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**Notice of Appeal.**

Filed Jan. 25, 1927.

**In Chancery of New Jersey** 10

Between	}	On Petition for Divorce.	20
ETHEL RAYMOND PETTY STEPHEN- SON,			
Petitioner,			
and			
CHESTER ARTHUR STEPHENSON, Defendant.			

Ethel Raymond Petty Stephenson, the above-named petitioner, hereby appeals from the final decree filed in this cause and dated the 30th day of June, A. D. 1926, and from every part thereof, to the Court of Errors and Appeals in the last resort in all causes.

Dated, January 24, 1927. 30

FREDERIC B. SCOTT,  
Solicitor for and of Counsel  
with Petitioner.

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

FREDERIC B. SCOTT,  
Of Counsel. 40

**Amended Notice of Appeal.**

Filed Feb. 4, 1927.

IN CHANCERY OF NEW JERSEY.

10 Between  
 ETHEL RAYMOND PETTY STEPHEN-  
 SON,  
 Petitioner,  
 and  
 CHESTER ARTHUR STEPHENSON,  
 Defendant.

On Petition  
 for Divorce.

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Ethel Raymond Petty Stephenson, the above-named petitioner, hereby appeals from the final decree filed in this cause and dated the 30th day of June, A. D. 1926, and from every part thereof, made on the advice of the Honorable Alonzo Church, Vice-Chancellor, to the Court of Errors and Appeals, in the last resort in all causes.

Dated, February 3rd, 1927.

30 FREDERIC B. SCOTT,  
 Solicitor for and of Counsel  
 with Petitioner.

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

40 FREDERIC B. SCOTT,  
 Of Counsel.

**Petition of Appeal.**

Filed Jan. 25, 1927.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between  
 ETHEL RAYMOND PETTY STEPHEN-  
 SON,  
 Petitioner,  
 and  
 CHESTER ARTHUR STEPHENSON,  
 Defendant.

On appeal  
 from  
 Chancery.

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*To the Honorable the Court of Errors and Appeals in the last resort in all causes:*

The petition of Ethel Raymond Petty Stephenson, appellant, respectfully shows that your petitioner finds herself aggrieved by a final decree made in the Court of Chancery by his Honor Edwin Robert Walker, Chancellor of the State of New Jersey, on the 30th day of June, A. D. nineteen hundred and twenty-six, in that the said decree recites and adjudges, that your petitioner has not sustained the truth of the allegations of her petition and is not entitled to the relief therein prayed; and doth decree that your petitioner's petition be dismissed. Your petitioner appeals from said decree and from every part thereof on the ground that the same is erroneous, and that the Chancellor should have found and adjudged the several allegations of your peti-

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*Petition of Appeal.*

10 tioner's petition to have been proved, and the respondent to have been guilty of wilful, continued and obstinate desertion by him of your petitioner for the term alleged in your petitioner's petition, and should have ordered, adjudged and decreed, that your petitioner be divorced from the bonds of matrimony with the respondent for the cause aforesaid, and that your petitioner should have the other relief prayed in and by her said petition.

Your petitioner therefore prays that the said final decree may be reversed, rescinded and for nothing holden, and that your petitioner may have such further relief as shall be meet.

20 FREDERIC B. SCOTT,  
Solicitor and of Counsel.

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**Amended Petition for Divorce.**

IN CHANCERY OF NEW JERSEY.

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

The amended petition of Ethel Raymond Petty Stephenson, of Summit, in the County of Union, and State of New Jersey, respectfully shows: 10

I. Your petitioner was lawfully joined in the bonds of matrimony to her present husband, Chester Arthur Stephenson, on the 28th day of March, 1906, by the Reverend George O. Houghton, Rector of the Church of the Transfiguration in the City of New York.

II. Defendant deserted the petitioner on the 28th day of March, 1906, ever since which time and for more than two years last past, said defendant has wilfully, continuedly and obstinately deserted the petitioner. 20

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

IV. Petitioner shows that there was no issue of said marriage. 30

V. Petitioner prays that the marriage between the petitioner and the defendant may be dissolved for the cause aforesaid, according to the statute in such case made and provided, and that she may have such further relief as may be just. And your petitioner will ever pray.

FREDERIC B. SCOTT,  
Solicitor of Petitioner. 40



*Answer and Counterclaim.*

And this defendant humbly prays to be hence dismissed in this behalf most wrongfully sustained.

And the defendant by way of counterclaim exhibited against the petitioner says:

10 I. That the petitioner and the defendant were lawfully joined in the bonds of matrimony on the 28th day of March, 1906.

II. That the petitioner and this defendant took up their residence in Summit, Union County, this State, in the Autumn of 1919 and have continued to reside in Summit without interruption since said Autumn of 1919, and now reside at No. 14 Franklin Place, Summit, New Jersey.

20 III. That for many years including two years last past, the petitioner has been extremely cruel in her conduct toward the defendant in that she has continually, and on many occasions during said time, accepted the escort and company of men other than the defendant, and took automobile rides in the company of men other than the defendant, the petitioner and one of said men being along in the automobile on each occasion, and allowed men to visit singly the home of the  
30 defendant when the defendant was not at home and the only persons then in the home were the petitioner and one of said men respectively, and that all this was done without the consent of the defendant.

40 IV. That for many years including two years last past, the petitioner has been extremely cruel in her conduct toward the defendant in that she has continually, and on all occasions during said time, has absolutely refused to perform her acts

*Answer and Counterclaim.*

and obligations as his wife, and deprived him of rights and privileges he might lawfully expect to receive from a wife.

V. That for many years including two years last past, the petitioner has been extremely cruel in her conduct toward the defendant in that during said married life, and particularly during the two years last past, the defendant frequently informed the petitioner that he desired to have a family, or at least one child, and on all of said occasions the petitioner refused to allow the defendant to procreate a child and resorted to extra means to prevent married intercourse and child birth. 10

VI. The defendant prays that the marriage between the petitioner and defendant 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. 20

And your defendant will ever pray.

H. H. SNEDEKER,  
Solicitor of Defendant,  
Office & P. O. Address:  
No. 129 Beach Street,  
East Orange, 30  
New Jersey.

H. H. SNEDEKER,  
Of Counsel.

*Answer and Counterclaim.*

STATE OF NEW JERSEY, }  
County of Hudson, } ss.:

10 CHESTER ARTHUR STEPHENSON, being duly sworn, according to law, upon his oath, deposes and says: That he is the defendant named in the foregoing counterclaim. That he has read the above counterclaim, and that said counterclaim is not made by any collusion between him and the petitioner, but in truth and good faith for the causes set forth in said counterclaim.

CHESTER ARTHUR STEPHENSON.

Sworn and subscribed before me at Jersey City, New Jersey, this 25th day of January, 1926.

20 GEORGE SCHEETZ JR  
Master in Chancery  
of New Jersey

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**Record.**

IN CHANCERY OF NEW JERSEY.

June 29, 1926.

Between	}	10
ETHEL RAYMOND PETTY STEPHENSON, Petitioner,		
and		
CHESTER ARTHUR STEPHENSON, Defendant.		20

Transcript of shorthand notes taken in the above-entitled cause before his Honor Alonzo Church, Vice-Chancellor, at the Chancery Chambers, Newark, New Jersey, June 29th, 1926, in the presence of Frederic B. Scott, Esq., for petitioner, and H. H. Snedeker, Esq., by Francis Child, Esq., for the defendant.

Discussion between the Court and counsel for respective parties not reported. 30

Mr. Scott: I move to amend the amended petition by setting out the date of the desertion to be October 2nd, 1919.

The Court: All right.

Further discussion between the Court and counsel for respective parties unreported.

Mr. Scott: The petitioner in this case now offers to prove that the petitioner in this case was married on March 28, 1906; that on October second, 1919, the parties moved to the State of 40

*Record.*

10 New Jersey, took up their residence here and continued to reside in New Jersey—the petitioner continued to reside in New Jersey up to the time of the filing of the petition; that the defendant refused to consummate the marriage in New York and continued to refuse to consummate the marriage in New Jersey from the time that they took up their residence here on October second, 1919, up until the time of the filing of the petition.

The Court: All right.

Mr. Scott: And your Honor allows the amendment but dismisses the suit on the basis that your Honor has already indicated.

The Court: You make a motion to dismiss?

20 Mr. Child: I do, sir.

The Court: I will grant it.

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**Decree of Dismissal.**

Filed July 1, 1927.

IN CHANCERY OF NEW JERSEY.

Between

ETHEL RAYMOND PETTY STEPHENSON,

Petitioner,

and

CHESTER ARTHUR STEPHENSON,  
Defendant.

On Petition  
for Divorce.

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This cause coming on to be heard in the presence of Frederick H. Scott, Esq., of counsel with the petitioner, and H. H. Snedeker, Esq., of counsel with the defendant, on petition, answer and counterclaim, 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; and it appearing to the Court that the petitioner has not sustained the truth of the allegations of her petition respecting her residence and is not entitled to the relief therein prayed; and it further appearing that the defendant is not entitled to maintain his counterclaim;

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It is thereupon, on this 30th day of June, 1926, ORDERED, ADJUDGED AND DECREED, that the petitioner's petition and the defendant's counterclaim, both, be and the same are hereby dismissed.

E. R. WALKER,  
C.

Respectfully advised

ALONZO CHURCH,  
V. C.

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**Stipulation Correcting State of Case.**

NEW JERSEY COURT OF ERRORS AND  
APPEALS.

Filed May 19, 1927.

Between ETHEL RAYMOND PETTY STEPHEN- SON, Petitioner-Appellant, <i>and</i> CHESTER ARTHUR STEPHENSON, Defendant-Respondent.	}	10
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Objection having been made by the defendant-respondent to the State of the Case served upon him in the above cause, it is hereby stipulated to, by and between the attorneys of the respective parties hereto that the State of the Case be and the same is amended, corrected and added to, to read as follows:

“The parties to the above entitled cause from the time of their marriage on the 28th day of March, 1906, as set out in the amended petition, were residents of the State of New York down to the year 1919, and the petitioner-appellant alleges that from the time of the marriage of the parties down to the year 1919, the defendant-respondent had not consummated the marriage and that such marriage has never been consummated. The solicitor for the respondent moved to dismiss the petition on the ground that even if the allegations of the petition as to the non-consummation of the marriage were true, that the cause of action accrued two years after the marriage of the parties, at which time both the petitioner and the defendant were residents of the State of New York, which State in the year 1919 did not recognize desertion as a cause for divorce.”

FREDERIC B. SCOTT,  
Attorney of Petitioner-Appellant.  
CHILD AND SHIPMAN,  
Attorneys for Defendant-Respondent. 40

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## New Jersey Court of Errors and Appeals

Between

ETHEL RAYMOND PETTY <sup>Saw</sup> *Stephenson*  
Petitioner-Appellant,

and

CHESTER ARTHUR STEPHENSON,  
Defendant-Respondent.

On Appeal from  
Chancery dismiss-  
ing Petition for  
Divorce.

### BRIEF OF PETITIONER-APPELLANT.

#### Statement.

This appeal presents for review a decree of the Court of Chancery, advised by the Honorable Alonzo Church, Vice Chancellor, dismissing a petition for divorce on the grounds of desertion.

The parties to said action were married in the State of New York on March 28th, 1906, and continued to live there until October 1st, 1919, when they removed to the State of New Jersey on October 2nd, 1919, continuing to reside together in New Jersey until the filing of the amended petition for divorce on November 27th, 1925.

Their marriage was never consummated while they lived in the State of New York.

Nor was said marriage consummated from the time of their becoming residents of the State of New Jersey on October 2nd, 1919, the time alleged by the petitioner as when the desertion in New Jersey started, down to the time of the filing of the appellant's amended petition for divorce on November 27th, 1925, a period of over six years.

On petitioner's offer to prove these facts, the learned Vice-Chancellor dismissed her petition, and from the decree entered thereupon she now appeals, contending that said decree so advised was erroneous.

#### Specifications of Error.

The appellant contends that the Court of Chancery in entering its decree of dismissal was in error in that the requisite jurisdictional facts of both residence and desertion had been made to appear uncontradictedly before the court.

#### Argument.

The record shows that the parties to this litigation were married on March 28th, 1906, in the State of New York; that on October 2nd, 1919, they moved to the State of New Jersey, becoming citizens herein, and have remained residents of New Jersey up until the filing of the original petition, which original petition was amended by the filing of an amended petition on November 27th, 1925.

On the trial of said cause on June 29th, 1926, the petitioner-appellant was permitted to amend the amended petition by setting out the date of desertion to be October 2nd, 1919 (page 11, line 30, S. C.).

Thereafter there was an informal discussion between the court and counsel for the respective parties which was unreported, and thereafter the petitioner-appellant's counsel made the following Offer to Prove:

"The petitioner in this case now offers to prove that the petitioner in this case was married on March 28th, 1906; that on Octo-

ber 2nd, 1919, the parties moved to the State of New Jersey, took up their residence here and continued to reside in New Jersey; that the petitioner continued to reside in New Jersey up to the time of the filing of the petition, and that the defendant refused to consummate the marriage in New York and continued to refuse to consummate the marriage in New Jersey from the time they took up their residence here on October 2nd, 1919, until the time of the filing of the petition" (page 11, line 38 *et seq.*, page 12, line 1 *et seq.*).

Counsel for the defendant-respondent, in objecting to the State of Case, has brought about the entering into a stipulation (page 14), reading as follows:

"The parties to the above entitled cause from the time of their marriage on the 28th day of March, 1906, as set out in the amended petition, were residents of the State of New York down to the year 1919, and the petitioner-appellant alleges that from the time of the marriage of the parties down to the year 1919, the defendant-respondent had not consummated the marriage and that such marriage has never been consummated. The solicitor for the respondent moved to dismiss the petition on the ground that even if the allegations of the petition as to the non-consummation of the marriage were true, that the cause of action accrued two years after the marriage of the parties, at which time both the petitioner and the defendant were residents of the State of New York, which State in the year 1919 did not recognize desertion as a cause for divorce."

On the foregoing uncontradicted facts the learned Vice-Chancellor on motion of the defendant-respondent, dismissed the petitioner's petition on the authority of *Koch v. Koch*, 79 N. J.

E. 24, and the decree of dismissal appealed from was thereupon entered.

In view of the fact that the learned Vice-Chancellor should have given the statements of fact made by counsel in his offer to prove the same force as though they were duly testified to by witnesses, the situation presents to this court a strict question of law untrammelled by any necessity of determining any other question as to whether the offer was sufficient to warrant a decree for the petitioner-appellant (*Carr v. D. L. & W.*, 78 N. J. L. 692-696; *Pleasants v. Fant*, 89 U. S. 116-120; *Oscayan v. W. R. Arms Co.*, 103 U. S. 539).

*Koch v. Koch*, 79 N. J. E. 24, adopted by the learned Vice-Chancellor as the rule which he felt obliged him to dismiss the petition, whether applicable or not to the instant case, has never been adopted by our Court of Errors and Appeals as the law of this State, *Buckley v. Buckley*, 95 N. J. E. 783, showing an equally divided court on that point.

The inapplicability of the doctrine laid down in the *Koch* case, *supra*, will be discussed after the appellant has pointed out and discussed the case decided by this court which she feels should have controlled the decision of the learned Vice-Chancellor.

*In limine*, it is suggested that desertion on the ground of a non-consummated marriage stands upon a somewhat different ground than that of other classes of desertion. See *Raymond v. Raymond*, 79 Atl. 430; *Wood v. Wood*, 97 N. J. E. 1; *Alexander v. Alexander*, 2 Swabey & Trams. Rep. 385-387; *Hannock v. Hannock*, 5 N. H. 239-40; 1 *Bishop on Marriage and Divorce*, Sec. 1678, from which authorities it would appear that

there was a presumption that the hitherto unconsummated marriage would be consummated, from which it must follow that the term of the commencement of desertion was properly placed by the petitioner-appellant as of October 2nd, 1919, when the parties became residents of the State of New Jersey.

*Carroll v. Carroll*, 68 N. J. E. 724, it is contended, governs the instant case and should have controlled the Vice-Chancellor from dismissing the petition.

Aside from the peculiar character of the desertion in the instant case, the facts in the *Carroll* case, *supra*, are quite analogous.

In the *Carroll* case the parties were married in the State of Pennsylvania; in the instant case, in the State of New York. In the *Carroll* case the defendant, while the parties lived in the State of Pennsylvania, deserted his wife, remaining, however, in the State of Pennsylvania, the State of marriage, for some five years, and then coming to New Jersey, where he was a resident for upwards of three years and probably for five years. In the instant case the defendant-respondent by non-consummation of the marriage deserted his wife while they were residents of the State of New York for a period of thirteen years, but both of the parties to the present litigation were residents of the State of New Jersey from 1919 to 1925, when the appellant's petition was filed, a period of seven years, thus conclusively establishing the jurisdictional requirements, to wit, (a) continuance of residence in the State of New Jersey from the time the cause of action arose to the time of the commencement of the action; (b) two years' residence next preceding the action. Under the petitioner's Offer to Prove the peti-

tioner-appellant had a right to establish (and that right must be conceded in view of the learned Vice-Chancellor's action) that the defendant-respondent *while in New Jersey determined thenceforth to desert her* and that determination was persistent in wilfully, continuously and obstinately for the statutory period. Such proof the Carroll case, *supra*, says:

“will constitute desertion within the statute” (page 727).

This rule thus laid down in the Carroll case, *supra*, the advisory master in Buckley v. Buckley, 95 N. J. E. 783, questioned, but our Court of Errors refused to modify the principle thus enunciated, and it is the law that governs the instant case.

In the Koch case the Court of Chancery held that the master was in error in determining that desertion arose in the State of New York (the place where, according to the wife's evidence, she resided at the beginning of the term of desertion) and not in New Jersey, the place where she resided at the expiration of the two years fixed by the Act as a cause for divorce (page 26). In the instant case both parties moved to the State of New Jersey on October 2nd, 1919, took up their residence here, and continued to reside in New Jersey up until the filing of the amended petition on November 27th, 1925, and it was in New Jersey, not in New York, that the respondent deserted the appellant by refusing to consummate the marriage. The Court of Chancery in passing upon the Koch case, said,

“The view of the master seems to have been, inasmuch as the desertion originated in New York, ‘the cause of action arose there.’ This view treats mere desertion in

New York without regard to its continuance as being ‘a cause of action’ within the meaning of section 6, and as a cause of action arising in New York” (page 29).

Further exposition as to when the cause of action arose appears from the language of the court to the effect that “this time is the end of the two years continuous desertion \* \* \* and cannot be taken to mean the commencement of desertion or any other time before the termination” (page 30). Applying the laws thus enunciated to the facts in the instant case, we have the uncontradicted evidence that the parties to this action had been both bona fide residents of this State during a period of over two continuous years before the termination of the deserting period, and therefore that section of the divorce act which refers to whether the cause of action was recognized in the jurisdiction where the parties or the petitioner resided at the time the cause of action arose has no application.

Buckley v. Buckley, 95 N. J. E. 783, does not establish the law of this State to be contrary to the appellant's insistence.

That case was one of actual separation, i.e., the wife leaving the husband, the advisory master finding that the desertion occurred in the State of New York because that was where the wife left the petitioner. In the instant case both of the parties came together to and became residents of the State of New Jersey in October, 1919, and continued to be residents of this State until the filing of the amended petition in 1925, the defendant all this time refusing to consummate said marriage.

We believe it begs the question to request this court now to adopt the advisory master's opinion

in the Buckley case, *supra*, which it there refused to do because of its non-applicability to the case at bar.

True, the marriage was not consummated while the parties in the instant case lived in the State of New York, but when the parties moved to New Jersey and became citizens of our commonwealth, the petitioner had every right to expect that the marriage would be consummated in this State, and the respondent's coming to New Jersey with the appellant and his refusal here to consummate the marriage well shows his determination, as said in the Carroll case, *supra*, that he would henceforth and in New Jersey desert the appellant. The question that a desertion (a non-consummated marriage) occurred in New York is beside the question.

For the foregoing reasons it is urged that the decree of the Court of Chancery be reversed and set aside.

Respectfully,

FREDERIC B. SCOTT,  
Solicitor and of counsel for  
the Petitioner-Appellant.

## New Jersey Court of Errors and Appeals

Between

ETHEL RAYMOND PETTY  
STEPHENSON,  
Petitioner-Appellant,

and

CHESTER ARTHUR STEPHENSON,  
Defendant-Respondent.

On Petition  
for Divorce.

On Appeal  
from  
Chancery.

CHURCH, V.-C.

### BRIEF OF RESPONDENT.

#### Statement.

The respondent, Chester Arthur Stephenson, and the appellant, Ethel Raymond Petty Stephenson, were married at the City of New York on the 28th day of March, 1906.

From the time of the marriage of the parties on March 28, 1906, and down to the year 1919, the parties to this suit lived together in the State of New York and never during that period, had a residence in New Jersey.

In the year 1919, the parties to this suit moved to New Jersey and resided in that State in the same house down to the 27th day of May, 1925, a period of some six years. On the latter date, the defendant-respondent left the matrimonial home for reasons that are not necessary to state in this appeal.

The amended petition for divorce charges that on the 28th day of March, 1906, the date of the marriage of the parties to this cause, the defendant deserted the petitioner and that ever since said time, the defendant wilfully, continued and obstinately deserted the petitioner.

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The ground upon which the desertion is based is the allegation that the marriage has never been consummated, although this does not appear either in the petition or in the state of the case. The allegation of non-intercourse or non-consummation of the marriage is not admitted by the defendant-respondent.

At the hearing of the cause, the petitioner was permitted to further amend her petition by alleging therein as the date of the desertion the 2nd day of November, 1919, which was the day upon which the petitioner and defendant moved from the State of New York and became residents of the State of New Jersey. This amendment was consented to by counsel for the defendant-respondent.

To the allegations of the amended petition, the defendant filed an answer denying the allegation that he had deserted the petitioner on the 28th day of March 1906, and further denying that the petitioner was a bona fide resident of the State of New Jersey when her cause of action arose. The defendant also filed a counter-claim against the petitioner alleging therein certain acts of cruelty which it is unnecessary here to comment upon.

After the court had permitted the amendment above referred to, counsel for the defendant demanded an opening of the petitioner's case which counsel for the petitioner proceeded to do and during the course of which opening he stated that the allegation was that the marriage between the parties had never been consummated from its date on March 28, 1906 down to the filing of the petition for divorce. He further stated that the parties to this cause had been residents of the State of New York from the time of their

marriage on the 28th day of March, 1906, down to the 2nd day of October, 1919, and from the latter date to the early part of November, 1925, the date of the filing of the petition, the parties had been residents of the State of New Jersey.

Upon the state of facts offered in support of petitioner's cause, counsel for the defendant demurred to the jurisdiction of the Court of Chancery on the ground that even if the marriage had not been consummated from its date in 1906, such non-consummation being the basis of petitioner's allegation of desertion, they, both the petitioner and the defendant, were residents of the State of New York when the petitioner's cause of action arose two years after the date of their marriage, namely, on the 28th day of March, 1908, and had continued to be such residents of the State of New York down to the month of October, 1919; that the court should take judicial notice that the State of New York did not recognize desertion as a ground for divorce and that consequently, the Court of Chancery had no jurisdiction in the cause because neither party was a resident of the State of New Jersey at the time such cause of action arose.

#### ARGUMENT.

**The jurisdiction of the Court of Chancery over divorce is derived solely from the statute, Section 6 of the act entitled "An Act Providing for Divorces and for Decrees of Nullity of Marriage and for Alimony and the Maintenance of Children, Revision of 1907;" Pamphlet Laws 1907 page 474; Compiled Statutes of New Jersey Volume 2 page 2030. Section 6 reads as follows:**

"6 Service of process in divorce proceedings—for the purposes of divorce, either absolute or from bed and board, jurisdiction may be acquired by personal service of process upon the defendant within this state under the following conditions:

(a) When at the time the cause of action arose, either party was a bona fide resident of this state and has continued so to be down to the time of the commencement of the action, except that no action for absolute divorce shall be commenced for any cause other than adultery, unless one of the parties has been for two years next preceding the commencement of the action, a bona fide resident of this state.

(b) When, since the cause of action arose, either party has been and for at least two years next preceding the commencement of the action, has continued to be a bona fide resident of this state, provided the cause of action alleged was recognized in the jurisdiction in which such party resided at the time the cause of action arose, as a ground for the same relief asked for in the action in this state."

Section 7 which provides for service by publication has the same jurisdictional requirements as section 6.

The learned Vice-Chancellor found that the Court of Chancery had no jurisdiction to hear said cause under the provisions of the act above cited and accordingly upon the authority of *Koch v. Koch*, 79 New Jersey Equity, 24, dismissed the petitioner's petition. The correctness of this decree of dismissal is the subject matter of this appeal.

Vice-Chancellor Emery in the Koch case held that if the petitioner became a resident of the

State of New Jersey within two years from the date of the separation, that the cause of action accrued within the State of New Jersey at the expiration of two years from the date of the separation, and that the court had jurisdiction, but that if the petitioner continued to reside for the full period of two years after the separation, within the State of New York, that the cause of action accrued while the petitioner was a resident of the State of New York or any other state, and that if such state did not recognize desertion as a ground for divorce, our court had no jurisdiction over the subject matter.

Vice-Chancellor Backes in the case of *Getz v. Getz*, 81 New Jersey Equity 465, held: "The jurisdictional period in causes for divorce on the ground of desertion, *i. e.* bona fide residence in this state 'at the time the cause of action arose,' terminates at the expiration of two years next succeeding the separation."

The Getz case was heard upon exceptions filed to the report of the special master, who held that the court had no jurisdiction because the petitioner did not, nor did the defendant, reside in this state at the time the cause of action arose. The facts in the Getz case were as follows: The parties were married in the State of New York, where they resided until September 6, 1906, when the defendant deserted the petitioner. The petitioner became a resident of the State of New Jersey in August, 1909, and continued to be such resident down to the filing of the petition, which was filed on the 11th day of June, 1912, in which petition the petitioner charged that the defendant had been guilty of desertion for more than two years last past.

Vice-Chancellor Backes referring to the Koch case says: "The Koch case deals with the

jurisdiction essential of bona fide residence in this state, 'at the time the cause of action arose' and it is plainly pointed out by Vice-Chancellor Emery that this period for the purpose of vesting jurisdiction in this court terminates at the expiration of the two years next succeeding the separation" \* \* \* "Guided by the rule thus laid down, the cause of action arose in this case on September 6, 1908, at which time neither of the parties was a resident of this state, so far as the evidence necessary for divorce, shows."

The exceptions raised the point and it is alleged that desertion being a continuing injury, a right of action accrued to the petitioner by reason of the wilful, continued and obstinate desertion of the defendant during the two years next preceding the filing of the petition.

Vice-Chancellor Backes in disposing of the contention raised by the exceptant and referring to the case of *Myles v. Myles*, 77 New Jersey Equity 265 and *Koch v. Koch*, *supra*, and referring to the Koch case says: "Guided by the rule thus laid down, the cause of action arose in this case on Sept. 6, 1908, at a time when neither of the parties was a resident of this state, so far as the evidence necessary for a divorce, shows. (Referring to subdivisions (a) and (b) of section 6 and 7 of the divorce act, *supra*.) To accede to the proposition of the exceptant would be to regard the provisions of subdivision (b) a piece of legislative supererogation, as in instances where the parties were non-residents at the time the marital offense was committed. (Citing *Sawtell v. Sawtell*, 17 Conn. 284.) I agree with the master that the petitioner was not a bona fide resident of this state at the time the cause of action arose and, therefore, the exceptions must be overruled."

This court in the case of *Flynn, Appellant, v. Flynn, Respondent*, 83 New Jersey Equity 690, decided November 16, 1914, unanimously sustained the conclusions of Advisory Master Clarence S. Biddle upon the following state of facts: "The desertion commenced in the State of New York in August 1904. After this, the petitioner lived with her mother in that state until the latter date in August, 1908, when she removed to the State of New Jersey. The jurisdictional fact stated by the master that the petitioner was a bona fide resident of this state when the cause of action arose, cannot be sustained. *Koch v. Koch*, 79 New Jersey Equity, 24. The petition should be dismissed."

Further depositions having been taken pursuant to an order, Advisory Master Biddle filed the following memorandum: "The additional testimony is to the effect that shortly before the petitioner became a resident of this state, the defendant said that if the petitioner would leave her folks and live elsewhere than in the City of Brooklyn or would live 'out of the state,' he would support her. I do not understand that the husband and wife agreed to live separate until the wife got ready to live out of the State of New York and there is no indication that the wife gave assent to the husband's previous desertion; and after taking up her residence in this state notified him of that fact and called upon him to fulfill his part of the agreement. The most favorable light in which the situation can be viewed from the wife's standpoint (and I think the true one) is that the husband did not arrest the period of desertion by such display of mental attitude. It is clear to me that the solicitor is dissatisfied with *Koch v. Koch*, 79 Equity 24. Since the former memorandum

in this case, the Court has decided *Getz v. Getz*, 81 New Jersey Equity 465. It does not appear to me to be becoming to further agitate the point in this court, but the petitioner, if aggrieved must resort to her appeal. The clerk is directed to dismiss this petition at once."

It will be noted that in the case last cited the question of jurisdiction was squarely presented to this court, which unanimately held that the decision of the Advisory Master was correct.

Vice-Chancellor Stevenson in the case of *Gordon v. Gordon*, 88 Equity 436, at page 441, says:

"3. The text writers, I think, all agree that after the statutory period of desertion is completed, the deserter cannot by any course of conduct indicating repentance and desire to terminate the desertion, impair in any way the legal effect of the matrimonial offense which he has committed." Citing 1 Bishop Marriage, Divorce and Separation, section 775. The Vice-Chancellor says at page 443, referring to what he terms as Vice-Chancellor Emery's "dictum" in the Koch case, says: "The Vice-Chancellor's dictum, however, has been accepted as law by the Court of Chancery in subsequent cases and has recently been approved by the Court of Errors and Appeals in *Flynn v. Flynn*, 83 New Jersey Equity 690. Thus it would seem that if a spouse deserted in another state remains a resident for two years and then becomes a resident of New Jersey and remains such resident for two years and then commences a suit for divorce, the two years to be estimated are not those 'immediately preceding the filing of the petition,' but those which immediately follow the separation in the foreign state or immediately preceding the departure of the deserted spouse from the foreign state."

This court followed the decision laid down in the Flynn and Koch cases in the case of *Buckley v. Buckley*, 95 N. J. Equity 783. The facts in that case were that on the 13th of December, 1901, the parties separated. Said date was made the basis of charge of desertion. The petition alleged that the petitioner had been a bona fide resident of the State of New Jersey from January 1, 1915. On December 13, 1920, an order was made amending the date of the desertion from December, 1901, and charging that "from January, 1915, to the date of filing the petition herein, and for two years next preceding the filing of the petition herein, the defendant wilfully, continuedly and obstinately deserted the petitioner." The evidence was that the parties were married in April, 1893 or 1894, and lived together in the State of New York down to the month of December, 1901, when the defendant wife, returned to her people. From that time on, the petitioner made numerous efforts to induce his wife to return to him. The petitioner came to New Jersey in the early part of 1915 and shortly thereafter made another effort to induce his wife to return to him, but without avail. The Special Master reported the desertion to have taken place in January, 1915. The opinion of Advisory Master Joline at page 786, is as follows: "I am unable to agree with the Special Master in this case. I think that the defendant deserted the petitioner in 1901, in the State of New York; that the desertion became complete in that state in December, 1903; that the petitioner did not become a resident of New Jersey until January, 1915, and that he was obliged to establish the fact that desertion, it having subsisted in this State for two years prior to the filing of the petition, was a good ground for divorce in New York in December, 1903. I understand this to

be the conclusion of Vice-Chancellor Emery in *Koch v. Koch*. See also *Getz v. Getz*, *Berger v. Berger*, *Flynn v. Flynn*. Where there is a desertion in another state, the petitioner must prove either that he came to New Jersey to live before the desertion accrued and remained in this State for the statutory period during all of which time the desertion continued, or else he must prove as above stated, that he came to New Jersey after the desertion accrued and that the desertion has continued for two years thereafter, and that desertion was a good ground for divorce in the State in which the desertion occurred. \* \* \* I think that when the defendant deserted the petitioner in New York in December, 1901, and refused to return to him, the desertion became wilful, continued and obstinate in December, 1903. This all occurred in New York State." The decision of the Advisory Master was sustained by an equally divided court as was the decision of the same Advisory Master in the case of *Light v. Light*, 95 New Jersey Equity 779.

Vice-Chancellor Bentley in the case of *Silbermuntz v. Silbermuntz*, 97 New Jersey Equity 451, at page 452, says: "The difficulty with the petitioner's situation is that the proofs disclose she did not take up her residence in the State of New Jersey until May, 1918, or more than four years after the desertion occurred. Vice-Chancellor Emery in *Koch v. Koch*, 79 Equity 24, settled the interpretation of the above language for this court to be, that the cause of action, while it does not arise immediately upon the completion of the act of desertion, does arise just two years thereafter. Within that time the petitioner under the circumstances of this case, must have been or become a resident of New Jersey in

good faith. Consequently, the petitioner's cause of action under our statute arose in January, 1916, at which time according to her own testimony, she was domiciled in and a resident of the State of New York, to which she has migrated after the defendant abandoned her and her children in Canada. Hence, she was not a "bona fide resident of this State" at the time the cause of action arose and the Legislature has conferred upon this court no authority to grant the divorce she seeks. \* \* \* To meet this difficulty, counsel has undertaken to fix the date of desertion at a period later than the separation which occurred in Canada. The petitioner testified that in May, 1920, she sought out the defendant in New York after his return from Europe, for the purpose of effecting a reconciliation and he refused to talk to her. At the hearing, the date of the desertion alleged in the original petition as having occurred in January, 1914, was amended to May, 1920. From this it is contended that the desertion occurred on that date. *Gates v. Gates*, 59 New Jersey Equity 100. It seems only necessary to say that not more than one desertion could have taken place without an intermediate reconciliation and it is undisputed in this case that the parties never resumed marital cohabitation after the defendant deserted his family in 1914."

It would seem from the above decisions, some of the Court of Errors and others of the Court of Chancery, that the correct interpretation of the jurisdictional clause, sections 6 and 7, subdivisions (a) and (b) of the Divorce Act, have been decided. It would seem that the Legislature certainly intended something when it enacted sections 6 and 7 (b) and used as a part of those sections the significant words "provided the

*cause of action alleged was recognized in the jurisdiction in which the petitioner resided at the time the cause of action arose, as a ground for the same relief asked for in this State.*" The courts of this State and all writers upon divorce, in treating the question as to *when the cause of action arose*, have always held that the cause of action arises *two years* after the separation which is alleged to be the commencement of the desertion; that when the cause of action has once arisen, the deserter cannot break that cause of action or in any way impair the right of a petitioner to proceed. The courts have gone so far as to hold that where there has been a desertion for two years, that the party guilty of such desertion cannot maintain an action for divorce on the ground of adultery and that the plea of such desertion may be successfully interposed as a plea in bar to the maintenance of an adultery action.

The Court must bear in mind that it is not concerned with the *logic* of the law in question, whether it is *reasonable or unreasonable* to say that a person coming from the State of New York to the State of New Jersey one year and three hundred and sixty-four days from the date of the commencement of the desertion, may after the expiration of such two-year period and a residence of two years, maintain an action for divorce on the ground of desertion, when another person coming to New Jersey two years and one day after the commencement of the desertion cannot, no matter how long a resident of this State, maintain such an action. That is not, it is respectfully insisted, a question for this Court to decide, the sole question before the Court being the *construction* to be placed upon the sec-

tions of the *act relating to divorce* above referred to.

It is respectfully insisted that the decree of the Court of Chancery should be affirmed.

CHILD & SHIPMAN,  
Solicitors of Respondent.

FRANCIS CHILD,  
Of Counsel.

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