rusling et al.*, 36 N. J. Eq. 603. Mr. Justice Dixon who wrote the opinion for this court said in part as follows:

“For the proof of undue influence, the caveators mainly rely upon declarations of the testators, made some time before and some time after the execution of the will, respecting the conduct towards him of the favored legatees. These declarations are not admissible as evidence of the facts which they were offered to prove.

“Where undue influence is set up in impeachment of a will, the ground of invalidity to be established is, that the conduct of others has so operated upon the testator’s mind as to constrain him to execute an instrument to which, of his free will, he would not have assented. This involves two things: first, the conduct of these by whom the influence is said to have been exerted; second, the mental state of the testator, as produced by such conduct, which may require a disclosure of the strength of mind of the decedent and his testamentary purposes, both immediately before the conduct complained of, and while subject to its influence. *In order to show the testator’s mental state at any given time, his declarations at that time are competent, because the conditions of the mind are revealed to us, only by its*

external manifestations of which speech is one. Likewise, the state of the mind at one time is competent evidence of its state at other times not too remote, because mental conditions have some degree of permanency. Hence in an inquiry respecting the testator's state of mind, before or pending the exerted of the alleged influence, his words, as well as his other behavior, may be shown for the purpose of bringing into view the mental condition which produced them, and through that, the antecedent and subsequent conditions. To this extent his declarations have legal value. But for the purpose of proving matters not relating to his existing mental state, the assertions of the testator are mere hearsay." (The italics are ours.)

It is respectfully submitted that the evidence complained of was proper for the purpose of disclosing the state of mind of the plaintiff's husband and this could only be revealed, as pointed out by this court, by its external manifestations of which speech is one. We respectfully contend that the foregoing case is directly in point and is dispositive of the question under consideration.

That the decisions of our courts on this subject matter are in accord with judicial opinion throughout this country is very clearly indicated by a reference to 30 C. J., page 1139, Section 1011, wherein it is stated:

"While statements or declarations of an alleged alienated spouse, not made in the presence of defendant, are inadmissible as substantive evidence to show defendant's guilt, nevertheless such declarations or statements may be admissible as competent and relevant for some purposes."

"As showing state of mind. As tending to explain their relation and mental attitude and defendant's motive, conversations between the alienated spouse and defendant

are admissible; for the same purpose also are admissible declarations made by the alienated spouse immediately before or at the time of leaving plaintiff, respecting plaintiff's mistreatment of such spouse. And very generally it has been held that statements or declarations of an alleged alienated spouse, although made out of the presence of defendant, are admissible to show the effect the conduct of defendant has had upon the affections of the alienated spouse, and to show the state of the alienated spouse's mind toward plaintiff and defendant, even though it has been held, such statements or declarations involve words and acts of defendant; but it seems, they are admissible only for this purpose and not as substantive evidence of the defendant's guilt."

Citing among other cases:

Hillers v. Taylor, 116 Md. 165; 81 Atl. 286;

Moir v. Moir, 181 Iowa, 1005; 165 N. W. 221;

Hardwick v. Hardwick, 139 Iowa 230; 106 N. W. 639;

Gilbreath v. Gilbreath, 42 Colo. 5; 94 P. 23;

White v. White, 140 Wis. 538; 122 N. W. 1051;

Bourne v. Bourne, 43 Cal. A. 516; 185 P. 489.

In the case of *Ickes v. Ickes*, 237 Pa. 582 (85 Atl. 885) the defendant's counsel offered to show that the day before the plaintiff's husband left her he, the said husband, told the witness that he had trouble with his wife and was going to leave her, and he said the reason he was going to leave his wife was that she was in a family way and he was not the father of the child. Objection to this testimony was sustained. This was held to be error. Mr. Justice Moschzisker

who wrote the opinion for the Court stated as follows:

“The plaintiff’s contention was that the defendant had so worked upon the mind of his son as to cause him to leave her and join the navy. The defense’s reply was that the husband had left not because of any advice or persuasion of his father, but as the result of other moving causes operating upon his mind at the time, the chief of which was the alleged unfaithfulness of his wife. This raised an issue as to the motive which caused George Ickes to leave, which involved his state of mind as a principal fact in the case. How could this be proved? When Ickes was called, his testimony was objected to and refused because he was the husband of the plaintiff. The only way his state of mind could possibly be shown was by proof of things that he said and did at the time: but this does not necessarily mean at the very moment of his departure. In the present case, as in many other cases in the books, confusion has been caused by losing sight of the distinctions between contemporaneous spontaneous exclamations growing out of and explanatory of an event or other declarations directly connected with and forming part of the *res gestae*, and declarations relied upon solely to show an existing intention or state of mind. When the court determines in any case that a man’s state of mind, or the reason why he did a certain act, is a relevant principal fact to be ascertained, that is the particular thing under immediate investigation, and what he may have said concerning it is usually the best and only evidence that can be obtained on the subject: but the proof must always be restricted to declarations indicating the state of mind at the time of their utterance.”

In 13 *Ruling Case Law*, under the title “Husband Wife,” section 527, on page 1478. The following statement appears:

“Ordinarily the declarations of the spouse whose affections are alleged to have been

alienated by the defendant, made to the plaintiff or to a third person, concerning the words and acts of the defendant and tending to prove the charge made against the defendant are purely hearsay and inadmissible against the defendant."

"On the other hand, it has been held in an action by the wife against her husband's parents that she may testify to his declarations to her and others of inducements held out to him by his parents to abandon her."

In the same section the following also appears:

"As a general rule all evidence having a material tendency to prove that the spouse whose affections are alleged to have been alienated left the plaintiff of his or her free will and not at the procurement and solicitation of the defendant, is admissible on behalf of the defendant. For this purpose, therefore, declarations of the spouse showing his or her mental state at the time he or she left may be admissible on behalf of the defendant. This does not, however, necessarily mean that such declarations should have been made at the very moment of departure. Accordingly, it has been held in an action to hold a man liable in damages for causing his son to leave his wife, that evidence is admissible of the reasons given by the son for leaving on the day before his departure. Such evidence is not to be excluded by the court because of the likelihood of collusion between the declarant and the defendant, as such an objection goes to the credit rather than to the competency of the evidence."

Citing *Ickes v. Ickes*, 237 Pa. St. 582; 85 Atl. 885; 44 L. R. A. (N. S.) 1118.

It is clear from an examination of the authority above quoted that the author clearly intended to indicate that the declarations of the alienated spouse were admissible for the purpose of evincing his state of mind but were not admissible

for the purpose of establishing before the jury the conduct of the defendant. We respectfully contend that the evidence in the case at bar, complained of, was only introduced for, and was only admissible for, the purpose of establishing the state of mind of the husband of the plaintiff, both before the marriage and after the marriage and until he separated himself from the plaintiff. A close examination of the case of *Cochran v. Cochran*, 196 New York 86; 89 N. E. 470, relied on and followed by the Supreme Court in reversing the Essex Circuit, will disclose that the Court merely held that the plaintiff was obliged to establish the unlawful conduct of the defendants in order to maintain her action and that she could not show the conduct of the defendants by hearsay testimony. But the case did not hold, nor was the question raised, that the testimony was not competent for the purpose of establishing the state of mind of the husband. Consequently we do not think this case should be followed as an authority for the broad principle stated by the Supreme Court.

The defendant in the trial court made no effort whatsoever to have this testimony limited in its effect and this he could have done had he submitted a proper request to the trial judge. The testimony was admissible for one purpose and therefore could not have been ruled out by the trial judge.

In examining the cases in other jurisdictions on this question we would respectfully ask the Court to bear in mind that the plaintiff in the case at bar did establish the unlawful conduct of the defendant prior to the introduction of any declarations made by her husband. We have pointed out in an earlier part of this brief where this testimony appears and repetition at

this point would be unnecessary. That our construction of the case of *Hillers v. Taylor* is correct is indicated by the opinion of the same court in the case between the same parties appearing in 116 Md. 165 (81 Atl. 286). It appears that after the reversal of the judgment in 108 Md. 148 that the case was retried and resulted in another verdict for the plaintiff. Appeal was again taken and we are commenting upon the appeal filed in that case somewhat at length because it occurs to us that defendant's counsel grasped the proper manner to limit the effect of declarations made by the alienated spouse. In the last mentioned case the defendant moved to strike from the record all the testimony of the plaintiff in that case with reference to conversations had with her husband, upon the ground that the conversations had not been in any way shown to have been caused or induced by the acts of the defendant. The testimony had been admitted subject to exception. The trial court declined to strike out the testimony and an appeal was taken from his refusal so to do. It was stated by Briscoe, *J.*, who wrote the opinion in that court as follows:

“We think upon the state of the record now before us the court was entirely right in overruling the motion. The testimony was competent under the well defined exception to the rule against hearsay evidence, in suits like the present one to show the state of feeling existing between the husband and wife on the second count of the declaration. In the former appeal we held that evidence of statements made to the plaintiff by her husband relating to the wishes of the defendant or of declarations made by the defendant on the facts of that case was inadmissible.”

The foregoing opinion makes it clear that the decisions in the Maryland courts closely follow *Renner v. Renner, supra*.

Inasmuch as it clearly appears that declarations of the alienated spouse are proper for the purpose of indicating his mental state and that it can only be determined by his outward manifestations just what his mental reaction is, it seems to us that the learned trial judge had no alternative but to overrule the objection. If, after the question was answered, it appeared that the declaration did not pertain to a showing of the state of mind of the husband then, as in the case of *Hillers v. Taylor, supra*, the attorney for the defendant should have thus moved to strike out the answer, or he should have made application to the trial court for a proper instruction to the jury that they should disregard the testimony. This was not done in the case at bar. The thought can not help but occur to us that the learned attorney for the defendant after interposing his objection speculated with the decision of the jury and now hopes to set aside their verdict on the ground that the learned trial judge erred in permitting the question to be answered, whereas he had it within his power, if he had a valid objection to the answer as given, not only to protect his own client from the effect of the answer, but to assist the trial judge in the progress of the case, and the effort of the trial judge to procure a fair result to both parties.

There are decisions in some of our sister states permitting declarations made by the husband, at the suit of the wife, to be admitted in evidence on the ground that the declarations are a part of the *res gestae*, but we are making no such contention here. However, an examination

of the case of *White v. White*, 122 N. W. 1051; 140 Wis. 538, is interesting. It was there held as follows:

“The court permitted plaintiff to testify to the declarations made by her husband to her and others, which purport to give the offers and inducements held out to him by his parents to induce him to separate from and abandon the plaintiff. It is claimed that this is prejudicial error. This class of evidence has been held proper and competent as showing the influences producing the alienation and loss of affection complained of, and the cause of separation and the destruction of the marital relation.”

From a close examination of the testimony complained of it will be seen that the testimony did not prejudice the defendant. If there were no other testimony in the case than the declarations made by the husband then we, of course, would agree with the appellant that the action could not be maintained. It is our contention, however, that this testimony was not intended to establish the conduct of the defendant but merely to establish the state of mind of the husband. If the testimony of the plaintiff appearing on pages 22 and 24 in the State of the Case, that of Bertha Wagman on pages 51 and 52, and that of Michael Brenner appearing on pages 62, 63 and 64, will be examined it will be apparent to this court that irrespective of the legal merit of appellant's contention, which we cannot concede, he was not injured in any way by the admission of this testimony. The defendant contended in the Supreme Court that the testimony of the plaintiff was corroborated by the admission of these declarations, but it is respectfully contended that she was not corroborated by the declarations but by the testimony of the two last mentioned witnesses, who had conversations

direct with the defendant and they testified to those conversations.

It is further contended that if the defendant desired to have the effect of these declarations limited he should have made a proper request to that effect. In the case of *Vapor Vacuum Heating Co. v. Kaltenbach & Stephens*, 94 N. J. Law 450 (111 Atl. 171), decided in this court in 1920, it was held as follows:

"The letter of February 14th was admittedly relevant. If the defendant desired the court to qualify its effect, a request should have been formulated, and even then the matter would probably have been within the discretion of the court."

For the foregoing reasons it is respectfully submitted that the learned trial judge committed no error in admitting the declarations complained of and that the Supreme Court erred in thus reversing the judgment in the Essex Circuit.

POINT TWO.

The only remaining ground urged by the defendant in the Supreme Court was that the learned trial judge refused to charge the defendant's third request. The Supreme Court found no error in the trial judge's refusal to so charge and it was stated in the opinion rendered by the Supreme Court that the charge requested was in effect charged by the trial judge.

It is respectfully submitted that the learned trial judge committed no error in refusing to charge the defendant's third request for the following reasons:

FIRST.

It will be noted that the first sentence in the request is as follows:

“If the wife’s affections have been lost or withdrawn from her husband for other reasons, or through other causes than the defendant’s course of conduct, plaintiff should not recover.”

It is contended that this part of the request is not legally sound. If the Court had charged the request in the form above the jury might rightfully have concluded that even though the defendant was the controlling cause of the loss of the husband’s affections still the plaintiff could not recover if there were other minor causes. This is improper. In 30 C. J. 1125, section 982, the following appears:

“It is no defense that defendant’s conduct was not the sole cause of the alienation or separation; it is sufficient if his conduct was the controlling cause, although other matters contributed. And there is authority that one who is either a procuring or a contributing cause is liable, whether or not he is the sole or the controlling cause.”

Authorities are cited in support of the foregoing legal proposition.

If the Court had charged this request it would have been prejudicial to the plaintiff inasmuch as she was only required to establish by the greater weight of evidence that the defendant was the controlling cause of her husband’s affections having been alienated.

SECOND.

The request embraces two distinct legal points. The first sentence in the request deals with the duty of the plaintiff to establish that the defendant was responsible for the loss of affection

of the husband for the wife. The second sentence deals with the malicious conduct of the defendant. If the request is good in part and bad in part the Court can reject the whole because it is not incumbent upon the trial judge to sift out that which is good and discard that which is bad. *Consolidated Traction Co. v. Chenowith*, 58 N. J. Law 416 (34 Atl. 817). Affirmed in 61 N. J. Law 554 (35 Atl. 1067).

THIRD.

It is further contended that the learned trial judge did, in effect, charge the third request. On page 137 of the State of the Case, it will appear that the Court charged the jury that the burden of proof was upon the plaintiff to prove by the greater weight of evidence that the defendant interfered with the marital relations existing between the plaintiff and her husband. He stated that the plaintiff charged the defendant with being derelict and that he committed a tort and the jury was told that she must prove it and that the plaintiff must prove that the defendant willingly, knowingly, unlawfully, unjustly and maliciously interfered with the marital relations between the plaintiff and her husband and that he alienated the affections of her husband and deprived her of the conjugal society of her husband. This effectually disposes of the second part of the charge requested.

On page 139 the Court instructed the jury that the defendant denied that he alienated his son's affections and the Court proceeded to say "and if you find he did not, your judgment shall be for the defendant."

We can not perceive how the Court could possibly have charged the jury on the matter requested in any clearer way. It has become firmly

established in this jurisdiction that the Court is not required to charge a request in the exact form requested, but if the matters requested are charged in effect then no error is committed.

The only reason the defendant assigned for the loss of affection of his son for his wife was that the wife refused to go through the Jewish ceremony and that she would not live within the means of the defendant's son. On page 137 of the State of the Case the Court pointed out to the jury the defendant's contention and consequently, there being no other reason assigned by the defendant for the loss of affection, he can not be heard to complain that the trial judge erred in not charging his request where the Court had expressly pointed out to the jury the defense interposed. It has been repeatedly held in this jurisdiction that instructions must be construed together, as a whole, and if, when so considered, they properly state the law, it is sufficient. *Sullivan v. North Hudson County R. Co.*, 51 N. J. Law 518 (18 Atl. 689).

It is therefore respectfully submitted that no error was committed by the trial court's refusal to charge the third request of the defendant and the Supreme Court was correct in so holding.

CONCLUSION.

For the reasons hereinbefore set forth it is respectfully submitted that the learned trial judge committed no legal errors in the trial of the above entitled cause and that the Supreme Court erred in reversing the judgment of the Essex Circuit.

Respectfully submitted,

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New Jersey Court of Errors and Appeals

PEARL LEAVITT, <i>Plaintiff-Appellant,</i> <i>vs.</i> MOSES LEAVITT, <i>Defendant-Appellee.</i>	}	<i>Action at Law. On Appeal from the New Jersey Su- preme Court.</i>
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BRIEF OF APPELLEE.

Facts.

The appellant obtained a judgment in the Essex County Circuit Court for the alienation of her husband's affections, the defendant's son. Judgment was reversed by the Supreme Court, and this appeal is from the judgment of reversal.

Briefly stated the facts are that the appellant was employed in the defendant's wholesale establishment at Orange, there became friendly with the defendant's son, and secretly married him in August of 1926. They never set up housekeeping and continued in their employ. The defendant learned of the marriage in November, 1926, and in January of 1927 the separation ensued, which is the basis of this suit.

The plaintiff claimed that the separation resulted from the defendant's disappointment and dissatisfaction with his son's marriage to a poor girl, he having intended a rich marriage for him. The defendant denied this, claimed that he was satisfied with the marriage, only wanted it ceremonialized according to the Jewish law, in fact, offered to furnish the home for the plaintiff and her husband, and that the separation was due to her abandonment of her husband because of the

modest scale with which the husband proposed that they should commence housekeeping.

To support her claim that the defendant wanted a rich marriage for his son and was disappointed with the marriage to the plaintiff, she called two witnesses, Bertha Wagman, her sister, and Michael Brenner, her father. They testified to conversations with the defendant's son, not in the presence of the defendant. These conversations were to the effect that the defendant wanted a rich marriage for his son, and that he was terribly disappointed when he learned of the marriage to the plaintiff. They were admitted over objection and exceptions duly allowed, and constituted the first ground for reversal in the Supreme Court. The second ground was the failure of the trial judge to charge a request submitted by the defendant. The Supreme Court reversed on the first ground, and its action is made the first point in the appellant's brief in this court.

POINT I.

The testimony of conversations by Bertha Wagman and Michael Brenner with the defendant's son, not in his presence, was hearsay, and its admission constitutes prejudicial error.

Reference has already been made to the fact that the marriage between the plaintiff and the defendant's son took place in August of 1926. Bertha Wagman, plaintiff's sister, was permitted to testify to conversations with the defendant's son, not in his presence, when he was courting her sister, the plaintiff. The conversation appears on page 47 State of Case, line 27:

"Q Did you have any conversation with your brother-in-law, Joseph Leavitt, during that period? A Yes, sir.

Q Did he ever say anything to you?

Q (Question read.) During the first half of the year 1926? A Yes, of course, he told me that he loved my sister and that he had intentions of marrying her; he was keeping company with her.

Q When? A Around January, 1926, when he first started to come into the house, and of course, immediately after he was coming there for a while I wanted to know what his intentions were, coming there two or three times a week and he told me that he loved my sister and that his intentions were marriage, and he asked me to please keep it a secret because he did not want anyone to find out about it just yet.

Q (By Mr. Ellenstein.) Why? A Of course I questioned him and asked him why he wanted it to be kept a secret, there was nothing to be ashamed of. 'Well,' he said his father wanted him to marry a girl with lots of money and had promised him share in the business at the end of the year and he thought that he would keep it a secret until he got the share of the business because if he didn't he thought his father would raise objections because my sister was a poor girl."

She was also permitted to testify to conversations with the defendant's son, not in the defendant's presence, after the marriage. This testimony appears on page 50, State of Case, line 13:

"Q (Question and answer read as follows): Question: What did he say? Answer: He told me his father carried on quite terribly, he was not at all pleased with it and he said— A (Continuing.) And he said he would try to win his father over and perhaps reconcile him by the end of the year and then he would get a share in the business and then he would set up housekeeping with my sister."

Michael Brenner, the plaintiff's father, was permitted to testify to conversations with the defendant's son, not in his presence, and this testimony appears on page 61, State of Case, line 38:

“Q Tell us the conversation you had with him? A Yes, sir; I asked Mr. Leavitt— A I asked Mr. Leavitt—I saw the marriage license and everything and I wanted to go and see his father. After I found out they were married I talked to Mr. Joseph Leavitt, my son-in-law, that I wanted to speak to his father to have them married in the Jewish faith, but he told me ‘Pop, don’t go down to my father, he is a hasty man and wants I should marry a girl with money, but I like your daughter Pearl, and he promised me a share in the business and after Christmas I will talk to my father on the quiet and save you the trouble.’”

The obvious purpose and effect of this testimony was to present the defendant in an unfavorable light and to convey to the jury the fact that he was designing a mercenary marriage for his son, to be rewarded by a share in his business, and that the disappointment of the defendant with the marriage to the plaintiff, a poor girl, led to the alleged interference between them which resulted in the separation. The jury by its verdict indicated that it believed this testimony, and if its admission was improper, it certainly was very prejudicial to the defendant. The Supreme Court held that this testimony was hearsay and improperly admitted, and adopted the opinion of Judge Hiscock, speaking for the New York Court of Appeals, in the case of *Cochran v. Cochran*, 196 N. Y. 86, 24 L. R. A. (N. S.) 160. The facts there are almost identical with the facts in this case, and the testimony there condemned as being hearsay is so similar to the testimony in this

case that we have taken the privilege of quoting fully from Judge Hiscock's opinion as it appears on page 163 in 24 L. R. A. (N. S.):

“While she was on the stand, and speaking of a time a year prior to her marriage, she was allowed to testify as follows:

‘Q Did you do that (stop going to church) after any conversation with your husband?

A Yes.

Q What did he say?

(Objected to as incompetent, irrelevant and immaterial, and not binding on the defendant. Objection overruled and defendant excepts.

A He said that he could not sit with me in church any more, that his mother wouldn't allow him, etc.’

The Court refused to grant a motion to strike out this evidence, saying that it would allow it to stand, not as ‘proof against the defendant at this time’ but ‘merely as bearing upon their relations to each other.’

In another place the following occurred:

‘Q What did he (the husband) say about keeping it (the marriage) secret? A That if his father knew it he would separate us, because he had had a cousin that had a picture in his pocket that he didn't like, that they had sent him away for it, and he knew his father would send him away much quicker for that.’

Defendant's motion to strike out this evidence as immaterial and irrelevant was denied; it being allowed to stand as ‘merely explanatory of the reason why the marriage was kept secret.’ Again, subject to proper objection and exception, plaintiff was allowed to state that on another occasion after the marriage her husband said ‘that his father told him that he didn't want him to go out of the house, and Ernest (the husband) said “Why not?” He said “You are going to obey me” and Ernest said to him “You should have told me that a long time ago”’

etc. On the strength of these rulings, and without unnecessary repetition of similar objections which defendants' counsel had the right to assume would be overruled, the plaintiff was allowed to give other testimony of statements made by her husband with reference to the hostile attitude and disposition of his parents. We think it is unnecessary to take time for the purpose of arguing that this evidence was very prejudicial to the defendants, and we know of no authority which justified its introduction. While, of course, plaintiff was required to prove the unlawful conduct of defendants, and while such unlawful conduct might be evidenced by such acts as were outlined in the evidence referred to, it was incumbent upon her to prove the same by competent testimony, and it was not proper to give evidence of her husband's declarations on the subject. Such evidence offended against the general rules of evidence, and has been specifically condemned in actions similar to this one. *Huling v. Huling*, 32 Ill. App. 519; *White v. Ross*, 47 Mich. 172, 10 N. W. 188; *Preston v. Bowers*, 13 Ohio St. 1, 82 Am. Dec. 430; *Manwarren v. Mason*, 79 Hun. 592, 29 N. Y. Supp. 915."

Judge Hiscock's logic is so convincing that it conclusively disposes of the proposition that testimony of the class here allowed is hearsay, inadmissible and its admission prejudicial error. For that reason the appellant now shifts ground, and in this court urges that the testimony was not offered assertively, but merely for the purpose of proving the mental attitude of the alleged deserting spouse.

Of course there is an exception to the hearsay rule, where such testimony is sometimes admitted for that purpose. Reference is made in the appellant's brief to the opinion of Mr. Justice Dixon in the case of *Rusling v. Rusling, Executors*, in the Court of Errors and Appeals, 36

N. J. Eq. 603, where Justice Dixon clearly indicates when such testimony is admissible and when it is not, and attention is directed to this caution contained in the first paragraph of the quoted part of the opinion in the appellant's brief:

“These declarations are not admissible as evidence of the facts which they were offered to prove.”

And the conclusion of the last paragraph of the quoted portion of Justice Dixon's opinion as contained in appellant's brief:

“But for the purpose of proving matters not relating to his existing mental state, the assertions of the testator are mere hearsay.”

Therefore the question is, were these conversations offered for the purpose of indicating the mental attitude of the defendant's son, or as evidence of the facts and conclusions contained in the son's statements.

We submit that the testimony was admitted for the latter purpose. The son's mental attitude was not an issue in the case. Both sides admit that he loved the plaintiff. The plaintiff in her own testimony, both on direct and cross examination, testified that his affections for her remained strong up to the time of the very separation. On her direct examination with respect to her husband's attitude toward her, she says (p. 28, State of Case, l. 10):

“Q Did your husband's attitude towards you change at any time from the time he kept company up to the time the defendant fired you? A No, it had not changed at all.”

On cross examination she confirms this fact (p. 37, State of Case, l. 10):

“Q You said the affectionate feeling towards you on the part of your husband

lasted up until July, 1926? A Up until July, 1926?

Q Yes, that was your testimony on direct examination? A No, sir.

Q Tell us the correct testimony, how long did it last? A It lasted until January, 1927, not July, 1926.

Q January, 1927? You said July, 1927, before. A That was the time I called my husband up last.

Q His affection for you then was just as strong as it was prior? A When I called him up?

Q Yes. A No, sir, it was different."

There are cases where the mental attitude of the deserting spouse is a material issue. Such was the case of *Ickes v. Ickes*, 237 Pa. St. 582; 85 Atl. 885, mentioned in the appellant's brief. There the plaintiff sued the father for the alienation of the affections of her husband, his son. The defendant attempted to prove that the son abandoned the plaintiff because of his conviction that she was unfaithful to him, and this by a witness who had overheard a conversation between the plaintiff and her husband, in which the husband had charged her with bearing a child that was not his own, and she had confessed to her infidelity. The trial court refused to allow this testimony offered for the defense, and on appeal to the Supreme Court, Mr. Justice Moschzisker wrote the opinion reversing the judgment in favor of the plaintiff, on the ground that the proposed testimony was competent and admissible for the purpose of proving the mental state and motive of the defendant's son in leaving his wife, the plaintiff. But there it was admitted that the husband had left his wife, and the question was, What was the motive for his abandonment of her? The plaintiff charged that that was due to the defendant's interference, and the defendant,

while admitting the abandonment, claimed that it was due to causes over which he had no control. The question of motive under the issues in that case became paramount, and Mr. Justice Moschzisker very ably indicates how in such a case the declarations and statements of the spouse made at or shortly before the abandonment became competent and admissible, but he gives the test for the admissibility of such testimony as follows:

“When the Court determines in any case that a man’s state of mind, or the reason why he did a certain act, is a relevant principal fact to be ascertained, that is the particular thing under immediate investigation, and what he may have said concerning it is usually the best and only evidence that can be obtained on the subject; *but the proof must always be restricted to declarations indicating the state of mind at the time of their utterance.*”

When evidence of this character is produced sufficient to show a then present intention or state of mind, it may be assumed to have continued and formed the motive which controlled the doing of a subsequent act following closely thereafter, if under all the surrounding circumstances one would naturally associate the two together, and it is for the jury to draw the conclusions.”

Taking this test into consideration, how can it be said that the son’s state of mind at the time when he was wooing the plaintiff is a relevant principal fact to be ascertained, that is the particular thing under immediate investigation. The first conversation admitted was between Bertha Wagman and the defendant’s son, when he was courting the plaintiff. That appears on page 47, State of Case, line 27, *et seq.*, and the second conversation occurred between Michael Brenner and the son after the marriage, but before the defend-

ant had learned of it. How can it be said that the mental attitude of the son before the marriage, and even after the marriage, but before the defendant knew of it, was relevant to the issue, and a principal fact to be ascertained? That is the test qualifying such testimony for admissibility in the opinion of Mr. Justice Moschzisker in *Ickes v. Ickes*, referred to in the appellant's brief. Both text and precedent on this subject uniformly hold that such testimony is admissible only for the purpose of showing the effect upon the deserting spouse produced by the interference of the defendant.

Reference is made in the appellant's brief to 30 C. J. page 1139, Section 1011, and to Section 13 Ruling Case Law, under the title "Husband and Wife," Section 527, on page 1478. The reference to 30 C. J. page 1139, Section 1011, contains the precise rule:

"And very generally it has been held that statements or declarations of an alleged alienated spouse, although made out of the presence of the defendant, *are admissible to show the effect the conduct of defendant has had upon the affections of the alienated spouse, and to show the state of the alienated spouse's mind toward the plaintiff and defendant.*"

And in 13 Ruling Case Law, on the other hand, the general rule is stated:

"Ordinarily the declarations of the spouse whose affections are alleged to have been alienated by the defendant, made to the plaintiff or to a third person, concerning the words and acts of the defendant and tending to prove the charge made against the defendant are purely hearsay and inadmissible against the defendant."

There is no doubt that this is the rule. It is because of this rule that the Supreme Court re-

versed the judgment of the Essex County Circuit Court. The exception is then stated in the following language:

“On the other hand, it has been held in an action by the wife against her husband’s parents that she may testify to his declarations to her and others of inducements held out to him by his parents to abandon her.”

The testimony in this case does not meet that test. It cannot, because as already referred to, the first conversation with the witness, Bertha Wagman, took place before the parties were even married. The conversation with the witness, Michael Brenner, took place before the defendant knew of the marriage. How can there be inducements to abandon a marriage which was unknown to the defendant?

Not only does the testimony in the present case fail to come up to the test of what may be admitted for the purpose of proving the mental attitude of the alienated spouse;—the case itself shows that it was introduced for the purpose of proving the truth of the facts stated, that is, it was offered assertively, in violation of the rule against hearsay evidence. When Bertha Wagman was being examined about the second conversation with the defendant’s son (p. 49, State of Case, l. 30), and related how the son had told her that when the father learned of the marriage “he carried on quite terribly,” the attorney for the defendant objected on the ground that there was no way of reviewing that testimony on the defense, and the Court overruled the objection on the ground that the defendant did have a way of reviewing or denying this testimony.

Now we recur again to Mr. Justice Dixon, in the case of *Rustling v. Rustling, Executors*, where the true test of what constitutes hearsay

is clearly established. If the testimony is offered for assertive purposes, that is for the purpose of proving the truth of the declarant's statements, it is hearsay and inadmissible. If it is not offered for the purpose of proving the declarant's statements but merely for the purpose of indicating his state of mind, it is an exception to the hearsay rule. In such a case the truth or the untruth is not material, and evidence will not be permitted to prove either the truth or the untruth of the statements. Now evidently in this case the learned trial judge did not put this testimony in the latter class, because he admitted this testimony on the particular ground that the defendant would on his defense have the opportunity of denying the facts stated in that conversation, and so by the record alone it appears that this testimony was offered and admitted not for the purpose of indicating the mental state of the alienated spouse, but assertively, for the purpose of proving the fact that the defendant wanted a rich marriage for his son, that he was very much upset and disappointed that his son had married a poor girl.

The appellant in this case is following the course adopted by the appellant in the case of *Hillers v. Taylor*, 108 Md. 148; 69 Atl. 715. There too the appellant in her brief took the position that the testimony of conversations with the alienated spouse were offered merely for the purpose of indicating his state of mind. The Court of Appeals, in an opinion by Judge Schmuckler, on page 716 of 69 Atl. HELD:

“The appellee in her brief filed since the hearing of the appeal, contended that as the evidence excepted to was not offered and admitted for the purpose of proving the misconduct of the defendant with the plaintiff's husband or the alienation of his affections,

but solely for the purpose of showing the state of his feelings toward his wife, and the purpose for which it was offered was openly stated in the presence of the jury, it was admissible for that purpose under a well-defined exception to the rule against hearsay which makes such evidence competent in suits like the present one to show the state of feelings existing between the husband and wife."

The opinion then proceeds to quote from Wigmore on Evidence, Sections 1730 and 1768 of Volume 3, more recently in Section 1730, and then from Volume 3, Section 1648, of Elliott on Evidence, and continues as follows:

"Declarations or letters tending to show the feeling existing between the plaintiff's consort and the defendant may be shown, but it must first be shown that the defendant was responsible for the affection manifested for him * * * Declarations or letters of the wife when the husband is plaintiff relating to the words or acts of the defendant, and tending to prove the wilful interference of the defendant, as they are merely hearsay, and would be dangerous because of possibility of collusion between husband and wife. 'Where, as in the case now before us, the wife is plaintiff, the rule would apply with equal force to declarations or letters of the husband.

When the declarations of the husband excepted to in the present case were offered in evidence, it had not been otherwise shown that the defendant was responsible for the husband's state of mind toward his wife, although testimony tending to establish that fact was afterwards introduced. * * * The state of Taylor's feelings toward his wife were plainly shown by his refusal to occupy the same room with her or continue to live with her, and his declarations formed but a faint and unimportant addition to the evidence on that branch of the case. They did, however, tend to prejudicially affect the

defendant in the eyes of the jury, although they were confessedly incompetent to prove the acts with which she was charged in the declaration because made out of her presence and hearing, and they should for that reason have been excluded."

The circumstance here is exactly the same as in that case, and the same point can be made here as was made by Judge Schmuckler, "When the declarations of the husband excepted to in the present case were offered in evidence, it had not been otherwise shown that the defendant was responsible for the husband's state of mind toward his wife." The conversations with Bertha Wagman and Michael Brenner took place in one instance before the marriage, and in the other instance before the defendant knew of the marriage. How can this prove the defendant's influence upon his son with respect to a marriage that in one instance was not existent, and in the second instance, was unknown to the defendant. This testimony did, however, tend to prejudicially effect the defendant in the eyes of the jury. It showed him up as a mercenary man, one designing a rich marriage for his son, ready to reward him with a share in the business, and grievously disappointed because of his marriage to a poor girl. It set the stage for the subsequent evidence which tended to show his interference with the marriage, and the ultimate separation. It tainted the verdict of the jury, and the Supreme Court properly reversed the judgment thereon.

Reference has been made in the appellant's brief to the case of *Renner v. Renner*, and attention is paid to it because it happens to be a case in our own courts. There was a defendant's rule to show cause why a judgment should not be set aside, and one of the reasons assigned was

that the statements and declarations of the alienated spouse were admitted in evidence. But in that case the plaintiff was her principal witness, and the defendant was supported by two sons, one the plaintiff's husband. From a reading of the per curiam opinion of the Supreme Court one may infer the fact that the son had testified with respect to his affection or lack of affection to his wife, the plaintiff, and on rebuttal statements and declarations of that son were introduced in evidence, as the Supreme Court said, for the purpose of affecting his credibility as a witness for the defendant. That case has no relation to the question here involved, and for that reason it was properly disregarded by the Supreme Court in its opinion.

It is respectfully submitted that the Supreme Court justifiably reversed the judgment of the Essex County Circuit Court on the ground above mentioned, and that the judgment of the Supreme Court should remain undisturbed.

POINT II.

The defendant, by his answer denied that he was responsible for the separation, and he testified (State of Case, p. 74, l. 38, etc.) that in November, when he learned of the marriage, he congratulated both of them, requested the plaintiff to remain in his employ until January, and proposed that they should then set up housekeeping, promised to furnish the home and to increase his son's, the husband's salary. He denied that he wanted his son to marry for money, that he ever proposed a divorce, and also denies responsibility for the separation. The plaintiff's husband, Joseph Leavitt, testified and he corroborates the defendant's testimony that he never

interfered in the marriage or suggested a divorce (State of Case, p. 120), and his explanation for the separation is that in January, 1927, he proposed to the plaintiff that they should get up a modest home and that she was dissatisfied with that and ceased her marital relations with him. Admittedly there was a separation between the plaintiff and her husband. Plaintiff's contention being that it was brought about by the unlawful interference of the defendant; the defendant denying any interference and disclaiming any responsibility for the separation. On these two conflicting contentions the case was submitted to the jury, and the defendant requested the learned trial court to charge:

"3. If the wife's affections had been lost or withdrawn from her husband for other reasons, or through other causes than the defendant's course of conduct, plaintiff should not recover. The plaintiff must show that the defendant wrongfully and wilfully attempted to alienate the husband's affections, and if you are not satisfied that defendant wilfully and in bad faith to the plaintiff alienated the affections of her husband, your verdict should be for the defendant."

We submit that the defendant was entitled to this instruction, for if the separation was due to causes over which he had no control, then the defendant was entitled to the verdict of the jury. This is the rule laid down by the Kentucky Court of Appeals, in *Scott v. O'Brien*, 110 S. W. 260, 16 L. R. A. (N. S.) 742, and in the opinion in that court rendered by Chancellor Clay, on page 744 of the 16 L. R. A. (N. S.) the Court held:

"The general rule is that there is no ground for an action where a spouse voluntarily gives his or her affections to an-

other, the latter doing nothing wrongfully to win such affections. To support an action for alienating a husband's or wife's affections, it must be established that the defendant is the enticer. Mere proof of abandonment, and that the husband or wife maintains improper relations with the defendant, is not sufficient. 21 Cyc. Law & Proc. page 1621; *Buchanan v. Foster*, 23 App. Div. 542, 48 N. Y. Supp. 732; *Churchill v. Lewis*, 17 Abb. N. C. 226; *Warner v. Miller*, 17 Abb. N. C. 221. In 15 Am. & Eng. Enc. Law, 2nd ed., page 865, the rule is thus stated: 'In order to sustain an action for the alienation of the husband's affections it must appear, in addition to the fact of alienation, or the fact of the husband's infatuation for the defendant, that there had been a direct interference on the defendant's part, sufficient to satisfy the jury that the alienation was caused by the defendant; and the burden of proof is on the plaintiff to show such interference.' Again, on page 866, it is said: 'But to maintain this action, it must be established that the husband was induced to abandon the wife by some active interference on the part of the defendant.' In 3 Elliott on Evidence, Sec. 1643, it is said: 'To entitle the plaintiff to recover in an action for alienating affections, the burden of proof is upon the plaintiff, and the plaintiff must show that there was a direct interference upon the part of the defendant, that not only was there infatuation of the husband or wife for the defendant, but that the defendant by wrongful act was the cause of it.' In the case of *Waldron v. Waldron*, (C. C.) 45 Fed. 315, the Court in an elaborate discussion of the question, said: 'Defendant should not be held to answer on damages because plaintiff's husband left her, though without good cause, and afterwards fell in love with and finally married defendant.' 'If, * * * (the husband) alienated his own affections from his wife; or if they were alienated by

the plaintiff's own conduct * * * or both without the interference of the defendant; or if they were alienated by any other cause known or unknown, over which the defendant had no control, or exercised no intentional direction or influence—then the plaintiff, howsoever unfortunate or wronged, cannot have her action against the defendant.' ”

We respectfully submit that the Court's refusal to charge the Third Request deprived the defendant of the right to have that defense considered by the jury and constituted harmful error.

We respectfully submit that the judgment of the Supreme Court should be affirmed for the reasons herein indicated.

Respectfully submitted,

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