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Bill of Complaint.

(Filed April 9, 1926.)

In Chancery of New Jersey

Between

LAURETTA V. O'BRIEN,
Complainant,

and

THOMAS M. O'BRIEN,
Defendant.

On Bill, &c.

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To the Honorable EDWIN ROBERT WALKER,
Chancellor of the State of New Jersey:

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Your oratrix, Laretta V. O'Brien, residing in Jamaica, County of Queens and State of New York, respectfully shows:

1. That she was married to the defendant, her husband, on the 25th day of April, 1922.

2. That her husband at the time of his marriage to your oratrix was an actual bona-fide resident of the State of New Jersey, residing at Atlantic City, and that ever since his marriage, the defendant has continuously resided in Atlantic City, in the County of Atlantic and State of New Jersey, and now resides there.

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3. That no children were born of said marriage.

4. That after her said marriage, your oratrix and her said husband, went to reside in Atlantic City in the County of Atlantic and State of New

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Bill of Complaint.

Jersey, and lived there for about three weeks, when your oratrix was obliged to leave the defendant, on account of his cruelty to her.

10 5. That your oratrix, heretofore, to wit, on the 11th day of October, 1922, filed a petition in this Court for a divorce from the bed and board, against the above herein named defendant, and in said petition alleged certain acts of cruelty; that a hearing was had on said petition and an answer filed, and to wit, on the 8th day of March, 1926, a decree was signed by Honorable Vivian M. Lewis, dismissing the said petition, for failure of proof.

20 6. That when the petitioner testified in the aforesaid case, she stated that she was ready and willing and desirous of going back to live with her husband, provided he would cease and refrain certain acts of marital and congenital cruelty towards her, and when the defendant was asked whether he was ready and willing to take the petitioner back and live with her, he stated he would have to consult with his counsel, but never made any reply to any questions in which he stated any willingness or desire to live with your oratrix; that
30 after the decree was signed in this cause, your oratrix again expressed her willingness to take up housekeeping and live with the defendant, but received no reply or offer from him to come and live with him, nor has the defendant made any effort whatever, robust or otherwise, since the filing by
40 her of her petition against him, to induce her to return and live with him.

7. That the defendant, according to his own testimony, sworn to in open Court, in the aforesaid trial, stated that he was worth in real estate

Bill of Complaint.

at least the sum of \$75,000.00 and that he had moneys in bank, and that he was the owner of a one-half interest in a hotel at Atlantic City, New Jersey, and owned other real estate in Atlantic City, and other places, and that there was deposited in a bank in Atlantic City, in the joint names of the oratrix and the defendant herein a sum in the neighborhood of \$9,000.00 which your oratrix cannot use or draw upon, because the defendant stated in open Court that he had put a string to it, so that she could not withdraw any part of this fund, and your oratrix is destitute of any means of support and is wholly dependent upon her own exertions and the charity of her family, because she has no means of support whatever, and owns no property of any kind, and is now in such poor health that she is unable to earn any money. 10
20

8. Your oratrix charges and further shows that ever since the separation between your oratrix and the defendant, which separation took place shortly after their marriage, the defendant has failed to support your oratrix, excepting that when she filed her petition aforesaid, the defendant agreed to pay her \$25.00 per week for her support and maintenance, but is now indebted to your oratrix in a large sum of money for support money, which he has not given to her; that her husband is the owner of a large hotel which he operates, and your oratrix is advised that his income is at least \$25,000.00 per year, and that he is abundantly able to maintain and support your oratrix in a manner suitable to his position in life; that he is about 36 years of age and is now in good health, but he refuses to live with your oratrix or to have anything to do with her, and has refused to maintain and support her 30
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Bill of Complaint.

since the decree above herein set forth was signed, and has stated that he never intends to give her any support or maintenance whatever.

In tender consideration whereof, and for as much as your oratrix can be relieved only in this Court;

10 To the end, therefore, that the said Thomas M. O'Brien may answer the premises, but without oath, and that he may be ordered and decreed to provide such suitable support and maintenance to be paid and provided by him, or made out of his property, for your oratrix, and for such times as the nature of the case and the circumstances of the parties render suitable and proper; and that the said defendant may be compelled to give reasonable security for such maintenance and allow-
20 ance, and to pay the same from time to time under the compulsory orders of this Honorable Court, as provided by the Statute; and in case the defendant cannot be found in this State, to be served with process, that his estate, property and effects in this State may be sequestered to compel his appearance and performance of any decree as shall seem fit to your Honor, and that the defendant may be required to pay to your oratrix, a proper amount for counsel fees and that she may have such further
30 equity as to your Honor shall seem meet.

May it please your Honor, the premises considered to grant unto your oratrix, the State's writ of subpoena, issuing out of and under the seal of this honorable Court, to be directed to the said Thomas M. O'Brien, commanding him by a certain day and under a certain penalty therein to be expressed, to be and appear before your Honor in this honorable Court, then and there to answer all and
40 singular the said premises, and to abide by and

Answer and Cross Petition.

perform such order and decree therein as to your Honor shall seem meet and shall be agreeable to equity and good conscience.

And your oratrix, as in duty bound, will ever pray, etc.

I. FAERBER GOLDENHORN,
Solicitor and of Counsel for Oratrix,
1 Newark Avenue,
Jersey City, N. J.

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Answer and Cross Petition.

(Filed August 13, 1926.)

IN CHANCERY OF NEW JERSEY.

Between

LAURETTA V. O'BRIEN,
Complainant,

and

THOMAS M. O'BRIEN,
Defendant.

On Bill, &c.

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To His Honor EDWIN ROBERT WALKER,
Chancellor of the State of New Jersey:

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The answer of Thomas M. O'Brien, residing at Atlantic City, in the County of Atlantic and State of New Jersey, to the bill of complaint filed against him by the complainant in the above entitled cause, says:

(1) That he admits the allegations contained in paragraphs one, two and three of the bill of complaint.

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Answer and Cross Petition.

(2) That he denies that the complainant resided with him at Atlantic City, for about three weeks, or that the complainant was obliged to leave him because of his cruelty to her.

10 (3) He admits that on or about the 11th day of October, 1922, the complainant filed a petition in this court for divorce from the bed and board against him, and that hearings were had upon said petition, and that a decree was entered therein dismissing the said petition, and refers to the record in said proceeding for an accurate statement of said proceeding.

20 (4) Defendant denies the allegation contained in paragraphs six, seven and eight of said petition, excepting the allegation contained in paragraph eight that portion of same which alleges that he refused to live with the complainant or to have anything to do with her, and has refused to maintain and support her since the decree in the aforesaid action was entered, and that he never intends to give her any support or maintenance whatever, which he admits.

CROSS PETITION.

30 By way of Cross Petition this defendant says:

1. That he was married to the complainant at Atlantic City, in the County of Atlantic and State of New Jersey, on the twenty-fifth day of April, 1922; that after the marriage he remained at Atlantic City with the complainant over night; that on April 26th, 1922, he went with the complainant to Overbrook, Pennsylvania, where he remained with her for two days; that on April 28, 1922, he
40 with the complainant visited Belair, a small town

Answer and Cross Petition.

in Maryland, where they remained over night, returning to Atlantic City on April 29th, where they remained until May 1st, 1922, and on May 1st, returned to Philadelphia, the complainant leaving him there to return to visit her mother in the City of New York, where she remained until May 6th, 1922, when she returned to Philadelphia, remaining there over night with him, visiting with his family in Philadelphia the next day and returning with him to Atlantic City in the evening; that the next day the complainant again left the petitioner and visited her mother in New York City, and returned to Atlantic City on May 12th. On May 17, 1922, the complainant again left this defendant in Atlantic City and visited her mother in New York City, stating that she would return two days later, this defendant arranging to meet her on the train arriving in Atlantic City at 6:10 P. M. That this defendant was present at the station when the said train arrived but the complainant failed to appear, after which this defendant communicated with her by telephone at her mother's home in the City of New York, when she stated to him that she did not intend to return to him until he acceded to certain demands which she had theretofore made upon him, and which are hereinafter referred to. That subsequently on June 11th, 1922, complainant returned to the hotel, which is operated by this defendant in the City of Atlantic City, with her mother, where she remained for a period of two weeks and two days, during which time she occupied a room with her mother and declined to occupy a room with this defendant.

That while she was at the hotel with her mother this defendant was visited by one Reginald M. Kelly, a member of the Bar of the State of New

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Answer and Cross Petition.

10 York, who represented to him that he had been consulted by the complainant and desired to make arrangements for her support and that she intended to live separate and apart from him. That this defendant declined to make any such arrangement, and on June 27th the petitioner left the hotel and remained away for two weeks, returning to the hotel on July 10, 1922, with her mother, with whom she remained until August 7th, 1922, refusing to communicate or live with this defendant, and at which time she left with her mother, since which time she has persistently and continually deserted this defendant.

20 2. That on October 11th, 1922, complainant filed a petition in this court for divorce *a mensa et thoro* from this defendant, in which she alleged that she was compelled to separate from him on August 7th, 1922, because of his extreme cruelty and because she discovered that he had been guilty of adultery with one Mrs. Brown at divers times and months of May, June, July and August, 1922, at the Hotel Deville in Atlantic City and at the Hotel Monticello in Atlantic City, and at divers other hotels in Atlantic City and Philadelphia during
30 those months. That she further alleged that almost from the time of her marriage this defendant began to show signs of moral degeneracy, asking her to cohabit with him in unnatural and improper ways, and asking her to do things to him which showed him to have a perverted mind, and that he committed such acts against her genital organs and parts that she was obliged to consult a physician, who subsequently treated her, and that by reason of these acts of cruelty and inhuman treatment she
40 had become a physical wreck, and that her nerves

Answer and Cross Petition.

were in such condition that if she was willing to forgive the acts of adultery committed by this defendant, it would be dangerous to her health and life to go back and cohabit and live with him.

3. That this defendant filed an answer to said petition in which he categorically denied the allegations therein made. 10

4. That the charges made by the complainant against this defendant received much publicity in the newspapers and subjected this defendant to unsavory notoriety to the extent that it caused him such mental anguish that he suffered from a temporary mental derangement, which required him to abandon his business and submit himself to medical care and treatment for a long period of time, during which he was under the care of specialists. 20

5. During all of the time that said proceedings were pending and until they were finally disposed of, defendant suffered mental anxiety and anguish, fearing that the effect of the complainant's conduct in instituting an action based upon the foundless charges would cause him to become a social outcast and ostracise him from business and society. 30

6. That this defendant for a long time refused to believe that the baseless and heinous offenses charged by the complainant against him were ever made by the complainant voluntarily in good faith, but were manufactured for the complainant by some one else or others as a nefarious scheme to compel this defendant to convey the property which he owned to the complainant. 40

Answer and Cross Petition.

7. That immediately after this defendant was married to the complainant she proposed that this defendant should turn over the real estate which he owned to her and that he should also engage her brother as manager in the business which he operated; that this defendant declined to so do, whereupon the complainant declined to consummate the marriage by having sexual intercourse with him, and in order to appease and satisfy her he visited a bank in Atlantic City, wherein he had deposited to his credit upwards of eight thousand dollars, and changed the account from his name to the joint names of himself and the complainant. That the complainant still continues to persist in her demands that this defendant should convey to and give her an equal interest with him in his real estate holdings, and also a voice in the management of his business, either directly or through the management of her brother as manager of his business; and when she failed to return to him as aforesaid in May, 1922, this defendant inquired with respect to her reason for failing to return as arranged, whereupon she told him that she did not intend to return until he would accede to her wishes.

8. When the complainant did return on June 11, 1922, she was accompanied by her mother. She persisted in her refusal to cohabit with this defendant and declined to occupy a room with him and occupied a room during the entire time that she was at the hotel with her mother.

9. During the time that she was at the hotel, and in furtherance of her announced plan to compel this defendant to accede to her demands, she engaged the services of said Attorney named Kelly,

Answer and Cross Petition.

who conferred with this defendant as aforesaid, and in which he urged this defendant to avoid the publicity of proceedings which were likely to be instituted against him unless suitable arrangements were made for the support and maintenance of the complainant.

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10. On her second visit to the hotel of this defendant on July 10, 1922, when the complainant returned after a visit to her mother in New York City, the complainant and her mother again occupied a room and remained away and apart from this defendant and repulsed all of his advances, refusing to talk with him. They further harassed this defendant by engaging in conversation with other guests of the hotel and made scandalous and humiliating statements concerning this defendant, much to the chagrin and embarrassment of this defendant. Upon learning of this conduct this defendant remonstrated with the complainant and told her that unless her mother ceased in harassing and annoying him by communicating with the guests as aforesaid, he would compel her to leave the hotel.

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11. That the complainant finally left the hotel with her mother on August 7, 1922, since which time she has wilfully, continuedly and obstinately deserted this defendant.

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12. While the proceedings instituted by the complainant against this defendant for a divorce *a mensa et thoro* were pending this defendant, believing that the complainant either was not aware of the gravity of the charges which were made against him or that the said complainant was not responsible for the making of the same, made

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Answer and Cross Petition.

an effort to communicate with the complainant in order to have her withdraw the same and reconcile herself with him; that the complainant emphatically declined to have any communication with this defendant and stated unequivocally that she did not desire to reconcile with him; that this defendant thereupon determined to refute the charges alleged by the complainant against him and demonstrate that the charges made were false and not genuine; and that this defendant now alleges that the proceeding instituted by the complainant against him was a fraud upon the court, on the law and upon this defendant, and that the said charges were manufactured in furtherance of the scheme designed to compel this defendant to turn over to the complainant his real estate and business, or the equivalent thereof by a substantial payment to her in cash.

13. Defendant prays that the marriage between this defendant (as cross petitioner) and the complainant (as defendant to said cross petition) may be dissolved for the cause aforesaid, according to the statute in such case made and provided; and that he may have such further relief as may be just.

And this defendant will ever pray, &c.

THOMAS M. O'BRIEN,
Defendant.

L. EDWARD HERRMANN,
Solicitor for and of Counsel
with the Defendant.

Answer and Cross Petition.

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

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

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THOMAS M. O'BRIEN

Sworn and subscribed before me }
 this 31st day of July, 1926. }

CHAS. C. BABCOCK,
 M. C. C. of N. J.

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(Indorsed)

Service acknowledged as in time.

I. FAERBER GOLDENHORN,
 Solr. and of Counsel
 with Complainant.

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Answer to Cross Petition.

(Filed August 12, 1926.)

IN CHANCERY OF NEW JERSEY.

| | | | |
|----|---|---|--------------|
| 10 | Between <div style="text-align: center;"> LAURETTA V. O'BRIEN, <i>Complainant,</i> and THOMAS M. O'BRIEN, <i>Defendant.</i> </div> | } | On Bill, &c. |
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The petitioner, Laurretta V. O'Brien, by I. Faerber Goldenhorn, her solicitor, says:

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1. She admits so much of paragraph "1" of the cross petition as relates to the date of her marriage, and denies all the rest of paragraph "1" of said cross petition.

2. She admits paragraph "2" of said cross petition.

3. She admits paragraph "3" of said cross petition.

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4. She denies paragraph "4" of said cross petition.

5. She denies paragraph "5" of said cross petition.

6. She denies paragraph "6" of said cross petition.

7. She denies paragraph "7" of said cross petition.

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Answer to Cross Petition.

8. She denies paragraph "8" of said cross petition, except in so far as she refuses to co-habit with her husband until he would treat her as a respectable married woman should be treated and would live with her in a natural way; that this petitioner never refused to live with or co-habit with her husband, if he would treat her with respect and live with her in a natural way and not perform unnatural acts with her, all of which are more fully and specifically set forth in the bill of complaint heretofore filed by her against her husband, for a divorce from bed and board. 10

9. She denies paragraph "9" of said cross petition, and says that the only reason she retained lawyer Kelly, was for the purpose of trying to effect a reconciliation and have her husband treat her as a respectable woman and wife should be treated. 20

10. She denies paragraph "10" of said cross petition.

11. She denies paragraph "11" of said cross petition.

12. She denies paragraph "12" of said cross petition. 30

13. And this petitioner, further answering said cross petition, says that after the bill of complaint herein was filed by her and dismissed, she did, in perfect good faith and sincerity as a good Catholic woman, endeavor to persuade her husband to co-habit and live with her as a good husband should; that she went to his hotel in Atlantic City where he resided, and pleaded with him to return to her and resume his marital relations with her, but the said cross petitioner refused to do that, and re- 40

Order of Reference.

fused to have anything to do with petitioner, and refuses to support her and cohabit and live with her, and ordered her out of the hotel.

10 WHEREFORE this petitioner prays that the prayer of the petition herein will be granted, and for such other relief as may be equitable and just.

I. F. GOLDENHORN,
Solicitor and of Counsel with
Complainant,
1 Newark Avenue,
Jersey City, N. J.

Order of Reference.

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(Filed May 3, 1927.)

IN CHANCERY OF NEW JERSEY.

Between

LAURETTA V. O'BRIEN,
Complainant,

and

30 THOMAS M. O'BRIEN,
Defendant.

} On Bill for
} Maintenance.

This matter being opened to the Court by Wall, Haight, Carey & Hartpence, Solicitors for and of counsel with the Complainant, and the Solicitor for the defendant consenting,—

40 It is, thereupon, on this 3rd day of May, A. D., 1927, on motion of Wall, Haight, Carey & Hart-

Order of Reference.

pence, Solicitors for the Complainant, ORDERED that the above-stated cause be referred to Honorable J. J. Fallon, one of the Vice-Chancellors of this Court, to hear the same for the Chancellor and to report thereon to him and advise what order or decree should be made therein.

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E. R. WALKER,
C.

I consent to the making of the above order.

L. EDWARD HERRMANN,
Solicitor for Defendant.

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Conclusions.

(Filed August 24, 1928.)

IN CHANCERY OF NEW JERSEY.

Between

10

LAURETTA V. O'BRIEN,
Complainant,

and

THOMAS O'BRIEN,
Defendant.

60-475.

On Bill, Etc.

On Final Hearing.

Messrs. WALL, HAIGHT, CAREY & HART-
PENCE, Solicitors for Complainant.

20

Mr. L. EDWARD HERRMANN, Solicitor for
Defendant.

FALLON, V.-C.:

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This matter is before the court on complainant's bill for maintenance, based on the 26th section of the divorce act, and defendant's counterclaim for divorce, based on the ground of desertion. The parties were married April 25, 1922, and lived together for about three weeks when the complainant abandoned the defendant. She says she was obliged to leave him "on account of his cruelty to her." The *cruelty* is not specified. The only cruelty recognized by our law which may warrant one spouse in abandoning another is such as denominated "extreme cruelty" which our Court of Errors and Appeals has defined to be such cruel conduct as endangers the safety of the person or the health of the aggrieved party, either actually

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Conclusions.

inflicted or reasonably apprehended. *Cavileer v. Cavileer*, 94 N. J. Eq. 160. The complainant's bill recites that on October 11, 1922, she filed a petition in this court against the defendant for a divorce from bed and board and "therein alleged certain acts of cruelty." She thereby assumed the burden of proving her allegations, for, as stated in *Taylor v. Taylor*, 73 N. J. Eq. 745, at p. 748—"she must show a case of extreme cruelty such as would entitle her to a decree of separation. The courts can know no middle ground." The defendant filed answer to the aforesaid petition, and a hearing on such petition and answer resulted in a decree dismissing the petition because of petitioner's failure to substantiate the allegations thereof. The complainant, in her aforesaid petition for divorce, alleged as acts of cruelty said to have been perpetrated upon her by the defendant, offenses of a nature which she might reasonably expect would effect his ostracism from friends, business associates, and all decent society. In testifying in her aforesaid divorce suit she repeated and amplified the allegations of her petition. She alleged, among other things, that almost from the time of her marriage to the defendant he began to show signs of moral degeneracy, asked her to cohabit with him in unnatural and improper ways, to do things to him which showed he had a perverted mind, and committed such acts of cruelty against her genital organs and parts that she was obliged to consult a physician for treatment; that by reason of his alleged "acts of cruelty and inhuman treatment" she became a physical wreck and her nerves were in such a condition that even if she were willing to forgive the alleged acts of cruelty it would be dangerous to her health and life to go back and

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Conclusions.

cohabit with him. She charged the defendant, in her testimony, with having been a party in an abortion committed upon a young woman whom she named, and also with having committed adultery. Her charges, though oft repeated, were not corroborated or substantiated. The record of complainant's aforesaid divorce suit (Docket 52, p. 480) offered and admitted in evidence in the case *sub judice* shows that it was heard before Vice-Chancellor Lewis, who on March 8, 1926, advised a decree dismissing the petition. The decree, which was entered March 10, 1926, reads in part as follows—"The court having read and considered said petition and the answer, and heard the testimony and proofs offered by petitioner, and being satisfied that the petitioner has failed to substantiate the allegations of her petition; and the court being satisfied that the bill of complaint should therefore be dismissed as against the defendant; it is on this 8th day of March, 1926, ORDERED, that the petition filed herein be and the same is hereby dismissed." The court must assume that the divorce suit was adjudicated upon its merit and that the decree entered therein is *res adjudicata* of the matters complained of therein, and, as the complainant herein relies upon the same matters alleged in the former suit, the aforesaid decree is dispositive of the case *sub judice*. Upon my making a statement to such effect at the hearing of this cause counsel for the complainant urged that the decree in the former suit should not be so regarded. It is clear to me that said decree must be regarded as having settled the rights of the parties as to the issues involved and decided in the pro-

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Conclusions.

ceeding upon which it was based, and dispositive of the case *sub judice*. *West New York Improvement Co. v. West New York*, 88 N. J. Eq. 571. The complainant cannot nullify the *res adjudicata* rule by changing the character of the relief sought from that of a decree of divorce *a mensa et thoro*, to a decree for maintenance; nor be held to question the decree in the former suit by collateral attack, such as is manifested by her present suit. *Hochman v. Mortgage Finance Corporation* (Pa.), 137 Atl. Rep. 252; *Nitti v. Public Service Railway Co.*, 139 Atl. Rep. 62; *Spence v. Spence*, 74 N. J. Eq. 786; *In re Walsh's Estate*, 80 N. J. Eq. 565, 569; *McGarvey v. Young*, 100 N. J. Eq. 174, *aff'd*. 137 Atl. Rep. 918; *Barber's Chancery Practice*, Vol 1, page 322; *Kocher & Trier, N. J. Chancery Prac. & Prec.*, Vol. 1, Sec. 466. In *Barber's Chancery Practice, supra*, it is said that if a bill be dismissed after hearing, unless the decree of dismissal be without prejudice to the complainant's right to bring a new suit, the decree may be pleaded in bar to a new suit. In *Kocher & Trier, supra*, it is said—"The dismissal of a bill in equity for failure of proofs has never been treated as similar in effect to a voluntary non-suit at law, but, on the contrary, a decree dismissing a bill of complaint after a full hearing upon the merits has always been treated as an effectual bar to the complainant, and to all who claim under him, from bringing a new suit so long as such decree is unreversed." See also *Henninger v. Heald*, 52 N. J. Eq. 431, *aff'd* 53 N. J. Eq. 694. In *Spence v. Spence, supra*, it was held that in a suit for divorce *a mensa et thoro* on the ground of extreme cruelty, if the facts constituting the alleged cruelty are disproved, a decree dismissing the petition of complaint will operate *res judicata* and be a bar to pleading or proving the same facts

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Conclusions.

in any subsequent suit. In *Hochman v. Mortgage Finance Corporation, supra*, the court, at page 253, 254 says—"A party cannot escape the bar of the judgment against him by bringing a new suit on the same cause of action, but in a different form
10 of action or proceeding, unless the relief sought in the second action was not, or could not have been, germane to the first proceeding. * * * The fact that a different measure of relief is asked by the plaintiffs in the latter suit does not deprive defendants of the protection of the prior proceedings and the decree in their favor. *Green v. Bogue*, 158 U. S. 478, 15 S. Ct. 975, 39 L. Ed. 1061."

Inasmuch as this court adjudicated in complainant's former suit that she had failed to substantiate the allegations of her petition, it was her duty
20 to return to live with the defendant, for, as stated in *Taylor v. Taylor, supra*, "A wife must live with her husband, make his home hers and give him her society and services, unless she can show reasons valid in law, relieving her from her duty to him." See also *Pinkinson v. Pinkinson*, 92 N. J. Eq. 669. Instead of complying with her aforesaid duty, within one month after the entry of the decree in her former suit she commenced her present
30 suit, and, on March 9, 1927, appealed from such decree. Her appeal was dismissed May 24, 1927, on motion of her solicitors. Disregarding the decree of this court in her former suit she persisted in reasserting her offensive allegations against the defendant. In paragraph 6 of her bill herein she says she testified in her previous suit that she was ready and willing and desirous of going back to live with her husband "provided
40 he would cease and refrain certain acts of marital and congenital cruelty towards her." In her reply

Conclusions.

to paragraph 8 of defendant's counterclaim she denies the allegation thereof—"except insofar as she refuses to cohabit with her husband until he would treat her as a respectable married woman should be treated and would live with her in a natural way; that your petitioner never refused to live with or cohabit with her husband, if he would treat her with respect and live with her in a natural way and not perform unnatural acts with her, all of which are more fully and specifically set forth in the bill of complaint filed by her against her husband, for a divorce from bed and board," Her actions and conduct from the time she abandoned the defendant, as disclosed by the pleadings and proofs, clearly manifest that she was determined that she would not resume cohabitation with him. This court may and should consider the conduct of the complainant towards her husband since her abandonment of him for the purpose of gauging the *bona fides* of her professed readiness and willingness to resume cohabitation with him, particularly in view of the apparent malignity with which she prosecuted her former suit and her present suit. *Cavileer v. Cavileer*, 94 N. J. Eq. 160, 166; *Cook v. Cook*, 11 N. J. Eq. 195, 201. The defendant's answer to paragraph 3 of the complainant's petition in her divorce suit in addition to denying the allegations thereof, says—"he is ready and willing to take back the petitioner and cohabit with her as man and wife." She did not avail herself of such offer. Her testimony evidences that her charges were *absolutely* of her own making, without any suggestion or influence upon the part of anyone else. The proofs show it was only after the defendant was convinced that his wife would not be recon-

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Conclusions.

ciled with him that he determined to refute her nefarious charges and demonstrate to the court that they were not only false in fact, but known by her so to be. Notwithstanding the dismissal of complainant's petition in her divorce suit, which
10 dismissal must necessarily be regarded as a refutation of the charges of alleged cruelty which she made against her husband, instead of expressing contrition to him for her aspersion of his character, and attempting to effect a reconciliation and resumption of marital cohabitation with him, she instituted her present suit, reiterated in her bill of complaint the same charges which she made against her husband in her former suit, and grievously slandered him by reiterating some of such
20 charges to divers persons, among whom, one Waverly A. Gale, asserting them to be true. Though her bill of complaint was filed April 9, 1926, she says she in good faith sought a reconciliation with her husband on June 17, 1926. Her statement is incredible. The testimony of Mr. Gale evidences that the complainant in October, 1926, asked him whether he knew her husband, "Mr. Thomas O'Brien of the Hotel Deville," and upon his replying in the negative, she said to him, "He is my
30 husband. * * * I am trying to get a divorce upon the grounds of adultery if I can get anything on him * * *. Did you ever hear that he was a degenerate?", and upon his replying in the negative, she said to him, "Well, he is." When recalled as a witness the complainant did not make denial thereof. In *Jacobs v. Jacobs*, 100 N. J. Eq. 482, it is said that all of the authorities are to the effect that there is a presumption that a spouse who
40 commences a suit for divorce does not want to resume cohabitation; and that it is fair to pre-

Conclusions.

sume, ordinarily, that after a suit is instituted, but before decree or judgment, the petitioning spouse is well content to have the other away, and such a presumption can only be overcome by competent and sufficient proof to the contrary. The presumption aforesaid has not been overcome by the complainant. On the contrary, the proofs warrant the conclusion that the complainant was not, as she says, conditionally ready, willing and desirous of living with her husband. The circumstances attending her visit to her husband's Hotel Deville in Atlantic City, when she says she "in perfect good faith and sincerity" endeavored to persuade him to cohabit and live with her "as a good husband should," coupled with her other conduct as manifested by the proofs in this case do not evince sincerity upon her part. She testified that she sought a reconciliation with her husband "if it could be accomplished upon proper terms," and when asked by the court what she meant thereby, she said, "Well, what I meant by that was if my husband would lead the right kind of life," and when asked whether she had ever said to her husband that she was desirous of being reconciled to him and live with him without regard to what she had said against him, or without regard to what she may have done before, she said, "No, I did not say that to him," and when asked whether she ever expressed any sorrow to him for the insinuations or accusations she had made against him, she replied, "No," and when asked, "Did you still believe they were true," she replied, "Yes." She testified also that on the above-mentioned occasion of her visit to her husband's hotel she said to him, "Tom, I have come down here to break the ice, to see if we cannot effect

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Conclusions.

a reconciliation." Her testimony in this respect, considering all of the other facts and circumstances in the case, does not ring true. Her statements that she endeavored to persuade her husband to cohabit and live with her "as a good husband should," and that the reconciliation which she sought with him was to be effected conditional "if it could be accomplished upon proper terms," and, "if my husband would lead the right kind of life," and, "if he turned over a new leaf," her statement to the court that she believed the charges which she made against her husband to be true, her inquiry of Mr. Gale as to whether he knew her husband was a degenerate, and upon his reply in the negative her statement that he was such, cannot reasonably be regarded as other than a further calumny upon him, and a plain innuendo that his cohabitation with her had not been honorably conjugal. The proofs disclose also that when the complainant went to the defendant's hotel for the avowed purpose, as she says, of endeavoring to persuade her husband to become reconciled and permit her to live with him again, she was accompanied by a Miss Kennedy as a witness to the colloquy between herself and her husband. The fact that she was accompanied by said party as a witness to her *persuasion* is quite indicative that she was merely *pretending* to make sincere overtures to her husband to resume marital relations with her and that her real purpose was to establish evidence to be used in her then pending maintenance suit. Furthermore, while residing at the defendant's hotel for several months after June 17, 1926, she sought information from several of defendant's hotel employees as to whether they knew he was running around with

Conclusions.

other women, and she had several interviews with one Hoey who conducted a private detective agency through which she sought to obtain evidence of defendant being guilty of adultery. In estimating the sincerity of her alleged endeavor to effect a reconciliation with her husband the court properly considers the intent, design and purpose of her activity. In *Popovics v. Popovics*, 98 N. J. Eq. 350 (a maintenance suit) the husband claimed he had endeavored to procure his wife's return, and that she had obstinately and unreasonably refused to listen to his appeal; the court declared, "A plea of that character must be supported by at least proof of his *bona fide* intention, and some proof of his heart-felt contrition for his past conduct. *Lister v. Lister*, 65 N. J. Eq. 109, aff'd 66 N. J. Eq. 434; *McVicker v. McVicker*, 46 N. J. Eq. 490. In estimating the sincerity of such an appeal, the court necessarily proceeds upon the theory *quo animo*, and in reaching any satisfactory conclusion as to his motives, the old adage that conduct speaks louder than words must needs play an important part." Considering that the complainant's abandonment of the defendant was based upon alleged acts of cruelty which by reason of the dismissal of her petition for divorce he must be conceded to have been exonerated of, it appears to me it was incumbent upon her to have manifested contrition or repentance for her unjustified abandonment of her husband, her base and malicious aspersion of his character, and the outrageous charges of moral depravity which she repeatedly made against him. The corollary of the above quotation from *Popovics v. Popovics* should, in my judgment, be applicable in the case

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Conclusions.

sub judice, and paraphrasing language contained in said case (at page 354) I deem it appropriate to herein declare that to expect the defendant, upon a perfunctory and artificial plea, enveloped in all the paraphernalia of a studied legal performance, to seek the return to his home or permit return thereto of the woman (his wife) who abandoned him, caluminated, traduced and outrageously vilified him, and who by her conduct and utterances caused him to suffer a nervous illness unfitting him for a time from pursuing his ordinary business activities, subjected him to probable ostracism from decent society, and possible indictment and criminal prosecution, without any expression upon her part of apology, recantation or repentence for her action, would be to impose upon human nature an artificial and extravagant attribute of self-abnegation which neither the law of nature nor the law of the land contemplates or exacts. In the case *sub judice*, I am of the opinion that the burden of proving a *bona fide* effort or willingness to effect a reconciliation was upon the complainant, and doubt as to her efforts or willingness should be resolved against her. To entitle the complainant to the relief sought by her in her bill of complaint the condition of abandonment, as stated in *Margarum v. Margarum*, 57 N. J. Eq. 249, "must necessarily be the husband's act; the wife cannot abandon the husband and then invoke the aid of the statute to secure support from him." The defendant, in my judgment, was absolved by the declarations and conduct of the complainant from making any overtures to reestablished cohabitation with her, other than such as he made by his answer to her petition for divorce, hereinabove mentioned. The

Conclusions.

proofs clearly evidence that no matter what overtures he may have made they would be ineffectual, and under such circumstances, he is relieved, in law, from what is ordinarily considered to be the duty of the husband as a preliminary requisite to granting him a decree of divorce on the ground of desertion. *Wood v. Wood*, 63 N. J. Eq. 688, 691; *Lammertz v. Lammertz*, 59 N. J. Eq. 649; *Fry v. Fry*, 100 Atl. Rep. 839; *Hall v. Hall*, 60 N. J. Eq. 469, 470; *Rogers v. Rogers*, 81 N. J. Eq. 479. In *Arnaboldi v. Arnaboldi*, 138 Atl. Rep. 116, it was held that no ills arising out of marriage or ill conduct of one party to the other will so justify breaking off of cohabitation as to prevent its being desertion, except such ill conduct be of such nature as in law to constitute foundation for divorce. This court should not through the medium of allowing alimony to the complainant in the case *sub judice*, encourage her abandonment of the defendant. In *Suydam v. Suydam*, 79 N. J. Eq. 144, it is said that a wife who leaves her husband does so at her peril, and assumes the burden of making the desertion constructively his by establishing his guilt by clear and satisfactory proof. Aside from the fact that the complainant abandoned the defendant without justification, her letter of March 8, 1923, addressed to her former solicitor, which was offered and admitted in evidence in her former suit without objection, and which reads, "As I have repeatedly said there is absolutely no possibility of a reconciliation it being against my religious principles in addition to it being dangerous to my life. I trust, Mr. Goldenhorn, you will not request me again to reconsider that, as my mind has been made up from the beginning," clearly manifests her state of mind; and

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Conclusions.

her evident determination to remain away from her husband notwithstanding his offer to take her back to live with him, and her oft repeated allegations of degeneracy, abuse of her genital parts and other grievous accusations, manifested her non-desire to live with him in the conjugal relation which the marriage state impliedly exacts of and imposes upon her, and exonerates him from the exacting importunities and intercessions ordinarily required of a husband as a prerequisite in a suit for divorce based upon the ground of desertion. It is clear to me that the prosecution of the complainant's several suits, and the time elapsed during the pendency thereof, cannot militate against the defendant. In *Weigel v. Weigel*, 63 N. J. Eq. 677, at 681, affd. 65 N. J. Eq. 398, it is said that when "the wife's previous suit, the pendency of which is set up to excuse her apparent desertion, was based on allegations which were known by her to be false when they were submitted to the court, and when her testimony in that suit, in support of those allegations, is proven to have been untrue by many disinterested witnesses, so that it is made quite clear that her previous suit was a false pretence, and not a genuine presentation of a believed grievance, the excusatory effect of the pendency of the previous suit is wholly lost. Such an exhibition shows that the proceeding was a fraud upon the court, on the law, and on the defendant attacked by it. Its pendency is no answer to proof that the wife wilfully, continuedly and obstinately abandoned her husband. Indeed, it may be additional evidence of the obstinacy of her determination to desert her husband, and escape from her marital duty." In *Hartpence v. Hartpence*, 121 Atl. Rep. 513, it

Conclusions.

was held that continuity of wilfulness and obstinacy of desertion was not broken by intervening suit for divorce, where it was obviously not brought in good faith. See also *Von Bernuth v. Von Bernuth*, 76 N. J. Eq. 487. If it be regarded that in the case *sub judice* it was requisite for the defendant to sustain the burden to show affirmatively that his wife abandoned him of her own choice and against his will, and that she continued to stay away when it was her duty to return, he has fully sustained such burden. In *Wood v. Wood*, 63 N. J. Eq. 688, 691, this court declared there are cases which hold that an indication, by the wife, of an unchangeable purpose to separate from her husband will excuse him from soliciting her return. In *Hall v. Hall*, 60 N. J. Eq. 469, it was held that the law does not impose upon the husband the duty in every case arbitrarily and without regard to the facts and circumstances by which it is surrounded to endeavor to effect his wife's return to him; that he is bound to make advances and concessions only where there is reasonable ground to suppose that such action upon his part will terminate the wife's desertion; that where it is manifest from the circumstances under which the desertion took place, or from her temper and disposition, or from any other fact in the case, that honest effort on the husband's part to terminate the separation will be unavailing; or, if successful in bringing the desertion to an end, would be so only temporarily, the duty of making such advances and concessions does not exist. In *Fry v. Fry*, 100 Atl. Rep. 839, Vice Chancellor Lane held that in order to establish desertion justifying a divorce, a husband need seek his wife's return only where there are reasonable chances of his

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Conclusions.

10 success. It is clearly apparent to me that all overtures and efforts which the defendant might have made to induce the complainant to return to live with him would have been futile. See *Rogers v. Rogers*, 81 N. J. Eq. 479, 485. The complainant cannot reasonably expect this court to believe that she, reiterating and reasserting as truths the nefarious charges against her husband, which, by the dismissal of her former suit must be regarded as groundless, would mortify herself by resuming cohabitation with him whom she had virtually proclaimed to the world as unfit to enjoy the society of decent people or be tolerated in their midst. I have in mind, too, in considering the complainant's alleged *bona fide* overtures to effect a reconciliation with her husband, that such were in the year 1926, when he had a right to reject all offers of reconciliation coming from her, however sincere they may have been, inasmuch as he had then a vested right to a divorce, on the ground of desertion, because of her wilful, continued and obstinate desertion of him for a period of more than four years prior thereto. See *Gordon v. Gordon*, 88 N. J. Eq. 436, 439; *Hall v. Hall*, *supra*.

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30 I will advise a decree dismissing the complainant's bill, and granting to the defendant a decree of divorce on the ground of desertion, as prayed in his counterclaim.

Dated, Hoboken, N. J. August 22, 1928.

Decree.

(Filed October 1, 1928.)

IN CHANCERY OF NEW JERSEY.

LAURETTA V. O'BRIEN,
Complainant,

v.

THOMAS O'BRIEN,
Defendant.

60-475.

On Bill, etc.

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Final Decree Dis-
missing Bill of
Complaint, De-
cree Nisi on
Cross Petition.

This cause coming on to be heard in the presence of John Hartpence, Esq., of the firm of Wall, Haight, Carey & Hartpence, solicitors for the complainant, and L. Edward Herrmann, Esq., solicitor for the defendant, upon the bill of complaint of complainant and cross-petition of the defendant, and oral proofs taken in open court; whereupon and upon duly considering the said pleadings and proofs and hearing and considering the arguments of counsel, from all of which it now appears to the satisfaction of the Chancellor, that the complainant and defendant cross-petitioner, were lawfully joined in the bonds of matrimony on or about the 25th day of April, 1922, and that at the time the cause of action theretofore arose, the defendant, cross-petitioner, was a *bona fide* resident of this state, and has continued so to be down to the time of the commencement of this action, and that the defendant, cross-petitioner, has been for the period of two years next preceding the commencement of this action a *bona fide* resident of this state.

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And it further appearing that jurisdiction herein has been acquired by personal service of process

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Decree.

upon the defendant in this state, and that the defendant, cross-petitioner, filed herein a cross petition, alleging desertion of him by the complainant for the period of two years and praying for a divorce from the complainant.

10 And it further appearing that the complainant has failed by her proofs to sustain the allegations of her bill of complaint, and that the same should be dismissed.

And it further appearing that the complainant has been guilty of wilful, continued and obstinate desertion of the defendant for the term of two years as alleged in the cross petition :

20 It is thereupon, on this first day of October, 1928, by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, ORDERED, ADJUDGED, and DECREED, and the said Chancellor by virtue of the power and authority of this court, and of the Acts of the Legislature, in such case made and provided, doth hereby ORDER, ADJUDGE and DECREE that the bill of complaint filed herein be and is hereby dismissed, and that the said defendant Thomas O'Brien and the complainant, Laurretta V. O'Brien, be divorced from the bonds of matrimony for the cause aforesaid as alleged in the cross petition, and the marriage between the said defendant and complainant is hereby dissolved accordingly, and the said parties, and each of them is hereby freed and discharged from all obligations thereof, unless sufficient cause be shown to the Court why the decree should not be made absolute, within three months from the date hereof.

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Respectfully advised,

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E. R. WALKER,
C.

JNO J. FALLON,
V.-C.

Notice of Appeal.

(Filed October 20, 1928.)

IN CHANCERY OF NEW JERSEY.

Between

LAURETTA V. O'BRIEN,
Complainant,

and

THOMAS M. O'BRIEN,
*Defendant.*On Bill, &c.
(60/475)

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To

THOMAS M. O'BRIEN, Defendant, and
L. EDWARD HERRMANN, Esquire,
Solicitor for said Defendant:

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PLEASE TAKE NOTICE, That the above-named Complainant, Lauretta V. O'Brien, hereby appeals from the decree made by the Chancellor, on advice of Vice-Chancellor John J. Fallon, on October 1st, 1928, dismissing the Bill of Complaint filed by Complainant in this cause and granting defendant a divorce from Complainant, *nisi*, upon his Counterclaim, and from each and every part thereof, to the Court of Errors and Appeals in the last resort in all causes.

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Dated October 19, 1928.

WALL, HAIGHT, CAREY & HARTPENCE,
Solicitors for and of Counsel
with Complainant.

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Petition of Appeal.

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

JOHN A. HARTPENCE,
Of Counsel.

Endorsed:

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Service of a copy of the within Notice of Appeal is hereby acknowledged this 19th day of October, 1928.

L. EDWARD HERRMANN,
Solicitor of Defendant.

Petition of Appeal.

(Filed October 23, 1928.)

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**NEW JERSEY COURT OF ERRORS
AND APPEALS.**

Between

LAURETTA V. O'BRIEN,
Complainant-Appellant,

and

THOMAS M. O'BRIEN,
Defendant-Respondent.

On Bill, &c.
On Appeal
from Court
of Chancery.

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To the Honorable the Court of Errors and Appeals, in the Last Resort in All Causes:

The petition of Lauretta V. O'Brien, the appellant in the above-stated cause, respectfully shows that your petitioner finds herself aggrieved by a decree made in the Court of Chancery of the State

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Petition of Appeal.

of New Jersey by his Honor Edwin Robert Walker, Chancellor (as respectfully advised by his Honor John J. Fallon, Vice-Chancellor), bearing date the 1st day of October, A. D., 1928, wherein your petitioner was Complainant, and Thomas M. O'Brien was defendant (Docket 60, page 475), in this respect, to wit, that the said decree adjudges that your petitioner's Bill of Complaint therein should be dismissed, and her prayer for maintenance denied, and that the defendant should be granted a divorce from your petitioner, *nisi*, whereas your petitioner feels that said Court should have decreed that your petitioner be allowed suitable maintenance, to be paid by said defendant, with appropriate counsel fees and costs necessarily incurred in the prosecution of her said suit, and that the defendant's prayer for divorce on his Counterclaim should be denied. 10
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And your petitioner humbly appeals from the whole and every part of the said decree of the Chancellor, so advised as aforesaid, upon the ground that the same is erroneous for the reasons above stated. Your petitioner therefore prays that the said decree, and each and every part thereof, of the said Chancellor, may be reversed, set aside, and for nothing holden, and that the prayer of her said Bill for maintenance be granted and defendant's counterclaim for divorce be dismissed, and that your petitioner may have such other and fur- 30
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Petition of Appeal.

ther relief in the premises as to this Honorable Court shall seem meet.

WALL, HAIGHT, CAREY & HARTPENCE,
Solicitors for and of Counsel with
Complainant-Appellant.

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JOHN A. HARTPENCE,
Of Counsel.

Endorsed:
Filed Oct. 20, 1928.

JOSEPH F. S. FITZPATRICK,
Clerk.

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Service of a certified copy of within Petition of Appeal is hereby acknowledged this 22nd day of Oct., 1928.

L. EDWARD HERRMANN,
Solicitor of Defendant-Respondent.

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Minutes of Final Hearing.
IN CHANCERY OF NEW JERSEY.

Between

LORETTA V. O'BRIEN,
Complainant and
Cross-Defendant,

v.

THOMAS M. O'BRIEN,
Defendant and
Counter-Claimant.

On Bill for
Maintenance,
etc.

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APPEARANCES :

For the Complainant: Messrs. WALL,
HAIGHT, CAREY & HARTPENCE (Mr. PETER
BENTLEY, of Counsel).

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For the Defendant: Mr. L. EDWARD HERR-
MANN.

Before—Hon. JNO. J. FALLON, Vice-Chancellor.

Chancery Chambers, Jersey City, N. J.,
October 18, 1927.

THE CASE FOR THE COMPLAINANT.

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LORETTA V. O'BRIEN, sworn.

Direct examination by Mr. Hartpence:

Q. Your full name is what? A. Loretta V. O'Brien.

Q. And when were you married to the defend-
ant? A. April 25th, 1922.

Q. And where were you married? A. St. Nich-
olas Rectory, Atlantic City.

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Loretta V. O'Brien, direct.

Q. At that time where did you live? A. Before I was married, in New York.

Q. Do you know where the defendant lived at the time of your marriage? A. Hotel DeVille.

Q. Where is that? A. Atlantic City.

10 Q. New Jersey? A. New Jersey.

Q. Do you know how long he had lived in New Jersey? A. I guess, about thirteen years.

Q. And still lives there, as far as you know? A. Yes, to my knowledge.

Q. Were there any children born of your marriage? A. No, none at all.

Q. After you were married where did you reside? A. At the Hotel DeVille.

Q. In Atlantic City? A. Yes, in Atlantic City.

20 Q. With your husband? A. Yes.

Q. How long did you continue to live with him there at the Hotel DeVille? A. Well, I was only there, I guess, with him about three weeks, or a month.

Q. And what took place between yourself and your husband with regard to your continuing to live with him—what did you do at the end of this period that you speak of? A. Well, he wanted me to submit to unnatural indignity.

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Mr. Herrmann: I ask that that be stricken out; that case has been disposed of. This bill alleges an abandonment after the decree. I do not think we need to go into those details.

The Vice-Chancellor: What have you to say to that, Mr. Hartpence? I have read the pleadings, and it seems to me this case was before Vice-Chancellor Lewis once before on a petition for divorce *a mensa et thoro*

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Case.

wherein it set out alleged degeneracy and quite a few other things, and extreme cruelty, and the petition was dismissed. Now, are not all the matters that transpired up to that time, indicated by Mr. Herrmann, to be considered as finally disposed of? Have you any right to inquire into them now? 10

Mr. Hartpence: Yes; I do not think that the issue of *res adjudicata* has been raised in these pleadings; perhaps my opponent can point out where it has been.

The Vice-Chancellor: Well, even if it has not, haven't I got to take judicial notice of it in a court of equity? I do not know who is responsible for sending two sets of papers down here, but somebody caused the papers in the previous suit to be sent here, and, being here, I familiarized myself with them. They would not have been here unless someone asked for them, because they are naturally different cases; one case is Docket 52, page 480, and the present case is Docket 60, page 475. 20

Mr. Hartpence: The matter was before your Honor on a preliminary application *pendente lite* for counsel fee and alimony, and at that time the inter-relation of the two suits came up, and of course all the papers were here, and, naturally, when the case came on for final hearing, the solicitors for the complainant requested the Clerk to send all the papers in both cases here, assuming that the Court and counsel would want them. But I had understood that the defense of *res adjudicata* was a matter to be pleaded and brought up specially. 30 40

Case.

The Vice-Chancellor: Does your bill in this case set out the date of the alleged desertion?

10 Mr. Hartpence: It shows in Paragraph 5; your Honor will also bear in mind that this bill was filed by the complainant's previous solicitor, and that we only came into the case at the last moment. By Section 5 of the bill of complaint it alleges that "your orator heretofore, to wit: on the eleventh day of October, 1922, filed a petition in this Court for a divorce from bed and board against the above herein-named defendant, and, in said petition, alleged certain acts of cruelty; 20 that a hearing was had on said petition, and an answer filed, and, to wit: on the eighth day of March, 1926, a decree was signed by Hon. Vivian M. Lewis dismissing the said petition for failure of proof." That is the allegation. Of course I do not understand that that would make it *res adjudicata*; and I do not think that the decree in the cause makes it *res adjudicata*.

30 The Vice-Chancellor: Well, what is your present suit, in your estimation—I mean, what is the nature of it? The reason I ask is that I was just examining the bill of complaint, and it did not seem to be explicit, and I would like to have it explained.

Mr. Hartpence: Our understanding is that it is purely and simply a bill for maintenance and support under the Twenty-sixth Section of the Divorce Act.

40 The Vice-Chancellor: Now, what did you consider was the suit previously before the Court?

Case.

Mr. Hartpence: The suit before the Court previously was a petition—this is a bill under the Twenty-sixth Section. The previous suit was a petition for a divorce, under the Divorce Act, for divorce *a mensa et thoro*, and I am, of course, not attempting to evade the fact that the allegations in support of the present bill are, of course, precisely the allegations of the former petition, in so far as we will go into them. It charges cruelty as the basis for the justification for the separation, and those acts of cruelty of course are not specifically set out here, but they will be the acts referred to in the previous testimony. There is no question about that at all. The only thing is that it is a bill for separate maintenance on the ground that the cruelty is such as to not only warrant the wife in living separate and apart from the husband, but as to make it extremely reprehensible and dangerous to her health to live with him. That is different entirely from a decree *a mensa et thoro*. 10
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The Vice-Chancellor: But is it not the fact that the bill must be predicated upon some justification for the wife having left her husband? 30

Mr. Hartpence: Yes.

The Vice-Chancellor: And as of what date? Would you say that you now have a right to inquire, in this suit, as to her reasons for leaving him at the time which was embraced within the other suit?

Mr. Hartpence: Yes, sir.

The Vice-Chancellor: I do not think so. Now here is this decree, before me, in this 40

Case.

10 other suit, and it specifically says that "the Court having read and considered the petition and answer and heard the testimony and proofs offered by the petitioner, and being satisfied that the petitioner has failed to substantiate the allegations of her petition, and the Court being satisfied that the bill of complaint should be dismissed as against the defendant, it is, on this Eighth day of March, 1926, ordered that the petition filed herein be and the same is hereby dismissed." Now, it seems to me that must be considered as dispositive of all matters embraced in that suit, or which might have been embraced in that suit, because, if that is not so, there could be no such thing as *res adjudicata*. It seems to me that your justification for abandonment in this case— if that is what you are going to claim—that is, your justification for this wife's leaving the husband, if such be the fact, must be as of some time subsequent to the decree.

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30 Mr. Hartpence: Well, of course it is not. The whole thing goes back to the very same occurrences which were alleged and testified to (as far as we would go into them here) in the former suit; there is no question about that.

The Vice-Chancellor: Well, now, have you any authority that would indicate that you are warranted in doing that? I cannot, for the life of me, see how you can do it.

40 Mr. Hartpence: Well, my position here, at this time, would be, your Honor, that, under the present rules of the Court of Chan-

Case.

cery *res adjudicata* is an affirmative defense which should have been pleaded; and there is nothing, as I recall, in the pleadings (as I say, if I have overlooked it, and Mr. Herrmann feels that it is there, he may show it) that would show them that was entitled to be raised as an affirmative defense. The result is, I am not prepared to argue that specific question at this time. 10

The Vice-Chancellor: Suppose it were necessary (I do not think it is necessary, myself, because I think, under the broad equity powers of the Court, the Court would consider this matter without a specific recital of that in the pleadings) but suppose it were necessary, what is there to prevent me now, on the application of counsel, if he sees fit to make it, from granting time to set up this former proceeding as *res adjudicata*? 20

Mr. Hartpence: I do not see anything to prevent your Honor from doing it, but I would simply ask for a continuance.

The Vice-Chancellor: How can it cause you surprise, in view of the fact that you must be familiar with that which has gone on before, the same as I am obliged to be familiar with it in view of the pleadings before me. It seems to me I am obliged to take judicial notice now of what has transpired before. 30

Mr. Hartpence: Our own petition does that, your Honor; I do not object to that; our own petition alleges that that took place; but it also says that the petition was dismissed for failure of proof, and I so read and interpret the pleadings. 40

Case.

10 The Vice-Chancellor: Is not that the result of all decrees of that kind—failure of proof? Now, inasmuch as the proof did not warrant it, and the petition was dismissed, can you thereafter go on, and, in another suit, bring in all the occurrences tried and disposed of in the previous suit?

Mr. Hartpence: With additional proof—which may leave it in a position where we could not fail.

20 The Vice-Chancellor: I mean that you may bring in additional proof, but I cannot see that you can bring in what went on before, because you would be lugging into the subsequent suit matters that were alleged and proved and disproved in a previous suit. Where would we get off?

30 Mr. Hartpence: I argue this way, your Honor: I had considered the question here as to *res adjudicata*, because, in the preliminary application for alimony Mr. Herrmann had suggested that it might be *res adjudicata*, and I could not feel that it was *res adjudicata* because of the entirely different nature of the suits, and of the relief sought for; but if your Honor feels (as I take it, your Honor does feel) that there is considerably more to the objection than I thought there would be, why then, it seems to me that I ought to be, in justice to the complainant in the present bill and the cross defendant in the counterclaim, afforded an opportunity to look into it from the point of view of your Honor's attitude. For instance, this is a court of equity, and the

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court desires to administer equity on the basis of the fundamental principles of procedure; and I take it that if the decree in the former suit had been dismissed without prejudice, then your Honor would not feel that it was binding in any way upon the present suit; now, I think I ought to have an opportunity to apply to Vice-Chancellor Lewis to bring the matter up before him and ask him for an amendment to the decree so he could dismiss it without prejudice, because, as I read the petition and testimony in the former case, it seems to me that it must have been clearly intended that that should be the effect of his decree. 10

The Vice-Chancellor: Mr. Herrmann, as long as all the parties are here, why might it not be well for me to hear the testimony, subject to your objection? I have a pretty definite view myself of the impropriety of the testimony about to be adduced, but it seems to me we might save a little time by letting the testimony come in, subject to your objection, and then, unless counsel can convince me otherwise before this case is concluded that I have the right to consider that testimony, it would not be considered. 20 30

Mr. Herrmann: That is an awful burden on the defendant.

Mr. Hartpence: Yes, and it is on me.

Mr. Herrmann: I will call your Honor's attention to the case of *Hartpence v. Hartpence*, 121 Atl. Rep. (page not stated by counsel) where this question of *res adjudicata* was raised, as to whether the defendant was guilty of desertion, and Vice-Chan- 40

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cellor Backes held that that decree, of course, was dispositive and could not be attacked, except for fraud, collaterally.

10 The Vice-Chancellor: There is no doubt about that. There are the cases of *Oertel v. Oertel*, and *Smith v. Smith*, and *Popovics v. Popovics*, and other cases, that clearly indicate that that is the case—that is on the question of abandonment—but I do not know that that is the question that is going to be submitted to me through the questioning of counsel.

20 Mr. Herrmann: That question necessarily arises under the defendant's cross petition; but we should not be put to the hardship of having spread broadcast again the wanderings of this woman's mind, so as to brand him as a social outcast. Now, all of that testimony is printed.

30 The Vice-Chancellor: You have this to consider, Mr. Herrmann, which it seems to me might be in your interest, that if these accusations that appear to have been made in the previous suit, and which I would take it for granted, by reason of the dismissal of the suit, were unfounded (I say that without knowing anything about the merit of the case) were to be reiterated by this witness, the complainant in this case, in this suit, then it might be harmful to her, because then the question arises, as in several of these cases, as to a party maliciously repeating these things, which would be considered by the court; because if one spouse falsely charges another with adultery, that
40 thing, in itself, has been regarded by our

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courts as tantamount to extreme cruelty, because certainly it is a very offensive thing, particularly as applied to the woman; now, that, in itself, has been regarded as extreme cruelty in a good many cases; but our courts have somewhat, as I understand it, palliated the extremity of the charge by saying that, unless there are some circumstances in connection with the allegation which would indicate that it was maliciously made, it should not be convincingly used against the party making it if the question of malice comes in. Now, if a person makes an allegation and then repeats it more than once, it is pretty hard to say that that person did not maliciously make it, because the malice is implied in the repetition of the utterances.

Mr. Herrmann: Well, I desire, if possible, to avoid the repetition of these charges, which will be broadcast publicly, and tend to make a public outcast of this defendant:—

The Vice-Chancellor: Wait—let me get a look at this pleading here (examining the pleadings).

Mr. Herrmann: The bill of complaint charges in the Paragraph 3, that on the 11th day of October she finally petitioned this court for a divorce from bed and board—

The Vice-Chancellor: You are referring to Paragraph 3?

Mr. Herrmann: Paragraph 5, rather.

Mr. Hartpence: I just read it, your Honor.

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Mr. Herrmann: Now, in our answer, by Paragraph 3, we admit that on the 11th day of March the complainant filed a petition, etc., and we refer to the record for the accurate statement of said proceeding.

10 Mr. Hartpence: It seems to me that I must bring in the whole record, including the testimony.

Mr. Herrmann: Now, Paragraph 6 of the present petition says that the defendant never made any effort, robust or otherwise, since the filing by her of the petition, to induce her to return to live with him. This action is based on this—that the defendant, without justifiable cause, abandoned the
20 petitioner or complainant; surely he could not have lived with her after she left him, prior to the commencement of her earlier suit, and during the pendency of that suit, if she charged him with being a social outcast; she could not live with him. That terminated with the decree. Now, I am going so far as to say in my argument this—that if she had come back to him and said, “I will
30 take you back, Tom, to live with me provided you cease what I have charged you with,” that he would have been entitled then to say, “I decline absolutely.”

The Vice-Chancellor: Inasmuch as you state that, I am obliged to say this to you: How am I to have brought before me the matters relied upon by the complainant in this suit for her leaving her husband as of the time when she claims to have left him, and for the reasons that she considered
40 proper as justifying her leaving, without

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receiving some testimony as to what those circumstances were? I have just looked at the complaint in this suit, and it refers to some other proceedings, and so does your answer. Now, if the complainant in this suit is confined only to matters subsequent to the entry of the other decree, what proof will be presented before me at all as to the reasons which justified the complainant in leaving her husband? 10

Mr. Herrmann: She would have to show, your Honor, that after her case was disposed of she was entitled to go back and live with him.

The Vice-Chancellor: All right; then your answer says—or, at least, I presume that you intend to claim that by reason of the unfounded (you might say “malicious,” I don’t know what you are going to say) accusations made by the wife as against the husband, he is not obliged to return again to live with her; you might say that; now, if you are going to say that, how am I going to determine those matters unless I know what they are? 20

Mr. Herrmann: Because the Court disposed of them, and said there was no foundation for those charges, by its decree. We cannot interpret the decree as Mr. Hartpence wants to, that she failed to prove them. The Court said she had no case—that is what the Court said. 30

The Vice-Chancellor: The court said that in the extreme cruelty case?

Mr. Herrmann: Yes; it said “You have got no case.” Now, what is her duty after 40

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that, and how could she get back unless the decree were attacked collaterally?

10 The Vice-Chancellor: If after that she went to her husband and sought to have him take her back, of course that raises the question as to whether or not her effort in that respect could be regarded as sincere, in view of the nasty allegations she made against her husband.

Mr. Herrmann: Yes, that, I think, is where we should start. I do not think your Honor is concerned with what happened before that at all. That is determined. What happened after the case was disposed of?

20 The Vice-Chancellor: I think, Mr. Hartpence, I will rule here that you are confined to matters subsequent to the dismissal of the former petition, and I will say now, in passing, that if, before this case is concluded, I conceive that it in anywise prejudices your case, and I might feel warranted then in permitting you to introduce testimony of these other matters that you seem now to have undertaken to offer, I will then hear both you and Mr. Herrmann as to the propriety of your being permitted to introduce that testimony.

30 Mr. Hartpence: In view of your Honor's ruling, may I, without impropriety, state that I also have other evidence, through two witnesses—one in court, and one by deposition—by way of corroboration of the testimony which your Honor has now ruled would be inadmissible on the part of the petitioner, which I will offer at the proper time, but, in

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view of your Honor's present ruling, I will not offer now.

The Vice-Chancellor: Mr. Herrmann, are you claiming, in your suit here, the right of your client to a divorce on the ground of desertion?

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Mr. Herrmann: Yes.

The Vice-Chancellor: And you are basing your claim upon the time that intervened between the time this woman left her husband and the time when the other suit was disposed of?

Mr. Herrmann: During that suit, the defendant in that suit made overtures to the complainant, or the petitioner, that she abandon the suit, cease her accusations, and come back and live with him; and she wrote a letter in which she said "Absolutely and under no circumstances will I ever return to live with you." Now, we base it from that time.

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The Vice-Chancellor: When was that?

Mr. Herrmann: That was—I have forgotten the date—March, 1923.

The Vice-Chancellor: Then you will be coming into the question as to whether or not you can offer any testimony preceding the date of your decree, won't you?

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Mr. Herrmann: Yes.

The Vice-Chancellor: If it is going to be opened for any purpose, I am going to admit it for all purposes.

Mr. Herrmann: Well, I don't think I shall fight upon that.

The Vice-Chancellor: How can you get into evidence here matter preceding the date

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10 of that decree—in other words, if you are going to claim against the other party that the decree is dispositive of all matters between these parties as of that time, or all matters that could properly get before the court as of that time, how can *you* expect to get into this case something that preceded that in point of time?

Mr. Herrmann: Under the doctrine laid down in *Cook v. Cook* and *Jacobus v. Jacobus*.

The Vice-Chancellor: Those, as I recall it, were cases of extreme cruelty?

20 Mr. Herrmann: No, those were cases where another suit was pending, and the court held that the pendency of the other suit was not dispositive of the case and did not operate as a bar, but was simply evidential of the conduct of the parties. In other words, I have here an absolute refusal to live with this man after genuine, honest efforts that were made by him and a decree against her. Afterwards I propose to show that there was no attempt made by the complainant to ever resume relations with this man—no sincere, *bona fide*, attempt—and, secondly, that, on the contrary, she persisted in her malicious charges; that she had him hounded by a detective, in the hope that she might get some other evidence; and that, from her own testimony in the other case, which your Honor will be entitled to examine, and which is on file—

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40 The Vice-Chancellor: If I am going to examine it, and it is evidential in that respect, why shouldn't I hear the whole of it?

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Mr. Herrmann: Because it will require us to go into the whole case again. We cannot take one witness out of the case without putting all of the case in.

The Vice-Chancellor: I know, but there is nothing in the file of papers here to indicate what was the testimony in the other case. 10

Mr. Herrmann: I have it here.

The Vice-Chancellor: It is not part of the record before me.

Mr. Herrmann: Oh, I can offer that, if it is necessary; but, for instance, suppose, instead of testifying herself, she were to bring a doctor, one of the witnesses in the earlier case, that would require me to call the experts which we called? 20

The Vice-Chancellor: I judge, from your pleading, or some papers I have read here, that you may call a doctor, too, to show the state of mind or mental condition of your client. I think I am going to reverse what I stated, and I think I am going to hear the whole case, and then use such part of the testimony as I think appropriate to the case; if I do not, it seems to me I may do an injustice to somebody. You are telling me you are going to offer a letter, bearing date in 1923, that certainly precedes the decree in the other suit, and I feel that I had better hear the whole of it. 30

Mr. Herrmann: Well, if your Honor does that, we might take a short cut and offer all the evidence in the other case.

The Vice-Chancellor: I do not care how you do it, but I think I ought to hear it. If 40

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10 I were to adhere to my first thought in this matter I might be shutting out something that may really be evidential in this case. In view of what you are saying about that letter of 1923, I think you had better put the case before me, with all the evidence you feel should go in on both sides, and I will consider that which I think is evidential, and I will disregard that which I consider non-evidential. I am sorry, myself, too. I feel that we would be obliged to sit here for additional time than that which might otherwise be required.

20 Mr. Hartpence: I was going to suggest this, in the light of the discussion which has taken place: It seems to me that there is a basic question now involved in the cross-petition, or counterclaim, and that is, whether any of the time prior to the filing of the petition and the making of the decree in the former suit can be considered as a positive desertion on the part of the wife; and I have a line of cases which hold that it cannot be, for this very reason, that pending such a marital suit, not only should not the party claim to live with the other spouse, but it would be highly reprehensible for him to do so.

30 The Vice-Chancellor: I think our courts have repeatedly held that where one is charged with adultery, the other party could not be expected to go back and live with the party pending that suit.

40 Mr. Hartpence: The only question raised here is *res adjudicata*, on my side, and the question of Mr. Herrmann's matter with re-

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gard to the period of desertion, on the other, and I am just as averse to going into the testimony in this case as the other party possibly can be; and it does seem to me, in the light of what has now taken place, that if we could have those two questions determined upon motion, prior to the taking of the testimony, and there were a continuance granted of the final hearing until that time, it would be the best thing we could all do, under the circumstances of the case. 10

The Vice-Chancellor: Well, if it is agreeable to you folks, I am satisfied to have that done. I do not like to inquire into this whole matter if it should not be inquired into. 20

Mr. Hartpence: I do not, either.

The Vice-Chancellor: I have been reading this cross-petition, as it is called here, and, according to the recital here, it seems to me, Mr. Herrmann, that you are charging matters there which necessarily bring in these former matters. You are reciting in Paragraph 5 such matters (reading said paragraph to counsel). Now, if you say those matters that were involved in that other suit were not necessary or proper to be brought into this suit, why did you recite that in your cross-petition? 30

Mr. Herrmann: I did it for this reason—that if it should become necessary, I proposed to offer in evidence before your Honor all the record in the other case.

The Vice-Chancellor: Well, you know the 40

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only requirement in these proceedings is to set forth, first, as briefly as possible, the facts which will confer jurisdiction upon the court, and to inform the court of the matters involved. Now, you have a lot of matters mentioned in your cross-petition which have nothing to do with matters subsequent to the decree in the other suit, but something antedating it.

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Mr. Herrmann: No, I have to go further, I understand; I understand that I have to show, in order to get relief for my client, that the other suit was brought improvidently, without foundation, and maliciously. Now, in order to prove that to your Honor I must submit the record in the other case, for your Honor to determine whether that was a *bona fide* suit, or whether it was not.

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The Vice-Chancellor: I do not think I have any such right, Mr. Herrmann. The case of *West New York Improvement Company v. West New York*, 88 N. J. Eq. and other cases, seem to indicate clearly that that decree was dispositive of the matters involved in that suit, and I would have no right to inquire into them. The Court of Errors undertook to rebuke a Vice-Chancellor in that *West New York Improvement* case. Now, if you say I have a right to inquire into matters involved in that suit, and I should happen in my consideration of those matters, to come to some conclusion which might be contrary to the conclusion which Vice-Chancellor Lewis came to, I would be practically overruling his decision.

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Mr. Herrmann: No, but in all the cases—

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your Honor has a line of them, undoubtedly—in which a suit of that kind is maintained—

The Vice-Chancellor: The law says a final decree cannot be attacked by a party unless by proper procedure, and if it is going to be attacked within a year, it must be by appeal. 10

Mr. Herrmann: But in all those cases in which the question arose of the *bona fides* of the party in the earlier suit the record must be introduced, and, as I understand, in those cases, in support of the defendant's position that the suit was improperly brought, they offered the record in the earlier suit, and then submitted with that such facts as to the conduct of the complainant as would demonstrate that she was acting in bad faith when she brought the suit. 20
The Court necessarily had to have the record.

The Vice-Chancellor: Mr. Hartpence, do you think, if you bring out evidence here such as you contemplate bringing by the question asked, as to matters previous to the date of this decree advised by Vice-Chancellor Lewis, that I would have a right to consider those matters as justifying in any respect, this complainant leaving her husband? 30

Mr. Hartpence: And continuing in her absence from him? Yes, sir. You see, it started back there, and of course my adversary feels that there was a duty cast upon the wife to go back to the husband and seek a reconciliation; I cannot quite agree with that myself. 40

The Vice-Chancellor: Now, as against

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10 that proposition of Mr. Herrmann's, he is raising the question that from some date in 1923 his client is entitled to a divorce—so that don't jibe—because this decree was filed March 10, 1926, Mr. Herrmann, and your letter that you refer to is in 1923 (I don't know what the date of it is exactly), but your contention, apparently, is that two years from the date of that letter your client would be entitled to sue for divorce, if, in the meantime, his wife refused to become reconciled with her husband and go and live with him. Now, that would be shutting out a lot of this decree if I were to sustain you in that contention, because that precedes the date of this decree; in other words, at the time that decree was made you had a vested right that nobody could deprive you of.

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Mr. Herrmann: That started in the *Von Bernuth* case (I have it in my brief) where the party contended that the charges were baseless, and the Court said he had an obligation to endeavor to get her to withdraw the suit, and, from that time, base the desertion.

30 The Vice-Chancellor: That is a case in which a lot of nasty accusations were made, too.

Mr. Herrmann: Yes; but the Court said the party had a right to have the suit withdrawn.

The Vice-Chancellor: Well, I do not see how I can possibly avoid receiving all the testimony.

40 Mr. Herrmann: Then your Honor should

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take it as received in the other suit, and not consider anew things already passed upon.

The Vice-Chancellor: Well, I don't know what the proofs in the other case were, and then the facts may differ; the other suit was for divorce, and a suit for maintenance is based upon proof that something justified her in leaving her husband. Now, Mr. Hartpence may not be relying upon those acts of extreme cruelty that were relied upon in the other case; he may be relying upon something else. 10

Mr. Hartpence: No, I asserted in the argument that I would rely upon them.

The Vice-Chancellor: I do not see how you can rely on anything that intended that decree; and, on the other hand, I do not agree with our friend, Mr. Herrmann, that his client's right of action begins with the date of that divorce. 20

Mr. Hartpence: I do not, either; now, that is the reason I suggested that it seemed to me that there are two vital points, one of which may stop me right where I am, and one that will stop Mr. Herrmann; and I am willing to thrash them out at first. 30

The Vice-Chancellor: In the cases of *Oertel v. Oertel*, and *Smith v. Smith*, and *Popovics v. Popovics*, our Court of Errors has expressly held that in a maintenance suit, where a decree has been made, and for a period of two years thereafter the offender does nothing *bona fide* to induce (we will call it) the wife to return again to live with him, that her right of action then is vested, at the expiration of the two-year period, and 40

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all of the overtures, or attempts at reconciliation that he might make thereafter would be of no avail, unless she wanted to consider them.

10 Mr. Hartpence: *Gordon v. Gordon* is another case of a similar kind; but where I take a sharp point of divergence on that principle is that, while it is the duty of the husband always to seek out the wife—and, manifestly, to a greater extent, where he was the one who caused the grievance that our courts have never cast that duty upon the wife.

20 The Vice-Chancellor: I think it is the duty of the husband always, unless, as our cases hold, there is some manifestation by proof that any overtures on his part would be unavailing.

Mr. Hartpence: That is the term they use. Now, I must confess that the case is not pleasing for me, and naturally, I do not think that it is for anybody, and I do not want the complainant in this case to have to go through it.

30 The Vice-Chancellor: I think I will receive the testimony, subject to your objection.

Mr. Hartpence: What I would like to do (if Mr. Herrmann is willing, and your Honor is willing) would be to continue the case to a later date, and give us a chance to thrash out these law points on proper motions.

The Vice-Chancellor: Well, counsel can make their minds up on that.

40 Mr. Hartpence: I think it is the best thing to do for all present.

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The Vice-Chancellor: It might possibly shorten the case; I am not sure it will, at all, but if it will I would be glad to do it. If it is not going to shorten the case, I might just as well proceed now and dispose of it.

Mr. Hartpence: There would be very little left of the case, I think, according to the way your Honor rules on those motions. 10

The Vice-Chancellor: Well, if the procedure would not be such as I have indicated, it seems to me that litigation could be kept up interminably—if, after allegations made and proofs submitted and a decree made, parties in a subsequent suit can again inquire into the matters necessarily involved in the previous suit, I do not know where we would get off. 20

Mr. Hartpence: I agree with your Honor perfectly in that respect. Of course there is always a point where there is a line of divergence.

The Vice-Chancellor: This might be such a case; for that reason I am saying, until I am informed a little more by what will come out through the progress of the case, I think I ought to receive the testimony. Then again, if these allegations that are suggested here (mention of which, to some extent, I see in these pleadings) are to be relied upon by the complainant in this cause as the justification of her having deserted her husband, you appreciate that there must be some corroboration of it; there is not the same kind of corroboration required in a suit for maintenance as in a suit for divorce, but, necessarily, it is in the nature 30 40

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of a divorce proceeding, and there has got to be some corroboration.

10 Mr. Herrmann: I can say that the question that is being dealt with now has been dealt with recently in the Cook case, where Vice-Chancellor Bentley distinguished the earlier cases. I think the Chancellor dealt with some case lately—I know Vice-Chancellor Backes did—in other words, where there was a case pending, whether or not that constituted a bar for the calculation of the period of desertion has been dealt with recently in this state in half a dozen cases, all of which I can present to your Honor, if your Honor thinks it is important
20 in this case.

The Vice-Chancellor: I think we ought to have that question thrashed out, if possible, before we go into a very lengthy hearing in this case, because it might shorten this case.

Mr. Herrmann: I think so, and to that extent I would be glad to join in the request of Mr. Hartpence, if it will shorten the case.

30 The Vice-Chancellor: How long will it take you to prepare yourselves on this—can you do it by two o'clock?

Mr. Hartpence: I cannot, your Honor; I will say this, in justice to myself: I have been trying all summer and fall to get a little vacation, and I went away last week and came back especially to take care of this case today, and, while I sort of feel that I am ironbound and can stand almost
40 anything, yet I do want to get my vacation if I can do it; and I was going to suggest

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that we might take an early open day, if your Honor has it, and, in a couple of weeks, give us a chance to present the motions.

The Vice-Chancellor: Our open days are away up in September of next year.

Mr. Hartpence: I think we can finish it on a motion day. 10

Mr. Herrmann: I am ready to go on today, if your Honor wants to. I have the law.

The Vice-Chancellor: Your adversary thinks there are some questions brought up here that he is not quite prepared for.

Mr. Hartpence: That is the way I feel about it now; and I am satisfied that it will result in a material shortening of the case. 20

The Vice-Chancellor: When can you argue that aspect before me—can you do it next Monday?

Mr. Hartpence: I can stay over and do it next Monday. Of course, if it is later it will be three weeks after next Monday, because I want to be away three weeks. I would rather go away right away and come back, if it is not holding the matter up too long for my adversary. Of course he is not harmed, because there is no alimony *pendente lite*; my client is the only one suffering in that respect. I can argue it in a month from now, and your Honor can fix the earliest date to go on, after that, for the hearing. 30

The Vice-Chancellor: Can you submit a memorandum to me—I mean just a statement of the citation of cases—before that?

Mr. Hartpence: Yes, sir. 40

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The Vice-Chancellor: Maybe you will do that before you go away, and argue it later?

Mr. Hartpence: Or, perhaps, do that up in the high air of the mountains.

10 The Vice-Chancellor: Suppose you do that, and then I will read your cases before you argue it, and I will be prepared to dispose of it, or try to, anyhow, at the conclusion of your argument; but I do not like to be reserving any decision in matters of this kind, because I can see, from the previous Vice-Chancellor's activities here, that there are many cases involved.

20 Mr. Hartpence: I will go ahead the best I can, and get out the cases and submit them to your Honor very shortly, and if your Honor will hear us on some motion day some time after the 8th of November—

The Vice-Chancellor (to Mr. Hermann): What do you suggest?

Mr. Hermann: I think, if Mr. Hartpence will now state the two points on which he desires to diverge, and then, if the Court will ask him to submit his brief to me, he can go away.

30 Mr. Hartpence: The two points, as I understand it, are first, that Mr. Herrmann says that I am stopped in my action because it is *res adjudicata* (and I have tried to bring out that the same matters are involved in this same question before the Court), and the other point is that, as I understand the earlier cases, no period of time during which a marital suit is pending can be calculated as a period of obstinate desertion on the part
40 of the other spouse; and if there are cases

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that hold differently I would ask time to look into them, because I think if that is so that stops me.

Mr. Herrmann: In his tracks—on his counterclaim.

The Vice-Chancellor: There is a point involved here, I suppose, too, as to whether or not, on the dismissal of the other case, it was the duty of the husband to then undertake to have his wife become reconciled and live with him again—whether that duty devolved upon him, and if it did devolve upon him, whether he did that. 10

Mr. Herrmann: We make no such claim; we claim the duty did not devolve upon us after the dismissal of that suit. 20

The Vice-Chancellor: Well, is it your contention, Mr. Herrmann, that because of the salacious (or whatever they were) allegations—nasty allegations—made by the complainant in this suit against her husband, who is the defendant in this suit, while she was the petitioner in a previous suit—that those accusations or allegations, not repudiated by her, justified the husband in remaining separate and apart from his wife, and refusing to contribute to her support? 30

Mr. Herrmann: Yes, sir.

The Vice-Chancellor: Well, that question I think you ought to brief; I think it is a very important matter. In the Von Bernuth case, as I recall the case, even though the accusations and allegations were very nasty and very extreme, still my recollection is that the Court held that the party was obliged to make some overtures, did it not? 40

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10 Mr. Herrmann: I think not, in that particular case; but in one of these three cases the Court said there was undoubtedly no obligation, where they had been charged with hideous crimes, that they could not respectably live together again.

The Vice-Chancellor: Those are the cases, it seems to me, counsel ought to devote their attention to, and determine from them whether or not, at the expiration or cessation of the other case the husband was in duty bound to make overtures to induce his wife to return again to live with him, or whether the wife was obliged to take any initiative with respect to the withdrawal or repudiation of the allegations that she had previously made.

20 Mr. Herrmann: I think the Cook case goes as far as to hold that. In that case the wife made a charge of adultery, and, the case being dismissed, the court held that it devolved upon her to go back and say, "I am sorry."

30 The Vice-Chancellor: Was that the case in which she said,—“I am sorry, but, nevertheless, I think it is true”? There is one of the cases that goes so far—where the party said,—“I am sorry for what I said; nevertheless, I think it is true.

Mr. Herrmann: I think that is the Cook case; it is either the Cook or the Jacobus case.

40 The Vice-Chancellor: I had before me this case in 94 Eq., page 160, but I was reading it just when I was told this case was ready to be tried; I do not know how far it

Loretta V. O'Brien, direct.

applies to this case, but it cites the Cook case.

Mr. Herrmann: The Cook case has been upheld by the Jacobus case and the Hartpence case. The Popovics case—

The Vice-Chancellor: The Popovics case I had occasion to deal with recently. 10

Mr. Herrmann: Now, has your Honor fixed a date?

(The cause was set for final hearing on Monday, January 9, 1928, at 10 o'clock, A. M.; the motions to be argued on the 14th day of November, 1927.)

Chancery Chambers, Jersey City, N. J., Jan. 9, 1928. 20

Hearing of the cause resumed, pursuant to adjournment, at 10 o'clock, a. m., in the presence of the counsel of the respective parties, before His Honor, Jno. J. Fallon, Vice-Chancellor.

The Vice-Chancellor: I am ready; you may proceed.

MRS. LORETTA V. O'BRIEN, recalled.

Direct examination resumed by Mr. Hartpence: 30

(The former examination of this witness, as contained in this record, on pp. 1 and 2 thereof, was repeated by the stenographer at the direction of the Court.)

Q. Mrs. O'Brien, were those occurrences that you refer to in that proceeding necessarily the same ones which you complained of and testified about in the former suit for a partial divorce from your husband, in this same court, tried before Vice- 40

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Chancellor Lewis? A. Yes, sir.

Q. And nothing of that same nature has occurred since those times? A. No, sir.

10 Q. As matter of fact, you have not been living with your husband since you testified in the former case, have you? A. No, that is right.

Q. Now, will you state what those occurrences were?

Mr. Herrmann: I object.

The Vice-Chancellor: An objection, without any ground stated, does not amount to anything.

20 Mr. Herrmann: I object, on the ground that the Court has already ruled that the offer of the record in the earlier case was all that your Honor will permit.

30 The Vice-Chancellor: Well, Mr. Hartpence, I fail to see how I can possibly receive testimony from this witness in response to the question that you just put. I have read these pleadings, and I have read the pleadings in the previous case that has been alluded to. I, of course, have had my attention called to and have read the decree entered in the previous suit; and in the bill of complaint in this present suit I note that counsel have distinctly stated that the previous suit was dismissed for failure of proof—those words are used, “failure of proof.” Under the circumstances, I am obliged to conclude, under the law, that all matters involved in that suit were disposed of by that decree; and the question that you have put to the witness now was as to whether or not
40 the acts of which she complains in this present suit, as a basis for her suit for mainte-

Loretta V. O'Brien, direct.

nance, were the same acts as complained of in the former suit; and she says, "Yes." Now, I feel that I am obliged to hold that as *res adjudicata*, and I will have to sustain the objection.

Q. Refreshing your memory as to the time of the entry of the decree of dismissal in the former suit, which is dated March 8, 1926, did you, after that date, Mrs. O'Brien, have any, or attempt to have any communication with your husband, the defendant in this suit, with regard to an amicable adjustment of the differences between you and a reconciliation? A. That is after March 8, 1926? Yes, June 17th, 1926. 10

Q. What did you do at that time? A. Why, I went down to the hotel with Miss Kennedy, and I had word sent in for Tom, Mr. O'Brien, and they said that his wife wanted to speak with him, so Mr. O'Brien came out, and Miss Kennedy was with me, and I said,—“Tom, I have come down to break the ice, to see if we cannot effect a reconciliation”; and he said,—“No, Loretta, you placed it in the hands of the court; let the court take care of it.” I then said,—“Won't you have dinner with us to-night?” He said, “No, not to-night or any other night.” The next night I sent Miss Kennedy down to see him, and to tell him that I wanted to speak to him alone; and he said, “No, absolutely, positively not.” 20 30

Q. Well, where did you stay? A. At the hotel.

Q. The Hotel DeVille? A. DeVille; yes, sir.

Q. And who stayed with you? A. Miss Kennedy. Again I spoke to him in the hall (I was alone this night), and I told him why does he not forget, and he says, “Let it stand as it is for the present.” 40

Q. Have you had any means of support yourself

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since you were married to Mr. O'Brien? A. You mean, from Mr. O'Brien?

Q. No, of your own—any means of support of your own? A. No, I had taken a position at Atlantic City when I was down there, I think it was
10 in November or December of that year.

Q. You have no independent means of income? A. No.

Q. No property of your own? A. No.

Q. Aside from the alimony which has been paid you, and counsel fees, by your husband in these two suits,—the alimony and counsel fee in the first suit, and the counsel fee in the second suit, the present suit—what has been your means of support, since you severed your relations with your
20 husband? A. Well, I lived home, and my father and brothers have been taking care of me.

Q. You have tried to work, you say? A. Yes.

Q. And did you succeed? A. No, I was not well enough.

Q. You were not able to keep up the work? A. No.

Q. Do you know what your husband is as to wealth, financially, and what his permanent income is, per year?
30

The Vice-Chancellor: I do not think you ought to go into that now, Mr. Hartpence; I think that ought to be a secondary consideration; if we get to that point I will either permit you to make the inquiry, or refer it to a Master to ascertain that.

The Witness: There is something else—may I say?

Q. Yes. A. I notice in the court room there is a
40 "George"—I have forgotten his last name—and

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there is a Mr. Gale; this Mr. Gale was in Coral Gables at that time, at Atlantic City, and I have spoken to him several times about a reconciliation with Tom—Mr. O'Brien—

Q. Now, was this before or after March, 1926?

A. After March, 1926; and he told me—

10

Q. Never mind what he told you; do you know whether he spoke to your husband about it? A. He told me he did.

By the Vice-Chancellor:

Q. What was his name? A. George Gale, and also this "George"—I have forgotten his last name.

By Mr. Hartpence:

Q. Were you working for Mr. Gale at that time?

20

A. No, I was working for a man by the name of—I have forgotten the man's name, now—in Atlantic City, in the Coral Gables office, and Mr. Gale was working there, too.

Q. Anything else that you desire to say about this matter? A. No, I guess that is about all.

Q. Where do you live now? A. I live at Jamaica, Long Island.

Q. And with whom are you living? A. My father and brothers.

30

Q. What is your father's business? A. Retired.

Q. What was his business? A. Police Lieutenant.

Q. Where? A. New York.

Q. New York City? A. New York City.

By the Vice-Chancellor:

Q. Can you fix the time when you spoke to this man Gale and asked him to intercede with your husband to effect a reconciliation? A. Well, some-time late in November, 1926.

40

Loretta V. O'Brien, direct.

The Vice-Chancellor: Is that all, Mr. Hartpence?

By Mr. Hartpence:

10 Q. After March, 1926, when the decree was entered in the former case, did you speak to anyone else with regard to the effecting of a reconciliation?

A. Yes, I spoke to Mrs. Weiss.

Q. What is her first name? A. Catherine.

Q. Where does she live? A. She lives at 15C Vassar Square, Ventnor City, N. J.

Q. That is near Atlantic City? A. Yes, at South Atlantic City.

20 Q. Do you know whether she spoke to your husband about that? A. Yes, I know she had him come down to the house shortly after—down to her home shortly after we were in court in September, 1926 (I think it was we were in court), and she had sent a telegram, too—

Q. Wait one moment, please—you are testifying of your own knowledge now, that she did these things? A. Yes.

30 Q. How did you know she did these things? A. Because I was with her. She sent a telegram to Father Shean and told Father Shean what had happened.

Mr. Herrmann: I object to that.

Q. You sent the telegram to Father Shean? A. I was with her when she done it.

Q. Do you know what the contents of that telegram were? A. Yes, I saw it, and read it.

Q. And what did it contain?

40 Mr. Herrmann: I object; it was not in the presence of the defendant.

Loretta V. O'Brien, direct.

The Vice-Chancellor: Anyhow, it is not a proper way to prove the contents of a writing, is it? That paper should be produced here, I presume.

Mr. Hartpence: Well, your Honor, she knew what it contained. 10

The Vice-Chancellor: I think it is a loose way of getting at that thing; I think I will sustain the objection. She may accurately state it, and she may not.

Q. Do you know what occurred as the result of the telegram that you say Mrs. Weiss sent Father Shean? A. Well, she spoke to Mr. O'Brien in the court, and she told him to come down to her home and see her. 20

By the Vice-Chancellor:

Q. You are telling us now what she reported back to you, are you? A. Yes.

Mr. Herrmann: I object to that.

The Vice-Chancellor: Yes.

Mr. Hartpence: That part I consent to be stricken out.

By Mr. Hartpence:

Q. Were you present when she spoke to Mr. O'Brien in court, that September day you have spoken of? A. No. 30

Q. You did not hear what she said to Mr. O'Brien? A. No.

Q. Or you did not hear what Mr. O'Brien said to her? A. No, sir.

By the Vice-Chancellor:

Q. Is she here in court, also? A. No, sir; she is not; she had a stroke. 40

Loretta V. O'Brien, direct.

By Mr. Hartpence:

Q. Do you know what Mrs. Weiss's condition has been for the past six months, or so? A. For the past year, yes, sir; she had a stroke of paralysis.

10 Q. Well, as a result of what you said to Mr. Gale, and as a result of what you said to Mrs. Weiss, did Mr. O'Brien communicate with you, at all, after that? A. No, not at all.

Q. Has he, at any time, communicated with you, or spoken to you in any way, with regard to your returning to live with him? A. No, never once.

20 Q. Did you take it up with anybody else, to intercede with Mr. O'Brien? A. Yes, I spoke to Miss Healey of the Healey Hotel in Atlantic City.

Q. Do you know whether she communicated with Mr. O'Brien? A. She told me she did.

Q. That is all you know about that? A. That is all I know.

Q. What is her first name? A. Margaret.

By the Vice-Chancellor:

Q. Is she in court? A. No, she is not.

By Mr. Hartpence:

30 Q. Can you state approximately when it was that you received your last payment of alimony from Mr. O'Brien? A. No, I really don't remember that.

Q. Can you state approximately how long it has been since you have received any money from him at all for your support? A. Well, it must be two years, or more.

40 Mr. Hartpence: I suppose, your Honor,

Loretta V. O'Brien, direct.

under your Honor's ruling, that is about as far as I can go with this present witness; so I will submit her to the other side for cross examination.

The Vice-Chancellor: I cannot undertake to say how far you could go, but of course I will have to adhere to that ruling, so far as you endeavor to bring out in this suit any matters that I consider were embraced within the other suit. 10

By Mr. Hartpence:

Q. Where have you lived—I think you said you were living in Jamaica—now, where have you lived at the different times since about July, 1922?

A. Well, I lived down with Mrs. Weiss some time, in Ventnor City. 20

Q. How long? A. Well, off and on for the seven months I was in Atlantic City—between that and the hotel.

Q. And where, after that, did you go? A. With my father, at Jamaica.

Q. Have you, at any time, since, lived at other places than Atlantic City? A. Oh, yes, I was at the Hotel Healey, just on a visit.

Q. How about the Hotel DeVille? A. Yes, I was at the DeVille; that was in 1926, for practically seven months. 30

Q. When? A. From June, 1926, until December, 1926.

Q. You were staying with your husband at that time? A. No, I was with Miss Kennedy part of the time; then I was with her sister and another girl at different times.

By the Vice-Chancellor: 40

Q. Who is this Miss Kennedy? A. She is a friend of mine.

Loretta V. O'Brien, cross.

Q. She is not connected with the hotel of your husband, in any way? A. No.

By Mr. Hartpence:

10 Q. During the time you were there, just referred to, at the Hotel DeVille, did your husband have any communication with you, at all? A. No, not at all.

Q. Did he talk to you, or speak to you? A. No.

Q. Where did you eat? A. In the dining room of the Hotel DeVille.

20 Q. When did you leave there? A. I left there a week or so before Christmas, 1926, and I left my trunk there, then I came back around the 3rd or 4th of February and just stayed that one night and took my trunk out.

Q. 1927? A. Yes.

Q. And since then you have been living where? A. At home.

Q. In Jamaica? A. In Jamaica.

Q. How did you come to leave when you did, in December, 1926? A. Well, I stayed around so long and I saw there was no chance for reconciliation, so I thought I had better go home.

30 Q. Did your husband say anything to you when you left? A. No, not a word.

Cross examination by Mr. Herrmann:

Q. Mr. Gale was employed with this Coral Gables Company? A. That is right.

Q. As what? A. Why, you might call him a clerk, I guess.

40 Q. Were you surprised to see him in court this morning? A. No, I am not really surprised at anything.

Q. You had not subpoenaed him, of course? A. No, indeed.

Loretta V. O'Brien, cross.

Q. And was it the fact that he was in court that reminded you of your requesting him that he try to effect a reconciliation? A. No, I wouldn't say that.

Q. What was it reminded you of the fact that you had talked to Mr. Gale? A. Just the different people that I had spoken to. 10

Q. You made no effort to get Mr. Gale to come here today? A. No, none at all.

Q. And you say it was not a matter of any surprise to you when you saw him here? A. No.

Q. After the decree was entered in the earlier suit, referred to by Mr. Hartpence, did you write any letters to Mr. O'Brien requesting an interview? A. I think I did; I am not so sure about it. 20

Q. Not so sure of it? You won't say that you did not? A. I won't say that I did not.

Q. Well, if you did, would it, likely, remain indelibly fixed in your memory whether you did, or not? A. No, because I have had a great deal of bother.

Q. What was that? A. Well, my mother's death.

Q. Did you write to any other member of Mr. O'Brien's family? A. I don't think so, only, in the former suit, I wrote to his father. 30

Q. I show you a letter addressed to "Mr. Thomas M. O'Brien, Hotel DeVille, Atlantic City," personally, and registered on January 9th, 1926, and ask you to identify that, as to whether it is in your handwriting, or not? A. Yes, this is mine; this is the letter I wrote to his father.

Mr. Herrmann: I ask to have that marked for identification.

(The letter is marked for identification, L. H., 1.) 40

Loretta V. O'Brien, cross.

Q. Now, that letter was written to his father before the case was decided, but after the case had been argued before Vice-Chancellor Lewis, wasn't it? A. I guess it was.

10 Q. Now, cannot you attempt to recall whether or not you ever addressed a letter to Mr. O'Brien? A. I would not say for sure; I have a vague recollection that I may have.

Q. When did you start your suit—this present suit against Mr. O'Brien? A. I guess about September, 1926; I think it is that date.

Q. I find, on the original bill of complaint filed, that it was filed on April 9, 1926? A. Well, it might have been; I cannot recall dates.

20 Q. In other words, didn't you immediately instruct your counsel to proceed with this new suit after the decree was entered in the earlier suit? A. Are you speaking now about Mr. Goldenhorn that I instructed?

Q. I don't know; who was your counsel? A. Well, Mr. Hartpence.

Q. Wasn't this suit started when you had Mr. Goldenhorn as your counsel? A. Yes.

30 Q. Well, didn't you immediately start this suit after the decree was filed in the earlier suit? A. Yes.

Q. Can you fix the time when you were down to Atlantic City to the Hotel DeVille with Miss Kennedy? A. June 17, 1926.

Q. June 17th? A. 17th, 1926.

Q. So that, at that time, there was pending in court this present proceeding? A. Yes.

40 Q. You did not go to the hotel with Miss Kennedy, did you? A. Yes, I went with her; she went alone at noon, and then I came back with her at dinner-time.

Loretta V. O'Brien, cross.

Q. By "dinner-time" you mean what hour? A. Six o'clock.

Q. But you did not enter the hotel and register with Miss Kennedy? A. No, she went alone.

Q. You do not know what representations Miss Kennedy made to the hotel about it when she registered? A. No. 10

Q. You did not apprise Mr. O'Brien of the fact that you were coming to the hotel? A. No, because I knew he would not welcome me.

Mr. Herrmann: I ask that that be stricken out.

The Vice-Chancellor: Strike it out.

Q. After your bill was filed there was a hearing in court at which you were present, on the allowance of temporary alimony, wasn't there? A. Well, what time was that? 20

Q. Immediately after your bill was filed? A. I guess so; I don't know.

Q. And you were present that day with Mrs. Weiss? A. Yes; that was in September.

Q. You are sure of that? Wasn't that earlier, when the Court declined to allow you any temporary alimony the first time? A. Not when Mrs. Weiss was in court; she was in court with me in September. 30

Q. Now, do you recall the application for temporary alimony in this present proceeding, immediately after the bill was filed? A. I really do not; I do not recall the dates.

Q. Well, you knew that Vice-Chancellor Lewis, on the application of Mr. Goldenhorn, had declined to allow temporary alimony? A. I knew that.

Q. Now, wasn't that before you went to the hotel with Miss Kennedy? A. I could not state that. 40

Loretta V. O'Brien, cross.

10 Q. And was not the real reason that you went to the hotel with Miss Kennedy the fact that Vice-Chancellor Lewis had declined to allow you any support, and therefore you planted yourself in the hotel to get support? A. No, the real reason I went back was my mother died in February, and he had always placed my mother as objectionable, and I thought now, that my mother had passed away that he would not have any real excuse, so I went back.

Q. Well, your fight with Mr. O'Brien has been very bitter, has it not?

The Vice-Chancellor: There is nothing said about a fight.

20 The Witness: I don't think we ever had one.

The Vice-Chancellor (to Mr. Herrmann): I mean, you are describing a "fight," and I have not heard a word about it.

Q. The earlier suit was very bitterly contested, was it not—the first suit? A. I suppose it was.

Q. Now, Miss Kennedy went to the hotel and registered at noon, you say? A. Yes.

30 Q. Where did you remain? A. Outside.

Q. Outside? A. Yes.

Q. You did not remain in the street all that while, did you—six hours? A. It was not six hours.

Q. How long was it? A. Half-an-hour; she came out—after she had lunch she came out and met me; then we stayed around together, and we came back at six o'clock.

Q. Will you describe to the Court exactly what happened when you went to that hotel?

40 *By the Vice-Chancellor:*

Q. What was the date of that happening? A. June 17th.

Loretta V. O'Brien, cross.

Q. What year? A. 1926.

By Mr. Herrmann:

Q. You had not seen your husband between the entry of the decree and June 17, 1926? A. No.

Q. And you cannot recall whether you sent any letter to him? A. I wouldn't say that I did not, and I won't say that I did. 10

Q. Now, at any rate, you did not see him, and you heard nothing from him? A. No.

Q. Now, just describe to the Court what happened when you went to the hotel with Miss Kennedy? A. We both went in, and she went up to the desk, and she requested someone to go back and say that Mrs. O'Brien wanted to speak to her husband, and this party at the desk said, "Who?" and she said, "Mrs. Thomas O'Brien wants to speak to her husband, Thomas O'Brien." With that, Mr. O'Brien came out and he came to the back of the desk, and I said,—“Why don't you come around here?” and he did; and I said to him,—“Tom, I came down to break the ice and see if we can effect a reconciliation?” He said, “No, you have placed it in the hands of the court, let the court take care of it.” I then said to him, “Won't you have dinner with us tonight?” He said, “No, not tonight or any other night.” 20 30

Q. And the matter was then actually in court, wasn't it? A. I suppose it was.

Q. And you remained there then for how long? A. I remained from June until a couple of weeks before Christmas.

Q. Do you know whether Miss Kennedy paid for her accommodation at the hotel? A. She paid one week forty dollars.

Q. How long did she remain there? A. A month. 40

Loretta V. O'Brien, cross.

Q. As your guest? A. Yes—that was three weeks as my guest. She paid one week.

Q. Then, after that you say you remained there with some of her relatives? A. A sister of hers.

10 Q. Did they pay their board? A. No, she did not; she was my guest.

Q. They were your guests? A. Yes.

Q. How long did she remain there? A. I guess a couple of months.

Q. Anyone else with you? A. Yes, another girl; she was there two weeks.

Q. Did she pay? A. No.

Q. She was there as your guest? A. Yes.

20 Q. Now, during that time how did you spend your time, what did you do? A. Well, different things.

Q. I assume that, but tell us some one thing? A. Well, I was on the boardwalk, and went down to Mrs. Weiss's; I spent most of my time down at Weiss's.

Q. Did you go among the different guests of the hotel, at all, and talk with them? A. A couple of them. Nothing about my case.

Q. What is that? A. Nothing about my case.

30 Q. Do you know a woman named Miss Maude Cummings? A. No, I do not place that name.

Q. Do you recall Mrs. Grim of Cincinnati, Ohio? A. No, I do not place that name.

Q. A Mr. Hoey? A. Yes.

Q. Who was Mr. Hoey, by the way? A. He was a detective.

Q. He was a detective, was he? A. Yes.

Q. Where was his office? A. Some place on Atlantic Avenue, Atlantic City.

40 Q. Where did you see him? A. I first met him in a jewelry store.

Loretta V. O'Brien, cross.

Q. Under what circumstances did you meet him?

A. Why, when the trouble first occurred, a family by the name of Beidelman, who have the Stirling Hotel in Atlantic City, told me to get this Mr. Hoey; that he knew a great deal about my husband; and when I spoke to this Mr. Hoey, oh, he wanted a great deal of money, and I couldn't afford it; so it was just closed, so I came to Atlantic City, and I know a party down there by the name of Balter—

Q. When was that? A. In June, when I went back in June, 1926; and she had known about the case, and was discussing it, and she said, "Do you know who is in the back of the store?" I said, "No." She said, "Mr. Hoey." I said, "Well, I doubt that he remembers me; I spoke to him away back in '22; I haven't seen him since"; and I spoke to Mr. Hoey, and he said to me "You were very foolish at that time that you did not allow me to get the evidence on your husband."

Q. Well, no matter what he said to you, did you actually retain Mr. Hoey? A. I won't say I actually retained him; I didn't give him any money.

Q. I show you a bill, and ask you whether you received duplicates of this bill from Mr. Hoey? A. No, I never received any bill like that, at all; I never received any bill from him, at all.

Q. Never received any bill from him? A. No.

Q. Did you ever pay Mr. Hoey? A. No, never paid him.

Q. Did he ever communicate with you about the bills you owed him? A. No; he might with Mr. Goldenhorn, not with me.

Q. Do you know to whom he sent his reports? A. I don't think he sent any.

Q. Did he ever send any to you? A. No, I never received anything from Mr. Hoey.

Loretta V. O'Brien, cross.

Mr. Herrmann (to Mr. Hartpence): Have you any reports that were submitted by the Hoey Detective Agency?

10 Mr. Hartpence: No, I don't think so. I will look through my papers, but I do not remember ever receiving any since I was retained in the case.

Q. Don't you know Mr. Hoey had operatives in that Hotel while you were there? A. No, I don't know that, at all; he had promised that he was going to, but I never knew that he did.

Q. That was in June, 1926? A. Yes.

Q. And that was after you said to Tom, "Let us break the ice"? A. Yes; that was the following
20 September.

Q. Did you ever have any talks with Mr. Hoey after that? A. Yes.

Q. Tell us when, please? A. I cannot state the time; it was some time that I was down there.

Q. That is, he would report to you from time to time what his suspicions were? A. No, he would not report, he would just tell me to come up and see him, and that he had secured an affidavit from some colored girl by the name of "Martha"—I have
30 forgotten her last name; and when this case came up and I had gotten somebody to secure this affidavit, he wanted one hundred dollars for it, so I never got it.

Q. Now, all during this time you were genuinely anxious to reconcile yourself with Mr. O'Brien? A. Absolutely.

Q. Why were you having him watched by a detective, under those circumstances? A. I hadn't any reason.

40 Q. Not to effect a reconciliation, was it? A. Yes,

Loretta V. O'Brien, cross.

Mrs. Weiss had spoken about that to Mr. Hoey, too.

The Vice-Chancellor: You misunderstand the question.

Q. (Question repeated.) A. Yes, it was at that time, and I had gone with Mrs. Weiss, and Mrs. Weiss had told Mr. Hoey not to continue, that she thought it would be better if we got together. 10

By the Vice-Chancellor:

Q. No, but was your purpose in employing Mr. Hoey to get some evidence against your husband which you thought would effect or cause a reconciliation? A. Oh, no, not that.

Q. Counsel wants to know, and he has asked the question, why, if you were sincerely desirous of effecting a reconciliation with your husband, you were employing a detective to watch his actions? A. Because I was there so many months and he never made any attempt, and different people were talking around about it, and Mr. Hoey himself was the man who told me he knew plenty about him. 20

Q. Well, assuming that he knew plenty about him, were you still anxious to be reconciled with him? A. Well, if he turned over a new leaf, I was. 30

Q. Why do you say, "if he turned over a new leaf"—did you have any information that he should turn over a new leaf, as a result of your action with Hoey? A. No, I had no information like that.

Q. I want to ask you, while I have got it in my mind—you took an appeal from Vice-Chancellor Lewis' decree—do you recall that—an appeal to the Court of Errors and Appeals? A. I don't think so. 40

Loretta V. O'Brien, cross.

Q. Well, I have here, in the file of papers relating to this former suit, a notice of appeal filed March 9, 1927; then I have here before me a dismissal of that appeal by the Court of Errors and Appeals, bearing date May 24, 1927; counsel are
10 aware of that, are you?

Mr. Hartpence: Yes, sir; I took the appeal, your Honor; she may not have any knowledge of what was done there.

The Vice-Chancellor: That was practically a year after the decree was entered.

Mr. Hartpence: Just prior to the expiration of the year; and that was taken for the purpose of protecting the record; we have
20 gone all through that in the suit on the other side of the hall; and we had just come into the case, having been substituted in the place of the former counsel a short time before that, and, in our study of the case we had not just exactly concluded what procedure should be for the best interest of our client, and the year was about to lapse, and we thought we had better protect the record with an appeal, that was afterwards dis-
30 missed by consent.

The Vice-Chancellor: Well, that is not before me, and I will have to assume, in the case before me, that the dismissal of that appeal must affect the decision of the Court of Chancery. Of course there is nothing in this order of dismissal that says anything about "consent." It says, "Due notice having been given to the solicitor of the defendant-respondent, it is ordered that the
40 appeal heretofore taken by the said peti-

Loretta V. O'Brien, cross.

tioner-appellant, to the final decree," etc. "be and the same is hereby dismissed, and the record remitted to the court below, but without costs."

Mr. Hartpence: Yes, sir, on our own motion. 10

The Vice-Chancellor: Well, I say, on the face of it, I have to take it for granted that the dismissal of the appeal by the Court of Errors and Appeals was an affirmance of the Court of Chancery decision, because that is the legal effect of it.

Mr. Hartpence: Well, if it becomes necessary to show the facts surrounding that, sir, we will put in the evidence.

The Vice-Chancellor: I don't know that it may be material or necessary, but I am calling the counsel's attention to that, because it seems to me now that the witness is testifying to attempts to become reconciled, and yet there was a subsequent appeal from the decision of the Court of Chancery. 20

Mr. Hartpence: Of course we say, after attempts to reconcile had become futile; that is the explanation of it, sir. You see the testimony is that she left the latter part of December, 1926; she just simply went back in February to get her trunk. 30

The Vice-Chancellor: She went back in March, as I remember.

The Witness: February.

The Vice-Chancellor: You also attempted a reconciliation in March, 1926, didn't you, and also in September?

The Witness: No, I did not go down there until June, 1926. 40

Loretta V. O'Brien, cross.

Mr. Hartpence: She went back for her trunk.

The Witness: No, that was the first time I went back—in June.

The Vice-Chancellor: All right.

10

By Mr. Herrmann:

Q. How many times, in all, do you suppose you saw Mr. Hoey, the detective, between June and December? A. Oh, several times.

Q. Several times? A. Yes.

Q. Where were the conferences usually held—at his office? A. Yes.

20

Q. And at those times would he show you how he had the goods on Mr. O'Brien? A. No, he never told me that he did any work, at all; he promised that he was going to.

By the Vice-Chancellor:

Q. Well, did he ever make a report to you showing any alleged infidelity on the part of Mr. O'Brien? A. No, sir.

By Mr. Herrmann:

30

Q. But he said he was going to? A. Yes, he said he was going to.

Q. And you knew that was being done? A. Yes, I knew that was being done.

Q. And it was being done at your request? A. Well, not altogether my request; he was very anxious himself to do it.

Q. Regardless of the fact that you were genuinely anxious to reconcile yourself to Mr. O'Brien, you employed this detective to watch him?

40

Mr. Hartpence: I object to that as not being a statement of fact; she said she did not employ him.

Loretta V. O'Brien, cross.

The Vice-Chancellor: I have that in mind distinctly she denies, all the way through her testimony, that she employed him.

The Witness: Mr. Hoey was, in fact, a man who employed himself.

Q. Do you know a Mr. Hennessy? A. Yes; he is a detective that came in the hotel there in 1922; I would not know him again if I saw him—oh, yes, I know who you mean; he is a house-man at the hotel.

10

Q. Did you have any talk with him, between June and December? A. Yes, I spoke to him.

Q. Didn't you offer him five hundred dollars if he would get Mr. O'Brien in a compromising position? A. I never offered him that because I would not be able to give it to him, and he had told me about some things that he had seen in a room in the hotel with Mr. O'Brien, and he said that it was too horrible to tell to me, and he said that for what Mr. O'Brien had done to him he would be glad to go to court and tell about it; and all I said to him was that if he would come—that was supposed to be September, 1926,—if he would come I would pay him for his day's work. That is the only offer I made to Mr. Hennessy. I told him if he would come to court and testify to what he actually knew I would pay him for the day he had lost. He was working in some other hotel at that time.

20

30

Q. That was also when you were genuinely trying to reconcile yourself? A. That was in September, yes.

Q. Was there anyone else you talked to about going to court—

By the Vice-Chancellor:

40

Q. Let me ask you—September what year are you talking about? A. '26.

Loretta V. O'Brien, redirect.

Q. That was after Vice-Chancellor Lewis had decided the matter against you? A. Yes.

Q. Well, what court did you expect him to go into to testify to that? A. Well, in September we were in court with Mrs. Weiss; in September, that
10 was the time.

Q. You mean, in this present suit you expected him to come in? A. Well, I really don't know.

Q. Didn't you know you did not charge him with any matrimonial offense or adultery in this present suit, that you were seeking merely to recover support? A. Well, I don't know one from the other now.

By Mr. Herrmann:

20 Q. Mrs. Weiss was authorized to act by you in your behalf with Mr. O'Brien? A. To effect a reconciliation, yes.

Mr. Herrmann: I think that is all.

Redirect examination by Mr. Hartpence:

30 Q. Mrs. O'Brien, after your first suit was dismissed, in March, 1926, and before you started your present suit in April, 1926, did you have any means of support? A. No, none at all.

Q. And your present bill was filed, or your present suit for maintenance, for that reason, was it not? A. Yes, sir.

Q. You needed the support? A. Yes, I needed it.

Q. When did your mother die? A. My mother died February 14, 1926.

Q. That was after the testimony had been put in in the former suit? A. Yes.

40 Q. She testified in that former suit, did she not, before Vice-Chancellor Lewis? A. Yes, she did.

Loretta V. O'Brien, redirect.

Q. After you went to the Hotel DeVille in June, 1926, as you have testified, was any effort made to exclude you from the hotel by your husband? A. You mean, after June 17th, 1926?

Q. Yes. A. Why, yes; I was there less than a week, and Miss Kennedy was present at that time, and when I had left in 1922 I had left a trunk there, and so I brought this trunk in from the hall, and I had the key in my father's home in Jamaica, so I went around to the locksmith, and told the locksmith to come up to my room and have a key made for this trunk, so I was expecting the locksmith, and a knock came to the door and Mr. O'Brien's father alone was there; so he started in—

Q. I did not ask you that; I asked you if any effort was made to exclude you from the hotel, and, if so, what was it? A. Oh, yes; his father came in—

The Vice-Chancellor: Do not tell what the father said to you.

A. His father and mother, brother and one of his married sisters and a detective came in—I found later that that detective was from the City Hall—and the detective said to me—

Mr. Herrmann: I object.

The Witness: Well, I don't know how to tell the story.

Q. Well, I have asked you to state what was done, not what was said? A. Why he wanted me to go—

Q. Who did? A. The detective.

By the Vice-Chancellor:

Q. What was done—what did he do—did he lay

Loretta V. O'Brien, recross.

hands on you, or choke you, or what? A. Oh, no; he just said that I had this trunk belonging to them, and I said no, it was my trunk; and then Mr. O'Brien's mother came in and she shoved me like that (indicating); I told her not to dare to do that.

By Mr. Hartpence:

Q. Well, tell us what was done, if anything, to exclude you from the hotel at that time; did anybody try to put you out? A. No, not at that time.

Q. Did they at any time? A. In the very beginning.

Q. When? A. In 1922.

Q. Well, as the result of this little situation you have just described, did anything result from that about your leaving the hotel? A. No.

The Vice-Chancellor: You are speaking of 1926?

Mr. Hartpence: 1926.

Q. And you stated, in your cross examination, that you were willing to effect a reconciliation with your husband if he turned over a new leaf? A. Yes.

Q. And were all these efforts that you speak of toward reconciliation based upon that? A. Absolutely.

Q. And, with regard to the securing of evidence affecting Mr. O'Brien, was that done after you felt that your efforts at reconciliation had been futile? A. Yes.

Recross examination by Mr. Herrmann:

Q. When did those efforts of yours to get evidence begin? A. Oh, I guess after I was there four months.

Loretta V. O'Brien, recross.

Q. So you did begin to get evidence against Mr. O'Brien? A. I wouldn't say exactly *I* began it; Mr. Hoey actually started it.

Q. Well, you agreed to it? A. Oh, yes, I agreed to it when he started it.

10

By the Vice-Chancellor:

Q. Were you then endeavoring honestly to effect a reconciliation, or were you endeavoring to obtain evidence against him which would be the basis of a suit for divorce which you might bring against him? A. Well, I was really anxious for a reconciliation at all times.

Q. Notwithstanding that you might feel that he was guilty of some act of infidelity? A. Well, yes, I think even could have forgiven that.

20

By Mr. Herrmann:

Q. Well, why didn't you say to Mr. Hoey, "No, I want a reconciliation"? A. He knew that; I told him that.

Q. Why didn't you say that to him? A. I did say that to Mr. Hoey.

Q. Well, then, why did you go there to see him after that? A. I did not, after that.

Q. Well, you saw him several times, you say? A. Yes.

30

Q. When did you say it on these several times—the first or the last time? A. Oh, the first or second time.

Q. You did see him, then, afterwards, didn't you? A. Well, I saw him several times; I don't know just how many.

Q. If you were genuinely anxious to restore this companionship with your husband, why would you listen to anyone try to tell you that they

40

Loretta V. O'Brien, recross.

would get the goods on him? A. Because my husband did not pay any attention to me, at all.

10 Q. Why did you say to Mr. Hennessy, when he said to you, "I can testify to certain facts that will win your case," why did you say "All right, I will pay for your time to go to court"? A. Why, folks told me to bring all the witnesses we could procure.

Q. But he was not looking for a reconciliation, and you were—why, if you were genuinely looking for a reconciliation, were you willing to listen to these people? A. Well, I was genuinely looking for one.

20 Q. How could you be genuinely looking for a reconciliation, and, at the same time, be making an effort to get the goods on your husband? A. Well, I say I don't know why I was, but I was.

Q. That is the best answer you can give? A. The best answer.

Q. Your position was not much different after the decree was signed than before you were married. Where did you live before you were married? A. In the Bronx.

Q. With whom? A. With my mother and father.

30 Q. And you were supported by them? A. Yes.

Q. You did not work? A. No.

Q. So that after this decree was entered you were still living with your father and mother? A. Yes.

Q. You actually lived with Mr. O'Brien about eleven days at the hotel? A. Three weeks, all together.

40 Q. It was over a period of three weeks, but, actually, you were only together eleven days with Mr. O'Brien? A. About that.

Loretta V. O'Brien, recross.

Q. And all you did was live in this hotel room?

A. Yes.

Q. You had no furnished apartment? A. No.

Q. You had no abode that was specially established for you? A. No.

Q. So that when you say you were without any means of support, after the earlier decree was dismissed, it was just the same as when you were not married? A. No, it was not the same. I went back to my people. It was entirely different when I was home single, and when I came back married it was a different story altogether. 10

Q. They did not refuse to support you? A. Well, they were not keen about it; they thought it was my husband's place.

By Mr. Hartpence: 20

Q. Did your religion, or religious scruples, have anything to do with your desire to effect this reconciliation, if it could be accomplished on proper terms?

Mr. Herrmann: Objected to as very leading.

The Vice-Chancellor: I do not think it can harm you, Mr. Herrmann, so I will overrule the objection. The reason I am doing it is because I see many references in these papers before me about her Catholicity, and there is also a recital in the bill of complaint filed in this suit, or in some paper here that I have read, that, because of her Catholicity she was sincerely desirous of trying to effect a reconciliation. That is the reason I am permitting it. 30

A. Yes, because I knew that, in our religion, once 40

Loretta V. O'Brien, recross.

married we are always married; the church recognizes divorce, but not remarriage.

By the Vice-Chancellor:

10 Q. What is meant by counsel qualifying his question by "if it could be accomplished on proper terms; "what does that mean; what did you have in mind when you say that you would effect a reconciliation if it could be effected on proper terms? There seems to be some sort of consideration you add to it, apparently, I see, from that remark, and I am wondering what you had in mind?
A. Well, what I meant by that was if my husband would lead the right kind of life.

20 Q. Well, in these talks which you had with your husband about reconciliation, which you say were in June, 1926, and also September, 1926, was there any such qualification made by you—in your talks with him? A. No; in fact, the only conversation I had with him was in June, and then once out in the hall.

Q. Well, you said something to the effect that you were willing to "cut the ice," or something of that kind? A. Yes.

30 Q. Just tell us all that was said at that time? A. I went down, and I told him that—"Tom, let us break the ice, and see if we can't effect a reconciliation and get together."

Q. Were you, at that time, sincerely desirous of effecting a reconciliation with your husband and taking up again your life with him as a wife, notwithstanding all that had gone on before? A. Yes, sir, if he had lived the right kind of life.

40 Q. You are saying that "if he lived the right kind of life"—I have no right to consider what you are driving at about "the right kind of life," I have

Loretta V. O'Brien, recross.

no evidence before me as to that. Now, you realized, did you, that in the previous suit you charged your husband with acts of degeneracy, and other matters which you charged to be cruelty—you recall that, do you? A. Yes.

Q. And you did realize, did you not, that the Court decided that matter against you? A. Yes, sir. 10

Q. Now, inasmuch as you made those charges, and the Court decided the matter against you, indicating thereby that your charges had not been proven, were you still desirous, or were you then desirous of becoming reconciled with your husband and living with him, without regard to what you had said against him before, or without regard to what he may have done before? A. Yes, sir. 20

Q. Did you ever say so to him? A. No, I did not say that to him.

Q. Did you ever express any sorrow to him for the insinuations or accusations you had made against him? A. No, sir.

Q. Did you still believe they were true? A. Yes.

Q. And did you tell him you believed they were true? A. Well, at the time the trouble first started I did.

Q. I mean after the decree? A. No, I had no conversation with him about it, at all. 30

Q. In the bill that is filed in this suit I find Paragraph 6 says that you testified in the former case you stated that you were ready and willing and desirous of going back to live with your husband provided he would cease and refrain from certain acts of unnatural and congenital cruelty toward you? A. Yes.

Q. And that when he was asked whether he was ready and willing to take you back and live with 40

Loretta V. O'Brien, recross.

you, he stated he would have to consult with his counsel, but he never made any reply to any questions in which he stated any willingness or desire to live with you—is that right? A. Yes, that is right.

10 Q. Now, you say that after the decree was signed you again expressed your willingness to take up housekeeping and live with your husband, did you? A. Yes.

Q. When was that? A. That was in June, 1926.

Q. Well, do you want me to understand, then, that notwithstanding that you believed those accusations that you made against him in your suit to be true, you, nevertheless, in June, 1926, were sincerely desirous of taking up housekeeping and living with your husband, without any qualification at all? A. Well, in the hope that he would reform.

Q. Well, I mean did you couple up any words to indicate that? A. No, we had no words about that.

Q. Now, in the former suit, after your petition was originally filed, it is said, in some of these papers that I have been reading here—the pleadings—that you filed an amended bill in which you made additional accusations of a similar kind against your husband—do you recall that? A. I really do not.

Q. Do you recall supplementing your petition by making additional charges against your husband? A. I cannot say about that.

Q. Well, do you recall that your husband made any overture to you during the pendency of the former suit to have you drop the suit and go back and live with him? A. No, he never made any offer like that.

40

Loretta V. O'Brien, recross.

Q. Well, in the affidavits that were presented to me here, on the application for alimony or counsel fee, or whatever it was, my recollection is that there is a letter bearing date May, 1923 (as I recall the date), which you wrote to your husband's counsel, saying that you positively, or absolutely (whatever the word was) would not resume marital cohabitation with your husband again—do you remember that? A. I wrote to Mr. Goldenhorn. 10

Q. Well, was that letter written in relation to some request made by your husband to you about your forgetting the past and taking up living with him again? A. No, nothing that I know of. I have just forgotten how that letter was written. I know I wrote to Mr. Goldenhorn, and when I was in court Mr. Herrmann had it. 20

Q. Well, what was your attitude of mind during the pendency of the former suit—had you any desire to live with your husband again, or did you want to get rid of him? A. No, I really did not want to get rid of him, because I knew it would do me no good.

Q. But you had this suit against him, and were seeking a divorce because of certain acts you charged against him—is that right? A. Yes. 30

Q. I ask you again, did he make any overtures, during the pendency of that suit, to induce you to drop the suit and take up living with him again? A. No, never to me.

Q. Did he ever make any effort, at any time, to induce you to return again to live with him and forget the things you had said about him? A. No, never; never once.

Q. Was it brought to your attention at any time that your husband, in a pleading filed by him in the former suit, expressed doubt as to whether you 40

Loretta V. O'Brien, recross.

actually were responsible for some of the accusations made in your pleading against him? A. I think he did accuse my attorney of doing some of them; I think so; I am not sure about it.

10 Q. Then these accusations that you made against your husband were actually of your own accord, and without any suggestion or influence upon the part of anyone else? A. Yes, absolutely.

By Mr. Herrmann:

Q. Now, Mrs. O'Brien, is it not the fact that when the first petition was filed—

20 The Vice-Chancellor: By the way, pardon me—the reason I have asked these questions is because I think somebody suggested at the last hearing that there should be introduced in evidence the record in the previous case—is not that so?

Mr. Herrmann: Yes, sir.

The Vice-Chancellor: I thought so, otherwise I would not feel warranted in asking those questions based on the other pleadings. By the way, have they been offered in evidence?

30 Mr. Herrmann: I understood they were already in evidence.

Mr. Hartpence: I don't know; I think Mr. Herrmann said it would be impossible to conclude the trial without putting them in evidence.

40 The Vice-Chancellor: Well, the only reason I am asking the question is because, if they are not in evidence, I do not think I ought to have asked some of those questions that I asked based upon the pleadings in the former suit.

Loretta V. O'Brien, recross.

Mr. Herrmann: If they are not, I will offer them in evidence now.

The Vice-Chancellor: Is there any objection to these papers being offered in evidence?

Mr. Hartpence: No. 10

The Vice-Chancellor: If they are not already offered, then it is considered that they are offered in evidence in this suit?

Mr. Herrmann: Yes, sir.

Mr. Hartpence: Yes, sir.

By Mr. Herrmann:

Q. Now, Mrs. O'Brien, I have in my possession the original petitions filed in the earlier suit, and you say that the charges which were made in those petitions were made by you and not by your counsel? A. Absolutely. 20

Q. So that when your husband testified on the stand that he did not believe until that day that those charges were made by you until he heard you testify out of your own mouth, you now, without qualification, say that they were made by you? A. Yes, they were made by me.

Q. In your first petition your charge was that your husband was a degenerate, alone? A. Yes. 30

Q. I find, in your second petition—

The Vice-Chancellor: What do you mean by the "second petition"?

Mr. Herrmann: The amended petition, filed.

Q. I find, in your amended petition, which was filed on November 18, 1922, in addition to that you added this charge: "Because of his extreme cruelty to her as hereinafter set forth, and because 40

Loretta V. O'Brien, recross.

10 she discovered that he had been guilty of adultery with one Mrs. Brown, whose Christian name of Mrs. Brown is unknown to your petitioner, the said acts of adultery having taken place in Atlantic City at divers times in the months of May, June, July and August, 1922, at the Hotel DeVille and Hotel Monticello"—did you furnish that information? A. No, I did not furnish that; Mr. Goldenhorn told me he had been informed about that.

Q. You did not furnish that? A. No, I did not furnish that.

Q. In the supplemental petition you also charged him with having committed adultery with his partner, didn't you? A. I said I had been so informed.

20 Q. And didn't you also say that he had an abortion on Mrs. Boss' daughter, twelve years old? A. Twelve years old? I guess she is twenty-five or six years old. I had been informed about that, too, I said.

Q. And that was while you were testifying, and after you made this offer of reconciliation, that you furnished your counsel with that information about Miss Boss, wasn't it? A. I don't think it was.

30 Q. Was that before? A. I cannot really say; I don't remember the time, at all. I remember at the time I heard about it I told Mr. Goldenhorn.

Q. You do not recall whether it was before or after that you furnished the charges against Mrs. Boss and her daughter? A. No, I do not recall that.

Q. You say you do not quite recall how it became necessary for you to write this letter to Mr. Goldenhorn—let me refresh your memory, and see if it refreshes it at all—

40 The Vice-Chancellor: That is not in evidence, you know.

Loretta V. O'Brien, recross.

Mr. Herrmann: Well, your Honor referred to a letter.

The Vice-Chancellor: "A letter," but I don't know whether it was that letter, and I referred to it because of some statement in an affidavit presented here.

10

Q. Do you recall a letter which was offered in evidence in the other case? A. Yes, I do.

Q. And you admitted in that case that you had written this letter? A. To Mr. Goldenhorn, yes.

Q. And you testified, as I recall it, to the circumstances under which you wrote it, didn't you? A. I don't recall that.

Q. Well, do you recall that you said that Mr. Goldenhorn had told you that I, as Mr. O'Brien's attorney, was very anxious to have talk with you and see if I could effect a reconciliation? A. Yes, I recall that.

20

Q. Mr. Goldenhorn did communicate that to you—that I had asked him for an opportunity to meet you, with Mr. O'Brien, and see if there was a— A. (Interrupting.) No, he did not say "with Mr. O'Brien," he said just you, alone; I recall that distinctly.

Q. And that was before there were any hearings, wasn't it? A. I cannot say about that.

30

Q. And, knowing that I was there for that purpose, you declined to meet with me, and stated that "there is absolutely no possibility of a reconciliation, it being against my religious principles, and, in addition to that, being dangerous to my health, I trust, Mr. Goldenhorn, that you will not request me again to reconsider this, as my mind has been made up from the beginning"? A. Yes, I wrote that; what I meant by that was that I would only live a natural life.

40

*Virginia Kennedy, direct.**By Mr. Hartpence:*

10 Q. And when Mr. Herrmann read that letter in full to you on the other hearing, Mrs. O'Brien, and said "So that, from the beginning you had determined there was no possibility of a reconciliation?" you answered, "From his conduct, yes," did you not? A. Yes, sir.

Q. And when the Court, right after that, asked you the question, "When you wrote that letter, had you in mind continuing that same kind of conduct that you complained about?" your answer was "Yes, sir," was it not? A. Yes, sir.

20 Q. "Q. Was that what you meant when you said you could not go back and live with him?" and your answer was "Yes, sir"? A. Yes, sir.

Q. And Mr. O'Brien was in court, and was present, and heard that, didn't he? A. Yes, he heard that.

VIRGINIA KENNEDY, sworn.

Direct examination by Mr. Hartpence:

30 Q. Where do you live, Miss Kennedy? A. Why, at the time of the case—

Q. Where do you live now? A. Kew Gardens, Long Island.

Q. Do you know Mrs. Loretta V. O'Brien, the complainant in this suit? A. I do.

Q. How long have you known her? A. About three years.

Q. Do you know Mr. Thomas M. O'Brien, the defendant in the suit? A. Now, yes.

40 Q. When did you first become acquainted with him? A. On June 17, 1926.

Q. Where, and under what circumstances? A.

Virginia Kennedy, direct.

At the Hotel DeVille, when I went there with Mrs. O'Brien.

Q. Where is that located? A. In Atlantic City.

Q. And did any conversation take place between you and Mr. O'Brien at that time? A. Yes.

Q. What was it? A. The first time I saw Mr. O'Brien at the desk when I first went in; Mrs. O'Brien asked me to ask for Mr. O'Brien. 10

Q. Now, what did she ask you to ask him—just state what the conversation was between you and Mr. O'Brien? A. I went up to the desk and asked the clerk to please tell Mr. O'Brien that Mrs. Thomas O'Brien, his wife, wished to speak to him, and Mr. O'Brien came behind the desk; Mrs. O'Brien and I were standing in front of the desk; and she said to him,—“Won't you come out in front,” and Mr. O'Brien came out in front of the desk, and she said, “Hello Tom!”— 20

Q. Now, this is the conversation that took place then between Mr. and Mrs. O'Brien, is it? A. Yes.

The Vice-Chancellor: All in her hearing?

Q. You heard the conversation, did you? A. Yes, I heard everything that was said; I was there all the time. 30

Q. State what took place then in the conversation between Mr. and Mrs. O'Brien? A. Mrs. O'Brien said,—“I came down to break the ice, as long as you have not made any attempt to make up, and to effect a reconciliation,” and Mr. O'Brien said,—“No, Loretta, you have placed the thing in the hands of the lawyers, let them take care of it”; and then she said,—“Won't you have dinner with us this evening?” and he said,—“Oh, no; not tonight or any other night.” He repeated that she 40

Virginia Kennedy, cross.

had "placed it in the hands of a lawyer, and let the court finish it."

10 Q. Did you have any further conversation with Mr. O'Brien after that? A. Why, the next evening, after dinner, I went down and asked Mr. O'Brien if Mrs. O'Brien could speak to him alone for a minute; and he said, "No, positively not." That was all.

Q. Where did you stay that first evening you were there? A. At the Hotel DeVille.

Q. Whom did you stay with? A. With Mrs. O'Brien.

Q. How long did you stay there with her? A. I stayed there with her for one month.

20 Q. During that time, did you observe whether or not Mr. O'Brien talked with Mrs. O'Brien? A. Oh, no, he never spoke to her at all.

Q. Did you see him when Mrs. O'Brien was present? A. I was always with Mrs. O'Brien, all the time.

30 Q. Well, you say he never spoke to her, at all? A. I mean he never spoke to her outside of the first evening when we arrived, and then, I believe, one morning in the hall we bumped into him accidentally, and she said something pleasant, and he disregarded it entirely.

Q. When you say he did not speak to her, was he around where she was so he might have spoken to her? A. Why, yes, of course, he was there all the time.

Cross examination by Mr. Herrmann:

40 Q. How long had you been at that hotel before Mr. O'Brien was sent for by you? A. I went into the hotel about lunch-time.

Q. When you went in at lunch-time you did not

Virginia Kennedy, cross.

see Mr. O'Brien, then? A. Yes, I did; I mean, I saw him, but he did not know me, of course.

Q. Well, how did you know him? A. Why, I knew him from his description.

Q. You had never seen him before that? A. No, I had not. 10

Q. So you knew Mr. O'Brien from the description alone? A. Yes.

Q. There were a number of other people in that office, weren't there? A. No, not around the lobby at that time.

Q. Was not Mr. O'Brien's brother there as a clerk? A. No.

Q. Who was the clerk there that day? A. Mr. Boss. 20

Q. Is he here today? A. No.

Q. You did not let Mr. Boss or Mr. O'Brien know you were coming, and I understand you were alone? A. I was.

Q. Just tell us what you said to Mr. Boss when you went to the hotel? A. I said, "I would like to have a double room," and I said, "I would like to see the double room," and he showed me a double room—I said "for two girls, myself and a friend"; and I registered and took the things up, and went down and had lunch. 30

Q. You did not then say,—“I am down here to take a room for Mrs. O'Brien and myself,” did you? A. No, sir.

Q. Why? A. Why, I did not think it was necessary to tell him why I was there.

By the Vice-Chancellor:

Q. Well, why, if you were down there sincerely in Mrs. O'Brien's behalf, to enable her to effect a reconciliation with her husband, should you con- 40

Virginia Kennedy, cross.

ceal anything from him? A. Well, I didn't do it intentionally, I just did not say anything; I just said I wanted a room.

Q. "For you and your lady friend," you say?
 A. I said, "For two girls"; and he said, "Where
 10 is the other one?" I said, "She will be here later."
 That was all. He did not ask me her name, or
 anything, and I did not tell him.

By Mr. Herrmann:

Q. You did not tell him, then, did you? A. No.

Q. So Mr. O'Brien had no idea Mrs. O'Brien was
 coming, from anything you said? A. No, he did
 not.

Q. And you did not want him to know? A. I
 20 did not do anything intentionally; it did not affect
 me, either way; I did not tell him.

Q. How did he know you were coming down
 with the wife of the owner of the hotel—did you
 think this unconventional way of getting a room
 was the proper way to get it?

Mr. Hartpence: That is objectionable.

The Vice-Chancellor: That is a little
 argumentative.

30 Q. Tell us why you did it that way? A. Why I
 did what?

Q. Why you registered in the manner in which
 you did, without developing the fact that Mrs.
 O'Brien was to be with you? A. Well, Mrs. O'Brien
 thought that was the best way.

Q. Oh, Mrs. O'Brien thought that was the best
 way? A. Well, we thought it was the best way;
 I don't know why we did it.

40 Q. Did Mrs. O'Brien tell you to do it that way?
 A. Not directly.

Virginia Kennedy, cross.

Q. Well, what did you mean by it when you said "she thought it was the best way to do it"?

A. Well, we thought it was the best way, then.

Q. Then you had discussed with one another as to how you should do it? A. A little.

Q. Now, tell us what Mrs. O'Brien said with respect to that? A. Well, I don't remember exactly what she said, it is such a long time ago; going down, she just said I would go and get the room and she would meet me later, she wanted to stop in the church. 10

Q. Did not Mr. O'Brien act surprised when you sent for him? A. I don't know that he did act surprised; he just came out the same as you would do.

Q. What did you say to the hotel clerk then? A. When? 20

Q. When you sent for Mr. O'Brien? A. I said, "Will you kindly tell Mr. O'Brien that his wife, Mrs. Thomas M. O'Brien, is here to see him."

Q. And where was Mrs. O'Brien then? A. She was right there with me, in front of the desk.

Q. So it was you said that, and not Mrs. O'Brien who said it? A. Well, I said it before, the same thing.

Q. Now, then, did not Mrs. O'Brien hide behind you? A. Oh, no. 30

Q. You are sure of that? A. I am positively sure; we were both standing there; there wasn't any place to hide in the lobby of the hotel.

Q. Was Mr. O'Brien surprised to see his wife there? A. He did not act surprised.

Q. Was there anything said by anyone to you as to the manner in which you hired the room there? A. Do you mean, at that time? 40

Q. Yes. A. No.

Virginia Kennedy, cross.

Q. At any time after that? A. Yes.

Q. Who said it? A. Why, Mr. O'Brien's mother, I believe it was.

By the Vice-Chancellor:

10 Q. You had known Mrs. O'Brien, at that time, about one year, had you? A. Well, about that.

Q. Because you say now you have known her about three years in all? A. Yes—that was about two years ago—yes.

Q. Were you employed in any way at that time? A. No, sir.

Q. You were not acting as a detective for Mrs. O'Brien, were you? A. No, sir.

20 Q. Were you an acquaintance, or companion of hers, in any way, for a year prior to that? A. Why, yes; it just happened she had lost her mother, and I had lost my mother the next month, so we had something in common, and that is why we were really so close to each other.

By Mr. Herrmann:

Q. You remained there a month, I understand? A. Yes, sir.

30 Q. Under what circumstances did you pay for the first week? A. Why, I paid, I expected to pay when I went there.

Q. But you did not pay after the first week, did you? A. Well, Mrs. O'Brien said she would be glad to have me stay as her guest, and I accepted.

By the Vice-Chancellor:

40 Q. Well, did you expect to pay, or didn't you go down with Mrs. O'Brien with a preconcerted idea of having her meet her husband? A. I went down, of course, with the idea of her meeting her

Joseph A. McCarthy, direct.

husband, but I did not expect her to keep me there, necessarily.

JOSEPH A. McCARTHY, sworn.

Direct examination by Mr. Hartpence:

10

Q. Where do you reside, Mr. McCarthy? A. Jamaica, Long Island.

Q. How long have you lived there? A. I have lived in Jamaica five years.

Q. Do you know Mrs. Loretta V. O'Brien, the complainant in this suit? A. She is my sister.

Q. Do you know Mr. Thomas M. O'Brien, the defendant? A. Yes, sir.

Q. How long have you known him? A. I should judge, since 1920.

20

Q. Do you recall when they were married? A. Yes, sir.

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

Q. Do you recall the date of the marriage? A. No, I do not.

Q. Where had your sister, Mrs. O'Brien, lived prior to the marriage with Mr. O'Brien? A. She lived with us—my mother, father, brother and myself.

30

Q. Where were you living then? A. In the Bronx.

Q. New York City? A. New York City, yes, sir.

Q. Is your mother still living? A. No, she is dead.

Q. Is your father still living? A. Yes, sir.

Q. Is he employed? A. He is retired.

Q. Retired on a pension? A. On a pension; yes, sir.

40

Joseph A. McCarthy, direct.

Q. He was a lieutenant of police, was he not, in New York City? A. In New York City, yes, sir.

10 Q. After the marriage of your sister and the defendant in this case, Mr. Thomas M. O'Brien, did any difficulty between them come to your attention? A. Well, when she came home the first time, that is all I made out.

Q. How long was that after she was married? A. I should judge, around three weeks.

Q. Well, you say "when she came home the first time"—did she come home again later on? A. I just cannot recall that.

20 Q. Well, did she go back with Mr. O'Brien after that time that you have just referred to, about three weeks after the marriage? A. I believe she did; I believe she and my mother went back to the hotel.

Q. Well, didn't, later on, your sister come back to your family to stay? A. Oh, yes, she came back and stayed altogether.

Q. Do you recall about when that was? A. I should judge, somewhere in 1922.

30 Q. Do you know where she has lived since that time? A. Well, except for a few months, on vacation in different places, she has lived with us.

Q. When you say "us," whom do you mean? A. My mother and father, when my mother was living, and now she is living with my father, my brothers and myself.

Q. Do you recall her going back to the Hotel DeVille in July, 1926? A. I do.

Q. How long did she stay, to your knowledge? A. Well, she was away five months—four or five months.

40 Q. Where did she go after that, do you know? A. She came back to us.

Joseph A. McCarthy, direct.

Q. How long has she been with you now, continuously? A. Do you mean with my father and I?

Q. Yes. A. About two years in Jamaica; we moved to Jamaica—from the Bronx to Jamaica.

Q. Can you fix, approximately, when it was that she came back, after she stayed the period you referred to, about five months, at the Hotel DeVille? A. Well, she came back right before Christmas, two years ago. 10

Q. When was it? A. 1926—about a week before Christmas she came back.

Q. And she has lived with you and your father ever since, has she? A. Yes.

Q. Do you know who supported her during that time? A. My father and myself. 20

Q. Has your sister been employed anywhere? A. Well, I believe she was down to Atlantic City for about a month, or something like that, but her health gave out, and she had to give it up and come home.

Q. What has been her condition of health, as you observed it, since she has been living with you?

Mr. Herrmann: Objected to, as incompetent. 30

The Vice-Chancellor: I do not think we ought to enter into that yet, Mr. Hartpence. If it becomes necessary I will afford you an opportunity of bringing that out.

Q. During these periods when you say Mrs. O'Brien has lived with you and your father, and mother during your mother's lifetime, and following the time that the difficulties arose between her and her husband, has Mr. O'Brien, to your knowledge, visited your sister at your home? A. No, sir. 40

Joseph A. McCarthy, cross.

Q. Or communicated with her in any way, to your knowledge? A. No, sir; she asked me to send him a telegram telling of mother's death; I did that for her.

10 Q. Did Mr. O'Brien attend the funeral? A. No, sir.

Cross examination by Mr. Herrmann:

Q. Who comprised your family before your sister married Mr. O'Brien? A. There was my father, mother, brother and myself—four of us—and my sister, five of us.

Q. And who comprise the family now? A. My father, my sister, and my brother and myself.

20 Q. The same, with the exception of your mother? A. The same, with the exception of the mother.

Q. Who has been maintaining your household for you since December, 1926? A. My father is only operating on a pension; I suppose it only amounts to about \$150 a month, or something like that; I am operating the biggest portion of it.

Q. Your sister never worked before she was married, did she? A. My sister never worked before she was married.

30 Q. And who is keeping house for you now? A. Well, she does, part of the time, and we have a woman that works.

Q. Well, your sister is actively in charge of your household, instead of your mother? A. Well, no; she could not dictate what would go on in the household.

Q. Why? A. Because I don't think we would tolerate her.

40 Q. You do not mean to say you would not? A. Well, she might offer a suggestion, but I would not let her influence me, because I would go put an

Joseph A. McCarthy, cross.

ad. in the paper for a woman to come and work there.

Q. But you are employed during the daytime?

A. I am employed during the daytime.

Q. And you don't say that you run the household, outside of what you contribute, do you? A. Well, I finance it. 10

Q. But your sister has taken the place of your mother in the household, has she not? A. No, I would not say so; I would not make a maid out of her.

Q. Your mother was not a maid? A. Well, no, my mother was not a maid, no.

Q. Well, your sister takes the place of your mother now in the household there? A. Yes.

Q. That is true, is it not? A. Yes, just to supervise it. 20

Q. And, in addition to that, you employ a maid, do you? A. Yes, sir.

Q. To do all of the cooking? A. Cooking and cleaning up.

Q. You employed a maid during your mother's lifetime? A. Well, off and on.

Recess until two o'clock, p. m.

30

AFTERNOON SESSION.

Hearing of the cause resumed at two o'clock, p. m.

Mr. Hartpence: There is a deposition of a Catholic priest that is not here. I have a copy of it here. I wrote the Clerk and asked him to send it here.

Mr. Herrmann: Suppose you use the copy. 40

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Mr. Hartpence: If you have no objection. I specifically wrote to the Clerk, at your Honor's request, to send it back, but he did not do it.

10 The Vice-Chancellor: If you say the original has been filed, you may use the copy.

Mr. Hartpence: The original has been filed. It was marked filed by your Honor, if you remember, the day of the previous hearing, but you wished it to be sent to the Clerk's office, and also asked me to request the Clerk to send it back, but, for some reason, he did not.

20 The Vice-Chancellor: Well, I say it is not here, but I may have been mistaken (examining the file in the case); yes, here is the deposition, perhaps that is the one, is it?

Mr. Hartpence: Yes, that is the one.

The Vice-Chancellor: You can read the original, then, if you will.

30 Mr. Hartpence: I would like to state, first, before I start to read it, your Honor, that there are two aspects of Father Shean's deposition—one relates to the alleged interview with Father Shean shortly after the marriage, and when the difficulties arose, and as to what took place there; and the other is as to what Father Shean did after the termination of the former suit along the lines of a reconciliation. Now, it may be that your Honor does not feel that the first part of this ought to go in, because that was to be corroborative, you see, of
40 Mrs. O'Brien's testimony with regard to the

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original difficulties back in 1922. I do not want to read any portion of it on a misapprehension of what your Honor feels should go in.

The Vice-Chancellor: Was that witness a witness in the former suit?

10

Mr. Hartpence: No, sir; he was not, and that was the reason we took his deposition; Father Shean was not a witness in the former suit.

The Vice-Chancellor: Nevertheless, if the testimony was known, and was obtainable, they should have had it in the suit; they cannot leave it out, and then subsequently bring it in.

Mr. Hartpence: Oh, no, I do not mean that that should be done. Your Honor will notice, in reading the testimony in the former suit, that counsel, at that time, felt that the testimony of Father Shean was privileged, which, under the law of New Jersey, it was not, and that was the explanation to the Vice-Chancellor as to why it was not brought in; but if your Honor feels that so much of his deposition as was intended to be simply corroborative of Mrs. O'Brien's story, if retold here today, is not admissible under your former ruling, I do not want to read it.

20

30

The Vice-Chancellor: No, I do not think it can be admissible under the ruling which I have made, and which is the ruling, as I understand it, to be applicable to this case; so you had better read that portion relevant to the subsequent matter.

40

Mr. Hartpence: If your Honor will just

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let me have an objection to the overruling of my offer to read it—

The Vice-Chancellor: You are offering to read it, and I am adhering to the former ruling.

10 Mr. Hartpence: Then I will read just that part as to what took place up to the former decree.

20 (Mr. Hartpence thereupon read the portion of the deposition referred to, of Rev. John T. Shean, of Lawrence, Mass., taken at Lawrence, Mass., on October 14, 1927, before Charles W. Weygand, one of the Masters of the Court of Chancery, in the presence of counsel for the complainant, and of L. Edward Herrmann, counsel for the defendant, pursuant to notice, beginning on page 5 of the deposition, ninth line from the bottom: "Q. (on direct examination.) Do you know Mrs. Catherine Weiss of Paulsboro? A. Yes," etc., to the end of the deposition.) (See p. 178.)

30 Mr. Hartpence: That seems to cover it, your Honor—the part referring to what took place up to the final decree. I should like to state to your Honor that this notice was attached to it, that Mrs. Catherine Weiss, who has been referred to by both Mrs. O'Brien and by Father Shean in his deposition, has been, for about a year the victim of paralysis, and at the time we endeavored to take her deposition we gave notice to the other side, and when we tried to take it her doctor absolutely refused to assent to the taking of the deposition, as a matter of his duty, feeling that it was not

40

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only a very, very detrimental thing to her health, but that it might really prove more than she could stand; and, under the circumstances, we did not care to press the taking of the deposition, feeling that even the vital rights of the complainant here ought not to be carried to such an extent as to endanger the safety and life of any person. Now we understand that she is somewhat better at the present time, but we have not yet been able to secure her attending physician's consent to the taking of the deposition without we are willing to take these serious consequences, and I spoke to Mr. Herrmann about it, and, subject to his correcting me if I am wrong, my understanding of it was that if it became material to take the deposition of Mrs. Weiss as to these efforts that she made to effect a reconciliation that have been referred to, if your Honor would continue the case until some later date before deciding it, we would arrange to take that deposition, if it is physically possible to take it. 10

The Vice-Chancellor: Well, we will see what the case will show. 20 30

Mr. Hartpence: Otherwise, we rest our main part of the case.

THE CASE FOR THE DEFENDANT.

Mr. Herrmann : I offer in evidence the letter, L. H., 1 for identification (exhibiting the same to opposing counsel).

Mr. Hartpence: I object to it as immaterial and irrelevant. 40

The Vice-Chancellor: I do not know what it is, so I cannot say anything about it.

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(The letter was thereupon read to the Court by counsel, who stated that it was addressed to "Mr. Thomas M. O'Brien, Hotel DeVille, Atlantic City, N. J." personally, registered on January 9th, 1926).

10 Mr. Hartpence: Addressed to the father.

Mr. Herrmann: Addressed to the father.

The Vice-Chancellor: What do you consider to be the materiality of that, in this particular case?

Mr. Herrmann: This was just before the decree was signed, and after the other case was finished and fully argued. It bears, of course, upon the reconciliation.

20 The Vice-Chancellor: What is there in that that bears upon that? All I can see there is a tirade of abuse on her part of his parents.

Mr. Herrmann: Well, it is put in to show her state of mind towards not only the defendant here, but towards the whole family.

30 The Vice-Chancellor: Well, in a number of places there there are some references to an intruding interference between her and her husband, and she indicates that if they mind their own business she and her husband could get along together,—do you think that is material to the maintenance suit, or on your cross petition?

Mr. Herrmann: No; it is on the maintenance suit.

40 The Vice-Chancellor: I doubt very much its materiality, but I do not want to shut it out, for fear it may be somewhat material, and I think I will receive that, Mr. Hartpence, over your objection, or subject to

Philip Robertson, direct.

your objection. My own impression is that it is not very material, if material at all.

(The letter was thereupon marked Exhibit D-1.)

PHILIP ROBERTSON, sworn.

10

Direct examination by Mr. Herrmann:

Q. Where are you employed? A. Now? I am doing laboring work now.

Q. Where were you employed between June, 1926, and December, 1926? A. Hotel DeVille.

Q. In what capacity? A. Bellman.

Q. During the time you were employed as a bellhop at that hotel was Mrs. O'Brien living there?
A. Part of the time Mrs. O'Brien was.

20

Q. Did you have any conversation with her with respect to her troubles with her husband? A. No, sir.

Q. Did you have any conversation with a detective? A. Yes, sir.

Q. Now, tell us the circumstances under which you saw that detective, and what he said to you, and what you said to him?

Mr. Hartpence: Objected to, unless it was in the presence of Mrs. O'Brien, and she heard it.

30

The Vice-Chancellor: How can that be material? She has repudiated the employment of a detective.

Mr. Herrmann: I will withdraw Mr. Robertson.

(The witness left the stand.)

40

Owen F. Boss, direct.

OWEN F. BOSS, sworn.

Direct examination by Mr. Herrmann:

Q. Mr. Boss, you were the clerk of the Hotel De-
Ville between June, 1926, and December, 1926? A.
10 Yes, sir.

Q. I show you an envelope addressed, "Owen
Boss, Clerk Hotel DeVille, South Atlantic Avenue,
Atlantic City, N. J.," registered; postmarked "At-
lantic City, August 18, 1926," and ask you if you
received that? A. Yes, sir.

Mr. Herrmann: I offer that in evidence
(exhibiting the same to Mr. Hartpence).

Mr. Hartpence: Objected to as imma-
20 terial and irrelevant and also incompetent.
It appears to be a letter written by someone
other than this complainant to Mr. Boss; I
cannot see how it can be competent to bind
the complainant in any way, shape or form.

Mr. Herrmann: Without reading it, will
your Honor glance at it (handing the letter
to the court).

The Vice-Chancellor: I will sustain the
objection.

Mr. Herrmann: The purpose in offering
30 this letter is this—the complainant has tes-
tified that she has had various meetings with
Mr. Hoey; she has denied that she ever re-
tained Mr. Hoey; Mr. Hoey is dead—if he
were alive I should surely call him; I would
be entitled to call him to contradict.

The Vice-Chancellor: Yes, but this letter
is written on the part of Hoey's National
40 Detective Agency, William M. Hoey, Di-
rector; it says, "We beg to advise you that

Owen F. Boss, direct.

we represent Mrs. Thomas M. O'Brien,"—surely you cannot prove an agency by any such means as that, or any declaration of Mr. Hoey, especially in the face of the repudiation of the agency by the petitioner.

Mr. Herrmann: Well, she goes this far— she says that she met this man, talked with him, consulted with him at his office— 10

The Vice-Chancellor: And he, apparently, so far as I can see thus far, seems to have been a volunteer. He apparently rendered her some service. She did not employ him; she did not pay him; she did not receive any reports from him.

Mr. Herrmann: Well, suppose we assume that he was a volunteer—a detective volunteer, if you please—if he goes and speaks to one of the boys in the hotel with respect to the relations between the complainant and defendants, it goes just as far as though he had been actually retained for that purpose. 20

The Vice-Chancellor: I think that goes too far afield, Mr. Herrmann; I cannot go along with you as far as that. If I were to admit this letter, which contains a statement that this detective agency is the agent of Mrs. O'Brien, it would lead to the introduction of the testimony, very likely, that you were about to offer of this bellhop, who may have had a talk with Hoey, not in the presence of Mrs. O'Brien, and of which she had no knowledge, perhaps; of course she could not be bound by why may have taken place between these two individuals. I certainly feel that it is not competent. 30

Mr. Herrmann: Your Honor will grant me an exception. 40

Thomas M. O'Brien, direct.

10 The Vice-Chancellor: There is no necessity for an exception in this Court. Furthermore, there is nothing before the Court to indicate that this man Hoey is dead, either, other than your statement a moment ago, and if he is alive, and until his death is shown, he is the one who ought to be brought here to testify to what he claims to be the agency, if he did so claim.

20 Mr. Herrmann: I had no reason to anticipate that the complainant was going to deny the agency; that is the reason I was not prepared on this matter. I am going to ask your Honor not to close this case until I have had a talk with the widow of Mr. Hoey; I am going to ask leave to take the testimony of the widow of Mr. Hoey. I had no knowledge of his death until this morning.

The Vice-Chancellor: If the case goes over for any reason at all, there is no reason why both of you should not have or be afforded an opportunity to take additional testimony. I am not sure it will go over. I will wait until the testimony is in to see what materiality it may have.

30 Mr. Herrmann: To bring the matter out clearly, I am going to call Mr. Thomas O'Brien for one question.

THOMAS M. O'BRIEN, sworn.

Direct examination by Mr. Herrmann:

40 Q. I show you a letter addressed, "Mr. Thomas O'Brien, Hotel DeVille, South Atlantic Avenue, Atlantic City," postmarked "Oct. 12/26," and ask you if you received that through the mail? A. Yes, sir.

Thomas M. O'Brien, direct.

Q. And the contents of it are just as they were when you received it? A. Yes, sir.

Mr. Herrmann: I offer that envelope and letter in evidence.

Mr. Hartpence: They are objected to, if your Honor please, on the same ground—the letter, the bill and the envelope—as incompetent as well as immaterial and irrelevant. It appears to be a letter written by someone other than the complainant, and received by Mr. O'Brien, and in the face of Mrs. O'Brien's testimony this morning that she never received any such communications.

10

The Vice-Chancellor: I will sustain the objection, because, as I read the paper, there is absolutely nothing in it to indicate that it has any reference to any services rendered to Mrs. O'Brien.

20

Mr. Herrmann: The bill is addressed to "Mrs. O'Brien," and the letter addressed to "Mrs. O'Brien."

The Vice-Chancellor: Oh, yes, and the envelope is addressed to "Mr. O'Brien."

Mr. Herrmann: Yes, but the enclosures were addressed to "Mrs. O'Brien."

30

The Vice-Chancellor: Well, in view of Mrs. O'Brien's denial of any employment of this party, I will sustain the objection.

Mr. Herrmann: I shall, of course, under these circumstances, have to ask leave to prove this, because it comes to me as an absolute surprise that there would be any denial of the agency.

The Vice-Chancellor: Well, we will see what the event may be at the conclusion of the hearing.

40

Michael Curran, direct.

MICHAEL CURRAN, sworn.

Direct examination by Mr. Herrmann:

Q. Where do you live? A. 18 South Kentucky Avenue, Atlantic City.

10 Q. During the months from June, 1926, to December, 1926, where were you employed? A. At the DeVille Hotel.

Q. As what? A. House-man.

Q. Did you ever have any conversation with Mrs. O'Brien respecting her relations with her husband during that time? A. Yes, sir.

Q. Will you state the circumstances under which those conversations took place?

20 The Vice-Chancellor: Better fix the time first.

Q. Can you fix the time of any definite conversation, other than "between June and December"? A. When I would be engaged in my duties in her room.

By the Vice-Chancellor:

Q. Well, what year, or what months, if you can tell us. A. During the summer.

30 Q. Summer of what year? A. '26.

By Mr. Herrmann:

Q. While you were engaged in your duties as house-man in her room? A. Yes.

Q. In the room occupied by her? A. Yes.

By the Vice-Chancellor:

40 Q. What would you be doing in her room, as house-man? A. Either cleaning the floor, or probably washing the windows.

Michael Curran, direct.

By Mr. Herrmann:

Q. Will you state these various conversations, and, if possible, fix the times? A. Well, Mrs. O'Brien had asked me on several occasions if I knew anything about Mr. O'Brien's private affairs—if he were going around with other women—if I had seen him running around with other women, and what he did at night-time. I told Mrs. O'Brien that I did not know anything about Mr. O'Brien's private affairs, I was there working, and I had never see anything wrong. 10

Q. Did she say anything else? A. Why that question of the five hundred dollars that Hennessey brought up, that was broached to me. Hennessey told me that— 20

Mr. Hartpence: I object to what Hennessey told him.

The Vice-Chancellor: Yes.

Q. Did you discuss this with Mrs. O'Brien? A. Yes.

Q. All right; tell us what she said about that?

A. Hennessey told me—

The Vice-Chancellor: Do not tell us what Hennessey told you, but tell us what you talked with Mrs. O'Brien about—you talked about Hennessey, did you? 30

The Witness: Yes, sir.

By the Vice-Chancellor:

Q. What did you tell her about Hennessey? A. I told Mrs. O'Brien that Hennessey was offered five hundred dollars for evidence against Mr. O'Brien.

Q. Is that just what you told her—what you have told me now? A. Yes. 40

Michael Curran, direct.

Mr. Hartpence: I move to strike that out.

The Vice-Chancellor: I will strike it out.
There is nothing to connect up Mrs. O'Brien
with this.

By Mr. Herrmann:

10

Q. Have you told the complete conversation,
now, with Mrs. O'Brien? A. I told Mrs. O'Brien
that Hennessey told me that he was offered five
hundred dollars through some agency—I couldn't
tell you directly what agency it was—that he was
offered five hundred dollars to get evidence against
Mr. O'Brien that he could produce in court to help
Mrs. O'Brien with her suit.

20

Mr. Hartpence: I move to strike that out.
The Vice-Chancellor: I will strike it out.
There is nothing here connecting Mrs.
O'Brien up with this.

Mr. Herrmann: He says he told this to
Mrs. O'Brien.

30

The Vice-Chancellor: He told Mrs.
O'Brien that Hennessey told him that five
hundred dollars was offered him by some
detective agency, he don't remember what,
if he would produce some information that
would be helpful to Mrs. O'Brien in her suit.
I do not see how that can possibly connect
Mrs. O'Brien with it. There has got to be
something upon her part, some affirmative
act on her part, either in spoken words or
conduct, which is going in any way to
ascribe these things to her.

40

Mr. Herrmann: I think the witness is
entitled to go on and say what Mrs. O'Brien
said.

Michael Curran, direct.

The Vice-Chancellor: Oh, that is all right, if you are going to bring out something else; I am only passing on what has come out thus far; if you are going to show now that Mrs. O'Brien said something which is going to couple up with this, and shows that she ratified and confirmed it, that is a different thing. 10

Mr. Herrmann: Yes, that is the only proposition.

Q. Go ahead—what did Mrs. O'Brien say in reply to that? A. I told Mrs. O'Brien that Hennessey had told me that there was five hundred dollars offered to him, and Mrs. O'Brien said she didn't offer five hundred dollars to Hennessey; and she told me on that occasion that Hennessey came to her and told her that when her case was coming up for a hearing that he would have a front seat and he would make Mr. O'Brien suffer. 20

The Vice-Chancellor: That is very interesting, from some point of view, perhaps, but it certainly is not evidential here against Mrs. O'Brien; unless you can couple it more than that I will have to strike it out. 30

Q. Was there any other conversation that you had with Mrs. O'Brien about Mr. O'Brien? A. Yes.

Q. Now, will you state what that was? A. Why, she asked me when—

Mr. Hartpence: I object, unless the time is fixed.

By the Vice-Chancellor:

Q. Is this also during the summer of 1926, that you are going to detail now? A. Yes. 40

Michael Curran, direct.

Q. That is as near as you can state it? A. During the summer; I cannot tell the month, no.

Q. What do you mean "during the summer"—between what months? A. Well, between June and the fall—between June and December.

10 Q. Well, you cannot give us any better statement as to when this conversation was had? A. No, because I have had several conversations with Mrs. O'Brien.

Q. Several conversations between June and December? A. And December.

Q. One of them you have already detailed? A. Yes, sir.

20 The Vice-Chancellor: I will permit it, and see what is coming.

Q. Let me ask you this—is the one you are going to detail now the second conversation you had with her, for you told us a previous conversation you had with her—was that the first conversation? A. Yes.

Q. Now you are going to detail the second conversation, are you? A. I couldn't tell whether it was the second or the third, but I will tell you what I do know relative to the conversation.

30 Q. Well, you are going to tell us some talk that you had with her in some conversation, are you? A. Yes.

Q. Well, go ahead? A. Why, Mrs. O'Brien met me and asked me if I knew that Mr. O'Brien was running around with anybody else, with any other woman.

Q. Cannot you tell us about where it was that she met you, to ask you? A. In the hotel.

40 Q. Where—at what part of the hotel? A. In her room.

George Howardell, direct.

Q. All right, go on? A. And she asked me if I knew that Mr. O'Brien was running around with any other woman; I said, "No," I said, "I don't know anything about his private affairs." I didn't, because I worked there.

Q. You are telling us the conversation? A. Yes, sir; and Mrs. O'Brien said to me, she said,—“I understand, and I have heard from some other sources, that Mr. O'Brien was running around with somebody else.” 10

Q. She was trying to get confirmation of it from you? A. Probably I said I didn't know; neither did I.

By Mr. Herrmann:

Q. Are there any other conversations with respect to Mr. and Mrs. O'Brien that you had with Mrs. O'Brien? A. No. 20

No Cross Examination.

GEORGE HOWARDELL, sworn.

Direct examination by Mr. Herrmann:

Q. Where do you live, Mr. Howardell—the address? A. 150 Westminster Avenue, Atlantic City. 30

Q. Where were you employed during the Summer of 1926, between June and December? A. At the Hotel DeVille; I was Room Clerk, or Night Clerk, I mean.

Q. During that time did you have any occasion to speak with Mrs. O'Brien? A. Yes, a few.

Q. Can you fix a time when you had a conversation with her? A. No, I cannot.

Q. Will you state what she said to you, and what you said to her? 40

George Howardell, cross.

Mr. Hartpence: Objected to, unless a more definite time is fixed. It might not have any bearing on the case.

The Vice-Chancellor: You had better fix some time.

10 Mr. Herrmann: 1926—I fixed the time, between June and December.

The Vice-Chancellor: I will admit it, then.

A. Do you want just as much of the conversation as I recall?

20 Q. Yes. A. She stated, on one occasion, that she thought some of her troubles had been due to some bad advice received from various people; and once or twice various questions was asked that she had heard from other people, and she asked me if I knew anything of them.

Q. Go on—tell us what she said? A. She asked me in regard to his companions, who he had been going with, and what sort of people they were, to which I replied I could not say.

By the Vice-Chancellor:

30 Q. All right—anything else? A. Again, I was asked if there was anything I knew which could be used against him, to which I replied, "No."

By Mr. Herrmann:

Q. Go ahead—do you recall anything else? A. I don't think I do.

Q. Now, then, were any of these conversations immediately after she came to the Hotel in June?

A. No, they were later, during August and September.

40 *Cross examination by Mr. Hartpence:*

Q. Where did these conversations take place,

George Howardell, cross.

Mr. Howardell? A. On the Hotel porch, the front porch.

Q. And who was present, beside you and Mrs. O'Brien, on these occasions? A. A young lady she had stopping with her, two or three times.

Q. Miss Kennedy, the sister of the young lady who testified here this morning—is that right? A. Yes. 10

Q. And what she said to you, and you said to her, was said in the presence of this other young lady, wasn't it? A. Not always; not on all occasions. Some of it was.

Q. But always on the front porch of the Hotel? A. That was all. Once I was down to Mrs. Weiss's house, at which we had something, but I do not recall. 20

Q. You do not recall what that was? A. No; Mrs. Weiss was present there, and the sister, and also the daughter.

Q. And don't you recall, on these several occasions, when Mrs. O'Brien did speak to you about her troubles, and when Miss Kennedy was present, her asking you to see if you could not do something to help bring about a reconciliation? A. Yes, I believe I do.

Q. And what was it that you went down to Mrs. Weiss's house for on these occasions? A. To see her daughter. 30

Q. And didn't you also go down to see whether, with Mrs. Weiss, something could be done to help bring about a reconciliation with Mr. O'Brien? A. That was not the primary reason; that was incidental.

Q. Well, what was said about that? A. Why, there was nothing—pardon me—only that perhaps I might be able to do something with Tom, which 40

George Howardell, cross.

I had lived next door to him, and I know him very well.

Q. What did you do—anything? A. No, I frankly did not believe it was any of my business, so I said nothing.

10 *By the Vice-Chancellor:*

Q. Did you say Mrs. O'Brien asked you if you would do something? A. Yes, I did.

Q. And you led her to believe that you would—is that what you said to her? A. No, I did not.

Q. What did you say to her when she asked you if you would endeavor to intercede for her? A. I said Mr. O'Brien had many moods, and sometime, if I felt it was favorable, I would speak to him about it.

20 Q. Well, did you report to Mr. O'Brien these matters and these conversations you had with his wife? A. I did not.

Q. When did you first make known those to him? A. Within the last few weeks.

Q. Within the last few weeks from now, from this period? A. Yes; of course I know, before that, I had been talking with him, but nothing was ever asked of him.

30 Q. Did you volunteer this information to him, or did he find out that you had been talking with his wife? A. Well, they knew that, naturally, because the conversations were held upon the hotel porch, where we could easily be seen by anyone.

Q. Well, if that be so, then, Mr. O'Brien ought to have known something about it previous to two weeks ago, oughtn't he? A. Well, no; not necessarily.

40 Q. Well, how did this come to his attention—did he tell you that you were informed of anything

George Howardell, cross.

that might be helpful to him in this case? Are you here under subpoena? A. No.

Q. Well, tell me, if you will, what he said to you that indicated that you should come here today, or that you might be helpful to him in this case?

A. Why, I knew that this was probably nearing the ending. 10

Q. Just what do you mean by that? A. Well, probably the case would be coming to a close very soon, and something would be settled.

Q. Who told you it was to be settled? A. Why, I just used that word for the lack of a better one.

Q. You do not seem to remember when these conversations were had, I mean the particular times, do you; do I understand you to say it was between August and September, 1926? A. Yes, sir. 20

Q. How do you fix that time? A. Because I left the 1st of October, and I became acquainted with her in those last two months—during the last of August and during September.

Q. You were not asked by Mr. O'Brien to throw yourself in her company, were you? A. No, I was not.

Q. And did she volunteer the conversations with you, or did you bring up the conversations with her? A. Well, from what I remember, they just came naturally, as talk would, of a thing which we both knew something of and were probably interested in. 30

Q. But you say you did not consider it any of your business, and you did not want to be concerned about it—was that what your attitude was at the time? A. Certainly; but surely I would not ignore her.

Q. You knew Mr. O'Brien pretty well at that time, didn't you? A. Very well. 40

George Howardell, cross.

Q. And notwithstanding you had these conversations with her, in which she tried to obtain from you some information which might be detrimental to him, you say you did not tell him? A. Not at that time.

10 Q. And you did not say a word about it until just within the past few weeks, you say? A. Yes.

Q. Now, you said a moment ago you did talk to him, at different times, about it? A. Talk to Mr. O'Brien.

Q. Yes. A. No, I don't believe I did.

Q. I understood you to say you did talk about it previous to these three weeks? A. I don't believe I did. (Former testimony of the witness upon this point read at the direction of the Court.)

20 Q. Now, you mean that before the three weeks you had been talking with O'Brien—and what were you talking with him about? A. Well, there I was probably referring to matters of the hotel, but not to these conversations.

Q. Well, what matters referring to the hotel were you interested in, that you could talk to him about? A. Why, as night clerk I had charge, after six o'clock, so there were lots of matters pertaining to the hotel.

30 Q. Do you mean that was what you had in mind when you made that statement a moment ago? A. It is.

Q. Do you want me to understand now that the first time you ever mentioned anything to Mr. O'Brien about the conversations which you had with his wife, and which you have referred to here, was within the past few weeks? A. Yes, sir.

40 Q. And that you volunteered the information then? A. I probably did.

George Howardell, cross.

Q. How did you come to do that—what brought it about? A. Well, I go over there, more or less; it is next door to my house.

Q. Well, if you kept your secrecy from August and September, 1926, up to three weeks ago, what was it that prompted you then to talk to Mr. O'Brien about these conversations? A. Well, I didn't think it was vital, or necessary, at the time. 10

Q. Well, what made you think, three weeks ago, it was vital or necessary? A. Well, just from hearing things in the case.

Q. Did you hear them from him? A. A little—just hearing a little here and there.

Q. So then it is true that you did talk to him, prior to three weeks ago, about this case? A. No, I did not. 20

Q. Well, you are after saying you heard things, a little from him—what "little" did you hear from him, and when did you hear it? A. Why, I would just hear occasionally how things were progressing, or things of that sort; there were no conversations about it.

Q. Well, why were you interested? I understood you to say before that the reason you did not speak to Mr. O'Brien was because you did not think it was any of your business, and you did not like to be mixed up in it? A. Yes. 30

Q. Why, then, were you indulging in talks whereby you were getting an acquaintanceship with what was going on? A. I did not necessarily have to talk to them about her things.

The Vice-Chancellor: All right; that is all.

By Mr. Hartpence: 40

Q. As a matter of fact, Mr. Howardell, didn't you

Waverly A. Gale, direct.

10 speak to Mr. O'Brien after Mrs. O'Brien had spoken to you about seeing if something could be done toward a reconciliation—didn't you speak to Mr. O'Brien about that time, and didn't you afterwards tell Mrs. O'Brien, or Miss Kennedy, who was with her, that you had spoken to Mr. O'Brien about it, and that he did not want to effect a reconciliation? A. I did not say it to anyone, because I had not talked to him.

Q. (By the Vice-Chancellor.) The question is whether you did not report to Miss Kennedy or Mrs. O'Brien that you had talked to him? A. I did not.

20 Q. You said that the primary consideration, the primary purpose of your going down to this Weiss' house, was not these O'Brien matrimonial troubles, but it was, you say, an incident—just how was it incidental to these visits there? A. Well, I called on the daughter.

Q. You mean Mrs. Weiss' daughter? A. Yes.

Q. How was that incidental to the O'Brien matrimonial troubles? A. I said that was the primary reason for going down, and the troubles were just incidental; they came up during my visit.

30

WAVERLY A. GALE, sworn.

Direct examination by Mr. Herrmann:

Q. Mr. Gale, where do you live? A. 148 Westminster Avenue, Atlantic City, N. J.

Q. What is your business? A. I am a Pennsylvania Railroad conductor, temporarily retired.

Q. For what reason? A. Physical disability.

40 Q. Now, while you are temporarily retired are you engaged in something else? A. Yes, sir.

Waverly A. Gale, direct.

Q. What business? A. Why, real estate, excepting up to this year, when I did not renew my license.

Q. With whom were you connected during the months from June to December, 1926? A. Coral Gables, 1729 Boardwalk, Atlantic City. 10

Q. During that time was the complainant in this case, Mrs. O'Brien, engaged by that company? A. Yes, sir; she applied there for a position.

Q. In what capacity? A. As stenographer.

Q. What was your position with the company? A. Mr. Westlake was the manager; I was the head salesman and assistant manager under Mr. Westlake.

Q. Did the complainant ever speak with you about her difficulties with her husband? A. She did. 20

Q. Now, will you state the time when she talked with you? A. Well, while she was employed by the Coral Gables corporation, or rather, Mr. Westlake, who represented the Coral Gables corporation; I think she came in October, sometime—in October I think it was—and she left about two weeks before Christmas. In reference to the conversation, Mrs. O'Brien asked me if I knew Mr. Thomas O'Brien of the Hotel DeVille; I said, "Yes." She says, "He is my husband," and she says, "I am about to get a divorce from Mr. O'Brien"; and I said, "Yes?" She says, "I am trying to get a divorce on the grounds of adultery, if I can get anything on him." She said, "Did you ever hear that he was a degenerate?" I said, "No." "Well," she says, "he is." 30

Q. Did she ask you to do anything? A. She did.

Q. What did she ask you to do? A. She asked 40

Waverly A. Gale, cross.

me if I was a friend of Mr. O'Brien's. I said, "I know him; I am not a personal friend"; and I said, "If I thought that it would be the means of you and Mr. O'Brien going back together, I would go and see him"; but that I did not do, I thought that
 10 I did not want to do those things.

Cross examination by Mr. Hartpence:

Q. What was it she said to you about going back together with him? A. I told her if I thought it would do any good I would go and see Mr. O'Brien in reference to them going back together; but I gave it a second thought, and I didn't bother with it, because on a previous occasion she said she was trying to get something on him for adultery; so I
 20 felt it would not do me any good to see Mr. O'Brien, in view of the fact of what she had told me in the conversation.

Q. Did she ask you, at that time that you were together, to see Mr. O'Brien with the idea in view of effecting a reconciliation, or how did you come to say this to her? A. Sir?

Q. How did you come to say this to her? A. How did I come to say it?

Q. Yes. A. Well, I mentioned it this way: I
 30 said I would like to do anything I could if I figured it was going to get them back together; but, in view of the fact of what she told me it would not do any good.

Q. Well, what brought that up, and when—that is what I am trying to find out—that was a later conversation, wasn't it? A. That was during the conversation.

Q. The only conversation? A. Well, she talked, you know, at different times, but that was the conversation, rather, that she talked to me about.
 40

Waverly A. Gale, cross.

Q. Pardon me, I haven't got it quite clear: you said that she first asked you, or first stated to you, that she was about to get a divorce from her husband on the ground of adultery? A. Yes, "if she could get the evidence," she said.

Q. Now, was it in that same conversation that you afterwards spoke about going back to see if a reconciliation could be effected, or a later time? 10

A. No, I think during that same conversation.

Q. The same conversation? A. Yes.

Q. Well, what was it brought up that statement by you? A. I don't think any particular thing, only I just put that in.

Q. Well, did you go back and see Mr. O'Brien, after you told her that? A. No, I did not see Mr. O'Brien; I thought if the case was that sort of a case, why, I would stay out of it. 20

Q. Well, didn't you afterwards state to Mrs. O'Brien that you did speak to Mr. O'Brien about seeing if it was possible to effect a reconciliation, and Mr. O'Brien said he was not willing to? A. No, sir; I did not.

Q. You did not tell anything such as that to Mrs. O'Brien? A. I did not, no, sir.

Q. Afterward? A. No, sir; I did not.

Q. Did you say that Mrs. O'Brien said to say, "Did you ever hear that my husband was a degenerate?" and you said, "No"? A. I said, "No"; yes, sir. 30

Q. And this, you say, was sometime in the latter part of the summer of 1926, in October? A. Yes, that was at the latter part of 1926. Now, in the first week that she came there that was one of the conversations that sprang up; now, whether it was the last of September, or the first of October—I think she was employed about six weeks—I have 40

Waverly A. Gale, cross.

no record of that, because the office finally closed—I think she was employed there about six weeks, if I remember aright.

10 Q. When did you first become acquainted with Mrs. O'Brien, Mr. Gale? A. When she applied to the Coral Gables for a position.

Q. When did you first learn that she was the wife of Mr. Thomas M. O'Brien? A. When she told me.

Q. When was that? A. That was during the first week that she was employed by Coral Gables, whatever date that was; I do not recall that.

20 Q. You did not know it right away, as soon as she went there, did you? A. No, I did not know it right away, because you know we interviewed a lot of people each day, and, in fact, I—

Q. (Interrupting): When you did learn that she was the wife of Mr. Thomas M. O'Brien, proprietor of the Hotel DeVille, what did you say to Mrs. O'Brien then? A. I didn't say anything to her, as I remember.

Q. Concerning Mrs. O'Brien? A. No, sir.

30 Q. Didn't you say that you had been asked to be a character witness for Mr. O'Brien in the former suit, and that you would not do it because you knew of his proclivities along the line that Mrs. O'Brien had stated? A. No, sir, I did not.

Q. You never said that? A. No, sir, I did not.

By the Vice-Chancellor:

Q. Well, had you, in fact, been asked to be a character witness in the former suit? A. No, sir; I never was.

40 Q. Was it after Mrs. O'Brien had stated to you that her husband was a degenerate that you said

Waverly A. Gale, redirect.

to her that if you thought you could be the means of O'Brien and she going back together, that you would go and see him? A. Yes.

Q. Why should you have offered to do that, after she told you that he was a degenerate? A. Well, I don't know why I said that, but I just happened to say it as a matter of conversation. 10

Redirect examination by Mr. Herrmann:

Q. What did she say when you said if you could be the means of reconciliation you would, but not otherwise? A. Her answer was that it would not do any good.

By the Vice-Chancellor:

Q. Why didn't you say that before when you were testifying? A. I was not asked that question, or I do not recall it. 20

Q. I understood you to say before, at least I think your answer was, that she did not say it would not do any good, but, upon reflection you thought it would not do any good, and you would not go near him? A. Well, the reason I gave that answer was because I was not called to answer that.

Q. The fact is, then, that is was not that you would not go near O'Brien because of what Mrs. O'Brien said to you, but because of your reflection on what she said to you, was that it? A. I believe that is correct. 30

Q. So whatever Mrs. O'Brien said to you did not, in any wise, actuate you in not going to see O'Brien? A. No, I don't think it did.

Q. What did you say she said to you? A. She said it wouldn't do any good.

Q. Well, if she said to you that it would not do any good, why did you then reflect upon it after- 40

Waverly A. Gale, recross.

wards in order to determine whether or not you would speak to Mr. O'Brien? A. I don't know your Honor, why I did say that.

10 Q. You mean you don't know why you said to-day that you reflected upon it, is that it? A. No, I don't know why I gave her that answer.

Q. What answer? A. Just what you asked here.

Q. Well, you did not give her an answer, you did not tell her that, did you? A. No, I said if I thought it would do any good I would go and see him, and then she said it would not do any good; then I just dismissed it from my mind.

20 Q. Well, why did you tell me before that you reflected on what she said and because of that you did not think it feasible to go see O'Brien? A. I do not get your meaning.

Q. You remember using the word "reflected"? A. I said, "on second thought."

Q. What was the "second thought" that you referred to before, that prompted you not to go near O'Brien? A. Well, I thought it was between two married people, and I was well-known at Atlantic City, that it would be the best thing for me to do to not mix in it.

30 Q. But you did not tell that to Mrs. O'Brien, did you? A. No, I did not tell Mrs. O'Brien that.

Recross examination by Mr. Hartpence:

Q. How did you come to come here today, Mr. Gale—were you subpoenaed at all? A. No, sir; I was not.

Q. You just came at the request of Mr. O'Brien? A. I came here at the request of Mr. O'Brien, who asked me to come.

Waverly A. Gale, recross.

By the Vice-Chancellor:

Q. As matter of fact, I suppose you came down with the other witnesses, didn't you? A. We all came on the same train; yes, sir.

The Vice-Chancellor: The reason I say that is because Mr. Herrmann told me there was a number of witnesses to come down with Mr. O'Brien; that is the reason the case did not start at eleven o'clock. 10

By Mr. Herrmann:

Q. When did you first tell your story to Mr. O'Brien? A. I told that story to Mr. O'Brien last Saturday night.

Q. Last Saturday night? A. Yes, sir. 20

By the Vice-Chancellor:

Q. What prompted you to tell it to him then, and under what circumstances did you come to say it? A. Mr. O'Brien knew that Mrs. O'Brien worked for the office which I was connected with, and he asked me if she had talked to me about the case, and I told him the truth about the matter; he asked me if I would come over and testify, and I said,—“Yes.” 30

By Mr. Hartpence:

Q. How long did you continue the work at this Coral Gables place after the time Mrs. O'Brien left? A. I think Mrs. O'Brien left the 23rd of December, 1926, and I think I left there on the 28th of December, 1926.

Q. Shortly after she did? A. Yes—due to the fact that the office closed up and the furniture was put in storage, and the Coral Gables went out of business, as far as Atlantic City was concerned. 40

Case.

Mr. Herrmann: With the exception of this deposition, which, in view of your Honor's ruling we might not be able to use—it relates to an alleged interview between the complainant and one, Max Meyer, which took place in 1922—

10

The Vice-Chancellor: I cannot receive that, any more than I could receive the testimony offered by the other side; so, if you make any offer of any testimony of that kind I will rule against you, so you may have the benefit, on the record, of my ruling.

Mr. Herrmann: Well, I did not know your Honor was going to rule that way with respect to the other, so we took this. Now, sir, I desire to have an opportunity to prove the engagement of this Detective Agency.

20

The Vice-Chancellor: Well, other than that, are you through; is that your case?

Mr. Herrmann: Other than that, I am through.

The Vice-Chancellor: Mr. O'Brien is not going to be sworn?

Mr. Herrmann: No, Mr. O'Brien cannot testify to anything.

30

The Vice-Chancellor: Of course, you have the privilege of trying your own case; I mean, if he was going to be sworn I was wondering why we could not take that now. Now, the only other offer you have relates to what?

Mr. Herrmann: The Detective Agency.

The Vice-Chancellor: Well, my view of the matter is that neither one of these pieces of testimony are going to be evidential in bringing me to a determination of this mat-

40

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ter. It seems to me that, in this case, no matter what these two parties will testify to, that you speak of, that it would not have any material effect on my mind as to what the disposition of the case ought to be. Unless there is some real good reason on the part of counsel why they think the case ought to be continued for the purpose of taking that testimony, I will dispose of the matter now. 10

Mr. Herrmann: It is very important for the defendant, sir, to show it, because it goes directly to the meat of the case.

The Vice-Chancellor: Well, will you state to me, on the record, just what you expect to call as witnesses, and what you expect to prove by them, so I will know whether or not I ought to grant any further time. 20

Mr. Herrmann: I expect to prove that, prior to June, 1926, this Detective Agency was employed by the complainant to get evidence against the defendant that she might use in this present suit.

The Vice-Chancellor: Do you mean in the maintenance suit? 30

Mr. Herrmann: Yes, sir—to get evidence against this defendant to use in the proceedings.

The Vice-Chancellor: Well, I do not see how that could be material or materially affect this case, even if you did get that evidence, because the question I am here to consider is whether or not Mrs. O'Brien was justified in leaving her husband at the time she left him and under the circumstances that she claims to have left him, and con- 40

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10 tinue away from him for the period of time that she has kept away. Now, assuming that Mrs. O'Brien may have been, in the interim, endeavoring to obtain,—I will call it "ammunition,"—or evidence, or whatever it might be, which she might possibly use against her husband, it would go, of course, I suppose, toward the *bona fides* of her representations that she made here today that she was sincerely desirous of becoming reconciled with her husband; but is there any duty, in law, upon her, to make overtures to the husband in order to become reconciled, that you appreciate?

20 Mr. Herrmann: Yes, she has brought a suit of the character that she has brought—

 The Vice-Chancellor: Well, it is an unusual case.

 Mr. Herrmann: Very. I know of a line of cases that your Honor has in mind—there is a long line of cases saying that there is an obligation on the wife, where she has characterized her husband, as in this case, with being a degenerate—even the Cavlier case—

30 The Vice-Chancellor: Is that the case in which the wife accused the husband of infidelity, or adultery? There is some case in which one of the spouses attributed to the other the commission of the offense of adultery, and then, after the party lost the case in court, it was a question as to whether or not there was a *bona fide* attempt at reconciliation, or whether the accusing person should not beg the forgiveness of the other party for the nasty accusations used; and

40 my recollection of that case is that the court

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says there is no precedent for the person (the wife it was in that case) going that far. As I said before, I can appreciate the whole difficulty in this kind of a case. Here is a case in which, apparently, from your allegations, a woman charges her husband with very heinous offenses that would outlaw him in society, if true—offenses that could not be reasonably expected to be condoned—offenses that not only would hold him up to public ridicule and contempt and ignominy and disgrace, but affect him, very likely, in his business affairs and his social and other activities. On the other hand, the woman claims that these allegations are true; and she says that because of these acts of degeneracy (as they have been alluded to a few times) she became physically affected, so much so that she was unfitted to perform her duties as a wife, and, because thereof, she separated herself from her husband's domicile. Now, taking that aspect of it (which, I think is the strongest aspect that you might be able to present from your side), and assuming, as we must necessarily assume, that the Court has declared in the case that was decided on the advice of Vice-Cancellor Lewis, that the wife's charges were unfounded—I will put it this way, that they were not proved,—because that is what the complainant herself, in this suit, says was the determination of the Court, because the complainant in this suit, by the bill of complaint, says, at the concluding part of Section 5, that “the decree was signed by Honorable Vivian M. Lewis, dismissing the said

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petition for failure of proof"—now, that, ordinarily, is what would be the case in this court—on failure of proof there would be a decree against the party whose suit was being prosecuted. Now, the decree also says that because of the failure of the complainant, I think it was, in that suit—

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Mr. Herrmann: The petitioner.

The Vice-Chancellor: —the petition in that suit to substantiate the allegations of her petition, the petition was dismissed. Now, I am firmly convinced that any allegations of a matrimonial offense that could have been reasonably urged upon the part of Mrs. O'Brien against her husband in that suit (even though she did not actually urge them in her petition) must be considered as disposed of by the decree then entered. It certainly is the policy of the law that parties should be required to try their case in its entirety when the opportunity is afforded, and not endeavor to do it piecemeal; and if the wife, during the progress of that suit—which I see by the file of papers here was not finally disposed of until the year 1926—had knowledge of any matrimonial offense that she might have urged against her husband, it was her duty, either by a counter-petition, or some other means that she might be advised, to bring it to the attention of the court for inquiry, so that the entire matter might be included in it. Now, on the other hand, you are urging here, in behalf of your client by way of counter-claim, an action for a divorce on the ground of desertion. The basic allegation of your

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claim for desertion, I understand from the pleadings, to be a letter written by Mrs. O'Brien to her counsel (I think the date was March, 1923, I am not sure whether it was March or May; it was mentioned in the pleadings, and was mentioned here before) and you are predicating upon that statement of Mrs. O'Brien at that time, a cause of divorce on the ground of desertion. Now, the suit was not disposed of between these parties in 1923. Mr. O'Brien, within the law, had a right, in that former suit, to file a petition before 1926, to seek a divorce on the ground of desertion, if the grounds urged by you, based on that letter, are tenable. Now, what right has he, after the decree is entered in that suit to bring up in this suit the allegation that his wife deserted him in May, 1923? I am saying that now because the view I have of this matter at the present time is that neither party can prevail in these proceedings—the wife certainly cannot prevail, in the view of the case that I see before me, because the law seems to me to be very clear against her. She left the abode. She claims she was warranted in leaving because of the alleged acts of cruelty to which she was subjected by her husband. As to that, the Court heretofore decided against her. Now, what has transpired since that suit was disposed of, as to matters anew, which she may predicate her action upon? All she does, apparently, is to come before the court, after the other suit is dismissed for failing to prove the allegations of extreme cruelty upon which

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10 the suit is based (and which, as I said before, I must take for granted were disposed of in that suit against her); she uses the same grounds as warranting her in filing a bill for maintenance against her husband. Now, my view of the law is that she cannot utilize, or make use of in this suit the very same grounds that were urged by her in the former suit. I do not know, of course, of any case in New Jersey upon which I might predicate just what I am alluding to at this time, but I do have before me, and I have had it in mind, and had the book brought in to me, a Pennsylvania case
20 which, it seems to me, is applicable to it—the case of *Hochman v. Mortgage Finance Corporation* (book and page not given, G. W. B.) While it is not a matrimonial case, nevertheless the gist of the law there stated, it seems to me, is applicable to the pleadings as they appear before me in this case; and, in that case the court has said that if the ultimate and controlling issues have been decided in a prior proceeding in which the present parties had opportunity to appear and assert their rights, they should not be permitted to nullify the *res adjudicata* rule by shifting complainants on the record or changing the character of the relief sought.
30 Now, as I stated before, the character of the relief sought in the previous suit was a decree of limited divorce based upon the allegations of extreme cruelty. The court has decided against her in that suit. Now, then, this petitioner in that suit conceives the idea
40 of starting a new suit, changing the char-

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acter of the relief sought, and, instead of seeking in this latter suit a divorce, either limited or absolute, she seeks support—"maintenance" as it is very frequently called—based upon the Twenty-sixth Section of the Divorce Act. Now, I cannot see how she can possibly prevail in that, based upon the proofs before me, or in view of the disposition of the other case alluded to. Again, in that Hochmann case, the Court says that, "All issues actually adjudicated in a former action between the same parties and of whole cause of action was same, those which might have been raised and passed on, are concluded by judgment or decree as between parties or their privies." Now, my reason for alluding to those two excerpts from that case is particularly with respect to your (Mr. Herrmann's) client's counterclaim here. My view of the matter is that you had a right in the former suit, prior to the hearing of the cause in March, 1926, when the decree was made, of amending your pleadings by setting up that which you now claim was a cause for divorce on the ground of desertion. In other words, you say that in March, 1923, this letter served as a means to enable your client to base thereon an allegation for a divorce on the ground of desertion; you say that that letter clearly demonstrated Mrs. O'Brien's determination that she would not thereafter live with him; and I suppose you will say, too, in Mr. O'Brien's behalf, that any further effort on his part thereafter to induce his wife to return again to live with him would be un-

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10 availing, in view of that very positive statement in that letter; yet I cannot conceive that that is sufficient in this case. I do not think that, even though Mrs. O'Brien did make that positive declaration in that letter, that that let the husband out; because, it seems to me, the husband has got to make
20 some effort of his own—"a *bona fide*, robust effort," as the law calls it—to induce his wife again to return and live with him. Now, I appreciate, in this particular kind of a case, it may be very embarrassing, it may be very humiliating, that a man should be obliged to ask a woman to return and live again with him who had made these very
30 nasty accusations that the wife made against him. But it is not worse, in that respect, than a case I have in mind (the name of which I have not before me at this time), in our own courts here, in which one of the parties (I do not recall now whether it was the wife or the husband, but I think it was the wife against the husband, charging him with adultery, and, under our law, you know, it is regarded as a very serious thing for a husband to charge a wife with adultery, but for some fanciful reason that I cannot divine or appreciate fully, it does not seem to be so serious an offense if the wife charges him with adultery. Now, in these present days, when women are seeking equality with men, it seems to me that the courts will have to come to the conclusion that it is just as bad for the woman to so
40 refer to the man as the man to the woman—especially in view of the latter-day ethics

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that are manifested by the women towards men. In that same case that I have alluded to, the Hochmann case, the Court also says that a party cannot escape the bar of a judgment against him. Of course that is applicable to Mrs. O'Brien in this case. I say she cannot escape the bar of the judgment by bringing a new suit under a different form of action or proceeding, unless the relief sought is not or could not have been germane to the first proceeding. Now, the filing of this bill of complaint in this case does manifestly appear to me to be what is described in the case I have just referred to as a "shuffling"—no, it is not; I cannot say it is not; I cannot say it is a "shuffling of the complainants on the record," but it is a changing of the character of the relief sought, that is all. She was defeated in the former suit, based on the same causes upon which she is relying in this present suit. Now, being defeated there, certainly the Court has, by its declaration in that case, and its decree in that case, indicated demonstratively that she was not warranted in leaving her husband's home; that her leaving her husband's home was not justifiable. Now, to succeed in an action for maintenance—by the way, do you gentlemen want to be heard in this matter? I am just passing casually on it.

Mr. Hartpence: I am not through with my case yet, your Honor. When Mr. Herrmann finally rests I may have some rebuttal.

The Vice-Chancellor: Oh, pardon me; I thought you had rested except for this wit-

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ness' testimony you want to take in Atlantic City.

Mr. Hartpence: Yes, but I want to put the complainant on the stand, with regard to the statements made by these witnesses.

10 The Vice-Chancellor: Oh, well, I am a little previous; I thought you had finished.

Mr. Hartpence: I don't know whether Mr. Herrmann has finished.

The Vice-Chancellor (to Mr. Herrmann): Do you rest, excepting for the offer of that additional witness? Have you any other witnesses to call?

Mr. Herrmann: No, I have no other witness, other than the Hoey evidence.

20 The Vice-Chancellor: I do not want to foreclose any of you folks in any way; I thought you had both rested.

Mr. Hartpence: No, I only rested as far as my main case was concerned.

The Vice-Chancellor: I am too premature, then, in my remarks.

30 Mr. Hartpence: There are two or three questions I would like to ask Mrs. O'Brien in rebuttal of what the other witness stated, and then, with the reservation as to Mrs. Weiss' deposition, we rest.

Mr. Herrmann: I admit that Mrs. Weiss' deposition would prove what you said it would.

40 The Vice-Chancellor: The view I have of both these depositions is that it would not change the case, in my opinion, any, and, therefore, I was going to determine it on the facts before me.

Loretta V. O'Brien, direct—cross.

LORETTA V. O'BRIEN, recalled.

Direct examination by Mr. Hartpence:

Q. Mrs. O'Brien, will you state whether or not, after you spoke to Mr. Howardell, the witness who testified here this afternoon, about interceding with your husband for a reconciliation, he told you what he said with regard to what he had done in that respect? A. He told me he had gone to see him, and that he said he did not want to be bothered; and his version—that is, Mr. Howardell's version—of it was that he was interested in numbers of women, and he did not want to be tied to one. 10

Q. When you say "he," who do you mean? A. My husband. 20

Q. What did Mr. Waverly Gale, the other witness who testified here this afternoon, say to you, if anything, when you were talking with him, about the question of a reconciliation, or otherwise, about his having been requested to act as a character witness for Mr. O'Brien? A. He told me that, in the former suit, Mr. O'Brien had wanted him to come on to be a character witness, and he said that he could not, under oath, take the stand and be a character witness, because, long before I was ever married, that propoganda had spread around Mr. O'Brien—that is, about his being a degenerate. 30

Cross examination by Mr. Herrmann:

Q. What did you say about a "character witness"? A. Mr. Gale said to me "You see, I was not in court at any time." Of course I did not know who Mr. Gale was at that time.

Q. Give me the name of any character witness 40

Loretta V. O'Brien—cross.

that you know was called in that case? A. I don't know of any.

Q. Did you tell Mr. Gale there was any character witness called? A. Yes, I told him that.

10 Q. You did tell him that? A. Yes, I told him that.

By the Vice-Chancellor:

Q. This Mr. Gale says that you told him, or you asked him whether he ever heard that your husband was a degenerate, and he said no, and you said he was? A. No, I never said that that way; and when he mentioned that first to me about a "character witness," he was the first one that brought that out.

20 Q. Then he said to you "If I thought I could be the means of you and Mr. O'Brien going back together I would agree to see him"? A. Well, he told me, when I talked about it to him, he said he had gone to see him, and that my husband wanted to know how it was I came to work in Coral Gables; and I said, "Did he make any other inquiries about me?" and he said, "No other than he wanted to know if I was wearing my marriage ring."

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Mr. Hartpence: I call for the production of this letter which was referred to by the other side as having been written by Mrs. O'Brien to Goldenhorn, but which was not offered in evidence by the other side.

Mr. Herrmann: It is in evidence in the other case.

The Vice-Chancellor: Is that the 1926 letter?

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Mr. Hartpence: No, sir; this was the letter

Loretta V. O'Brien—cross.

which was referred to as having been written by Mrs. O'Brien to Mr. Goldenhorn, and from which counsel for Mr. O'Brien read a portion.

The Vice-Chancellor: Well, is that dated in 1923?

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Mr. Hartpence: I have not seen it before, because it was not offered in evidence. This one was dated March 8, 1923. I call for the production of that in order to offer it in evidence myself, and ask Mrs. O'Brien if that is the letter she wrote to Mr. Goldenhorn, which has been referred to during the progress of this case.

(The letter called for is produced, and is shown to the witness by Mr. Hartpence.)

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The Witness: Yes; that is the letter.

Mr. Hartpence: I want it to go in in its entirety. I offer it in evidence.

(The letter is admitted and marked Exhibit C-2.)

By Mr. Hartpence:

Q. That is the letter which you were questioned about in the former suit, which we spoke about this morning when you were on the stand, is it not?

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A. Yes.

Q. In which you said, with regard to the statements therein contained, that your idea about it was that you made the statements therein contained conditional upon Mr. O'Brien living the right kind of life, when you said you would not go back to live with him? A. That is correct.

Q. Now, that letter was written to your counsel, was it not? A. I wrote that to Mr. Goldenhorn.

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Q. It was not written to Mr. O'Brien, at all? A. No, to Mr. Goldenhorn.

Loretta V. O'Brien—cross.

Q. Do you know how it came to be in the possession of Mr. Herrmann, or Mr. O'Brien? A. No; when we had it in court Mr. Herrmann had it in his possession.

10 *By the Vice-Chancellor:*

Q. Well, it was offered in evidence in the other suit, was it not? A. By Mr. Herrmann; not by Mr. Goldenhorn.

20 Mr. Hartpence: That is all, I believe, except the deposition of Mrs. Weiss, which would go to corroborate the *bona fides* of the efforts of Mrs. O'Brien to effect a reconciliation; and we contend, of course, that that forms a completely new situation, and that it was the duty of Mr. O'Brien at that time, to take care of his wife, and to take her back, if it could be effected upon proper terms, and even though that might not be alleged as a specific ground for relief in this bill, that it forms a complete, new starting point where it became his duty to do it, and, if he won't (and he says in his answer to our bill in this case that he won't) then I

30 ask for leave to amend the bill so as to conform to the proofs in the case, and make that the ground of the relief sought for; because all we are asking here, your Honor, is support, and this lady needs support, and she is entitled to one thing or the other—to have her husband say he will take her back and take care of her, or to have support.

40 The Vice-Chancellor: The question is whether she is entitled to have it in this suit, because, as I said before, it is a very

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unusual case; it is not the ordinary case where, after a litigation is unsuccessful, the unsuccessful litigant then goes to the other party and says,—“I am willing to let bygones be bygones now, and let us make a new start and live together”—she does not say that; she always qualifies, as I recall her pleadings and her tesaimony, always qualifies it by saying, “If you promise not to again commit this nasty offense that I have charged you with heretofore, and which you have been guilty of heretofore.” 10

Mr. Hartpence: Yes, sir; we agree that is the situation.

The Vice-Chancellor: Thereby expressly adhering to and repeating those accusations. 20
Now, in view of that, what self-respecting person (be it man or woman) could be expected to reunite with the other spouse where those accusations were persisted in? I mean, that is the condition we have confronting us here. I think I will hear counsel in whatever way they want to be heard. I have said considerable of what was in my mind before, and I do not mind saying at this point that there is nothing brought out 30
by the rebuttal that has changed my view of the matter; at the same time, counsel may be able to set me right if I am in any wise wrong in my understanding of the matter, and I would be glad to hear you.

(Mr. Hartpence thereupon argued the case.)

The Vice-Chancellor: I really think this is a case that I ought to afford you counsel an opportunity of briefing, because it is an unusual case; it is a case that I know no precedent for in our law, 40

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and I think you gentlemen have been quite diligent heretofore in endeavoring to find some law which would be applicable to this situation which confronts the court; and if you can find anything that is going to be elucidating, I would be glad to have you find it. So far as to what the wife has to show to entitle her to success, that has been alluded to a number of times by our courts; and I am going to state this for the benefit of counsel now, so, when they are arguing it they can get the benefit of what is in my mind: In 92 N. J. Eq., page 670, a Court of Errors case, the Court said, "For a wife to prevail in a suit for alimony, it is necessary for her to show, first, that her husband has abandoned her or separated himself from her without justification; and, second, that he has refused or neglected to maintain and provide for her," and cites two cases. Now, in this case, you see, the husband did not abandon the wife, or separate himself from the wife; but the wife, apparently, has (if I recall the facts correctly) because of the grievance that she claims she had against the husband, separated herself from him. Now, in 57 N. J. Eq., page 250, it is said that this Court has no jurisdiction, under its general equity powers, to make a decree for the support of a wife because of the husband's failure to maintain her, and it is said that the wife is entitled to share her husband's bed and room, and if he refuses to allow her to come to his bed and room, or treats her with such cruelty that she reasonably fears to go there, that is an abandonment on his part, because he is the creator of the condition of the separation—

Mr. Hartpence: May I interrupt your Honor—
is not that just what took place on June 17, 1926?

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The Vice-Chancellor: You are arguing, and your proofs tend to substantiate, as you have undertaken to present them, that the wife was subjected to unnatural abuses at the hands of the husband—that he wanted her to, instead of cohabiting in the true matrimonial sense, to do unnatural things with her, and to submit to him doing unnatural things to her, which, if true (I won't say positively now, but I say which, if true) may have reasonably justified her in separating herself from him. Now, what proof is there before the Court that that is true? 10

Mr. Hartpence: That, I understand, your Honor has said, passes out of the present consideration, and that leaves us then, if we are to prevail at all, upon the other situation that I referred to, that, on June 17, 1926, and from that time on, she made an honest effort to try to bring about a reconciliation and to go back to the husband, and that he would not take her; and that brings us within the very phraseology of those two decisions that your Honor has now read. That is our argument. 20

Mr. Herrmann: Why, the bill was filed before that—it was filed in April. 30

Mr. Hartpence: Well, I am asking leave to amend it, if it is necessary, to make the allegations conform to the proofs. It is always considered proper to do that.

The Vice-Chancellor: It is permissible, generally; but the sixth paragraph of your bill of complaint indicates to me, however, that which I have adverted to before, that her expressions of willingness of resumption of marital cohabitation were always predicated upon or prefaced by her statement, "If you will promise to conduct yourself 40

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properly," or words to that effect—in other words, "if you will omit these nasty practices that you have been subjecting me to heretofore, or endeavoring to have me be subjected to, then I will resume cohabitation with you."

10 Mr. Hartpence: Yes, that is correct, in her aspect; that is the aspect she took and still takes.

The Vice-Chancellor: I do not know what counsel's purpose is in continuing this complainant's allegations in that respect, but, however, he has a right to try his case in his own way. (The Court thereupon cited the cases of *Taylor v. Taylor*, 73 N. J. Eq., at page 745; *Cavalier v. Cavalier*, 94 N. J. Eq. 166; *Hill v. Hill*, 98 N. J. Eq. 237; *Spence v. Spence*, 74 N. J. Eq. 786; *Doty v. Doty*, 92 N. J. Eq. 660.)

20 In the *Taylor* case, as I recall it, in 73 Eq. 748, the Court has said,—“The wife must live with her husband, make his home hers, and give him her bounty and services, unless she can show reasons, valid in law, relieving her from that duty to him.” Now, I take it for granted in this case, in view of the determination by Vice-Chancellor Lewis, that there is no reason shown to the Court, or shown to me, which justified the wife in not living with her husband; so it is her duty, under the

30 law, to do that which I have just stated the rule of the Court to be. In the case of *Spence v. Spence*, 74 N. J. Eq. 786, to which I referred, it is said that “in a suit for divorce *a mensa et thoro*, on the ground of extreme cruelty, where the facts constituting the alleged cruelty are disproved, a decree dismissing the petition of the complainant will operate *res adjudicata* and be a bar to pleading or proving the same facts in a subsequent suit; but if the facts be true, but insufficient to entitle the

40 petitioner to relief, then a decree of dismissal may

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be entered without prejudice to the petitioner's right to plead and prove the same facts in addition to any other, or others, which may afford a ground of a subsequent suit against the defendant." But, in this case, the decree does not dismiss the suit— I mean in the case now before me it is indicated that the decree in the former suit between these parties was not disposed of without prejudice to the rights of the complainant. There is no saving clause whatever in the decree. So it must be considered as though the Court did not intend to grant a saving clause to the petitioner in that suit. Now, under the law, I do not think that there would be any dispute of the fact that, in order for a wife to succeed she must show not only that her husband has abandoned her, or separated himself from her without justification, but that he also has refused and neglected to maintain and provide for her. Well, of course, the refusal to maintain and provide is manifest in this case; but it is not manifest to me that he abandoned her. The fact is that she abandoned him. Now, whether or not she was justified in abandoning him is a matter that was disposed of by Vice-Chancellor Lewis as against her. Furthermore, I think that counsel should, in this case, be afforded an opportunity to present to me any memorandum they wish to present which may change my view, because I think it is eventually a case that will go to the Court of Errors and Appeals, and if it goes there, it ought to go there with the greatest assistance we may afford the Court in that respect. But, as I said before, my present impression is that neither party can prevail in this suit. I am not so declaring at this time for the very reason that I am offering to counsel an opportunity of presenting whatever they wish.

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Mr. Herrmann: I know of no case which I can point to as a precedent. The case of *Cavalier v. Cavalier*, which I so persistently relied upon, shows the test to be, in a suit for maintenance, that the proof must be equal to that which would entitle her to a divorce from bed and board.

10 The Vice-Chancellor: I do not think there is any doubt about that; that is the reason I am deciding against her.

Mr. Herrmann: I think your Honor is perfectly sound on that. I do, however, desire to be heard on the question as to whether or not, under the circumstances of this case, the defendant is not entitled to relief under his cross petition. Now, the only thing I have heard urged by your Honor against that is the fact that—

20 The Vice-Chancellor (interrupting): Well, let me tell you something more: The law requires three requisites to prove your case,—a willfulness, a continuity and an obstinacy. You have got to show the willfulness on the part of the wife, Mrs. O'Brien, to desert him. The continuity is manifested in this case, unless the fact that there was litigation pending between these parties is going to excuse her from what might be said to be the continuity. Our courts have repeatedly held that where a suit is pending between parties it is their duty to live separate and apart. Now, they ought not to be charged, therefore, with the desertion during that period in which the Court says they should live separate and apart. Now, we come down to the question of obstinacy, and you have got to show when this alleged desertion commenced, as against her. Can it be said that it commenced at the time she left her husband?

40 Mr. Herrmann: Yes, sir; that is what I think, and I am so going to argue.

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The Vice-Chancellor: Well, I am not going to decide the question now; but the thought in my mind is this—she apparently thought, because of the acts she charged against him, that she was justified in leaving him; as to that the Court has decided against her, and therefore she might not get the benefit of that; but if she should be able to get the benefit of that, then surely she should not be obliged to live with her husband while that suit was pending, and the suit was not disposed of until 1926, and then not disposed of because counsel filed an appeal and that appeal was not dismissed, as I recall it, until May, 1927. 10

Mr. Herrmann: Unless I can take it out of that category and put it in the category of *Weigel v. Weigel* and *Cook v. Cook*, and that is what I design to do. 20

The Vice-Chancellor: Well, what proof have you to predicate that upon? All you have, apparently, is the proof which is in with respect to the wife having left her husband under the circumstances indicated, and then this letter of May, 1923. Your client has not taken the stand, or shown any attitude on his part.

Mr. Herrmann: There is nothing that he could do. 30

The Vice-Chancellor: Well, that is up to you; that is for you to say.

Mr. Herrmann: There was nothing to come out. I have purposely kept Mr. O'Brien from the stand because there is nothing he can testify to subsequently that is going to avail him.

The Vice-Chancellor: On the other hand, the Court might have the right to consider that his failure to take the stand should be construed 40

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most strongly against him as admitting the truthfulness of the allegations made against him.

Mr. Herrmann: No, all he could say is this—

The Vice-Chancellor: Well, you are saying it now.

10 Mr. Herrmann: No, I am satisfied that, under the doctrine of *Spence v. Spence*, your Honor has treated that other record properly—in other words, it is *res adjudicata*. There is nothing O'Brien could say other than he has said in his pleading—"I decline to support her, and insist on going on declining to support her."

The Vice-Chancellor: Then I suppose that his wife did make these overtures to him that she testified she made?

20 Mr. Herrmann: No, sir.

The Vice-Chancellor: It stands here uncontradicted.

Mr. Herrman: No, sir; he doesn't concede that, but he does contend that there is no obligation on his part to return.

30 The Vice-Chancellor: Well I, suppose that is what I have to determine when the case is concluded; but as the case stands before me now, as far as her offer to return is concerned, of course I have to consider that with all the other aspects of the case, and whether or not she can be said to have been sincere in her desire to become reconciled to him, in view of her accusations made against him previously and repeatedly since, unless he promised her he would live a different life, or treat her differently.

Mr. Herrmann: He has insistently declined, and we make no question about it.

40 The Vice-Chancellor: There are two things standing against him now, and those are that she

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did make a sincere effort in June, 1926, to induce him to return to live with her and "break the ice," as she called it, and then, the further statement that in September, 1926, she again endeavored to have herself become reconciled with him; that is undeniable. That is what you have to contend with. 10

Mr. Herrmann: Yes, sir. Now, I say we have a right to bring it within the cases of *Weigel v. Weigel*, *Cook v. Cook*, and *Hartpence v. Hartpence*. If we can bring it within those three cases, I think we are entitled to the relief we seek.

Mr. Herrmann: How long will your Honor give us, then, to prepare the memorandum?

The Vice-Chancellor: I think you had better suit your own convenience in that, because I do not want to hurry you; I know you are both busy, and I would like to dispose of it while it is a little bit fresh in my mind. Can each one of you, within ten days, get up your memorandum? 20

Mr. Hartpence: Not within ten days; I have two or three cases coming on in the Circuit Court; but I think before the 1st of February I can.

Mr. Herrmann: Well, we are entitled to the same time.

Mr. Hartpence: Shall we come before your Honor for further argument? 30

The Vice-Chancellor: I think you had better submit the briefs to me, and then I will let you know whether I wish to hear you any further.

(Case held for briefs.)

Deposition.

IN CHANCERY OF NEW JERSEY.

Between
 LAURETTA V. O'BRIEN,
Complainant,
 10 and
 THOMAS M. O'BRIEN,
Defendant.

Depositions of Rev. John T. Sheehan of Lawrence, Massachusetts, in a cause depending in the Court of Chancery of the State of New Jersey wherein Lauretta V. O'Brien is complainant, and Thomas M. O'Brien is defendant, taken at the Rectory of St. Laurence's Church, at Lawrence, Massachusetts, on the 14th day of October, 1927, at 2:00 o'clock in the afternoon, before me Charles W. Weygand, one of the Masters of the said Court, in the presence of Alfred F. Conway, of the firm of Wall, Haight, Carey & Hartpence, of counsel with complainant, and of L. Edward Herrmann, of counsel with defendant, pursuant to Notice, dated September 29th, 1927, and pursuant to the statute in such case made and provided.
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CHARLES W. WEYGAND,
 Master in Chancery of New Jersey.

OATH OF STENOGRAPHER.

You, Frank A. Welch, do swear that you will faithfully and truly take stenographically and reproduce in typewriting the depositions of the Rev. John T. Sheehan, to be given in a certain cause

Deposition of Rev. John T. Sheehan.

now depending in the Court of Chancery of New Jersey wherein Laretta V. O'Brien is complainant and Thomas M. O'Brien is defendant, So help you, God.

FRANK A. WELCH.

Subscribed and sworn to before me } 10
 this 14th day of October, 1927. }

C. W. WEYGAND,
 Master.

REV. JOHN T. SHEEHAN, witness produced on behalf of the complainant being first duly sworn according to law, testified as follows:

(L. Edward Herrmann, Counsel for Defendant waives signature of witness to this testimony.) 20

Questions by Attorney Conway:

Q. What is your vocation, Father? A. Clergyman.

Q. Of what church? A. Roman Catholic.

Q. Where are you now assigned? A. Pastor of St. Laurence's Church, Lawrence, Mass. 30

Q. How long have you been Pastor here? A. About 14 months.

Q. Before you came to Lawrence, you were stationed where? A. Atlantic City, New Jersey, St. Nicolas' Church.

Q. While you were at Atlantic City, did you know Laretta V. O'Brien and Thomas M. O'Brien, her husband? A. Yes.

Q. How did you come to know them? Did they attend your Church? A. Well, of course Tom was unmarried and I knew him by reason of his being 40

Deposition of Rev. John T. Sheehan.

a member of the Parish and attending Church and making preliminary arrangements for marriage. I met his intended wife while making the arrangements. I married them and I suppose I met her after the marriage.

10 Q. Do you remember when you married them?
A. I know it was in April—I couldn't say what year.

Q. After you married them did Mrs. O'Brien come to see you? A. Yes.

Q. How many times? A. Two to be sure. It may be more.

Q. What did she come to see you about? A. Complaints of dissatisfaction with her husband.

20 Q. Did she state in what regard? A. Her complaints, as I remember them now, were that she felt that she should have certain interest in the ownership of the hotel which he was conducting, which she said she didn't have; and that the presence of his brother was objectionable; that a Mrs. Boss, I think that is the name, was having what she thought an undue part in the active management of the hotel and she did in a general way indicate that there were some attempts at unnatural relations.

30 Q. What did she say about these unnatural relations? A. That is about all I remember. I mean that is the impression I carry of the conversation.

Q. Do you remember what she said about her husband, Mr. O'Brien, in that regard? A. No.

Q. But you would say that she claimed there was some attempt at some unnatural relations in their married life? A. I take it for granted that that is what she meant.

40 Q. Was the husband present? A. To make a chronological sequence, I can't say he was there

Deposition of Rev. John T. Sheehan.

at the first time. That is, the first two visits were times when she came alone.

Q. When she came the second time was he with her? A. I am pretty sure she had made two visits alone. I don't think, as I remember, he was with her at the second time.

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Q. Was he with her on any occasion when she came to see you? A. Yes, will I call it the third time or another time. We will call it the third visit, she made one or two alone and then both of them came.

Attorney Herrmann: I desire to enter an objection to any conversations that were had between the witnesses of the petitioner or complainant in the absence of Mr. O'Brien on the ground that that isn't binding on him.

20

Q. When Mr. O'Brien was present with Mrs. O'Brien, do you recollect what was said on that visit? A. Well, may I go into details?

Q. Yes, that is what we want. A. It is a matter of memory, and as I remember the visit when both were present I can say now as I think is truthful, that there was nothing left unsaid by either party against the other and so that what she said beforehand, I can almost say without being positive—if I were confronted with an indisputable fact, I would say that is right and I am wrong, but I know that the occasion was such that just as soon as his chart would be taken up, it would be the beginning of a little advance and right away the other wouldn't allow it to go far without either coming back to say, "No," and the other would say, "Yes." So that it is safe to say as I carry the memory of it, that the charges she made to me in visits, she

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Deposition of Rev. John T. Sheehan.

alone, they were carried over and repeated, with that qualification if I could be shown beyond question that such and such a thing didn't appear, I would say it was caused by my getting two visits mixed up with another. The visits were close together. I don't think I can elucidate between.

10 Q. When Mr. and Mrs. O'Brien were present do you recall Mrs. O'Brien charging her husband at that time with wanting to subject her to unnatural sexual indignities?

Attorney Herrmann: I object to the question on two grounds: It is leading and it has been already answered by the witness.

20 A. I would answer that now by saying that I don't remember what was said relative to this matter at that time. I mean I can't do any better than what I have done. I can't say it wasn't said at the time. I have a general impression of everything that was said as when the previous interview was reported, but I can't say about that specific time.

30 Q. You stated before that it was your belief that that had been said by Mrs. O'Brien. A. Yes, I say that almost by way of inference. This condition was so violent that I hardly think of anything that could be brought up as a charge or counter charge that was left unsaid.

Q. Did he at that time make any denial of her charges?

Attorney Herrmann: I object to that.

Attorney Conway: I will change the question.

40 Q. When these charges were made by Mrs. O'Brien, what did Mr. O'Brien say?

Deposition of Rev. John T. Sheehan.

Attorney Herrmann: I object to the question, first on the ground that Father Sheehan has clearly indicated that by reason of the lapse of time he cannot categorically say what statements were made in the presence of Mr. O'Brien and what were made outside. 10

A. To give you a definite answer I could say I don't remember. To give you my general impression, I can say this, that the charges in toto, the whole, some of the charges were denied by each party, so I would include that if you think I should.

Q. Do you recollect, Father, making affidavit in this cause? A. Yes, that means any affidavit. 20

Q. Do you recall making affidavit in this cause in May, 1927, when I was here before? A. Yes, it was in the spring of the year.

Q. And that affidavit—

Attorney Herrmann: I object if this is an attempt to impeach your witness.

Attorney Conway: It is to refresh his memory.

Q. Then do I understand you now to say, Father, that whatever charges Mrs. O'Brien made at that time, whatever they were, were denied by Mr. O'Brien? A. No, I don't want to say that. What I wanted to say is this: that the inferences that I drew from the conduct was that charges made and counter charges made were denied in effect. I don't want you to think that anyone of the two said, "I admit that to be true," or anyone said, "That is not true." Because they were coming 30

Deposition of Rev. John T. Sheehan.

thick and fast and most likely what happened was that no charge was really brought to a conclusion as far as denial or admission. That is the way I don't know any other way of putting it. If you were to say that such and such a thing
10 happened with some evidence that would be conclusive and positive, I would say that it is simply something that I don't remember.

Q. Do you recall Mr. O'Brien making any denial of these charges which she made—any of these charges? A. Any of these charges?

Q. Well to these charges of sexual indignities? A. No, I don't. I don't remember the charges in the sense of their being specific and whether it was made then I couldn't say, but I can say that
20 if any of them were made, they were probably denied, as I remember the conference.

Q. Do you know Mrs. Catherine Weiss of Paulsboro? A. Yes.

Q. Do you know her in connection with this case? A. No, she sent me a telegram. I will say it was in September, 1926, to the purpose of asking me to try to bring about a reconciliation. I answered that telegram and I couldn't tell you
30 honestly whether I sent it to her or to you, Tom, or to Mrs. O'Brien. I don't know what happened.

Q. Do you recall what you said? A. No, I don't, but I think it would be advising them to become reconciliated if possible.

Q. Is there anything else that you recall, Father, that was said on this occasion? A. No, I couldn't give you one word of substantial meaning in this case other than the general impression that remains such as I have given. There were charges
40 and counter charges and denials and counter denials I suppose.

*Deposition of Rev. John T. Sheehan.**Questions by Attorney Herrmann:*

Q. From your general impression, without making any attempt to be specific, what would you say were the major charges of those made by Mrs. O'Brien? A. Well, that is not just relative to this particular conference? 10

Q. No, at the other times, what would you say was the complaint that she stressed most? A. Well, I couldn't tell you that. I don't remember the chronological order in which she made them and I don't know—I don't remember the length of time that she gave to each charge. I don't think there was one singled out more than any other.

Q. As I recall it, you said that she complained that the hotel was not in her name but all in his. A. No, I don't think that would be quite exact. I think she wanted a part, whether it was half or quarter, I don't know. I know the substance, leaving the fractional part out, was that she thought she ought to have part of the management. 20

Q. Could you say that she stressed more the material side rather than his conduct? A. No, I wouldn't say that—no.

Q. How long have you known Mr. O'Brien, Father? 30

Father Sheehan: What year were you married Tom?

Mr. O'Brien: 1922.

A. Two or three years before that.

Q. Did you have opportunity to observe his method of living? A. No, except I saw him at Mass, Communion and his religious duties.

Q. He attended your church? A. Yes.

Q. Went to Communion and Confession—attended Mass regularly? A. I would say that, yes. 40

*Deposition of Rev. John T. Sheehan.**Questions by Attorney Conway:*

10 Q. Did you know, Father, whether or not the time of this visit, Mr. and Mrs. O'Brien were living together? A. They were living in the same house—hotel. That is all I know. No, I do know that one of the things she said was that she was denying him marital relations.

Q. Did she say why she was denying him marital relations? A. I can't tell you whether she said that alone or in his presence. That is an impression that I have or her saying that. Whether that was as a reprisal for something or some charge she had against him, I think that is the way I understood it and that is the way she intended it.

20 Q. In general would you say that by reason of the complaint she made that is what she was doing, withholding marital relations? A. Yes, but they were living in the same domicile.

Q. You don't recall definitely what her reasons were? A. No.

30 Attorney Herrmann: We admit that without fixing the time it was, shortly after they were married, Mr. and Mrs. O'Brien were present with Father Sheehan on at least one occasion.

I certify that the foregoing depositions were taken by Frank A. Welch, the stenographer selected by me, and by me duly sworn faithfully and truly to take stenographically and reproduce in typewriting the testimony given, and that such depositions were taken in my immediate presence and hearing by said stenographer sworn as above

Deposition of Rev. John T. Sheehan.

stated, and I believe that they accurately state the said evidence.

CHARLES W. WEYGAND,
Master in Chancery of New Jersey.

Dated October 14, 1927.

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Endorsed:

IN CHANCERY OF NEW JERSEY

Between

LAURETTA V. O'BRIEN,
Complainant,

and

THOMAS M. O'BRIEN,
Defendant.

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Depositions

WALL, HAIGHT, CAREY & HARTPENCE,
Solicitors for Complainant,

15 Exchange Place,

Jersey City, N. J.

Filed Oct. 17/27

J. J. F.

V. C.

30

Note—Filing consented to by L.
Edward Herrmann Solicitor of Deft.
in open Court.

J. J. F.

V. C.

Received in office

Oct. 19, 1927

Thomas Barber

Clerk.

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Exhibits.

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Exhibits.

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Exhibits.

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Exhibits.

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Exhibit D.

(Record in former suit for divorce *a mensa et thoro*, 52/480. See page 103.)

Petition and Affidavit.

(Filed October 13, 1922.)

IN CHANCERY OF NEW JERSEY.

To his Honor EDWIN ROBERT WALKER,
Chancellor of the State of New Jersey:

The petition of Laretta V. O'Brien, whose maiden name was Laretta McCarthy of the City of New York, in the County of New York and State of New York, respectfully shows:

20 1. Your petitioner was lawfully joined in the bonds of matrimony to her present husband, Thomas M. O'Brien, the defendant in this suit, on the 25th day of April, 1922, at Atlantic City in the County of Atlantic, and State of New Jersey, by Reverend Father Sheehan of St. Nicholas Catholic Church.

30 2. Petitioner and defendant co-habited at Atlantic City with some interruptions as hereinafter stated from the date of their marriage until the 7th day of August, 1922, when she was compelled to separate from him finally, because of his extreme cruelty to her as hereinafter set forth and because she discovered that he had been guilty of adultery with one "Mrs. Brown" whose Christian name of Mrs. Brown is unknown to your petitioner, but said acts of adultery having taken place at Atlantic City in the County of Atlantic, and State of New Jersey at divers times in the months

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Exhibit D—Record in Former Suit.

of May, June, July, and August, 1922, at the Hotel Deville in Atlantic City, and at Hotel Monticello in Atlantic City, and at divers other hotels in Atlantic City, and Philadelphia during those months.

3. Petitioner further shows that almost from the time of her marriage, the defendant began to show signs of moral degeneracy and did ask your petitioner to co-habit with him in unnatural and improper ways, and did ask your petitioner to do things to him which showed the defendant to have a perverted mind, and the defendant committed such acts of cruelty against the genital organs and parts of your petitioner that she was obliged to and did consult a physician, a Doctor Roberts of Decatur Avenue in the Bronx, New York City, and is under his treatment now, and by reason of the defendant's acts of cruelty and inhuman treatment your petitioner has become a physical wreck and her nerves are in such condition that even if your petitioner were willing to forgive the acts of adultery committed by her husband, it would be dangerous to her health and life to go back and co-habit and live with him, and although your petitioner has conscientious scruples against divorce, she being a devout Catholic, your petitioner prays that she may be divorced from the bed and board of her said husband for the causes aforesaid, and that the defendant may be compelled by the decree of this honorable Court to support her up to his station in life, and that she may have such further and other relief as may be equitable and just.

4. The defendant has been a bona-fide resident of the City of Atlantic City, in the County of Atlantic, and State of New Jersey, for many years

Exhibit D—Record in Former Suit.

last past continuously and was a resident of Atlantic City when this cause of action arose, and is now a resident of Atlantic City, and has continue to be a resident of Atlantic City, from the time when this cause of action arose, up to this present time, and is the owner of a Hotel at Atlantic City, in which he has an interest, as your petitioner is informed by the defendant, of \$75,000.00, and he has an income of \$18,000.00 a year from said hotel business conducted by him at Atlantic City, and known as the Hotel Deville.

5. Your Petitioner therefor prays for the relief above herein set forth and asks that a counsel fee be paid her attorney for prosecuting this action, because she has no money with which to defray the costs and expenses of this suit.

And your petitioner will ever pray, &c.

I. F. GOLDENHORN,
Solicitor and of Counsel for Petitioner,
243 Washington Street,
Jersey City, New Jersey.

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

30 LAURETTA V. O'BRIEN, being by me duly sworn, according to law, on her oath, deposes and says: That she is the petitioner in the foregoing petition; that her said petition is not made by any collusion between her and the defendant, but in truth and good faith, for the causes set forth in the petition.

LAURETTA V. O'BRIEN.

40 Sworn and subscribed to before me, }
this 11th day of October, 1922. }

THOMAS F. FARRELL,
Notary Public
of New Jersey.

*Exhibit D—Record in Former Suit.***Answer.**

(Filed November 2, 1922.)

IN CHANCERY OF NEW JERSEY.

Between

LAURETTA V. O'BRIEN,
Petitioner,

and

THOMAS M. O'BRIEN,
Defendant.

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On Petition
for Divorce.

The answer of Thomas M. O'Brien, defendant, to the petition of Lauretta V. O'Brien, petitioner.

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1. The defendant admits it to be true that the petitioner and the defendant were married as in said paragraph one of the petition is alleged.

2. This defendant admits that the petitioner and defendant co-habited in Atlantic City, with some interruptions, from the date of their marriage, until the seventh day of August, 1922, but denies that the petitioner was compelled to separate from the defendant because of his extreme cruelty to her. Defendant further denies that he has been guilty of adultery with one "Mrs. Brown," in the City of Atlantic City, and State of New Jersey, at divers times in the months of May, June, July and August, 1922, at the Hotel DeVille in Atlantic City, and at the Hotel Monticello, in Atlantic City, and at divers other hotels in Atlantic City and Philadelphia, during those months; but to the contrary this defendant says that he has ever faithfully observed his obligations as the husband of the petitioner.

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Exhibit D—Record in Former Suit.

10 3. The defendant denies that from almost the time of his marriage with the petitioner he did ask the petitioner to cohabit with him in unnatural and improper ways and did ask the petitioner to do things to him which showed the defendant to have a perverted mind; but on the contrary this defendant says that from the beginning of their marriage the petitioner requested of the defendant that no intercourse be had by them and that they assume a sort of brother and sister relationship, the petitioner stating that she was averse to intercourse and that she desired the relationship of the petitioner and the defendant to be that of a "platonic" relationship.

20 Defendant further answering paragraph 3 of the petition further says that he denies he committed acts of cruelty against the genital organs and parts of the petitioner and that she was obliged to consult a physician by reason of the defendant's acts of cruelty and inhuman treatment of the petitioner but on the contrary this defendant says that he has at all times treated his wife with great consideration and with loving kindness and has at all times deported himself as a true husband should towards his lawful spouse.

30 Defendant further answering paragraph 3 of the petition says that he denies the allegations therein contained that it would be dangerous for the health and life of the petitioner to go back and cohabit and live with him but on the contrary says that he is ready and willing to take back the petitioner and cohabit with her as man and wife. Defendant further says that petitioner, by reason of her aversion to intercourse, has made the home life

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Exhibit D—Record in Former Suit.

of the petitioner and defendant unbearable to the defendant but notwithstanding the feeling of the petitioner in this respect the defendant is ever ready and willing to provide a home for the petitioner and to cohabit with her as man and wife.

4. This defendant admits it to be true that he has been a bona-fide resident of Atlantic City for many years and was a resident of Atlantic City at the time of the cause of action alleged in this petition and up to the present time:

Defendant further answering paragraph 4 of the petition denies that he has an interest valued at \$75,000 in an hotel in Atlantic City and that he has an income of \$18,000.00 a year from the hotel business conducted by him in Atlantic City and known as the Hotel DeVille.

5. That defendant prays to be hence dismissed, with his reasonable costs and charges in that behalf most wrongfully sustained.

THOMAS M. O'BRIEN
Defendant.

JOSEPH B. PERSKIE,
Solr. of Defendant.

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Exhibit D—Record in Former Suit.

Reply.

(Filed November 13, 1922.)

IN CHANCERY OF NEW JERSEY.

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Between

LAURETTA V. O'BRIEN,
Petitioner,

and

THOMAS M. O'BRIEN,
Defendant.

On Petition, &c.
Reply.

20

The petitioner in reply to the answer filed herein, and particularly in reference to paragraph 3 of the answer filed herein, says:

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1. That she denies that from the beginning of her marriage to the defendant, or at any time during her married life to the defendant, she requested defendant that he have no intercourse with her and that they assume a sort of brotherly and sisterly relationship; she denies that she was averse to intercourse with the defendant, and she denies that she desired the relationship with the defendant to be of a platonic relationship.

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2. And for a further reply to the answer of the defendant this petitioner says that she denies that she ever refused intercourse to her husband in the proper way and manner, and she denies that her husband was ever ready and willing to provide a home for her up to his station in life, but says that, to show the attitude of her husband toward her,

Exhibit D—Record in Former Suit.

her husband, in order to acquire more money, rented out the very rooms which petitioner had occupied in said hotel.

Wherefore this petitioner prays that she may have the relief asked in her petition.

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I. F. GOLDENHORN,
Solicitor and of Counsel
with Petitioner,
243 Washington Street,
Jersey City, N. J.

Decree Dismissing Petition.

(Filed March 10, 1926.)

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IN CHANCERY OF NEW JERSEY.

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| <p>LORETTA V. O'BRIEN, <i>Petitioner,</i></p> <p>and</p> <p>THOMAS M. O'BRIEN, <i>Defendant.</i></p> |
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This matter being opened to the court by L. Edward Herrmann, solicitor for and of counsel with complainant, in presence of I. Faerber Goldenhorn, solicitor for, and of counsel with petitioner, and it appearing that a petition duly verified has been filed therein by the petitioner, and that the defendant filed an answer, and that hearings were had thereon, and proofs taken:

And the court having read and considered said petition and the answer, and heard the testimony

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Exhibit D—Record in Former Suit.

and proofs offered by petitioner, and being satisfied that the petitioner has failed to substantiate the allegations of her petition.

10 And the court being satisfied that the bill of complaint should therefore be dismissed as against the defendant:

It is on this 8th day of March 1926, ORDERED, that the petition filed herein be and the same is hereby dismissed.

E. R. WALKER,
C.

Respectfully advised,

VIVIAN M. LEWIS,
V. C.

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Exhibit D—Record in Former Suit.

Notice of Appeal.

(Filed March 9, 1927.)

IN CHANCERY OF NEW JERSEY.

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| <p>Between</p> <p style="text-align: center;">LAURETTA V. O'BRIEN, <i>Petitioner,</i></p> <p style="text-align: center;">and</p> <p style="text-align: center;">THOMAS M. O'BRIEN, <i>Defendant.</i></p> | } | <p>10</p> <p>On Petition for Divorce.</p> |
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| <p>To</p> <p style="text-align: center;">L. EDWARD HERRMANN, Esq., Solicitor for Defendant.</p> | <p>20</p> |
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SIR:

Lauretta V. O'Brien, the above-named petitioner, hereby appeals from the decree made by the Chancellor on advice of Vice-Chancellor Vivian M. Lewis dismissing petition filed in this cause March 10, 1926, and from each and every part thereof, to the Court of Errors and Appeals in the last resort in all causes.

Dated March 8, 1927.

WALL, HAIGHT, CAREY & HARTPENCE,
Solicitors for and of Counsel
with Petitioner.

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

| | |
|---|-----------|
| <p>JOHN A. HARTPENCE, Of Counsel.</p> | <p>40</p> |
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Exhibit D—Record in Former Suit.

Endorsement:

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

10 GROVER J. CAREY of full age being duly sworn
 according to law on his oath deposes and says:
 That he is in the employ of Wall, Haight, Carey
 & Hartpence, Solicitors for the petitioner herein.
 That on Tuesday the eighth day of March, 1927,
 he served the within Notice of appeal upon L. Ed-
 ward Herrmann, by delivering a true copy of same
 to the person in charge of his office at his said of-
 fice No. 15 Exchange Place, Jersey City, N. J., at
 about the hour of 10:15 in the forenoon.

20

GROVER J. CAREY.

Subscribed and sworn to before me }
 this 8th day of March, 1927. }

ALFRED F. CONWAY,
 Master in Chancery of New Jersey.

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Exhibit D—Record in Former Suit.

Petition of Appeal.

(Filed March 28, 1927.)

NEW JERSEY COURT OF ERRORS AND
APPEALS.

Between

LAURETTA V. O'BRIEN,
Petitioner-Appellant,

and

THOMAS M. O'BRIEN,
Defendant-Respondent.

On Appeal
from Court
of Chancery.
Petition of Appeal.

10

To the Honorable the Court of Errors and Appeals
in the Last Resort in All Causes:

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The petition of Laurretta V. O'Brien, the appellant in the above-stated cause, respectfully shows that your petitioner finds herself aggrieved by a final decree made in the Court of Chancery of New Jersey by his Honor Edwin Robert Walker, Chancellor (as respectfully advised by his Honor Vivian M. Lewis, Vice-Chancellor), bearing date the eighth day of March, A. D., Nineteen hundred and twenty-six, and filed therein on the tenth day of March, A. D., Nineteen hundred and twenty-six, wherein your petitioner was the petitioner and Thomas M. O'Brien was the defendant (Docket 52, p. 480), in this respect, to wit: that the said decree adjudges that your petitioner's petition therein should be dismissed, and her prayer for a divorce *a mensa et thoro* from her husband, the said defendant, was thereby denied, whereas your petitioner feels that said Court should have decreed

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Exhibit D—Record in Former Suit.

that your petitioner be granted a divorce from her
 said husband *a mensa et thoro* for the causes in
 her petition alleged, with the allowance to your
 petitioner of appropriate alimony and for counsel
 fees and costs necessarily incurred in the prosecu-
 10 tion of her said suit.

And your petitioner humbly appeals from the
 whole and every part of decree of the Chancellor
 so advised as aforesaid, upon the ground that the
 same is erroneous for the reasons above stated.
 Your petitioner therefore prays that the said de-
 cree, and each and every part thereof, of the said
 Chancellor, may be reversed, set aside and for
 nothing holden and the prayer of her said petition
 be granted, and that your petitioner may have such
 20 other and further relief in the premises as to this
 Honorable Court shall seem meet.

WALL, HAIGHT, CAREY & HARTPENCE,
 Solicitors for and of Counsel with
 Petitioner-Appellant.

JOHN A. HARTPENCE,
 Of Counsel.

State of New Jersey,)
 30 County of Hudson,) ss.:

GROVER J. CAREY, of full age, being duly sworn,
 according to law, on his oath says that on March
 26th, 1927, at about the hour of 10:30 A. M., he
 served a certified copy of the Petition of Appeal
 in the within cause, a copy of which is hereto an-
 nexed, on L. Edward Herrmann, Solicitor for De-
 fendant-Respondent, by leaving same at his office

Exhibit D—Record in Former Suit.

at No. 15 Exchange Place, Jersey City, New Jersey,
with a person in charge thereof.

GROVER J. CAREY.

Sworn to and subscribed before me }
this 26th day of March, A. D., 1927. } 10

WM. W. SHAW,
Master in Chancery of New Jersey.

Answer to Petition of Appeal.

(Filed May 20, 1927.)

NEW JERSEY COURT OF ERRORS AND
APPEALS. 20

Between

LAURETTA V. O'BRIEN,
Complainant-Appellant,

and

THOMAS M. O'BRIEN,
Defendant-Respondent.

On Appeal
from Court
of Chancery.

30

To the Honorable, the Court of Errors and Appeals
in the last resort in all causes:

The answer of the Respondent to the petition of
appeal of Appellant:

The respondent admits it to be true that a cer-
tain decree was on the 8th day of March, 1926,
made and entered in the Court of Chancery as in
the petition of appeal is stated: but as to the sub- 40

Exhibit D—Record in Former Suit.

stance and form thereof, this respondent prays to refer thereto when the said shall be produced.

This respondent is advised and believes that said decree is agreeable to law and equity, and he prays that the same may be affirmed with costs to be adjudged to this respondent.

L. EDWARD HERRMANN.

Solicitor for and of counsel with respondent.

Endorsed:

We hereby acknowledge service of the within answer and consent to the filing of same, this 19th day of May, 1927, but without prejudice.

WALL, HAIGHT, CAREY & HARTPENCE,
Solicitors for and of counsel
with Petitioner-Appellant.

Dismissal.

(Filed May 24, 1927.)

NEW JERSEY COURT OF ERRORS AND
APPEALS.

30

Between

LAURETTA V. O'BRIEN,
Petitioner-Appellant,

and

THOMAS M. O'BRIEN,
Defendant-Respondent.

On Appeal
from Court
of Chancery.
(52-480)

40

Due Notice having been given to the Solicitor for the Defendant-Respondent:

Exhibit D—Record in Former Suit.

IT IS ORDERED that the appeal heretofore taken by said Petitioner-Appellant from the final decree of the Court of Chancery in above-stated cause be, and the same hereby is dismissed, and the record remitted to the Court below, but without costs.

Dated May 24, 1927.

10

On motion of

WALL, HAIGHT, CAREY & HARTPENCE,
Solicitors for and of Counsel
with Petitioner-Appellant.

Endorsed:

Due and legal service of Notice of this motion acknowledged and consent given to the within order.

20

Dated May 23, 1927.

L. EDWARD HERRMANN,
Solicitor for and of Counsel
with Defendant-Respondent.

“Filed May 24, 1927,
JOSEPH F. S. FITZPATRICK,
Clerk.”

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Exhibit D—Record in Former Suit.

Testimony.

IN CHANCERY OF NEW JERSEY.

| | | | |
|----|---|---|---------------------|
| 10 | Between LAURETTA V. O'BRIEN, <i>Petitioner,</i> and THOMAS M. O'BRIEN, <i>Defendant.</i> | } | On Petition, &c. |
|----|---|---|---------------------|

20 Transcript of testimony taken in the above-entitled cause, at the Chancery Chambers, Jersey City, New Jersey, on the fourteenth day of January and fifteenth day of January, nineteen hundred and twenty-five, before Hon. Vivian M. Lewis, Vice-Chancellor.

APPEARANCES:

I. FAEBER GOLDENHORN, Esq., for the petitioner.

L. EDWARD HERMANN, Esq., for the defendant.

30

LAURETTA V. O'BRIEN, being duly sworn on her own behalf, testified as follows:

Direct examination by Mr. Goldenhorn:

Q. What is your full name, Mrs. O'Brien? A. Laretta Vivien O'Brien.

Q. What was your name before you were married? A. McCarthy.

40 Q. Where do you live? A. With my parents at 2955 Grand Concourse, New York.

Q. When were you married to the defendant, Thomas M. O'Brien? A. April 25, 1922.

Exhibit D—Record in Former Suit.

Q. Where were you married, at what place? A. At St. Nicholas Church, Atlantic City.

Q. Who were present at the wedding? A. Betty McNulty and Mr. O'Brien's brother.

Q. Did the wedding take place at the church?
A. Yes, sir. 10

Q. After the wedding where did you go? A. We stayed in Atlantic City at one of the hotels.

Q. How long were you there? A. Just over night.

Q. And then where did you go? A. We started to Pennsylvania, Overbrook, Pennsylvania.

Q. How long were you away before you returned to Atlantic City to live? A. About ten days.

Q. When you returned to Atlantic City, where did you take up your residence? A. At the Hotel De Ville. 20

Q. Where? A. Atlantic City.

Q. And was your husband the owner of that hotel? A. He told me he was.

Q. At that time? A. Yes, sir.

Q. How many rooms had you in the hotel at that time? A. I had one small room and a bath, at that time, and I had to dress and undress in bed; and my trunk was in the main hall, and in order to get anything I had to go in the public hall to go to my trunk. 30

Q. You took up this room, you say, at this Hotel De Ville? A. Yes, sir.

Q. And how long did you occupy that room with Mr. O'Brien? A. Why, about two weeks.

Q. What happened then, Mrs. O'Brien? A. When I was four days married my husband started in with degenerate acts.

Mr. Hermann: I object to that. 40

The Court: Do not characterize them.

Exhibit D—Record in Former Suit.

Q. Just tell us what he did. A. (No answer.)

By the Court:

Q. Did you consummate the marriage? A. Yes, sir.

10 Q. In the regular way? A. Yes, sir.

Q. Then in two or three days he commenced to do things that you call unnatural? A. Yes, sir.

Further direct:

Q. Now, tell us what he did. A. He wanted me to take his penis in my mouth, and I left him and came home.

Q. And you refused and left him? A. Yes, sir.

20 Q. How soon did you leave him after he asked you to do this? A. The next morning.

Q. When you left him, where did you go? A. To my parents' home in New York City.

Q. When you were there, what did he do? A. He called me up and told me if I would come back he would live the natural life.

Q. When was that? A. I cannot say; it was within a week of my marriage.

30 Q. And you were married when? A. April 25, 1922, that would be the early part of May.

Q. Now, then, when he called you on the telephone, did you go back? A. Yes, sir.

Q. Did you go back alone? A. Yes, sir.

40 Q. What happened when you got back? A. He did not bother me at all; he had told me he did not enjoy natural intercourse, and he did not bother me at all, and in less than a week's time he again wanted me to take his penis in my mouth; and I said to him, "Do you realize that I receive the body and blood of Our Lord every week in my mouth, and how dare you ask me to do that

Exhibit D—Record in Former Suit.

again?" He ground his teeth, and said if I loved him I would do that as long as it made him happy. I again left him and came back with my mother.

Q. When was that? A. I came back sometime in June, and mother came back to protect me.

Q. You say for about a week or ten days he had nothing to do with you; then you say he again did the same thing; what did you say to him then after he did that? A. I told him, did he realize that I took the body and blood of Our Lord each week, and he said if I loved him I would do anything as long as it would make him happy. 10

Q. Now, then, when he told you that, what did you say to him? A. I told him I refused to do that, but that I would do everything that a good wife should do. 20

Q. Did he ever have any natural sexual intercourse with you after that time? A. In the very beginning of our married life he did.

Q. When he had natural sexual intercourse with you, what did he do to you? A. He would be as long as 40 minutes, and insisted on my working up and down, which I did, until I was too tired, and then when I would not continue, then he pinched me with his hand. 30

Q. Did he do anything else to you? A. And he inserted his finger in my vagina, and withdrew it and licked his finger.

Q. Did he do anything else to you? A. Well, I never remember any kindness from him at all.

Q. You said he pinched you; did he do that more than once? A. Only once.

Q. Was that very hard? A. No, sir, but it was hard enough to be painful.

Q. Did he do anything else in addition to that, in the way of treating you cruelly? A. Well, after 40

Exhibit D—Record in Former Suit.

I came back to the De Ville he had locked the bathroom up, and told me he wanted to rent that with the room next door, and if I wanted a bath, I would have to take it in a basin; that he took his shower at the golf club; and he allowed his
10 brother and the Boss woman, and her daughter to abuse me.

Q. What do you mean? A. This brother stood out on the porch before a number of guests and said if I were to get out of here they would have a clean house, and the Boss woman's daughter said that I went to communion every morning, and she said, "Believe me, she needs it."

Q. Was your husband present? A. Yes, sir, and he stood there and said anything they said to
20 me was perfectly all right, and I could either like it or get out; and this Boss woman, she said that I acted like an idiot when I first came there to the Hotel De Ville; and I said to my husband, "Did you hear what she said to me?" He said, "She is right, you are an idiot." He never once stood by me as a husband should.

Q. Did he show you affection? A. No.

Q. When you refused to have intercourse in the way he objected, did he ever attempt to obtain
30 sexual intercourse with you by force? A. No, sir. Then at another time when I was menstruating, I told him that he could not have sexual intercourse at that time, and he said to me, "Well, then, let me put my tongue in your mouth?"

Q. Did he do that? A. No, sir, I would not stand for that.

Q. When you refused to do that, what did he do to you? A. He said, "I would like to choke
40 you."

Q. What did he do then? A. Nothing else other than that.

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Q. Did he ever threaten you at any other time?

A. No, sir.

Q. Outside of that once? A. No, sir, and then he had told me prior to our marriage, that this boss woman he just hired her on contract, and that when her time would be up in October she would go; and he told me also, that his brother would leave after I was married; so when I was married, I found out they were going to be a detriment to my happiness, and I told him I thought it was better that they go; and he told me that this Boss woman had as much right there as I had. I brought his brother up to my husband, who was lying on the bed at the time, and he said to my husband, "Do you want me to stay here?" and my husband said "Yes, I want you to stay here as long as you please"; and he looked at me and said, "You can get out." After that, my mother came along and said, "I heard you say that she can get out"; and he said, "I never said such a thing; are you going to lie now, too?" He then said, to his brother, after I told him what he had said about his brother going, "Don't believe a word of it"; I said, "How would I know that you told me you did not want your brother here, unless you told me that the winter prior to our marriage"; and he said, "She is a liar, don't believe her"; and the brother said, "No, I don't."

Q. How long was that after you were married?

A. It was less than three weeks.

Q. When you found that your husband asked you to do these things that you have described, did you go with him to see the Priest in Atlantic City? A. Yes, sir, I took him to the Priest, to Father Sheehan, and I told him, Father Sheehan, in my husband's presence, of his vile conduct, and

Exhibit D—Record in Former Suit.

10 my husband never denied it; he just held his head; and I also told the Priest that I was informed that this Mrs. Boss was his common law wife, and the first time I said that he did not deny it; and the second time he said, "Oh, Father, just think what she is saying," and this woman has only been a converted Catholic, prior to that she had been a Protestant and her husband divorced her.

Q. After you had this scene at Father Sheehan's, did you go back and live with your husband? A. No, sir, I was with mother at the time, and I had a room with mother.

20 Q. Was your mother occupying a room with you in the same hotel? A. Yes, sir; mother thought on account of my religion, that I should try and be reconciled to my husband; I am a Catholic, and my husband is a Catholic, too.

Q. Now, then, did you both attend the Catholic Church in Atlantic City? A. Yes, sir.

Q. Whose church was it? A. Father Sheehan's.

Q. Was he the same Priest whom you both consulted at that time? A. Yes, sir.

30 Q. After you had this talk with Father Sheehan, in the presence of your husband, did Father Sheehan say anything to you or your husband about going back to live together? A. No, sir, Father Sheehan said, "See if you cannot make up the peace"; so then, when we went back to the hotel, I spoke to my husband, and he absolutely refused to have anything to do with me.

Q. Did he say why? A. No, sir; I don't know why, other than I think—

Q. He did not say why? A. No, sir.

40 Q. When you went back to the hotel just explain to his Honor the kind of a room you were living in, and the kind of a room the other guests in the hotel were living in.

Exhibit D—Record in Former Suit.

Mr. Hermann: Objected to.

The Court: What is the charge against the man?

Mr. Goldenhorn: Cruelty. We ask for divorce from bed and board.

The Court: I will allow it to go in, Mr. Hermann. 10

Q. (Question read.) A. He had 105 rooms in the hotel, and I was in a small room.

Q. Was there any bathroom attached to it? A. Not when I came back the second time; he told me I did not need a bath, and I had to dress and undress in bed, and he said, "Maybe after Decoration Day, I might let you put your chiffonier and dresser in the next room; I might" he said. 20

Q. Was that ever done? A. No, sir.

Q. At this time, and just after you were married, did he purchase a syringe for you? A. Yes, sir.

Q. What kind of a syringe was it, do you know? A. A regular vagina syringe.

Q. Did you know it at that time? A. No, sir.

Q. Did he tell you what it was for? A. No, sir, he told me he wanted to keep me to keep my complexion clear; and when I told it to the Priest in confession, the Priest said, "He is a liar"; he said, "He did that to prevent children." 30

Q. Did you make that statement to him in the presence of the Priest? A. No, sir, this was in confession; and the Priest said if he was not man enough to have children, he should not have got married.

Q. Did you know at the time that the syringe was to be used for that purpose? A. No, sir.

Q. Did you speak to him when you went back; what did you say? A. He then said, "If you want to put it that way, I bought it for you so you would be clean." 40

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Q. Now, from the date of your marriage up to the time you say you were obliged to leave your husband, did he make any purchases for you of clothing? A. The second day I was married, I had on a light broadcloth suit, and he wanted me to save that suit, and he bought me a coat; I think it was \$45 or \$50, and he would not permit me to wear that suit only on special occasions.

Q. At that time what was your husband worth in real estate? A. Prior to my marriage he told me he had refused \$175,000 for the hotel.

Q. Did he tell you what mortgage was on the property? A. I think he told me about \$30,000.

Q. Did he have any money in the bank at that time? A. He told me he had money in two banks in Philadelphia, and also this joint account in the Marine Trust Building in Atlantic City.

Q. You were only occupying one room in his hotel, without any bathing accommodations? A. That is right.

Q. After you had your trouble with Mr. O'Brien, you say you separated from him? A. Yes, sir.

Q. After you separated, did you go down to see him again with Mr. Reginald Kelly? A. Yes, sir, I was down that time when Mr. Kelly came down.

Q. Is Mr. Kelly in the court room now? A. Yes, sir.

Q. You say Mr. Kelly was at Atlantic City? A. Yes, sir, he came down expressly for that; I asked him to come down.

Q. Did you go to see Mr. O'Brien with Mr. Kelly? A. No, sir, Mr. Kelly went in alone.

Q. You were not with him at that time? A. No, sir.

Q. After Mr. Kelly came back, did you see Mr. O'Brien again? A. Yes, sir.

Exhibit D—Record in Former Suit.

Q. What was it about? A. He just came over and sat on the porch.

Q. You did not talk to him, did you? A. He mentioned something about Mr. Kelly—what a fine looking man he was.

Q. Nothing about yourself? A. No, sir.

10

Q. At that time did you make any offer to return to your husband if he would treat you properly?

A. Yes, sir, I told him that if he could live the natural life and leave this Mrs. Boss and her daughter and his brother, that I would return to him and do everything that a good wife should do, and this he absolutely refused to do.

Q. When you said that, what did he say to you?

A. He told me he would not do it.

Q. Did he tell you why he would not?

20

Mr. Hermann: Don't lead the witness.

Q. Did Mr. O'Brien tell you why it was that he did not want to have sexual intercourse with you in the natural way? A. Yes, sir, he told me he did not enjoy it.

Q. Now, after you had these numerous talks with Mr. O'Brien, did Mr. O'Brien at any time request any detectives or any men to come and see you?

A. Yes, sir.

30

Mr. Hermann: I object to the form of the question.

The Court: The objection will be sustained; strike the answer out.

Mr. Goldenhorn: The question is withdrawn.

The Court: Don't characterize it; just relate the conversations.

Mr. Goldenhorn: The witness has already said that she had a number of talks.

40

Exhibit D—Record in Former Suit.

Q. After you had any or many talks with your husband, did you speak to him at any time about his having sent detectives down there to the hotel?

10 A. One evening when mother and I were in the dining room, mother noticed a man looking out, and she said to me, "Oh, I think that he is some man watching what I am eating"; and as we came out the bell boy came to me and said, "Mr. O'Brien wants to see you"; and I said, "You tell him to come to me"; and my husband said, "Come in there; there is a man from the church wants to see you"; and as I walked in, this Mr. Hendricks, the detective, displayed his badge; I was too full for utterance; I asked him what he was doing here; and he said, "Well, Mr. O'Brien requested me to
20 come, and that he wanted my mother to leave the hotel at 10 A. M. Saturday morning."

Q. What day of the week was this? A. That was about August 2, 1922.

Q. What day of the week was it with respect to the Sabbath? A. This was on a Thursday.

Q. You fix the date as what? A. As Thursday, August 2nd, 1922, at 10 A. M.; he fixed for her to leave at 10 A. M.; and I asked why, because, prior to that he had his father, mother and his brother
30 there; and I asked why my mother should leave; and the detective said, "Mr. O'Brien said your mother is creating trouble around." I said, "I want him to come in and prove one word that my mother has spoken to him"; she never reproached him once for his vile conduct to me, simply because I told her I did not want her to interfere in any way.

Q. Did you say this to Mr. O'Brien? A. Yes, sir.

40 Q. Then what happened; what did he say? A. This is the talk of the detective, Mr. Hendricks; I said, "Mr. Hendricks—"

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Q. Was Mr. O'Brien there at the time? A. He was back and forth in the room.

Q. Was Mr. O'Brien present when you were talking to the detective, Hendricks? A. Yes, sir.

By Mr. Hermann:

Q. All during the time? A. No, sir, he was back and forth. 10

Q. When he was there, what passed? A. The decttive said, "Mr. O'Brien wants this order made out for your mother to leave," and he said, "Yes, I will put my signature to it that she is to get out."

Further direct:

Q. Up to that time, had your mother had any trouble with Mr. O'Brien? A. No, sir, she never spoke a word to him other than when she said, "I heard what you said to my daughter about getting out." 20

Q. Outside of that little remark, had your mother spoken to him at all about the way he was treating you? A. No, sir; I told her I did not want her to.

Q. That was in the month of August, 1922, you say? A. Yes, sir.

Q. Is that right? A. Yes, sir, the second of August. 30

Q. After that conversation did your mother leave the hotel? A. We both left August 6, 1922.

Q. What room in the hotel, or where in the hotel was your mother living at that time? A. Room 9, with me at the Hotel De Ville.

Q. Where was that room with respect to the room your husband had occupied with you at the hotel? A. Just one room between.

Q. How long did you occupy that room with your mother? A. Three weeks. 40

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Q. During all those three weeks, did your husband at any time ask you to leave your mother and occupy a room with him? A. No, sir.

10 Mr. Hermann: I object to the form of the question; there is no basis for such a question.

Q. Did your husband at any time say anything with respect to your leaving your mother's room and occupying a room with him? A. No, sir, all I ever heard from him was to get out; he told me he would be perfectly pleased if I went home to live with my parents, and he would be able to save money.

20 Q. Up to that time, and while living at the hotel with your mother, did he give you money for your own support? A. When Mr. Kelly came down, I requested Mr. Kelly to speak about an amicable separation.

Mr. Hermann: Objected to.

Q. After you had your talk with Mr. Kelly, did he go and see your husband? A. Yes, sir.

Q. Then did he come back and see you, did Mr. Kelly? A. Yes, sir.

30 Q. And did you and Mr. Kelly and your mother leave the hotel, or did you and your mother leave the hotel alone? A. Mr. Kelly was down sometime in May and we left in August; we had been away all that time, and we came back.

40 Q. When you came back in August, or rather, when you left in August, did you tell your husband you were leaving him? A. His sister told it; she told me that she was down in the big room with him, and that he seemed very nervous at my going,

Exhibit D—Record in Former Suit.

and she said, "Are you going to allow that girl to leave?"—

Mr. Hermann: Objected to.

The Court: Objection sustained.

Q. Did you tell your husband you were going to leave him when you went? A. No, sir, he disappeared; the only party I saw was Mrs. Boss at the desk. 10

Q. Is that the last time you were with him at all? A. Yes, sir.

Q. When your mother received the notice from the detective to leave on Saturday, August 2, 1922, as you have related, did you speak to your husband about that? A. The next morning I met him coming from church, and I told him I was going home, and that is the morning he said to me, "I don't care if you go home for five or ten years, I will have money." 20

Q. Did you tell him when you were going? A. No, sir.

Q. When you got out on this Saturday, what happened to your things that were down there? A. I had taken one trunk; I left the smaller one down there, and at that time he did not know whether I was going to return or not. 30

Q. Answer my question—did you leave any trunk there? A. Yes, sir.

Q. Did you ever get it? A. No, sir.

Q. And you haven't got it yet? A. No, sir.

Q. Then you went where after you left the Hotel De Ville; where did you go? A. To New York with my mother.

Q. And you have been with her ever since? A. Yes, sir. 40

Q. Has your husband come to see you since you

Exhibit D—Record in Former Suit.

have been away from him? A. No, sir, he never came to see me, and he never wrote, and he never telephoned. That was on August 6, and it was not until sometime in January that I heard that he was mentioning about—

10

Mr. Hermann: Objected to.

The Court: The objection is sustained.

Q. He has not been to see you and he has not written to you and he has not telephoned to you; is that right? A. That is right.

Q. Has he sent anyone to you to ask you to return to him? A. No, sir.

Q. Has he made any efforts at reconciliation since? A. No, sir.

20

Q. Did he send you any money for your support prior to an application being made to this court for support for you? A. No, sir.

Q. Since then you have been receiving \$25.00 a week? A. Not all the time.

Q. But you get it regularly, and sometimes irregularly? A. Yes, sir.

Q. Now, after you left him did you consult with any physician? A. Yes, sir, Dr. Roberts.

30

Q. Where is his office? A. 2766 Decatur Avenue, Bronx.

Q. How soon after you left your husband was it that you consulted with him? A. Just one month.

Q. What was your condition of health at that time? A. He examined me and told me—

Mr. Hermann: I object.

The Court: The objection is sustained.

40

Q. Don't tell us what the doctor told you; you cannot tell us that; was there anything the matter with you at that time, you can tell us that? A. Yes, sir, I had pains in the lower part of my genital

Exhibit D—Record in Former Suit.

organs, and bearing down feelings; and I had terrific pains in the right side, and I was very nervous.

Q. Now, while you were at Atlantic City did you consult with any doctor? A. Yes, sir, I had a Dr. Coward there.

10

Q. What was your trouble when you consulted him? A. I was very, very nervous, and he told me—

Q. Don't tell us what he told you; what else outside of nervousness did you experience at that time? A. Loss of sleep; I cannot state what he told me.

Q. You say you suffered from loss of sleep and extreme nervousness? A. Yes, sir.

Q. Did you have any pains at that time? A. I had pains in my right side, and even today I am unable to lie on it.

20

Q. Have you told us everything that your husband did to you with respect to his actions in regard to your genital parts; have you told us everything? A. This is terrible talk.

Q. State it. A. He used my breasts with his mouth—

Q. And did you experience any pain in your breasts afterwards? A. Just at the time it was being done, but not after.

30

Q. What effect had that on your nerves, if any?

The Court: She cannot tell that; how can she tell that?

Mr. Goldenhorn: I should think one could tell; if one hit me alongside of the face—

The Court: It hurt her, probably, but the question is leading.

40

*Exhibit D—Record in Former Suit.**By the Court:*

Q. What effect did it have on you? A. I was extremely nervous.

Further direct:

10 Q. How old are you? A. 27.

Q. How old were you when you were married?
A. 25.

Q. How long were you and your husband together, from when until when, in your marital relationship? A. About three weeks altogether.

Cross examination by Mr. Hermann:

20 Q. Your husband has never undertaken to communicate with you since you left? A. No, sir.

Q. He has never written to you? A. No, sir.

Q. Suppose he had written to you, would you have gone back to him? A. If he promised he would lead a natural life, and if this Boss woman and her daughter and his brother were removed.

Q. What is your real trouble; is it because of this woman and his brother, because they are there, or is it because of this cruelty? A. The cruelty, that is the main point.

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

Q. Your principal complaint against Mr. O'Brien, is it the fact that he indulged in these acts that you have testified to? A. Yes, sir.

Q. That is the principal thing? A. Yes, sir.

Q. That is the only thing? A. I don't understand that question.

40 Q. What don't you understand about it? A. You said was that the main point, and I said yes, that is the main point.

Q. Was there any other cause? A. The Boss

Exhibit D—Record in Former Suit.

woman and her daughter and his brother were another cause.

Q. But you could not have had any trouble with the Boss woman and his brother during this short three weeks? A. Not right in that three weeks, it was after, when I came back with my mother. 10

Q. When did you actually leave Mr. O'Brien the first time? A. The middle of May.

Q. How long was that after you were married? A. About three weeks.

Q. During that time you had no trouble with the Boss woman or with Mr. O'Brien's brother? A. The Boss woman said I acted like an idiot.

Q. Didn't you testify before when you were back there with your mother, that the Boss woman had said that? A. I came back to the hotel ten days after our marriage; it is really so long ago, I cannot place it. 20

Q. You testified very well on your direct examination. When did Mrs. Boss say to you you acted like an idiot; wasn't it when your mother returned with you? A. I don't know.

Q. So that when you first left, your only complaint against your husband was these acts that you have testified to? A. Yes, sir. 30

Q. Now, let us see, did you make an affidavit in this case on application for alimony? A. Yes, sir.

Q. And in the answering affidavit to the affidavit of Mr. O'Brien, what did you mean when you said this: "That when she married her husband she did so as a good Catholic woman desired to marry a good Catholic man, and although deponent had another offer of marriage at the time she married the defendant, she nevertheless preferred defend- 40

Exhibit D—Record in Former Suit.

ant because she loved him and thought she could be happy with him; but deponent learned upon living with the defendant for three weeks, that the defendant was a man of very low moral character; that he asked deponent to do things too
10 filthy to mention in an affidavit of this character, but which deponent would be glad to mention in the ear of the court or any special master to whom this matter might be referred. Deponent would have been willing to indulge her husband even in this matter, if it were not for the attacks made upon her by her husband, and the effect of injuring the genital organs of deponent, causing her to become a nervous wreck." You were willing then, you say, to even indulge in what you
20 knew were immoral practices? A. If it was not injurious to my health and life, and thinking that any time he might get over that way.

Q. What did you mean on your direct examination, then, when you said that because you took Holy Communion every morning you would not allow that? A. I would not allow that.

Q. What did you mean when you said, that he desired to use his finger on your genital organs; what did you mean by that? A. He did.
30

Q. How? A. By inserting it.

Q. And that was objectionable to you? A. Yes, sir.

Q. And that was the reason you objected to it? A. Yes, sir.

Q. When he kissed your breasts, that was objectionable to you? A. Yes, sir.

Q. And when he asked to have that indulgence, you told him that that was not the natural way, and that was the reason you would not do it, didn't
40 you? A. Yes, sir.

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Q. How do you reconcile that with this statement, that you would even have been willing to indulge your husband even in these matters? A. It was thoroughly objectionable.

Q. You signed this affidavit and you said that the acts were objectionable to you? A. Yes, sir. 10

Q. I ask you how you reconcile that with the statement in this affidavit that you would even be willing to indulge your husband even in these matters? A. The only answer I can give you is on account of my religion; not recognizing divorce, I thought if it was possible for me to live my life with him, I should do so.

By the Court:

Q. Doesn't your religion recognize divorce? A. Yes, sir, but not remarriage. 20

Further Cross:

Q. Now, Mrs. O'Brien, what date were you married? A. April 25, 1922.

Q. And after you were married, you say you remained at Atlantic City over night? A. Yes, sir.

Q. Did you have sexual intercourse with your husband that night? A. No, sir. 30

Q. Why not? A. I don't know why not.

Q. Did he ask you for it? A. No, sir.

Q. Did you object to it? A. No, sir, the next morning he told me the reason he did not bother me was that he thought I might be ashamed.

Q. So there was nothing objectionable that night? A. No, sir.

Q. He did not indulge in any of these practices then? A. No, sir.

Q. Where did you go from there? A. To Overbrook, Pennsylvania. 40

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Q. Did you indulge in sexual intercourse that night? A. Yes, sir.

Q. Is that the time you complained that it lasted forty minutes? A. Yes, sir.

10 Q. You objected to that? A. No, sir, I did not object; I tolerated it, which was very painful.

Q. Did it happen more than one time that night? A. No, sir, that night and the next morning.

Q. That was the second day? A. Yes, sir.

Q. How about the third? A. The third day we had it.

Q. On the third day, didn't you return to Atlantic City to visit Father Sheehan? A. No, sir.

20 Q. Sure of that? A. Positive; we were in Overbrook, Pennsylvania two days, and on the fourth day we were in Maryland.

Q. On the fifth day did you return to see Father Sheehan? A. No, sir.

Q. On the fifth day you returned to Atlantic City? A. Yes, sir.

Q. At that time had there been any difference between you and your husband over these alleged indecent acts? A. In Maryland I objected.

Q. Was Maryland the first time? A. Yes, sir, that was the fourth day.

30 Q. And what was the action then complained of that happened in Maryland? A. About putting his penis in my mouth.

Q. That was all that time? A. Yes, sir.

Q. Did you on any of those four days object to having further sexual intercourse with your husband? A. No, sir.

Q. Hadn't you refused him? A. No, sir.

40 Q. You were perfectly willing to have it? A. Yes, sir, in the natural way.

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Q. And then when you returned to Atlantic City, what happened there? A. After I got back to Atlantic City I came home the next morning.

Q. That is, you came home to New York to your mother? A. Yes, sir.

Q. What was the reason for that? A. On account of the treatment. 10

Q. What treatment? A. Taking his penis in my mouth.

Q. That happened once in Maryland? A. That was the fourth day, and then I came home to my mother, and then he called me up.

Q. Did you indulge him as he requested, or did you refuse; did you allow him to insert his penis in your mouth? A. No, sir, I refused it, and he tried to force it. 20

Q. When you got back to Atlantic City, you then returned to your mother in New York? A. Yes, sir.

Q. How long did you remain there? A. A couple of days; he called me up and told me if I would come back he would lead a natural life, and I did go back.

Q. How many days were you with your mother? A. Possibly two. 30

Q. Did anything else happen in Atlantic City that you recall at that time? A. Then he started in in less than a week's time with the same treatment after I came back to him.

Q. You were married what day? A. April 25, 1922.

Q. And then you must have left then on the 30th, to return to your mother? A. It might be; I really don't know the dates,—within the week, I will say.

Q. And you remained with your mother how long? A. Possibly two days; it would not be any longer than that. 40

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Q. When you came back, how long did you remain at Atlantic City with Mr. O'Brien? A. About ten days.

Q. Did you bring your mother back with you? A. No, sir, not at that time.

10 Q. You were alone? A. Yes, sir.

Q. Did you transact any business at all in Atlantic City? A. Transact any business?

Q. Yes. A. Are you referring to the charge account? What business do you mean?

Q. You had an account in a department store? A. Yes, sir.

Q. You also discussed with Mr. O'Brien the value of the property? A. No, sir.

20 Q. Didn't you also ask him to get rid of the services of Miss Boss and of his brother and put your brother in charge of the hotel? A. No, sir, I never made any such statement. I said, to annoy him, "If your brother remains, I have to bring my brother down."

Q. That was only to annoy him? A. Yes, sir.

Q. Why did you want to annoy him? A. Because he was annoying me continually.

30 Q. What was he doing to annoy you? A. He used a great deal of sarcasm at all times; I had a bag, and I had a \$20.00 gold piece in it, and he said, "Better let me hold that"; and I gave it to him, and he held it up and he said, "Some dowry you came to me with," holding it up. He noticed it was breaking the bag, and that is why he asked for it.

Q. Did the annoyance impress this on you? A. At the time.

40 Q. You remember Mrs. Boss said to you at this time, that you were acting like an idiot? A. Yes, sir.

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Q. See if you cannot refresh your recollection of any other annoyance besides the one about holding the \$20.00 gold piece. A. Another time we were driving in the car, and I just put my foot on his to make the car go faster, and he kicked me in the ankle; then he gave me a map of the road and told me to look for a certain direction, and I could not find it quickly enough to suit him, and he snapped it from me and said, "You are so darned dumb; give it to me." 10

Q. Isn't it a fact that he took you to the Atlantic City Bank and put in your name \$8,962.00? A. Yes, sir, that is a fact.

Q. Give me the circumstances under which that was done? A. He was not giving me any money, and I was getting money from my mother, and I said to him, "I am not going to plead with you for money continuously; I want you to let me have an account of my own"; and he said, "All right; I will put your name in the joint account." A few days later he said to me, "I put your name in the joint account with me, but there is a string on it—you just try and get it." 20

Q. You had a charge account in the store? A. Yes, sir, he opened that up for me.

Q. You were living in the hotel? A. Yes, sir. 30

Q. Didn't he give you an allowance in addition to that? A. No, sir.

Q. Didn't you have spending money? A. No, sir, he told me as long as I had my food and bed I did not need spending money. At one time he gave me \$50.00.

Q. But that \$50.00 was not all spent in one day, was it? A. No, sir.

Q. How many days did you live in all with him? A. I lived three weeks with him, but then I came back with my mother. 40

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Q. Just to get this spending money he transferred this \$8,962.00? A. I suppose that must have been it.

10 Q. You are sure you had no discussion with Mr. O'Brien immediately after your marriage, in which you said, "Unless you put this hotel property in my name and put your brother and Mrs. Boss out, and put my brother in as manager, I do not propose to live with you as your wife?" A. That is absolutely false.

Q. And you deny that Mr. O'Brien, in order to get peace with you, and at your request, put this \$8,962.00 in your name at this bank? A. I certainly do.

20 Q. And your only explanation for that is, that Mr. O'Brien, not giving you any money for an allowance, although he gave you carte blanche at the department store and gave you \$50 during the three weeks, you wanted \$8,962.00 in your name for spending money? A. When I came back with my mother the spending money was mentioned.

30 Q. Have you any recollection how much you spent at the department store during that three weeks? A. No, sir, he promised me he would give me \$50.00 a week, and I said, "As long as you give me \$50.00 I won't bother with the charge account"; and then I opened another account.

Q. Do you know how much you expended at that department store for those three weeks? A. No, sir.

40 Q. Why did you complain about him buying you one coat and making it appear that was because he wanted to make you keep a particular dress for special occasions? A. That was the second day after I was married that the coat was bought.

Q. Didn't you buy other wearing apparel in

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those three weeks at Blatt's? A. I think that was in June or May that that was bought in.

Q. Did he furnish you with money to go home to your mother? A. On one occasion he did.

Q. Did you ever ask him for money on any occasion when he refused it? A. Very often. 10

Q. Do you mean to say, that when you asked him for money to go home to your mother he refused it? A. He did refuse it, but I told him I had to have it to go home with.

Q. Have you given us all the conversation you had with Father Sheehan—is Father Sheehan in the court room? A. No, sir, he is not here; yes, sir, I have given you all the conversation, to the best of my knowledge.

Q. Did you have any discussion with Father Sheehan with respect to Mr. O'Brien's failure to turn the hotel over to you? A. No, sir. 20

Q. Then, if Father Sheehan makes a statement in which he says that was the only conversation, is that true or not true? A. That is not true.

Q. And if Father Sheehan is here tomorrow to testify as a Catholic Priest, you being a good Catholic, would still say it is not true? A. I say that is not true. The only conversation I had with Father Sheehan was about his degenerate habits, my husband's degenerate habits. 30

Q. You deny you said to Father Sheehan that "Mr. O'Brien declines to turn over the hotel property to me"? A. Absolutely; I never made any such statement.

Q. You never told Father Sheehan that the property was worth \$175,000 and that you should have part of it? A. I don't remember telling him that, and I am positive I did not. At the time I went to Father Sheehan was only about my husband's degenerate habits. 40

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Q. Didn't you tell Father Sheehan that the only reason you declined to be a wife to Mr. O'Brien was until he made some arrangement to turn this hotel property over to you? A. No, sir, I never made such a statement.

10 Q. Don't you know it happened before this \$8,000 was put in your name? A. No, sir.

Q. Was this \$8,000 transferred before you saw Father Sheehan? A. I think it was before; I did not see Father Sheehan until late in July.

Q. You did not see Father Sheehan until when? A. The middle of July I saw Father Sheehan.

Q. Was that when you returned after the long visit to your mother or the first visit to your mother? A. That was after the long visit to my mother; at the time mother was with me at the hotel.

Q. What was your idea in coming down and bringing your mother to live at the hotel? A. Simply because I happened to go back to the basin at the bottom of the hall, and this Mrs. Boss' daughter was serving in the pantry, and the waitress said she wanted some brown bread, and the daughter said, "Who is it for?" and the waitress said, "For Mrs. O'Brien," and Mrs. Boss' daughter said, "I would like to put poison in if I could get away with it."

Q. I ask you for the reason that you came back to live at this hotel after discovering Mr. O'Brien's degenerate propensities, and having left him to go home to your mother, why did you bring your mother back to the hotel to live again? A. To see if she could effect a reconciliation, and to see if she could get him to live the right kind of a life; but he ignored my mother and me, too.

40

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Q. And you had a great deal of difficulty there, didn't you? A. In what way?

Q. Did you or didn't you? A. My married life was nothing but difficulty.

Q. Tell us what difficulty you had while your mother was there? A. I don't remember what it was. 10

Q. Your mother was followed by a detective; you remember that, don't you? A. The detective was brought into the place.

Q. What for? A. To see that my mother should leave.

Q. Mr. O'Brien ignored your mother altogether? A. Yes, sir.

Q. So that there was no controversy between your mother and Mr. O'Brien? A. That is very true. 20

Q. If he ignored her there could not be any controversy? A. No, sir.

Q. Then tell us what the controversy was, then? A. Mother did not have anything to say to him.

Q. Why did you think this detective was there to put your mother out? A. I am sure I don't know; Mr. O'Brien wanted to make it appear that mother was creating trouble, and he wanted her to go. 30

Q. What trouble did he say your mother was creating? A. He did not say, and I asked him to prove it, and he said nothing.

Q. And yet he gets a detective to tell your mother to leave? A. Yes, sir.

Q. Cannot you tell us your whole truth? You know that is an improbable story, don't you?

Mr. Goldenhorn: Objected to.

(Question withdrawn.) 40

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Q. Why did you bring your mother down to Atlantic City?

Mr. Goldenhorn: I ask that that comment be stricken out.

10 *By the Court:*

Q. Why did you bring your mother down to Atlantic City? A. I brought her down to see if she could effect a reconciliation.

Q. Tell us what efforts were made. A. She would not make any, because he would not even look in her direction.

20 Q. Tell us what efforts she made to effect a reconciliation, or what efforts he made. A. One time at the table she spoke to him and he ignored her, and then she did not speak further.

Q. What did she say to him? A. She said one time, "Why cannot you be happy and get along together?"

Further cross:

Q. What did he say? A. He did not make any answer.

30 Q. How long did your mother remain at the hotel with you? A. About three or four weeks.

Q. And was this alleged conversation between your mother and Mr. O'Brien on the first day, or when? A. I could not recall that.

Q. Your mother and you remained there for a period of three weeks and no further effort was made by your mother to effect a reconciliation? A. Very true.

Q. And during all that time you occupied the room with your mother? A. That is very true.

40 Q. Did you take the furniture out of the room

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that you had formerly occupied and put it in your mother's room? A. I did not take all the furniture, just two pieces.

Q. Where was Mr. O'Brien's room? A. The second next to the one mother and I occupied.

Q. What efforts did you make to effect a reconciliation? A. Just as I have stated. 10

Q. Now, did you at any time have anything to say to either the Boss woman or to Mr. O'Brien to provoke the remarks that were made, did you at any time say anything yourself to this Boss woman? A. I spoke to the Boss woman's daughter; I said, "How dare you say you would like to put poison in my food?" and she said, "I never said such a thing." 20

Q. And when they insulted the guests that came to see you, did you try to find out why it was done? A. No, sir. 20

Q. When Mrs. Boss said to you, "You act like an idiot," did you ask her why she drew that conclusion? A. No, sir.

Q. When Mr. O'Brien was standing on the porch and made an insulting remark to you, did you inquire why he did that? A. No, sir.

Q. There was no reason for them to be unfriendly to you, was there? A. They were extremely unfriendly. 30

Q. Didn't you want to know why it was? A. He had told me prior to our marriage, that they would go, and I did not think that there was any need to have any conversation about it; I thought he would live up to his promise and let them go; that was prior to our marriage; he told me they would go after we were married.

Q. Why? A. Because he told me there was no house big enough for two families. 40

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Q. Did you object to them being there? A. I did, after I was married.

Q. Before you were married, did you? A. No, sir, I had no say to that.

10 Q. Might that not have had something to do with your request that your brother take the place of Mr. O'Brien's brother? A. No, sir, I said if his brother was to remain, I was going to see that my brother would come down.

Q. If Mr. O'Brien was to get out, your brother was to be brought down? A. No, sir; I mean, that if his brother was to stay, then I was to have my brother there, but my brother would not have come; he had too good a job.

20 Q. What was the idea of having your brother there when Mr. O'Brien's brother was there? A. Simply to have some member of my family there, as a protection.

Q. You did not need protection before your marriage? A. I am talking about since my marriage.

Q. What was the object of having your brother there if Mr. O'Brien's brother was to be there; what was the object?

30 The Court: The witness said that if O'Brien's brother was there, then she wanted her brother there; and then she said her brother would not have come down in any event.

Q. (Question read.) A. Simply to have some member of my own family there.

By the Court:

40 Q. What did you want your brother there for?
A. As a sort of a protection against Mrs. Boss and her daughter, and my husband and his brother.

*Exhibit D—Record in Former Suit.**Further cross :*

Q. You rather thought it would be a nice thing to have your brother assist Mr. O'Brien in running the hotel? A. No, sir, I simply made the remark, I knew Mr. O'Brien would not have it.

10

Q. Why did you think he would not have it? A. Because he would not have any member of my family there. He told me it was all right for his family to be there, but none of mine.

Q. You said he proposed that the place was not big enough for two families? A. He said that.

Q. You believed that, then, didn't you?

Q. And wasn't it at that time that you had the discussion about your brother coming there if his brother did remain? A. No, sir, that conversation was never brought up about my brother prior to my marriage.

20

Q. What did you think he meant when he said, "After marriage, I am going to get rid of Mrs. Boss and my brother"? A. That they would be out of there.

Q. What position does Mrs. Boss occupy? A. He said he hired her on contract for two years, that she received a profit for the buying of the food.

30

Q. What did Mr. O'Brien's brother do at the hotel? A. He was the clerk. My husband told me in a letter before our marriage, that this Boss woman had taken an apartment out of the hotel; he said, "I told her to go, because there is no home big enough for two families; she knows we are engaged now"; and he said, "Her daughter wanted a private home, and that she was going to give Mrs. Boss' son his meals in their apartment."

40

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Q. Was that before your marriage? A. Yes, sir.

Q. And that was in the form of a letter? A. That was in the letter.

10 Q. So when you said he told you he was going to get rid of the Boss woman and of his brother, you mean that he wrote that to you? A. He wrote to me about the Boss woman; he said, "She takes the apartment outside"; that she was coming in at 7:30 in the morning and leaving at 7:30 at night, and that she would not live at the hotel.

Q. Did he at any time talk to you about it? A. Prior to my marriage he told me, if I found I could not get along with them, they would have to go.

Q. If you could not get along with them, they would have to go? A. Yes, sir.

20 Q. So it was not because the house was not big enough for two families? A. That is the way he put it.

Q. He told you, if you could not agree with Mrs. Boss and his brother, that he would get rid of them? A. That is very true.

Q. The brother was the clerk in the hotel? A. Yes, sir.

30 Q. And the Boss woman was the one that ran the dining room? A. Yes, sir, I asked him if he would allow the brother to go, I would do the typing, and he said, "What would Jack do?"

Q. How long did you know Mr. O'Brien before you married him? A. Seven years.

By the Court:

40 Q. How long did he come to see you before your marriage? A. Off and on during the seven years. I first met him at the Hotel De Ville in Atlantic City; I was there with my mother.

Q. Did you become engaged immediately? A. Not until 1920.

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Q. Did he give you a ring? A. Yes, sir.

Q. When? A. In 1920, in June.

Q. Did he ever have sexual intercourse with you before you were married? A. No, sir.

Q. Did he ever kiss you before you were engaged? A. Yes, sir. 10

Q. He used to take you out before you were engaged? A. Yes, sir.

Q. Did you go alone with him? A. Yes, sir.

Q. He never abused you then? A. No, sir.

Q. Did he ever give you any money before you were married? A. Prior to my marriage he gave me a thousand dollars as a gift for our marriage.

Q. How long prior to your marriage? A. Possibly a month before our marriage. 20

Q. What did he say that was for? A. He asked me what I would want for a gift, and I told him gold mesh bags, and he told me to go out and buy them myself.

Q. Had he given you money before that? A. No, sir.

Q. What was your financial condition when you first met this man; what did you live on? A. My father's salary.

Q. Is he here? A. Yes, sir. 30

Further cross:

Q. Let us hear about the ring; Mr. O'Brien bought you quite a substantial diamond ring? A. Yes, sir, he paid \$1,750.00 for it; in the beginning, he had given my brother a check for a thousand dollars, and when we were looking over the rings I told him the kind we were looking at, and he said, "Pick out a nice one"; he said that he wanted me to pay more than a thousand dollars for the ring, because the waitresses only had that priced ring, and he sent \$750.00 more after that. 40

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Q. He did not buy the ring at all himself? A. No, sir.

Q. He sent your brother a check for a thousand dollars? A. Yes, sir.

10 Q. What is your father's business. A. He is a Lieutenant of Police in New York.

By the Court:

Q. How much did Mr. O'Brien send your brother? A. He gave my brother a check for a thousand dollars to get the ring for me, and then he sent a check for \$750.00 more.

Q. Why did he give it to your brother? A. He said he would make it out to my brother for my engagement ring.

20 Q. Didn't you object to that proceeding? A. No, sir.

Q. Why did he give one check to your brother and one to you? A. He did not tell me; after he went back he sent the \$750.00.

Q. Did your brother go after the check? A. No, sir; he mailed the \$750.00 to me, and he handed the check for \$1,000 to my brother in New York. The three of us were having dinner together at the time.

30 Q. Was the dinner to celebrate the engagement? A. No, sir.

Further Cross:

Q. When was this ring purchased, how long before you were married? A. Two years—1920.

Q. Was not the first check, your brother got, for \$1,500? A. No, sir, I don't think so; I think it was a thousand; and he sent me \$750.00, to my knowledge.

40 Q. How was this \$750.00 sent to you, and what were the circumstances under which it was sent?

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A. I wrote and told him about the ring I was looking at, and he wrote back and told me to pick out a very nice one, and when I went down to pick it out the man said it would be \$1,750.00, and then I wrote to him and he sent me the difference.

Q. Didn't you write to him and tell him that \$1,500 was a piker amount for the ring? A. No, sir.

10

Q. Didn't you write and tell him that that ring would not do for you and that he had to send you more money? A. No, sir.

Q. What did you do? A. I explained that.

Q. You did not complain about the rings that could be bought for a thousand dollars? A. No, sir.

Q. And you did not tell him he had to send you more money? A. I told him the ring I was looking at was more than a thousand dollars, and he said "Pick it out and tell me the difference, and I will mail same to you," which he did.

20

Q. And about a month before you were married, didn't you say to Mr. O'Brien that you needed a thousand dollars to buy a mesh bag and buy a trunk and a grip? A. No, sir, I never made any such statement; it was he who volunteered to give me that as a wedding gift, as he called it.

30

Q. Didn't he give you any other wedding gift than the thousand dollars? A. And the ring.

Q. Do you mean to say those were the only gifts he gave you during those seven years? A. He bought me a gold bracelet with five diamonds in it, five small diamonds.

Q. Take your mind back to the first Christmas; did Mr. O'Brien give you a brooch pin? A. I don't remember.

Q. Wouldn't you remember such a thing as that? A. I would if I received it.

40

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Q. Do you recall sending the pin back because it was too deep? A. No, sir.

Q. Would you recall it if it were a fact? A. I think I would.

10 Q. Did you enumerate all the gifts Mr. O'Brien gave you? A. To my knowledge, yes, sir.

Q. During the years you were engaged to be married, do you mean to say he did not give you anything at Christmas or on your birthday? A. No, sir.

Q. And you don't recall the incident of a brooch? A. No, sir, I don't recall that.

20 Q. Are you not in error when you say you lived with Mr. O'Brien three weeks; enumerate for me again the time you actually lived with Mr. O'Brien after you were married. A. Three weeks.

Q. See if we cannot trace those three weeks; the first night after you were married, or the first night you were married, you remained in Atlantic City; then you went to Overbrook, Pennsylvania; how long did you remain there? A. Two or three days.

Q. Can you not fix the time? A. No, sir, two or three days, to the best of my knowledge.

30 Q. Now, from there you went to Maryland; how long did you remain in Maryland? A. Possibly two days.

Q. Was it one day? A. I will say possibly two, to make sure.

Q. Then you left and came back to Atlantic City? A. Yes, sir.

Q. How long did you remain at Atlantic City? A. Just over night. The next day I came to New York.

40 Q. How long did you remain in New York? A. One or two days at the most.

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Q Then when you came back, how many days did you remain at Atlantic City? A. About ten days.

Q. You say about ten days; cannot you give me the exact time? A. About ten days.

Q. Was that the time you had all this trouble with Miss Boss and the brother? A. I really cannot recall whether it was that time or the time I came back in June. 10

Q. When did you retain Mr. Kelly and send him down; wasn't that shortly after that? A. That was in the middle of May.

Q. So that you did have trouble with him during those ten days that you now say you lived with him on your return from New York? A. Yes, sir. 20

Q. Do you remember how long after that it was that you saw Mr. Kelly? A. No, sir, I cannot say that.

Q. When you were in Philadelphia or Overbrook, did you leave Mr. O'Brien in Philadelphia and go to visit your mother? A. Yes, sir, I did.

Q. How long were you away then? A. Just over night, because I had gone away without telling my mother I was going to be married, and when he brought me in to see his mother, I thought I ought to go home and see my mother and tell her I was married. 30

Q. Was that in Philadelphia? A. Yes, sir.

Q. Do you remember whether it was on the second or third day? A. It was within the week, I think so.

Q. You were only in Philadelphia or Overbrook three days at the most? A. Then it was after we got back to Philadelphia again; we came back again to Philadelphia. 40

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Q. When was that? A. I really don't know, I cannot say.

Q. But the maximum that you can make of it is three weeks that you have lived with him? A. Yes, sir.

10 Q. After that, you retained Mr. Kelly, and Mr. Kelly went down to talk to Mr. O'Brien about your relations? A. Yes, sir.

Q. After that you and your mother went and lived at the hotel for three weeks? A. Yes, sir.

Q. During which time you did not live with Mr. O'Brien? A. No, sir.

Q. So that the total period spent by you is three weeks during which you lived with Mr. O'Brien? A. Yes, sir, to my mind three weeks.

20 Q. And since that time you have been getting \$25.00 a week alimony? A. I did not get the alimony until January, 1923, and I have not got it all now.

Q. You have never written to him? A. No, sir.

Q. Never saw him? A. No, sir.

Q. Have you visited Atlantic City at all? A. Yes, sir, numbers of times.

30 Q. You have been right in Atlantic City? A. Yes, sir.

Q. You never undertook to find out where he was? A. Yes, sir, I did, and a man named Carberry said, that when my husband found out I was in Atlantic City he disappeared.

Q. How long were you engaged to Mr. O'Brien? A. Two years.

Q. How long did Mr. O'Brien court you? A. Six or seven years.

40 Q. During that time, how many times did he actually visit you at your New York home? A. Possibly five or six times.

Exhibit D—Record in Former Suit.

Q. Was an engagement ever set prior to the actual engagement? A. Yes, sir, when I first met him.

Q. What happened then? A. My mother objected on account of my living in Atlantic City and on account of my knowing him such a short time. 10

Q. Most of the times that you have seen him have been at Atlantic City? A. Yes, sir.

Q. And all during that time, seven years, would you say that he visited you in New York five times? A. Five or six; he always told me he would rather have me come to Atlantic City; that his business was there, and he could see me there.

Q. Where did you usually remain in Atlantic City? A. I remained at his hotel once or twice, and at other places. 20

Q. During that time were any charges made for the support of yourself and your mother? A. Yes, sir, we paid.

Q. Are you positive of that? A. Yes, sir; except on the last occasion, when we were there one day.

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Q. How many times did you visit Atlantic City to visit with him? A. I could not say that—numbers of times—three or four times a year.

Q. Did you always take your mother with you? A. Yes, sir. 30

Mr. Hermann: Might I at this point take a recess?

The Court: Yes.

RECESS To 1:45 P. M.

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Exhibit D—Record in Former Suit.

AFTER RECESS.

LAURETTA V. O'BRIEN resumes the witness stand.

Cross examination (continued) by Mr. Hermann:

10 Q. Out of the three weeks you lived with Mr. O'Brien you actually made three visits to your mother in New York? A. Two, to my knowledge.

Q. Then each time you came back to Mr. O'Brien, and finally, after the expiration of some months you came down to the hotel to live again in the hope that you would become reconciled? A. Exactly.

Redirect examination by Mr. Goldenhorn:

20 Q. The bank account put in the name of yourself and your husband, did you ever draw any money? A. No, sir.

Q. Were you ever given a check book or a bank book, or anything to show you had any money in the bank? A. No, sir.

30 Q. You testified, in answer to Mr. Hermann, certain things that you said provoked you, that your husband had done; do you recall anything else that he did that provoked you while you were living with him? A. At one time he told me that I could go out with any man that came to the hotel, that it would bring him trade.

Q. When was it he said that to you? A. Shortly after my marriage, we were speaking friendly; he said I was a good looking girl and I ought to be able to attract the men.

40 Q. At the time when you and your brother and your husband were dining, when your husband gave your brother a check for \$1,000 what was your

Exhibit D—Record in Former Suit.

brother's business at that time? A. Why, he was starting in business in McCarthy and Company.

Q. Was he connected with any concern at that time? A. Not to my knowledge.

Q. You say you are living with your father and mother? A. Yes, sir. 10

Q. Your father is a Lieutenant of Police? A. Yes, sir.

Recross examination by Mr. Hermann:

Q. What is your father's business? A. Lieutenant of Police.

Q. Is he assigned to the detective force? A. Yes, sir.

REGINALD M. KELLY, being duly sworn in behalf of the petitioner, testified as follows: 20

Direct examination by Mr. Goldenhorn:

Q. State where you reside? A. I reside at 116 Glenwood Avenue, Jersey City.

Q. Do you know the parties to this suit? A. Yes, I know both of them.

Q. What is your profession? A. I am a member of the Bar of the State of New York, Attorney and Counsellor at Law there. 30

Q. Where is your office? A. I practice and have an office at 256 Broadway; I have been practicing law since 1910.

Q. Were you, in the year 1922, consulted by Mrs. O'Brien, the petitioner here? A. Yes, sir.

Q. Did you, at her request, go to Atlantic City to see her husband? A. Yes, sir.

Q. Where did you see him? A. At the Hotel De Ville. 40

Exhibit D—Record in Former Suit.

Q. Do you recall when it was? A. It was in the early part of June, I think, about the 12th, 1922.

Q. What did you say to him and what did he say to you?

10 Mr. Hermann: I object.

The Court: The objection will be overruled; I will take it and deal with it at the conclusion of the case; I may rule it is improper testimony on the final disposition.

A. I told Mr. O'Brien that his wife had consulted me.

Q. Had she retained you; had she paid you any money? A. She had not paid me any money.

20 Q. How did you come to go to Atlantic City? A. Because she had been sent to me by a friend of their family that I knew, and I thought it was all right; Mr. Goodman was the friend.

Q. What is his business? A. He has some real estate interests in New York that he has talked to me about from time to time; he is retired, I believe.

By the Court:

30 Q. You had never seen the young woman before you went to talk to her? A. No, sir.

Q. How long a talk did you have with her? A. Probably it was about an hour.

Q. Did Mr. Goodman give you any money? A. No, sir.

Q. Did you pay your own carfare? A. Yes, sir, I advanced the disbursements and went down to see Mr. O'Brien.

Further Direct:

40 Q. What time in the day was it when you got there? A. I think it was about one o'clock in the afternoon.

Exhibit D—Record in Former Suit.

Q. What did you say to him and what did he say to you at that time? A. I told him that Mrs. O'Brien had consulted me, that she did not feel that she could—

Q. You told this to Mr. O'Brien? A. Yes, sir; that she had complained of certain things in their relations, of sexual abuse and unnatural practices, and that she did not feel that she could continue to live with him, and that I had come to see him in order to see if we could make arrangements for her support and for her living apart from him. We had quite a long talk. I was with him about an hour, I think; and he told me that he could understand how she felt, but that he had not been able to control himself, and that if she did return to him those things would not happen again; that he would endeavor to avoid any repetition of that sort of thing. I told him that she had complained that he had abused her sexually.

Q. Did you tell Mr. O'Brien what his wife had stated to you? A. I stated that she had complained of unnatural acts on his part.

Q. Did Mrs. O'Brien tell you what the unnatural acts were? A. Yes, sir, she complained.

Q. What did he say to you then? A. We had some talk then about the question of support; he at first objected to making any provision at all for her unless she came back and lived with him; and I told him under the circumstances, considering the condition of her health and the lack of confidence she felt in him that she did not want to do it; and he said if she would go down and live at the hotel—not as his wife—occupying separate quarters—that he would maintain her there and pay her \$50.00 a week for herself, hoping that in the course of time that she might eventually decide to go back to him again.

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Q. Did you speak to him at that time with respect to the complaint which his wife had made to you about the way she had been living in one room? A. I don't think that was specifically mentioned; we went over the whole ground, but I
10 don't remember whether that was mentioned or not.

Q. Did you have any talk with him about his ability to pay \$50.00 a week? A. Yes, sir, he told me about his income, etc.

Q. What did he say? A. He told me about the ownership of the hotel; he said he had bought it and he had some mortgages on it, and that his equity was somewhere between fifty and sixty
20 thousand dollars; he said he was making about \$15,000 a year.

Q. Did he say anything else to you about his wife? A. I don't recall anything else particularly.

Q. Did you speak to him anything at all about the fact that he was a Catholic and his wife was a Catholic, and they ought to get together? A. I talked to him about that, of course. I told him they ought to try to live together, but that she felt at that time that she could not put up with him
30 living with him as his wife, and I told him what she said; and he always came back to the proposition that if she saw enough of him and came back to the hotel she might get over that feeling and come to have more confidence in him.

Q. Did you report his remarks to his wife? A. Yes, sir.

Q. Were you subsequently paid by her for that visit? A. Yes, sir.

Q. In cash? A. By check.

40 Q. Whose check? A. I don't recall; it came by mail.

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Q. What did you charge to go to Atlantic City and have this interview? A. I charged \$50.00, and the disbursements were carfare, etc.

Q. In your talk with Mr. O'Brien did you tell him specifically any of the charges which his wife had made against him? A. I think I mentioned one particular thing, but I am not sure. 10

Cross examination by Mr. Hermann:

Q. Who is Mr. Goodman? A. He is a client of mine.

Q. Did you ever know he courted Mrs. O'Brien? A. I don't know.

Q. How old is he? A. About fifty.

Q. Widower or single? A. I believe he is single. 20

By Mr. Goldenhorn:

Q. You never saw them out together, did you, Mr. Kelly? A. No, sir.

Further cross:

Q. You went to Atlantic City with Mrs. O'Brien?

A. I went alone and met her there.

Q. Did she remain there? A. I believe she did.

Q. You made an affidavit on the application for alimony? A. Yes, sir. 30

Q. Was this a true statement: "Deponent says he went to Atlantic City with the petitioner in the early part of June, 1922, for the purpose of securing a separation from bed and board from the defendant, because of the fact that petitioner had complained to the deponent of the inhuman and filthy and degenerate habits of the defendant towards her, which were amply verified by the certificate of the physician who was in attendance"? A. She had shown me a certificate from a doctor; 40

Exhibit D—Record in Former Suit.

it stated that he had examined her and found certain conditions of the genital organs, but I don't remember the particulars.

10 Q. "Deponent says that when he saw the defendant in Atlantic City and told him about his treatment of the petitioner, the defendant admitted that he had been rough with the petitioner, and that it was his purpose to consult a doctor to find out what could be done to quell his ardor towards his wife"? A. He did say that; he said he realized how she felt; that he had been rough, and he lost control of himself, but if necessary he would see if a doctor could prescribe anything to make him less ardent.

20 Q. He did not admit any degenerate acts? A. That is just what we were talking about at the time.

Q. You said his wife had said that he was guilty of filthy and degenerate habits? A. He did not deny it.

30 Q. When he said that he had been rough with the petitioner, and that it was his purpose to consult a doctor to find out what could be done to quell his ardor—that means to quell his passion and love for his wife, doesn't it? A. I don't know what he meant; I say that is what he said.

MRS. THERESA McCARTHY, being duly sworn,
testified as follows:

Direct examination by Mr. Goldenhorn:

Q. Mrs. McCarthy, where do you live? A. At 2955 Grand Concourse, New York City.

40 Q. The petitioner in this case is your daughter?
A. Yes, sir.

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Q. Is she living with you now? A. Yes, sir.

Q. Do you recall the time when she was married? A. No, sir, I did not know that she was getting married at the time.

Q. You heard of the marriage afterwards? A. Yes, sir.

10

Q. And did your daughter visit you shortly after she was married? A. It must have been around two weeks after, because she was away ten days on her wedding trip.

Q. When she came back to you, did she complain to you?

Mr. Hermann: I object.

The Court: It is hearsay.

Q. Did she see you after she was married? A. Yes, sir.

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Q. Where was it? A. At my home.

Q. What did she say to you?

Mr. Hermann: Objected to.

The Court: Objection sustained.

Q. By reason of what she said, did you look at your daughter? A. Why, there was all red and blue marks up around her.

Q. Had she changed in her appearance? A. Her eyes were bulging out, and she looked desperate, and I said, "In the Name of God, what has happened to you?"

30

Q. Did you notice anything about her condition; what did you see about her that was different? A. She was very different; she was all bitten up, and I thought it was by vermin from the hotel; and she said he bit her all over.

The Court: Strike that out.

40

Exhibit D—Record in Former Suit.

Q. Did she take off her clothes? A. No, sir, but she complained of this bearing down pain.

Q. Did you notice anything yourself? A. I noticed the bites up and around her neck and face, and her eyes were bulging; red and blue marks; terrible looking.

Q. Did you examine any part of her body outside of her neck? A. I did see small lumps under her breasts.

Q. How did she appear to be with respect to her nerves; did you notice anything there, anything about them?

Mr. Herman: Objected to.

The Court: Objection sustained.

Q. A. She was extremely nervous and hysterical.

The Court: Strike that out.

Q. What evidence did you see of hysteria or nervousness, if any?

Mr. Hermann: Objected to.

The Court: Objection sustained.

Q. Just tell us in your own way what further did you observe, Mrs. McCarthy, about your daughter, anything else than what you have told us? A. No, sir, that is about all.

Q. Now, did you go with her to Atlantic City? A. Yes, sir, when she came back and told me how it was; we are strict Catholics, and I thought by going down I could reconcile them and speak to him as a good Catholic woman to a good Catholic man, but he did not want to have anything to do with us; he ignored us; he did not look at me.

Q. Did you try at any time to talk to him? A. I did.

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Q. Did you call him by his first name? A. Thomas.

Q. Did you call him Thomas? A. I said, "Why don't you get together and be good?" and he never answered me.

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By the Court:

Q. Did you ever take him aside privately? A. No, sir, he would devour you.

Q. How old is he? A. He is 40 years of age next month, I think.

Further direct:

Q. How long did you remain at Atlantic City with your daughter? A. I went down there with her, and I waited and waited, thinking there would be some reconciliation; I knew her life was spoiled and that she could never marry again while the man lived, but there was no reconciliation in sight.

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The Court: Strike that out; it is a statement of a conclusion.

Q. While you were there, did you hear any conversation between your daughter and her husband; or her husband and anyone else? A. One night I was on the porch, and he said, "You can go out with the men in the hotel, it will bring trade"; and I told her she must never do that.

30

By the Court:

Q. When you heard him say that, do you say you spoke to him about it? A. No, sir, I did not speak to him about it.

Further direct:

Q. Now, when did you leave the hotel? A. I think it was on the 6th of August of 1922; I was told to get out.

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Exhibit D—Record in Former Suit.

Q. Did you see these detectives there at that time? A. I saw the detective, but I did not speak to him; I was sitting in the dining room, and I saw her husband stretching, looking in—

10 The Court: Strike that out.

Q. You left the hotel then with your daughter?
A. Yes, sir.

Q. Did your daughter speak to her husband while you were there? A. She did not have a chance.

The Court: Strike it out; it won't be considered.

20 Q. Did you hear your daughter's husband tell her to get out? A. I certainly did, and I upbraided him for that; and he told his brother,—his brother came up and said to him, "Do you want me in this hotel or not?" and he said, "Yes, you can stay here just as long as you like;" and he turned to his wife and said, "You can get out."

Q. Did you ever see the husband kiss your daughter? A. Once.

Q. Did you ever see him strike her? A. No, sir.

30 Q. Did you ever hear him call her any names?
A. No, sir.

Q. Did you ever sit down all together at the table? A. Yes, sir.

Q. Did your daughter and your son-in-law go to mass together? A. She went with him, certainly.

Q. Since your daughter has been living with you and your husband has the defendant been near her? A. No, sir, he never interested himself one way or the other about her.

40 Q. He has never been back, as far as you know, since your daughter came back? A. No, sir.

*Exhibit D—Record in Former Suit.**Cross examination by Mr. Hermann:*

Q. Why do you think Mr. O'Brien is such a terrible man? A. Why, he is very degenerate; could I think him anything else?

Q. Did he ever do anything to you? A. He grossly insulted me; but then I did not mind that if I could make up between him and his wife. 10

Q. How did he ever grossly insult you? A. By not recognizing me when I was there.

Q. You did not occupy the same table all the time you were there? A. No, sir.

Q. You occupied it for one meal? A. No, sir, it was for three or four days.

Q. What happened after he did not occupy the table with you and your daughter any longer? A. He went to the table with Mrs. Boss, and he ignored his wife; there was a three-seat table, and he went and sat with Mrs. Boss. 20

Q. The first time you were there—you were there twice after your daughter's marriage, were you not? A. Yes, sir, and I went to New York and came back again.

Q. Now, the first time you were there you were very friendly and went out in a wheeling chair with him? A. Yes, sir, he was with his wife, one night, he sat in the chair alongside of his wife. 30

Mr. JOSEPH A. McCARTHY, being duly sworn, testified as follows:

By the Court:

Q. You are a brother of Mrs. O'Brien? A. Yes, sir.

Q. Were you ever down at the hotel with her? A. One night I stopped there. 40

Exhibit D—Record in Former Suit.

Q. Did you have any talk with Mr. O'Brien? A. No, sir.

Direct examination by Mr. Goldenhorn:

10 Q. Were you present when there was a thousand dollars paid to you for an engagement ring?
A. Yes, sir.

Q. Where was that paid to you? A. We were having dinner on one occasion in New York City.

Q. What part of the city? A. It was in one of the hotels.

By the Court:

20 Q. What hotel; how long ago is it; do you recall where it was; was it given to you by check?
A. Yes, sir.

Further direct:

Q. What did you do with the thousand dollars; did you give it to your sister? A. I believe it was made out in my name, and Mr. O'Brien asked me if I could get him a ring and save him a little money on it.

30 Q. What did your sister say about that, about giving you the thousand dollars to buy the ring?
A. She did not say anything, only she asked me what I could do and see what size ring I could get for it.

Q. Are you married? A. No, sir.

Q. Did she go with you when you got the ring, you sister? A. No, sir.

Q. Who got the ring? A. My sister did.

Q. Did you cash the check? A. Yes, sir.

40 Q. Did you turn her over the full sum of \$1,000?
A. Yes, sir.

*Exhibit D—Record in Former Suit.**By the Court:*

Q. Why didn't you endorse the check over to your sister and let her buy the ring? A. The reason I did not do that was because I was formerly in the automobile business, and the ring was bought from a client of mine whom I had done favors for, and he said he would reciprocate and save some money on the proposition. 10

Q. Wasn't the check for \$1,500.00? A. I don't recall whether it was fifteen hundred or a thousand.

Q. Don't you remember what the check was for? A. I don't remember whether it was a thousand or fifteen hundred dollars.

Q. Your sister says he gave her \$750.00, and that he gave you a thousand dollar check; is it a thousand or fifteen hundred dollars? She said the ring cost \$1,750.00; which story is correct? A. I do not recall the amount of the check. 20

Q. You just said that it was a thousand dollar check he gave you, that you cashed it and turned the thousand dollars over to her; now you say you don't know whether it was a thousand or fifteen hundred dollars? A. I don't know which it was. Mr. Berrien was the name of the man. 30

By Mr. Hermann:

Q. Didn't this transaction take place right in your office where the check was delivered? A. I cannot recall it now.

By the Court:

Q. Who invited you to this dinner between your sister and her fiancee? A. I don't recall that.

Q. How did you get in on it, do you know? A. No, sir. 40

Exhibit D—Record in Former Suit.

Further direct:

Q. Don't you know how you happened to be there with your sister? A. My sister would ask me to go down; she asked me to go with her.

10 Q. Did you meet him by appointment, or don't you remember? A. I don't remember; it was not a matter that I was really vitally interested in; I was not interested.

Q. You don't know what happened after that? A. No, sir.

Mr. Goldenhorn: That is all I have here today.

The Court: What is the position of the case?

20 Mr. Goldenhorn: I would like to ask leave to put in the testimony of this Dr. Roberts, and I would like to put in the testimony of Mr. Goodman and Mr. Bartleman; they are not here today.

The Court: Do you want to go ahead with the case, Mr. Hermann?

Mr. Hermann: Not without Dr. Roberts' testimony.

30 Mr. Goldenhorn: We will take Dr. Roberts' testimony next Tuesday afternoon.

The Court: What are your witnesses about, Mr. Hermann?

Mr. Hermann: First, as to the conduct of this woman and her mother at the hotel; and secondly with respect to certain statements that they have since made; and thirdly, with respect to the bank account. This whole thing revolves around the bank account, the bulk of the thing will be on that. One

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Exhibit D—Record in Former Suit.

month after the desertion Dr. Roberts gave this certificate. (Reads a certificate by Dr. Roberts.) I don't believe the man is going to testify. I think his conduct in not coming here is sufficient. In the meantime, this young woman is getting \$25.00 a week. The defendant is under a strain that has put him three times in a rest cure from the terrible worry, and he is a social outcast with worry. I think he is entitled to a speedy trial. Instead of that, it has been postponed three times. 10

Mr. Goldenhorn: It has not been postponed three times on my account. I have done everything in my power to hurry this case along. 20

The Court: What testimony have you got from these other witnesses?

Mr. Goldenhorn: They will testify to certain acts of this defendant, and certain admissions which he made, of his habits.

The Court: Of his conduct with his wife?

Mr. Goldenhorn: One of them will testify to that, of admissions made by the defendant to this witness. 30

The Court: Of unnatural intercourse with his wife?

Mr. Goldenhorn: Yes, sir.

The Court: What is the name of the man?

Mr. Goldenhorn: His name is Bartleman. He was under subpoena the last time, but did not appear; my clerk subpoenaed him. He came here the first day, but he did not come the second time. 40

The Court: Well, you had better bring

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him here tomorrow morning. Mr. Hermann says he will go now with you to take Dr. Roberts' testimony in New York, and you had better go over to New York and take his testimony this afternoon.

10

Testimony .

IN CHANCERY OF NEW JERSEY.

Between

LAURETTA V. O'BRIEN,
Petitioner,

and

THOMAS M. O'BRIEN,
Defendant.

On Petition,
&c.

20

Continuation of the taking of testimony in the above-entitled cause, at the Chancery Chambers, Jersey City, New Jersey, on the fifteenth day of January, nineteen hundred and twenty-five, before Hon. Vivian M. Lewis, Vice-Chancellor.

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Same appearances as before noted.

GEORGE A. WARDELL, being duly sworn, testified as follows:

Direct examination by Mr. Goldenhorn:

Q. What is your profession? A. Stenographer and Supreme Court Examiner.

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Q. As such, did you accompany Mr. Goldenhorn, the solicitor for the petitioner, and Mr. Hermann, the solicitor for the defendant, to the Canadian Club yesterday, January 14, about five o'clock in

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the afternoon and take the testimony of Dr. Roberts at the Canadian Club in New York City?

A. Yes, sir.

Q. Did you transcribe those minutes? A. No, sir, I did not.

Q. You did not have time to do so? A. No, sir. 10

Q. Are you prepared now to read the minutes which you took at that examination of Dr. Roberts? A. I am.

Q. Will you do so? A. (Reading shorthand notes): "The deposition of Dr. Roberts was taken in this case before me as Supreme Court Examiner, by stipulation of counsel, at the Canadian Club, 42nd Street, New York City, on January 14, 1925, at 5:40 P. M., in the presence of I. Faber Goldenhorn, Esquire, solicitor of petitioner, and L. Edward Hermann, Esquire, solicitor of the defendant. 20

"DR. ROBERTS was sworn by me, and testified as follows:

"Direct examination by Mr. Goldenhorn:

"Q. Doctor, are you a practicing physician of the State of New York? A. Yes, sir, I am.

"Q. How long have you been such? A. Since 1907. 30

"Q. Are you a graduate of any college? A. Yes, University and Belleville Hospital Medical School.

"Q. Are you acquainted with Mrs. O'Brien, the petitioner in this case? A. Yes, sir, I am.

"Q. When did you meet her first, Doctor? A. I think it was two and a half years ago.

"Q. That would be in what year? A. 1922.

"Q. Do you recall the month? A. I think it was around April or May or June. 40

Exhibit D—Record in Former Suit.

“Q. Well, which month was it? A. That is quite important, because she testified here that it was about a month after she left her husband, and as I recall it, she left her husband some time in May.

10 “Q. Do you recall what month it was? A. I think it was in May.

“Q. Of 1922? A. Yes, sir.

“Q. Where did you meet her? A. At her mother’s house.

“Q. Where was that? A. I think it was 2474 University Avenue, New York City.

20 “Q. How did you come to go there? A. I called upon her mother, and at that time I was treating the mother for high blood pressure and chronic kidney trouble. She asked me if I would examine her daughter, as she complained of some pain and discomfort.

“Q. Did you examine her then? A. Yes, sir, I made an examination.

“Q. What did you find to be the matter with her? A. I found she had a general congestion of the pelvis, which caused some tenderness in the region of the fallopian tubes. I made a diagnosis of the uterus and fallopian tube.

30 “Q. Did you prescribe for her? A. I advised her to refrain from intercourse, and rest, as near as I can remember.

“Q. Did you get any history from her of anything that might have caused such a condition as you noticed? A. She stated she had discomfort because she had intercourse with her husband, a long intercourse, she said.

40 “Q. What was her condition, so far as you observed, if you observed it, of her nerves? A. She was very nervous and unset mentally.

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“Q. Would such a condition as you observed be caused by a bearing down pain in the abdomen?

A. Yes, sir.

“Q. What would you attribute such a condition as you found to, Doctor? A. According to the history, I attributed it to the sexual intercourse,— a long intercourse.

10

“Q. What would long intercourse be attributable to; is there any limit of the possible pleasure it causes the male organ, which might be attributed to some condition? A. It might come from anything; it might arise from age, or the nervous condition of the man.

“Q. Is there anything else you can add to this situation, Doctor? A. The bearing down pain was due to bearing heavily upon the ligaments.

20

“Q. Did the petitioner tell you how long it was before your examination that she had last had intercourse with her husband? A. If she told me, I don't remember.

“Q. Could such a condition as you observed have been there so long as thirty days after the last intercourse? A. Yes, sir, it could.

“Q. Has such a condition as you observed any effect upon the nerves of the party suffering from it? A. Uterine conditions are apt to make any female patient nervous.

30

“Q. Would it cause hysteria? A. No, sir.

“Cross examination by Mr. Hermann:

“Q. Don't you find, Doctor, that intercourse affects different females differently? A. Yes.

“Q. And Mrs. O'Brien might be one who would be adversely affected by intercourse? A. She might.

“Q. Mrs. O'Brien testified that on the first act of intercourse in which she indulged, which lasted

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40 minutes—assuming that Mrs. O'Brien possessed her virginity, have you in your practice ever known of a case in which a virgin would indulge in intercourse for that long a period? A. Yes, sir.

10 "Q. What other things would cause a congested uterus? A. There are various causes, numerous things, such as debilitating diseases, anemia or heart trouble, and various other causes.

"Q. If it is true that the last intercourse occurred thirty days before your examination, wouldn't you be likely to say that it was due to other causes than the last act of intercourse? A. It would seem so.

"Redirect examination by Mr. Goldenhorn:

20 "Q. Did you find any evidence there of anemia? A. No, sir, I did not.

"Q. Was there another cause you gave? A. Any debilitating disease would do it.

"Q. Was there any evidence of any debilitating disease that you could find that Mrs. O'Brien was suffering from? A. No, sir.

30 "Q. Then are you not of the opinion that it must have been caused as a result of this intercourse of which she complained? A. It is very difficult for me to say absolutely what caused this congestion, except from the history she gave to me at the time.

"Q. When you say, 'except from the history she gave to me at the time,' you mean Mrs. O'Brien? A. Yes, sir.

"Q. And on that history you passed your opinion? A. Yes, sir.

40 "Q. Why was it you could not come to New Jersey to testify in court? A. Well, I am very

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busy just now in general practice, and I don't know of any other reason.

“Q. Is that your only reason, Doctor? A. I subconsciously don't care to be an expert in this type of cases.”

Mr. Goldenhorn: I desire to close my case with that testimony. We rest.

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PETITIONER RESTS.

Mr. Hermann: I move to have the testimony stricken out on the ground that it is incompetent, irrelevant and immaterial; it does not bear out the charges of the bill of complaint. This doctor says he found this was due from intercourse. I suppose that is likely to happen to anyone.

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The Court: You can object to it, but I don't see how you can move to strike it out after stipulating to take it. I shall deny the motion.

Mr. Hermann: I object to the testimony as incompetent, irrelevant and immaterial.

The Court: The objection will be overruled.

DEFENSE.

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THOMAS M. O'BRIEN, sworn in his own behalf, testified as follows:

Direct examination by Mr. Hermann:

Q. Where do you live? A. Hotel De Ville, Atlantic City.

Q. What is your business? A. Proprietor of the Hotel De Ville.

Q. How long have you been in that business?
A. We rented the Hotel De Ville May, 1915, on a four season lease. The members of the firm were

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Arthur O. Frankel, Thomas M. O'Brien and Anna Boss, that is Mr. Frankel's sister. Previous to the expiration of that lease, Mr. Frankel, myself and Mrs. Boss endeavored to negotiate to buy the property. Mr. Frankel put a bid in for himself of

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\$72,500.
Q. You have since purchased the property? A. Yes, sir.

Q. You and who? A. Myself and Mrs. Boss.

Q. How long have you known the petitioner in this case, Laretta V. O'Brien? A. March, 1915.

Q. Under what circumstances did you meet her? A. She came to the Hotel De Ville with her mother as a stranger; I assigned her to a room, and I became acquainted with her; I had seen her twice

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in church and walked home with her.
Q. After you met her, how frequently did you visit her in New York? A. September, 1916, I visited her in New York for four days. While I was over there she mentioned to me that we knew sufficient of one another, that we had been corresponding daily throughout the summer, and so, why not get married?

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Q. Where was this? A. In her mother's home in New York City; I went over to see her on an invitation from her. We went to the parish priest, and she told him of her mother's objection to her getting married, and we would have to get a license unbeknown to the public, to be kept out of the newspapers. He told us to come the next day, and he would give us a note to the proper parties in the City Hall, who would give us a license which would prevent it from being advertised in the papers.

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Q. That was in September, 1916? A. Yes, sir.

Q. Was that course followed? A. No, sir; she

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informed her father that she was going to do it quietly, and the father kept it secret for 24 hours, and then he told her mother; and when I came that evening Laretta told me there was a terrible scene in the house; that her mother threatened to jump out of the window and commit suicide.

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Q. When next did you visit her? A. She came to Atlantic City and stayed in the Hotel Bothwell in the spring of 1917.

Q. April 25, 1922, you were married? A. Yes, sir.

Q. Your marriage was in 1922? A. Yes, sir.

Q. You say she told you her mother threatened to jump out of the window that night— A. She was indignant; she blamed it all on me. Anyhow, this evening she also stated that Laretta was the only child and she did not know the consequences of marriage.

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Q. How old are you? A. 40 next March; she stated, in our presence, the three of us, that Laretta was only a child and did not realize what marriage was, and that while she loved children, the thought of the act was repulsive to her.

Q. How many times subsequent to September, 1917, did you visit your wife? A. I did not visit her again until June, 1920.

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Q. During that time did you see her at all? A. Yes, sir, every time she came to Atlantic City, we saw each other, unbeknown to the mother; that was prior to our marriage; she did not want her mother to know about it. Her mother wanted to keep her away from me lest she run away and get married. I wrote to her father—

By the Court:

Q. You never had sexual intercourse with her

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until you were married? A. No, sir. I wrote to the brother for months, and then in the end we discontinued writing. I wrote to the father also, but he said he did not want to be bothered.

Q. You married when? A. April 25, 1922.

10 Q. Where? A. At St. Nicholas Church, Atlantic City, by Father Sheehan.

Q. Were her parents present? A. No, sir. One month previous to her marriage she came down with her brother to get a marriage license secretly; we kept that out of the papers; everything was kept absolutely secret; my parents did not know anything about it. My parents are here in the courtroom now.

20 *Further direct:*

Q. You kept up this acquaintance? A. Yes, sir; every time she came to Atlantic City we got together.

Q. When did you become engaged? A. In June, 1920; that was the second and last time I visited her in New York.

30 Q. Do you remember the circumstances of giving the engagement ring? A. I was over there two days when she mentioned that it was about time for her to have a ring; that was agreeable to me. She said she would take me down to a very swell place to see what they had, and get an idea what a ring would cost; so the ring that she liked cost \$3,500.00. I did not feel that I wanted to pay that at that time, with the mortgage on the hotel; and I said, "As far as I want to pay would be about \$1,500.00"; I said, "That surely would buy a beautiful stone"; then this man showed us rings at that price. Well, we made an excuse that we would
40 come back later and decide definitely. On the way uptown she suggested that her father, being for-

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merly a policeman, knew the diamond merchants, and he could get a \$1,500 ring for a thousand dollars, and if I would give her the money her father could make this saving for both of us. So the following day her brother and myself had lunch at Reisenweber's restaurant. After lunch, she said to Joe, that Tom wanted to see him at his office, that he wanted to write out a check; so we went to the brother's office. There was a stenographer, and he pointed out his check and I wrote a check to the order of her brother for \$1,500.00.

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Q. Did that buy the ring? A. No, sir. I went home the following day and received a letter from Laretta that she could not get what she wanted for \$1,500.00, that it would cost \$1,750.00.

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By the Court:

Q. Have you got the letter here? A. No, sir.

Further direct:

Q. Where is it? A. I destroyed the letters.

Q. What did you do after you received that letter? A. I immediately wrote her the check for \$250.00, and was well satisfied that she could get what she wanted.

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By the Court:

Q. That made \$1,750.00? A. Yes, sir.

Further direct:

Q. Do you know whether that amount was ever paid for the ring or not? A. I don't know.

Q. After that, did you ever give her any other gifts? A. Yes, sir, after I gave her the engagement ring, she came to Atlantic City, January, 1922, and

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10 stayed at the Hotel Denis; she stayed there with her mother. She came up that afternoon and waited in the hotel to see me. When I went in, I was surprised to see her there, and I kissed her. She was waiting in the Hotel De Ville for me; she was talking to my brother for two hours; my brother is here now. I kissed her and we had a chat, and she said, "Come down and have dinner with us tonight," with her mother, at the Denis; and I got dressed and shaved and we had dinner, and she was there for about ten days; and then we were getting close to the marriage question again; so she said, "Now, it is only proper that fellows give their fiancées a present," she said, "I would like to have a nice solid gold mesh bag"; she said, "You can get it for \$500.00"; and she said, "I want a band to keep on the engagement ring; they cost \$300.00"; I said, "How about the wedding ring?" She said, "Well, we can get these things in New York much more reasonable, and they have a greater variety in New York City"; so I went to the bank with her and got \$1,000 in cash out of the bank and gave it to her there.

20 Q. Do you know whether the things that she purchased, if she purchased anything, cost \$1,000? A. I never doubted that at all, but that what she told me was the truth. When we got down to the Hotel Denis, just as we rang for the elevator for her to go up, she said, "We are going home suddenly this afternoon"; she said, "Mother is upset about our marriage"; she said, "Don't come over to the train, but kiss me good-bye here"; so I did.

30 Q. What time were you married? A. At seven o'clock in the evening.

40 Q. After you were married where did you go? A. We went directly to the Hotel Ritz Carlton, Atlantic City.

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Q. How long did you remain there? A. Until nine o'clock the next morning; then we went up and visited my parents, to break the news to them; they lived in Philadelphia.

Q. How long did you remain there? A. We stayed with them two hours; then we went out to the Green Hill Farms Hotel, Overbrook, and we stayed there until Friday morning, that is, from Tuesday afternoon until Friday morning. 10

Q. Then where did you go? A. Then we went from there to Maryland, and we were heading for Baltimore, and there is a place called Bel Air, which is about 20 miles from Baltimore, I judge, and we got off there and stayed over night.

Q. How long did you remain at this town? A. Over night; we left the next morning. We had intended to go to Washington previous to the marriage, and every day, previous to this time, Loretta had called up her mother in New York and had a lengthy conversation with her from ten minutes to thirty minutes. 20

Q. She had a lengthy conversation with her mother? A. Yes, sir.

Q. Did you get to Washington? A. No, sir; Loretta had been getting very cool to me from all these telephone calls, and she said she preferred to go back so she could see her mother the following week; so we went back to the Ambassador Hotel, Atlantic City. 30

Q. How long did you stay there? A. Until Monday morning, and then I called up my brother and we met in the furniture store in Atlantic City to buy the furniture that we thought we were going to have for our apartment. When we got to the store, Loretta only wanted new furniture for a room in the Hotel De Ville, after she had changed 40

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her mind about taking an apartment; we bought a bedroom suite; my brother was present; we picked out a walnut set, and I wanted a double bed. Laretta insisted on single beds, and said that a double bed was unsanitary; she said that
10 in the presence of myself, my brother and the salesman; she said she would have the single beds, or nothing at all. The furniture was delivered to the Hotel De Ville the next day. I bought a new carpet; my brother had the whole room papered and re-papered between that Monday and the following Friday.

Q. And you then went to the Ambassador? A. From that Monday we went to Philadelphia.

Q. Instead to the Ambassador? A. Yes, sir; we
20 left that Monday to commence our trip to Philadelphia.

Q. You went to Philadelphia? A. Yes, sir.

Q. How long did you remain there? A. We registered at a hotel; we registered there for three or four days. Tuesday morning Laretta insisted on going to see her mother in New York. I wanted to go with her. Laretta said, "No, you know the disturbances of the past, and my mother's physical condition; it is bad enough for
30 me to go over and fix all this up; let alone her seeing you." She went to New York alone; I called her up the following evening at seven o'clock and asked her if she was well, and if her mother was all right; and she telephoned Thursday evening at seven o'clock, and she said everything was all right, and her mother did not have any disturbance to make, and she would be back the following evening; she told me the train time, and I went
40 to the station to meet her, and we went up to the hotel and stayed there over night; from there we

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went to my parents'. We brought my parents and the wife and myself down. First, we went to visit my three sisters; I wanted them to see my wife; they lived at different little towns in New Jersey.

Q. And you went to Atlantic City with your wife? A. Yes, sir, and the room was all fixed up.

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Q. That is the room that you had papered, and the furniture purchased? A. Yes, sir, it was a brand new room and it had a bath with it.

Q. How long did she remain then at the hotel with you? A. Until the following Tuesday; that was from Friday evening until the following Tuesday; then she went to New York again to visit her mother.

Q. With your consent? A. Yes, sir; I said I thought things could be fixed up now; I said "Your father always liked me; he never objected to me; he was quite interested in me."

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Q. How long did she remain then on this visit? A. Until the following Thursday, and I met her on the train alone.

Q. She then lived with you again at the hotel? A. From that Thursday until the following Tuesday, yes, sir; then she went to New York alone, and she was to come back on Thursday.

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Q. How long did she actually remain away? A. I was to meet her on the 6:10 train that night, but she was not present; I thought she had missed the train, and I waited until the 8:39, and she was not on that train. Then at nine o'clock I called up her home; somebody answered and they got Lauretta, and I asked her why she had not come home, and she said she did not intend to come home until I would accede to her wishes.

Q. How long did she remain away? A. She stayed in New York for three weeks and four days.

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10 Q. So that, until that time, can you now summarize how many days you were actually with your wife from the time you were married? A. We stayed one night at the Hotel Ritz-Carlton; we stayed three nights at the Green Hills Farms—one night at the hotel in Bel Air—two nights at the Ambassador in Atlantic City; I stayed two nights with her in the hotel in Philadelphia, and two nights alone—that was the Majestic Hotel in Philadelphia; I stayed there two nights with her, and two nights alone.

20 Q. And after that? A. Friday evening, that was the next night, we stayed at the Hotel De Ville in Atlantic City, four nights we stayed there, and she returned to New York for two days.

Q. She returned to Atlantic City on a Thursday? A. Yes, sir, for five days, and then she left on Tuesday morning.

Q. And that was the time she did not come back? A. That is the time she did not come back.

Q. She made three trips from Atlantic City to New York to see her mother? A. Yes, sir.

30 Q. Did she kiss you good-bye when she left? A. Yes, sir, I took her over to the train; I gave her \$50.00, and gave her a ticket in addition.

Q. You also made arrangements as to the train she was to come back on? A. Yes, sir, I was waiting for her that evening; and she did not come up.

Mr. Goldenhorn: I object to counsel leading.

The Court: Objection sustained.

40 Q. During the three weeks and four days that she was away, did you hear from her? A. No, sir.

Q. Give us again the last talk you had with her when she did not return on any of the trains that

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you waited for until nine o'clock? A. When I called on the telephone at nine o'clock somebody answered the telephone and they got Laretta; I asked Laretta what the trouble was, why she did not return, and if she was sick and what was the matter with her; she just simply stated that she would not come back until I agreed to accede to her wishes. 10

Q. When she came back after three weeks and four days, did she come alone? A. No, sir, she came with her mother; she had been in the house half an hour I judge before I knew it.

Q. You did not know that she was coming? A. No, sir.

Q. Now, then, tell us what happened when you observed that they were there; did you discover which room they were occupying? A. Yes, sir. 20

Q. Was it the same room she had occupied before? A. No, sir.

Q. Was the furniture in the new room that they occupied? A. Yes, sir, sufficient furniture for two persons.

Q. Was the furniture in there? A. Yes, sir.

Q. And who was there? A. Her mother and herself; she occupied my parents' room in the Hotel De Ville. 30

Q. That was not the room you had fitted up for her? A. No, sir, not the room we had lived in ourselves.

Q. Did she live alone in that room? A. No, sir, with her mother, in the double bed.

Q. What conversation, if any, did you have with your wife or her mother, when you discovered they were there? A. I went to the front lobby, and both my wife and her mother were sitting, and as I went over and spoke to them and neither of them 40

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said anything to me—I said, “Hello, there, Laretta,” and I went over and tried to kiss her, and she kind of pulled away and did not say a word to me.

Q. Did you address them? A. Yes, sir.

10 Q. Did you have any conversation with your wife or her mother? A. No, sir; the only thing was, when I found out they would not talk to me, I told the head waiter to arrange for three as I went out in the lobby, and I told Laretta the three of us would sit together, and they came in and sat down at the table; that was the evening meal at six o'clock.

Q. When you sat at the table, what happened? A. We went along in a very quiet manner.

20 Q. What was said? A. I could not get anything from Laretta, and then we finally started to chat and had a few little talks, and I tried to liven things up; I thought presently I would get her alone and talk things over.

Q. Did you get her alone? A. Yes, sir, I got her alone in this room which is part of the lobby, and she said she had been over to New York; I said, “What is the trouble, why continue this here; you have been to New York; here is the same thing over and over again; now your mother is going to try to separate us again.”

30 Q. What did you say to her further? A. Laretta said, “I have been sick, and I ran up a doctor's bill in New York, and I want \$350.00 to pay him.”

Q. Did she tell you the doctor's name? A. No, sir; and I said “I cannot understand that; there are plenty of doctors here in Atlantic City.”

40 Q. Did you ask her what the sickness was? A. Yes, sir, and she said I would not understand it if

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she told me; and I said I would not pay the bill until the doctor sent me an itemized account. She would not kiss me; she would pull herself away from me.

Q. Did you ask her why she did not want to stay in your room? A. Yes, sir, and she said she did not intend to; she said she was not well, that she was going to stay with her mother. 10

Q. How long did they remain at the hotel? A. Two weeks and one or two days.

Q. At your hotel? A. Yes, sir.

Q. During that time which room did she occupy? A. Room No. 9, with her mother.

Q. Did her mother sleep in the same room with her? A. Yes, sir. 20

Q. Which room did you occupy? A. No. 8, that was Lauletta's room and my room.

Q. During that time did you entertain your wife and her mother? A. I chatted regularly; Lauletta and I ate alone at breakfast time; I could not get her to go into room No. 5 with me. I let it go along quietly.

Q. After the two weeks and some days, under what circumstances did they leave? A. This Mr. Kelly came during that period while they were there. He came in one morning about 12 o'clock; gave me his card as an attorney from New York City, 12 o'clock, noon. He said he came down there to adjust the differences and grievances that were going on between my wife and myself, and I became very nervous. 30

The Court: Strike that out.

Q. Did you tell him you were astounded? A. Yes, sir, I told him I did not understand why he had come down there, and he said he was a friend 40

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of her father and he wanted to adjust the matter; he said the wife claimed that I was rough and vigorous and insisted on having her every night, and she could not stand it, and she was not well herself now, and from what he told her, she could
10 get a divorce in the upper end of the State; “of course,” he said, “I am not that kind of a lawyer, and I would not take the case, but it would be easy pickings for any lawyer.”

Q. Did he say anything about any adjustment for support? A. He tried to get me to break the ice as to what there was to offer.

Q. Tell us the conversation that took place between you and Mr. Kelly. A. First he said to me,
20 “Your wife wants to go home; what will you be willing to give her?” I said, “I will give her \$25.00 a week if she remains; she always has a charge account in the local stores”—

Q. Did you ask him why she wanted to go home? A. Yes, sir, and he said, “You are rough with her and you are too vigorous with her, and you want to go with her every night”; he said, “If you want to come to some agreement, you will have to be lenient and whole-hearted.” So he was talking
30 for almost an hour; so I said, “Well, I will give her \$50.00 if she comes and lives with me, \$50.00 a week.”

Q. Why did you promise him anything? A. I wanted her to be there; it was a humiliation to me; all the guests knew about it; and it got all over the neighborhood; all the help knew about it.

The Court: Strike that out.

Q. Did Mr. Kelly discuss with you your financial

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ability to pay? A. Yes, sir, I told him I could afford to pay \$50.00 a week; and I told him of the mortgages on the property and what we paid.

Q. Did he ask what mortgages were on the property? A. Yes, sir.

Q. Did Mr. Kelly discuss with you the value of your property and amount of mortgages that were on it? A. He discussed the mortgages on it. 10

Q. Did he discuss with you your income? A. I told him we made from ten to fifteen thousand dollars a year there, my partner and myself, between us; that was an average.

Q. And that was while your mother-in-law and wife were living at the hotel? A. Yes, sir.

Q. Describe the conduct of your wife and mother-in-law towards you during that period. A. Well, just as I said, we had breakfast together each morning; the other two meals the three of us had together; that continued through the entire period. Mr. Kelly left at 1:30 that afternoon, and my wife returned and everything was fine; I felt that it was settled now, and it was calm and quiet, and I could face the guests again. I had not been attending to business. 20

Q. How many rooms are in the hotel? A. 105 bedrooms. 30

Q. Now, when they left after two weeks and two days, when did you next see your wife? A. She went home for two weeks.

By the Court:

Q. Did she kiss you good-bye? A. Yes, sir.

Further direct:

Q. Did you give her anything? A. No, sir, I had given her \$150.00 for the three weeks past, 40

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\$150.00; and she was gone for three weeks, and I said I would give her \$50.00 a week; and I gave her \$150.00 for the three weeks, and she went off with her mother.

Q. Did she tell you when she would be back?

10 A. No, sir; she said she was going over to see the doctor, and she came back two weeks afterwards with her mother.

Q. What happened when she came back? A. She went up and occupied her room.

Q. Was it still vacant? A. Yes, sir; her trunk was there, and her mother's clothing was there.

Q. Well, what happened? A. Lauretta saw the head waiter himself; she wanted a two-seated table, and she pointed out a conspicuous place in
20 the dining room.

Q. Then what happened? A. She went over there, and she had supper with her mother—she and her mother; she would not say a word to me this time, neither of them would; I attempted to talk to her and wanted to see her afterwards, and she would not talk; it was the third day before she would talk to me.

Q. Did she continue to occupy that room with her mother? A. Yes, sir.

30 Q. On the third day, what happened? A. I asked her how long this was going to continue; she said, that my people could stay there and she thought her mother could stay there as long as she wanted to stay; I said her mother was keeping her away from me and creating trouble for me.

Q. Did you have any talk with her mother when they returned the last time? A. Yes, sir, the third or fourth day; and her mother said she would stay there; I asked her mother what she intended
40 to do; I told her she was keeping Lauretta away from me.

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Q. You said to the mother, "How long are you going to stay down here?" A. Yes, sir, and her mother said she would stay as long as she wished to stay; that she was paying her weekly board to Lauretta and not sponging on me.

By the Court:

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Q. Lauretta was staying away of her own accord? A. Yes, sir.

Q. Did you afterwards see Lauretta and tell her you had talked to her mother? A. Yes, sir, and she said, "I am going to stay with my mother until I get well"; and I said, "What is the trouble with you?" and she said I would not understand it; she said the doctor in New York knew all about her history, and that she preferred to go to him from time to time; and I said there were doctors in Atlantic City and for her to see them.

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Q. How long did they remain there? A. Until the 7th day of August.

Q. When did they return? A. They did not return after that time.

Q. You have not lived with your wife nor seen her since? A. No, sir.

Further direct:

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Q. Before you were married did you have any talk with your wife about the management of the hotel or the business? A. No, sir.

Q. After you were married, did you have any talk with your wife? A. The only thing is, that she said she wanted her brother there to look out for her interests in the business.

Q. When did she say that? A. After she was married.

Q. How soon after? A. After the first time she went to New York City.

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Q. Did she say anything to you about the ownership of the hotel? A. No, sir, not at that time.

10 Q. When was that? A. That came up after Mr. Kelly had been there; she told me Mr. Kelly was in Mays Landing and found out the mortgages that were on it, and she knew the property was in my name, and if I wanted to sign the deeds over to her I could do so without anyone's consent.

Q. Is that the first time that discussion ever took place? A. Yes, sir, I think that was the first time that ever took place. No, sir, previous, she wanted the property changed into her hands, but she did not know whether I could change it into her hands.

Mr. Goldenhorn: Objected to.

20 The Court: Strike that out.

Q. Did she tell you Mr. Kelly had been over to Mays Landing to discover the title? A. Yes, sir.

Q. Had she ever asked you before that about the title to the property? A. No, sir.

Q. Do you remember when she asked you about transferring it over to her?

30 Mr. Goldenhorn: I object to it as leading; secondly, the witness has not said anything about it; it is very suggestive.

The Court: The objection is sustained on both grounds; it is leading.

Q. What did she say to you about Mr. Kelly having gone to Mays Landing to find out whose name the title was in?

Mr. Goldenhorn: Objected to for the same reason, as leading.

The Court: The objection is sustained.

40 Q. What did she say to you about Mr. Kelly's visit to Mays Landing?

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Mr. Goldenhorn: Objected to, because there is no foundation for the question, and secondly, it is leading.

The Court: I think he might answer the question, "if anything."

A. She said I could sign it over to her if I wished, and she wanted me to do so. 10

The Court: I would not go too far along that line, because yesterday I assumed there might be a conspiracy to extract funds, etc., but it appears the mother seriously objected to the marriage; therefore, there was no conspiracy as between mother and daughter or the rest of the family to extract funds from this man. I allowed a wide latitude to the testimony yesterday, because I assumed there might be a scheme, but I don't think so now. 20

Q. When did you first have sexual intercourse with your wife? A. The second night we were married.

Q. Why didn't you have sexual intercourse with her the first night?

Mr. Goldenhorn: Objected to on the ground that it is immaterial. 30

The Court: Objection overruled.

A. She wrote a letter after we were married; it was after nine o'clock, when all of us had dinner; we had music until 11 o'clock, and she wrote a letter to her mother, and then we undressed and went to separate beds in the same room. I wanted to kiss her and fondle her, and she said she was tired. I wished to have sexual intercourse with her after a while— 40

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Q. Did you tell her so? A. Yes, sir.

Q. What did she say? A. She allowed me to insert it a trifle, and she said it hurt her.

Q. Did you finish the act then? A. No, sir, I did not persist.

10 Q. What happened on the second night? A. We had sexual intercourse, and she did not object, but she would not co-operate with me; she would not assist me in the least: I tried to tell her what to do.

Q. Your wife testified that the sexual intercourse took 40 minutes; is that a fact? A. I don't think it is possible, no, sir.

By the Court:

20 Q. Will you say it did not take 40 minutes? A. I would say it was not 40 minutes.

Q. Was it 20 minutes? A. I don't know.

Further direct:

Q. Was the copulation completed? A. On my part it was, but not on her part; she did not assist me in the least.

Q. When did you next have sexual intercourse with your wife? A. On the following night.

30 Q. How many times in all, did you have sexual intercourse with your wife? A. Five times during the three weeks; I never had sexual intercourse with her after she returned from New York—after she returned the first time from New York.

Q. Did you, at any time, fondle your wife's breasts? A. Yes, sir, she would not uncover herself, though; she was so modest.

Q. Did you at any time attempt to insert your penis in your wife's mouth? A. No, sir.

40 Q. Did you at any time put your hand down on her genital organs? A. I put my hands around

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her body and around her limbs and around her stomach, but never into her organs.

Q. Have you at any time indulged in any degenerate acts?

Mr. Goldenhorn: Objected to.

The Court: It calls for a conclusion.

10

Q. Was there anything else that you ever indulged in? A. No, sir.

By the Court:

Q. Did you bite her or bruise her? A. No, sir.

Q. You did not attack her on the lower part of her breasts? A. No, sir.

Q. Or in any unnatural way? A. No, sir.

Q. Then you say you did not have sexual intercourse with her the first night you were married? A. No, sir.

20

Q. Why not? A. She said she was tired; she was upset, and she had written to her mother.

Q. Had you ever been married before? A. No, sir. She claimed it hurt her when I inserted it triflingly.

Q. Did she express her opinion to you about it, as to whether it was distasteful to her? A. She said it hurt her.

30

Q. Have you been to see your wife since she left the hotel with her mother? A. Yes, sir, I saw her and her mother on the boardwalk.

Q. Did you speak to her? A. No, sir; they saw me and they turned their chair around before I got to them.

Further direct:

Q. That is all. A. There are some other things I want to speak about.

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The Court: You may speak to your client, if you wish to, Mr. Hermann.

(Mr. Hermann and the witness talk to each other privately.)

10 *Further direct:*

Q. You testified with respect to a telephone talk with your wife, in which she said she would not come back until you acceded to her wishes? A. Yes, sir.

Q. Will you tell us what those wishes were? A. That is when she wanted half the property put in her name, and my brother to go, and her brother to take his place, so he could look after her interests in the property.

20 Q. When did she first propose that? A. Twice before this telephone message; that was her real cause for not coming back; that is what she meant.

Q. It has been testified to, that you transferred a certain sum of \$8,000 to both your names? A. Yes, sir.

30 Q. Under what circumstances was that done? A. The second Tuesday she was there, I wanted to take out a policy of \$10,000; that is the first thing I did; I got an insurance man to come there and sign an agreement; I was going—

Q. Answer the question. A. That \$8,000—I took her over and told her I was going to transfer the account that I had, my own money; I had two accounts in Philadelphia that I was going to have transferred in both of our names; so I drew them out myself; I drew that money out myself, when putting it in her name.

40 Q. When did she first propose you turn the property, or half of it, over to her? A. After the first time she came from New York; that was when

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she wanted half the property. Later on, she wanted all the property; she wanted the hotel sold and for me to move to New York; she said that on the Friday previous to the Monday she left.

Cross examination by Mr. Goldenhorn:

10

Q. When was it she discussed with you the suggestion of having the hotel sold? A. The Friday previous to the 7th of August; that was the third day of August; that was three or four days before she left with her mother—in the presence of Mr. Hendrick.

Q. He was a detective whom you had engaged there? A. Yes, sir.

Q. He is connected with a detective agency in Philadelphia? A. I don't know; he is custodian clerk in the City Hall at Atlantic City.

20

Q. You engaged him to spy on your mother and your wife? A. He would go in the room adjoining my wife's at times.

Q. You paid him to spy on your wife? A. No, sir, on my mother-in-law.

Q. You engaged the man to spy on your wife and on your mother-in-law, and paid him while he lived in your hotel? A. He did not live in the hotel; he just came in five or ten minutes at a times.

30

Q. And how many days before the 7th day of August, was it, in 1922, that you engaged him to occupy that room nearest to your mother-in-law's and your wife's, for that purpose? A. The last few days in July.

Q. He was there from the 26th of July? A. Off and on.

Q. Up to that time you told this court you were trying to effect a reconciliation with your wife, while you were engaging a detective to occupy a

40

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room next to hers for the purpose of spying on her and her mother? A. I wanted the mother to get out of the hotel.

10 Q. Why did you have the detective watch the mother? A. Because I heard her telling guests and employees what a degenerate I was, that I was no good; I heard the mother tell that herself; she told it to numerous people.

Q. Have you any of them in court? A. No, sir.

Q. And she said you were a degenerate? A. Yes, sir.

Q. So that was not a new thing for you to have been charged with, was it?

Mr. Hermann: Objected to.

20

The Court: Objection overruled.

A. Her mother had been telling others and myself.

Q. You don't want to tell this court that the first time you heard you were a degenerate was when her mother was there? A. Yes, sir.

Q. Don't you know you were known in Atlantic City as a fairy?

The Court: I will strike that question out.

30

Q. Were you ever accused, before you heard that your mother-in-law had accused you, of being a degenerate? A. No, sir.

Mr. Hermann: Objected to; let us suppose he was—accused of it.

The Court: He says he has never been accused at all; in fact, he has never been married before.

40 Q. But you have had sexual intercourse with women before you were married, haven't you? A. Yes, sir.

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Q. So that when you told the court she did not cooperate with you, and you had to tell her what to do, you knew that from experience? A. I have read sufficiently, besides having experience myself.

Q. Had you had sexual intercourse with other women than your wife before your marriage to your wife? A. Yes, sir, I had. 10

Q. So when you told us a little while back, that you had to tell her what to do, you were telling her what to do from the experience you had had with women other than your wife? A. No, sir, I got it from a doctor.

Q. He told you what to do? A. Yes, sir.

Q. He told you how you could tell her what she could do to cooperate with you while you were having sexual intercourse? A. Yes, sir. 20

Q. You told this court a little while ago that you never doubted your wife until yesterday; is that so? A. Yes, sir.

Q. There cannot be any question about that, that prior to yesterday you never had any doubt of your wife's veracity, of her truthfulness, or anything; is that true? A. I thought all the statements made by these papers came from others.

Q. Now, you told us a little while ago, that you never doubted your wife until yesterday; are you mistaken about that now, or not? A. Not from her own lips; from her own lips she never told me a falsehood. 30

Q. You never doubted her until yesterday? A. No, sir, not from her own lips.

Q. You made an affidavit in which you doubted her? A. That was on paper.

Q. And that doubt was expressed a long time ago? A. She accused me of committing adultery hundreds of times, according to that paper. 40

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Q. And she accused you in that paper, under oath, that you had indulged in indecent practices?

A. Yes, sir.

Q. You answered it by filing an affidavit in this case denying it? A. Yes, sir; I never believed she
10 made any such statement from her own lips.

Q. Did you believe, when you made the affidavit denying her affidavit in this case, that she had been telling the truth about you? A. I thought it came from others.

Q. Then you did doubt her when you swore under oath that she had made statements contrary to what she testified to? A. I thought somebody put all this stuff into her head.

Q. You thought that was so in respect to the time
20 that Mr. Kelly, a lawyer, came to your hotel and spoke to you about it, and told you that you were not treating her right and doing the right thing by her? A. He never told me that I was not treating her right; he simply came there to find out if I would not be a little lax in having continual sexual intercourse with her; she told him that I wanted to have sexual intercourse with her every night.

Q. Did he tell you that you had been over-indulging in sexual intercourse with her? A. He
30 said from what she told him, that she thought I was. But he said he did not think I was.

Q. If he told you that, why did he tell you, if you know, that you should be lax in your sexual intercourse with her? A. He told me what she told him; I told him I lived a natural human life.

Q. Do you mean to say you did not refute, and vigorously refute the fact when he told it to you, that you had over-indulged, when you knew you had not over-indulged? A. I did tell him that;
40 and he told me she was not well; and I said, then I would wait until she was better.

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Q. If that is so, why didn't you go and tell her?

A. I told her I would not bother her at all, if she did not wish me to, if she would only come in the room and rest there.

Q. Didn't she tell you that Dr. Roberts had told her that she could not have sexual intercourse with you on account of her physical condition? A. No, sir.

10

Q. Now, when your wife left you the first time, she told you that if you had sexual intercourse with her in a proper manner she would come back to you? A. No, sir.

Q. Didn't she ever complain to you about improper sexual intercourse? A. No, sir; she said I was having it too frequently; she thought that twice a month was sufficient; she said twice a month was sufficient.

20

Q. Do you mean to tell this court she ever denied you the right of sexual intercourse? A. Yes, sir.

Q. How many times did she deny it? A. Numerous times after the first visit to New York.

Q. You told the court a little while ago, in answer to counsel's question, that the very first night you tried to have sexual intercourse with her and you consummated it; and the second night you had sexual intercourse with her, and the next night you had sexual intercourse with her? A. Yes, sir.

30

Q. So she had not refused you very much? A. Not then.

Q. And she never objected to it? A. Not then; she said she did not enjoy it; she said she thought her father and mother had enjoyed a celibate life for years, and she thought we would be much happier doing the same way; and she told me she had a cousin who did the same way.

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Q. Now, you also told the court a little while ago, that all this money that you put in the joint names of yourself and wife was your own savings? A. Yes, sir.

10 Q. Did you mean that? A. Yes, sir; it had nothing to do with the business.

Q. The affidavit on page 7 contains this language: "The petitioner demanded that deponent transfer to her certain accounts which deponent had with banks or building and loan associations, in which he had accumulated savings of his own, as well as moneys belonging to the business"; is that right? A. That is what she wanted done.

20 Q. But there was no money belonging to the business that she wanted transferred? A. Yes, sir, she wanted half the profits every week from the hotel.

Q. But you never gave her that? A. No, sir.

Q. And you transferred that money to your joint names? A. Yes, sir; I gave her this one account in the department store—I was giving her \$50.00 a week; she had a checking account, and she would not live in the room with me.

30 Q. You did place this \$9,000 in your joint names? A. Yes, sir.

Q. That had a little string tied to it? A. It was there for us; she never asked for any of that money because she was getting the \$50.00 a week, and she did not take any, and I did not either.

40 Q. When you told the court a minute ago, that one of the reasons she wanted you to go back, was because she wanted you to accede—I will change that—the only reason that she would go back to you would be that if you had acceded to her numerous requests—she said she would come back to you if you would accede to her numerous requests? A. Yes, sir.

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Q. Yet you gave her this amount of \$9,000 which she never used? A. Yes, sir.

Q. But you were not willing to do anything else?

A. If she had given way slightly at all, I would.

Q. When you gave her the \$9,000, was there any one there at the time you turned it over to her? 10

A. The clerk was there; I went in and had the account transferred; it was done legally.

Q. Did anyone hear her make a request of you for these numerous things that she wanted you to accede to before she would come back to your room? A. Yes, sir, my father. That conversation was had on the porch of the Hotel De Ville.

Q. When? A. I don't know the date.

Q. What month was it? A. It was in the month of May. 20

Q. What year? A. 1922.

Q. And was she alone at the time? A. She was with my father.

Q. And in the presence of your father she said, that if you would transfer half the hotel to her—give her half the income of the hotel, transfer the property to her, she would go back and live with you? A. That is part of it, yes, sir.

Q. What is the rest of it? A. She claimed I had to be very quiet and mild with her; she wanted her mother to come as often as my parents came there; that is all. 30

Q. She wanted her brother to be at the hotel? A. Yes, sir.

Q. And you never heard of the request that she wanted her brother to come down there? A. I heard it often.

Q. You also heard her request that she wanted Mrs. Boss out, too? A. Yes, sir. 40

Q. And that was one of the things she wanted you to accede to? A. Yes, sir.

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Q. But you knew she wanted Mrs. Boss out of there long before you were married? A. No, sir, when we were to be married in October, 1920, we were to live at the Hotel De Ville.

10 Q. Answer my question. Did you before your marriage tell your wife that you would get Mrs. Boss out of there and find a little home for her and her daughter away from the hotel; and did you say that two families could not live under the same roof, namely, Mrs. Boss and her daughter, and your wife? A. No, sir, I never used those words.

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

Q. Is that your letter? A. Yes, sir.

20 Q. Let me call your attention to some parts of that letter; just read the latter part of that letter, page 1, and the top of page 2. A. "I am improving and getting stronger every day, though I have my hands full; Mrs. Boss has been ill for a few days; Chickie had to be away at the same time for a few days" (that was the clerk).

30 Q. That is the wrong part of the letter; let me ask you this, while we are waiting for that, let me ask you this: Reading from page 3 of the letter which you say is your handwriting, dated the 12th day of October, 1920, reading from page 3 of the letter; you read from that paragraph at the top of the page.

Mr. Hermann: I object; let the whole letter go in.

Mr. Goldenhorn: I shall offer the whole letter.

Mr. Hermann: I think the witness should know what the whole letter is.

40 Q. Read that. A. "Mrs. Boss left because I told her she knew that we are engaged, and I always

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said that one home, no matter how large, was not large enough for more than one family. Elizabeth has been wanting, as she stated the past winter, she would like to have their own home, so that they could have their quiet, private apartment; she came back Monday, and they are settled and contented.” 10

Q. So that when you wrote this letter you had had a talk with your fiancee about having Mrs. Boss out of the house? A. No, sir.

Q. And you knew she was going to leave? A. It was either one of the two; Lauretta had decided that we were to take an apartment or a cottage; Mrs. Boss was to remain in the house.

Q. If Lauretta remained in the hotel, however, Mrs. Boss was to get out? A. If she wished. 20

Q. So you had discussed it with her, hadn't you, with Lauretta? A. Yes, sir.

Q. So that when you told this Court a little while ago that you never discussed it with her before or after marriage, you were mistaken? A. Not about putting Mrs. Boss out of the house; I never said such a thing.

Q. You did not read all of the letter when I gave it to you, at the top of page 3? A. You took it out of my hand. 30

Q. Did you read this in the letter: “Mrs. Boss left because I told her so”? A. “She knows we were engaged”; that is one paragraph; I did not tell her to leave the hotel; I told her we were engaged, that is all; she left of her own accord, because we were engaged—

Q. Read the letter. A. “Mrs. Boss left because I told her—she knew that we are engaged.”

Q. Why didn't you read it that way before? A. 40

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That is the only reason why she left; she was willing to go of her own accord.

Q. Why didn't you read that part of the letter before? A. I did read it.

10 Q. Didn't you, a little while ago, deny that you had written to your wife a letter, containing that information that Mrs. Boss was to leave your hotel?

A. Mrs. Boss left the hotel of her own free will.

Q. Listen to the question. (Question read.) A. I wrote that letter to my wife stating that—

Q. Answer my question. (Question read.)

Mr. Hermann: Objected to.

The Court: The objection is overruled.

A. I wrote the letter, yes, sir.

20 Q. That is not my question; didn't you deny a few minutes ago that you wrote the letter? A. I denied it before because I had forgotten all about it.

Q. When you got married, after the first time that you had sexual intercourse with your wife, and after the first time that you had occupied a room with her, you knew that the very next day she consulted Dr. Coward, of Atlantic City? A. No, sir.

30 Q. When did you first hear of that? A. He came in one day about July, not before that, I paid him a bill for \$5.00 for the one visit.

Q. After she had consulted Dr. Coward she told you, didn't she, that Dr. Coward told her that you would have to stop your indecent and degenerate habits towards her, because it was unnerving her system? A. No, sir, I asked Dr. Coward what the trouble was; and he said, "She needs a little sedative, that is all"; that is what he told me.

40 Q. That is all Dr. Coward told you? A. Yes, sir.

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Q. But you did not tell us what your wife told you?

Mr. Hermann: I do not believe it is proper for counsel to intimidate the witness in this way.

10

The Court: The question was a very proper question.

By the Court:

Q. You did not state what your wife said to you?
A. I never knew he was there until Dr. Coward told me he was there, and I paid him the five dollars that minute; he said, "She won't need me again"; that conversation was in a drug store and took place five or ten days after this visit.

20

Further direct:

Q. Can you fix the time of that visit by any check that you gave Dr. Coward? A. I gave him a five dollar note in the drug store, when he told me he had been to see my wife.

Q. You want this Court to understand, that up to the time you had this talk with Dr. Coward, you never knew your wife had even consulted him? A. I did not.

30

Q. And yet you tell this Court you never doubted your wife until you heard her oral testimony on the witness stand yesterday? A. That is right.

Q. And up to the time you spoke to Dr. Coward, your wife had never told you anything at all about your degenerate habits? A. No, sir, not myself.

Q. You have been in one or two sanitariums for your mental, physical and moral condition? A. I have been on a health farm.

Q. How many? A. I went to Muldoon's.

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Q. How many have you been to? A. I went there for five and a half weeks to do some walking, and shower baths.

10 Q. Where else have you been? A. I went to St. Agnes' Hospital last March, and having my tonsils and teeth removed; then from there I lost so much blood—I was in there when the hearing was to have taken place last March, and from that time they built me up; it took me six weeks to build me up in the hospital; and they sent me out to Germantown, Pennsylvania, to a health farm.

Q. Were you a Kirkbride's in Philadelphia? A. No, sir.

Q. Were you ever psychoanalyzed? A. What is that?

20 Q. You never had your mental organs examined by any doctor? A. Dr. Ramsey told me,—he examined me in Mr. Hermann's office, and I said I did not remember it.

Q. You have been told by physicians that there was something the matter with your genital organs? A. No, sir.

Q. You told this court that you had a lot of love and affection for your wife before marriage? A. Yes, sir.

30 Q. And you had a lot of it afterwards? A. Yes, sir.

Q. Yet the second day of marriage you took out of your wife's wallet a \$20.00 gold piece and said, "This is the dowry that you brought to me," didn't you? A. No, sir.

Q. That is a pure figment of your wife's imagination? A. It is not so.

Q. When she says it is so, it is not so?

40 The Court: Strike that out.

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Q. Now, you told us a little while ago, that you knew how to have your wife co-operate with you because you had read certain books; had you read a book by Creft Ebbing? A. No, sir.

Q. Had you read a book by Edward Carpenter? A. No, sir.

10

Q. Did you read a book by Havilock Ellis, on the subject of "Sex"? A. No, sir, the book I read I got from a trained nurse.

Q. You were interested in that book? A. I am very much interested in physical culture, etc.

Q. You mentioned the names of these different sanitariums? A. It was two health farms, not sanitariums.

Q. Have you mentioned all of them? A. Yes, sir, I went to two doctors—three or four different doctors.

20

Q. Who were they? A. Dr. Potts, of Philadelphia, Dr. McCarthy, of Philadelphia, Dr. Dare, of Philadelphia,—he is Dr. McCarthy's assistant, and I went to a doctor in Kirkbride's Hospital for Nervous Diseases.

Q. When I asked you if you had ever been over to Kirkbride's, you said "No." A. You asked me if I stayed there.

Q. You admit you were there to be examined. A. I merely went in to find out what the rates per week would be, and he told me that was no place for me to be; and I went to Dr. McCarthy then; I consulted also Dr. Potts and Davis; that is all that I know of.

30

Q. Were you not at the Buckhill Falls' Farms for Mental Defectives? A. No, sir.

Q. You know where it is? A. It is in Cresco, Pennsylvania.

Q. You were there for a while? A. I was there a little less than two weeks; that is a hotel.

40

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Q. It is a sanitarium, isn't it? A. No, sir; I just went up for a little trip; it was after these papers had been served on me.

Q. How long did you stay there? A. For about two weeks.

10 Q. Were you examined there by any doctor? A. No, sir, there is not a doctor in the place; they call the family doctor in from the village; I was nervous, and he gave me something to make me a little more contented.

Q. You were not very contented? A. No, sir; I have not been contented from the May after I was married.

20 Q. Now, when you gave this \$1,500 for the ring, and sent \$250.00 more, you got a receipt from your wife for the payment by her for that ring? A. She said she sent the receipt on in one of her letters; I don't doubt it.

Q. Why did you tell your attorney to insinuate in this proceeding that your wife was a "gold digger" when she married you?

The Court: Strike that out.

30 Q. Didn't you, in your affidavit, charge her with—in your answer didn't you charge your wife with bringing this whole proceeding against you in conformity with a conspiracy with her mother and her family to take away your money and your property from you?— A. Relating to the property that is still there.

Q. And didn't you in your affidavit charge your wife with having bought this ring for less than \$1,750.00, and with trying to palm off \$1,750.00 worth of indebtedness against you? A. No, sir.

40 Q. You knew Mrs. Boss? A. Yes, sir.

Q. And you told this court that she had an interest in your hotel? A. Yes, sir.

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Q. How much of an interest did she have? A. One-third.

Q. So when your wife asked you for a half-interest in the hotel— A. She wanted one-half of my interest.

Q. Then you told your wife that Mrs. Boss had an interest in the hotel? A. My wife knew that. 10

Q. You say your wife knew that? A. Yes, sir.

Q. And yet in your letter you told her you were going to put her out? A. No, sir, that was simply an agreement; I was not going to put her out.

Q. So that when you told your wife in this letter that you were going to put Mrs. Boss out, you were going to put Mrs. Boss out, even though she had an interest in your hotel, were you not? 20

Mr. Hermann: The letter does not say he was going to put Mrs. Boss out.

Q. When you told her in the letter to your wife, that you were going to tell her to go, that you had told her to go— A. It was all arranged partially, that Mrs. Boss was willing to either go or stay; it was arranged with Mrs. Boss and my wife; my wife was deciding for six years whether she wanted to live in the hotel or out of the hotel. 30

By the Court:

Q. You told the court a little while ago, that you had no conversation with your wife about Mrs. Boss being in the hotel; now you say it was all arranged between your wife and Mrs. Boss and yourself; now, which is the truth? A. If my wife wanted to stay at the hotel, Mrs. Boss was satisfied to go; my wife wanted Mrs. Boss to stay, because my wife knew nothing about the hotel business; Mrs. Boss does the buying daily. 40

*Exhibit D—Record in Former Suit.**Further cross:*

10 Q. So that even though your wife wanted her to remain, you still tell this court that one of the conditions that your wife would come back and occupy a room with you was that Mrs. Boss was to get out; is that right, that Mrs. Boss was to get out? A. Not in 1922.

Q. You told the court, didn't you, on your direct examination by Mr. Hermann, that if you acceded to your wife's wishes, she would come back and occupy a room with you? A. Yes, sir, that was in 1922.

Q. Did you tell the court that in answer to Mr. Hermann's question? A. I should have done so.

20 Q. And at that time you told the court that one of the things your wife wanted you to accede to, was first, to put the property, one-half of your interest in the property, in her name; and another condition was, that Mrs. Boss was to get out? A. No, sir, my brother only was to get out.

Q. Don't you recall my asking you on the witness stand—then you forgot about Mrs. Boss, that she was to get out? A. I would like to hear that testimony read.

30 Q. After you were on your wedding trip two days, as you told the court, your wife was anxious to get back? A. Not two days—the Saturday when we were ready to go to Washington.

Q. You told the court she was anxious to get back? A. Yes, sir.

Q. Why? A. She wanted to get back and go and see her mother.

40 Q. Do you mean to tell the court she did not say to you then that she would go home until you learned to act like a man and perform your marital duties in a natural way? A. No, sir.

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Q. And were you not anxious to get back then because you wanted to go back to your business and take care of it because you did not trust your brother to take care of it? A. No, sir.

Q. Didn't you tell your wife the reason you wanted to get back, and you were anxious to curtail your wedding trip, was because you wanted to get back and take care of your business? A. No, sir, only after I called up my brother when I got into town, to find out how things were going. 10

Q. When you got back to Atlantic City your wife told you she wanted an apartment; that she was not satisfied with one little room without a bathroom? A. No, sir, she had a bathroom.

Q. Didn't you take the bathroom away from that room, and didn't she complain about it? A. No, sir. 20

Q. Do you mean to say she never complained about occupying one single room there? A. She complained in one of her affidavits, but she did not complain to me until she came back with her mother and was occupying Room No. 9, then she complained that the room was too small; that it did not have bath accommodations; she was already living in the mother's room then when this controversy took place. 30

Q. Didn't she say that was not a suitable place for the proprietress of the hotel to be living in when you had 105 rooms that you could put her into? A. No, sir, we were to tear that partition down and make one mammoth room; and she said, "Don't take that trouble."

Q. Didn't she complain to you at that time that you had your clothes hanging over the bed and there was not room enough for her to sleep in the bed? A. Not to me she did not complain; she 40

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could have complained at that time, but she was not justified in the complaint.

Q. Did she complain? A. She did not complain to me; she complained in one of these statements that was sent to me.

10 Q. Didn't she complain to somebody in the hotel, who told you that you ought to find a more commodious place for her to live in that one room? A. No, sir; I wanted to have two rooms communicating with the one bath, and she did not want it.

Q. Didn't your wife complain about that room because she had not even room to dress, and she had to dress and undress in bed? A. No, sir.

Q. Was there room enough for her to dress in the room outside of her dressing and undressing in bed? A. Yes, sir.

Q. That you are positive of? A. Yes, sir.

Q. Wasn't the room so small that it was necessary for her to have her trunk put in the hall? A. Nearly all the people that visit the hotels and bring steamer trunks—

Q. Did she have a trunk out in the hall? A. Yes, sir.

Q. Didn't she complain to you that she was obliged to go outside every time she wanted to get a nightdress she had to go out in the hall to get it? A. No, sir.

Q. Now, you have told the court you took out a policy of insurance on your life? A. Yes, sir.

Q. Have you got that here? A. No, sir, I signed the agreement to take the policy, but it was never signed to her name on account of this trouble.

Q. You told this court that you had these detectives watching your mother-in-law because of certain remarks that she made about you? A. Yes, sir.

40

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Q. What did you hope to accomplish by having your mother-in-law watched? A. I had been tired telling my wife to tell her mother to go home and let us get along in a quiet manner; she absolutely refused; she said her mother could stay as long as she wished. There were two priests occupying Room No. 11. 10

Q. You say that when you paid this \$5.00 to Dr. Coward, that that was the first time you knew your wife had consulted him? A. Yes, sir.

Q. And you told this court, didn't you, that it was in the month of July, 1922? A. I think that was the date.

Q. How many days before or after that visit that you had, or rather, the time that you paid the five dollars to Dr. Coward, was it that you consulted with Father Sheehan? A. I just don't remember the date that I went to Father Sheehan with my wife. 20

Q. How many days before or after the visit that you had with Dr. Coward in the month of July, 1922, when you paid him the five dollars, was it before you consulted Father Sheehan? A. I cannot say; it was previous to that, I know.

Q. So that you saw Father Sheehan previous to the time that you paid Dr. Coward? A. Yes, sir, with my wife. 30

Q. And you knew when you were before Father Sheehan, that your wife had then and there accused you of degenerate habits? A. No, sir, she never did that in his presence; she never accused me of degenerate habits in the presence of anyone.

Q. What did she take you before Father Sheehan for? A. To state there were too many bosses in the Hotel De Ville; that she had no one to look after her interests; and she said, "I want to go 40

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10 home with my people"; and she said, "He says he won't provide for me if I do go home"; that is what she told Father Sheehan; and I told Father Sheehan that her mother was there; I stated the whole trouble was, that her mother was there, and that she encouraged the daughter to go and live in Room No. 9, and to keep her away from me, and to eat at a different table away from me.

Q. In what month was that? A. This was in the month of July.

Q. Don't you know the mother did not come back until August, and you had her put out in August? A. She came back two weeks previous to the 7th of August.

20 Q. You do know it was July? A. That was the second time she returned.

Q. If it was in the month of July and it was at the time that Mrs. O'Brien's mother was living at your hotel that this talk was had with Father Sheehan, please fix the date now with respect to the time you paid that five dollars to the doctor. Was it before that time that you paid the doctor—was it previous to the time that you went to Father Sheehan? A. No, sir, after I went to Father Sheehan.

30 Q. Give us the time you paid Dr. Coward with respect to the time you consulted with Father Sheehan? A. I cannot say.

Q. Didn't you consult Father Sheehan with your wife after you paid Dr. Coward the five dollars? A. No, sir.

40 Q. So when you said a little while ago that you saw Father Sheehan in July, some time after you had spoken with the doctor, you did not understand my question? A. I paid Dr. Coward after I went and saw Father Sheehan.

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Q. So that you had seen Father Sheehan, and the only complaint your wife made before Father Sheehan was the fact that your wife thought she was being bossed by too many people at the hotel?
A. Yes, sir.

Q. Had you consulted with Father Sheehan about the deposition? A. I was present when Father Sheehan took the affidavit. 10

Q. Were you there? A. Yes, sir.

Q. When Father Sheehan made the affidavit, you had forgotten all the talk you had with him about your wife being bossed by your help? A. Yes, sir.

Q. But he had not forgotten that she had complained to him about your degenerate habits? A. She never told Father Sheehan anything like that in my presence. 20

Q. Did not Father Sheehan complain to you and say to you, in the presence of your wife, or say to your wife in your presence: "You cannot live with a man who has those habits"? A. No, sir, absolutely not.

Q. Did your wife ever complain about the fact that there were too many bosses at the hotel? A. Yes, sir, she said everybody there was "a boss but myself"; she said that everybody down there had a key to the money drawer excepting herself. 30

Q. Was that true when she said it to you at that time? A. I did not have it.

Q. Then when she told you that everybody had it but herself she lied, didn't she? A. She thought I had the key; she did not know that I did not have a key for the money drawer.

Q. She told the truth that everybody, excepting you— A. She thought that I had a key for the money drawer in addition to these other three, and I told her I did not have any key to the money 40

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drawer, and I explained to her why I did not have a key; there are only three that had keys to the money drawer.

10 Q. You knew that when she told you that everybody had a key but herself, that she was telling an untruth? A. She was not telling an untruth; three did have a key.

Q. Then why did you not explain it to her? A. I did explain it to her.

Q. When was it you had this talk with her? A. In the month of June.

Q. Did you have any talk with her about that situation in the month of July? A. No, sir, she never brought it up in the month of July, not about this here particular question of the money drawer.

20 Q. Did she say that everybody was bossing the place but herself? A. She said she had no say in the place at all.

Q. In July did she say that everybody was a boss in the place except herself? A. She told Father Sheehan that; she did not tell me; she had to have something to tell Father Sheehan; she had to have something to ask him.

30 Q. So that you want the court to understand the only reason she brought you before Father Sheehan in July was because of the fact, as she told Father Sheehan, in your presence, that everybody in the hotel was a boss except herself, and that she never discussed the matter with you during the month of July? A. That is right.

40 Q. So that you never had any discussion with her during all the month of July before she took you down to Father Sheehan; is that right? A. She had been talking continually almost every day, about things that she wanted changed.

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Q. Did anyone hear that? A. Yes, sir, the employees heard it; my brother heard it.

Q. Was your brother employed by you? A. Yes, sir.

Q. Your brother gets a salary? A. Yes, sir.

Q. You own this hotel? A. Mr. and Mrs. Boss and I own it, since March 25, 1918; we paid a purchase price of \$75,000, and \$10,000 first payment. 10

Q. How much was the mortgage on it? A. \$65,000 balance, and we have reduced it to \$45,000.

Q. Didn't you tell your wife in the month of July, that you had to pay these different installments on the mortgage? A. Yes, sir.

Q. And she was agreeable to that, wasn't she? A. She had no say in the matter whatsoever; it was my business. 20

Q. You did not want to let her know anything about it? A. She knew all about it.

Q. Didn't you tell her, in July, before you went to Father Sheehan, that it was "none of her damned business" what your business was earning, or what the installments were? A. No, sir.

Q. You never discussed it? A. I never used any such language to her.

Q. So when you went to Father Sheehan with her, nothing was said about mortgages or the price of the property? A. No, sir. 30

Q. When you found out Mr. Kelly had been down to Mays Landing and had found out what mortgages there were on your place, then it was that you told her, wasn't it— A. I told Mr. Kelly, and he corroborated my statements.

Q. Didn't you tell your wife that Mr. Kelly had told you that he had investigated and found out the amount of mortgages and the amount of pay- 40

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ments, didn't you then tell your wife when she asked you about the installments, that it was none of her business? A. No, sir; Mr. Kelly went over to the station and told her everything about it, and she came back and told it to me.

10 Q. Who asked you to go to Father Sheehan?
A. I suggested to go over and let Father Sheehan decide whether the home was the proper place for her mother to be, and she told her mother, and her mother said, "What does a priest know about family affairs?"

Q. What did you go to Sheehan for? A. To see if he could not advise us what to do with regard to the status of the matter; I wanted her out after all the disturbance that she had created. I put
20 up with this until the last week in July.

Q. Then it was the last week in July you went to Father Sheehan? A. No, sir.

Q. Why didn't you write a letter or leave some word with your wife's mother to get out? A. I told her nicely, and Laretta said she would tell her, but she did not.

Q. Was that after you had been to Father Sheehan? A. Before and after.

30 Q. And after you had been to Father Sheehan you told the mother what? A. The mother said, "Don't you think I am a sponger; I am paying Laretta my board every week." I told her if she wanted to pay board she could pay at the office.

Q. Why didn't you tell her that she was peddling scandal about you in that hotel, and for that reason you wanted her out? A. She knew it; I told her half a dozen times that she was creating trouble for me, and she would laugh at me, and she would draw her skirts around her and go to her room.

40 Q. You did not like your mother-in-law any

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more than she liked you? A. I took her out in the automobile.

Q. Now, when Mr. Kelly came down to see you, what was the first thing he said to you, and your reply to him? A. He gave me his card, and said he came down in behalf of my wife, something to that effect; he came back to tell me that my wife was dissatisfied, that I was too vigorous for her; that I wanted to go with her every night. 10

Q. How did you know at that time, that he had been over to Mays Landing? A. I suspected he had been over; I knew he had come down there in a foxy manner.

Q. He handed you his card. When he told you you should not be so vigorous with your wife, why didn't you tell him it was none of his business; why didn't you tell him to get out of your place; that you were going to manage your affairs as you wanted to? A. In the hotel business we receive everybody calmly and politely, whether they are in the right or in the wrong. 20

RECESS TO 2 P. M.

AFTER RECESS.

30

THOMAS M. O'BRIEN resumes the witness stand.

Cross examination (continued) by Mr. Goldenhorn:

Q. You testified this morning that the first time you doubted your wife was when you heard her testify yesterday? A. Yes, sir.

Q. You swore to an affidavit, a copy of which I have here, and which I show your attorney. On 40

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page 12 of the affidavit, which was filed in this case at the time an application was to have been made for alimony and counsel fees, it reads as follows: "Deponent further said, in furtherance of the scheme of the petitioner to mulct him of all she could, about two years prior to their marriage, she suggested and insisted that he purchase her a ring, stating that she wanted a ring that would cost about \$3,500.00; finally, deponent consented to buy her a ring that would cost about \$1,500.00, and advanced to her brother \$1,500.00 with which to buy her a ring; that after this deponent advanced \$1,500 for the ring, he was informed that petitioner selected a ring to the value of \$1,750.00, whereupon this deponent advanced the additional sum of \$250.00. That in February, 1922, just prior to their marriage, and in furtherance of her scheme to mulct this deponent of moneys, the petitioner advanced the sum of \$1,000.00, which she persuaded this deponent to advance her for jewelry." You swore to that? A. Yes, sir.

Q. At the same time you swore to that, do you want the court to understand that you did not then doubt her? A. No, sir, I did not.

Q. Not even then, when you told the court under oath, that she was trying to mulct you out of money when she asked you for those advancements? A. No, sir.

Q. Those advancements were made in the form of engagement presents? A. Yes, sir.

Q. You thought a whole lot of her then, didn't you? A. I willingly gave them to her.

Q. When you swore to that affidavit that she was trying to mulct you out of these moneys, you did not mean that, did you? A. At that time I just simply took it for granted what my lawyer encouraged me to say.

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Q. And so you swore to that? A. I felt that she was truthful throughout the whole thing.

Q. Even though you felt that way, yet you deliberately swore to an affidavit that she had mulcted you out of these moneys, didn't you? A. Yes, sir.

10

Q. Now, you told us under oath this morning, that your wife and her mother were continuously running down to Atlantic City before you were married, for the purpose of seeing you? A. No, sir, I did not, not exclusively to see me; they called me up.

Q. Didn't you ask them to come? A. Only when I was sick in July, 1920, they came down for one day, and that is the first time I had seen the ring; it cost \$1,750.00, and she said, "It is only a \$450.00 ring, because you could have bought it for that before the war.

20

Q. You wrote her to come down in January, 1920? A. Yes, sir.

Q. I show you this letter, which I ask to have marked for identification, and which I can offer in evidence, with your Honor's permission—you wrote these words, didn't you—I am calling your attention to your handwriting—"I would prefer to see you and mother here for a while than for me to go away"; isn't that right; did that mean that you wanted them to come to Atlantic City? A. We were to be married.

30

Q. Did that mean that you wanted them to come to Atlantic City? A. Yes, sir, and spend the honeymoon there.

Q. You were not married at that time? A. No, sir.

Q. You were not married until two years after this was signed? A. No, sir.

40

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Q. In fact, more than two years? A. Yes, sir.

Q. Now, you know Mrs. Boss has a daughter?
A. Yes, sir.

Q. Did you commit adultery with her within the
last two years? A. No, sir, never.

10 Q. Didn't you pay for an abortion committed on
the daughter of Mrs. Boss about two years ago?
A. No, sir.

Q. Did you pay Dr. Conaway any money for at-
tending Mrs. Boss' daughter? A. No, sir.

Q. Did you know that this daughter of Mrs. Boss,
whose name is Elizabeth, had had an abortion com-
mitted on her about two years ago? A. No, sir.

Q. Did she live at your hotel with her mother?
A. She has been living at our hotel since 1915.

20 Q. Do you know Mrs. Boss' brother, Arthur O.
Franklin? A. Yes, sir.

Q. Is he the same man that has an interest in
your hotel? A. Yes, sir.

Q. Isn't he the same man that found you in your
hotel in a bedroom with Mrs. Boss? A. No, sir.

Q. Didn't he, the brother of Mrs. Boss, complain
to you that he had caught you in a bedroom with
Mrs. Boss, and he did not want any more of that?
A. No, sir.

30 Q. And has not Elizabeth Boss been living with
her mother in one of the rooms of your hotel, and
haven't you been visiting them nightly? A. I have
not.

Q. Haven't you been out with them? A. I have
never been out with them alone.

Q. You never went down the Boardwalk with
them or took them to a cabaret? A. No, sir.

40 Q. Were you ever in a cabaret when one of the
girls at the cabaret painted your face and
powdered it? A. No, sir; I never took a hard
drink in my life.

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Q. Isn't it a fact, that about two years ago, in the month of June, 1922, that you were in a cabaret in Atlantic City when one of the girls painted your face and powdered you up? A. No, sir.

Q. Have you ever been called by anyone in Atlantic City or anywhere else, a "fairy"? A. No, sir, I have not. 10

Q. When you had your trouble with your wife, and Mr. Kelly came down, what did your wife tell you; did not your wife tell you, and did not Mr. Kelly, in her behalf and in her presence, tell you that if you would let your brother go, she, your wife, was willing to do the typewriting and the clerking, and would assist you in every way possible in your hotel? A. No, sir. 20

Q. Did Mr. Kelly, on behalf of your wife, ever tell you that? A. No, sir.

Q. Did your wife, at any time, in her talks with you about your brother leaving that hotel, say that if your brother left she would be willing to do the typing and the clerking, but she felt she ought to have a key for the cash drawer as well as anyone else? A. No, sir.

Q. Didn't your wife tell you, didn't she say it was most humiliating to go to the clerk to keep her jewelry when she went in bathing? A. No, sir. 30

Q. If your wife told you that she wanted, as you stated, half of your interest in the hotel, and wanted your brother discharged, didn't you doubt her then? A. No, sir, I did not doubt her then, because I knew it all came from somebody else; everything she said somebody had told her; it never came right from her own heart.

Q. Did you at that time when she asked you 40

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about those things, doubt her? A. No, sir, I never doubted this girl in my life.

Q. You did not think then that she was after your money? A. No, sir.

10 Q. And you don't think she is now, do you? A. No, sir.

Q. And when she told you on the witness stand yesterday, that she was perfectly willing to go back and live with you even now if you would give up your degenerate habits and perform your marital functions as a man ought to, did you doubt her?

Mr. Hermann: Objected to.

A. I have never done anything unnatural.

20 Q. Answer the question. A. I don't know whether to take her back or what to do.

Q. Will you take her back? A. That is what I have been thinking about all night long.

Q. Then you don't doubt her, do you, when she made that statement yesterday, that she was in perfect good faith, willing to go back and live with you? A. That stuff never came from the girl's heart.

30 Mr. Hermann: Suppose I were to make the statement that a proposition for a monied settlement has been made; it was made by Mr. Goldenhorn many times, that for a certain number of thousands of dollars, that she will get a divorce.

Mr. Goldenhorn: I deny it.

Mr. Hermann: There was a witness present who is not now in the courtroom.

40 Q. (Question read.) A. Up to the very moment yesterday that I heard those words from her mouth, I cannot come to a conclusion.

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Q. Did you testify this morning that you paid this \$5.00 to this Dr. Coward in Atlantic City on the 5th of July? A. No, sir.

Q. Can you tell us what day you did pay him? A. No, sir.

Q. Was it the early part of July or the latter part of July? 10

Mr. Hermann: Objected to.

The Court: If you overlooked some matter, I will allow it; I remember your dwelling on the five dollars before. Make the question as brief as you can.

Q. Was it the 5th of July or later than that? A. Later than that; they came back on their last trip from New York, on the 5th of July. 20

Q. How long after that day that they came back from New York was it that you paid that five dollars to Dr. Coward? A. It was after the middle, I would say.

Q. So if it was paid after the middle of July, it must of necessity have been paid before you consulted with Father Sheehan? A. Exactly. We saw Father Sheehan first, before I made the payment; I saw Father Sheehan before I paid the five dollars. 30

Q. Now, one question more; when you paid the five dollars to the doctor, you told this Court this morning you did not inquire what services he had rendered to your wife? A. Yes, sir, I said, "What is the matter with my wife?" and he said, I owed him for a call, that I knew nothing about, and he said she needed a sedative.

Q. Didn't he tell you that she should take a sedative and keep away from you on account of what she had said to him? A. Absolutely not. 40

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DR. BYRON G. DAVIS, being duly sworn, testified as follows:

Direct examination by Mr. Hermann:

Q. You are a practicing physician in this State?
10 A. Yes, sir.

Q. You are licensed to practice? A. Yes, sir.

Q. And you practice where? A. In Atlantic City.

Q. How long have you practiced? A. Since
1910.

Mr. Goldenhorn: His qualifications are admitted.

Q. Prior to Mr. O'Brien's marriage, did he consult you? A. He did.
20

Q. For what purpose?

Mr. Goldenhorn: Objected to as incompetent, irrelevant and immaterial, prior to the marriage.

The Court: What is the object of it?

Mr. Hermann: Mr. O'Brien said he consulted certain physicians to see if he was in good physical shape to get married.

The Court: I overrule the objection.

30 *By the Court:*

Q. Did he consult you? A. Yes, sir.

Q. How long before he was married? A. Possibly two or three weeks.

Q. Did you make an examination of him? A. Yes, sir.

Further direct:

Q. What was the purpose of the examination?
40

Mr. Goldenhorn: Objected to.

The Court: Objection overruled.

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Q. What did you find his physical condition to be? A. Good.

Q. Since this suit has been started, has Mr. O'Brien consulted you with respect to his physical condition? A. He has.

Mr. Goldenhorn: Objected to as incompetent, irrelevant and immaterial, and not part of the *res gestae*.

10

The Court: Objection overruled.

By the Court:

Q. Have you examined him since the suit was started? A. No, sir, he consulted me about his nervousness.

Q. You treated him for nervousness? A. Yes, sir.

20

Further direct:

Q. What did you advise him to do, if anything? A. To try and forget his troubles and to go away to the mountains for a little rest for the purpose of forgetting. I recommended Buckhill Falls; that is a hotel located a few miles above Gresco, in Pennsylvania, in the Pocono Mountains.

Cross examination by Mr. Goldenhorn:

30

Q. Can you tell us what year or month it was that he consulted you? A. No, sir.

Q. Have you your book of records showing when he was there? A. I have my ledger account at home, but not here.

Q. You don't know what month it was? A. No, sir.

Q. What is this Buckhill Falls? A. It is a mountain hotel where I take my family every year.

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Mr. Hermann: I go there every year myself.

Q. Now, you have known Mr. O'Brien for a number of years? A. Yes, sir.

10 Q. You have had occasion to be called in to examine him a number of times prior to his marriage? A. Yes, sir, when he was ill.

Q. He has been ill several times before he was married? A. Yes, sir.

By the Court:

Q. What kind of an examination did you make; did you examine his private parts? A. No, sir.

Further cross:

20 Q. You never examined his genital organs at all? A. No, sir.

DR. WILLIAM E. RAMSAY, being duly sworn, testified as follows:

Direct examination by Mr. Hermann:

Q. You are a licensed practicing physician of this State? A. Yes, sir.

30 Q. You are also the consultant or attending physician—

Mr. Goldenhorn: His qualifications are admitted.

40 Q. What institutions are you the consulting physician of? A. The Perth Amboy City Hospital, and visiting physician, too. I examine in psychiatry at the Rahway Reformatory, and at the Jamesburg School for Boys; and the purpose of that is to determine whether they are abnormal or not; that occurs in the examination of the boys as to

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the evidence of degeneracy, the evidence of their habits, etc.

Q. Have you made an examination of Mr. O'Brien? A. Yes, sir.

Q. When? A. Just before the last day set for the hearing in 1924.

10

Q. From your examination, are you able to say as to whether Mr. O'Brien is a normal, moral person, or otherwise?

Mr. Goldenhorn: Objected to.

A. My conclusion is, that he is a normal individual; I do not find any psychopathic evidence.

Q. Did you hear the testimony of Dr. Roberts yesterday? A. Yes, sir.

Q. What do you say with respect to his testimony that the uterus may become congested and the fallopian tubes inflamed, being caused by sexual intercourse thirty days prior? A. The time is too long for the continuation of a congestion after a sexual excitement.

20

Q. Could there be such a condition created by sexual excitement? A. Only temporary.

Q. Temporary of how long a duration? A. The time that the effect of the passion takes in passing off, during the excitement of intercourse; in the normal being, the female genital organs are congested, and, when the excitement passes off the congestion disappears.

30

Q. Can that occur through sexual intercourse between an abnormal person—change that—through one who is over-sensual? A. A person who is strong in her sexual desires, is more liable to be more congested than a person of a cold disposition or tendency.

Q. The degree of sexual desire varies in differ-

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ent persons? A. Very markedly, particularly in the female.

Cross examination by Mr. Goldenhorn:

10 Q. You have heard of the famous Loeb and Leopold case in Chicago? A. Yes, sir.

Q. And such an observation as you made of the defendant here, Mr. O'Brien, if the same had been made on those two men, they could not have told then that they were abnormal either, could they?

Mr. Hermann: Objected to as calling for a conclusion.

Mr. Goldenhorn: This man is an expert.

20 *By the Court:*

Q. You have not been out to Chicago and examined these men? A. No, sir.

Further cross:

Q. But you read the medical history of that case, didn't you, Doctor? A. Only in the newspapers and "World's Work."

30 Q. You don't want us to understand that by the cursory examination which you say you made of this defendant, that you are certain that this man is not abnormal, do you? A. My conclusion is, that he is not; I have examined a great many boys of degenerate type in the reformatory.

40 Q. If a man were given to putting his finger in the genital organs of a woman, and asked a woman to permit him to put his private parts of penis in her mouth, and persisted in that desire because it would afford him a great deal of pleasure, and if she loved him she would grant him that pleasure he said, would you say that man was normal or abnormal?

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Mr. Hermann: None of those factors are present in this case.

A. If I may be permitted, I would like to answer that question in two sections—the first, with reference to placing the finger in the genital organs; I think that that is a perfectly normal procedure; all animals, whether they be human or the lower animal type, have their methods of approaching their mate; the stallion, for instance, biting the neck and the groin of the mare. With the human being, it seems to be an almost normal method, placing the hands on the female genitals, and also on the other organs that are closely associated, such as the breast; I think that is a perfectly normal proceeding. As to the second section of that question, the question of placing the penis in the mouth of the female, that is not a normal procedure and is an abnormal condition.

Q. Would the insertion of the finger in the genital organs of a woman cause a greater congestion than if the normal penis were to enter? A. Yes, sir, because it is a method of exciting the woman's passions by irritating the clitoris.

Q. And if the finger were inserted would not that be apt to cause a congestion? A. The object of that proceeding is to produce a congestion.

Q. Would that congestion last for thirty days? A. It would not.

Q. If you were told that in having sexual intercourse it took the man 40 minutes to gratify his passion, would you, in your opinion, say that that was an abnormal condition of the man? A. In my clinical experience, I have never heard of sexual intercourse lasting that length of time.

Q. But if it did last 40 minutes, would you say

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that that was attributable to some abnormality in the man or not? A. Yes, sir.

Q. Now, your examination was made of this man without his even knowing you were making it? A. Yes, sir.

10 Q. And it was made in a law office? A. Yes, sir.

Q. Had you spoken to him; did you ask him any questions? A. Yes, sir.

Q. Did you get anything about his history? A. Yes, sir.

Q. Did he tell you he had consulted with a number of doctors before the day that you asked him the questions? A. Yes, sir.

20 Q. Doctor, from the fact that a man takes his hand and persists in reiterating his answers in the manner in which you observed the defendant on the witness stand this morning, I ask you whether that is or is not a symptom of abnormality? A. The man was under an emotion—

Q. Yes or no? A. He was in an emotional condition—

Q. Is that an abnormal condition? A. No, sir.

Q. Is that a normal condition? A. Yes, sir.

30 Q. And you think that is the normal condition of a man to sit there on the witness stand when questions have been put to him as I have been putting them to him, and as the court has been putting them to him, and as his attorney has been putting them to him, you think that his answers and his manner on that witness stand were those of a perfectly normal man? A. Of an emotional man.

Q. Then he is emotional? A. Yes, sir.

40 Q. Would the fact that a woman would resist a man in the granting of sexual intercourse, a man, as you say, with those emotional qualities that you

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observed—would the fact that a woman had denied to him what he wanted in the way of sexual desires, would a man with that high emotion, be apt to bite her in the neck? A. I could not say that definitely.

Q. Is the biting in the neck a sign of abnormality? A. To the extent of doing damage, yes. 10

Q. If he does do damage, then he is abnormal?
A. Under excitement, yes.

THOMAS B. O'BRIEN, being duly sworn, testified as follows:

Direct examination by Mr. Hermann:

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

Q. Did you have a talk with the petitioner, Mrs. O'Brien? A. Yes, sir.

Q. What was that talk about?

Mr. Goldenhorn: Objected to unless time and place are fixed.

The Court: The objection is overruled.

A. That was one week after their return from their wedding trip; 16 days after the day of the marriage. 30

Q. What was that conversation and where did it take place? A. On the porch of the Hotel De Ville; she approached me and asked me if I did not think that her husband should go fifty-fifty; I said, "I don't understand what you mean"; she said, "What I mean is this—to turn half of the hotel and also turn over half of what money he has"; I said, "Don't you think this is a little premature?" and she said, "No, I do not, and I am going 40

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to see about it"; another thing she said, "My brother has just as much right behind that desk as his brother."

Cross examination by Mr. Goldenhorn:

10 Q. When was this? A. March 8th and 9th, in the morning.

Q. Where was Mr. O'Brien at that time? A. He was somewhere around the hotel.

Q. Were you sitting alone at that time? A. I was talking to a gentleman, and she asked me if she could speak to me a moment.

Q. She interrupted a conversation that you were having with a gentleman, to call you aside for the purpose of telling you she thought Tom ought to go fifty-fifty on the hotel? A. Yes, sir.

20 Q. And that her brother ought to be there as well as his brother? A. Yes, sir.

Q. And you gave her the advice that it was a little premature? A. Yes, sir.

Q. And that ended the conversation? A. Yes, sir.

Q. And you never spoke to her about it afterwards? A. Somebody came and called me to breakfast; she said she thought her brother had as much right behind that desk as his brother. I said I did not think so; she said, "I am going to see about it"; and I said, "Very well, it is your husband's business and not mine."

30 Q. Didn't you know at that time that your son did not have the entire hotel in his own name, and that he could not have given up one-half? A. I knew that.

Q. And although you knew that, you never said a word to her about getting a half? A. No, sir.

40 Q. You never spoke to your son about it? A. Not at that time, but I did when this trouble arose.

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Q. How did you know this trouble arose? A. Because I was at the hotel when the papers were served on him.

Q. Then it was that you reminded your son of the fact that you were having a talk one day sixteen days after the marriage, on the porch of the hotel, at eight o'clock in the morning, while you were talking to a man? A. I said sixteen days. 10

Q. What was the name of the man you were talking to? A. It was a visitor at the hotel.

Q. What kind of looking man was he; where did he come from? A. He was just a visitor.

Q. How long had that man been in the hotel before you spoke to him? A. I could not tell you.

Q. Do you know where he came from? A. No, sir, I was only a visitor at that hotel myself. 20

Q. You said it was sixteen days? A. I said one week after their return from their honeymoon; they were married on the 25th of April.

Q. How did you know that? A. From my son's information.

Q. How did you figure it out it was just sixteen days? A. From the date of their return from the hotel; I returned to the hotel with them, my wife and I. 30

Q. How did you figure it out that it was exactly sixteen days from the time she got married? A. It was on the 10th or 11th of May, and they were married on the 25th of April.

Q. When were the papers served on your son; what year was it? A. In October, 1922.

Q. What day of the week? A. I don't know.

Q. What day of the month? A. I could not recall.

Q. Who served the papers? A. That I don't know. 40

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Q. What time of the day were they served? A. I don't know.

Q. Who was there when they were served? A. I don't know.

Q. How old are you? A. 62.

10 Q. Then you have a very fine memory? A. Very good, I think.

Q. What day of the week did the Fourth of July fall on of that year? A. All I can tell you is, that it is my birthday; the 4th of July is my birthday.

Q. And even though it is your birthday on the 4th of July, you cannot tell us what day of the week it was—the year that this lady spoke to you? A. No, sir.

20 Q. Now, as a matter of fact, you have been talking to your son about this case, haven't you? A. Yes, sir.

Q. And didn't your son bring you home from Philadelphia today? A. I live in Atlantic City.

Q. Did you live at the hotel with him? A. Yes, sir.

Q. How long have you been living with him there? A. Since last August, and before that time I lived in Philadelphia.

30 Q. Do you remember any other talk you had with her? A. Casual conversations.

Q. She never discussed with you the fact that she would like to do the typing in the hotel and assist your son in making that hotel a success? A. That is right.

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JOHN J. O'BRIEN, being duly sworn, testified as follows:

Direct examination by Mr. Hermann:

Q. You are the brother of the defendant in this case? A. Yes, sir. 10

Q. And a son of the last witness? A. Yes, sir.

Q. Did you ever talk with Mrs. O'Brien with respect to the property and somebody to take your place as clerk? A. No, sir.

No cross examination.

DEFENDANT RESTS.

LAURETTA V. O'BRIEN, the above-named petitioner, recalled in rebuttal. 20

Direct examination by Mr. Goldenhorn:

Q. Did you at any time say to your husband that if he would give you half of his interest in the hotel, or half of the hotel interest, and if he would discharge his brother, that you would accede to his wishes and go back and live with him; did you or didn't you? A. I did not.

Q. Did you ever have any talk with him where- by and wherein you asked him to give up to you his half interest in the hotel? A. No, sir. 30

Q. Did you ever tell him that if he did anything like that, that you would go back and be willing to live with him? A. No, sir.

Q. Did you ever authorize anyone to say that if you were given a lump sum of money that you would obtain a divorce, or let him obtain a divorce and be satisfied? A. No, sir.

Q. Did you ever authorize me or anyone in your behalf to make any such statement? A. No, sir. 40

Q. When he spoke to you on the telephone, and

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you were home with your mother, what did you say to him with respect to acceding to his wishes?

A. I told him if he would live a natural, normal life, I would go back to him.

10 Q. Who went to Father Sheehan first? A. I brought him in with me.

Q. Had you seen this doctor in Atlantic City, whose name I always forget, Dr. Coward, had you consulted with Dr. Coward before you took your husband to Father Sheehan? A. Yes, sir.

Q. Did you tell your husband you had consulted with Dr. Coward? A. Yes, sir.

20 Q. What did you tell your husband that Dr. Coward had said to you? A. I told him when Dr. Coward examined me he found me extremely nervous; he said I would have to refrain from sexual intercourse with my husband; and he said the only thing for me to do was to change my environment, because it is as if a bone was in a part of the flesh and he was working all around that bone, and unless that bone would be removed, he could not effect a cure.

Q. Had you reported to Dr. Coward about these acts you have complained of here? A. Yes, sir.

30 Q. Did you tell your husband you had spoken to Dr. Coward about that? A. Yes, sir.

Q. What did he say? A. He made no answer; and I said, "We will go over to Father Sheehan to talk about the degeneracy," and see if Father Sheehan could make an impression on him.

40 Q. What did you say to Father Sheehan that your husband heard, and what did your husband say to Father Sheehan? A. I told Father Sheehan the exact facts of his conduct towards me, and my husband simply hung his head and never denied it.

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Q. Now, did your husband at any time ever tell you to get your mother out of the hotel because she was interfering between you and him? A. At no time.

Q. And did you at any time say to your husband that your mother was paying you while she was there, and that she was going to stay? A. No, sir. 10

Q. Did your mother ever say that to him, to your knowledge? A. No, sir.

Q. Did you know the detectives were occupying the room next to you? A. Not until after he told me about it.

Q. Did your mother ever refuse to go when she was told to go? A. She was never told to go.

Q. Did your mother in any way interfere between you and your husband when she was at the Hotel De Ville? A. No, sir. 20

Q. When you were there with your mother, did your husband at any time ask you to have sexual intercourse with him? A. No, sir.

Q. Did you ever refuse or deny him sexual relations in the proper way? A. Never.

Q. Did you or didn't you testify yesterday, that if your husband would give up these habits, that you would be willing to go back right now and live with him? A. Yes, sir. 30

Q. Did you ever tell him that you would not do that unless he divided his property with you? A. No, sir.

Q. Did you ever tell your husband that everybody about the place had a key to the cash drawer, and why not you? A. I did.

Q. Under what circumstances did you tell that to him? A. I thought that was due to me out of respect for being his wife. 40

Q. Did you at any time say to your husband that

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it was humiliating for you not to be permitted to go to the cash drawer yourself and take our your jewelry when you had left it there when you went in bathing? A. I did, and I resented having Mrs. Boss hand it to me.

10 *Cross examination by Mr. Hermann:*

Q. You told Dr. Coward in detail of these acts that you have testified to here? A. Yes, sir.

Q. How long after that did you see Dr. Roberts? A. I saw Dr. Roberts within a month of my marriage.

Q. Dr. Roberts testified yesterday, that you told him that your husband only indulged in prolonged intercourse? A. No, sir, I told Dr. Roberts about his degeneracy.

20 Q. If Dr. Roberts said that was all you told him about—

Mr. Goldenhorn: I want to object to this, because Dr. Roberts said this woman gave him a history.

By the Court:

Q. You heard Dr. Roberts' testimony today, did you? A. Yes, sir.

30

Further cross:

Q. Dr. Roberts said, that in asking you for the history that you told him your husband indulged in prolonged sexual intercourse? A. Very true; I told him that in the presence of my mother.

Q. And this was the principal cause of your congestion? A. No, sir, I claimed the degeneracy, too, with it.

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By the Court:

Q. He was using his finger on your private parts?

A. Yes, sir.

Further cross:

Q. The doctor was after a history to find out what the cause of this was? A. Not particularly. 10

Q. What do you think he was asking you the question for? A. I did not think at the time.

Q. You knew Father Sheehan made an affidavit in this case on the application for alimony? A. No, sir, I did not.

Q. Let me read to you what Father Sheehan said, and tell me if it is true or untrue: "John P. Sheehan, being duly sworn deposes and says—I am the Priest of St. Nicholas Catholic Church at Atlantic City, and the person who performed the marriage ceremony between the petitioner and the defendant in the above-entitled cause; that both the petitioner and defendant are known to this deponent; that during the month of July, the petitioner and defendant came to this deponent with reference to an adjustment of the various disputes and differences then existing between them; that the defendant objected to having petitioner's mother live with them at the Hotel De Ville; and keeping the petitioner in this room with her; I further state that the petitioner desired the defendant to turn over to her one-half the interest in his property, and moneys; and that the petitioner desired an active management at the hotel. The petitioner stated she was not getting sufficient financial assistance from the defendant; that she desired the defendant to remove his brother and Mrs. Boss from the active management of the hotel, 20 30 40

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and that until such time that her demands were complied with, she would not cohabit with the defendant; the defendant further stated, that she desired to have an equal title to the property and the money end of it.”

10

Mr. Goldenhorn: I object to this.

Mr. Hermann: I want to ask her if Father Sheehan made such an affidavit?

The Witness: No, sir, never.

Q. If Father Sheehan did make such an affidavit is he declaring an untruth?

Mr. Goldenhorn: I object.

By the Court:

20

Q. Have you been to see Father Sheehan lately?

A. Yes, sir.

The Court: Why isn't he subpoenaed?

Mr. Goldenhorn: I think conversations with a lawyer, a priest or a doctor, are privileged.

The Court: The objection is sustained.

30

MRS. THERESA McCARTHY, being recalled in rebuttal, testified as follows:

Direct examination by Mr. Goldenhorn:

Q. Did you ever tell Mr. O'Brien that you were paying board to your daughter while you were living at his hotel, and that you would not get out?

A. No, sir.

Q. Were you ever asked to leave that hotel because of the interference that you had been creat-

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ing between your daughter and her husband? A. No, sir, because I did not create any disturbance.

Mr. Hermann: I ask that the last be stricken out.

The Court: Strike it out.

Mr. Goldenhorn: I consent to its being struck out.

10

REST ALL.

The Court: You may come in when you get the testimony, and I will fix a day for the argument.

Testimony.

20

IN CHANCERY OF NEW JERSEY.

Between

LAURETTA V. O'BRIEN,
Petitioner,

and

THOMAS M. O'BRIEN,
Defendant.

On Petition
for Divorce.

30

Continuation of the taking of testimony in the above-entitled cause, at the Chancery Chambers, Jersey City, New Jersey, on the fourth day of March, nineteen hundred and twenty-five, before Hon. Vivian M. Lewis, Vice-Chancellor.

Same appearances as before noted.

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MRS. LAURETTA V. O'BRIEN, the above-named petitioner, being recalled, testified as follows:

Recross examination by Mr. Hermann:

10 Q. On page 163 of the testimony, you testified as follows: "Ques. Did you ever authorize anyone to say that if you were given a lump sum of money that you would obtain a divorce, or let him obtain a divorce and be satisfied? Ans. No, sir. Ques. Did you ever authorize me or anyone in your behalf to make any such statement? Ans. No, sir. Ques. When he spoke to you on the telephone, and you were home with your mother, what did you say to him with respect to acceding to his wishes? Ans. I told him if he would live a natural, normal

20 life, I would go back to him." Do you recall that testimony? A. I remember saying that.

Q. Can you fix the time when you said you would go back to him if he would give up his unnatural practices? A. No, sir, I cannot fix the date.

Q. Since that time, have you ever offered to return to live with him? A. Do you mean through my counsel?

30 Q. Through anyone. A. I told Mr. Goldenhorn a number of times that if he could lead a clean, moral life and treat me as a wife and not as a woman of the streets, I would be glad to return to him.

Q. Did you ever tell Mr. Goldenhorn you would not live with him? A. I said if he continued to live that kind of life, I would not live with him.

40 Q. Did you ever tell Mr. Goldenhorn that under no circumstances would you live with him? A. No, sir, I don't remember that.

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Q. I show you a letter and an envelope, addressed to Mr. I. F. Goldenhorn, 243 Washington Street, Jersey City, New Jersey; postmarked "Jersey City, March 8, 1923," and ask you if that is your handwriting? A. Yes, sir.

Q. That is your writing? A. Yes, sir. 10

Mr. Hermann: I wish to offer this envelope and letter in evidence.

Mr. Goldenhorn: I have no objection.

Q. What did you mean then when you said, "Dear Mr. Goldenhorn: Referring to my conversation with you today, due to ill health, it will be impossible for me to be at your office tomorrow to meet Mr. Hermann. As I repeatedly said, there is absolutely no possibility of a reconciliation, it being against my religious principles, in addition to it being dangerous to my life. I trust, Mr. Goldenhorn, you will not request me again to reconsider this, as my mind has been made up from the beginning. With kindest regards from my parents and myself, I am, most sincerely, (Mrs.) Laretta O'Brien." So that, from the beginning you had determined there was no possibility of a reconciliation? A. From his conduct, yes. 20

Q. I ask you now what you meant when you said, "Referring to my conversation with you today"; what was the conversation you had with Mr. Goldenhorn that day? A. I don't remember that. 30

Mr. Goldenhorn: I don't think it is fair to ask what the conversation was between counsel and client.

The Court: It is privileged—isn't it privileged, Mr. Hermann? 40

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Mr. Hermann: She refers to the conversation in the letter.

The Court: I don't think you should go any further; you have the letter now.

By the Court:

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Q. When you wrote that letter had you in mind continuing that same kind of conduct that you complained about? A. Yes, sir.

Q. Was that what you meant when you said you could not go back and live with him? A. Yes, sir.

(Letter and envelope marked "Exhibits H. F. 1, H. F. 2.")

Further recross:

20

Q. When Mr. Goldenhorn cross examined your husband, you were present alongside of Mr. Goldenhorn while that cross examination was in progress? A. Yes, sir.

Q. Were you there when Mr. Goldenhorn asked this question: "Did you commit adultery with her (meaning Mrs. Boss' daughter) within the last two years?" Did you tell Mr. Goldenhorn that Mr. O'Brien had committed adultery with her? A. I said I was so informed.

30

Q. Did you give Mr. Goldenhorn this information: "Ques. Did you pay for an abortion committed on the daughter of Mrs. Boss about two years ago?" A. I was informed of that.

Q. Mr. Goldenhorn then said, "Did you pay Dr. Conaway any money for attending to Mrs. Boss' daughter?" A. I don't remember that.

Q. Did you ever consult Dr. Conaway? A. I did for myself.

40

Q. With respect to Mr. O'Brien's conduct towards you? A. Yes, sir.

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Q. Did you ever consult Dr. Conaway? A. Yes, sir.

Q. Tell us what you told him. A. Dr. Conaway examined me, and he found these lumps under my breast, and I told him of my husband's unnatural practices.

10

Q. What did you say about it? A. All the things I have stated in the affidavit—that he wanted me to take his penis in my mouth, and all those things; and Dr. Conaway said, "Oh, simply get a divorce and get rid of him"; he said, "I don't know what kind of a man he is; he is coming to my office with his father;" he said, "It is very unusual to see a man in my office." And he treated me twice; and he said, unless I continued treatments he was afraid that a tumor might form; he treated me two or three times.

20

Q. That is the talk you had with Dr. Conaway? A. Yes, sir.

Q. Now, what talk did you have with Dr. Coward? A. He examined me and I told him I was extremely nervous; my nerves were all shattered.

Q. Did you tell him about these unnatural practices of your husband? A. Yes, sir, and he said at that time that he would not mind going to court. He said, "I would not mind going to court, but it takes up so much of my time"; then afterwards I was informed that he knew quite some about Mr. O'Brien.

30

Q. Did he tell you what he knew about Mr. O'Brien? A. No, sir, not he himself.

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DR. WALT PONDER CONAWAY, being duly sworn, testified as follows:

Direct examination by Mr. Hermann:

10 Q. Before you enter the courtroom this morning, Mrs. O'Brien, the petitioner, testified that she had consulted you with respect to the unnatural practices of her husband towards her?

Mr. Goldenhorn: Objected to on the ground that it is privileged.

The Court: The objection will be overruled.

20 Q. Indulged in with her by her husband; she testified that she told you. Now, may I have the stenographer read her answer?

The Court: You may read her testimony.

Mr. Goldenhorn: I object to it on the ground that it is privileged, being a conversation between a physician and his patient.

The Court: All right; let the testimony be read.

30 Mr. Hermann: Now, will you read to Dr. Conaway Mrs. O'Brien's testimony given today?

(The court stenographer then read the testimony of Mrs. O'Brien given today.)

Q. Doctor, you have heard that testimony read, which was testimony given by Mrs. O'Brien this morning. Did Mrs. O'Brien call upon you for professional treatment? A. She called upon me February 26th, 1923, for examination.

40 Q. Did she tell you that her husband had indulged in degenerate practices on her? A. Yes, sir.

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Q. Did you make an examination? A. I did.

Q. Did you find any evidence of any degenerate practices? A. I did not.

Q. Did you tell Mrs. O'Brien that she should get rid of the man by getting a divorce? A. I don't recall that at all, because that is not my business.

10

By the Court:

Q. What is the fact? A. I don't recall ever making that remark.

Further direct:

Q. Will you say you did not make it? She says you did. A. I think I did not.

Cross examination by Mr. Goldenhorn:

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Q. Are you just as certain about your other talk with her as you are about that? A. I wrote down the result of my examination.

Q. At the time of the examination? A. Yes, sir.

Q. Have you that in a book? A. Yes, sir.

Q. Did you find any evidences of any malady due to anything that her husband might have done? A. No, sir; there was a slight enlargement of one or two glands under her breast; I said, "They are trifling, I would not pay any attention to them at all; they might increase in size."

30

Q. Did she tell you what they were caused by? A. She said she thought they were caused by her husband.

Q. Did she tell you they were caused by her husband biting her there? A. No, sir; she came to me because she said she thought she was injured for life by her husband being abusive towards her, and she told me she had large lumps under her breasts; but I only saw tiny little lumps. I ex-

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amined her internally, and found no evidence of disease or injury. I had some laboratory tests made and they were negative of any disease.

Redirect examination by Mr. Hermann:

10 Q. How long have you been practicing medicine in New Jersey? A. Since 1900.

Q. During that time have you been an officer in any medical society of the State?

Mr. Goldenhorn: Objected to on the ground that it is immaterial.

A. Yes, sir, I was President of the Atlantic County Medical Society for four years, having been attending gynaecologist at the Atlantic City Hospital for fifteen years. I am now Vice-President of the Medical Society of the State of New Jersey. I am a member of the American College of Surgeons for ten years.

20 Q. What is your college? A. Bellevue Hospital.

Q. Mr. Goldenhorn, in cross examining Mr. O'Brien at page 143 of the testimony, asked the following question: "Did you commit adultery with her (meaning Mrs. Boss' daughter) within the last two years? Ans. No, sir, never. Ques. Didn't you pay for an abortion committed on the daughter of Mrs. Boss about ten years ago? Ans. No, sir. Ques. Did you pay Dr. Conaway any money for attending Mrs. Boss' daughter? Ans. No, sir. Ques. Did you know that this daughter of Mrs. Boss, whose name is Elizabeth, had had an abortion committed on her about two years ago? Ans. No, sir." Did you ever commit an abortion on Mrs. Boss' daughter? A. No, sir, I never at any time had Mrs. Boss or her daughter for a patient.

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Mr. Goldenhorn: I object and ask to have it stricken out, because there is no such evidence.

The Court: The Court will let it stand under the broad rules of this Court.

10

Q. On page 143: "Did you pay Dr. Conaway any money for attending Mrs. Boss' daughter?" That is the question. A. I never had her for a patient; I did not know the girl.

Q. When did you first meet Mrs. Boss and her daughter? A. They called at my office on January 19th of this year, to tell me my name had been mentioned in this trial; I had never met them before that time; they said they had seen me and knew who I was, and they wanted to acquaint me with the fact that my name had been brought into this case.

20

Q. Are there any other Conways in Atlantic City, a doctor? A. No, sir.

Q. You made an examination of Mrs. O'Brien on the 28th of February, 1923, didn't you? A. Yes, sir.

Q. You gave her a certificate of what you found was the matter with her? A. I think so.

30

Q. I show you what purports to be your signature, and ask you if you did not give her that? A. Yes, sir.

Q. And what you certified to in that certificate was true? A. Yes, sir.

Q. That is what you found was the matter with her? A. Yes, sir, "She has a few nodules at the base of each breast which are probably cystic mastitis. She also has a purulent vaginitis, which, according to laboratory findings, is not due to a

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Neisserian infection." She had an excessive leucorrhoeal discharge.

Q. Would that be attributable to any congestion there? A. There might be some congestion, a normal condition.

10 Q. Did you examine her after that? A. The next day she came in after I had had the laboratory test made, and I said it was nothing of a serious nature and to let it alone.

By Mr. Goldenhorn:

Q. Didn't you tell her at that time she ought to get away from her husband? A. I don't recall that; there is no reason for it.

20 Q. Would you advise a woman who is suffering from leucorrhoea to have sexual intercourse with her husband? A. Yes, sir.

Q. Don't you recall, Doctor, when you had the conversation when she told you about these improper practices that her husband was asking her to indulge in, that you said, "Why don't you get a divorce from him; why do you have anything to do with a man like that?" Do you recall that? A. I might have said that; I don't recall it.

30 Q. These nodules that you found on the breast, they might be caused by the hand being put on the breast? A. Repeated manipulations might cause a gland to arise.

Q. And repeated placing of the hand on the breast might result in a tumor? A. Repeated bruising of the breast could cause an injury.

Q. Didn't you tell her she might develop a tumor? A. A tumor means swelling; the glands were slightly enlarged.

40 Q. Now, had you also been the physician, and were you the physician for Mr. O'Brien? A. Not

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regularly; he called at my office a few times, and I told him he did not need me.

Q. Did he call on you? A. Yes, sir.

Redirect examination by Mr. Hermann:

Q. Doctor, these nodules, as you call them, on the breast, if it were a fact that her husband had not been with her so as to put his hands on her breast from the May prior to the time you examined her, which was in 1923, February 26, 1923, would those nodules be due to anything the husband had done back in May? A. I would not think so; it is too far away. 10

Recross examination by Mr. Goldenhorn:

Q. You came down here today because Mrs. Boss and her daughter had complained to you about your being charged with having committed an abortion on her daughter? A. I was very glad to come when I heard that. 20

Q. You were incensed that such a charge had been made? A. Yes, sir.

Q. Who asked you to come here? A. Dr. Davis.

DR. EDWIN H. COWARD, being duly sworn, testified as follows: 30

Direct examination by Mr. Hermann:

Q. You are a practicing physician of the State of New Jersey, and have been for how long? A. Since 1913.

Q. Do you hold any official position with any society? A. I am connected with the Tubercular Hospital at Atlantic City. 40

Q. Mrs. O'Brien testified in this case this morn-

Exhibit D—Record in Former Suit.

ing that she had consulted you and had told you, or made some statement to you with respect to degenerate habits indulged in by her husband; did she consult you?

10 Mr. Goldenhorn: I want to raise my objection now on the record—I want to object to any conversation had between this witness and Mrs. O'Brien, on the ground that it is privileged.

 The Court: The objection will be overruled.

 A. She consulted me on the 16th of July, 1922; I received a call to go to the Hotel De Ville on South Kentucky Avenue.

20 Q. Was her husband present when you arrived there? A. No, sir.

 Q. Did you see him during that visit? A. No, sir.

 Q. What was her condition when you arrived? A. Very nervous.

 Q. That was in July? A. That was on the 16th of July, 1922.

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

30 Q. What did you do? A. I prescribed a prescription—a medication.

 Q. Did you at any time subsequently see Mr. O'Brien? A. I met Mr. O'Brien in Deakyne's drug store afterwards on the first of September, 1922.

 Q. What did he say to you, or what did you say to him?

 Mr. Goldenhorn: I object, on the ground that it cannot possibly be binding on this petitioner.

40

Exhibit D—Record in Former Suit.

Mr. Hermann: This is rebuttal.

The Court: You may retain the privilege of striking it out if it is not rebuttal. I don't see how it can be rebuttal as binding on Mrs. O'Brien; I don't think she testified to any conversation that she heard there, or any conversation related to her by her husband there; or any conversation related to her by her physician. 10

Mr. Hermann: She said that she told Mr. O'Brien after the doctor had left, that he had been there to treat her, and Mr. O'Brien denies that she ever told him any such thing.

The Court: How can this be binding on the wife? However, I will take the testimony. 20

Q. Tell us what happened at the drugstore. A. My recollection is, that I walked in the drugstore, and Mr. O'Brien was at the counter purchasing something, and he saw me and called me over; and he said, "How much do I owe you?" and I said, "Five dollars." And he paid me right there.

By Mr. Goldenhorn:

Q. Did Mrs. O'Brien have any conversation with you? A. I only saw her that one visit; there was a lady present, who I think was her mother; the only examination I made of her was, that I listened to her heart and took her pulse. 30

Further direct:

Q. Mrs. O'Brien further testified in this case, that you told her she should have nothing more to do with her husband, and not allow him to have sexual intercourse with her? A. I do not remember having had any such conversation with her. 40

Exhibit D—Record in Former Suit.

By the Court:

Q. Did you ever tell her not to have any more sexual intercourse with her husband? A. No, sir, I did not.

10 *Further direct:*

Q. What did you examine Mrs. O'Brien for, Doctor? A. Just nervousness; that is all, as I recall it.

Q. Did she tell you what she said caused the nervousness? A. I remember her mentioning something about that he did not like her mother.

Q. Did she say anything about his having indulged in any immoral practices? A. No, sir.

20 Q. Did she complain of his over-indulging in sexual intercourse? A. No, sir.

Cross examination by Mr. Goldenhorn:

Q. If she had told you that her husband was asking her to suck his penis, you would have advised her to get away from him? A. I certainly would, yes, sir.

Redirect examination by Mr. Hermann:

30 Q. And you would have remembered that? A. Yes, sir.

Recross examination by Mr. Goldenhorn:

Q. Do you remember a single thing on the day you met her? A. I remember meeting her in the room with another woman, who I believe was her mother.

40 Q. That is all you recall? A. I remember examining her, and I remember prescribing a sedative for her.

Exhibit D—Record in Former Suit.

Q. How many patients did you have at that time—four hundred or five hundred? A. No, sir.

Q. You cannot profess to tell us of every conversation you had with every one of your patients? A. No, sir.

Q. Your memory has been refreshed of this by some conversation you had with Mr. O'Brien? A. No, sir.

Q. Didn't you come up on the train with Mr. O'Brien this morning? A. No, sir.

Q. How did you happen to come here? A. Dr. Davis, of Atlantic City, said there was testimony given by Mrs. O'Brien here in which my name was used as having treated her; Dr. Davis asked me to come up.

By the Court:

Q. Did they pay you to come up? A. They paid my fare; Mr. O'Brien paid my fare up here.

Mr. Goldenhorn: I offer the certificate by Dr. Walt Ponder Conaway in evidence. (Marked "Exhibit G. F. 1.")

BOTH SIDES REST.

30

40

Exhibit G. F. 1.

DR. WALT PONDER CONAWAY

1723 Pacific Avenue

Atlantic City, New Jersey

February Twenty-eighth, 1923

10

To Whom It May Concern:

This is to certify that Mrs. Loretta O'Brien has been under my care since February 26th. She has a few nodules at the base of each breast which are probably cystic mastitis. She also has a purulent vaginitis, which according to laboratory findings is not due to Neisserian infection.

Signed.

20

WALT P. CONAWAY

30

40

New Jersey Court of Errors and Appeals

Between

LAURETTA V. O'BRIEN,
Complainant-Appellant,

and

THOMAS M. O'BRIEN,
Defendant-Respondent.

On Bill for
Maintenance.

On Appeal from
Chancery.

(60/475)

BRIEF OF COMPLAINANT-APPELLANT.

I.

The complainant, Laretta V. O'Brien, filed a bill in Chancery for maintenance under Section 26 of the Divorce Act. Defendant, Thomas M. O'Brien, filed a cross-petition for divorce on the ground of desertion. The final hearing was before Vice Chancellor FALLON, who advised a decree dismissing complainant's bill and granting an absolute divorce in favor of defendant on his cross-petition. A decree was entered accordingly on October 1, 1928. From that decree complainant has appealed to this Court.

II.

There had been a previous suit for divorce *a mensa et thoro* commenced by the present complainant against the present defendant, petitioner alleging cruelty as the basis of her suit. The cruelty complained of resolved itself into alleged acts of sexual perversion by defendant, which pe-

itioner would not tolerate. On final hearing, Vice Chancellor LEWIS "being satisfied that the petitioner has failed to substantiate the allegations of her petition," advised a decree "that the petition filed herein be and the same is hereby dismissed." That decree was dated March 8, 1926, and was filed March 10, 1926. Just prior to the expiration of a year thereafter, an appeal was taken from the decree, but it was subsequently dismissed without having been perfected and argued, upon application of appellant's counsel and with the consent of counsel for the respondent.

III.

Meantime, on April 9, 1926, the then solicitor for complainant filed the present bill for maintenance, basing the suit on alleged overtures made by the wife to the husband to resume cohabitation, upon terms of proper marital treatment, which were repulsed by the husband, and justifying her absence from the matrimonial domicile upon the same grounds and occurrences covered by the testimony in the former suit.

In his answer the husband states that he admits the allegations of the wife that he refused to live with her or to have anything to do with her; that he had refused to maintain and support her since the decree in the former action was entered; and that he never intends to give her any support or maintenance whatever.

Subsequently, in June, 1926, the wife, accompanied by a friend—Virginia Kennedy,—went to her husband's hotel at Atlantic City, which had been the matrimonial domicile, and sought unequivocally to effect a reconciliation, but the husband refused to consider it, and said, "No, Laur-etta, you have placed it in the hands of the court,

let the court take care of it." She then said to him, "Won't you have dinner with us tonight?" But he replied, "No, not tonight or any other night." The next evening she sent Miss Kennedy to see her husband and to tell him that his wife desired to speak to him alone; but he said to Miss Kennedy, "No, positively not." The wife further testified that "Again I spoke to him in the hall (I was alone this night), and I told him why does he not forget, and he says, 'Let it stand for the present.'" This testimony, which was fully corroborated, was not refuted. The husband did not take the witness stand either in defense of the maintenance bill or in support of the cross-petition for divorce (State of Case, 71, 83, 107, 169).

IV.

The Court, however (while ruling that all occurrences prior to the final decree in the former suit by which the wife sought to justify her withdrawal from her husband were *res adjudicata*, and sustaining defendant's objection to their admission in evidence), held, nevertheless (after exhaustively reviewing the record in the former suit, which was ultimately offered in evidence by the defendant), that the prior decree established conclusively the falsity of the wife's allegations and the truth of the husband's denials, and that he was satisfied therefrom that the wife's overtures were not made in good faith, and thereupon dismissed her bill.

The Court also held that the effect of that record was to establish the fact that the former suit had not been brought in good faith; that therefore the time during which it was pending could be computed as part of the time of the alleged desertion complained of by the husband; that the conduct of the wife, thus established, was such as

to relieve the husband of any duty to make overtures to her for a reconciliation; and that therefore the refusal of the wife to live with the husband because of alleged misconduct on his part, had no foundation in fact, and that she thereby became judicially guilty of desertion entitling her husband to a decree for divorce against her.

To state it otherwise, the effect of the decision of the Court below, in this respect, is that the record of the former suit is not admissible for the purpose of aiding the complainant's suit, and that it is *res adjudicata* against her, but that it is admissible in all its aspects in aid of the defendant's defense to the bill for maintenance and of his cross-petition for divorce against complainant.

V.

Is the decree of dismissal in the former suit (52/480) between the same parties for divorce *a mensa et thoro* to be given the effect of *res adjudicata* of the present suit except as to occurrences subsequent to that decree?

The decree simply recites that "The Court * * * being satisfied that the petitioner has failed to substantiate the allegations of her petition. * * * It is ordered that the petition filed herein be and the same is hereby dismissed."

It does not adjudge that the defendant was not guilty of the charges alleged in the petition. If there had been such an affirmative adjudication in favor of defendant, it might be argued with stronger force that its effect would be conclusive in favor of the defendant as to the occurrences in issue. But such is not the case.

There are cases which indicate that a dismissal should be "without prejudice" if a further suit is contemplated or if it is to be later sanctioned.

Smith v. Smith, 55 N. J. Eq. 222;
Freund v. Freund, 71 N. J. 524; 72 Eq. 943;
Spence v. Spence, 74 N. J. Eq. 786;
Hewitt v. Hewitt, 37 Atl. Rep. 1011;
Barbour v. Barbour, 94 N. J. Eq. 7.

But that is not conclusive, and it is doubted if the real effect of a decree can be avoided by the use of that phrase, or by the absence of it.

"I think the petitioner would have a right to seek a divorce for desertion and that the decree of dismissal (in a nullity suit in which she failed) would not prejudice her in that regard even without the saving clause applied for. However, in the circumstances, the decree will contain a provision that the dismissal shall be without prejudice."

Per WALKER, Ch., in *Barbour v. Barbour*,
supra.

"So great a master of equity practice as Lord Cottenham (and there never was a greater) disclaimed the notion that the Chancellor has any power to destroy the evidential value of his own decrees. *A fortiori* he cannot alter a statute in order to let a particular suitor down easy. The declaration 'without prejudice' must be regarded as a judicial deliverance that the suit in which it is entered has not influenced the defendant's desertion."

Biddle, N. J. Divorce Practice (2nd ed.),
 91.

"The Court has no power to interfere with the effect which the dismissal of the bill may have upon the claim made by the corporation, or to regulate the extent and effect which may arise from it as a matter of evidence in any future contest. The effect of the dismissal, therefore, will be *to operate as a bar against any future suit in this Court by the Corporation against the defendant for the same purpose*, and to create a great, though not irre-

mediable, difficulty in the assertion of such claim at law."

Per Lord COTTENHAM in *The Corporation of Rochester v. Lee*, 1 Macn. & G. 467.

But the present suit for maintenance is not for the same purpose as the former suit for divorce. The issue is different. This is a suit for maintenance simply. It has merely to do with the question of support.

In a somewhat similar situation Vice Chancellor BUCHANAN held that the decree in the former suit was not *res adjudicata*.

McCormack v. McCormack, 3 N. J. Misc. Rep. 624, 626-7.

The language of the decree in that case was the same as in the present suit, and the Vice Chancellor said:

"The difficulty is that the decree in the prior suit does not adjudicate that the parties were living separately by consent. That decree simply dismisses the petition and the counterclaim, and the only adjudication of fact therein expressed is that the proofs of the petitioner were insufficient to support the allegations of the petition and the proofs of the defendant were insufficient to support the allegations of the counterclaim. Manifestly it is not a necessary inference or conclusion from this that the Court must have found that the parties were living separately by consent. It would be equally as possible an inference that the decree was the result of a finding that the separation had not continued for two years, or that the jurisdictional requisites had not been proven, or any one of several other possibilities."

In *Adams v. Adams*, 77 N. J. Eq. 123, 126, Vice Chancellor LEAMING said:

"The decree (for maintenance) is not in any sense a decree for divorce, but is purely a money decree authorized by the statute in any case where a husband abandons his wife or separates himself from her and refuses and neglects to maintain and provide for her."

In *Pinkinson v. Pinkinson*, 92 N. J. Eq. 669, 672, Mr. Justice KATZENBACH, speaking for this Court, in discussing the question of corroboration and distinguishing the case then under judicial consideration from another case involving divorce, said:

"In that case the parties sought a dissolution of the marriage relation. The dissolution of the marriage relation is a proceeding which the law does not favor. The present proceeding (for maintenance) is not one seeking a dissolution of the marriage relation, but one to uphold an obligation implied by the relation. The cessation of intercourse is but one element or factor to be taken into consideration in reaching a conclusion upon the question involved. We are therefore, of the opinion that it is proper under such circumstances to consider the testimony of the parties on this subject, although uncorroborated."

And again, in *Shore v. Shore*, 126 Atl. Rep. 320, this Court, speaking through Judge CLARK, with relation to the rule respecting corroboration in divorce proceedings and proceedings for maintenance, and declaring that it is a rule in this State founded upon public policy in its application to proceedings for divorce, said:

"The public policy which has influenced the courts is, of course, their interest in preserving the married status, so important to the state, from dissolution by means of collusive testimony. Thus, both because of the *nature of the issue* and the kind of witnesses adduced thereto, corroborative evidence is in-

sisted upon in actions for the dissolution of the marriage relationship. Mr. Justice KATZENBACH, in *Pinkinson v. Pinkinson*, *supra*, points out that a bill for maintenance is intended to *preserve, not dissolve*, the marital status, in that it is aimed at enforcing the duty of support by a husband, one of the primary obligations flowing from the relationship."

Judge CLARK outlines the reasoning leading to the rule that such corroboration is not necessary or required in suits for maintenance, *because of the opposite nature of the two proceedings*, as above indicated, and adds that:

"Furthermore, since separation agreements are permissible, we can think of no reason why a husband should prefer to have his wife's support ordered by a court as the result of collusive testimony."

It is respectfully submitted, therefore, that regardless of the *form* of the prior decree (which, however, we contend is not in form to make it conclusive on the merits), in substance it is not *res adjudicata* of the issues involved in the present suit for maintenance, and that the Court below erred in ruling *contra* and refusing to admit the testimony of complainant respecting the causes leading to her withdrawal from the matrimonial domicile.

VI.

The occurrences complained of by the present complainant in her former suit for divorce *a mensa et thoro* having been thus practically eliminated from this suit by the ruling of the Vice Chancellor that the decree in that suit, dated March 8, 1926, was *res adjudicata* and binding against the complainant, all that remained of it apparently before the Vice Chancellor, as a result of that ruling, was

whatever atmosphere it may have created upon final hearing.

Haskell v. Haskell, 99 N. J. Eq. 399, 402;

Parmly v. Parmly, 90 N. J. Eq. 490;

Foote v. Foote, 71 N. J. Eq. 290;

Robinson v. Robinson, 83 N. J. Eq. 150; 84 Eq. 201;

Rogus v. Rogus, 89 N. J. Eq. 1;

Orens v. Orens, 88 N. J. Eq. 29.

As the hearing progressed, however, it became more and more apparent that, in the very nature of things, like Banquo's wraith, it would not down, and through the necessity of frequent references to the record by the Court, and the concomitant necessity of discussion of it by counsel, it became interwoven with the fabric of the case to such an extent as to be inextricable, until finally counsel for the defendant himself put the whole record of the former suit in evidence (State of Case, pp. 57, 103). And there it is in the case, we contend, for the consideration of this Court in its entirety, with every intendment to be taken most strongly against the defendant and in favor of the complainant. The colloquy is therefore deemed essential to the record (State of Case, p. 53).

The Vice-Chancellor, on the contrary, while indicating on the trial that he would so regard it (State of Case, p. 53), seems to have actually considered it as being in the case in so far as it was beneficial to the defendant, or detrimental to the complainant, but excluded in so far as it was beneficial to the complainant. Therein we respectfully submit he erred.

And as a direct corollary, we also respectfully submit that it was error to exclude that portion of the deposition of Rev. John T. Sheehan pertaining

to the alleged marital indignities referred to, which, equivocal though it be, is corroborative of complainant (State of Case, pp. 172-178). The latter part of the deposition was admitted in evidence (State of Case, pp. 178-181, 120).

VII.

A review of the record will demonstrate the presence of an abundance of evidence, direct and corroborative, to sustain the contentions of complainant and to establish her right to the relief she seeks, and to sustain the proposition that a high spirited woman could not remain in the environment in which her husband placed her, and maintain her self-respect and the position to which she was entitled as his wife.

VIII.

But, irrespective of the review of the full record, we respectfully submit that the occurrences subsequent to the entry of the decree in the former suit, as outlined in the earlier portions of our brief, constitute a complete case entitling complainant to the maintenance prayed for, and that it was not met nor even attempted to be met or refuted by defendant, who, though present in Court, did not go on the stand in his own behalf, and whose counsel stated that:

“I have purposely kept Mr. O’Brien from the stand because there is nothing he can testify to subsequently that can avail him” (State of Case, p. 169).

This was certainly completely corroborative of the truth of the testimony of complainant and Miss Kennedy regarding complainant’s overtures for a reconciliation and their repulse by defendant. See also, deposition of Rev. John T. Sheehan, Mrs.

Katherine Weiss statement, and testimony of Gale and Howardell (State of Case, pp. 121, 133, 140, 147, 158, 162).

And in this respect we also desire to stress the fact that, while the wife has always maintained that if marital cohabitation were resumed (to which she felt impelled as a religious duty), a condition of proper wifely treatment was indispensable (which surely no one can say was contrary to her right or contrary to the common acceptance of things), yet in the instance of June, 1926, when she went to her husband's domicile with her friend Virginia Kennedy to see if she "could break the ice," and sought to effect a reconciliation, the record shows that that action was unequivocal and unconditional. But even that was rebuffed by the husband, who refused absolutely to have anything to do with her. What more could a wife be expected to do? We think that the law did not even exact that much of her, and that she did more than her duty required.

"The fact that she previously instituted and dismissed a bill for divorce does not necessarily prevent her from maintaining a suit for separate maintenance."

30 *Corpus Juris*, 1076, Sec. 870.

"The court may decree separate maintenance in favor of the wife, where both parties have been at fault."

30 *Corpus Juris*, 1077, Sec. 871, citing *Irwin v. Irwin*, 88 N. J. Eq. 139; *affd. id.* 596; where it was held that even where both were at fault, if the wife's conduct does not amount to extreme cruelty, the husband is bound to support her, though he will not live with her because of her conduct.

"A wife living apart from her husband generally becomes entitled to alimony or separate maintenance where she offers to return to him and he refuses to accept the offer and receive the wife, unless there are facts, such as adultery during the separation, which justify the refusal of the husband."

30 *Corpus Juris*, 1077, Sec. 872, citing, among others, *Haley v. Haley*, 209 Ill. App. 153, 154, where the Court said:

"It is clearly shown that within a few weeks after this separation the wife made repeated offers to return to her husband and resume marital relations; which were refused by him. * * *

"It is the law in this State that under such circumstances it is the duty of the husband to receive the wife and properly provide for her, and that should he refuse to perform this duty it cannot then be said that she is living apart from her husband through her fault." * * *

And further, citing *Thomas v. Thomas*, 152 Ill. 577:

"Even though the original separation was without any fault of the husband, still if she afterwards, in good faith, offered to return and live with him, it was his duty to receive her back and there properly provide for her."

In *Newing v. Newing*, 45 N. J. Eq. 498, at 502, Vice-Chancellor VAN FLEET stated the rules governing the conduct of the husband and the wife where separation had taken place, which we think have been steadfastly adhered to by our Courts, as follows:

"If (after receiving a letter from the wife offering to return to the husband) he had had the slightest doubt about her sincerity, and had not wanted her to remain away in order that he might make her absence the basis of

a suit for divorce, there can be little doubt that it would have occurred to him that there was a very easy way for him to put her sincerity to a decisive test, and that was for him to meet her offer to return in the same frank and forgiving spirit in which it was made. I have no doubt as to the sincerity of the defendant's offer. I believe that she wanted to return to her husband, and that she most earnestly desired that their broken home should be restored. Her controlling motive in asking to be taken back may have been a wish to do that which she believed would best promote the happiness and welfare of her children; she testifies, however, that, between the date of the separation and the time when she wrote the letter her feelings towards her husband had undergone a change, and that she felt all she wrote. There is, in her letter, the very highest evidence, in my judgment, of both that contrition and affection that the petitioner had a right, under the circumstances, to either expect or demand. A husband has no right to require his wife, even when she is in the wrong, to crawl back to him. It is his duty to take her back upon such terms as will permit her to preserve her self-respect. He must act the part of a just man, and if he refuses to make the advances to her which a just man ought to make in order to put an end to his wife's desertion and allow her to return to his home, he, from that time forth, becomes the party in fault, and relieves his wife from the charge of being an obstinate deserter. * * * The reception of this letter made it the duty of the petitioner to speak, if he was willing to allow his wife to return. Silence meant repulsion. If he had said with his tongue or pen what he did by his conduct I cannot suppose it would have been possible to contend that he was not, from that time forth, responsible for his wife's absence from his home."

And in *Sargent v. Sargent*, 36 N. J. Eq. 644, 646, this Court made clear the distinction between the reciprocal duties of the husband and the wife respecting overtures for reconciliation:

“The marital relation is recognized both legally and morally, as imposing obligation pre-eminently on the husband. Society, so far at least, has regarded the duty of the latter in maintaining and preserving those relations as of the superior order. This may or may not be modified in the future. Not that the tie is more sacred or less binding on the part of the wife, but where the act of desertion occurs without reason on his part and without fault on her side, the same efforts to restore harmonious relations are not expected from her as would be from him, if the case were reversed. The principle that the integrity of the matrimonial tie requires this of the husband, is stated clearly by the Chancellor in *Schanck v. Schanck*, 6 Stew. Eq. 363, and must command general assent.”

But it was argued that in view of the nature of the wife's accusations the husband was under no duty to receive the wife back or to seek her out and persuade her to return. This, however, was refuted in *Stover v. Stover*, 94 N. J. Eq. 703, and cases cited by the Vice-Chancellor there, where the wife charged the husband with adultery, which she was unable to prove, and the husband refused to take her back, when she made the overtures, unless she publicly retracted the charge. The Court held that the husband was not justified in refusing to take the wife back, and that the time accruing thereafter could not be computed as part of the period of desertion charged by him.

To like effect is *Bowlby v. Bowlby*, 25 N. J. Eq. 406; *affd. id.* 570; where the wife charged the

husband with having infected her and her child with a loathsome venereal disease.

See also:

Miller v. Miller, 1 N. J. Eq. 386, 391, 392;

Yule v. Yule, 10 N. J. Eq. 138, 145;

Cory v. Cory, 11 N. J. Eq. 400;

Anshutz v. Anshutz, 16 N. J. Eq. 162, 165;

Parker v. Parker, 57 N. J. Eq. 577, 578;

Irvine v. Irvine, 81 N. J. Eq. 20;

Hague v. Hague, 85 N. J. Eq. 537, 541, 544.

In *Miller v. Miller*, *supra*, maintenance was allowed. The Court said:

“Although it appears that the complainant voluntarily left her husband’s house, it also appears that afterwards she offered to return; and that he has separated himself from his said wife and refuses and neglects to provide for her.”

In *Yule v. Yule*, *supra*, the Court cites the case of *Meloney v. Meloney*, which allowed alimony, at page 145 of the report, and says:

“But the case was brought within the tenth section of the statute. The Chancellor says, ‘I think it sufficiently proved that the complainant has offered to return and live with the defendant, and that he refuses to live with her, and neglects to provide for her, or to maintain her, according to his circumstances and situation in life.’”

And in *Hague v. Hague*, *supra*, Justice TRENCHARD, speaking for this Court, at page 544 of the report, said:

“‘Actions speak louder than words.’ The petitioner seems to have been a refined, intelligent, industrious and self-respecting woman. It was entirely unnecessary for the defendant to tell her in so many words that

he had no intention of resuming cohabitation with her on a basis that would enable her to retain her self-respect. She correctly interpreted his conduct and discerned his purpose. With respect to the suggestion that the wife was not willing to live with her husband as his wife, we must say that in our opinion it finds no support in the evidence, and the contrary is clearly shown to be the fact."

IX.

But it was urged by defendant that the advance by the wife came too late, and that it cannot avail complainant in this suit. We do not think, however, that the relief sought will be denied on such technical ground. The complainant was only a young woman. She had never worked for her living. She had no funds and was being supported by her father (who received only a retired policeman's pension) and her brother. As she testified, —no matter what they may have been willing to do in that respect prior to her marriage, it was different afterward. They might then with unobjectionable propriety feel that they ought not to be expected to maintain her. She tried to work, but her health would not permit. Her position became not only embarrassing,—it became distressing and untenable. Her former suit failed for lack of *corroborative proof* to sustain her allegations for relief, which in their very nature were such as to render direct corroboration practically impossible.

In this dilemma, former counsel who then represented her, within a few days after the decree of dismissal was filed in the previous suit, filed the present bill for maintenance. Quick relief is the vital essence of such a proceeding. If not obtained promptly, it is of but little avail. This makes such applications *sui generis*, and puts them in a class

by themselves. No matter what may be ultimately involved, the wife and family must be provided for. This is the strict policy of the law.

Now, our courts, in this class of cases, have always endeavored to adjust the marital difficulties at any and every stage of the proceedings, and it is not uncommon practice for the Vice Chancellors to call upon one or both of the contending parties right in the course of the hearings to say what they are willing to do, one way or another, to settle the difficulties, and to put them to an election in that respect, proceeding then to dispose of the situations accordingly, entirely regardless of the technical status of the pleadings, later directing whatever changes and amendments may be necessary to satisfy reasonable exactions of agreement of *allegata* and *probata*, and making the decree to conform. And this is the very spirit of our laws and procedure in cases of this kind.

In *Cavileer v. Cavileer*, 94 N. J. Eq. 160, at page 166, Justice TRENCHARD, speaking for this Court, said:

“In such a proceeding as the present one (for maintenance) it is always proper for the Court to look at the attitude and conduct of the husband towards his wife since the commencement of the suit, for the purpose of giving character to the act of the husband in separating himself from his wife. * * * He never made any overtures for a reconciliation. When his wife approached him, as he admits, in a ‘very nice way,’ for the purpose of reconciliation, he refused to speak with her. At the trial in the Court below, while she expressed herself as willing to live with him, he expressed himself as unwilling to return unless he could be assured that she would treat him right, and declined to accept his assurance on that point.”

This closely accords with the actions and attitude of the defendant in the case at bar. When

complainant sought him out at his hotel in Atlantic City for the purpose of "breaking the ice" and effecting a reconciliation, he refused to have anything to do with her; and when she stated on the trial of the first suit that she was willing to go back with him, in good faith, if he would treat her properly, he said that he was unable to reach a conclusion about it (State of Case, p. 314).

Leave to make appropriate amendment, if required, was applied for on the hearing below, and is renewed here (State of Case, p. 145).

Excelsior Electric Co. v. Sweet, 57 N. J. Law 224, 226, and cases cited.

In *McLaughlin v. McLaughlin*, 90 N. J. Eq. 322, 327, *infra*, Chancellor WALKER said:

"* * * Instead of filing a new petition, the petitioner could have applied for and obtained leave to amend her petition in her original suit, by alleging the cause for action set up in the instant case; and this could be done at or after the trial as well as before."

X.

Defendant has shown no right whatsoever to prevail on his cross petition for divorce. He appears to rely entirely on a letter written by his wife to her own former counsel, and which later appears to have been delivered by him to defendant's counsel without complainant's knowledge or consent or instruction. That letter, however, was not sent by the wife to the husband nor to his counsel, and it was not unequivocal. It was fully explained by the petitioner on the former trial, in response to the Court's own questions, in the presence of defendant, who from that time on, at least, knew that it was not an absolute refusal of the

wife to live with him, but only conditional upon his observing propriety of marital relations (State of Case, pp. 335, 336).

Regardless of that, however, the defendant has taken no steps to seek his wife's return, and seems to have taken the position that he was under no duty to do so, and that he was likewise under no duty to accede to his wife's overtures to effect a reconciliation when she went so far in the other direction as to make them. That it was his duty to make robust, *bona fide* efforts to have his wife return to him even though she had been in the wrong in separating from him, seems to be the settled law in this State.

Bishop on Marriage and Divorce, Vol. I, Secs. 1738, 1757; Vol. 2, Sec. 443 (1891 Ed.);

19 *Corpus Juris*, 81, Sec. 183;

Stover v. Stover, 94 N. J. Eq. 703, *supra*;

Bowlby v. Bowlby, 25 N. J. Eq. 406; *affd. id.* 570;

Cavileer v. Cavileer, 94 N. J. Eq. 160;

McLaughlin v. McLaughlin, 90 N. J. Eq. 322;

Barbour v. Barbour, 94 N. J. Eq. 7, *supra*;

Biddle on Divorce (2 Ed.), pp. 83, 86, 87 88;

VanWart v. VanWart, 57 N. J. Eq. 598;

Light v. Light, 95 N. J. Eq. 779, 782;

Schmidt v. Schmidt, 117 Atl. Rep. 400.

See also, cases cited, *infra* and *supra*.

Not only has the husband in the present case failed to endeavor to effect the wife's return, but he specifically refused to even consider a reconciliation when the wife herself made the advances, and in his answer he has unequivocally stated on the record that he refuses to maintain and support

his wife and never intends to do so. This was amply corroborated and is uncontradicted, as heretofore pointed out, and it is vitally significant that the husband, though present at the hearing, in no-wise refuted it.

XI.

It remains to consider whether any part of the time during which the former suit for divorce *a mensa* was pending can be computed in the two years' period of desertion required by the statute, asserted by defendant as the ground for divorce from complainant in his cross-petition. There are numerous cases that hold that it cannot be included in the period of desertion charged. For the parties to live together while suit for divorce is pending is not only contrary to a sound public policy of propriety but would amount to a condonation of the offenses complained of, which would in itself destroy the status of the parties to the suit in litigation. Hence, during such period of pendency of another action, there is no obstinacy of desertion. The law requires them to remain apart. Hence the period does not accrue to the benefit of either party as a part of the required two years of continued and obstinate desertion.

Weigel v. Weigel, 63 N. J. Eq. 677;
Wood v. Wood, 63 N. J. Eq. 688;
Kyle v. Kyle, 52 N. J. Eq. 710;
Smith v. Smith, 55 N. J. Eq. 222;
Bowlby v. Bowlby, 25 N. J. Eq. 406;
VanWart v. VanWart, 57 N. J. Eq. 598;
Newing v. Newing, 45 N. J. Eq. 498, 502.

These cases also deal with the question of the duty of the husband to make just advances to the wife to seek her return to him, even though she

may have originally been in the wrong in leaving him.

In *McLaughlin v. McLaughlin*, 90 N. J. Eq. 322, 327, *supra*, Chancellor WALKER said:

“However, the doctrine that the time consumed in a previous divorce suit cannot be counted as any part of an obstinate desertion in a subsequent one between the same parties, is too firmly established in this Court to now be questioned.”

In *Weigel v. Weigel*, 63 N. J. Eq. 677, at 681, *supra*, Vice-Chancellor GREY said:

“In such a case (where a previous suit had been brought) it is of no significance whether the complainant succeeds or fails in the suit by which she presents her claim. Her separation, pending it, is not obstinate, for the reason that there is a justifying cause for it, and that it is her right to have a judicial determination of what she believes to be real grievance, unembarrassed by presumptions adverse to her which would necessarily attend upon continued cohabitation with her husband.”

Authorities cited by defendant which may indicate a contrary view do not change the rule. They simply point out that if a suit be brought fraudulently for the purpose of stopping the running of the period of desertion, the party so bringing the suit cannot take advantage of it in that respect. This, we assume, is a question of fact under all the circumstances of the case, and we respectfully submit that there is no evidence in the present case to sustain a finding of such fraudulent procedure on the part of complainant, and that therefore no part of the period of separation of the parties after the filing of the petition in the first suit on October 13, 1922, and until the entry of the final decree on March 10, 1926, can be computed by de-

fendant as part of the two years' period of obstinate desertion required prior to the filing of his cross-petition on August 13, 1926.

XII.

It is respectfully submitted, therefore, that the decree appealed from should be reversed, and that the complainant should be granted the maintenance prayed for, the amount thereof to be ascertained upon appropriate reference, as indicated by the Court upon the final hearing (State of Case, p. 115), as of the date of the filing of the bill, and that the cross-petition of defendant be dismissed, with costs and reasonable counsel fees to the complainant.

Freund v. Freund, 71 N. J. Eq. 524; *affd.*

72 N. J. Eq. 943;

Tehsman v. Tehsman, 93 N. J. Eq. 424.

Respectfully submitted,

WALL, HAIGHT, CAREY & HARTPENCE,

PETER BENTLEY,

Of Counsel with Complainant-Appellant.

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

New Jersey Court of Errors and Appeals

Between

LAURETTA V. O'BRIEN,
Complainant-Appellant,

and

THOMAS M. O'BRIEN,
Defendant-Respondent.

On Bill, &c.

BRIEF OF DEFENDANT-RESPONDENT.

Statement.

The facts have been so exhaustively covered by the learned Vice-Chancellor in his opinion, that respondent will not re-state them, but will only refer to them under the points urged.

With respect to the law, counsel will merely urge cases which they believe are despositive with the contentions raised by appellant, and for brevity will not present the numerous authorities cited by the learned Vice-Chancellor in his opinion.

POINT I.

The Court of Chancery appropriately dismissed the bill of complaint.

The gravamen of the proceeding is stated in paragraph 6 of the complaint.

“That when the petitioner testified in the aforesaid case, she stated that she was ready and willing and desirous of going back to live with her husband, provided he would cease and refrain from certain acts of marital and congenital cruelty towards her, and when the defendant was asked whether

he was ready and willing to take the petitioner back and live with her, he stated he would have to consult with his counsel, but never made any reply to any questions in which he stated any willingness or desire to live with your oratrix; that after the decree was signed in this cause your oratrix again expressed her willingness to take up house-keeping and live with the defendant, but received no reply or offer from him to come and live with him, nor has the defendant made any effort whatever, robust or otherwise since the filing by her of her petition against him, to induce her to return and live with him."

The proceedings are brought under Section 26 of the Divorce Act. To maintain her complaint requires that she should prove such extreme cruelty on the part of her husband as would entitle her to a divorce from bed and board on the ground of extreme cruelty.

This has been held in several cases in which this section was construed.

In *Cavileer v. Cavileer*, 94 N. J. Eq., page 160, Mr. Justice Trenchard said:

"The statute in question was construed in *Taylor v. Taylor*, 73 N. J. Eq. 745 (in this court), it being held that a wife, to justify her desertion of the husband, so as to bring her within the statute (adultery not being alleged) must prove such extreme cruelty on the part of the husband as would entitle her to a divorce from bed and board on the ground of extreme cruelty, were she suing therefor, and that a failure to so justify her desertion precluded recovery of separate maintenance under the statute."

The complainant relied upon the facts which she alleged, and attempted to prove in her earlier action for a divorce from bed and board. The

decree dismissing this complaint is a bar to a subsequent suit upon the same causes of action.

“A decree dismissing a complaint for divorce on the merits is a bar to a subsequent suit upon the same cause of action. Acts occurring subsequent to the dismissal, however, may be set up as ground for a new action.”

We submit that this is fundamentally sound; to permit a party to rely upon facts which were discredited or not proved in a suit, subsequent to another suit which in effect is the same cause of action which constitutes a collateral attack of the decree in the earlier action.

On March 8, 1926, a decree was made in an earlier proceeding instituted by the complainant-appellant against the defendant-respondent for a divorce *ad mensa et thoro*, alleging extreme cruelty as the basis of her suit. In this proceeding the defendant had filed an answer denying the alleged acts of cruelty. After hearings a decree dismissing the petition was made and entered.

No communication directly or indirectly passed between the parties after this decree was made. On April 9, 1926, the complainant-appellant filed a bill for maintenance under Section 26 of the Divorce Act. In her bill she sets forth the institution by her of the first proceedings, also the disposition thereof (Case, p. 2, ll. 9 to 18).

POINT II.

The decree of dismissal of petition for divorce *ad mensa et thoro* operates *res adjudicata*.

At the hearing complainant attempted to testify anew to all of the facts which she had testified to in the earlier proceeding. Objection was made

on the ground that the decree dismissing the petition filed in the earlier proceeding operated *res adjudicata*, and the court sustained the objection.

The rule has been succinctly stated by Chancellor Walker in *Spence v. Spence*, 74 N. J. Eq., page 788 as follows:

“I have no hesitation in pronouncing the rule to be this: If the facts constituting the alleged cruelty are disproved, a decree dismissing the petition of complainant will operate *res adjudicata* and be a bar to pleading or proving the same facts in any subsequent suit; but that if the facts be true, but insufficient to entitle the petitioner to relief, then a decree of dismissal may be entered without prejudice to the petitioner's right to plead and prove the same facts in addition to any other or others which may afford the ground of a subsequent suit against the defendant.”

It is urged by counsel for complainant in his brief that the decree recites that the petitioner had failed to substantiate the allegations of her petition, and that it does not adjudge that the defendant was not guilty of the charges alleged in the petition.

We submit that if the court in the earlier suit had found the facts to be true but insufficient to entitle the petitioner to relief, the court would have rendered a decree of dismissal *without prejudice* to the petitioner's right to plead and prove the same facts in a subsequent suit.

The rule announced by Chancellor Walker has been consistently followed.

McCormick v. McCormick, 3 N. J. Misc. Reports 624, 625-7 does not conflict with this rule as is urged by appellant. In that case the defendant urged that the petitioner was not entitled to

maintain his suit because he had failed to establish the jurisdictional fact of residence. The defendant urged that a decree entered in an earlier proceeding in which he and petitioner were parties was *res adjudicata*; with respect to this fact the learned Vice-Chancellor held that the decree was not *res adjudicata* with respect to facts which were jurisdictional and that the burden of proof to establish the jurisdictional facts by satisfactory evidence and corroboration was upon the party alleging such facts. The court in that case therefore held that the earlier case did not dispose of this statutory requirement.

We submit that the complainant, to maintain her bill of complaint for maintenance must confine her proofs to acts occurring subsequent to the decree of dismissal of her petition for divorce from bed and board.

The decree dismissing the petition in the earlier case was entered on March 8, 1926. On April 11, 1926, the bill of complaint for maintenance was filed. No overtures were made by the complainant to defendant between the time of the dismissal of the petition in the first suit, and the filing of the bill of complaint in the present proceeding.

On June 17th, and while her proceeding was pending, she presented herself at the hotel of defendant and without much ado stated that she had come down to break the ice.

POINT III.

The Court of Chancery did not err in awarding the defendant a divorce on his cross petition.

To the bill of complaint filed by the appellant, the respondent filed an answer and cross petition,

in which he alleged that the complainant deserted him on August 7, 1922. He further urges that the proceeding instituted by complainant in the earlier proceeding was not brought by her in good faith, that the charges made by her against him are baseless, and that her conduct since the entry of the decree in her former case manifests a purpose on her part to annoy and harass him.

He further alleged that the complainant manifested by her conduct an ulterior purpose; that she was mercenary and endeavored to compel the defendant to convey his real estate to her and give her a voice in the management of his business; that failing in this she left him and filed her petition alleging extreme cruelty. The acts alleged by her as constituting extreme cruelty need not here be repeated, but were so abhorrent as to cause the defendant such mental anxiety as to cause him to be confined in sanitariums for a long period of time. The publication of these charges might even result in causing the defendant to become a social outcast.

He declined to believe that the complainant was aware of the gravity of the charges or if aware that she made the charges for some ulterior purpose. Knowing the charges to be baseless he refused for a long time to believe that the complainant knowingly made them.

Through his counsel he requested a meeting with the complainant. In response to this request the complainant addressed a letter to her then counsel, I. Faerber Goldenhorn, which was postmarked "Jersey City, March 8, 1923." The exhibits which were offered in the proceeding under review are not printed in the state of case. During the hearings the exhibits were mislaid. This letter, which is Exhibit C-2, however fortunately appears in full having been read into the

record in the former suit. For the convenience of the court, it is here set forth at length as it appears in the record (Case, p. 235):

“Dear Mr. Goldenhorn: Referring to my conversation with you today, due to ill health it will be impossible for me to be at your office tomorrow to meet Mr. Herrmann. As I repeatedly said, there is absolutely no possibility of a reconciliation, it being against my religious principles, in addition to it being dangerous to my life. I trust, Mr. Goldenhorn, you will not request me again to reconsider this, as my mind has been made up from the beginning. With kindest regards from my parents and myself, I am most sincerely, (Mrs.) Lauretta O'Brien.”

Thus failing either to have the suit withdrawn or to effect a reconciliation, the proceedings went to final hearing, and on March 8, 1926, this decree dismissing her petition was made.

On April 9th, one month thereafter, the present suit was started.

We recognize the rule that the time during which a suit is pending cannot be included as part of the period of desertion. There are exceptions to this rule however.

See *Weigel v. Weigel*, 63 N. J. Eq. 677;

Van Bermuth v. Van Bermuth, 76 N. J. Eq. 487;

Byrne v. Byrne, 93 N. J. Eq., p. 5;

Cook v. Cook, 97 Eq., p. 264.

Vice-Chancellor Bentley, in *Cook v. Cook*, 97 Eq., p. 264, comprehensively dismissed the rule and the exceptions to it.

“The entire rule springs from a brief statement of law enunciated by Chancellor Green in the Marsh case (at p. 318), where he says:

“The presumption must be, therefore, if the wife absent herself from his home, pending a suit against her for adultery, that such separation is by his procurement or with his assent. This language has been referred to and commented upon in almost, if not every, case upon this point. A reading of it will show that by its terms it is a mere presumption (not a conclusive presumption), and, therefore, that it may be rebutted and overcome. It does not amount to a rigid rule of law to be applied as, for example, is the statutory rule of direction that a written will is not probated unless witnessed by two individuals or declared by the testator to be his will to both witnesses at the same time. *Bioren v. Nesler*, 77 N. J. Eq. 560. Rather is it a rule of evidence to be weighed in with all the other facts and circumstances of the case. In the cases of *Weigel v. Weigel*, *Von Bermuth v. Von Bermuth* and *Byrne v. Byrne* (*supra*) the exceptions to the rule had all been based upon *mala fides* in the institution or pendency of the prior suits, and, therefore, the presumption was overborne. This could not have been so if it was an unyielding rule such as Lord Coke’s understanding of the effect of the doctrine of estoppel. In the unrecorded case to which reference has been made namely, *Sarson v. Sarson* (Docket 311, 474), the first suit was commenced July 9, 1907. It was never actually dismissed until after the second suit had been commenced, but it had been treated as abandoned from the time of the filing of an opinion by Vice-Chancellor Stevens on July 16, 1908. The master to whom the second cause was referred found that there had been willful and continued desertion, but that the same had not been obstinate because of the pendency of the former suit, or until at least July 16, 1908, upon the filing of the opinion mentioned, when insufficient time would have remained. The Chancellor, principally upon the reasoning of *Easter v.*

Easter (a New Hampshire case reported in 73 Atl. Rep. 30) sustained the exceptions to the report, and decrees nisi and final were duly entered. In the Easter case a libel was filed by a wife, and while the suit was still pending, commenced another for desertion under a statute similar to our own for the purpose of this discussion. It was there objected by the libellee that the pendency of the first suit was a bar to the second. But the objection was overruled. Chief Justice Parsons, in his argument, made use of the following language:

‘The pendency of a libel for divorce is an evidentiary fact bearing upon the question whether the absence complained of is such an abandonment as the statute makes a cause for divorce, but it is not necessarily decisive of the question * * * But in this case the separation was not caused by the plaintiff’s former suit, not justified by the plaintiff’s conduct, but resulted from the defendant’s wrongful act prior to the commencement of that suit. The former application for divorce upon the ground of abandonment did not conclusively establish that the libellant consented to the separation, nor the pendency of the application necessarily destroy the libellee’s abandoning intent.’

While this decision has no binding effect upon the court, the reasoning of the Chief Justice appeals to me as a sensible and logical statement to the effect of the rule in question, and was given force by the Chancellor’s adoption of it in the Sarson case.”

An examination of the record of the former case, will show that it is within the law and recognized as exceptions to the rule, and that the time consumed by the earlier case should not operate as a bar to the relief which the defendant seeks. He made bona fide attempts to induce the complainant to abandon her ill-founded

suit; she resisted his efforts and stated unequivocally and emphatically that she would never return to live with him again, she made no reservation in her letter and now seeks to avail herself of a modification of its terms. She states that what she meant was that she would return provided he changed his conduct toward her. She persisted in reiterating the notorious charges which she made, in face of the decree dismissing her petition on the merits.

The charges were such as to make him a social outcast. It cannot be conceived that any reputable woman would genuinely desire to have her name any longer associated with his, or that she would be willing to live with him if he indulged in the acts charged by her.

It cannot be conceived that any decent self-respecting woman would be willing to lay herself open to the unsavory criticism which would follow, should she resume living with him, after publicly characterizing him as a degenerate.

The complainant in the brief filed in her behalf endeavors to sustain the proposition that the law imposes an obligation upon the defendant to make sincere advances to the complainant to secure her return, before he is entitled to the relief which he seeks. For the defendant to make advances to the complainant could be only construed as an insane act. The sincerity of his denial of the charges cannot be questioned. How could he consistently or genuinely forgive the complainant for exposing him to public disfavor and making a social outcast of him?

The complainant has created a situation which makes it impossible for a resumption of the marital status. She persists in accusing him of degenerate practices, yet she says she genuinely

desires to live with him again provided he reforms. Such conduct is so unreal and contrary to all human experience as to justify the conclusion that the appellant's motives are not bona fide and that her real motives are concealed.

Motion for support and maintenance pending appeal, counsel fees and suit money, including cost of printing state of case and briefs.

By stipulation this motion is submitted to this court with the briefs in the main case, and in conjunction with the record without oral argument.

ARGUMENT.

The appellant is not entitled to maintenance pending this appeal, or counsel fee, suit money, costs of printing state of case and briefs.

Although the parties were married on April 25, 1922, they have actually been together less than three weeks. A chronological detail of their relations is set forth in the following table:

| | |
|----------------|---|
| April 25, 1922 | Married and remained at Atlantic City over night. |
| April 26, 1922 | Visited Overbrook, Pennsylvania, remained 2 days. |
| April 28, 1922 | Visited Bel Air, a small town in Maryland outside Baltimore, and remained over night. |
| April 29, 1922 | Returned to Atlantic City, remaining until May 1st. |
| May 1, " | Returned to Philadelphia. |
| May 2, " | Petitioner returned to New York to visit mother. |

- May 3, 1922 Defendant called petitioner on long distance telephone from Philadelphia.
- May 5, " Petitioner telephoned from New York to defendant at Philadelphia advising him she would return following evening.
- May 6, " Petitioner returned and met defendant at Philadelphia, remaining there over night, and then visited members of his family returning in the evening to Atlantic City to defendant's hotel, where room, which had been refitted with furniture purchased by the petitioner and the defendant, was occupied, where they remained until the following Tuesday.
- May 10, " Petitioner went to New York to visit mother.
- May 12, " Petitioner returned to Atlantic City, and remained with defendant until the following Tuesday.
- May 17, " Petitioner again went to New York and planned to return the following Thursday, the defendant arranging to meet her on that day on the 6:10 train. This train arrived but petitioner did not appear. The defendant waited until the 8:39 train and found that she was not on that train. Defendant telephoned to the petitioner at New York asking her why she did not come home as she had promised, to

- which she relied that she did not intend to come home until he would accede to her wishes.
- June 11, 1922 Petitioner returned to defendant's hotel at Atlantic City with mother. Declined to occupy room with defendant, where she remained for two weeks and two days, occupying during the entire time a room with her mother.
- June 12, " Reginald Kelly, a member of the bar of the State of New York, visited defendant and told him that he had been consulted by petitioner, and desired to make arrangements for her support and her living apart from him.
- June 27, " Petitioner returned to New York with her mother where she remained for two weeks.
- July 10, " Returned to hotel of defendant at Atlantic City with mother and refused to talk with defendant for three or four days. Defendant remonstrated at petitioner's conduct and particularly with respect to the conduct of her mother toward him.
- Aug. 7, " Petitioner and her mother left and has since remained away from defendant and has neither communicated with him personally, by telephone or by letter.
- Oct. 11, " Petition in proceeding filed.
- Jany. 15, 1925 Hearing on petition.

- March 4, 1925 Continuation hearing.
- March 8, " Decree dismissing petition.
- April 9, 1926 Bill of complainant for maintenance filed and application for alimony *pendente lite*.
- June 17, " After alimony *pendente lite* denied, appellant lodged herself in the hotel of defendant-respondent, by subterfuge through the instrumentality of Miss Virginia Kennedy, Miss Kennedy engaging the accommodations without knowledge of the defendant.

It will be observed that the bill of complaint for maintenance was filed about one month after the decree dismissing the petition for divorce from bed and board was rendered. When she filed her bill of complaint she also applied for alimony *pendente lite*. The court denied her application for alimony, and on June 17, 1926, the appellant lodged herself in the hotel of the respondent. She attempted to converse with the respondent and he stated to her that inasmuch as she had brought a new action that he relied upon his legal rights and would permit the court to dispose of it.

Since that time she has harassed the defendant by reiterating the charges which she failed to prove in the earlier action to friends and employees of the respondent and solicit their aid in securing evidence which would enable her to bring another action against the respondent.

Numerous witnesses were produced by the respondent to testify that since the dismissal of her first suit, she maligned the defendant in con-

versations with them by reiterating the heinous charges against the defendant which she had made in the first suit, and also sought to ascertain from them whether they knew of any facts which she might be able to use against him. She even engaged detectives to follow the defendant, and urged persons employed by him to watch him and furnish her with information respecting people with whom he associated, and in each instance stated that she desired to obtain these proofs in order that she might get a divorce from the defendant.

We urge that the conduct of the appellant genuinely admits of the conclusion that her actions are not bona fide, and that she is actuated by a desire to compel defendant to furnish moneys to her.

Although married to the respondent nearly seven years, as is shown by the tabulation above, she has actually been in the respondent's company at intervals, aggregating not more than three weeks. During the rest of the time covering this long period she has lived with her parents as she did before she was married to the defendant. Her position has not changed and her leaving him being voluntary has deprived the respondent of her society during this long period. There is no obligation on his part, under these circumstances, to be required to support her.

With respect to the cost of printing the case and the briefs, we submit that the application is belated. The application is made after the case and briefs are printed, served and filed. Presumably, in proceeding with her appeal, appellant anticipated the costs involved, and presumably made arrangements for payment.

A consideration of the case will convince this court that the appellant cannot prevail in her contentions, and that her appeal is ill founded.

If, as is urged by counsel for appellant, that she believes that the charges which she made against the defendant are true, it is unconceivable that she can genuinely and bona fide hope to reconcile herself with him and live with him again. The fact that she has persisted in reiterating these charges, and also the fact that she has endeavored to obtain additional evidence against him clearly indicates her desire to molest and harass him, rather than genuinely live with him again.

Respectfully submitted,

JOSEPH B. PERSKIE,
L. EDWARD HERRMANN,
Solicitors for and of Counsel
with Defendant-Respondent.

MacCrellish & Quigley Co., Printers, Trenton, N. J.

NEW JERSEY
Court of Errors and Appeals.

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| <i>Between,</i> LAURETTA V. O'BRIEN, <i>Complainant-Appellant,</i> and THOMAS M. O'BRIEN, <i>Defendant-Respondent.</i> | } | On Bill, &c. On Appeal from Chancery On Application for alimony pending appeal, counsel fee, costs, etc. <hr style="width: 10%; margin: auto;"/> No. 42, February Term, 1929 <hr style="width: 10%; margin: auto;"/> |
|---|---|---|

MEMORANDUM OF COMPLAINANT-
APPELLANT

This is an application for alimony pending appeal, and for the allowance of counsel fees and suit money to the Complainant-Appellant, including the payment of costs of printing the Case and Brief on appeal by the Defendant-Respondent. On the call of the argument calendar on the opening day of the present February Term, 1929, leave was granted by the Court to submit this motion on briefs with the main case on appeal, which is No. 42 on the printed calendar and which was itself submitted on briefs.

Alimony *pendente lite* was denied below, and the wife, although dependent upon the gratuity of her father and her brother, has received no maintenance from her husband since the filing of the Bill in this suit, in the early part of the year 1926. The sum of \$200 was allowed by the Vice-Chancellor as "suit money," only. No other allowance has been made, except the costs of the *pendente* application, below. Complainant has been un-

able to work because of the effect upon her health, which she asserts has not been good since shortly after her marriage with defendant. She has no independent means of her own.

Under these circumstances, it seemed to counsel for complainant that *pendente* maintenance, with appropriate suit money and counsel fees, would go in her favor almost as a matter of course, under the familiar and well-established rules in this respect, which make the wife, regardless of the ultimate outcome of the suit, the favored suitor *pendente lite*. This seems equally so to counsel on appeal, pending the determination of the main issues by the Court.

As was said by Mr. Justice Garrison, speaking for this Court in *Disborough v. Disborough*, 51 N. J. Eq. 306, at page 307, in allowing alimony pending appeal, counsel fee, and costs of printing, and relieving appellant from making the deposit to secure costs required by the Rules,

“Where an appeal is taken in good faith by a wife, whether she was complainant or defendant below, the expense must be borne by the husband when it appears that the appellant is otherwise without the means to prosecute her appeal.”

This, we submit, states the fixed policy of this Court, and has been steadfastly adhered to. Its philosophy requires no elucidation, and its purpose is self-evident as a factor in sustaining the dignity of the relation involved and the self-respect of the parties affected, the maintenance of which the law regards with jealous favor. But expressive of that underlying philosophy, and illustrative of the application of the principle, is the language of Chancellor Walker in *Verbeeck v. Verbeeck*, 93 N. J. Eq. 17, at pages 20-22:

“The matter of costs between husband and wife in a divorce suit is *sui generis*, * * * and to say that * * * the wife should have no allowance therefor, might be to deny her the means of making a defence against her husband’s suit. * * *

“In 19 C. J. 226, S537, it is said:

‘In addition to the sum allowed the wife for her maintenance and support during the pendency of the suit, it is usual to allow her a sum to defray the expenses of the suit.’

“In *Bish. M. D. & S.*, S992, it is laid down:

‘It would be a disgrace to the law and a grievous offence against justice, if, after a woman had given her person and property in marriage to a man with whom afterward a litigation arose as to the conduct of either in the new relation, or as to the validity of the marriage itself, she must sustain her *prosecution or defence* without the money essential thereto, and with no possible access to the fund which she had contributed to accumulate. Hence, the doctrine and practice of suit money.’

“Although the control of the property of married women in this State is no longer given by law to their husbands upon marriage, and while most married women do not contribute to the funds accumulated by their husbands, nevertheless, the doctrine laid down by Mr. Bishop is equally applicable to our women who have no funds, quite irrespective of whether or not they ever had any which went to their husbands; although, if the wife has sufficient separate property, the reason for giving her either temporary alimony or money to defray her expenses in the suit does not exist, and she is not entitled to either.”

And of Chancellor Green, in *Marsh v. Marsh*, 14 N. J. Eq. 315, at page 318:

“Where a bill has been filed against a wife, if she have no property of her own, and deny the truth of the charges against her, it is very much of course to make her an allowance, not only for the costs and expenses of litigation, but for her maintenance during the continuance of the suit. And

this order is made without any regard to the question, whether she has or has not been compelled to leave the house of the husband, the court regarding the institution of the suit as sufficient cause for a separate maintenance. * * *

“The allowance for separate maintenance is made upon the principle, that it would be improper for the parties to cohabit during the pendency of such suit. * * *

“If a husband, by his cruelty or misconduct, compels his wife to seek a home elsewhere than under his roof, she is not guilty of desertion. Any circumstances which render it necessary or proper that she should reside elsewhere than with her husband is a valid defence to a charge of desertion.”

It is to be borne in mind that the present suit by the wife for maintenance has in it a counter-claim, or cross-petition, for absolute divorce filed by the husband against the wife on the ground of her alleged desertion of him. This is denied by the wife.

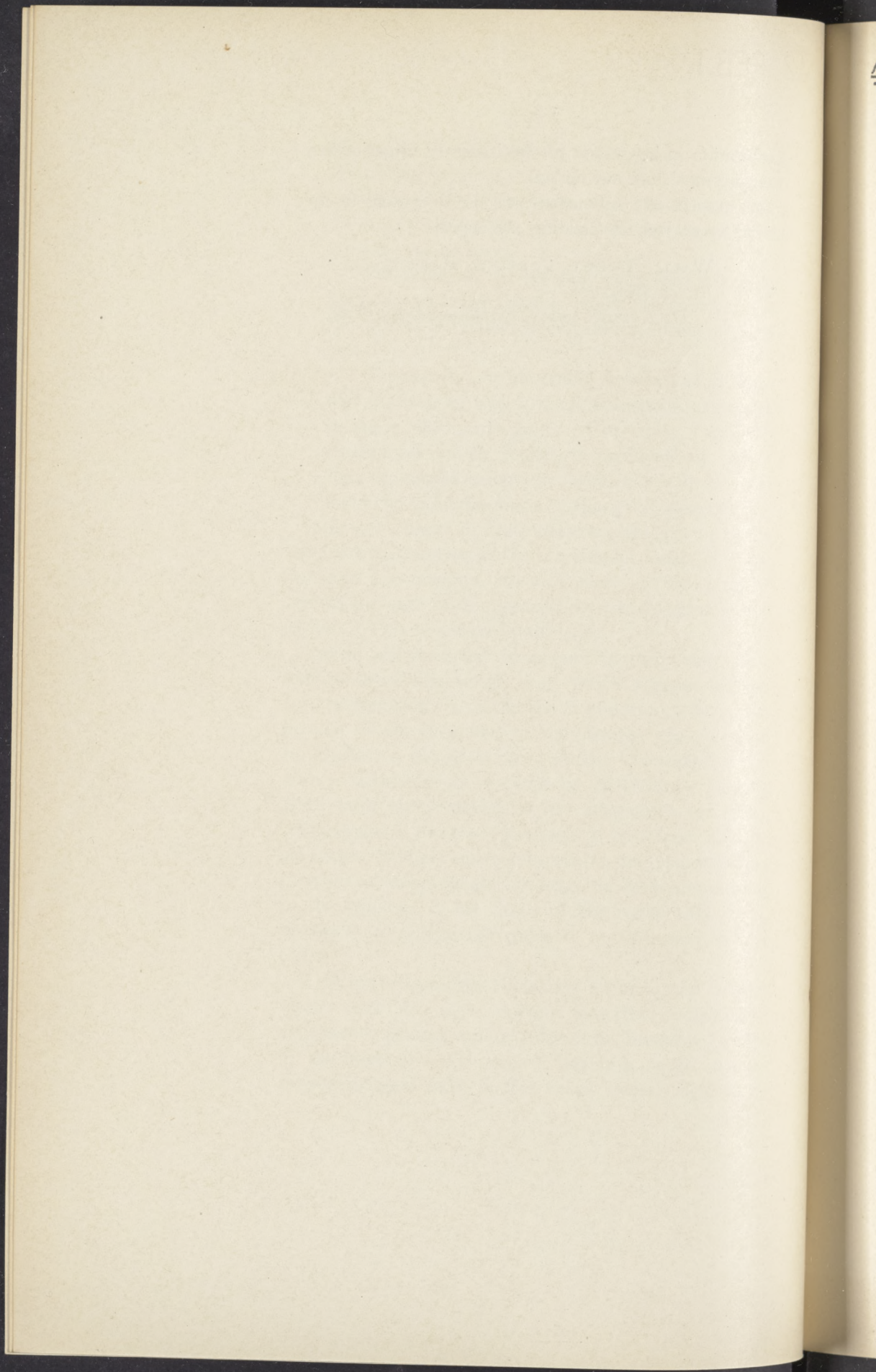
But it will doubtless be argued in this Court, as it was in the Court below (and which appears to have formed the basis of the denial of *pendente* relief), that in view of the dismissal of complainant's first petition for divorce *a mensa et thoro* by the Chancellor, which was an adjudication in favor of defendant's freedom from fault and a denial of her allegations for relief, complainant is thereby foreclosed of and from any and all *pendente* relief, and is relegated to the (paradoxical) position of being obliged to await the ultimate outcome of the litigation in the Court of last resort while being unable to prosecute her cause to a conclusion in that Court.

This, we respectfully submit, is unsound and without merit; and the facts remain that the complainant-appellant is without funds, without maintenance (except by the bounty of her people), unable to work, and asserting in good faith in this Court a clear right to an

adjudication in her favor of the issues in litigation between her husband and herself.

It is respectfully submitted that she is entitled to the allowances prayed for pending the appeal.

WALL, HAIGHT, CAREY & HARTPENCE,
PETER BENTLEY,
Of Counsel with Complainant-Appellant.



Stipulation.

(Filed February 5, 1929.)

New Jersey Court of Errors and Appeals

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| | | | |
|---|---|--|----|
| Between LAURETTA V. O'BRIEN, <i>Complainant-Appellant,</i> and THOMAS M. O'BRIEN, <i>Defendant-Respondent.</i> | } | On Bill, etc. On Appeal from Chancery. | 20 |
|---|---|--|----|

It is hereby stipulated and agreed that the accompanying motion for alimony *pendente lite*, counsel fees, and costs of appeal, shall be submitted to the Court on Briefs with the Briefs of the main case and in conjunction with the record in the cause, without oral argument, and that the motion be continued accordingly; and that the extra cost of printing the motion papers will be about fifteen dollars.

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Dated: February 4, 1929.

WALL, HAIGHT, CAREY & HARTPENCE,
Solicitors for Complainant-Appellant.

L. EDWARD HERRMANN,
Solicitor for Defendant-Respondent.

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Notice.NEW JERSEY COURT OF ERRORS AND
APPEALS.

Between

10

LAURETTA V. O'BRIEN,
Complainant-Appellant,

and

THOMAS M. O'BRIEN,
Defendant-Respondent.

On Bill, etc.

On Appeal from
Chancery.To L. EDWARD HERRMANN, Esq.,
Solicitor for Defendant-Respondent.

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SIR:

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PLEASE TAKE NOTICE, that on Tuesday, February 5th, 1929, at 11:00 o'clock in the forenoon or as soon thereafter as the Court may hear the same, we will apply to the above-stated Court at the State House, in the City of Trenton, N. J., for an order requiring the above-named defendant-respondent to pay to the above-named complainant-appellant a proper allowance for her support and maintenance pending this appeal, as and from the date thereof, viz., October 19, 1928, and also a reasonable sum for counsel fees, and for suit money, to enable her to prosecute said appeal and to pay the costs thereof, including the cost of printing the State of Case and Briefs. On said application we will use before the Court the affidavits annexed hereto and the record in the cause.

Dated January 26, 1929.

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Yours, &c.,

WALL, HAIGHT, CAREY & HARTPENCE,
Solicitors for and of Counsel
with Complainant-Appellant.

Affidavit.NEW JERSEY COURT OF ERRORS AND
APPEALS.

Between

LAURETTA V. O'BRIEN,
Complainant-Appellant,

and

THOMAS M. O'BRIEN,
Defendant-Respondent,

On Bill, etc.

On Appeal from
Chancery.

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

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LAURETTA V. O'BRIEN, being duly sworn according to law, on her oath says:

I am the complainant-appellant in the above-stated suit. I retained the law firm of Wall, Haight, Carey & Hartpence to act as my solicitors and counsel in said suit about two years ago, after the suit had been commenced by former counsel. I am now living with my father and my brother at No. 6 Amherst Avenue, Jamaica, Long Island, N. Y., with whom I lived continuously except about one week since December 18, 1926, and who are and have been since said date maintaining me. I have no means of income for subsistence or to prosecute this suit or to pay the costs of this appeal or to pay counsel except from my own personal labor or the generosity of my family as aforesaid. In attempting to work on several occasions during the past three years I have been physically unable to continue to do so because of the condition of my health which I have been in since shortly after my marriage with defendant.

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Affidavit.

10 My husband I believe to be worth at least a sum in excess of \$100,000 and that he is in receipt of a large annual income. He is amply able to support me and to defray the cost of this appeal. He has not paid me anything since March, 1926, except \$200 suit money allowed in this cause by the Vice-Chancellor on June 6, 1927. I have received no alimony *pendente lite* in this suit. I am informed by my counsel that the cost of printing the Case and Briefs on this appeal is \$488.50.

The matters set forth in my Bill for Maintenance in this suit are true, and I deny that I have deserted defendant as alleged in his cross-petition, within the true intent and meaning of the law.

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LAURETTA V. O'BRIEN.

Sworn to and Subscribed before me }
 at Jersey City, N. J., this 26th day }
 of January, A. D. 1929. }

GEORGE G. TENNANT, JR.,
 Attorney at Law of New Jersey.

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Affidavit.NEW JERSEY COURT OF ERRORS AND
APPEALS.

Between

LAURETTA V. O'BRIEN,
Complainant-Appellant,

and

THOMAS M. O'BRIEN,
Defendant-Respondent,

10

On Bill, etc.

On Appeal from
Chancery.State of New Jersey, }
County of Hudson, } ss.:

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JOSEPH A. MCCARTHY, of full age, being duly sworn according to law on his oath says, that he has resided at #6 Amherst Avenue, Jamaica, Long Island, New York, since March, 1927, and that prior thereto he resided at 224 Hillside Avenue, Jamaica, aforesaid, for about a year; that he is a brother of Lauretta V. O'Brien, the above named complainant, and that she also resided at said addresses with this deponent continuously since about December 18, 1926, except on two or three occasions when she was away for a few days on social visits with friends, and that during that whole period said Lauretta V. O'Brien has been practically supported and maintained by this deponent; that on several occasions she has endeavored to obtain employment, but has been unable to continue work because of her poor physical condition, and that she has been obliged to consult physicians and take medical treatment on a number of occasions during the period stated; that deponent's father also resides with deponent and that his mother also resided with him, in the Bronx, New York City,

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Affidavit of Service.

until her death there on February 14, 1926. Deponent further says that since some time in the year 1922 said Laretta V. O'Brien has resided with this deponent and her father and mother as aforesaid, except for a period of a few months in the year 1926 when she was at Atlantic City, New Jersey, and except on a few occasions when she was away for brief periods on social visits with friends, as aforesaid.

JOSEPH A. MCCARTHY.

Sworn to and Subscribed before me }
this 26th day of January, 1929. }

GEORGE G. TENNANT, JR.,
Attorney at Law of New Jersey.

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(Indorsed)

Affidavit of Service.

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

GROVER J. CAREY, of full age, being duly sworn according to law, upon his oath deposes and says:

30 That he is in the employ of Wall, Haight, Carey & Hartpence, Solicitors for the complainant-appellant in the within matter.

That on Saturday, the 26th day of January, 1929, he served the within notice and affidavits upon L. Edward Herrmann, Solicitor for defendant-respondent herein, by leaving a true copy of same at his office in the Commercial Trust Building, 15 Exchange Place, Jersey City, N. J.

GROVER J. CAREY.

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Subscribed and Sworn to before me }
this 28th day of January, 1929. }

GEORGE G. TENNANT, JR.,
Attorney at Law of New Jersey.

