

INDEX

	PAGE
Notice of Appeal.....	1
Petition of Appeal.....	2
Petition to Re-open, Review, Vacate and Set-Aside Final Decree and Dismiss Bill.....	5
Affidavit of Frank J. Mittenbuhler.....	9
Affidavit of Thomas Brunetto	13
Exhibit A. Bill of Complaint.....	16
Exhibit B. Answer	19
Exhibit C. Report of Advisory Master.....	21
Exhibit D. Final Decree	24
Exhibit E. Excerpts from Testimony of Petitioner.....	26
Order to Show Cause.....	27
Answer	29
Affidavit of Babetta R. Mittenbuhler.....	31
Affidavit of Benjamin A. Toby.....	35
Opinion of Advisory Master.....	38
Supplemental Opinion	45
Decree of Dismissal.....	47

TESTIMONY.

Witnesses for Petitioner.

Babetta R. Mittenbuhler,	direct examination.....	49
	cross "	61
	recalled, re-direct "	83, 86
	cross "	86, 120
Mabel Van Lenten,	direct examination.....	71
	cross "	74
	re-direct "	76
	recalled, re-direct "	85
	cross "	86
William Speicer (Father),	direct examination.....	77
	cross "	78, 80
	re-direct "	80
Babette Speicer,	direct examination.....	81
	cross "	82
William Speicer (Brother),	direct examination.....	83
	cross "	84
Emaline Torbet,	direct examination.....	127
	cross "	128
Motion for Dismissal.....		87

PAGE

Witnesses for Defendant.

Frank R. Mittenbuhler,	direct examination.....	88
	cross ".....	99
James J. Clark,	direct examination.....	102
	cross ".....	103
Joseph Solinsky,	direct examination.....	104
Estelle Bond,	direct examination.....	105
	cross ".....	106
Elizabeth Thomas,	direct examination.....	108
	cross ".....	108
May Mittenbuhler,	direct examination.....	110
	cross ".....	114, 120
	re-direct ".....	119

Petitioner's Rebuttal.

Babetta R. Mittenbuhler,	direct examination.....	121
	cross ".....	124
Mabel Van Lenten,	direct examination.....	129
	cross ".....	130
Emaline Torbet,	direct examination.....	134
	cross ".....	135

Defendant's Rebuttal.

May Mittenbuhler,	direct examination.....	131, 134
	cross ".....	134
Frank R. Mittenbuhler,	direct examination.....	131
	cross ".....	133
Elizabeth Thomas,	direct examination.....	135
Certificates of Advisory Master and Stenographer.....		136

Notice of Appeal.

*Served Dec 5 1934
Filed Jan 11, 1935*

NOTICE OF APPEAL.

In Chancery of New Jersey

#77/477

Between

BABETTA R. MITTENBUHLER,
Complainant,

and

FRANK J. MITTENBUHLER,
Defendant.

On Bill, &c.
Notice
of Appeal.

10

The defendant, Frank J. Mittenbuhler, hereby
appeals from the decree of November 26, 1934,
made in the above-entitled cause by the Chan-
cellor on the advice of Bernard L. Stafford,
Advisory Master, dismissing application of de-
fendant to vacate final decree and from the whole
and every part thereof, to the Court of Errors
and Appeals in the last resort in all causes.

20

THOMAS BRUNETTO,
Solicitor for and of Counsel
with Defendant.

30

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

THOMAS BRUNETTO,
Of Counsel with Defendant.

40

New Jersey Court of Errors and Appeals

10 BABETTA R. MITTENBUHLER,
 Complainant,
 Appellee,

and

FRANK J. MITTENBUHLER,
 Defendant,
 Appellant.

}

*On Bill, &c.
On Appeal
from
Chancery.

Petition
of Appeal.*

The petition of Frank J. Mittenbuhler, defendant-appellan in the above-entitled cause, respectfully shows that:

That said decree adjudged that petitioner's application to reopen, vacate and set aside final decree be denied, and that said petition should be dismissed.

40 That said Frank J. Mittenbuhler pay to said complainant her costs in said proceedings to be

Petition of Appeal.

taxed, including a counsel fee of \$100.00 which was allowed to the said complainant's solicitor, Harris J. Westerhoff.

And petitioner appeals from the decree of the Chancellor, which orders, adjudges and decrees as aforesaid, upon the ground that the same is erroneous in that: 10

1. That the lower court erred in adjudging that there were no special equities entitling Frank J. Mittenbuhler, the defendant, to vacate, review, reopen and reverse and set aside said final decree in said maintenance suit.

2. That the lower court erred in adjudging that the application of Frank J. Mittenbuhler, the defendant and petitioner, be and the same is hereby denied and that the petition be dismissed. 20

3. That the lower court erred in failing to decree that the decree advised on June 30, 1930 and filed on July 2, 1930, was erroneous and contrary to equity and that the Chancellor, at the time of making said decree, was without jurisdiction for the reason that no evidence was submitted to said Chancellor to support the findings contained in the report of the Advisory Master upon which said final decree was predicated. 30

4. That the lower court abused its discretion in failing to decree that the Chancellor had no jurisdiction to make the final decree on June 30th and filed on July 2, 1930.

5. That the lower court erred in decreeing that the decree of the Chancellor made on June 30th and filed on July 2, 1930, was valid. 40

Petition of Appeal.

6. Because the lower court erred in holding that the decree made on June 30th and filed on July 2, 1930, was valid because it appeared from the evidence that the complainant had not established by legal proof said cause of action stated in her bill of complaint entitling her to relief in equity.

Petitioner therefore prays that the said decree of the said Chancellor may be wholly reversed, set aside and for nothing holden, and that the petitioner may have such other and further relief as to this Court shall seem proper.

THOMAS BRUNETTO,
Solicitor for and of Counsel
with Defendant-Appellant.

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Petition to Re-open, etc., Final Decree.

PETITION.

Filed

IN CHANCERY OF NEW JERSEY.

<i>Between</i> BABETTA R. MITTENBUHLER, <i>Complainant,</i> <i>and</i> FRANK J. MITTENBUHLER, <i>Defendant.</i>	}	10 <i>On Bill, etc.</i>
---	---	---------------------------------------

*Petition to Re-Open, Review, Vacate and
 Set Aside Final Decree and Dismiss Bill.*

20

*To the Honorable Luther A. Campbell, Chancel-
 lor of the State of New Jersey:*

The petition of Frank J. Mittenbuhler, the
 defendant in the above entitled cause respect-
 fully shows:

1. On or about the 26th day of February,
 1930, Babetta R. Mittenbuhler, wife of peti-
 tioner herein, filed her bill of complaint in
 this Honorable Court against your petitioner, 30
 amongst other things setting forth that peti-
 tioner on the 24th day of January, 1930, left
 complainant and abandoned her separating him-
 self from her and that said complainant gave
 petitioner no cause for his action and that the
 complainant had been a true and faithful wife
 to petitioner and that since the 24th day of
 January, 1930, to the time said bill was filed,
 petitioner had abandoned complainant without
 justifiable cause and separated himself from her 40

Petition to Re-open, etc., Final Decree.

and had refused and neglected, and still refused and neglected to maintain and provide for her and the infant child of the marriage in her custody. A copy of said bill is attached hereto, made part hereof and marked Exhibit A.

10 2. Petitioner thereafter was served with a subpoena to answer said bill and did appear and answer the same setting forth that the allegations in said bill that this petitioner had abandoned and refused to support the complainant were untrue. A copy of said answer is attached hereto, made part hereof and marked Exhibit B.

20 3. Issue having been joined thereon, said cause was referred by his Honor the Chancellor to J. W. De Yoe, one of the Advisory Masters of this Court, to hear said cause and advise the Chancellor the decree which was to be entered in said cause.

4. That on or about the 30th day of June, 1930, the said Advisory Master filed his report advising that a decree in favor of the complainant be entered. A copy of said report is attached hereto, made part hereof and marked Exhibit C.

30 5. That on the 2nd day of July, 1930, pursuant to the recommendations of the report of said J. W. De Yoe, Esquire, Advisory Master as aforesaid, his Honor, E. R. Walker, Chancellor, made a decree in said suit in conformity with said report. A copy of said decree is attached hereto, made part hereof and marked Exhibit D. Said decree has been duly enrolled but petitioner insists that it is erroneous and ought to be, by this Honorable Court, reviewed, re-opened, reversed and set aside for many apparent errors and im-

Petition to Re-open, etc., Final Decree.

perfections inasmuch as it appears that the complainant did not produce any evidence before the said Honorable J. W. De Yoe, Advisory Master as aforesaid to support the conclusions of the Advisory Master upon which said final decree is predicated.

6. Petitioner further says that he is not familiar with the procedure of this Court and that he was represented in said suit by the Honorable James J. Farley, Esquire.

10

7. That although the bill of complaint charges this petitioner with desertion and an actual abandonment, the evidence produced before said Advisory Master by the complainant tended to prove that this petitioner was guilty of constructive desertion in that petitioner's wife alleged that petitioner had treated her cruelly and by reason thereof she was compelled to leave petitioner's home.

20

8. Petitioner during the hearing before the said Advisory Master was represented by James J. Farley, and was governed in the defense of said suit by the advice given to him by the said James J. Farley, Esquire.

9. That sometime in the latter part of October, 1932, petitioner was ordered to appear before the said J. W. De Yoe and show cause why he should not be adjudged in contempt of Court for failing to comply with the decree of this Court filed on or about July 2, 1930, and at that time the petitioner consulted his present solicitor, Thomas Brunetto, as to his rights under said proceedings. Petitioner then demanded all his papers from the said James J. Farley, Esquire, so that he could deliver the same to Mr. Bru-

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Petition to Re-open, etc., Final Decree.

netto and be advised as to his rights. The said James J. Farley refused to deliver said papers to petitioner. Therefore the petitioner was compelled to obtain copies of all the pleadings which included the final decree in this cause from the Clerk of the Court of Chancery. However, petitioner at that time was unable to obtain a transcript of the testimony taken before the said Advisory Master aforesaid prior to July 2, 1930, upon which said final decree is based because he did not have the funds to pay for the same and that this petitioner did not obtain a copy of said transcript until on or about the 15th day of April, 1934.

10
20 10. That upon reading the transcript of said testimony the only evidence of any abandonment submitted to the Advisory Master by the complainant, petitioner's wife, was to the effect that the complainant by reason of the cruelty of the petitioner on or about January 24, 1930, was compelled to leave him and that on that day she did leave petitioner. The part of said testimony relating to the leaving of the petitioner by the complainant is attached hereto and marked Exhibit E.

30 11. Petitioner says that the decree made by the Chancellor on the advice of J. W. De Yoe, Esquire, one of the Advisory Masters of the Court of Chancery advised on June 30, 1930 and filed on July 2, 1930, is erroneous and contrary to equity as at the time of the making of said decree there had been no evidence submitted to the said Advisory Master to support the report of said Advisory Master upon which said final decree is predicated, therefore the petitioner says that said decree is erroneous and

Affidavit of Frank J. Mittenbuhler.

should be re-opened, reviewed, reversed and set aside and no further proceedings had thereon.

Petitioner therefore prays:

1. That this Court review, re-open, reverse and set aside the decree filed in the above entitled cause on July 2, 1930, a copy of which is attached hereto and marked Exhibit D and that the bill of complaint of the complainant be dismissed. 10

And petitioner ever prays, etc.

THOMAS BRUNETTO,
Solicitor of Petitioner.

IN CHANCERY OF NEW JERSEY.

20

Between

BABETTA R. MITTENBUHLER,
Complainant,

and

FRANK J. MITTENBUHLER,
Defendant.

On Bill, etc.

Affidavit.

On Petition to Re-open, Review, Vacate and Set Aside Final Decree and Dismiss Bill. 30

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

FRANK J. MITTENBUHLER, being duly sworn according to law upon his oath deposes and says:

1. That I am the defendant in a certain cause wherein Babetta R. Mittenbuhler is complainant and Frank J. Mittenbuhler is defendant, the bill 40

Affidavit of Frank J. Mittenbuhler.

10 of complaint having been filed in said suit on or about the 26th day of February, 1930, which amongst other things set forth that petitioner on the 24th day of January, 1930, left complainant and abandoned her separating myself from her and that she gave me no cause for my action and that she had been a true and faithful wife to me, and that since the 24th day of January, 1930, to the time said bill was filed, I had abandoned her without justifiable cause and separated myself from her and refused and neglected, and still refuse and neglect to maintain and provide for her and the infant child of the marriage in her custody. A copy of said bill is attached to the petition herein.

20 2. Thereafter I was served with a subpoena to answer said bill and did appear and answer the same setting forth that the allegations in said bill that I had abandoned and refused to support the complainant were untrue. A copy of said answer is attached to the petition herein and marked Exhibit B.

30 3. Issue having been joined thereon, said cause was referred to by his Honor the Chancellor to J. W. De Yoe, one of the Advisory Masters of this Court, to hear said cause and advise the Chancellor the decree which was to be entered therein.

4. That on or about the 30th day of June, 1930, the said Advisory Master filed his report advising that a decree in favor of my wife be entered. A copy of the report is attached to the petition herein and marked Exhibit C.

40 5. That on the 2nd day of July, 1930, pursuant to the recommendation of the report of said

Affidavit of Frank J. Mittenbuhler.

J. W. De Yoe, Esquire, Advistory Master as aforesaid, his Honor E. R. Walker, Chancellor, made a decree in said suit in conformity with said report. A copy of said decree is attached to the petition herein and marked Exhibit D. Said decree has been duly enrolled but I have been advised that it is erroneous and ought to be, by this Honorable Court, reviewed, re-opened, reversed and set aside for many apparent errors and imperfections inasmuch as it appears that there was no evidence produced before the said Honorable J. W. De Yoe, Advisory Master as aforesaid, to support the conclusions of the Advisory Master upon which said final decree is predicated. 10

6. That although the bill of complaint charges me with desertion and an actual abandonment, the evidence produced before said Advisory Master tended to prove that I was guilty of constructive desertion in that my wife alleged that I had treated her cruelly and by reason thereof she was compelled to leave my home. 20

7. During the hearing before the said Advisory Master I was represented by James J. Farley, and was governed in the defense of said suit by his advice. 30

8. That sometime in the later part of October, 1932, I was ordered to appear before the said J. W. De Yoe and show cause why I should not be adjudged in contempt of Court for failing to comply with the decree of this Court filed on or about July 2, 1930, and at that time, having become dissatisfied with the services of Mr. Farley, I consulted my present solicitor, Mr. Thomas Brunetto, as to my rights under said proceedings. I then demanded all my papers from the 40

Affidavit of Frank J. Mittenbuhler.

said James J. Farley, Esquire, so that I could deliver them to Mr. Brunetto and be advised as to my rights, as aforesaid. He refused to deliver said papers to me.

10 9. I was compelled to pay for obtaining copies of all the pleadings which included the final decree in this cause from the Clerk of the Court of Chancery. However at that time I was unable to obtain a transcript of the testimony taken before the Advisory Master prior to July 2, 1930, upon which said final decree is based because I did not have the funds to pay for the same and for that reason did not obtain a copy of said transcript until on or about the 11th day of April, 1934.

20 10. That upon reading the transcript of said testimony the only evidence of any abandonment submitted to the Advisory Master by my wife was to the effect that by reason of my cruelty, on or about January 24, 1930, she was compelled to leave me and that on that day she did leave me. The part of said testimony relating to her leaving me is attached to the petition and marked Exhibit E.

30 11. I have been advised by Mr. Thomas Brunetto, my present solicitor, that the decree made by the Chancellor on the advice of J. W. De Yoe, Esquire, one of the Advisory Masters of the Court of Chancery advised on June 30, 1930 and filed on July 2, 1930, is erroneous and contrary to equity as at the time of the making of said decree there had been no evidence submitted to the said Advisory Master to support the report of said Advisory Master upon which said final decree is predicated, therefore the case is erroneous and should be re-opened, reviewed, re-

40

Affidavit of Thomas Brunetto.

vesed and set aside and no further proceedings had thereon.

FRANK J. MITTENBUHLER.

Sworn and subscribed to before me
this 25th day of June, 1934.

10

LOUIS C. MICONE,
An Attorney at Law
of New Jersey.

IN CHANCERY OF NEW JERSEY.

Between

BABETTA R. MITTENBUHLER,
Complainant,

and

FRANK J. MITTENBUHLER,
Defendant.

On Bill, etc.

Affidavit.

20

*On Petition to Re-Open, Review, Vacate and
Set Aside Final Decree and Dismiss Bill.*

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

30

THOMAS BRUNETTO, being duly sworn according to law, upon his oath deposes and says:

1. That I am an attorney and counsellor at law of the State of New Jersey with offices at 9 Clinton street, Newark, New Jersey.

2. That at the request of Frank J. Mittenbuhler, the defendant in a suit wherein Babetta R. Mittenbuhler is complainant and Frank J.

40

Affidavit of Thomas Brunetto.

10 Mittenbuhler is defendant, wherein the bill of complaint was filed on or about February 26, 1930, I obtained a transcript of the testimony in said suit from the official stenographer who took the same at the hearing before his Honor J. W. De Yoe, the Advisory Master to whom the above matter was referred for final hearing by the Chancellor.

20 3. That I received a transcript of said decree the later part of April, 1934, and that I examined it and also examined the pleadings filed by the parties in said suit together with the report of the Advisory Master and the final decree entered thereon and after said examination I advised the defendant Frank J. Mittenbuhler that in my opinion the decree which was entered in said suit was erroneous because the pleadings, the report of the Advisory Master upon which said final decree is predicated, was not supported by the evidence which had been produced by the complainant and the defendant at the final hearing before said Advisory Master.

30 4. That the pleadings disclose that the cause of action alleged by the complainant was to the effect that the defendant was charged with actual abandonment of the complainant in said suit and the report of the Advisory Master and final decree were based upon the theory that the complainant had proven a case against the defendant of actual desertion whereas the evidence as shown by the transcript was to the effect that if the defendant was guilty of any offense it was that of constructive abandonment and that the bill of complaint did not charge him with this offense. Therefore the final decree entered in
40 said suit was erroneous. Attached to the peti-

Affidavit of Thomas Brunetto.

tion are excerpts of the testimony of the complainant relating to the nature of the offense of which the defendant was guilty.

5. That before the delivery to me of said transcript of testimony I examined the affidavits filed by the complainant in the application for alimony *pendente lite*, and the answering affidavits filed by the defendant in opposition to said motion and said affidavits also disclose that if the defendant was guilty of any offense it was that of constructive desertion. 10

6. That during the later part of 1932 and early part of 1933 I informed both the present solicitor for the complainant and the Advisory Master, the Honorable J. W. De Yoe that the report of said Advisory Master and the final decree which is based thereon were erroneous because it appeared that the defendant was not guilty of an actual abandonment of the complainant in said suit and that I suggested to both the Advisory Master and to counsel for the complainant that the final decree be re-opened, reviewed, vacated and set aside and that the pleadings should be amended to comply with the proof. At the time I inquired of them if the evidence which had been produced at the final hearing upon which the Master's report and final decree were based was to the same effect as shown by said affidavits I was unable to get any definite information from them. I then informed my client the only way I could determine as to whether the Advisory Master had any jurisdiction to make the report he did and advise the Chancellor as to the nature of the decree to be entered was to obtain a transcript of the evidence. My client 20 30 40

Exhibit A.

was unable to get all the money for said transcript until sometime in April of this year.

THOMAS BRUNETTO.

Sworn and subscribed to before me
this 25th day of June, 1934.

10

LOUIS C. MICONE,
An Attorney at Law of New Jersey.

EXHIBIT A.

Filed February 26, 1930.

IN CHANCERY OF NEW JERSEY.

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

Complaining, shows unto your Honor, your complainant, Babetta R. Mittenbuhler, of the City of Paterson, in the County of Passaic, and State of New Jersey.

1. On the twenty-first day of April, A. D. nineteen hundred and twenty-four, she was lawfully married to her present husband Frank J. Mittenbuhler, at Paterson, in the County of Passaic, and State of New Jersey, by Rev. Louis Vanderburg, a Minister of the Gospel.

30

2. After her said marriage, your complainant and the defendant, her said husband, went to live in the City of Newark, in the County of Essex, and State of New Jersey where they lived and cohabited as husband and wife until the abandonment of your complainant, as hereinafter complained of.

3. One child was born of the marriage aforesaid; to wit, Franklin R. Mittenbuhler, age four

40

Exhibit A.

years, now in the custody of the complainant and being supported by her parents.

4. Your complainant shows and charges that on the twenty-fourth day of January, A. D. nineteen hundred and thirty, the defendant left complainant and abandoned your complainant separating himself from her saying that she would have to look for herself; that your complainant gave her husband no cause for his action but has ever been a true and faithful wife to him. 10

5. Your complainant shows and charges that ever since the twenty-fourth day of January, A. D. nineteen hundred and thirty, defendant has abandoned your complainant without justifiable cause and separated himself from her, and has refused and neglected and still refuses and neglects to maintain and provide for her and the infant child of the marriage in her custody. 20

6. Your complainant shows that she is now dependent for her support and maintenance and that of the infant child, upon the bounty of her parents.

7. Your complainant further shows that the defendant is steadily employed as a solicitor for the Standard Brands, Inc., located at 174 William street, Newark, New Jersey, and is receiving a salary of not less than seventy-five (\$75.00) dollars a week, and that the infant child in a manner suitable to their position. 30

Complainant is without adequate relief in any other court and therefore prays:

1. That the defendant Frank J. Mittenbuhler, answer fully each and every allegation of this bill. 40

Exhibit A.

2. That he be decreed to provide suitable support and maintenance for complainant and the child of the marriage in her custody, to be paid or provided by him or made out of his property.

10 3. That the defendant give reasonable security.

4. In case the defendant may not be found in this State to be served with process, that his estate, property and effects may be sequestered to compel his performance of any decree as shall be equitable and just.

5. That the defendant may be compelled to pay to complainant a reasonable fee for counsel, support and maintenance during the pendency of this suit.

20 6. That a writ of subpoena may issue, commanding the defendant to answer the bill of complaint and to abide by such decree as this Court may make in the premises.

And your complainant, as in duty bound, will ever pray, &c.,

JACOB VAN DER CLOCK,
Solicitor of Complainant.

30 SAMUEL ROSENFELD,
Of Counsel.

Exhibit B.

EXHIBIT B.

Filed April 23, 1930.

IN CHANCERY OF NEW JERSEY.

*Between*BABETTA R. MITTENBUHLER,
*Complainant,**and*FRANK J. MITTENBUHLER,
Defendant.

10

*On Bill, etc.**Answer.*

The defendant, Frank J. Mittenbuhler, residing in the Town of Kearny, in the County of Hudson and State of New Jersey, answering the bill of complaint of the complainant, says that:

20

1. The defendant admits that he was married as is alleged in paragraph 1, of the complaint.

2. The defendant denies that part of paragraph 2, wherein the complainant states that she cohabited with the defendant until the abandonment of your complainant as is alleged in the complaint. The remaining part of the paragraph is admitted.

30

3. Defendant admits that one child was born as the fruit of the aforesaid marriage as is alleged in the complaint but not having sufficient information to form a belief, neither admits nor denies the remaining part of the said paragraph.

4. The defendant denies paragraph 4, as is alleged in the complaint and on the contrary this defendant says that the complainant abandoned and deserted the defendant on the 24th day of

40

Exhibit B.

January, 1930, and separated herself from him, without justifiable cause, and has refused to return to him since she deserted him.

10 5. The defendant denies paragraph 5 as is alleged in the complaint and on the contrary says that the complainant deserted and abandoned the defendant without justifiable cause and separated herself from him and has refused to return to him and further that she took the funds belonging to the defendant, from the bank, and she took all the furniture belonging to him from her house and refused to tell the defendant her whereabouts and the whereabouts of his infant child. Defendant did not refuse to maintain and provide for her and their infant child but the conduct of the complainant made it impossible for him to do
20 because he did not know her whereabouts.

6. The defendant denies paragraph 6 as is alleged in the complaint and says on the contrary that if she is compelled to live upon the bounty of her parents, it is her own doing; that it was not at his advice and because of his actions towards her but on the contrary solely as a result of the advice of her parents.

30 7. The defendant admits paragraph 7 as alleged in the complaint except that part which states that he is making \$75.00 per week. This defendant says on the contrary that his salary is \$53.00 a week.

Defendant prays that the said bill be dismissed with costs.

JAMES J. FARLEY,
Solicitor for and of Counsel with Defendant.

Exhibit C.

Service of a copy of the within Answer is hereby acknowledged as of time on this 21st day of April, 1930.

JACOB VAN DER CLOCK,
Solicitor of Complainant.

10

EXHIBIT C.

Filed July 2, 1930.

IN CHANCERY OF NEW JERSEY.

Between

BABETTA R. MITTENBUHLER,
Complainant,

and

FRANK J. MITTENBUHLER,
Defendant.

*On Bill of
Complaint.*

20

*Report of
Advisory
Master.*

*To the Honorable Edwin R. Walker, Chancellor
of the State of New Jersey:*

In pursuance of an order of this Court made in the above-entitled cause, bearing date the 30th day of April, 1930, whereby it was referred to me, the subscriber, an Advisory Master, to hear for the Chancellor and report to him and advise what order and decree should be made therein. 30

I do respectfully report,

1. That Tuesday, May 27, 1930, at ten o'clock in the forenoon, at my office, No. 126 Market street, at Paterson, N. J., was fixed as the time 40

Exhibit C.

and place, Jacob Van Der Clock, Esq., solicitor for the complainant, appeared for the complainant, and James J. Farley, Esq., solicitor for the defendant, appeared for the defendant.

2. I proceeded to hear the cause,

- 10 a. The testimony of Babetta R. Mittenbuhler, Mable Van Lenten, William Speicer, Sr., Babetta Speicer and William Speicer, Jr., witnesses offered by the complainant, and of Frank J. Mittenbuhler, Joseph J. Clark, Joseph Solinsky, Estelle Bond and Elizabeth Thomas, witnesses offered by the defendant, was taken; the following exhibits were offered: Letters marked Exhibits P. 1; P. 2; P. 3; P. 4 and P. 5. The case was then continued to Wednesday, June 18, 1930,
- 20 when the testimony of Mrs. May Mittenbuhler, Frank J. Mittenbuhler and Elizabeth Thomas, witnesses offered by the defendant, and of Babetta Mittenbuhler, Emaline Torbet and Mabel Van Lenten, witnesses offered by the complainant, was taken and the following Exhibit was offered; copy of letter marked Ex. P. 6.

3. I do find and report,

- 30 a. The complainant, whose maiden name is Babetta Speicer, and the defendant, were lawfully married on the 21st day of April, 1921, as alleged in the bill of complaint.

b. That the defendant on or about the 24th day of January, 1930 left and abandoned the complainant and that she now resides with her parents in the City of Paterson, in the County of Passaic and State of New Jersey.

- 40 c. That the complainant was, at the time of filing this complaint, and still is, a bona fide resident of this State, residing in the City of Paterson, County of Passaic.

Exhibit C.

d. That one child, Frank, Jr. was born of this marriage and that said child is in the custody of the complainant.

3. In my opinion the child of said marriage should be committed to the custody of the complainant.

10

f. I am of the opinion that all of the material facts alleged in the bill of complaint filed in this cause are true.

g. I advise that a decree be made in accordance with the prayer of said bill of complaint and the *the* defendant pay to the complainant or her solicitor the sum of Fifteen Dollars per week for her support and maintenance and Five Dollars per week for the support and maintenance of their infant child in the custody of the complainant and that the defendant further pay to the complainant or her solicitor the costs of this suit to be taxed and a counsel fee of Two Hundred Dollars.

20

Respectfully submitted this 30th day of June, 1930.

J. W. DE YOE,
Advisory Master.

30

40

Exhibit D.

EXHIBIT D.

Filed July 2, 1930.

IN CHANCERY OF NEW JERSEY.

10	<i>Between</i> BABETTA R. MITTENBUHLER, <i>Complainant,</i> <i>and</i> FRANK J. MITTENBUHLER, <i>Defendant.</i>	}	<i>On Bill, etc.</i> <i>Final Decree.</i>
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20 This cause coming on to be heard in the presence of Jacob Van Der Clock, solicitor for and of counsel with the complainant, and James J. Farley, solicitor for and of counsel with the defendant, on bill, answer and oral proofs taken in open court, whereupon and upon duly considering the pleadings and proofs and hearing and considering the arguments of counsel, from all of which it now appears satisfactorily to the Chancellor that the complainant and defendant were lawfully married on or about the twenty-first day of April, A. D. nineteen hundred and

30 twenty-four; and that the defendant, without justifiable cause, abandons the complainant and separates himself from her and refuses and neglects to maintain and provide for her; and that the parties have their domicile in this State; and that the defendant was personally served with process within this State; it is thereupon, on this 30th day of June, A. D. nineteen hundred and thirty, by his Honor Edwin Robert Walker, Chancellor of the State of New Jersey,

Exhibit D.

ORDERED, ADJUDGED AND DECREED, that the defendant Frank J. Mittenbuhler, do pay to the complainant, or to her solicitor, the sum of fifteen (\$15.00) dollars per week, at the beginning of each and every week from the date of this decree until the further order of this Court, for her support and maintenance, and the sum of five (\$5.00) dollars per week, at the beginning of each and every week from the date of this decree until the further order of this Court for the support and maintenance of Franklin R. Mittenbuhler, infant child of the marriage, in the custody of the complainant; and it is further 10

ORDERED, ADJUDGED AND DECREED, that the said defendant Frank J. Mittenbuhler, do further pay to the complainant, or to her solicitor, the costs of this suit to be taxed, and also the sum of two hundred (\$200.00) dollars, which is hereby adjudged and decreed to be a reasonable counsel fee for the solicitor of said complainant; and that the said complainant do have execution for said costs and counsel fee according to the practice of this Court; and it is further 20

ORDERED, ADJUDGED AND DECREED, that either party be at liberty to apply, upon a future change of circumstances of the parties, for a variance or modification of this decree concerning the support or the maintenance of the complainant, as shall be just and equitable. 30

E. R. WALKER,
C.

Respectfully Advised,

J. W. DE YOE,
Advisory Master.

Exhibit E.

EXHIBIT E.

On page 12 of the direct examination Babetta R. Mittenbuhler:

10 Q On the 24th of January, 1930, what finally happened? A I got so scared, I was afraid of him, he choked me and he told me to get out and I went and took my belongings.

Q How long before did he choke you?

(Mr. Farley objects.)

A About the middle of January.

Q You then left on the 24th? A Yes.

Q You went home to your parents? A Yes.

On page 19, cross examination she testified as follows:

20 Q Did you sleep with your husband? A Yes, until I left him, Jan. 24th.

Q Did you tell your husband you were going?

A No, I took the furniture, I paid for half of it, and my clothes.

And on page 22 on further cross examination she testified as follows:

30 Q Would you be willing to forgive him now, would you go back with him? A No.

Q Why? A I don't intend to get choked again.

Q You testified that he choked you once in January? A In December.

Order to Show Cause.

ORDER TO SHOW CAUSE.

Filed

IN CHANCERY OF NEW JERSEY.

<i>Between</i> BABETTA R. MITTENBUHLER, <i>Complainant,</i> <i>and</i> FRANK J. MITTENBUHLER, <i>Defendant.</i>	}	<i>On Bill, etc.</i> <i>On Petition,</i> <i>etc.</i> <i>Order to</i> <i>Show Cause.</i>	10
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This matter being opened to the Court by Thomas Brunetto solicitor of the defendant and the Court having read the petition and affidavits verifying the same, together with the exhibits attached hereto, why the final decree made in the above entitled cause on June 30 and filed on July 2, 1930, should not be re-opened, reviewed, vacated and set aside; 20

IT IS, on this 23rd day of June, 1934, ORDERED that the complainant show cause before the Chancellor at Chancery Chambers, Passaic County Court House in the City of Paterson, New Jersey, on the 16th day of July, 1934, at 10:00 A. M., D. S. T., or as soon thereafter as counsel may be heard why an order should not be made in the above entitled cause reviewing, re-opening, vacating and setting aside the final decree made in the above entitled cause on June 30 and filed July 2, 1930; 30

It is further ordered that a copy of this order together with the petition, affidavits and exhibits upon which it is based, certified to as true copies 40

Order to Show Cause.

by the solicitor of the defendant be served upon
the solicitor for the complainant within five days.

LUTHER A. CAMPBELL,
C.

Respectfully advised.

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VIVIAN M. LEWIS,
V.-C.

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Answer.

ANSWER.

IN CHANCERY OF NEW JERSEY.

D77 P477

<i>Between</i> BABETTA R. MITTENBUHLER, <i>Complainant,</i> <i>and</i> FRANK J. MITTENBUHLER, <i>Defendant.</i>	}	10 <i>On Bill, etc.</i> <i>Answer.</i>
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*On Petition, etc., to Re-open Final Decree
and Dismiss Bill.*

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BABETTA R. MITTENBUHLER, the complainant in the above entitled cause answering the petition filed herein, duly verified, June 25, 1934, says:

1. She admits the allegations in paragraphs 1, 2, 3 and 4.

2. She admits that part of paragraph 5 wherein it is set forth that a final decree was entered in said suit in conformity with the Advisory Master's report. She denies the rest of said paragraph. 30

3. Answering paragraph 6 she admits that defendant was represented by the solicitor therein mentioned and she has no knowledge as to the other matters therein alleged.

4. Answering paragraph 7 she admits that the bill of complaint charged the defendant with desertion and abandonment, and she denies the rest of said paragraph. 40

Answer.

5. Answering paragraph 8 she admits that said defendant was represented by the solicitor therein mentioned, and she has no knowledge as to the other matters therein alleged.

10 6. Answering paragraph 9 she admits that part thereof wherein defendant alleges that he was cited for contempt and she has no knowledge as to the other allegations set forth in said paragraph.

7. Answering paragraph 10 she admits that there is some testimony attached to the petition filed herein but as to whether the same is correct or not complainant has no knowledge, and for greater certainty she asks that the original testimony be produced.

20 8. Answering paragraph 11 complainant admits that a decree was made on the date therein set forth, but as to the substance thereof complainant takes leave to refer thereto when the same shall be produced and she denies all the other allegations in said paragraph.

30 9. Complainant is advised and believes that said decree is agreeable to law and equity and prays that the petition filed herein may be dismissed with costs to be taxed in favor of complainant.

HARRIS J. WESTERHOFF,
Solicitor of Complainant.

Affidavit of Babetta R. Mittenbuhler.

IN CHANCERY OF NEW JERSEY.

D77 P477

Between

BABETTA R. MITTENBUHLER,
Complainant,

and

FRANK J. MITTENBUHLER,
Defendant.

On Bill, etc.

Affidavit.

10

*On Petition to Re-open, Review, Vacate and
Set Aside Final Decree and Dismiss Bill.*

STATE OF NEW JERSEY, }
COUNTY OF PASSAIC. } ss.:

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BABETTA R. MITTENBUHLER, being duly sworn,
according to law, on her oath says:

1. I am the complainant in the above entitled
cause; I have read the petition filed herein by
the defendant, Frank J. Mittenbuhler, duly veri-
fied June 25, 1934, and also the exhibits attached
to said petition.

2. I admit the allegations as set forth in
paragraphs 1, 2, 3 and 4 of the said petition.

30

3. Deponent further says that a final decree
was entered in said cause in favor of the com-
plainant, as alleged in said petition.

4. Deponent further says that said defendant
was duly represented by one James J. Farley,
as his solicitor, in said cause; that said cause
was tried in open court before Honorable J. W.
De Yoe, as Advisory Master, who heard all of
the testimony in said cause; that after the

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Affidavit of Babetta R. Mittenbuhler.

entrance of said decree defendant failed to comply therewith and deponent was obliged to have him brought before the Court for contempt, and at the time he was brought up for contempt he was represented by Mr. Edward O'Byrne, an attorney at law of the State of New Jersey, having an office in the City of Paterson; that thereafter on January 3, 1932, this Court made an order that the defendant pay to the complainant the moneys then in arrears and a counsel fee due to her former solicitor and also to her present solicitor; which said sums of money defendant paid and were in payment up to January 6, 1932; that defendant then pleaded that he was out of employment and could not make any further payments for the support and maintenance of deponent and the Court then suspended the payments insofar as this deponent was concerned until the defendant could secure employment, and ordered and directed said defendant to pay \$5.00 per week for the support and maintenance of his said son, Franklin J. Mittenbuhler, commencing January 11, 1932, which said sum has been paid.

5. Deponent further says that she has not received any moneys from her said husband since on or about January 8, 1932.

6. Deponent further says that thereafter she was informed by her solicitor, Harris J. Westenhoff, that one Lawrence Diamond, an attorney at law of the State of New Jersey, practicing in the City of Paterson, had called upon him and stated that he represented the defendant in this cause.

7. Deponent further says that during the month of October, 1932, she learned that her husband Frank J. Mittenbuhler, was employed and had been employed for some time and she

Affidavit of Babetta R. Mittenbuhler.

then made application to this Court for an Order directing him to pay her \$15.00 per week for her support and maintenance and to continue the \$5.00 per week for the support and maintenance of the infant child, and an order was duly made therein and said matter came on before Advisory Master De Yoe, and said Frank J. Mittenbuhler on November 23, 1932, did then and there testify, under oath, before Advisory Master, J. W. De Yoe, and he had not been working from the 8th day of January, 1932, to November 23, 1932; that said cause was then adjourned to December 19, 1932 and on December 19, 1932 said deponent presented an affidavit made by one Benjamin Toby, Treasurer of S. Gumpert & Co. of Brooklyn, N. Y., which affidavit alleged that the said Frank J. Mittenbuhler had been employed from January 11, 1932 to July 15, 1932 by said S. Gumpert & Co. at a salary of \$150.00 per month, a copy of said affidavit is hereto annexed and made part hereof.

8. Deponent further says that on December 19, 1932 defendant admitted that he had testified falsely on November 23, 1932 before Advisory Master De Yoe, that thereafter proceedings were commenced to adjudge said defendant in contempt of Court for committing perjury, and which said proceedings are now pending and have not been determined.

9. Deponent further says that she is destitute and without funds and has no means and is dependent upon her relatives for support, although she believes that her husband is still able to pay the \$15.00 per week.

10. Deponent further says that on March 9, 1933 an Order was made by Advisory Master,

Affidavit of Babetta R. Mittenbuhler.

De Yoe, which recited among other things "that so much of the aforesaid order, bearing date January 8, 1932 as suspends the weekly payment by defendant to the complainant of \$15.00 per week for her support and maintenance, be and the same is hereby vacated" and said defendant was in and by said order directed to pay to this deponent \$15.00 per week at the beginning of each week commencing November 1, 1932, and also \$5.00 per week for the support and maintenance of their infant son, Franklin J. Mittenbuhler, and a counsel fee, a copy of which said order was duly served upon said Frank J. Mittenbuhler, the above named defendant. Defendant has not complied with said Order and has not paid this deponent any moneys since the date above set forth.

11. Deponent further says that thereafter contempt proceedings were commenced against said Frank J. Mittenbuhler, the above named defendant, which proceedings are now pending and undetermined.

12. Deponent denies that the final decree made herein on June 30, 1930 and filed July 2, 1930 is erroneous and contrary to equity and that there is any error in any of the proceedings, that the report of said Advisory Master is founded upon the testimony as presented in said cause.

Deponent further says that the testimony attached to the defendant's petition is not all the testimony that was taken in said cause and does not truly state all of said testimony and the evidence presented.

BABETTA R. MITTENBUHLER.

Affidavit of Benjamin A. Toby.

Subscribed and sworn to before
me this 12th day of July, 1934.

GERTRUDE A. MOODY,
Notary Public of N. J.

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IN CHANCERY OF NEW JERSEY.

D77 P477

Between

BABETTA R. MITTENBUHLER,
Petitioner,

and

FRANK J. MITTENBUHLER,
Defendant.

*On Petition,
etc.*

Affidavit.

20

STATE OF NEW YORK, }
COUNTY OF KINGS. } ss.:

BENJAMIN A. TOBY, being duly sworn, according to law, on his oath says:

I am Treasurer of S. Gumpert Co., Inc.; that said S. Gumpert Co., Inc. is engaged in the manufacture of food products and baker's supplies, at 220 36th Street, Brooklyn, New York, and has been engaged in said business for more than 35 years last past. I have been Treasurer of said corporation since 1930 and was Treasurer in 1932.

30

I personally know Frank J. Mittenbuhler, the defendant in the above stated cause; said Frank J. Mittenbuhler was employed by said S. Gumpert Co., Inc. as salesman from January 11, 1932 to July 15, 1932, inclusive, and as such salesman

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Affidavit of Benjamin A. Toby.

the territory he covered for the purpose of selling products of our company was the eastern territory of Pennsylvania; that the salary of said Frank J. Mittenbuhler was One Hundred Fifty (\$150) Dollars per month and he was also allowed traveling expenses, that during the period
 10 hereinbefore mentioned while he was employed by said S. Gumpert Co., Inc. he was paid by it the sum of Nine Hundred Twenty-five (\$925) Dollars for wages and his traveling expenses during that period were \$1,117.88; said Frank J. Mittenbuhler was under my personal supervision and I know of my own knowledge that these moneys were paid to him. I have this date inspected the books of the company for the purpose of verifying the figures.

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BENJAMIN A. TOBY.

Subscribed and sworn to before me
 this 25th day of November, 1932.

MILTON L. SARNER,

Notary Public, Kings County.

(L. S.) Kings Co. Clk's No. 197, Reg. No. 4204.
 N. Y. Co. Clk's No. 792, Reg. No. 4-S458.
 Commission Expires March 30, 1934.

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Affidavit of Benjamin A. Toby.

STATE OF NEW YORK, }
COUNTY OF KINGS. } ss.:

No. 27267 Series A

I, JOHN N. HARMAN, Clerk of the County of Kings, and also Clerk of the Supreme Court for the said County, the same being a Court of Record, having a seal, DO HEREBY CERTIFY that Milton L. Sarner whose name is subscribed to the deposition or certificate of the proof of acknowledgments of the annexed instrument, a Notary Public in and for such County, duly commissioned and sworn, and authorized by the laws of said State, to take depositions and to administer oaths to be used in any Court of said State and for general purposes; and also to take acknowledgments and proofs of deeds, of conveyances for land, tenements or hereditaments in said State of New York. And further, that I am well acquainted with the handwriting of such Notary Public, and verily believe that the signature to said deposition or certificate of proof or acknowledgment is genuine.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the said Court and County, the 25th day of November 1932.

JOHN N. HARMAN,
(SEAL) Clerk.

Opinion of Advisory Master.

OPINION.

Filed.

IN CHANCERY OF NEW JERSEY.

77-477.

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Between

BABETTA R. MITTENBUHLER,
Complainant,

and

FRANK J. MITTENBUHLER,
Defendant.

Opinion.

20 *On petition to re-open, vacate and set aside
final decree.*

Harris J. Westerhoff, for complainant.

Thomas Brunetto, for defendant-petitioner.

STAFFORD, A. M.

30 Complainant filed her bill for maintenance
under Section Twenty-six of our Divorce Act
on the 26th day of February, 1930, in which she
charged that the defendant on the 24th day of
January, 1930, abandoned her without justifiable
cause and separated himself from her and re-
fused and neglected to maintain and provide for
her and the infant child of the marriage, who
was in her custody.

Defendant answered and denied the allegations
in the bill of complaint, and further charged that
the complainant had abandoned and deserted him
on the 24th day of January, 1930, and had re-
fused to return to him.

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Opinion of Advisory Master.

The cause came on to be heard before an Advistory Master of the Court of Chancery in the presence of Jacob Van Der Clock, solicitor for and of counsel with complainant, and James J. Farley, solicitor for and of counsel with defendant.

Upon considering the pleadings, together with the testimony of the complainant and her witnesses, and the testimony of the defendant and his witnesses, and upon considering the arguments of counsel of both parties, the Advisory Master advised a decree in favor of complainant and against defendant. This decree was filed July 2nd, 1930.

On October 31st, 1932 the defendant, Frank J. Mittenbuhler, filed a petition for divorce, alleging that his wife, Babetta R. Mittenbuhler, had deserted him in the month of January, 1930, and for more than two years had willfully, continuedly and obstinately deserted him.

His wife, Babetta R. Mittenbuhler, on December 1st, 1932, filed her answer in which she denied the allegations of desertion, and alleged further that on June 30th, 1930 in a cause wherein she was complainant, and her husband was defendant, it was adjudged and decreed that her husband, Frank J. Mittenbuhler, had abandoned her without justifiable cause, and had separated himself from her and refused and neglected to maintain and provide for her, and that the said final decree remained in full force, operation and effect because no appeal had ever been taken from said decree.

The husband, Frank J. Mittenbuhler, joined issue on the answer of his wife, Babetta R. Mittenbuhler, and the cause was referred to one of

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Opinion of Advisory Master.

the Vice-Chancellors of this Court and is still pending.

10 On June 23rd, 1934, which was four years after the decree in the maintenance suit had been filed, and eighteen months after the said Babetta R. Mittenbuhler had filed her answer to the petition for divorce filed by the said Frank J. Mittenbuhler, in which answer she had set up as a bar the decree in the maintenance suit, Frank J. Mittenbuhler filed his petition with this Court to vacate, review, re-open, reverse and set aside the decree filed in the above mentioned bill of complaint on account of certain errors and imperfections, in that: (1) the evidence adduced before the Advisory Master did not support his conclusions or the decree; (2) the bill of complaint charged actual abandonment, while the
20 testimony adduced proved constructive abandonment and desertion; (3) defendant, on account of some difficulty with his solicitor, was unable to obtain the file in the above maintenance suit, and on account of lack of funds was unable to obtain a transcript of the testimony until April 15th, 1934.

The wife, Babetta R. Mittenbuhler, filed her answer to the said petition, stating that the
30 decree is agreeable to law and equity, and prayed to have this petition dismissed with costs.

The testimony adduced before the Advisory Master undoubtedly proved constructive abandonment and not actual abandonment. The husband, however, was personally served with a subpoena ad respondendum, filed his answer, appeared at the hearing before the Advisory Master with his solicitor, cross examined the witnesses of the complainant, and introduced
40 testimony in his own behalf.

Opinion of Advisory Master.

No appeal was taken within the time limited for that purpose.

In *Oddo v. Saibin*, 106 N. J. Eq. 453, at page 458, it was held: "All the powers of this Court over its orders and decrees ceases upon the expiration of the time fixed by law for the taking of an appeal. The rule of law above stated is qualified by certain exceptions, such as newly discovered evidence or where some special equity appears, such as fraud and the like." Citing 1 Comp. Stat. 1910, page 450, paragraph 111; *Mitchell v. Mitchell*, 97 N. J. Eq. 298; *Watkinson v. Watkinson*, 68 N. J. Eq. 632; in re *Roberson*, 95 N. J. Eq. 672; *Nash v. Leiderman & Nash Building Co.*, 103 N. J. Eq. 287; *Grant Inventions v. Grant Oil Burner Corp.*, 104 N. J. Eq. 341. 10

The questions of newly discovered evidence or fraud do not enter into the discussion of this matter. The only question to be decided is whether or not the facts set forth in the petition constitute sufficient grounds of special equity upon which to rest such order as prayed for by the petitioner. 20

In weighing the merits of this petition I have kept in mind the expression of the Court of Errors and Appeals on the question of setting aside a decree of the Court of Chancery, as enunciated in the case of *West New York Improvement Co. v. Town of West New York*, 88 N. J. Eq. 571 (574), in which case the Court expressed itself as follows: "We confess a moderate degree of surprise that a Vice-Chancellor should undertake to set aside the solemn decree of the Court of Chancery which had not been appealed from, and still remained in full force and effect, simply because he thought it should never have been made. Such a proceeding 30 40

Opinion of Advisory Master.

amounts to the exercise by the Vice-Chancellor of an appellate power to review all of the decrees of the Chancellor, however ancient, which do not comport with his view."

10 Counsel for the husband contends that since the bill of complaint charges actual abandonment, and the proof undisputably shows constructive abandonment, therefore the Court had no jurisdiction of the subject matter and the decree therefore filed in the maintenance suit is a nullity.

Jurisdiction is the right to adjudicate concerning the subject matter in a given case.

20 "To constitute this there are three essentials: First. The Court must have cognizance of the class of cases to which the one to be adjudged belongs. Second. The proper parties must be present. And, Third. The point decided must be, in substance and effect, within the issue." *Munday v. Vail*, 34 N. J. L. 418, at page 422.

30 The Court had jurisdiction of the subject matter of actual abandonment; the testimony shows that while actual abandonment was pleaded the proof showed constructive abandonment. The Court did not direct the complainant to amend her bill of complaint and follow the procedure outlined in *Succherielli v. Succherielli*, 101 N. J. Eq. 30, at page 37.

The proper parties were present and the point decided was in substance and effect within the issue.

40 If this were a judicial error it "cannot be corrected after the time to appeal has expired in the absence of fraud or a mistake or newly discovered evidence or some special equity that would give the Court the discretionary power to

Opinion of Advisory Master.

make the order. * * * To disturb the decree, after the time to appeal has expired, in any manner except to correct clerical errors or relieve an innocent party from the effect of fraud or a mistake or because of newly discovered evidence would be tantamount to granting a rehearing or a review and it is well settled that a bill of review cannot be filed after the expiration of the appeal period, except in cases of fraud, mistake or newly discovered evidence." *Locker v. Locker*, 111 N. J. Eq. 123, citing *MacKenzie v. Standard Bleachery Co.*, 109 N. J. Eq. 429, at page 432. 10

The husband's appearance and submission at the final hearing would not have prevented his questioning on appeal the Court's jurisdiction of the subject matter. *Odoo v. Saibin*, 106 N. J. Eq. 453, at page 459. 20

If the husband were of the opinion that he had suffered substantial harm and his rights had been prejudiced by the said decree in the maintenance suit he should have filed his appeal within time and not sat idly by until after he had filed his petition for divorce against his wife, charging desertion, at which time he apparently discovered that the said decree in the maintenance suit was a stumbling-block to the prosecution of his pending divorce petition. 30

A decree in a maintenance suit is conclusive evidence of the desertion on the day specified in the decree. *Smith v. Smith*, 55 N. J. Eq. 222, at page 225; *Oertel v. Oertel*, 92 N. J. Eq. 327; *Popovics v. Popovics*, 98 N. J. Eq. 350; *Willis v. Willis*, 99 N. J. Eq. 486; and "at the end of two years therefrom a cause of action for divorce matures in favor of the wife and is operative as a bar to the husband's suit for divorce on the 40

Opinion of Advisory Master.

ground of desertion, in the absence of evidence that during such period of two years the husband manifested a sincere desire to resume marital relations with his wife and that he made a bona fide effort to effect to reconciliation with her." *Holst v. Holst*, 101 N. J. Eq. 682.

- 10 Petitioner's assertions that he was unable to secure his file from his solicitor does not constitute a special equity upon which an order might be based, because he could have secured copies of all the pleadings from the Clerk of this Court, and, while his financial inability prevented him from obtaining a copy of the testimony until April 15th, 1934 is an unfortunate circumstance for him, this likewise is not a special equity upon which an order might be based
- 20 in this matter.

- The decree in the maintenance suit may be reopened for the purpose of permitting an amendment to be made in the bill of complaint in order that constructive abandonment may be alleged and not actual abandonment, so that the allegations and the proofs will thereby agree. But I am of the opinion that there are no special equities present in this case entitling the petitioner to reopen the said decree for the purpose
- 30 of attacking the merits of the same, nor are there any special equities present entitling petitioner to have the said decree reversed, vacated and set aside.

 I shall therefore advise an order in conformance with the above views. Costs may be included in said order.

Supplemental Opinion.

SUPPLEMENTAL OPINION.

Filed

IN CHANCERY OF NEW JERSEY.

(77—477.)

10

Between

BABETTA R. MITTENBUHLER,
Complainant,

and

FRANK J. MITTENBUHLER,
Defendant.

*Supple-
mental
Opinion.*

*On petition to re-open, vacate and set aside
final decree.* 20

Harris J. Westerhoff, for complainant.

Thomas Brunetto, for defendant-petitioner.

STAFFORD, A. M.

Since filing the opinion in the above-entitled matter wherein I stated that I would advise an order permitting the re-opening of the decree in the maintenance suit for the purpose of amending the bill of complaint to charge constructive desertion and not actual desertion, so that the allegations and proofs would agree, upon further deliberation I have decided to change my conclusions in the matter and advise an order dismissing the petitioner's petition. 30

I am of the opinion that there are no special equities present entitling the petitioner to vacate, review, re-open, reverse and set aside the said decree filed in the maintenance suit. To conclude otherwise would be to create a sub- 40

Supplemental Opinion.

stitute for an appeal after the right to appeal had expired.

I shall therefore advise an order in conformance with the above view. Costs may be included.

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Decree of Dismissal.

DECREE OF DISMISSAL.

Filed.

IN CHANCERY OF NEW JERSEY.

Between

BABETTA R. MITTENBUHLER,
Complainant,

and

FRANK J. MITTENBUHLER,
Defendant.

On Bill, etc.

10

*On Petition
to Reopen,
etc. Final
Decree and
Dismiss Bill.*

*Decree for
Dismissal.*

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Frank J. Mittenbuhler, the defendant, having filed his petition herein to vacate, review, reopen, reverse and set aside the final decree made in the above-entitled cause on June 30, 1930, on account of certain alleged errors and imperfections set forth in said petition; an order to show cause having been made and served upon the complainant, Babetta R. Mittenbuhler, and the complainant having filed an answer to said petition alleging that the decree is agreeable to law and equity, and the Court having heard the argument of Thomas Brunetto, solicitor of Frank J. Mittenbuhler, the defendant and petitioner herein, and Harris J. Westerhoff, solicitor of the complainant, Babetta R. Mittenbuhler, and being of the opinion that there are no special equities present entitling Frank J. Mittenbuhler, the defendant and petitioner, to vacate, review, reopen, reverse and set aside said decree filed in said maintenance suit:

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Decree of Dismissal.

It is, thereupon, on this 26th day of November, 1934, ORDERED, ADJUDGED and DECREED that the application of said Frank J. Mittenbuhler, the defendant and petitioner, be and the same is hereby denied, and that the petition be dismissed.

- 10 It is further Ordered that the said defendant, Frank J. Mittenbuhler, pay to the said complainant her costs in these proceedings to be taxed, including a counsel fee of One Hundred Dollars, which is hereby allowed to the said complainant's solicitor, Harris J. Westerhoff.

LUTHER A. CAMPBELL,

C.

Respectfully advised,

- 20 BERNARD L. STAFFORD,
A. M.

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Babetta R. Mittenbuhler, for Petitioner, Direct.

TESTIMONY.

IN CHANCERY OF NEW JERSEY.

Between

BABETTA R. MITTENBUHLER,
Petitioner,

and

FRANK J. MITTENBUHLER,
Defendant.

*On Bill for
Separate
Maintenance.*

10

Hearing, Tuesday, May 27, 1930.

Appearances:

Jacob Van Der Clock, Esq., solicitor for petitioner.

20

James J. Farley, Esq., solicitor for defendant.

BABETTA R. MITTENBUHLER, a witness on her own behalf, being duly sworn, on her oath according to law, deposes and says:

Mr. Van Der Clock—Direct.

Q You are the complainant in this case? A Yes.

30

Q You're living at the present time with whom? A My mother and father.

Q Where? A At 83 No. 6th street, City.

Q How long have you lived in New Jersey?

A All my life but five years.

Q How old are you? A Twenty-six.

Q Are any children born of the marriage? A Yes, one, Franklin R. Mittenbuhler.

40

Babetta R. Mittenbuhler, for Petitioner, Direct.

Q And how old is he? A He's four years old.

Q Living with whom? A He's with me.

Q When were you married? A April 21, 1924.

10 Q By whom? A Rev. Vanderburgh in Paterson.

Q Were you a resident of Paterson at the time and was the defendant? A Yes.

Q After your marriage where did you go to live? A 43 E. 36th street, Paterson.

Q Who did that house belong to? A Mrs. Mabel Van Lenten.

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

20 Q Then where did you live? A 196 No. 7th street, Paterson for about a year and a half

Q And then where to? A 125 No. 7th street.

Q And after that, where? A 417 Florence avenue, Newark.

Q How heavy did you weigh? A Ninety pounds.

Q How heavy does the defendant weigh?

(Mr. Farley objects.)

30 A About a hundred and ninety-five.

Q You were married in the spring 1924; how did you get along together? A Fairly well until about four months after we were married.

Q What happened then? A My husband received a letter from his mother.

Q Do you know his mother's writing? A Yes.

40 Q I show you this letter, is that the letter you referred to? A No, that's my letter.

Babetta R. Mittenbuhler, for Petitioner, Direct.

Q I show you this letter, is that the letter referred to? A Yes.

(Offered in evidence and marked Exhibit P. 1.)

Q Under what circumstances did you see 10
this letter?

(Mr. Farley objects.)

A I found it in my husband's trouser pocket.

Q What was the appearance of the letter?

A It was in an envelope; the envelope was open and it looked worn.

Q Can you tell us approximately how long after the date of the letter and envelope that you found the letter? A Perhaps about a week. 20

Q Did you see the letter come to the house? A No.

Q With reference to the time you found the letter, what was the action or conduct of the defendant towards you?

(Mr. Farley objects.)

A He acted peculiar. 30

(Mr. Farley objects.)

Q What did he do? A He wasn't speaking.

Q What did you do or say to your husband with reference to the letter? A I asked him how it was he got a letter from his mother like that. He said he never saw the letter.

Q Did you tell him where you found it? A Yes, in his trouser pocket. He said I stole the letter. I said I found it but I didn't steal it. 40

Babetta R. Mittenbuhler, for Petitioner, Direct.

Q Is this the letter you found?

(Mr. Farley objects.)

The Master.

10 Q Did you show the letter to him? A No, I kept it; it was open, he read the letter.

Q How do you know he read it? A It was open.

Q How did he know what letter you were talking about? A It was the letter in his trouser pocket.

Q Was anything asked about the contents of the letter? A Yes, I said what right had his mother butting in. He said he never read the letter; he said it was a tampered letter.

20

Mr. Van Der Clock continues—Direct.

Q He said you stole it? A Yes.

Q Did you tell him where you got it? A Yes, in his trouser pocket.

The Master.

30 Q What day did you find that letter? A I don't know, about four months after we were married, in August.

Mr. Van Der Clock continues—Direct.

Q Did you have any discussion with the defendant with reference to that letter? A Yes.

Q What was his treatment after you talked to him about the letter and until the separation? A We had an argument over the letter.

40 Q Where were you living at that time? A 43 E. 36th street on the second floor in Mrs. Van Lenten's home.

Babetta R. Mittenbuhler, for Petitioner, Direct.

Q Is she present in the room now? A Yes, she's present in the room. We had an argument over the letter and he twisted my arm out of its socket. I fainted and I was lying on the bed and Mrs. Van Lenten came to my assistance and she took care of me. I was laid up about a week.

Q After that you continued to live at Mrs. Van Lenten's house for over a year? A Yes. 10

Q What were his actions towards you during that period of time? A Argument after argument.

Q What were his habits with reference to coming home and staying out? A He came home and if supper wasn't ready, we had an argument over it. He started travelling; we were married about seven months; he used to come home about seven o'clock. 20

Q After that did he make any reference to your home? A He called it a god damn dump.

Q How did he act toward you with reference to kindness or affection? A After we left Mrs. Van Lenten's house he told me he didn't love me any more. When we lived at 196 No. 7th street he punched me in my mouth.

Q Did you try to be kind and affectionate to him? A Yes, I couldn't understand. 30

(Latter part stricken out.)

Q When you were affectionate to him what would he do? A Push me away. If I ever showed him any affection he'd push me to the floor, tell me to keep away and if I didn't, he'd give me something I would carry to my grave, the sooner I would get it through my head, the better, he'd rather blow his brains out than live with me. 40

Babetta R. Mittenbuhler, for Petitioner, Direct.

Q Did that continue the entire time he and you were in Paterson? A Yes, and while we were in Newark.

Q Did the defendant discuss with you his family?

10 (Mr. Farley objects.)

A Yes, he told me that no skirt could ever come between his mother and him; I should mind my own business, where his mother went was none of my affairs. He said he didn't love me any more and it was worth \$50.00 to him rather than live with me; I was dead as far as he was concerned.

20 Q While you lived in Paterson and while you were living in the Van Lenten home, did the defendant call you any names? A Son of a bitch, whore, bastard, everything that ever came to his mind; he frequently called me these names.

Q Tell us how you came to move to Newark? A My husband was travelling for four years and he was permanently stationed in Newark. We thought by moving there it would be different. After he was eating at his own table he'd feel different. He said, not even if I went to Newark would he show me any more love than 30 he did now; he was through and the sooner I got it through my head, the better, he had no more love for me.

Q Did he indicate at that time or say what he was going to do?

(Mr. Farley objects.)

A That he'd give me a dollar and make me like it. I bled him when he was on the road and he'd make me like it. 40

Babetta R. Mittenbuhler, for Petitioner, Direct.

Q Was there any discussion between you about you getting out?

(Mr. Farley objects.)

A He said he would treat me no different.

Q At that time was there anything else that the defendant said to you, did you tell all? A He said that I was to understand he would treat me no different and that he had no more love for me. 10

Q You went to Newark? A Yes.

Q When? A It was in March, 1929.

Q You lived with him in Newark until when?

A January 24, 1930.

Q After you went to Newark was there any difference in the treatment of the defendant to you? A No, he still called me names. 20

Q Do you remember the month of June, 1929?

A Yes.

Q Did you visit your mother during that time? A Yes.

Q Having in mind June, 1929, on the visit to your mother did anything occur at that time?

A Yes.

Q What was your condition at that time physically? A I was a physical wreck and mentally and nervous. 30

Q You say your mother spoke to you about it? A Yes.

Q Did your mother ask you anything at that time?

(Mr. Farley objects.)

A Yes.

Q Did you answer your mother? A Yes. 40

Babetta R. Mittenbuhler, for Petitioner, Direct.

Q Were you accustomed to going to your mother's home with your husband's permission?
A Yes.

Q Did the defendant go there on that occasion? A He took me there; my father had a talk with him.

10 Q Were you present? A Yes.

Q What did your father say to the defendant in your presence and what did your husband say in reply? A My husband called for me about twelve o'clock that evening and my father came to the door of the car and he said, "Hello, Frank, how is it you and Betty can't get along?" My husband said, "There's two sides to the story." My father said, "Is it the work, if it is, give it up and I'll help you along, but I ask you
20 to be a man." My husband replied, "I am a man." My father said for the child's sake, couldn't we get along, there was a little fellow there. My father tried to find out the trouble between us and he wouldn't give him any information.

Q Was there anything else said by the defendant? A He said no one could make him live with a woman he had lost all love for.

Q Did anything take place in the latter part
30 of July or August, 1929? A My husband went on a fishing trip but I don't know with whom. I was calling him back and wanted to caress him but he rejected me.

Q How long was he gone? A About a week.

Q Do you remember July 4, 1929? A Yes.

Q Were you home on that occasion? A Yes.

Q Did you see the defendant's mother? A Yes, at my house.

Q What did she say? A If I wasn't satisfied
40 in my own home, why the hell I didn't get out.

Babetta R. Mittenbuhler, for Petitioner, Direct.

Q Was the defendant there? A Yes, he was. "Frank is too damn good for you anyhow." The fight would have to be stopped, she said, otherwise he would have to come home, he was still her son. My brother was there, too.

Q During the entire talk by his mother, did your husband stop her? A No.

10

Q Do you remember September 1929? A Yes, he went on a business trip with Mr. Burns for two weeks. I went to my mother's; he took me there.

Q On your way up to your mother's what were you doing? A I was pleading; I asked him why he treated me so, if there is anything I can do better. He said, "I hate the God damn sight of you."

Q Was there anything else said by the defendant at that time to you? A He hated the looks of me, if I didn't start something, he would, as long as I could stand it, he could stand it.

20

Q And regarding finances? A He said he would give me a dollar a day and make me like it.

Q Did you ever go out with other men during your married life?

(Mr. Farley objects.)

30

A No.

Q Did you ever have any trouble with your husband with reference to any other man? A No.

Q Having that in mind, was anything said about that? A I should go out with other men, I'd have to go sooner or later.

Q Why didn't you say so?

(Stricken out.)

40

Babetta R. Mittenbuhler, for Petitioner, Direct.

Q Do you remember October, 1929? A He told me to get out.

Q Did you get out? A No.

Q What did he say? A He would make it so damn hot for me that I'd have to get out.

10 Q Did he say anything else to you? A He wouldn't speak, he wrote notes.

Q Do you know his handwriting? A Yes.

Q I show you this piece of paper, is that in his writing? A Yes, I found it on my buffet in the dining room.

(Exhibit P. 2.)

Q I show you this note, is it in his handwriting? A Yes, I found it in the same place on the buffet.

20

(Exhibit P. 3.)

Q Is it in answer of the note on the same piece of paper? Is it in your handwriting? A Yes.

Q I show you this paper. The lead pencil handwriting, is it yours? A Yes.

Q On the back of it in ink, whose writing is that? A My husband's.

30 Q Is the writing in ink in answer to the note in pencil?

(Exhibit P. 4.)

40 Q Referring to the note about "Frankie"—the present—will you explain what you did on that occasion? A I bought a shirt and a tie for my husband's birthday, October 10, 1929. I laid it on the buffet in the dining room with a birthday card and I wrote on it, "From Franklin." When I got up in the morning, I found the following note.

Babetta R. Mittenbuhler, for Petitioner, Direct.

Q During this period of time, did you receive other notes of a like nature from the defendant? A Yes, but I destroyed them; there were about two or three a week from October to January, when I left.

Q Did he have any communication with you whatever during that time? A No.

10

Q Did you attempt to speak to him? A I did.

Q Did you have intercourse with him during that time? A Very seldom, not since November, 1929.

Q How did you spend your evenings from October to January? A With my little boy. He'd come home two or three in the morning; he didn't speak to me at all. If I was making supper he'd make insinuations to the boy, "As soon as she gets it through her head to get out, the better." He hated the looks of me. If I made any attempt to speak to him, he'd give me something to carry to my grave.

20

Q Anything take place in December, 1929? A He came home about three o'clock in the morning. He wanted intercourse and I was menstruating. He wanted me to put it in my mouth and I started to scream and he choked me until I was unconscious. He was watching me when I came to and I said, "That's enough." He said, "I'll kill you altogether." I went to Mrs. Flish and showed her the marks on my throat.

30

Q Was your husband carrying insurance? A He dropped it.

Q How do you know? A I had a Christmas fund and asked if he would carry it and he said he didn't intend to live with me.

Q What happened on the 29th? During December what were his actions other than what you described? A He acted like a wild man.

40

Babetta R. Mittenbuhler, for Petitioner, Direct.

Q In what way? A I was afraid of him, I no longer attempted to talk to him; my health was very bad, I was under the doctor's care from November on.

Q What Dr.? A Dr. Knapp.

10 Q What were you being treated for? A Lacerated cervix due to childbirth.

Q On the 24th of January, 1930, what finally happened? A I got so scared, I was afraid of him, he choked me and he told me to get out and I went and took my belongings.

Q How long before did he choke you?

(Mr. Farley objects.)

A About the middle of January.

20 Q You then left on the 24th? A Yes.

Q You went home to your parents? A Yes.

Q Had your husband ever visited there prior to 1930? A No.

Q Did he ever call on your parents with you before? A Yes.

Q So he knew where your parents lived? A Yes.

30 Q Having in mind, January, 24th, and up until you started this suit, did the defendant come to see you, send you any money for yourself or the child, did he write you any letters, or did he send anybody to see you? A No.

Q How long were you without funds? A Three months.

Q What was your condition of health physically or mentally when you left on Jan. 24th? A A wreck.

Q Are you under the Dr.'s care? A Yes.

Q Is anything going to happen to you soon? A Yes.

Babetta R. Mittenbuhler, for Petitioner, Cross.

Mr. Farley—Cross.

Q When were you married? A April 21, 1924.

Q You were in love with your husband when you married him? A Yes.

Q He was kind to you up to that time? A 10 Yes.

Q Do you remember your marriage night? A Yes.

Q You went to a hotel? A Yes, Hotel Pennsylvania.

Q Prior to going there where were you? A We stopped at Passaic for lunch.

Q Anybody present at that time? A Yes, my husband's sister and her husband.

Q Any conversation there between you and 20 your husband? A Not that I remember.

Q Did you have any argument? A No.

Q Did you use any bad language? A No.

Q Did you find any fault with him? A No.

Q When you went to the hotel that night, did you have an argument? A A little argument, it didn't amount to anything.

Q You had little arguments all along during your married life, didn't you? A They weren't 30 little arguments.

Q You were the instigator of them? A No.

Q How much did you weigh when you married? A Ninety pounds.

Q What do you weigh now? A Eighty-five to ninety pounds.

Q You lived happily for the first four months of your married life? A Yes.

Q Was your husband in love with you up until then? A As far as I know of. 40

Babetta R. Mittenbuhler, for Petitioner, Cross.

Q What made him change, do you think? A The letter from his mother written the middle of August, 1924.

Q Has your husband continued to harp on that letter ever since? A No, he tried to patch it.

10 Q Did you quarrel with him about that letter ever since? A It was the cause of our trouble.

Q There were lots of quarrels about it? A Yes.

Q He didn't read the letter? A He said he didn't.

Q You made an affidavit in this preliminary application you made before this Court for alimony? A Yes.

20 Q Did you say you saw him reading the letter in your affidavit? A Yes.

Q The scene you described, when did it take place after the receipt of the letter? A Three or four days after.

Q Just what took place at that time? A We had arguments, one thing led to another. He twisted my arm out of the socket.

Q You knew it was out of the socket? A Yes.

30 Q Did you go to the Dr. to have it fixed? A It has been out several times since.

Q Never went out before? A No.

Q Was that the beginning of your fights? A Yes.

Q How long did these fights continue? A Until we moved to 196 No. 7th street after living at 43 E. 36th street.

Q Were you jealous of your husband? A No.

40 Q You wouldn't remember whether he went out with other women? A Yes.

Babetta R. Mittenbuhler, for Petitioner, Cross.

Q Did you have any arguments over that? A Yes.

Q Did you have any arguments over child-birth conception? A Yes, my husband didn't want any more children.

Q Did you want them? A Yes.

Q Did you ever take any precaution? A No, 10
never in all my life.

Q How would you become affectionate to your husband, so that he would quarrel with you? A He was always quarrelling. He always acted peculiar and I went around to him like a wife should be and he told me to keep away, he didn't love me anymore.

Q Was this in 1924? A No, later.

Q What were the causes in 1924? A His 20
mother.

Q What did you call his mother in his presence? A Nothing but a trouble-maker.

Q No bad names? A No.

Q He called your father something? A Yes, a "bitch bastard."

Q Then what did you call his mother? A Nothing.

Q Did you ever swear? A After I married.

Q You never got drunk? A His sister had a party and they forced drinks on me. My husband always said I wasn't a sport. 30

Q It only happened once? A No, on two occasions.

Q Were you really drunk? A I was sick from it.

Q But you did drink? A I can stand only very little.

Q What did you get sick on at his sister's house? A High-balls.

Q You say you were fond of them? A No. 40

Babetta R. Mittenbuhler, for Petitioner, Cross.

Q Didn't you drink them with a boy friend in the other room? A I have no boy friend.

Q Didn't you have any liquor in an adjoining room? A In the presence of my husband.

Q But you often drank? A No.

10 Q How often would you say you drank altogether? A Once a year.

Q I am going to read paragraph two of your affidavit, is it true? A Yes.

Q "I was never drunk in my life," is that so? A Yes.

Q "I do not drink," is that so? A Yes.

Q "Only one occasion at the celebration of my husband's sister," is that right? A No.

Q That is true? A We never had any drink in our house.

20 Q You said only on one occasion were you affected by drink and, on that occasion, it was at your husband's sister's celebration? A Yes.

Q So you were drunk? A He gave it to me.

Q But you were drunk? A What do you call drunk?

Q Were you intoxicated? A No, I was sick.

Q When you took a couple of drinks you knew what you were doing? A Yes.

30 Q Isn't it a fact you have told your friends you are fond of liquor? A No.

Q You also drank liquor in your own home? A No.

Q Your husband came home and found you drunk on many occasions? A No, that's a lie.

Q Your husband brought you to your mother's house frequently? A Yes.

Q He had no objection to your going there? A Yes.

40 Q He always treated your mother and father kindly? A Yes.

Babetta R. Mittenbuhler, for Petitioner, Cross.

Q Did you always treat his mother with kindness? A Yes.

Q Never swore at her or called her bad names? A No.

Q How long have you been sick? A It was in November I went to the doctor.

Q You were always sick, weren't you, you were never strong? A I couldn't say I was sick.

Q You were nervous, high-strung? A Yes, at times, according to the situation.

Q You were given to peculiar ideas as a result of your nervousness? A No.

Q You often had illusions? A No.

Q Did you never say you felt like committing suicide? A No.

Q Didn't you attack your husband without reason? A No.

Q Didn't you accuse him of going out with women when you knew, in your heart, he was not? A No.

Q How did this nervousness affect you? A He knew I was nervous.

Q Did it bother you mentally, did you sleep at night? A Yes.

Q Did you sleep with your husband? A Yes, until I left him, Jan. 24th.

Q Did you tell your husband you were going? A No, I took the furniture, I paid for half of it, and my clothes.

Q You left eighteen soiled shirts? A No.

Q Who left the shirts? A I don't know.

Q Who was the last one in the house? A Mrs. Van Lenten.

Q Did you know there were eighteen soiled shirts in the house? A No.

Babetta R. Mittenbuhler, for Petitioner, Cross.

Q Were there also clean shirts for him? A Yes.

Q He never had to go and buy shirts? A Not when he was home.

Q You spoke to your father about the fight in 1929? A Yes, I spoke to him before that.

10 Q Did you tell him what happened prior in your home? A Yes.

Q Your father had never spoken to your husband before about it? A He attempted to do it but my mother prevented him.

Q Did you tell your mother and father about this inhuman treatment that happened in 1929? A Yes.

Q Are you sure? A Yes, I'm sure.

20 Q You testified that this happened in Dec. 1929? A Yes.

Q Isn't it a fact that your father didn't say anything to your husband after Dec. 1929? A He never spoke to him, he wouldn't go in the house.

Q When was the last time your husband spoke to your mother? A April, 1929.

30 Q When your father and Mr. Mittenbuhler had the discussion in your presence, what did your father say with reference to what he was going to do to Mr. Mittenbuhler for Mr. Mittenbuhler's remarks to him? What conversation took place at the end of the story or the quarrel between your father and husband? A He said if it took his last cent he would make him do what was right.

Q Did your father say anything about the Lodge? A No.

40 Q Did he say anything about Mr. Mittenbuhler's job? A Yes, he would see he lost it if he didn't do what was right.

Babetta R. Mittenbuhler, for Petitioner, Cross.

Q Didn't he tell him something that he would bring Lodge trouble on him? A No, I'm positively sure.

Q How long before did you stop talking to your husband? A I never stopped talking to him.

Q Isn't it a fact that you used to stop speaking to him for periods at a time? A No. 10

Q He rarely came in the house, but you would quarrel with him? A No.

Q When was the last time you and your husband had sexual relation? A November.

Q You slept with him until you left? A Yes.

Q How were you getting along over the holidays—Christmas? A We weren't speaking. I made a little gift for my son to give him, Frank wanted to give it to him; my husband said he didn't want it. 20

Q You slept with him that day? A Yes.

Q You were still in love with your husband? A No.

Q When did your love grow cold for your husband? A After he started to swear at me.

Q That was a long time before? A No, during 1929.

Q What part of 1929? A He told me he didn't want my love, the sooner I got that through my head the better. 30

Q When did you get cold towards him or indifferent? A After October.

Q Prior to that you had'nt expressed any desire of leaving him? A No.

Q You loved him up to that point? A Yes.

Q Were you willing to forgive him up to that time? A Yes.

Q These really were the only things he did from October until you left that you were really mad at him for? A Yes. 40

Babetta R. Mittenbuhler, for Petitioner, Cross.

Q Would you be willing to forgive him now, would you go back with him? A No.

Q Why? A I don't intend to get choked again.

Q You testified that he choked you once in January? A In December.

10 Q He had choked you before that? A That was the first time he choked me, he has hit me before.

Q Would you say that your nervous condition had gotten to such a place where you needed a change in January? A No.

Q Didn't you have any conversation with your father and mother about leaving Mr. Mittenbuhler? A Yes.

20 Q What did they advise you? A They said it was up to me.

Q Was he always willing and ready to cohabit with you? A No.

Q During the past? A Yes.

Q During the time after you married your husband and up until the time you left, what were your sexual relations, satisfactory? A Yes.

30 Q Would your husband have relationship when you cared to at all times? A Yes.

Q What happened after October that you didn't continue to cohabit? A He didn't want to have anything to do with me.

Q You slept with him? A Yes.

Q When was the last you had intercourse? A Possibly in November.

Q What did you say you were suffering from? A Lacerated cervix, the result of childbirth.

40 Q Was it caused by a miscarriage? A No, by childbirth.

Babetta R. Mittenbuhler, for Petitioner, Cross.

Q Your husband gave you money? A Ten to fifteen dollars a week.

Q What else? A He paid the rent, light and gas.

Q He provided for your clothes? A Not before I left. He wouldn't give me money, but during the course of our married life he did provide for the boy. 10

Q While you lived in the house with Mrs. Van Lenten you testified in your affidavit concerning some arrangement you had with a toilet, what was it? A We had a night pail; I used it at night and my husband.

Q Was that the same practice as downstairs? A Yes.

Q It was your general custom to excavate that pail in the morning? A Yes. 20

Q Paragraph Three, is that so? A Yes.

Q What was the purpose of you putting that in your affidavit? A My landlady put it in her affidavit.

Q I show you your signature, is that your signature? A Yes.

Q I show you paragraph Three, which I am referring to? A Yes, I did say it.

Q Why did you put it in? A He wouldn't put it in. 30

Q Was it to discredit your husband? A Yes.

Q During these quarrels you never lifted your voice? A At times.

Q You'd be excited about it and got back at him, didn't you? A At times.

Q Why did you say in your affidavit, paragraph Three, "I never lifted my voice in answer to the defendant." Did you mean that? A At times I did lift my voice and at times I didn't. 40

Babetta R. Mittenbuhler, for Petitioner, Cross.

Q That you never lifted your voice is not correct? A Yes and no, not, it's not correct.

Q Isn't it a fact that the only time your husband ever laid his hand on you was in 1924? A No.

10 Q How often did he lay his hands on you? A When he came home once he would come to bed. He slept in the parlor on the tete.

Q You were away at that time? A No, when we lived in Newark; he told me to keep away.

Q You continued to live with him? A Yes.

Q You weren't afraid of him? A Not then.

Q When were you afraid of him? A After we moved to Newark.

20 Q You continued to sleep with him? A Yes, I was afraid of him and didn't speak to him. He asked me not to, it was in September we stopped. I spoke at times but he told me to keep my damn mouth shut.

Q How many times altogether did he strike you? A I don't remember, often enough that I had bruises on my body.

Q Did you ever fall down while in the house? A No.

30 Q You said you didn't take liquor in the house? A No.

Q What did you tell him when he said he was through? A That he should get out, that I wouldn't get out without legal advice.

Q Did you tell him you were going? A No, I was afraid to speak to him.

40 Q You went to some bank and drew out money there in your name? A Yes, \$300.00 I had saved. I took it in October or November for the protection of my boy. He wasn't giving me money, I had no clothes and I needed medical

Mabel Van Lenten, for Petitioner, Direct.

attention. I saved it myself, it was in his name and in my name. I had access to it.

Q You didn't tell him you were drawing it?

A No.

Q How much did you leave? A A balance of a dollar.

Q You intended in October to leave? A I didn't expect to stick it out all my life. 10

Q When did you first go to the doctor? A November 19th.

Q Did you have any conversation with anybody wherein you stated that your purpose was to get a divorce from your husband? A No.

MABEL VAN LENTEN, a witness produced by the petitioner, being duly sworn, on her oath, according to law, deposes and says: 20

Mr. Van Der Clock—Direct.

Q Are you related to the petitioner? A No.

Q How long have you lived in Paterson? A Forty-eight years, all my life.

Q When did you first become acquainted with the petitioner and defendant? A When they came as bride and groom to live in the rooms around the Easter holidays, the same year they were married. 30

Q What floor did they occupy? A Second floor, 43 E. 36th street.

Q Do you still live there? A Yes, I own the house.

Q You saw them every day? A Yes.

Q Were you in her house? A Yes, we were very friendly. 40

Mabel Van Lenten, for Petitioner, Direct.

Q Up until July of that year how did the petitioner appear? A She seemed to be happy and he seemed to be happy.

Q What happened? A One day she came down crying and she had a letter.

10 Q Is that the letter?

(Showing Exhibit P. 1.)

A Yes, it was open and all crumpled and in an envelope.

Q From that time on, while they lived at your house, what was the appearance of the petitioner? A Nervous, wondering why he didn't come home for his supper when it was ready.

20 Q Did anything take place shortly after you saw this letter? A He went to his mother and I had to 'phone for her people. She was very excitable.

Q After the receipt of the letter did you ever hear the defendant's voice? A Yes, she once moved the clock and he tore two of her hats.

Q On this occasion did you see the defendant that day? A Yes, after he went out and took the car out, he ran off.

30 Q Did anything occur to him while he rushed out? A I don't know, I saw him get in the car.

Q What did he do? A It wasn't the night he got the letter, he fell in a mud puddle.

Q How long did they live at your home? A About a year and a half.

Q You were frequently in their home? A Yes.

Q How did she take care of her house? A Very fine for a young girl, very clean.

40 Q Was there something said about a pail to excavate? Who emptied that pail? A His wife.

Mabel Van Lenten, for Petitioner, Direct.

Q Did you ever see the defendant empty it?

A No.

Q Did you see her every day while they were living there? A Yes.

Q How about his meals? A Yes, she made them.

Q Did you keep in touch with the petitioner?

A When Frank called me up.

Q After they moved Frank called you up?

A Yes.

Q Did you ever see her drink intoxicating liquor? A No.

Q Did you ever see her under the influence of liquor? A Positively no.

Q Do you remember August, 1924? A Yes.

Q Tell us what you heard and what you observed? A I was in bed at nine o'clock. There was such a racket, screaming, everything. I didn't do anything, but I listened until he knocked for me to come upstairs.

Q You were downstairs, and you first heard all this racket, and heard the petitioner screaming. As a result, you went upstairs? A Yes.

Q Where did you find the petitioner? A He opened the door and I asked what was the matter. He said "We had an argument." She lay on the bed unconscious, she didn't know me, she couldn't raise her arm. He said she hurt her arm. She was unconscious for about five or ten minutes.

Q How long was she incapacitated after that?

A Five days or a week.

Q From that time on until they moved, did you hear the defendant's voice raised often?

A Yes.

Q Did you ever hear him curse or swear?

A Often.

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Mabel Van Lenten, for Petitioner, Cross.

Q What did you notice about her condition until they moved? A Not so well.

Q Did you say anything to the defendant when you found her in that condition? A I said if my husband came upstairs he'd break his neck abusing a little girl like her.

10

Q Did you go anywhere in January, 1930? A Yes, I went working for her, helped her pack her clothes.

Q What was her condition? A Very nervous.

Q Who did the packing? A I did, I packed the dishes and the laundry.

20

Q Were there eighteen shirts? A No, I wrapped her things and Franklin's things around the dishes. There were about seven shirts and three which Frank would never wear, and four or five shirts that he would wear. I put them in a sheet and in a closet.

Q Did you leave any note of any kind? A Nothing.

Mr. Farley—Cross.

Q When did you first see the letter? A I saw it in the morning when she came crying.

30

Q You had never seen it before that? A No.

Q She showed it to you? A Yes.

Q It was open? A Yes.

Q Did she tell you the contents? A No, I read it, she was too nervous.

Q She was pretty nervous at that time? A Yes.

Q How did she conduct herself when she got the letter? A Very nervous.

40

Q Did she raise her voice? A She was very nervous, she was crying.

Mabel Van Lenten, for Petitioner, Cross.

Q Was she standing around, sitting down?

A She was weak, very nervous, she sat in a chair.

Q Had you ever seen her that way before?

A No.

Q Was she nervous before she left your house? A No. 10

Q That letter changed her whole life? A I don't know.

Q You said she was a nervous and mental wreck. A I said she was nervous.

Q A physical wreck? A Not when she left my house, but when I saw her in January.

Q Wasn't she, at the time she left your house, a complete nervous and physical wreck? A She was nervous.

Q Paragraph Six of the affidavit. You signed 20
an affidavit for Mr. Van Der Clock, April 5, 1930.
Is this affidavit correct? A Not when she left
from my house, but the time I helped her move
from Newark she was very sick.

Q Did you see Mr. Mittenbuhler read that letter? A No.

Q Then why did you say in your affidavit,
paragraph Three on page 2, "The letter was
read by the defendant?" A It must have been
read, it was opened. 30

Q How do you know it was in his possession?
A It was old, crumpled.

Q How do you know it was in his pocket?
A His wife told me, she wouldn't tell an un-
truth.

Q You knew that he read the letter because
it was opened and crumpled? A Certainly.

Q Do you know of your own knowledge
whether he read the letter or not? A No, not
of my own knowledge. 40

Mabel Van Lenten, for Petitioner, Re-direct.

Q What do you mean by "blind staggers?"

A He ran and fell in the mud, he was so mad.

Q How many times did you see Mrs. Mittenbuhler drink liquor? A Never.

Q Why did you say so? A Because she drank a glass of beer in the presence of her husband and my husband, they all took it.

(Last part stricken out.)

Q How long had it been between the time that Mr. and Mrs. Mittenbuhler left your house and you next saw her? A I just don't remember. I saw her when she was sick and Frank called me.

Q You saw her then? A Yes.

Q Why did you say in paragraph Eight of your affidavit you didn't see her? "We haven't been in touch with each other." A I didn't say that, I've met her different times.

Q You know she never drank during that period? A No.

Q As an indication of what the petitioner did, do you mean you saw everything? A No, I smelt.

Q Did you see him use the pail? A No.

Q Then the affidavit isn't true? A No.

30

Mr. Van Der Clock—Re-direct.

Q Did you ever see him use the outside toilet?

A No.

William Speicer, for Petitioner, Direct.

WILLIAM SPEICER, a witness produced by the petitioner, being duly sworn on his oath according to law, deposes and says:

Mr. Van Der Clock—Direct.

Q You are the father of the petitioner? A 10
Yes.

Q Where do you live? A 183 No. 6th street.

Q How long? A A few months.

Q Where before that? A 103 No. 7th street.

Q Do you remember your daughter's marriage? A Yes.

Q After the summer of 1924 did your daughter visit your home a great deal? A Every Saturday.

Q How did she act? A Kind of quiet, she didn't say much. 20

Q What was her condition? A She didn't look good to me.

Q Do you remember the month of June, 1929? A I think so.

Q The last time you talked to your son-in-law? A Yes.

Q Why did you talk to him about your daughter then? A He brought them Saturdays at four o'clock. Then he would return around 12 o'clock when the whole family was asleep. Lots of times we had to call him up, my daughter said she couldn't understand it. I kept back but that night I waited until he came and it was after 12 o'clock and I walked over to the car and I said, "Say Frank, what's the idea?" He said, "Listen, there's two sides to the story." I said, "If you don't like the job, quit the job, I can keep you and your family or try to get a job in Paterson." He said, "Nobody can make me live with a woman if I don't want to." I 40

William Speicer, for Petitioner, Cross.

said, "If you think it can be done so easy, I'll be behind her." Then he went off and I slammed the door. She's lived with me since January, 1930 with her child, I take care of them.

Mr. Farley—Cross.

10

Q What did you threaten you would do to him? A Nothing.

Q You heard your daughter say you did say something? A No, maybe she didn't understand it right. If I said it, maybe I would see the headquarters about it, I'm not sure.

Q Then your daughter lied? A Yes.

Q Did you tell your son-in-law that you would use your Lodge connections to destroy him? A No, we don't use such language.

20

Q They got along good together? A Never got along good together, they can't agree, he always started an argument.

Q Was the wife free from any fault herself? A More or less, I brought up my child and I know what she is.

Q Did they both quarrel? A He was the most of it. Everything was wrong, they had it made up, someone had to go, she had to get out; maybe it was his mother. Right after they were married they set traps for her. They forced the liquor into her. My daughter never drank any in my home.

30

Q What was the condition of your daughter's health, how many pounds did she weigh? A A little over a hundred; she was a healthy girl when she married.

Q Did you notice her failing since her marriage? A Not getting better.

40

Q Was she nervous? A Yes.

William Speicer, for Petitioner, Cross.

Q Did she ever have any quarrels with you?

A No.

Q These things she complained of, what were they? A Because he treated her like a dog, bring the family at four o'clock and then get them up at one o'clock.

Q You were mad because he came at one o'clock at night? A Yes. I could see how it was; I didn't always listen to my daughter. 10

Q You were sore because he didn't come around early in the evening and you had to mind the baby? A Yes.

Q It was all these arguments about coming to the house, and staying out late at night, that you wanted to punch his nose off? A Yes, I talked to him, but I didn't touch him.

Q Your daughter wanted to come to your house? A Yes. 20

Q He brought her there? A Yes, that's right.

Q You didn't want him at the house after a while? A I don't know.

Q What did you say in reference to your seeing that she got a divorce? A I said, "You want to get rid of your family, go to it, I'll stand behind her."

Q You didn't say, "I'll show you what we can do?" and they left together? A What could she do? 30

Q She used to come to see you? A Yes.

Q When she got ready to leave, did you tell her to leave? A No.

Q Did she ask your advice? A No.

Q How did she come to leave? A By legal advice, she was afraid of him.

Q Did the lawyer tell her to leave? A I don't know. 40

William Speicer, for Petitioner,
Re-direct—Cross.

Q Did she tell you a lawyer told her? A No.

Q Did you advance the money for her to get a divorce? A No.

Q Who did? A I don't know, maybe the Mrs.

10 Q Did she tell you about taking money out of the bank? A No.

Mr. Van Der Clock—Re-direct.

Q In January of this year, when your daughter came home, or before that, did you notice any marks on her body? A Yes.

Q Where were they? A A mark on her neck and arm, not long before she came home, about a week before.

20

Mr. Farley—Cross.

Q You're positive it wasn't a week after? A Yes.

Q How do you check up the date? A Because when she came there she left.

Q When did she leave? A I don't remember.

Q It was in Dec. 1929, wasn't it? A I don't remember.

30

Q Was it a month before? A A week before she came to live with us.

Q Where is the furniture of your daughter? A In my home.

Q Are you using it? A Yes.

Q How much is there of it? A Everything.

Q What did she bring? A Everything.

Q Is it all being used in your house? A Yes.

Babetta Speicer, for Petitioner, Direct.

BABETTA SPEICER, a witness produced by the petitioner, being duly sworn on her oath, according to law, deposes and says:

Mr. Van Der Clock—Direct.

Q You are the mother of the petitioner? A Yes. 10

Q Do you remember her marriage? A Yes.

Q After her marriage, and until she left, did you visit your daughter at her home? A Yes.

Q More frequently in Paterson than in Newark? A Yes.

Q When did you first notice there was anything wrong between them? A After she received that letter.

Q Was your daughter happy over that or unhappy? A Unhappy. 20

Q From that time on did you talk to your daughter about her trouble? A She wouldn't say anything.

Q What was her condition when she came home? A She cried.

Q Did you ever talk to the defendant about the way he treated your daughter? A When he received the letter I asked if it was the cause and he said no. He said he never read the letter. I had the letter and he wanted to read it. 30

Q Did you ever see any marks on your daughter? A On her arms and her throat and her chin.

Q Before they separated, while they lived in Paterson? A Yes.

Q Did you ever argue or fight with him? A No.

Q You scolded him? A No.

Q Did you ever ask your daughter what the trouble was? A Yes, before she came home. 40

Babetta Speicer, for Petitioner, Cross.

Q Why did you ask her? A She was failing.

Q What did you say to her?

(Mr. Farley objects.)

10 A I never liked to interfere with the family's affairs, she should stand it as long as she can on account of the boy's sake. She told me the trouble; he called her names, got her by the throat and I saw the marks. When she went home I was afraid I wouldn't see her anymore.

Q Did you tell her that? A No.

Q Do you remember the defendant coming to your house with the wife and child? A Yes, about four o'clock in the afternoon and then he'd come again at one o'clock to get them.

20 Q Do you remember the petitioner coming on the 24th of January for good? A Yes, she was all broke down, she's been that way ever since.

Q Is she able to work? A No.

Q Is she being treated by a Dr.? A Yes.

Q Has the defendant ever come to see her?
A No.

30

Mr. Farley—Cross.

Q What was your daughter's physical condition in January of this year? A All run down.

Q In your affidavit of March 10th she was a physical and mental wreck; is that true? A Yes.

Q Did you ever notice anything peculiar about your daughter? A No.

Q Did she ever quarrel with you? A No.

Q Get easily excited? A I can't say, we
40 don't quarrel in our home.

William Speicer, for Petitioner, Direct.

Q What was her mental condition? A She came home all broken up, crying and saying she couldn't stand it.

Q Did she show other signs? A She's excitable like anyone else.

Q Where is her furniture now? A In my home. 10

Q Being used there? A Yes.

Q Who told her to leave her husband, did you? A No, I told her to stand it as long as she could, I don't break up homes.

Q You only talked to Mrs. Mittenbuhler about the situation once after the mother's letter came? A Yes.

BABETTA MITTENBUHLER, recalled. 20

The Master.

Q I show you that, in whose handwriting is it? A My husband's.

Q Is that the one you received at the same time as the others? A Yes.

(Letter marked Exhibit P. 5.) 30

Hearing continues at 2 P. M.

WILLIAM SPEICER, a witness produced by the petitioner, being duly sworn, on his oath, according to law, deposes and says:

Mr. Van Der Clock—Direct.

Q Where do you live? A 83 No. 6th street. 40

William Speicer, for Petitioner, Cross.

Q Are you a brother of the petitioner in this cause? A Yes.

Q Were you in the home on the 4th of July, 1929? A Yes.

Q Who else besides your sister, her husband and baby? A That was all—his mother.

10 Q Did anything take place? A A quarrel between my sister and his mother.

Q What did your sister say? A She said it was her home and her mother-in-law said "if you're not satisfied why don't you get the hell out and go where you came from."

Mr. Farley—Cross.

Q Who did you live with in the last six years? A Mother and father.

20 Q Anyone else? No.

Q Did you ever live at the Mittenbuhler house? A No.

Q Were you there many times? A Visiting, yes.

Q What took place there, exactly as you know it? A Frank had the car there and he went for his mother. We went out for a walk. On arriving back, his mother and Frank were there. I entered first and said hello to Mrs. Mittenbuhler, but she made no reply. My sister
30 came in. I noticed Mrs. Mittenbuhler didn't notice me at all. She seemed as though something had happened.

Q Did your sister say, "What the hell did you come down here for, to pick a fight?" A No, she said why did she come down. She was drinking water at the time and walked into the front room. There was a uke there and I was trumming on that. After awhile we went into
40 the kitchen again and she started to make re-

Mabel Van Lenten, Recalled, Re-direct.

marks about my father and mother; how, at one time, when my sister's baby was sick, she had to take care of Betty at the time. She also made a remark to my father that he was the head of the home and also of me. She thought I had a lot to say.

Q What did your sister say? A My sister said it was her home and why her mother-in-law came. Mrs. Mittenbuhler said, "Why don't you get out?" My sister said, "This is my home." Mrs. Mittenbuhler said, "She stole my son and if the quarrel doesn't stop, she may have to go home." She made remarks about going to court and what she would do. Mr. Mittenbuhler said nothing all this time. My sister said, "Why did you come down here?" 10

Q Wasn't she exicted? A She took it serious, she asked what was the matter. 20

Q Did you use any rough remarks? A No.

Q After that was all over, what happened? A After the scrap was over nothing was said.

Q What did your sister, Mrs. Mittenbuhler and your your brother-in-law do, did they go out in the car? A No.

Q Are you sure? A I'm sure.

Q What makes you so sure? A Because they had no occasion to. 30

MABEL VAN LENTEN, recalled.

Mr. Van Der Clock—Re-direct.

Q While they were living at your home, did you have any occasion to see the defendant and his mother and the petitioner out in his car? A Yes, a number of times. 40

Babetta Mittenbuhler, Recalled,
Re-direct—Cross.

Q About how many times? A Four or five.

Q On each of these occasions where would the petitioner sit and where would his mother sit? A His wife had the back seat, he sat in the front with his mother.

10

Mr. Farley—Cross.

Q Whom did you talk to at noon hour? A I talked with no one.

Q When did you talk with Mr. Van Der Clock since this morning? A Not at all.

Q When did you tell Mr. Van Der Clock that you saw them ride in the car together? A I didn't tell him.

20

BABETTA MITTENBUHLER, again recalled.

Mr. Van Der Clock—Re-direct.

Q Did you ever go out with your husband and his mother while you lived at the Van Lenten home? A Yes.

Q After that? A Yes.

30 Q Where would you sit? A Sometimes in the front with my husband and sometimes in the back.

Mr. Farley—Cross.

Q Did you have any objection to that? A No.

40

Motion for Dismissal.

SUIT FOR SEPARATE MAINTENANCE.

Mr. Farley moves for dismissal of this matter on the grounds that the complainant has not sustained her verdict. The only evidence so far is evidence given by the mother. If it hadn't been for a far-fetched case, the evidence would be shut off entirely. There is no evidence to discuss except that the woman is a nervous wreck. A person of such a nature and of such physical health is a subject more or less of her nerves. As a result, very little stress could be put on the stand. The mother testified that in 1924 there was some talk with the husband relative to a letter and that only one conversation was had with the husband about his conduct towards his wife.

At the time he denied that he read the letter and it looks to me as though the letter had been made a great deal of for the next six years, that this happy young couple, only four months out of the sea of matrimony, couldn't drown that letter.

There was no testimony except from the mouth of the young lady and her landlady, which was very much discredited, and that was in 1924. They have lived together as man and wife since. The burden is on the wife.

It is my contention that, at this time, she has not made out a case. There is no corroboration, except in 1924, when they were then very shortly married, if we can believe the testimony of her brother and former landlady, there is corroboration. From October to January, when she left, there was absolutely nothing corroborated, with the exception of what her mother has said that she had said to her, and then, on general prin-

Frank R. Mittenbuhler, for Defendant, Direct.

10 ciple, that the mother noticed the daughter getting ill. It has been testified all along that the girl was a nervous wreck; ninety pounds when she married. The girl is admittedly ill. Up to October she admitted she had forgiven her husband up to that point. What did he do after
20 that point that brings separate maintenance? She had in mind some time in October to do something; she went out and took his money out of the bank. Whether it was from the conduct of the husband or not, we don't know. There is no corroboration.

20 FRANK R. MITTENBUHLER, a witness on his own behalf, being duly sworn, on his oath, according to law, deposes and says:

Mr. Farley—Direct.

Q You are the husband of the petitioner in this case and I believe you were married in April, April 21, 1924. After you got married where did you go to live? A Mrs. Van Lenten's home, E. 36th street or 37th street, Paterson. We lived there about a year and a half or two
30 years.

Q Then where did you go? A To 196—197 No. 7th street, Paterson.

Q How did you and your wife get along together in the early part of your marriage career? Do you recall the first night you were married? A Yes, very well. We fought the entire night through. Before that my wife was very much put out because I had taken her to an Italian restaurant in Passaic. She thought it wasn't
40 right to take a bride for the first time. She said,

Frank R. Mittenbuhler, for Defendant, Direct.

"This is a hell of a dump to bring me." That caused dissension until we reached the Pennsylvania Hotel. We quarrelled until an early hour in the morning. She wanted to go home to her mother.

Q How did you get along from that time until July when this reported letter from your mother came? A Fairly well, we argued, always had disagreements. 10

Q You heard a letter read this morning which is alleged to have come from your mother. Tell us what you know about that letter. A I know nothing more about it than that the first time I ever read it was at the time my wife had filed that letter in her affidavit. I received a letter in our Paterson office at 100 Park avenue, but at the time it was handed to me I was very busy. I put it in my back pocket. One afternoon I came home and she called me everything. I asked her to show me the contents of the letter. She threw a bottle of disinfectant at me, which splattered over my clothes. 20

Q How much did your wife weigh when she married you? A Ninety or ninety-five pounds.

Q You heard your wife and Mrs. Van Lenten testify to a scene in your house in 1924, wherein there was some arm twisted. What have you to say about that? A I know nothing about an arm being twisted, only my father's arm, when my mother and my wife were at her mother's home. 30

Q You deny you twisted your wife's arm? A I positively do.

Q Do you know Mrs. Van Lenten? A Very well.

Q You don't suppose she would charge you with that if it wasn't true, nor hurt your feel- 40

Frank R. Mittenbuhler, for Defendant, Direct.

ings? A She started acting cool to me a few months before we moved. I was working for the Fleischmann Co. I got a position for her son, George. He worked there for some time and was let go. I was informed by my wife that
10 it and she would square accounts with me.

Q Your wife testified you called her home a "god damn dump." What have you to say about that? A I've never called my home that.

Q Your wife stated that you then punched her around. Did you ever punch your wife? A Never struck her at any time.

Q Your wife said when she made an effort to show affection, you pushed her away and, finally, on one occasion, told her you would give her
20 something she could carry to the grave. A I don't remember saying anything like that. I sat for hours trying to make her change her nasty disposition which she had at all times.

Q Did you say you would blow your brains out? A No.

Q What attitude did your wife have toward your mother? A She'd curse my mother and sister at different times because of our arguments. She told me she used that as a means to
30 get even.

Q What did she call your mother? A Am I supposed to say that?

Q Was it a degrading name? A Yes, a very degrading name.

Q You called your wife son of a bitch, whore, etc., did you? A No.

Q How did you and your wife get along together from the time you married until you went to Newark? A Continuously arguing. I
40 travelled on the road for the Fleischmann Co. I

Frank R. Mittenbuhler, for Defendant, Direct.

was sending home my check every month. I was paid once a month or every two weeks. My wife would endorse my checks. I never saw any of that money. I'd ask her for money to go away with on a Sunday night, for a five or ten dollar bill and she'd immediately tell me I'll have to get it at my mother's house. That irritated me that she wasn't capable of taking care of the money I worked for and that caused arguments. Other times I wouldn't find enough clean clothes to leave on a Sunday. My shirts had buttons off, my socks with holes in. I'd ask her, "Why don't you do the right thing here and have these things ready for me. I don't have the time when travelling from hotel to hotel." I expected to have a Sunday meal at home and I was told, "We would eat at mother's home." The only thing I had was eggs and bacon. 10 20

Q Would these quarrels bring about arguments? A Yes.

Q What was her conduct during the arguments? A She had a habit of firing the first thing she could grab at me.

Q What was her physical condition from marriage until the present time? A My wife was a nervous wreck at all times. I attributed a lot of her ways and habits to this nervous condition. 30

Q Did you make any effort to correct her physical condition? A I asked her a number of times that she should get a doctor and take an examination and take medicine but she refused to take care of herself.

Q In June, 1924 you had some argument with her father. What were the words that followed? A I was in the habit of driving up for my wife on a Sunday evening and on Sat- 40

Frank R. Mittenbuhler, for Defendant, Direct.

urday. I'd blow the horn and my wife would come down with the baby. My father-in-law walked towards the car and, placing his hands on the car, he said, "Frank, what seems to be the trouble between you and Betty, why can't you get along, Betty says you are at fault." I said, "Listen, pop, I think Betty and I can straighten it out. Don't take too much what your daughter tells you." He said, "If it takes me \$10,000 to ruin you, I'll do it." He would use his connections with the fraternal organization to ruin me in the concern I am employed with.

Q Did your father-in-law, at any time other than that, speak to you about this matter?

A My father-in-law and I got along aces high.

20 We fished together and my mother-in-law and I at all times agreed and she never scolded me about anything, always treated me perfectly.

Q Did she ever call your attention to any misconduct between you and your wife? A No.

Q You went on a fishing trip in July. Did you slap her face when you came back? What happened then, did you have an argument? A Not that I remember.

30 Q Young Mr. Speicer has testified that, on July 4th, there was some quarrel in your house relative to you and your mother. Tell us what it was about? A My wife invited my mother to have dinner with us through me asking and to spend the 4th of July at 417 Florence avenue. I drove to Paterson for my mother and, on returning, found that my wife and her brother had left home with the baby. My mother asked for a drink of water. I gave it to her and also stale cakes that were lying in the closet. I saw no food around. My wife walked in with that nasty

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Frank R. Mittenbuhler, for Defendant, Direct.

way about her and looked at my mother and tossed her hat on the table, and immediately walked out again. She did say hello. She returned in about a half hour and my mother was then placing her wraps on to go home. My wife said, "What's the matter?" My mother said, "Nothing, I would rather go home." My wife said, "What the hell did you come down here for, to fight like your son?" My mother said, "No, Frank, will you please take me to the bus?" We had a spat and I broke in and asked them to get together. They got over the argument and we took a ride through the Orange Mountains. Coming back, my wife put up a supper for the family and after that, we watched the fireworks, and in between that time my mother went home and we shot off the fireworks bought for Frank. We then drove mother home and we came back home. 10 20

Q Your wife stated that you were going to New Brunswick some time and she had a conversation wherein she stated something about, "Why are you treating me in such a manner?" She testified you said, "I'm finished with you, I hate the looks of you, if you don't start something soon, I will." Do you remember that? 30
A No.

Q Did you say those words to your wife?
A No.

Q Did you have any conversation with your wife about a divorce? A I said I'd never get a divorce, never leave my home.

Q Did she say she would get a divorce?
A She'd do what she could to ruin me, she had a home to go to, that her father and mother were willing to support her and the child. 40

Frank R. Mittenbuhler, for Defendant, Direct.

Q Did you ever call your wife a whore?
A No.

Q Your wife testified that in Oct. 1929 you told her to get out and threw her clothing after her. A I never threw anything at her, that was her bad habit.

10 Q There are several notes in this case, what have you to say about them? A I admit there were notes written between my wife and I and spread over a long period of time. We were only writing notes of that description when we had heated arguments. We had a little baby home and the language that came from my wife's mouth wasn't fit for the baby. We did write notes, but it was spread over a long period of time. They were written as far back as last
20 year or the year before.

Q Would she write you notes of the same nature you have there? A Certainly. One instance she had a small cartoon. It was a picture of a wife and a baby and, in the corner, was a picture of a man supposed to be entertaining a sweetheart. She wrote, "This is for your information."

Q What have you to say relative to her mental condition? A During our arguments she'd
30 get so extreme that I thought she wasn't in her right senses. She used to say, "Frank, when I get like that I could kill you." She'd throw anything. Every time we had an argument I'd catch something; one morning it was because I refused to get up for breakfast, and there was a small ivory box of jewelry and she threw that and the marks are still on the bed.

Q What explanation have you about that particular note relative to the boy, about leaving
40 \$10.00 for Franklin's clothes and \$4.00 for your

Frank R. Mittenbuhler, for Defendant, Direct.

wife? A My wife, instead of asking me for money for Franklin's clothes, would write a note, then she wouldn't speak. She'd ask for money for the household. My wife was never up when I left in the morning, so I would answer her note. There was an argument when that gift was given. She threw it at me and I would have accepted it if she had given it to me right. 10

Q You read the note in anger? A Positively.

Q Your wife said sometimes you wouldn't speak to her, some time in October until January, is that so? A That's impossible.

Q Were there times when you didn't speak? A Yes.

Q How old are you? A Twenty-six.

Q How old is she? A The same age. 20

Q When did you last have intercourse with your wife? A Up until she left on January 23rd.

Q What have you to say about coming in two or three in the morning? A My work caused me to be away that long.

Q Are you a travelling salesman? A Up until a year ago I was travelling salesman for the Fleischmann Yeast Co. During this period of time of re-organization the entire office force was in that office night after night. One instance I do remember of three o'clock in the morning, it was the time that the Fleischmann man in the office worked with me until three o'clock at the office. 30

Q You heard your wife make a serious charge against you, stating that you had treated her inhumanly. Is it true? A No.

Q Did you grab your wife and threaten to kill her? A No. 40

Frank R. Mittenbuhler, for Defendant, Direct.

Q Did you drop the insurance? A Yes, long after I took another insurance out by the Standard Brands, Inc. I still carry two insurances.

Q Your wife said you acted like a wild man in Dec. 1929, she was afraid of you? A She never had cause to be afraid of me.

10 Q How do you account for her coming up here and swearing you acted like a wild man?

(Mr. Van Der Clock objects.)

A She was apt to say anything during an argument at home.

Q Were you in favor or were you opposed to having a child by her? A Why, I love children, Mr. Farley.

20 Q Were there arguments between you and your wife about children? A My wife would even take it out on Frankie, and I wouldn't stand for it, she'd bang him.

Q Was there any argument or trouble about your wife having an abortion? Your wife stated in her affidavit there was some trouble about a miscarriage she had. She later corrected that by saying her present trouble was the result of child-birth. Was there any trouble, did she have a miscarriage? A Yes, my wife, with the use of a syringe, inflicted a wound that brought on this miscarriage; she told me that after she had done it.

30 Q Was she ill as a result of that? A She certainly was.

Q Your wife said that, in January, 1930, she was scared that you would choke her. Was that true? A No.

40 Q Did you choke her in January or any other time? A No.

Frank R. Mittenbuhler, for Defendant, Direct.

Q Did you ever see any bruises on her? A No.

Q When you came home from your trips at different times, how did you find your wife, would she get your meals for you? A No, this caused disruption, too.

Q What were her habits with reference to drink? A She was very fond of liquor, on several occasions she really disgraced me. 10

Q How about around the house? A She brought girl friends in the house and drank with them during the afternoons.

Q How did your wife come to leave, did she leave any word? A Never gave me the slightest inkling she was going to leave. I didn't know then that she had drawn the money.

Q Tell us what occurred on the 24th of Jan. 1930. A On the 24th I left for my work in the regular manner and, coming home that evening, I found my wife not home. It wasn't unusual, she'd spend every Friday to Monday, as she said, at her mother's home. I spent the week-end in and around Newark. I quit work on Monday night, Jan. 27th and I stopped with a few fellows from the office and had a bite. Coming to my house, 417 Florence avenue, I walked in and flashed the light and found the entire house was wiped out, not even a chair. I walked all the way through. Everything was taken down with the exception of the shades, even the electric light bulbs. My clothes were thrown on the floor and there was a small card which said, "Rescue Mission." I didn't know what to do. I couldn't realize my wife would do that. I had no place to go, but I did get a room in a local hotel in Newark and stayed there and then went back to work the next morning. 20 30 40

Frank R. Mittenbuhler, for Defendant, Direct.

Q How many shirts did you find there?
A Eighteen soiled shirts. Mr. Clark went to my home with me, to 417 Florence avenue.

Q There was a card, with black printing on it, "Rescue Mission?" A Yes.

Q Did your wife tell you where she was going when she left? A No.

Q Did you visit her or see if you could find her? A I went to my mother-in-law's with my sister, my mother and my dad; nobody was home. I later wrote a letter direct to the moving man who moved us to Newark and I had received no answer. I called him on the 'phone and I learned where he had taken the goods.

Q What was the nature of your wife's words, was she gentle or not, what was her language?

20 A She'd call me profane names.

Q Did your wife tell you she was going to leave you? A She certainly did.

Q Why? A She wanted to have a free and easy life.

Q How did you treat your wife in reference to money? A Paid all household bills, rent, light, heat, gas, milk, bread, laundry, always gave my wife about \$15.00 a week and I kept it up until she left.

30 Q Did you ever give her any presents? A Yes, my wife was very fond of jewelry, fine clothes, such as coats, dresses, shoes, hats.

Q Did you satisfy her fondness for that? A As far as my financial means would allow me, she was dissatisfied at all times.

Q Did you give her jewelry? A Yes.

Q When you took your mother out for a ride what was the general practice relative to seating? A Most times my wife and I sat in the front seat with the baby in the back with my
40

Frank R. Mittenbuhler, for Defendant, Cross.

mother, but, on different occasions my wife would ask my mother, "Do you care to sit in front with Frank, as you don't have him much?" and my mother did sit in the front seat, but not often.

Q Do you remember the incident where your wife attempted to spank you with an umbrella? 10

A I do.

Q Do you still love your wife? A I positively do.

Q Would you be willing to go back with her?

A I certainly will.

Q Was that money you and she had in the bank a joint account? A Yes, I allowed her to draw at any time she might need it; at one particular time I allowed her to draw \$100 for a fur coat. 20

Q In summing this up, did you, or did you not, during the time you lived with your wife, ever strike her? A No.

Q Did you ever choke her or attempt to choke her? A No.

Q Did you attempt to kill her or say you would? A No.

Q You admit there were many arguments?

A Yes.

Q You didn't call your wife a bad woman? A 30
No.

Mr. Van Der Clock—Cross.

Q You still love your wife? A I certainly do.

Q You never lost your love for your wife? your mother, you still love her? A I do.

Q A woman that was addicted to drink, couldn't sew, or cook, was so profane, insulted your mother, you still love her? A I do. 40

Frank R. Mittenbuhler, for Defendant, Cross.

Q Did you love your wife when you wrote this to her: "Will you please leave the rest of my money, because you don't come home for supper, isn't any reason we shouldn't eat. It's bad enough when I have to borrow from the other Fleischmann men." A No.

10 Q The answer: "You surely think of yourself, but no food in the house over the weekend. You don't have to borrow money from the other Fleischmann men," etc. Did you love her when you wrote that? A I sure did.

Q That's the way you expressed your love? A Yes.

Q You say you bought her jewelry. Isn't the last thing you bought her, three years ago on her birthday, a diamond ring? A No, I bought a
20 wrist watch and a cameo.

Q Was it during 1929 or 1928? A I think it was during 1928.

Q Did you buy her anything during the summer of 1929? A Yes, it was a diamond ring.

Q Where did you buy it? A Tappan's, Newark.

Q What kind of a ring? A Very inexpensive, about \$69.00.

Q Did you pay for it? A Yes, on time payment.
30

Q Did you ever receive that letter from Tappan's? A Yes.

Q You say that you purchased from Tappan's, with that letter as reference, something for your wife? When did you buy it? A During the summer time.

Q How much did you pay on it when you received this letter? A I don't remember.

Q When was the last time you paid on it? A
40 I don't know.

Frank R. Mittenbuhler, for Defendant, Cross.

Q Where did you purchase the wedding ring she found in your pocket? A I found it.

Q Did you ever have any cundums in your pocket? A I never remember.

Q Did you and your wife have any trouble about lip stick she found on your handkerchief or any hairs on your clothes? A I don't remember. 10

Q You were amazed when you found this furniture gone? A Yes.

Q You love your boy? A I certainly do, I made an effort to locate my wife.

Q How long after did you locate her? A When I received the affidavit.

Q You never made any effort? A Yes.

Q Didn't you think your wife would go back to her mother? A Yes. 20

Q Why didn't you send money by registered letter for the child in those three months? A Because I didn't.

Q Wasn't it because of your state of mind expressed in this letter I read? A No.

Q You left \$10.00 for Franklin's clothes and said in your note, "Could only leave \$4.00, as it is all I had in cash, want to let you know, I am not a millionaire," etc. Did you love her when you wrote that? A I loved her when I wrote that, yes. 30

Q Why didn't you tell her that? A Because my wife wouldn't speak to me, I even spoke to her and received no answer from her.

Q "No supper tonight. Where is my green silk shirt, make damn sure you find it." You wrote that to the woman you loved? A Yes.

Q How much do you make a week? A \$53.00. 40

James J. Clark, for Defendant, Direct.

JAMES J. CLARK, a witness produced by the defendant, being duly sworn, on his oath, according to law, deposes and says:

Mr. Farley—Direct.

10 Q Do you know Mr. Mittenbuhler? A Yes.

Q Do you know his wife? A By meeting her twice.

Q Did you work with Mr. Mittenbuhler or how do you know him? A Through the Fleischmann Co. about three years ago.

Q Did you ever have occasion to go to his house? A On several occasions, his wife was there on two occasions.

20 Q What happened? A Frank and I stopped in the house and he looked around and saw no supper. He asked his wife, "Where's the supper?" She used very profane language. When Frank asked about the supper she said, "To hell with you, you dirty son-of-a-bitch, I'm sick of you."

30 Q What did he say? A He tried to cool her off. He said, "Please calm down, there's somebody here, don't take things up at a time like this." She wouldn't get the supper so he fried eggs and bacon.

Q From your observation, what were her characteristics, how did she act at that time? A Kind of stewed, she acted like she was intoxicated.

Q What did she do when he cooked? A She laid down on the couch.

40 Q Did you have occasion to go there another time? A I visited the house at another time when Mrs. Mittenbuhler was there. She just said hello, and I saw her no more.

James J. Clark, for Defendant, Cross.

Q You were there in January, 1930, at the house where they had moved from, weren't you?

A I was to Florence avenue address several times after she had moved away.

Q What did you see? A The house was cleaned out with the exception of his clothes on the floor and the Mission card. Papers and bottles were in the sink. 10

Q How many shirts were there? A Eighteen.

Q How do you know? A Frank counted them.

Q How did he come to count them? A Well, he did.

Mr. Van Der Clock—Cross.

Q How did he count them? A 1—2—3—4, etc. 20

Q Do you know what an oath is? A Yes, an oath is something you swear to, the truth.

Q Did you hear Mr. Mittenbuhler testify? A Yes.

Q Did you hear him say anything bad that his wife said to you? A No.

Q It was a terrible thing in your mind? A Yes. 30

Q When was this? A About a week before Christmas.

Q You said, "Being such a good friend of Mr. Mittenbuhler," what did you mean by that? A Just what it said.

Q What was the occasion you went to his house before, when she used this language? A We arrived at his home at 6:30.

Q Had you been there before? A Yes, but I never met his wife before. 40

Joseph Solinsky, for Defendant, Direct.

Q What is the language she used to you? A He wanted to know where the supper was.

Q When he walked in did he kiss his wife? A No, but he grabbed Frank.

Q What were his first words when he asked his wife for the supper? A Just, "Where is the supper?"

Q Didn't he say, "Where the hell is the supper?" A No.

Q But she used profane language without any reason whatever? A Yes.

Q Was he standing or sitting? A Standing.

Q There was no reason at all, from what you could see, for her to be excited? A No.

Q He simply quietly asked, "Where is the supper?" A Yes.

Q Are you under subpoena here, did you get papers? A No.

Q Who asked you to come to his house? A He did.

JOSEPH SOLINSKY, a witness produced by the defendant, being duly sworn, on his oath, according to law, deposes and says:

30

Mr. Farley—Direct.

Q Do you know Mr. and Mrs. Mittenbuhler, the complainant and defendant in this case? A I don't know Mrs. Mittenbuhler, never saw her.

Q Do you know Mrs. Mittenbuhler, his mother? A No.

Q Did you ever bring his mother from Mr. Mittenbuhler's home? A I brought Mr. Mittenbuhler's mother home from her daughter-in-law's home. It was after twelve each time.

40

Estelle Bond, for Defendant, Direct.

Q Do you know what she was doing there?

(Mr. Van Der Clock objects.)

Q Who had you take her home? A Mr. Mittenbuhler's father.

Q How many times? A Four or five times.

10

ESTELLE BOND, a witness produced by the defendant, being duly sworn, on her oath, according to law, deposes and says:

Mr. Farley, Direct.

Q What relation are you to Mr. Frank Mittenbuhler? A His aunt.

Q Do you know his wife? A Yes.

20

Q Do you know them both? A Yes.

Q Were you ever in Mrs. Mittenbuhler's company at any times? A Yes, several times.

Q What was her conduct toward her husband? A Very irritable and very nagging, I think twice intoxicated.

Q What was her language toward her husband? A Cursing, "What the hell," always addressed him as her "son-of-a-bitch," talking of fine clothes, new fur coats, new dresses.

30

Q What did you observe with relation of him toward her? A Frank was very devoted to Betty, very loving.

Q During these fits of anger, were there any scenes in your presence? A Yes, Betty was carrying on terrible, I felt embarrassed. I said, "Frank, why do you allow Betty such freedom?" and he said, "Aunt, I dare say nothing now or there would be war," and Betty had her own way the rest of the evening.

40

Estelle Bond, for Defendant, Cross.

Q What caused that? A She had been drinking. There was a party and we had a punch and it seemed some boys came in and had something on their hip and Betty and her girl friend went in the kitchen and had something to drink.

10 Q She was drunk and her conduct was what?
A Vile.

Q Did you have any conversation with her relative to miscarriage? A Yes, two years ago I had been ill and she asked me how I was. She told me what she had done. She said she had pierced herself with an instrument and if I wanted to loan it any time I could have it. Twice I met her while shopping. She was always wild. "That damn mother of his," she'd say, which is my sister. "That son-of-a-B of mine." I never
20 mentioned it to Frank or my sister, I didn't want any trouble.

Mr. Van Der Clock—Cross.

Q Don't you know you haven't seen or talked to Betty in three years? A Yes I have.

Q Have you been in her house in three years?
A No.

30 Q This party where you say they were drinking at Mrs. Thomas' house. Her husband was there? A Yes.

Q Other people were there, others had drinks? A No, only Betty and this woman.

Q How long ago? A I can't remember, I've been ill.

Q You remember the details of the language, her getting drunk, kicking up her heels. A Yes, it was three years ago.

40 Q What was the occasion? A I think it was a New Year's party.

Estelle Bond, for Defendant, Cross.

Q Three years last New Year's? A Perhaps, 1926.

Q You were affected so much you talked to her husband? A Yes.

Q You thought it was terrible, so much so that you took him to task about it? A Yes, I spoke to him about it. 10

Q Did anyone speak to him about it? A I don't know.

Q He lived with her afterward? A Yes.

Q You went bond for Frank and put up \$1,000.00? A Yes.

Q Are you here on subpoena? A I told Frank I'd come from the very beginning.

Q You were present in Jersey City on the occasion when the application for alimony came up? A Yes. 20

Q How many times were you there? A Twice.

Q Not subpoenaed? A No.

Q Do you remember being in Vice-Chancellor Lewis' courtroom? A Yes.

Q Do you remember, or did you go out of Vice-Chancellor Lewis' courtroom to where the telephone booths were near the elevator? A I don't remember.

Q Did you stop and talk to someone in the presence of this lady, Mrs. Thomas? A No. 30

Q Did you ever see this man before (Harry)? A No.

Q Did you say to Mrs. Thomas, "I hate her looks, I could call her more names." A Absolutely not.

Elizabeth Thomas, for Defendant, Direct—Cross.

ELIZABETH THOMAS, a witness produced by the defendant, being duly sworn, on her oath, according to law, deposes and says:

Mr. Farley—Direct.

10 Q You are a sister of Mr. Mittenbuhler. Do you know the petitioner and defendant in this case? A Yes.

Q Did you ever observe the attitude of the petitioner toward the defendant or vice-versa?

A Betty liked parties. She always planned with me what parties we could have when her husband was home on Saturday and Sunday. I was at parties with her and about ten or eleven o'clock she became so intoxicated it would spoil the party.

20 Q There was some incident about a can opener. A I visited Frank at Betty's home on No. 7th street. He wasn't home yet. When he came home, he said, "I'm hungry, get me something to eat." She started opening a can with a fork and he said, "That was a wedding present from my grandmother, use a can opener." She swore and said, "If you want the damn can open, open it yourself," and she threw the can opener at him.

30 Q What kind of a housekeeper was she? A When the baby was small I've often seen the diapers in the sink and bathroom.

Mr. Van Der Clock—Cross.

Q In other words, she was a dirty housekeeper? A Only what I saw.

Q Did you ever visit them when they lived on 36th street? A Only when the baby was
40 born.

Elizabeth Thomas, for Defendant, Cross.

Q You haven't been there in over three years? A Yes, in No. 7th street.

Q Within three years? A I don't remember.

Q You're not friendly with Betty? A I was, I've never seen her since living in Newark.

Q You don't speak to her? A I've only seen her that once. 10

Q On this occasion she threw a can at him because he asked her to use a can opener? A Yes, because she was using the fork.

Q On this occasion was she drunk? A Not when she threw the can opener, that was the New Year's party. We went to see friends after New Year's Eve and she had drinks there. The men were all drinking.

Q Was her husband there? A Yes. On one occasion her husband wasn't there when she was drinking. It was a New Year's party and Frank was on the road. 20

Q Where did the liquor come from? A A man brought it in a bottle.

Q Who was the young man?

(Mr. Farley objects.)

A A young man from the Mi-Own Baking Co., Holderhawk. 30

Q He was there before? A No, he knew there was a party and he came there.

Q He knew Betty? A He had heard of her.

Q He came to your house with a bottle of liquor. When did you first see the bottle? A When she was drinking it in our kitchen, I told my mother about it.

Q Why didn't you order him out of the house? A Because he was a guest.

Q You told your brother? A No. 40

May Mittenbuhler, for Defendant, Direct.

Q Up until the present time, your brother knew nothing of it? A No.

Q Did you ever tell your aunt? A Yes.

Q When? A She heard it when I was telling my mother.

Q But you never told her husband? A No.

10

Babetta Mittenbuhler v. Frank J. Mittenbuhler
On Bill for Separate Maintenance.

Hearing, Monday, June 18, 1930, 10 A. M.

MAY MITTENBUHLER, a witness produced by the defendant, being duly sworn, on her oath, according to law, deposes and says:

20

Mr. Farley—Direct.

Q Are you the mother of Frank Mittenbuhler in this case? A Yes.

Q Do you know his wife? A Yes.

Q You had occasion to visit their home since their marriage? A Very often.

Q Some time before they moved to Newark, you were in their home, wherein some argument commenced. How did they get along together?

30 A No, she was constantly arguing with him and accusing him of running with other women.

Q Tell of any incident that occurs to your mind now, that happened between the two. A One Saturday night I was there. Frank was ready to bring me home. She asked for a pail of coal. He said, "Why didn't you speak before?" She said, "God damn you, you're a kind man," and I walked home.

Q Were you there when he came home late?

40 A I went over one night about six o'clock. I

May Mittenbuhler, for Defendant, Direct.

took her candy and music rolls and Frank would come home at ten o'clock and she'd say, "You God damn son-of-a-bitch, what whore have you been out with tonight?" and he'd say, "You know I've been working, and the traffic is heavy coming from Asbury."

Q On July 4, 1929 you were at your son's house when an argument ensued. A Yes, Frank came to get me. When I came there Betty was out. When she came in she threw her hat across the table and went out again. Her brother came in, too. She was out a half hour and she came in again and sat by her brother, Billie. She didn't speak to me. She abused me. I asked Frank to take me home and she said, "If you want to go home, take your God damn son with you and keep him." I said, "You treat me as though I'm nobody, I want a little respect, your father wouldn't call your mother what you call Frank." She said, "No." I said, "You have a nice home and nice baby." She said, "I know, mother, I have an awful temper, I see fire and blood." We went for a ride, she and Frank, and her baby and I and her brother. We stopped for ice cream. 10 20

Q Have you had occasion to telephone her?

A When she was a week over time she'd call me up. She wouldn't go through with having another baby. She'd always complain to him going with other women. I said "he doesn't, he doesn't approve of those things." 30

Q At various times you went there and was in her house and in her company, did you ever notice whether she indulged in intoxicating liquor? A Yes, she had them in the house; she gave me wine her father made and gave to her, and she smokes. 40

May Mittenbuhler, for Defendant, Direct.

Q Have you ever seen her intoxicated? A Yes.

Q What was her mental condition? A She had a violent temper, she'd get so mad she'd grab her hair.

10 Q At any time was there a remark made by her with reference to her husband's sex relations? Did Mrs. Mittenbuhler ever say anything to you about her sex relationship with her husband? A Yes, she said Frank wasn't the type of a man she liked. She liked a thin, tall man. He had never given her a thrill.

Q When was it she indicated something with a firecracker? A I don't understand what you mean.

20 Q Did she ever show you any article or make a remark in connection with her husband? A I don't understand.

Q Was there anything ever said by Mrs. Mittenbuhler about her husband's money? A Yes, she told me if it wasn't for the salary she was getting from him, she wouldn't live with him.

30 Q What did she say to you, if anything, before she went to Newark to live? A She said, "Mother, we're going to move away to Newark." I said, "I'm awfully sorry," and I started to cry. She said, "It won't be for long, it will break up my home, I don't want to be away from my mother, I'll give myself a year down there, if that long."

Q You heard it testified by her in reference to some toilet article? A Yes, I had given her a pail. She told me she wouldn't go to the toilet, there were too many spiders. She said I could use the pail, but I wasn't afraid.

40 Q What was the incident about a player piano? A That was when she had scarlet fever.

May Mittenbuhler, for Defendant, Direct.

I took care of her night and day; I neglected my home and my husband. On Easter, Frank got her a player piano. The piano didn't come on Saturday afternoon, at the time stated it was to come up. She went on crazy. We had no 'phone in the house and she wanted me to call up on the corner. I had washed my hair and I went and called up. In the meantime, the piano had come. 10

Q When she married your son what was the state of her health? A She went with Frank about two months, when Frank brought her to the house. We were sitting at the table talking and she was telling me she was a ribbon weaver and she wasn't strong.

Q After this 4th of July incident, did you ever go out with your daughter-in-law? A Yes, in the first week of July and the first week in August. He made arrangements for the four of us to go to Asbury. We waited in Newark with my mother and they were one hour late. I asked why she was late and she said she had to iron a shirt for Frank. 20

Q What kind of a housekeeper was she? A Not a clean housekeeper, things under the sink and she had roaches.

Q What happened as a result of the conversation when she called you? A Betty was sick and they asked me to come over. I went over and she had been working with herself then and she hadn't menstruated for two months. She went out in the afternoon and had ice cream and she had an awful chill. I worked with her until three o'clock in the morning and broke the chill. I washed diapers the next morning for the baby and went home. She said the ice cream brought on clots of blood. 30 40

May Mittenbuhler, for Defendant, Cross.

Q When did you take care of her again? A Two years later, she had another miscarriage. The little boy held the strings for her while she worked with herself.

Q Did you take care of the boy at any time?

A Yes, when he had a broken arm.

10 Q Did you, during these visits to your son's home, see him strike his wife? A No.

Q What was his general conduct? A Always tried to be kind, bring candy home to her.

Mr. Van Der Clock—Cross

Q She told you she didn't love him? A Yes.

Q Always told you that? A Yes.

Q She wrote you a nasty letter one time? A Yes.

20 Q That letter was written to you some time after you had written this letter to your son, Frank, wasn't it? A I believe it was a few days afterwards.

Q Do you remember the letter? A Yes, because it hurt me very much.

Q This letter that I have reference to was the only letter you received from Betty? A No, I received several after that from Newark.

30 Q Isn't it true that the only other letter you got from the petitioner was when she lived in Newark and asked you to come there? A She never asked me to come there.

Q How many did you receive altogether? A I believe there were three.

Q But you did write your son the letter that has been testified to? A Yes.

40 Q A few days after you received a letter from Betty with reference to that letter, taking you to task about writing that letter to your son? A Yes.

May Mittenbuhler, for Defendant, Cross.

Q Do you remember her saying in this letter to you, "Just a few lines to let you know why Frank and I sometimes quarrel. It's because I just found the kind of letter you write to Frank."

(Mr. Farley objects on the grounds of it being a self-serving declaration.)

10

A No, it wasn't in the letter.

Q Did she, in that letter, say, "Do you think I can ever show any love for you when you do things like that?" A No.

Q Did she say, "We are married soon four months and have hell like this"? A I believe she did say that.

Q Did she say, "Do you think Frank and I can be happy with letters like that?" A No.

Q Did she say, "On this matter, mother, can't you see Frank and I get along?" A No. 20

Q Did she say, "You are selfish"? A Yes.

Q Did she say, "No one knows how I love Frank"? A No.

Q Did she say, "Oh, God, how it hurts, and then you writing letters like that?" A She did not.

Q Did she say, "You know no true love ever runs smooth; you told him to make me afraid of him?" A No. 30

Q "Would you expect your daughter to live that kind of a life?" Did she say that? A No, she didn't say that.

Q None of these sentences are impressed upon your mind? A No.

Q Did she say, "Why do you try to break us apart, you tried it when Frank and I were keeping company?" A No.

Q Did she say, "Writing letters to me down in the store?" A Yes, I remember that. 40

May Mittenbuhler, for Defendant, Cross.

Q You're quite sure you don't remember those terms of affection? A No.

Q Did she say, "I never said anything to anyone because I love Frank?" A No.

Q Didn't she say in any part of her letter that she loved Frank? A No.

10 Q Did she say, "You told me to my face I kidnapped him?" A No, she never used the word "kidnapped."

Q Did she say, "He loved me, I didn't have to kidnap him?" A No.

Q Did she say, "I couldn't make a home for you?" A Yes.

Q "When you make hell for me?" A No.

Q Did she say, "I would try to love you, but after today I couldn't. You would be as
20 welcome in my home as my mother?" A No.

Q "I tried to be nice so you don't think Frank married a girl who knew nothing?" A No.

Q "I don't give a damn about my home, but I'll protect it from the one who wants to destroy it?" A No.

Q Did she say, "I'm sorry I ever found this letter for Frank's sake?" A No.

Q Did she say, "Don't say I went through
30 his pockets because he knows better?" A No.

Q Did she say, "This suit must go to the cleaners, and that's how I found it?" A No.

Mr. Farley makes motion to strike out testimony until letter is referred to the husband.

(Denied for the present.)

Q "I believe in an Almighty God, He has helped me find a person who doesn't mean it
40 right?" A No.

May Mittenbuhler, for Defendant, Cross.

Q Did she say, "You can't ever realize what that letter done to me?" A No.

Q "I tried so hard for Frank's sake, but you show me where I stand?" A No.

Q "I think too much of my family, but they have only treated him like a man, more than I was ever treated like a lady?" A No. 10

Q Do you remember receiving a letter from Betty and you became incensed and hurt? A Yes.

Q Tell what was in the letter?

(Mr. Farley objects on the ground that it was not shown, that the husband has no knowledge of what was in the letter and it is not binding upon him and that the letter is the best evidence.) 20

(Objection overruled.)

A She headed it as "Mrs. Mittenbuhler."

Q Like this one is headed?

(Mr. Farley objects.)

A She's writing these lines informing me how she felt about me and Frank; she wished she had left him the first night she married him; that I could never expect a home from her and she was sorry she ever knew such a big, fat, pig-face as I was." 30

Q Did you show that letter to your son? A No, he never knew I received it.

Q Did you answer it? A No, I spoke to Betty about it and she spoke to me about it.

Q From the time your son married Betty, she never had very much use for you? A No, she made me very unhappy. 40

May Mittenbuhler, for Defendant, Cross.

Q In what way? A She used to say nasty things to me about Frank; she called him names, cursed and swore about him.

Q She drank? A Yes.

Q She was a dirty housekeeper? A Yes.

Q Is there anything kind you can say about
10 Betty toward your son in your presence?

(Mr. Farley objects.)

A No.

Q That hurt you very much? A Yes. (Witness succumbs to tears and sobbing.)

Q Has that influenced your testimony in favor of Frank? A No.

Q This terrible letter you say she wrote, didn't influence you? A No, I loved her since
20 the letter.

Q Then why did you break down and cry?

A Because I worked for her and slaved for her and to think she would bring this on me.

Q If she wrote this terrible letter and it didn't have any affect on you at that time, why did you break down now?

(Withdrawn.)

Q You did, however, write a letter to your
30 son? A Yes.

Q You heard that letter read here? A Yes.

Q In that letter you wrote to your son, addressed to him, did you say this—

(Counsel interrupted by Mr. Farley who objects.)

Q You did write the letter? A Yes.

Q You received a letter from Betty? A Yes.

Q Did that letter express your feelings?

40 (Mr. Farley objects.)

May Mittenbuhler, for Defendant, Re-direct.

Q You haven't changed your opinion?

(Mr. Farley objects—sustained.)

Q You went out with the complainant frequently? A Often, we were pals.

Q You frequently visited them at their home? 10

A Yes, once or twice a week.

Q Frequently went out with your son? A Very seldom.

Q You bought him a car? A Yes, when they were first married.

Mr. Farley—Re-direct.

Q You just said you bought your son a car?

A Yes, four months after they were married.

Q What caused you to write that letter? 20

(Mr. Van Der Clock objects.)

Q You had a conversation with Mrs. Betty Mittenbuhler relative to the letter she wrote you? A Yes.

Q Tell us that conversation you had with Betty Mittenbuhler about the letters?

(Mr. Van Der Clock objects.)

30

A She asked, "What did you do with the letter I sent to you, I want you to destroy it the same as I did the one you sent to me." I told her, "I did, I'm not looking for trouble."

Q Mrs. Betty Mittenbuhler and her husband got along good at times? A Yes, at times.

Q During those times were there any acts of kindness mutually? A Sometimes.

Q You testified you never saw any kind acts?

A Not when I was there.

40

Babetta Mittenbuhler, Recalled, Cross.

Q What feeling have you toward your daughter-in-law?

(Mr. Van Der Clock objects.)

The Master.

10 Q Did Betty ever have anything to drink at your house? A No.

Mr. Van Der Clock—Cross.

Q Were you present the night of their marriage when they quarrelled? A No.

Q Were you told about it by Betty or your son? A By Betty.

20

BABETTA MITTENBUHLER, recalled:

Mr. Farley—Cross.

Q You testified you didn't love your husband, is that correct?

(Mr. Van Der Clock objects.)

A Yes.

30 Q When did your love for your husband change? A About six months before I left him.

Q Do you recall saying that your love didn't change until some time in January?

(Mr. Van Der Clock objects.)

Question withdrawn.

Q If your husband offered you a home now, would you be willing to go back with him?

(Mr. Van Der Clock objects.)

40 A No.

Babetta Mittenbuhler, in Rebuttal, Direct.

Mr. Van Der Clock—Rebuttal.

Q You heard the testimony of your mother-in-law regarding your swearing. Did you ever use such language toward your husband, either alone or in the presence of your mother-in-law?

A No.

10

Q Did you ever say to her, "I have an awful temper, I don't know what I'm doing?" A No.

Q Did you ever discuss sex relations with her and that he had never given you a thrill? A I told her Frank complained of that, that I gave him no satisfaction.

Q Did you speak to her about him going with other women and accompany it with foul language? A No.

Q Do you remember getting hold of that letter sent to your husband by his mother? A Yes.

20

Q Did you, after that letter, referred to as Exhibit P. 1, write a letter to your mother-in-law with particular reference to the letter?

A Yes.

Q Did you mail it? A Yes.

Q To whom did you address it? A Mrs. May Mittenbuhler, 89 Redwood avenue.

Q Did you make a copy of that letter? A Yes.

30

Q I ask you if that is your handwriting (showing letter)? A Yes.

Q Is that an exact copy of the letter sent to your mother-in-law by you? A Yes.

Q Do you know whether or not your husband saw the original of this letter? A Yes, he told me.

Q Did he discuss the contents with you? A No.

Q Did you tell him you made a copy at that time? A Yes.

40

Babetta Mittenbuhler, in Rebuttal, Direct.

Q Did you show him the copy? A No.

Q Did you ever have a conversation with your mother-in-law regarding that letter? A No.

Q Did you ever write her another letter? A Yes, last June, from Newark.

10 Q Is the letter of which this is a copy, and the letter from Newark the only letters you wrote to your mother-in-law? A Yes.

Q What was the contents of the letter in June? When did you write this letter, what year? A I was married April 21, 1924.

Q Was this letter written in 1921?

(Mr. Farley objects.)

A Yes, the same day I discovered it in my husband's pocket.

20 Q Did you send the letter of which this is a copy to your mother-in-law in 1921? A Yes.

Q The only other letter was in June, 1929, that you wrote to her? A Yes.

Q Anything in that letter with reference to you and Frank?

(Mr. Farley objects—stricken out.)

Q Did you hear your mother-in-law's testimony with reference to the contents of the letter, as she remembered it? The letter she said she received from the petitioner? A Yes.

30 Q Did you ever write such a letter containing such statements to your mother-in-law? A I did not.

Q This letter you sent a year ago June didn't contain any such statements? A No.

Q You heard your husband's testimony with reference to the ring he gave you a year ago last summer?

40

Babetta Mittenbuhler, in Rebuttal, Direct.

(Mr. Farley objects.)

Q Did you ever receive a diamond ring from your husband? A Yes, it was two years ago, May 30th.

Q Do you know where that ring was purchased? A In a diamond shop in Newark. I wasn't with him when it was purchased, but he showed me a card that had the price on. 10

Q Was the ring I am questioning about purchased from Tappin's? A No.

Q Have you the ring now? A Yes.

Q Is that the ring that you have on your left hand, the diamond ring, the ring you received two years ago while you lived in Paterson? A Yes.

Q Did you ever say to your mother-in-law, when talking about moving to Newark, that you wanted to get away from your mother? A No. 20

Q Who was the moving party in moving to Newark? A I was.

Q It has been testified here that there was a quarrel the very night of your wedding or an argument. Is that true? A Yes, we had an argument all day, his mother wanted to go to New York with us on our honeymoon trip and I objected. 30

Mr. Farley objects to letter, nothing to show it is a true copy, when it was made; it isn't signed, it doesn't show any address, nor to whom it is written, with the exception of Mrs. Mittenbuhler, which might be herself or any other Mrs. Mittenbuhler. Objects also that it is a self-serving declaration; no evidence except produced by petitioner's own statement that the original was 40

Babetta Mittenbuhler, in Rebuttal, Cross.

shown to the husband but not this copy; no evidence that this is a true copy.

(Objection overruled.)

(Copy of letter marked Exhibit P. 6.)

Mr. Van Der Clock Continues.

10

Q Do you remember a man testifying here by the name of Clark, on behalf of your husband? Did you hear his testimony? A Yes.

Q Do you remember his going to your home in Newark with your husband? A Yes.

Q Was it the first time you ever saw the gentleman and the only time? A Yes.

Q Did you curse and swear then? A No, it was about seven o'clock and Frank came home with Mr. Clark. Frank introduced me to Mr. Clark and I asked him to have supper with us. Mr. Clark said he had supper, so I asked him to have coffee and cake; that's all that took place.

20

Mr. Farley—Cross.

Q Did you ever get angry at any time? A I did.

Q How often did you get angry? A According to circumstances.

30

Q You're nervous? A Yes.

Q High-strung? A At times.

Q You never get angry? A We all get angry.

Q You never show your temper? A When I get angry.

Q You said you never displayed your temper. A We all have a temper.

Q You remember the night you married your husband? A Yes.

40

Babetta Mittenbuhler, in Rebuttal, Cross.

Q Who was there? A Mr. and Mrs. Thomas was there, Mr. and Mrs. Barnes, Miss Zimmermann and us.

Q Mrs. Mittenbuhler wasn't there? A No.

Q How could she say anything then? A She wanted me to put it in the paper we were going to Washington and what I wore, but I refused. She wanted to go to New York with us because Frank didn't know much about New York and neither did I. 10

Q This was in the morning? A Yes.

Q Who went to the restaurant? A The group just mentioned.

Q It was mentioned and arranged you and Frank would go to New York? A Yes.

Q What caused the quarrel when you knew your mother-in-law wasn't going to New York? A It was because of that. 20

Q Wasn't the trouble over the restaurant? A No.

Q Didn't it bring that on? A Partly, he wasn't satisfied with the restaurant himself.

Q How did Mrs. Mittenbuhler get into it? A I told him that night.

Q I am talking about the quarrel in the restaurant? A We didn't quarrel in the restaurant, in the Hotel Pennsylvania. 30

Q Why did you keep this letter? A Because I knew what she would say on the stand. My mother saw it and Mrs. Van Lenten.

Q You kept this letter from 1924? A Yes, I did.

(As far as question is concerned, she had a right to keep it—Judge so characterized it.) 40

Babetta Mittenbuhler, in Rebuttal, Cross.

Q When did you make a copy of this letter?

A That very day.

Q How did you address the letter? A Mrs. Mittenbuhler.

Q How did you sign the letter? A Betty.

10 Q Didn't you sign any endearing term in the letter?

(Mr. Van Der Clock objects.)

A No.

Q How did you make a copy of the letters?

A The way it's there.

Q This or the other letter? A I wrote the other in pen and ink.

20 Q Exactly what did you make a copy of? A The letter I wrote to my mother-in-law.

Q Did you compare it? A Yes.

Q What kind of paper did you write the other letter on? A Regular writing paper.

Q And you wrote this on other paper?

(Mr. Van Der Clock objects.)

Q Why did you copy this letter?

(Mr. Van Der Clock objects.)

30 Q At the time you made a copy of this letter you were preparing for your divorce case? A No.

Q You kept a copy of the other letter you found in your husband's clothes? A Yes.

Q Why did you keep a copy of the second letter you wrote to your mother-in-law? A Because it simply asked her to come down.

40 Q You had a conversation with Mrs. Mittenbuhler about this letter later? A No, at the time she received it.

Emaline Torbet, for Petitioner, Direct.

Q Did you tell her what you did with the letter, the original letter you got from your husband? A No.

EMALINE TORBET, a witness produced by the petitioner, being duly sworn, on her oath, according to law, deposes and says: 10

Mr. Van Der Clock—Direct.

Q Do you know the petitioner, Babetta Mitzenbuhler? A Yes, since we were small children.

Q Has your relation with her been intimate? A Yes.

Q Do you know the defendant? A Yes. 20

Q Did you keep up your friendship after they married? A Yes, I visited them in Paterson. I was only once in Newark.

Q When they lived in Paterson were you in a position to observe what kind of a house she kept?

(Mr. Farley objects.)

A Everything was fine when I went there, her home was always clean. 30

Q Did you ever see her drunk? A No.

Q Did you ever know her to drink to excess? A No.

Q Did you ever see her drink? A Yes, one time when I was in Newark, we all did.

Q About when was that? A In July, 1929 we went down, a girl friend, her husband, my husband and myself and my baby, to Mrs. Mitzenbuhler's home. 40

Emaline Torbet, for Petitioner, Cross.

Q Did anything take place that night with reference to Mr. Mittenbuhler? A Mr. Mittenbuhler took my husband and the other lady's husband out. They were away an hour or an hour and a half.

10 Q When Mr. Mittenbuhler came back what did he do or say? A He brought in a bottle of booze for us to drink. He poured it out and he said he paid \$6.00 for it and where he got it.

Q Did Mrs. Mittenbuhler have a drink that night? A She had to, yes.

Q Do you know how she came to take that drink? A Yes, Frank said we should have a little drink to be able to have some fun.

Mr. Farley—Cross.

20 Q You've been a friend of Mrs. Mittenbuhler, the petitioner in this case, for years? A I have.

Q Since their marriage, you and she and the Mittenbuhler's have interchanged visits, have you not? A Very seldom, she came but he only came twice.

Q What did you have there at that time? A It was Christmas.

Q Did you have liquor? A No.

30 Q Do you recall having trouble one night at your house? A Not with Mrs. Mittenbuhler.

Q Do you recall Mrs. Mittenbuhler tearing a curtain from your windows? A No.

Q How many times were you in Mrs. Mittenbuhler's house? A Occasionally, during the day we went out.

Q Did you have a drink at that time? A No.

Q Why did you visit her? A She's my friend.

40 Q How often was Mr. Mittenbuhler and your husband present? A Twice.

Mabel Van Lenten, in Rebuttal, Direct.

Q So you only saw Mr. Mittenbuhler with Mrs. Mittenbuhler about four times? A Yes, but they weren't in the house.

Q Down in the house that night you all indulged in the liquor? A We took a drink.

Q And when they were at your house? A They never came to my house after they went to Newark. 10

Q What did you give them to drink at your home? A It was Christmas—we had no liquor, coffee and cake.

MABEL VAN LENTEN, again recalled.

Mr. Van Der Clock—Rebuttal 20

Q Do you remember about a letter that Mrs. Mittenbuhler showed you? A Yes.

Q Did anything take place after that? A She wrote an answer to Frank's mother.

Q Were you present when the letter was written to Mrs. Mittenbuhler, Sr.? A Yes.

Q Did you read it? A Not word for word.

Q Was a copy made of that letter 30

(Mr. Farley objects.)

to Mrs. Mittenbuhler, Sr., in your presence? A Yes.

Q Was the original and the copy compared? A Word for word.

Q I show you Exhibit P. 6 and ask you if you ever saw it before? A That's just like the one Betty sent to her mother-in-law.

Q Is that the copy made at the time? A Yes. 40

Mabel Van Lenten, in Rebuttal, Cross.

Q Do you know whether or not that original letter was sent to Mrs. Mittenbuhler? A Yes.

Q How do you know it was sent to her? A I mailed it "Special Delivery" on Washington street, across from the City Hall.

10

Mr. Farley—Cross.

Q You saw the letter that day? A Yes.

Q You compared it? A Yes.

Q You saw it compared? A She copied it.

Q Did you compare it? A Yes.

Q How? A Same as you'd write a copy of anything.

Q How do you know that this is a true copy of that letter? A It's word for word.

20 Q How do you know that? A I heard so many remarks about it, I guess I know.

Q When did you next see this letter? A Just now.

Q You haven't seen it since? A No.

Q How did the letter end? A I don't remember.

Q Do you know whether she dated the letter or not? A I don't know.

Q You have not seen this letter since 1924? A No.

30 Q You didn't look at this letter when it was shown to you by counsel, you simply glanced at the first page and said it was a true copy? A Certainly.

Frank Mittenbuhler, in Rebuttal, Direct.

MAY MITTENBUHLER, recalled.

Mr. Farley—Rebuttal.

Q Did you have occasion to read this letter in the intervening time? A This isn't the letter.

Q Is that a copy of the letter? A No. 10

The Master.

Q Why isn't it a copy? A The letter wasn't as long; it was only a page and a little over. A messenger brought it up to me at five P. M. There's lots of things in this letter that weren't in mine.

FRANK MITTENBUHLER, recalled. 20

Mr. Farley—Rebuttal.

Q Do you know Mrs. Torbet? A I do.

Q Was she there in your house and you in hers? A Yes.

Q How often was she in your house while you were present? A Four or five times.

Q What was done relative to drink while in your house, did you have any drink in your house when she was present? A Yes. 30

Q Did your wife drink? A Yes, the entire party of six.

Q Did you ever go to her house? A Yes.

Q What happened? A We had a party and drinks were served.

Q What happened about a curtain shifting? A In my home it was done.

Q What happened? A We had a party where there was considerable amount of liquor drank. My wife's wish craved for liquor. 40

Frank Mittenbuhler, in Rebuttal, Direct.

(Mr. Van Der Clock objects to latter statement.)

My wife drank considerable that evening and, while having the party, my wife pulled the curtain from the front room window.

10 Q You heard your wife say she never showed her temper?

(Mr. Van Der Clock objects.)

Q I show you a letter, or what is a copy of a letter written to your mother. Did you ever see this copy or any other letter of a similar character? A No.

Q Did you wife show you the copy or original letter sent to your mother? A No.

20 Q Did she tell you about it? A Yes, but not the contents.

Q Will you explain when you purchased the ring you spoke about in your direct examination?

A I purchased it some time in the early part of last year, 1929, in Tappan's jewelry store, Broad street, Newark for my wife. I still have it.

Q Did you give it to her? A No.

Q Any reason for your not giving it?

(Mr. Van Der Clock objected.)

30 Q You still have the ring in your possession?

A I have.

Q Are you willing to take your wife back?

A Yes, I am.

Q The first night you were married, what was the argument about?

(Mr. Van Der Clock objects.)

Q How did you come to move to Newark?

40 (Mr. Van Der Clock objects.)

Frank Mittenbuhler, in Rebuttal, Cross.

A Due to the fact that I wanted to get off the road and be home nights.

Mr. Van Der Clock—Cross.

Q Was that early in 1929 you purchased the diamond ring? A Yes.

10

Q Never told your wife about it? A No.

Q Until you were asked on cross examination and confronted with this letter? A Yes.

Q You lived with her all of the rest of 1929 up until January this year? A Yes.

Q You and your mother discussed this case after suit was started against you? A Yes, at times.

Q And since with your lawyer? A Yes.

Q You've seen your mother frequently since this suit was started? How often have you seen her? A About once a week.

20

Q Since this case was started, you've discussed it with her? A At times.

Q In discussing this case with your mother, did she tell you at any time what she was going to testify to? A No.

Q You mean to say your mother didn't tell you, at any time since suit was started, what she was going to testify to here? A That she would tell the truth only.

30

Q Did your mother ever go to Mr. Farley's alone? A No.

Q Do you know she never went without you? A I don't remember.

Q Did she say in his office what she was going to testify to?

(Mr. Farley objects.)

40

May Mittenbuhler, Emaline Torbet, in Rebuttal.

The Master.

Q Did your mother, in your presence, state to you or to anyone else the things she has testified to here today? A No.

10 *Mr. Van Der Clock continues.*

Q So that what you heard your mother testify to here this morning, you never heard before? A No.

Q Did your mother sign an answering affidavit in this cause? A I don't remember.

MAY MITTENBUHLER, recalled.

20 *Mr. Farley—Rebuttal.*

Q When were you to see me? A Yesterday alone, and one afternoon with Mrs. Bond.

Q Was your son with you? A No.

Mr. Van Der Clock—Cross.

Q You never discussed the case with your son? A No, never.

30

EMALINE TORBET, recalled.

Mr. Van Der Clock—Rebuttal.

Q You heard the defendant testify about a curtain being torn down? A It happened in Newark.

Q Who pulled it down? A Mrs. Mittenbuhler tried to pull it down and it came off the
40 hinges.

Elizabeth Thomas, in Rebuttal, Direct.

Mr. Farley—Cross.

Q You and Mrs. Mittenbuhler went out riding together? A In my car.

Q On one occasion you were stopped for speeding? A Never, I never had a ticket.

Q You never had a ticket? A Never.

10

Q You weren't drinking when you went out?

A Absolutely not.

ELIZABETH THOMAS, recalled.

Mr. Farley—Rebuttal.

Q Did you have any conversation with Babetta Mittenbuhler with reference to Emaline Torbet? A Yes, she told me she had been riding with her friend, and that she felt sick, they had been drinking and got a ticket for speeding and she was worried because the husbands were not to know about it.

20

Alimony awarded: \$20.00 weekly.

Counsel fee: \$300.00.

30

40

Certificate of Advisory Master and Stenographer.

IN CHANCERY OF NEW JERSEY.

*Between*BABETTA R. MITTENBUHLER,
*Petitioner,**and*FRANK J. MITTENBUHLER,
*Defendant.**On Bill for
Separate
Maintenance.**Certificate of
Advisory
Master and
Stenog-
rapher.*

I, PAULINE BASSOU, a stenographer duly appointed to report stenographically the evidence given before J. W. De Yoe the Advisory Master to whom the above-entitled matter was referred for hearing by the Chancellor do hereby certify that the foregoing is a true and correct transcript of the evidence given on the 27th day of May, 1930 and June 18th, 1930, before the Honorable J. W. De Yoe, Advisory Master in Chancery, in the said matter.

PAULINE BASSOU.

I, J. W. DE YOE, Advisory Master of the Court of Chancery, do hereby certify that the foregoing is a transcript of the evidence given upon the hearing of the case between Babetta R. Mittenbuhler and Frank J. Mittenbuhler on the 27th day of May, 1930 and June 18th, 1930, as certified to by Pauline Bassou, the stenographer appointed by me to report such evidence stenographically.

J. W. DE YOE,
Advisory Master.

81 FEB.T.1935

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

New Jersey Court of Errors and Appeals

Between

BABETTA R. MITTENBUHLER,
Complainant-Respondent,

and

FRANK J. MITTENBUHLER,
Defendant-Appellant.

*On Appeal
from Order
of the Court
of Chancery
Denying Peti-
tion to
Vacate and
Set Aside
Final Decree.*

MEMORANDUM ON BEHALF OF DEFENDANT-APPELLANT.

(Italics mine unless otherwise noted.)

This is an appeal from the decree of the Chancellor dated November 26, 1934, dismissing petition of the defendant-appellant to reopen, vacate and set aside a final decree advised on or about June 30, 1930, upon the ground that at the time that the Chancellor made said decree he lacked jurisdiction to make the same.

Facts.

1. Complainant filed a bill for maintenance under section 26 of our Divorce Act on the 26th day of February, 1930, alleging therein that her husband, on the 24th day of January, 1930, left complainant and abandoned her and separated himself from her and that the said complainant gave defendant no cause for his action.

2. The defendant filed his answer to said bill on April 23, 1930, denying the allegations.

3. The matter was referred to J. W. De Yoe, one of the Advisory Masters of this court and on the 30th day of June, 1930, the said Advisory

Master found that the defendant-appellant on or about the 24th day of January, 1930, left and abandoned the complainant and that all the material facts alleged in the bill of complaint filed in said cause were true and that a decree be made in accordance with the prayer of said bill of complaint. The defendant was ordered to pay to the complainant or her solicitor, \$15.00 per week for her support and maintenance and \$5.00 per week for the support and maintenance of the child of said marriage.

4. The transcript of the testimony is barren of any evidence to support the allegations of that part of paragraph four of the bill of complaint which, in substance, are as follows:

(1) That the defendant on January 24, 1930, left and abandoned said complainant and that he separated himself from her, a copy of said bill of complaint being attached to the petition and marked Exhibit "A" (S. C. pp. 16-18).

(2) The bill for maintenance was filed under the provisions of Section 26 of the Divorce Act, V. 2, C. S. 1910, page 2038, Childs on Divorce, page 165. The part of said statute applicable to the case at bar is as follows:

"In case a husband, without any justifiable cause, shall abandon his wife or separate himself from her, and refuse or neglect to maintain and provide for her, it shall be lawful for the court of chancery to decree and order such suitable support and maintenance, to be paid and provided by the said husband for the wife and her children or any of them, by that marriage, or to be made out of his property, and for such time as the nature of the case and circumstances of the parties render suitable and proper in the opinion of the court."

Therefore, in order for the complainant to maintain her bill, it was necessary for her to show two elements.

First, *an unjustifiable abandonment on the part of the husband.*

Second, *a refusal to support the wife*, and the courts have held that unless these elements appear, *the court has no jurisdiction.*

See:

Margarum v. Margarum, 57 N. J. Eq. 249;
Anshutz v. Anshutz, 16 N. J. Eq. 162;
Walling v. Walling, 16 N. J. Eq. 389;
Roarkes v. Roarkes, 77 N. J. Eq. 181, on page 183, opinion of Walker, C.;

O'Brien v. O'Brien, 103 N. J. Eq. 215, on page 224, opinion by V.-C. Fallon;

Biddle v. Biddle, 104 N. J. Eq. 313, on page 315, opinion by V.-C. Leaming;

Dinnebil v. Dinnebil, Ct. of Errors, 109 N. J. Eq. 594, on pp. 596, 602, opinion by Wells, J.;

Fallon v. Fallon, Ct. of Errors, affirmed on the opinion of court below by Dougal Herr, 111 N. J. Eq. 512, on page 516.

(3) That part of the report of the Advisory Master under paragraph three, Section B, wherein he reports to the Chancellor that the defendant on or about the 24th day of January, 1930, left and abandoned the complainant (S. C. pp. 21-23).

(4) As soon as the defendant was able to obtain a stenographic transcript of the testimony, which is set out in State of Case pages 49 to 136, he informed the court of the fact, and at the suggestion of the Chancellor, he filed a petition to reopen and vacate the original decree (S. C. pp. 5 to 9). Upon the filing of said petition, together

with the affidavits and exhibits attached thereto, which is set out at State of Case pages 9 to 25, an order to show cause was made by the Chancellor (S. C. pp. 27 to 28). The complainant-appellee filed her answer to said petition (S. C. pp. 29 and 30) and the affidavits attached to said answer are set out in State of Case pages 31 to 37. The Chancellor, after having heard counsel for the parties, on or about November 26, 1934, filed two opinions, which are set out in State of Case pages 38 to 44, denying defendant-appellant's application, and in one of them stated that the decree may be reopened for the purpose of permitting an amendment to be made in the bill of complaint in order that constructive abandonment may be alleged and not actual abandonment so that the allegations and the proofs will thereby agree. This is set out at State of Case page 44, lines 20 to 30. Later, he filed a supplemental opinion (S. C. pp. 45, 46) in which he stated that he decided to change his conclusions in that matter, and on November 26, 1934, he signed a decree dismissing defendant-appellant's petition (S. C. pp. 47, 48).

(5) That part of the final decree, which recites and adjudicates that the defendant without justifiable cause abandoned the complainant and separated himself from her and refused and neglected to maintain and provide for her is set out in State of Case pages 24-25.

5. This court and the Court of Errors and the United States Supreme Court has determined that a decree or judgment made in a cause wherein the court had no jurisdiction is null and void. In the case at bar, defendant contends that the court lacked jurisdiction to make the decree in question upon the ground that no legal proof had been adduced before the court justifying said

decree as the complainant can only recover on the case made by her bill. In the case at bar the defendant was only required to meet such of the complainant's proofs as tended to establish the case made by the bill.

LAW AND ARGUMENT.

POINT I.

The modern procedure to reopen and vacate a final decree is by petition and order to show cause.

The procedure adopted by the defendant in the case at bar is that approved by the courts in our late cases, that is by petition to open a final decree, and order to show cause issued thereon, which procedure has been recognized in this state as a substitute for the procedure by bill of review or by bill in the nature of bill of review, and although our practice still recognizes such bills, the practice of procedure by petition and order to show cause has been recognized in this state for more than a century.

See:

- Miller v. Rushforth*, 4 N. J. Eq. 174;
- Watkinson v. Watkinson*, 68 N. J. Eq. 632,
60 A. 931 L. R. A. 397, 6 Ann. Cas. 326;
- Cook v. Weigley*, 69 N. J. Eq. 836, 65 A.
480;
- Sparks v. Fortescue*, 73 N. J. Eq. 251, 67
A. 391;
- Boyer v. Boyer*, 77 N. J. Eq. 144, 76 A. 309;
- Jones v. Read-Jones*, 84 N. J. Eq. 479,
93 A. 580;
- In re: Robertson*, 95 N. J. Eq. 672, 123 A.
721;

Mitchell v. Mitchell, 97 N. J. Eq. 298, 127 A. 185;

In re: O'Mara, 106 N. J. Eq. 311, 151 A. 67;

Morris v. Glaser, 106 N. J. Eq. 585, Affirmed 110 N. J. Eq. 661;

Cameron v. Penn Mutual Life Ins. Co., 116 Eq. 311, decided July 3, 1934, opinion by Berry, V.-C.

POINT II.

Complainant can only recover in the case made by her bill. The defendant is only required to meet such of the complainant's proofs as tend to establish the case made by the bill.

In the case at bar, in paragraph four of the bill of complaint it alleges that:

"On the twenty-fourth day of January A. D. nineteen hundred and thirty, the defendant abandoned said complainant and separated himself from her saying that she would have to look for herself; and complainant gave her husband no cause for his action but that she had ever been a true and faithful wife to him."

Paragraph four of the answer states as follows:

"Defendant denies paragraph 4, as is alleged in the complaint and on the contrary this defendant says that the complainant abandoned and deserted the defendant on the 24th day of January, 1930, and separated herself from him without justifiable cause, and has refused to return to him since she deserted him."

At the final hearing where testimony was taken on two different days, the complainant, on

the first day of the hearing, which was May 27, 1930 testified as follows (S. C. p. 60):

“Q On the 24th of January, 1930, what happened finally? A I got so scared, I was afraid of him, he choked me and he told me to get out and I went and took my belongings.

Q How long before did he choke you?

(Mr. Farley objects.)

A About the middle of January.

Q You then left on the 24th? A Yes.

Q You went home to your parents? A Yes.”

On page 65 of State of Case, line 30 she testified as follows:

“Q Did you sleep with your husband?

A Yes, until I left him, Jan. 24th.

Q Did you tell your husband you were going? A No, I took the furniture, I paid for half of it, and my clothes.”

On page 68, line 1, she testified as follows:

“Q Would you be willing to forgive him now, would you go back with him? A No.

Q Why? A I don't intend to get choked again.

Q You testified that he choked you once in January? A In December.”

On June 18, 1930, she testified as follows (S. C. p. 120):

“Q You testified you didn't love your husband, is that correct?

(Mr. Van Der Clock objects.)

A Yes.

Q When did your love for your husband change? A About six months before I left him.

Q Do you recall saying that your love didn't change until some time in January?

(Mr. Van Der Clock objects.)

Question withdrawn.

Q If your husband offered you a home now, would you be willing to go back with him?

(Mr. Van Der Clock objects.)

A No."

On direct examination, on page 97 of State of Case, Mr. Mittenbuhler gives his version as to what happened on January 24, 1930:

"Q How did your wife come to leave, did she leave any word? A Never gave me the slightest inkling she was going to leave. I didn't know then that she had drawn the money.

Q Tell us what occurred on the 24th of Jan. 1930. A On the 24th I left for my work in the regular manner and coming home that evening, I found my wife not at home. It wasn't unusual, she'd spend every Friday to Monday, as she said, at her mother's home. I spent the week-end in and around Newark. I quit work on Monday night, Jan. 27th and I stopped with a few fellows from the office and had a bite. Coming to my house, 417 Florence avenue, I walked in and flashed the light and found the entire house was wiped out, not even a chair. I walked all the way through. Everything was taken down with the exception of the shades, even the electric light bulbs. My clothes were thrown on the floor and there was a small card which said, 'Rescue Mission.' I didn't know what to do. I couldn't realize my wife would do that. I had no place to go, but I did get a room in a local hotel in Newark and stayed there and went back to work the next morning."

* * * * *

(S. C. p. 98)

"Q Did your wife tell you where she was going when she left? A No.

Q Did you visit her or see if you could find her? A I went to my mother-in-law's with my sister, my mother and my dad;

nobody was home. I later wrote a letter direct to the moving man who moved us to Newark and I had received no answer. I called him on the 'phone and I learned where he had taken the goods."

* * * * *

"Q Did your wife tell you she was going to leave you? A She certainly did.

Q Why? A She wanted to have a free and easy life.

Q How did you treat your wife in reference to money? A Paid all household bills, rent, light, heat, gas, milk, bread, laundry, always gave my wife about \$15.00 a week and I kept it up until she left."

Upon reading the affidavit of the complainant on the application for alimony *pendente lite*, and particularly upon reading paragraph fourteen (14) the true situation is disclosed, indicating that the reason for the separation of the parties to this suit was not that of actual desertion as set out in the bill of complaint, in the report of the Advisory Master and in the final decree, but that the complainant says that she was compelled to leave her husband by reason of his extreme cruelty. In other words, the proof as to the cause of the separation of the said parties was that of extreme cruelty. Thereby, if the defendant is guilty of any charge whatsoever, he is guilty of constructive desertion and that is not the charge in the case made out by the pleadings. The following is the particular allegation of paragraph fourteen (14) which I have reference to:

"During December, nineteen hundred and twenty-nine, and January, A. D., nineteen hundred and thirty, defendant's actions became so terrible and his actions and gestures so vile that deponent kept out of his way as much as possible and finally her health became so affected that she could not stand it

any longer and was compelled to leave the defendant and go to the home of her mother on the twenty-fourth day of January, A. D. nineteen hundred and thirty, where she has remained ever since, and the defendant has made no effort to have her return to him, nor has he supported deponent and their child."

Therefore, it appears from an examination of the testimony, the only evidence before the Advisory Master was to the effect that if the defendant was guilty of any matrimonial offense whatsoever it was that of constructive desertion, *and that* was not pleaded nor does the record show that the complainant at any time made any application to amend her pleadings to comply with the proof, and, of course, it is an elementary principle of law that the court, in making or advising a decree in a Chancery suit, can only consider evidence which is applicable to the issues raised by the pleadings by the parties in said suit. This is borne out by the opinion of our late Chancellor in *Succhierelli v. Succhierelli*, 101 N. J. Eq. 30, where he said: (Syllabus.)

1. When a husband physically and actually leaves his wife, and remains away for the statutory period, &c., she may sue him for the cause of desertion by charging him with that fact in the simplest possible form mentioned in the statute.

2. But, when a wife is compelled to leave the matrimonial abode, either because her husband drives her away, or by conduct so cruel as to show that he means to force her away, or by such conduct compels her to leave for her own safety, then, in theory and intendment of law, the husband is the deserter; but this is a constructive desertion.

3. Whenever a constructive desertion exists, then, in the petition in a suit for desertion for that cause, the facts must be pleaded, so that the husband, being served,

may know the case he has to meet; and if, in such circumstances, a simple desertion is charged, he may remain away and rely upon his wife being unable to prove it against him.

The legal proposition then is, what is the effect of a decree which is predicated upon evidence not within the issues created by the pleadings. The answer to that is found in the opinion of Vice-Chancellor Backes in *16th Ward Bldg. & Loan Association v. Louisi, et als.*, 108 N. J. Eq. 619, 156 A. page 119.

Vice-Chancellor Backes, at page 120 of 156 A., stated the rule relating to pleadings and the nature of a decree that could be entered as follows from said pleadings:

"The court may decide only the issues raised by the pleadings, and a decree must be limited to the issues decided. Beyond that a decree is a nullity."

In *C. & D. Bldg. Corporation v. Griffithes*, 109 N. J. Eq. 319, 157 A. page 141, Vice-Chancellor Bigelow stated the rule as follows:

"Complainant's relief must be based on facts alleged in the bill and admitted by the defendant, or proved; it cannot be based on facts not pleaded, although established by the proofs."

Andrews v. Farnham, 10 N. J. Eq. 91.

In *Midmer v. Midmer's Executors*, 27 Eq. 548, this court stated the rule as follows:

"It is further insisted that the case made by the appellants, on the evidence, substantially meets and satisfied the allegations of their bill. The bill proceeds upon the ground of a trust arising, not by mere operation of law, but by virtue of an express agreement between the parties. This trust, so far as the bill discloses, had its inception at the date of the purchase of the land in question

by John J. Midmer. *There is not the slightest intimation in the bill of any other trust in land.* The very groundwork of the appellants' case, upon the evidence, is a purely resulting trust in the mother of the parties to the alleged agreement, originating almost two years earlier than that stated in the bill. It is manifest that, upon such a case, assuming it to be established, the *appellants can have no relief upon the pleadings as they stand.*"

Again, in *Trainor, et al. v. Le Beck, et al.*, 101 Eq. 823, 139 A. 16, Justice Black, speaking for this court, said:

"The record shows the decree is not supported by the findings of the learned Vice-Chancellor. It is elementary, and settled beyond discussion, a decree must be based upon the findings of fact, as made by the court, and without such findings, the decree cannot stand. *The decree must conform to the case made by the pleadings, as well as to the proofs.*"

In *Munday v. Vail*, 34 Law 418, from the syllabus:

"A decree in equity, which is entirely aside of the issue raised in the record, is invalid, and will be treated as a nullity, even in a collateral proceeding."

Chief Justice Beasley, on page 421, stated the following:

"The counsel for the defense did not attempt to maintain the propriety of such a decree, but argued that if erroneous it could not be called in question in this collateral suit. Cases were cited to sustain this position. But these decisions are all to the effect that the judgment or decree of a court having jurisdiction over the controversy and the parties cannot be impeached for error, except in a direct proceeding for that purpose. The proposition has long since taken its place

among the settled maxims of law. The only question is, whether it applies to the present case. If the Court of Chancery, in the case under review, had the power to make the decree in question, the legal rule thus invoked must prevail; but if the court had no such power, the rule is not applicable. The inquiry is, had the court jurisdiction to the extent claimed?

Jurisdiction may be defined to be the right to adjudicate concerning the subject matter in the given case. *To constitute this there are three essentials: First. The court must have cognizance of the class of cases to which the one to be adjudged belongs. Second. The proper parties must be present. And, Third. The point decided must be, in substance and effect, within the issue. That a court cannot go out of its appointed sphere, and that its action is void with respect to persons who are strangers to its proceedings, are propositions established by a multitude of authorities. A defect in a judgment arising from the fact that the matter decided was not embraced within the issue has not, it would seem, received much judicial consideration. And yet I cannot doubt that, upon general principles, such a defect must avoid a judgment. It is impossible to concede that because A and B are parties to a suit, that a court can decide any matter in which they are interested, whether such matter be involved in the pending litigation or not. Persons by becoming suitor do not place themselves for all purposes under the control of the court, and it is only over these particular interests which they choose to draw in question that a power of judicial decision arises."*

In *Reynolds v. Stockton*, 43 Eq. 211, syllabus 1, affirmed in 140 U. S. R. 254:

"1. A decree in New York which adjudicates a matter not presented by the pleadings nor within the issue can have no higher

effect than a judgment rendered in our own courts under like conditions. Under the authority of *Munday v. Vail*, 5 Vr. 418, it must be treated as a nullity."

Justice Van Syckel speaking for this court on page 214 said:

"The question presented by the appeal to this court is whether to the decree of the New York court the conclusive force and effect of a judgment must be accorded.

That question is distinctly presented in *Munday v. Vail*, 5 Vr. 418, where it is held by the supreme court of this state that a decree which is entirely aside of the issue raised in the record is invalid, and will be treated as a nullity, even in a collateral proceeding.

A decree or judgment which is not appropriate to any part of the matter in controversy before the court can have no force. The matter in controversy is that exclusively which is presented by the pleadings and the issue framed thereby.

The object of the New York suit was fully accomplished, so far as the pleadings disclosed its purpose, when the New York fund was disposed of. There was an entire absence of such specific allegations in the complaint as were necessary to put the receiver of the New Jersey company on his defence in respect to the state of the account between that company and the Hope company.

The decree in New York, having adjudicated a matter not presented by the pleadings nor within the issue, can have no higher effect than a judgment rendered in our own courts under like conditions. Under the authority of *Munday v. Vail*, it must be treated as a nullity."

Also see:

Dodd v. Williams, 40 N. J. Eq. 672, 706 (opinion by this court);

Jones v. Davenport, 45 N. J. Eq. 77 (opinion by Vice-Chancellor Van Fleet) (syllabus):

A decree or judgment on a matter outside of the issue raised by the pleadings is a nullity.

A complainant will not be allowed to amend his bill after final hearing so as to make a new case, or to state a new and additional claim to relief.

Courts can only hear and determine causes on the pleadings actually filed, and not on what parties may agree they shall be.

In 33 *Corpus Juris*, under the title Judgments, page 1152, section 93, the rule is stated as follows:

(2) Judgment beyond issues as void or voidable.

A judgment upon issues not made by the pleadings is at least erroneous, and may be set aside or reversed in a proper proceeding for that purpose. But many cases go further, and hold that judgments based upon issues not made by the pleadings are coram non judice and void.

Citing cases from practically every state in the Union. The following cases were cited from New Jersey, New York and Massachusetts:

Spooner v. Davis, 7 Pick. 147;

Standish v. Parker, 2 Pick. 20, 13 Am. D. 393;

Munday v. Vail, 34 N. J. L. 418;

Reynolds v. Stockton, 43 N. J. Eq. 211, 10 A. 385, 3 Am. S. R. 305 (aff. 140 U. S. 254, 11 S. Ct. 773, 35 L. Ed. 464);

Jones v. Davenport, 45 N. J. Eq. 77, 17 A. 570 (rev. on other grounds 46 N. J. Eq. 237, 19 A. 22);

Husted v. Van Ness, 158 N. Y. 104, 52 N. E. 645;

- Pray v. Hegeman*, 98 N. Y. 351;
Dunham v. Bower, 77 N. Y. 76, 33 Am. R. 570;
Reid v. Gardner, 65 N. Y. 578;
Peo v. Johnson, 38 N. Y. 63, 97 Am. D. 770;
Campbell v. Consalus, 25 N. Y. 613;
Embury v. Conner, 3 N. Y. 511, 53 Am. D. 325;
Banta v. Banta, 103 App. Div. 172, 93 N. Y. S. 393;
Davis v. Davis, 86 App. Div. 401, 83 N. Y. S. 794;
Schlimbach v. McLean, 83 App. Div. 157, 82 N. Y. S. 516;
Bolivar v. Bolivar Water Co., 62 App. Div. 484, 70 N. Y. S. 750;
Bryant v. Allan, 54 App. Div. 500, 67 N. Y. S. 89;
Clapp v. McCabe, 84 Hun. 379, 32 N. Y. S. 425 (aff. 155 N. Y. 525, 50 N. E. 274);
William Anson Wood Mower, etc. Co. v. Thayer, 50 Hun. 516, 3 N. Y. S. 465;
Smith v. Weeks, 26 Barb. 463;
Vandenburgh v. New York, 57 N. Y. Super. 285, 7 N. Y. S. 675;
Manny v. Harris, 2 Johns. 24, 3 Am. D. 386.

Therefore, when the case was closed before Advisory Master De Yoe, we had this situation:

The complainant had filed a bill alleging actual desertion. The answer of the defendant denied such allegations. The proof before the court was to the effect of complainant alleging constructive desertion and extreme cruelty, and the defendant denying said proof. Therefore, the issue which was tried was that of extreme cruelty. At the conclusion of the hearing, and as a mat-

ter of fact to this date, no amendment was or has been made to the pleadings in order to comply with the actual proofs before the Chancellor. Therefore, upon what authority did the Chancellor make the final decree in question? And, when the Advisory Master reported to the Chancellor that the complainant had sustained the burden of proof, that statement or that report was false, as there was no evidence that the defendant-appellant had actually abandoned and without justifiable cause refused to support and maintain the complainant. Under such circumstances, what is the effect of a decree predicated upon a report which is untrue?

The defendant was obliged to meet the issue created by the pleadings, and in a decree made upon any proof of such issue is bound by it. There was no obligation on his part to challenge a report which is false; nor a decree entered or made by virtue of said report.

The contention of the defendant-appellant is that the Chancellor had no jurisdiction to make the decree in question, unless the same is supported by proper and legal proof.

In *Dinnebeil v. Dinnebeil*, 109 N. J. Eq. 594, on page 602, this court stated the rule to be as follows:

(1, 2) "The law is well settled * * * that, to entitle a wife to alimony (under Section 26 of the Divorce Act), two elements must concur: First, the husband must, in the language of the statute, without any justifiable cause abandon his wife, or separate himself from her; and *second, he must either refuse or neglect to maintain and provide for her.*"

Taylor v. Taylor, 73 N. J. Eq. 745, 70 A. 323, 324;

Margarum v. Margarum, 57 N. J. Eq. 249, 41 A. 357;

Biddle v. Biddle, 104 N. J. Eq. 313, 145 A. 639.

and on page 600 of 109 N. J. E. this court again said:

(4) "This leads to the consideration of the second question involved, namely, as to whether the respondent is entitled to separate maintenance.

"Before the respondent can succeed in her suit for maintenance, she must show (as we have already said), not only that appellant had abandoned or deserted her, but that he also had refused or neglected to maintain and provide for her in accordance with the requirements of the statute, and the question reserved is whether the complainant has succeeded in that part of her case."

In *Roarke v. Roarke*, 77 N. J. Eq. 181, on page 183 Vice-Chancellor Walker (who later became our late Chancellor) says:

"To give the court jurisdiction to decree such support as the wife seeks in this case, there must be not only an abandonment of the wife by the husband, *but also neglect or refusal to support her*. Both conditions must exist to give jurisdiction. *Margarum v. Margarum*, 57 N. J. Eq. (12 Dick.) 249. Now, how can it be said that the husband neglects or refuses to support his family, when, as a matter of fact, he is paying for their support such sums as we adjudged against him by a magistrate, upon proceedings instituted by his wife, the present complainant?"

In support of the above argument, counsel for defendant desires to cite the case of *People v. Kilduff County*, an opinion by the Supreme Court of Illinois, decided December 21, 1927, and reported in 160 Northeastern, page 76, which I feel

is very much to the point. The pertinent parts of said opinion, which are applicable to the case at bar are as follows (at p. 80):

(12, 13) "The purpose of invoking the judgment order or decree of the court in local improvement cases is to protect, by judicial investigation and determination, the rights of holders of improvement bonds, the municipal and property owners whose property is subject to the burden of the assessment. *Case v. City of Sullivan*, 22 Ill. 56, 78 N. E. 37. It is clear, therefore, that the mere power conferred by law upon the court to hear and determine a question authorized or required by law to be determined is not the whole of jurisdiction. When the decisions speak of the powers of the court being invoked, they refer to the action of the party complaining or petitioning as an integral factor in bringing about the court's jurisdiction of a particular case, whether ex parte or between parties, in which the law empowers it to act. The element authorizing an action as to subject matter for decision is the presentation of the tribunal, in the manner appointed by law, of such facts as the law requires it to act upon. In cases at law, a declaration, in equity a bill, and in statutory proceedings, a petition or report is the usual method of invoking the exercise of jurisdiction. *If the court acts and expresses the result of its deliberation in a final judgment, order or decree, and the facts, however well stated, do not authorize it, as matter of law, to act, jurisdiction is lacking, and the judgment rendered is a nullity. The test of jurisdiction is not whether a court of review would reverse the judgment rendered. An appellate court would reverse a judgment on the ground that it was rendered without jurisdiction, but it is begging the question to say that, because a reviewing court on appeal or error, would reverse the judgment or order, therefore it can be attacked in no other manner.*"

The record in the case at bar is barren of any such proof, and in the absence of any proof to sustain the allegations of the pleadings, the Chancellor never acquired jurisdiction of the subject matter, so that he was authorized to make the decree in question, and a decree made by the Chancellor under such circumstances, is null and void. In the case at bar, there is no middle ground. The decree is void from the beginning.

Therefore, the learned Advisory Master, when he made his decree dismissing the defendant-appellant's petition to reopen and vacate the final decree in question was in error. The reason given by him (S. C. pp. 42-43) for dismissing said petition, "that the point decided by the final decree was in substance and effect within the issue, and if the Chancellor committed judicial error it could not be corrected after the time to appeal had expired, *in the absence of fraud or mistake or newly discovered evidence, or some special equity that would give the court discretionary power to make the order,*" is not supported by any legal authority, as the Chancellor has discretion to reopen, modify, mould or set aside any of his own decrees where the same have been made without authority.

"*To disturb the decree, after the time to appeal has expired, in any manner except to correct clerical errors or relieve an innocent party from the effect of fraud or a mistake or because of newly discovered evidence would be tantamount to granting a rehearing or a review and it is well settled that a bill of review cannot be filed after the expiration of the appeal period, except in cases of fraud, mistake or newly discovered evidence.*"

“The husband’s appearance and submission at the final hearing would not have prevented his questioning on appeal the *court’s jurisdiction of the subject matter.*”

However, defendant-appellant at this time urges that he is not estopped to question the final decree, which is not supported by the evidence, as it is the duty of the Chancellor not to make a decree foreign to the issues made out by the pleadings. And, it is a legal error, under the facts in the case at bar, for the Chancellor to make a decree where there is no evidence to support it, and we say it was the duty of the solicitor for the complainant in the court below to see that the only decree which was entered was the one established by the proofs. It was the duty of the Advisory Master who heard the case not to make a report to the Chancellor unless the same was predicated upon legal proofs before him, and when a report is made under those facts, and if the Chancellor is led to make a final decree upon said facts, it is contended that it was fraud to make the final decree in the case at bar. The Chancellor at all times has control of his decrees, and when his attention is called to the fact that a decree is made where there was no proof to support it, it is his duty to correct it, and when the Chancellor refuses to do this, *then it is contended, on behalf of the defendant-appellant, that this was an abuse of discretion.*

The learned Advisory Master who heard the application to open the decree in question, in his original opinion suggested the making of an amendment, and he later, by supplementary opinion (S. C. pp. 45-46) said that upon further deliberation “I have decided to change my con-

clusions in the matter and advise an order dismissing the petitioner's petition."

I feel that he was correct in said supplemental opinion, because after the decree is enrolled the Chancellor has no jurisdiction to amend a final decree and set up a new cause of action without a re-reference and a re-hearing. As hereinabove stated, the present condition was wholly due to the fault, at least if no one else's but to that of the complainant, as she was obliged to see that no decree was entered except the one set out by the pleadings and the proofs. And, if it happened that someone made a mistake in not properly setting out the facts in the bill of complaint (S. C. pp. 16-18), as in this case the cause of action set out in said bill is that of actual desertion, whereas constructive desertion should have been set out as the cause of action, the complainant certainly knew what her proof was. Why didn't she apply to amend her bill of complaint? Surely it was not the duty of the defendant to see that the bill of complaint was properly amended. He was dragged into court and the only issue he was bound to meet was that set out in the pleadings. Certainly the complainant knew the case that she had proved when all of the testimony was in. Why didn't she apply to amend her bill at the time to conform with the proofs? No, but she sits down for three or four years, and then, when her attention is called to the fact that a decree was made not within the issues created by the pleadings, she shouts the defendant is not entitled to relief because he has waited too long. This is not the law.

POINT III.

The doctrine of laches does not apply in the case at bar as the decree was null and void in the beginning for want of jurisdiction.

Complainant at the argument before the Advisory Master stated that the defendant was not entitled to his relief because he was guilty of laches. The answer to his whole argument is that if the decree in question never had any vitality because the Chancellor had no jurisdiction to make it or had not properly acquired jurisdiction to make said decree because it is not within the issues created by the pleadings and a decree in order to be valid must be based on the pleadings, and if issue of fact is created by said pleadings, that is, the complainant charges certain facts which are denied by the defendant, the court is not justified or has no legal right to make a decree to grant relief to said complainant and make a decree for that purpose unless the same is based on legal evidence produced before the court upon issues created in the pleadings.

Counsel for defendant met the same issue in the case of *West Essex Bldg. & Loan Association v. The Borough of Caldwell*, 112 N. J. L. 677, 171 A. 671, decided April 4, 1934; where the Supreme Court stated the rule as follows:

“Laches cannot give vitality to ordinance based by council where ordinance never had existence because not approved by the Mayor or passed over his veto.”

The opinion of the court below was affirmed by this court (174 A. 576) and the rule of laches seems to be that in order for that principle to apply or to be used as a weapon to deny the relief prayed for there must be a delay for a

length of time which, unexplained and unexcused, is unreasonable under these circumstances, *and which has been prejudicial to the complainant in the case at bar.*

Sobota et ux. v. Shaffer et ux., 105 N. J. E. 459, A. Rep. 148, page 196,

where Vice-Chancellor Fielder stated the rule as above:

“Laches involves something more than mere delay. There must be delay for a length of time which, unexplained and unexcused, is unreasonable under the circumstances and which has been prejudicial to the defendants.”

Massie v. Asbestos Brake Co., 95 N. J. E. 308.

Court of Errors and Appeals in the above case affirmed a decree of the Court of Chancery upon the opinion filed by Vice-Chancellor Buchanan, and on page 311 of said opinion the Vice-Chancellor stated the rule as to laches as follows:

“* * * laches involves something more than mere delay, mere lapse of time. There must be delay for a length of time which, unexplained and unexcused, is unreasonable under the circumstances, and which *has been prejudicial to the defendant.* Cf. *Johnston v. McKenna*, 76 N. J. Eq. 217 (at p. 229); affirmed, 77 N. J. Eq. 555; where there was a delay of some seven or eight years. Cf. also *Soper v. Cisco*, 85 N. J. Eq. 165 (at p. 174). *In the present case no prejudice is shown, or can be inferred, to have resulted to complainants. There has been no loss of memory, no loss of witnesses, no loss of evidence. Defendants' course of conduct was not induced by complainants' delay or inaction.*”

In the case at bar, complainant knew her cause of action at the time she filed her bill and that

was, as shown by the evidence, constructive desertion. Then why did she file a bill charging actual desertion except that it was done for the purpose of misleading the defendant in his defense? At the conclusion of the testimony, she knew that the only case proved by her was that of constructive desertion. Why did she not at that time apply to amend her bill? When she presented her final decree to the Advisory Master, which the Chancellor signed for her, she knew that she had not substantiated the allegations of her bill, and at that time she could have averted the present situation by applying to the said Advisory Master to have the bill of complaint amended to comply with the proof and she could have very easily prepared a final decree for the Chancellor to make adjudicating the cause of action which she had made out in her pleadings and her proof.

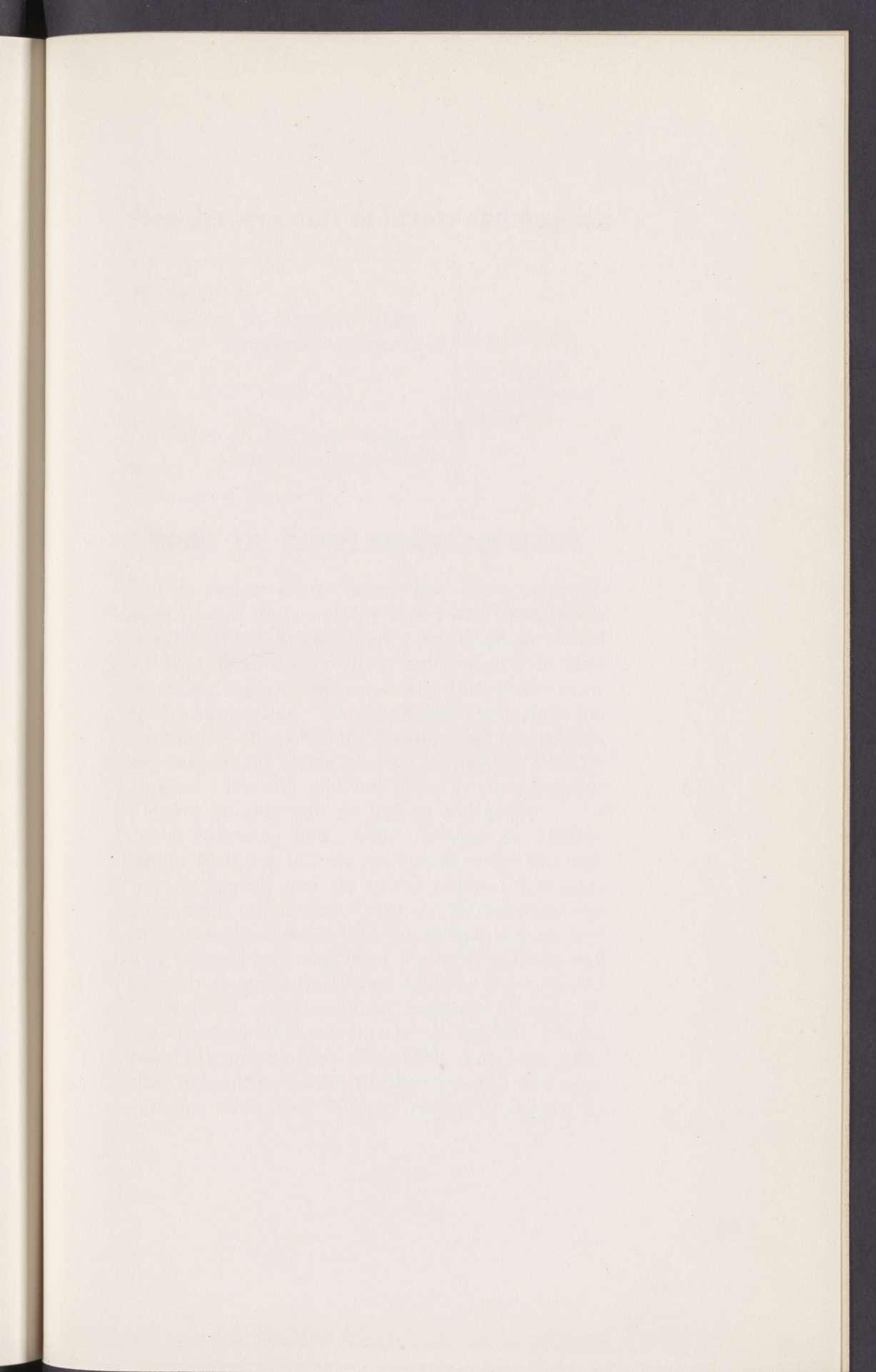
The defendant in the case at bar, true, was represented by counsel, a Mr. James J. Farley of the City of Newark, and whether through ignorance or inadvertance or whether the decree in question had never been submitted to him, still the situation today is that a decree is made in a cause which is not supported by any evidence. The defendant is a layman and when he became dissatisfied with Mr. Farley, he retained present counsel. By reason of the present bill filed by the complainant, defendant lost his position as a salesman with the Fleischmann Company. When he retained the present solicitor, he demanded his papers from Mr. Farley, which request was refused, and in view of his financial condition he was unable to obtain a transcript of the testimony in the present case until some time in April of this year.

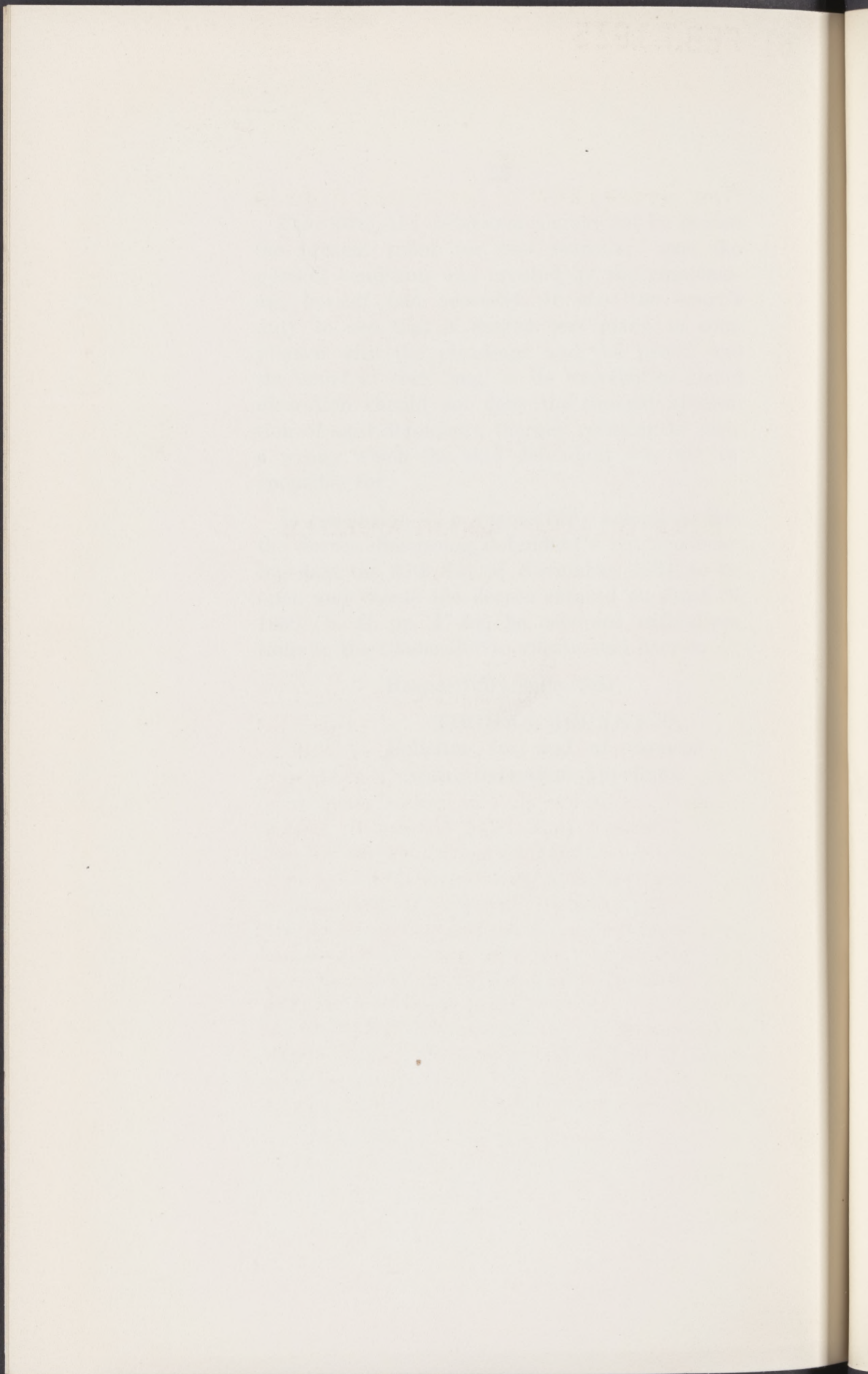
Therefore, the defendant should not be denied the present relief for two reasons: one, the present condition was created by the complainant herself and secondly, it was the court's duty to see that a decree was made in compliance with the pleadings and the proof, and the court at this time, in its exercise of sound discretion should not deny the present application of said defendant, thereby refusing to undo a wrong which the said defendant was not responsible for.

In conclusion, it is respectfully submitted that the decree dismissing defendant's petition bearing date the 26th day of November, 1934, to reopen and vacate the decree entered on June 30, 1930 (S. C. pp. 47-48) be reversed with directions to the Chancellor to vacate said decree.

Respectfully submitted,

THOMAS BRUNETTO,
Solicitor for and of Counsel
with Defendant-Appellant.





New Jersey Court of Errors and Appeals

Between

BABETTA R. MITTENBUHLER,
Complainant-Appellee,

and

FRANK J. MITTENBUHLER,
Defendant-Appellant.

On Bill, &c.

On Appeal
from Court of
Chancery.

BRIEF OF COMPLAINANT-APPELLEE.

This matter comes before the Court upon appeal from a decree of the Court of Chancery denying defendant-appellant's application to set aside a final decree filed and enrolled in that court for a period of practically four years prior to the application. The application was made before one of the Advisory Masters and his opinion appears in the State of Case on pages 38-46 inclusive. We can add but little to that comprehensive opinion and its logical conclusion.

On February 26th, 1930, Babetta R. Mittenbuhler filed her bill for maintenance for the support of herself and the infant child of her marriage with defendant, Frank J. Mittenbuhler, on the ground that defendant had abandoned her and had refused and neglected and still refuses and neglects to maintain and provide for her and said infant child. (State of Case, pages 16, 17 and 18).

Defendant filed an answer to the bill, (Case, page 19) and on May 27th, 1930, and June 18th, 1930, the entire matter of abandonment and non-support was tried before Advisory Master J.

WILLARD DEYOE, with all the facts pertinent thereto thrashed out; complainant, on the first day of the hearing, having offered the testimony of herself, of Mabel Van Lenten, William Speicer, Sr., Babetta Speicer and William Speicer, Jr., and defendant having offered the testimony of himself, of Joseph J. Clark, Joseph Solinsky, Estella Bond and Elizabeth Thomas, and on the second day of the hearing, defendant having offered the testimony of himself, of Mrs. Mae Mittenbuhler and Elizabeth Thomas, and complainant having offered the testimony, (in rebuttal) of herself, of Emaline Torbet and Mabel Van Lenten. (See testimony and copy of report of Advisory Master filed in the cause.)

Not only was the issue of abandonment thrashed out by witnesses, but also by various exhibits.

After hearing the testimony, the Advisory Master found and reported, among other things, that the defendant had abandoned complainant, and advised that a decree be made requiring the defendant to pay to complainant, the sum of \$15. per week for her support and maintenance, and \$5. per week for the support and maintenance of their infant child in her custody. (Case, pages 21, 22 and 23).

Pursuant to said report, the said final decree was signed, which recites that defendant, without justifiable cause, abandons the complainant and refuses and neglects to maintain and provide for her, and decrees the allowance before mentioned. (Case, pages 24-25).

Defendant, as above stated, was present and testified each day of the hearing, contraverted the abandonment alleged by the wife and endeavored to prove to the satisfaction of the Advisory Master that instead of defendant abandoning his wife, she abandoned and deserted him on the date of abandonment, alleged both in the bill of complaint

and in the answer. This is specifically set forth in paragraphs 4 and 5 of defendant's answer.

The Advisory Master, after due consideration of the evidence, found as a matter of fact, that complainant had maintained the allegation that defendant had abandoned her and the child. *No appeal was taken from the said final decree resulting from said conclusion, and the question as to whether the husband abandoned the wife, or the wife abandoned the husband is now res adjudicata.*

The husband now attempts to circumvent the barrier of *res adjudicata* by having said final decree reviewed, re-opened and vacated, on the ground that the decree "is erroneous and contrary to equity, as at the time of the making of said decree there had been no evidence submitted to the said Advisory Master to support the report of said Advisory Master, upon which said final decree is predicated." (See paragraph 11 of Petition to Vacate Decree), (Case, pages 5, 6, 7, 8 and 9).

The gist of defendant-appellant's argument, as set forth in his brief is that the application to set aside said final decree should have been granted and the final decree should have been vacated because the bill of complaint alleged an actual abandonment, and the proofs established a constructive abandonment on the part of the husband.

In other words, the defendant-appellant, in legal effect, admits the fact that he abandoned his wife and child, but says that the decree for maintenance and support of the wife and child based upon such abandonment, be vacated on the highly technical ground that the husband's abandonment of his wife was not properly set forth in the bill of complaint.

In support of this proposition, he sets forth a number of New Jersey cases, grounded upon

sworn petitions for absolute divorce in which the allegations are actual desertion and the proofs constructive desertion.

A perusal of all these cases sets forth in no uncertain language that the defendant filed no answer and offered no defense, for the reason that he might have thought that the petitioner could not produce proof of the actual desertion alleged.

In the case at bar, the defendant-appellant knew just what the proof of abandonment was and endeavored, in a two days' hearing to contravert it. Both he and his counsel knew clearly the issue at the trial.

Section 26 of the Act providing for divorces, and for decrees of Nullity of marriage, and for Alimony, and for the maintenance of children, provides that "in case a husband, without any justifiable cause, *shall abandon his wife* or separate himself from her and *refuse or neglect to maintain and provide for her*, it shall be lawful for the Court of Chancery to decree and order such suitable *support and maintenance* to be paid and provided by the said husband for the wife and her children as the nature of the case and the circumstances of the parties shall, in the opinion of the Court, be considered suitable and proper".

In the case at bar, the bill for maintenance alleged that the husband abandoned his wife, and refused and neglected to maintain or provide for her, the Advisory Master found and reported that on or about the twenty-fourth day of January, 1930, the husband abandoned the wife and neglected and refused to maintain and provide for her, and the final decree set forth that the husband abandoned his wife and refuses to maintain and provide for her; all without justifiable cause.

The case of *Succhierelli v. Succhierelli*, 101 N.

J. E. 30, decided June 10, 1907, relied upon by the defendant in his brief, is not analogous to the case at bar, for the following reasons:

(a) The *Succhierelli* suit was uncontested, and the defendant had no knowledge or notice that the petitioner, in her proof, would prove a different cause of action than that alleged in her petition. The concluding paragraphs of the Court's opinion are most significant. They are as follows:

"The result reached is that the desertion in this case is constructive, while it is charged as an actual one. *The defendant has chosen to remain absent.* The Court cannot say but that he would have appeared and contested the action if he were served with a petition for divorce which charged the facts that compelled the wife to leave as stated by her in her testimony before the reference master * * *"

"The petitioner may amend her petition in the respects aforesaid and then take an order reciting the making of the master's report, the filing of the amended petition, and requiring the defendant to show cause why she should not have a decree against him for constructive desertion on the master's report and the evidence thereto annexed, as permitted in the Metzler case, *ubi supra.*"

The obvious purpose of the rule to show cause was to give the defendant an opportunity to come in with affidavits and set forth facts denying the constructive desertion.

In the case at bar, the defendant had actual notice of the facts and evidence upon which complainant relied for the abandonment, and at the time of the hearing produced witnesses to contravert the abandonment. In the *Succhierelli* case,

as well as the cases therein cited, no defense was interposed, and the underlying principle which motivated the court's decision appears to be that the defendant was sued for one thing, and without any notice of knowledge, had a judgment against him for another.

(b) The case at bar is solely a suit for maintenance, whereas the *Succhierelli* case is one for absolute divorce.

The entire proceedings in a divorce suit is highly technical from the inception of the case until its final conclusion. To the petition for divorce must be attached an affidavit of non-collusion, and the proof must correspond with the allegations. In a divorce suit all the material allegations must be corroborated.

In a suit for alimony under the statute the Court will consider, in the disposition of the cause, the evidence of the parties as to a cessation of marital relations, although the evidence is uncorroborated. *Pinkinson v. Pinkinson*, 92 N. J. E. 669.

A dissolution of the marriage relation is a proceeding which the law does not favor.

Speaking for the Court of Errors and Appeals, Mr. Justice KATZENBACH, in his opinion in the *Pinkinson* case, which was on a bill for maintenance, in distinguishing that case on the point of corroboration required, from the case of *Stieglitz v. Stieglitz*, says:

"In that case the parties sought a dissolution of the marriage relation. The dissolution of a marriage relation is a proceeding which the law does not favor. The present proceeding is not one seeking a dissolution of the marriage relation, but one to

uphold an obligation implied by the relation."

In the case at bar the bill for maintenance was one to uphold an obligation implied by law. It is needless to state that the law is eager to uphold and enforce such obligations.

In reviewing the cases which have come to our attention, founded upon bills for maintenance, we have found none that require the same technical pleadings and proof as required in a divorce suit.

Furthermore, under Section 26 of the Act above recited, it is said "that in case a husband without any justifiable cause, shall abandon his wife or separate himself from her, etc." The Act does not require an abandonment and separation, but an abandonment or a separation.

Paragraph 2 of complainant's bill of complaint charges that defendant abandoned complainant, and paragraph 4 of the bill of complaint alleges that defendant abandoned complainant, separating himself from her, saying that she would have to look for herself.

Inasmuch as the bill alleges abandonment and that is all that is required, it would seem that the words "separating himself from her" are pure superfluity.

Under this pleading, the issue of abandonment was clearly tried out, complainant maintaining that defendant abandoned her, and defendant maintaining that complainant abandoned him. During the two days trial there was but one issue and complainant prevailed.

Defendant-appellant says in his brief that the legal proposition is "what is the effect of a decree which is predicated upon evidence not within the issues created by the pleadings," and then after citing a number of cases says, in effect, that such a decree is a nullity. Our answer to this

question is that the decree in the case at bar is not predicated upon evidence not within the issues created by the pleadings. As we have already pointed out, there is but one issue created by the pleadings and that was the only issue which was tried.

The case of *Sixteenth Ward Building and Loan Association v. Louisi, et als.*, 108 N. J. E. 619, cited in defendant's brief, is far afield. In that case a bill was filed to foreclose a mortgage given by defendant, Louisi, to the Sixteenth Ward Building and Loan Association, and one of the answering defendants, Brodsky & Son, filed an answer alleging that the money advanced by the complainant was not used in the building on the premises under foreclosure to entitle the mortgagee to priority under Section 15 of the Mechanics Lien Act, but there is nothing in the answer that the owners built on the mortgaged premises, or that the claimants, (Brodsky & Son) provided work and material toward a building on the mortgaged premises, or any facts that show a mechanics lien or priority over the mortgage, and furthermore, there is no proof. Brodsky & Son said at the hearing, and asserted in their brief, that the superiority of their claim was established by a judgment at law and that the priority was *res adjudicata*, but it was not pleaded and there was no proof. The court said that it may decide only the issues raised by the pleadings and a decree must be limited to the issues decided * * * that counsel had prepared the pleading, put in their proof, submitted their arguments and called for a decision. It is given on the pleadings and the proofs supporting the pleadings; not on the briefs which argue much not to be found in the issue.

In the case at bar, there is but a single issue, namely, the issue of abandonment, and that issue

was raised by the pleadings and tried out on the evidence.

The case of *C. & D. Building Corporation v. Griffiths*, 109 N. J. E. 319, cited in defendant's brief, is likewise far afield. In this case the Court says, on page 326, "the lien claim and the complainant in the Circuit Court charged Rosina and Nicolo as joint contractors for the material, whereas it appears that Nicolo was the sole contractor. But I need not consider these matters, since the bill of complaint does not allege them. Complainant's relief must be based on the facts alleged in the bill and admitted by the defendant or proved; it cannot be based on facts not pleaded, although established by the proofs.

In the case at bar the fact alleged in the bill of complaint, pertinent to this brief, was an abandonment; this was the only fact in issue.

The case of *Midmer v. Midmer's Executors*, 27 N. J. E. 548, also cited in defendant's brief, is likewise far afield. The bill in this case sought to establish a trust by virtue of an express agreement. The evidence was of a purely resulting trust in an entirely different person originating almost two years earlier than that stated in the bill, and the court held that the variance between the *allegata* and *probata* was fatal to relief, and that an application to amend the pleadings was properly refused below; the evidence failing to convince the judgment of the court that the complainants were entitled to any relief.

The case of *Trainor, et al v. LeBeck, et al.*, 101 N. J. E. 823, cited by defendant in his brief, is also far afield. In this case a bill was filed to enforce a restrictive covenant in a deed which provides for a single dwelling house to be devot-

ed exclusively to private dwelling house purposes, and in this case the Court says:

“the record shows the decree is not supported by the findings of the learned Vice Chancellor. It is elementary and settled beyond discussion. A decree must be based upon the findings of fact as made by the Court, and without such finding the decree cannot stand. The decree must conform to the case made by the pleadings, as well as to the proof.”

I again repeat that in the case at bar, the only essential pertinent allegation was abandonment and the decree in the case conformed with the pleadings as well as with the proofs.

In the case of *Mundy v. Vail*, 34 N. J. L. 418, cited by defendant in his brief, hits right on the head and clinches the point which I am driving at in this part of my argument. It holds, in part, that to constitute jurisdiction there are three essentials, first, the court must have cognizance of the class of cases to which the one to be adjudged belongs; second, the proper parties must be present; and third, the point decided must be in *substance and effect within the issue*; that a court cannot go out of its appointed sphere and that its action is void with respect to persons who are strangers to its proceedings or propositions established by a multitude of authorities. A defect in a judgment arising from the fact that the matter decided was not embraced within the issue has not, it would seem, received more judicial consideration, and yet, I cannot doubt that upon general principles such a defect must avoid a judgment.

In the case at bar the point decided, namely, the abandonment, was in *substance and effect within the issue*, was the only matter embraced in the issue and the only matter that could be given judicial consideration.

We do not take the trouble to comment upon the other cases cited in defendant's brief on this point, because all of them, for the reasons stated in the cases commented upon, are far afield.

In concluding this point, defendant says in effect that the learned Advisory Master had no right to make a report to the Chancellor which was false and that the decree in the case was predicated upon the report based *upon no legal evidence*. *The answer is that for two days the only issue tried was the issue of abandonment.*

Defendant further says in his brief that in order to give the Chancellor jurisdiction to make the decree in question, there must be proof to sustain his findings, and then asserts, without any comprehensive review of the evidence, that in the case at bar there was no such proof. The answer to this assertion is that the issue was fought out for two days, and there was ample proof to sustain the fact of abandonment. The Court of Chancery had jurisdiction, and if defendant was dissatisfied with the finding that he had abandoned his wife and his wife had not abandoned him, *then his remedy was by appeal.*

The next point raised by defendant in his brief is that a decree which is null and void from the beginning may be set aside at any time, regardless of the doctrine of laches or of the statute of limitations. As we have hereinbefore shown, the decree in the case at bar was not null and void from the beginning.

In the case of the *O'Mara's Estate*, 106 N. J. E. 311, it is held that while statutes of limitation do not apply in terms to courts of equity, those courts have always felt themselves bound by the principles of the statutes, *except in matters of strict trust and matters purely equitable in their nature.*

In the *O'Mara* case, as well as in the *Miller* case, 170 Atl. 666, the court pointed out the inequities and the equitable ground for relief sought.

In the case at bar, nothing was done that was inequitable and defendant can show no equitable ground for the extraordinary relief which he now seeks. He had his day in court, and now seeks, in an inequitable manner, to be relieved of his plain duty to support his wife.

In the *Miller* case, Vice Chancellor BUCHANAN says:

"it would seem intolerable that the State should collect and retain a tax which has been definitely and conclusively determined it had no right at all to collect."

In this case the tax had already been paid and upon this point the Vice Chancellor said:

"the situation in the instant case is not analogous to the cases where review by appeal has been denied to one who has made a payment or settlement, *without exhausting all the possibilities of appellate review*, where the legal issue has not been determined and established in similar cases by the highest appellate court. In such a case the party has acquiesced in the then adjudication and elected to accept it rather than to seek to have the adjudication reversed or modified by appeal; there is, at least, an estoppel by acquiescence or election."

In the case at bar the *defendant acquiesced in the final decree and elected to accept it rather than to seek to have the adjudication reversed or modified by appeal, and is estopped by his acquiescence or election in the present procedure.*

The only objection he has heretofore made to the decree was that he could not afford to pay the

amount of money therein mentioned for maintenance and support, although he did pay these moneys from the date of the decree up to January 6th, 1932, at which time defendant pleaded that he was out of employment and could not make any further payments, and the Court, upon his plea, suspended the payments insofar as complainant is concerned, until the defendant could secure employment, and ordered and directed the defendant, to pay \$5. per week for the support and maintenance of the infant, Franklin J. Mittenbuhler, commencing January 11th, 1932, which said sum has been paid.

In the month of October, 1932, complainant, learning that defendant was employed and had been employed for some time, made an application to this Court for an order directing the defendant to pay her the \$15. per week mentioned in said final decree, and to continue the \$5. payment to the infant, and on November 23, 1932, the defendant herein testified, on the application in his behalf, that he had not been working since January 8th, 1932 to November 23rd, 1932, which testimony was false. In other words, in the month of November, 1932, the defendant again acquiesced in said decree and elected to abide by it; his only complaint being that he had been out of work and was unable to meet the maintenance provided by the decree.

Having paid under the decree, having obtained a modification of the terms of the decree and having never appealed from the decree, we insist that under the above mentioned law cited in the *Miller* case, and set forth in defendant's brief, he is estopped from now vacating the decree.

Furthermore, the defendant not only has elected to abide by and acquiesced in the decree and is, consequently, estopped, but he is also guilty of laches.

Defendant, in his brief admits, in effect, that he is guilty of laches and says that the answer to this whole argument is that the decree in question never had any vitality, because the Chancellor had no jurisdiction and hence there could be no laches. The premises upon which he reaches this conclusion as we have heretofore pointed out, is without foundation in the case at bar.

For this reason, the case of *West Essex Building and Loan Association v. The Borough of Caldwell*, 171 Atl. 671, does not apply and the other cases mentioned by defendant in his brief do not apply because they are upon laches in the bringing of a suit.

As we have heretofore pointed out, this application is made four years after the entering of the decree.

In the case of *Watkinson v. Watkinson*, 68 N. J. E. 632, our Court of Errors and Appeals has held that

“the object of a bill of review is to procure the reversal, alteration or explanation of the decree in a former suit, and must rest on error in law upon the face of the decree, fraud in procuring the decree, new or newly discovered matter which could not have been used before the decree was made.”

It was further held that

“although there is no express statutory limitation as to the filing of bills of review, the analogous limitations of the right of appeal should govern, and a bill of review cannot be filed after the lapse of three years from the final decree, except in case of new or newly discovered matter.”

In this case, on page 641, of the opinion, the Court says:

“we are brought to the consideration of a very important and serious question of whether defendant’s laches and delay in petitioning for the filing of a bill of review has barred her from the relief prayed for. The record in this case shows that the petition for leave to file a bill of review was not filed until nearly four years after the entering of the final decree in the suit for divorce, and the question to be determined is whether the laches and delay of the respondent in asserting her rights, is a bar to this suit.

The Supreme Court of the United States, in the case of *Thomas v. Harvie’s Heirs*, 10 Wheat 146, Justice WASHINGTON, in commenting upon the question of the limitation of the right to file a bill of review said:

It must be admitted that bills of review are not strictly within any act of limitations prescribed by Congress, but it is unquestionable that courts of equity, acting upon the principle that laches and neglect, ought to be discountenanced and that in case of stale demands its aid ought not to be afforded, have always interposed some limitation to suits brought in those courts. And this case explicitly declares the rule never since departed from in that court, as follows:

There is no statute expressly limiting bills of review, but the courts of the United States are governed in this particularly by the analogous limitation of the rights of appeal and, therefore, a bill of review cannot be filed after the lapse of five years of the final decree. Applying this rule to the practice in our State, after the lapse of three years leave would not be granted to file a bill of review. * * *

My examination of the authorities leads me to the conclusion that the law as above

laid down in the Supreme Court of the United States has been almost uniformly followed in this country.

The time of appeal having expired when this application for leave to file the bill of review was made, the petitioner was barred, unless her case could be brought strictly within the exception of newly discovered evidence or of some special equity that would give the court the discretionary power to make the order."

In the case at bar there is neither newly discovered evidence nor special equity, and the time of appeal having expired, the rule to show cause should be dismissed.

The law laid down in the last above mentioned case has been followed repeatedly in many decisions in our State, the last of which appears to be the case of *McKenzie v. Standard Bleachery Co.*, 109 N. J. E., page 429. In this case, Vice Chancellor LEWIS, following a long line of precedents, including the case above cited, says that:

"The Court of Chancery will not entertain a petition submitted after the expiration of the statutory period limit for an appeal to vacate or open an order or decree made by it, except in cases of fraud or newly discovered evidence, and that a bill to review an order or decree of this court must, by analogy, be filed within the period limited by statute for the taking of an appeal."

In the case at bar there is neither fraud nor newly discovered evidence, and defendant, by his laches, is estopped from prevailing in his application.

"So a decree will not be opened on an application five and one half years after a de-

cree was made and four and one half years after it came to the knowledge of the defendant, upon the ground of the pecuniary inability of the defendant to make the application at an earlier day, *Robertson vs. Miller*, 3 N. J. E. 451."

"So a defendant's application to open a decree after he had known it for at least nine months, on the ground that he had been inveigled into signing a request to a solicitor to enter his appearance to the suit, was held to be barred by laches. *Embury vs. Klemm*, 30 N. J. E., page 517, affirmed in 31 N. J. E. 797."

Furthermore, defendant is estopped in this motion because he does not come into Court with clean hands. Having acquiesced in the decree in question, and having obtained the indulgence of this court for a modification of the decree as to the amount of payment on the ground that he was out of work, and having again obtained work and having refused to abide by the decree, application is now pending to have him adjudged in contempt.

In conclusion, we would state that the question as to whether the husband abandoned the wife or the wife abandoned the husband, has been determined, and the decree in question makes the matter *res adjudicata*, and the doctrine of *res adjudicata* cannot be circumscribed by the present application; that the decree in question is a valid decree; that defendant has elected to abide by said decree and has acquiesced therewith; that he is estopped by such election and acquiescence from succeeding in this application; that he has been guilty of laches and cannot now successfully press this application after his time for appeal, which he never took advantage of, has expired, and that his application is unconscionable in that

it is made for the purpose of endeavoring to avoid payment of maintenance. Furthermore the opening and amending of a final decree is a matter lying within the discretion of the Court. *Morris v. Glasser*, 106 N. J. E. 585; affirmed 110 N. J. E. 661.

We respectfully submit that the decree dismissing appellant's petition, bearing date November 26, 1934, to reopen and vacate the decree, entered and enrolled on June 30, 1930, be affirmed and that appellant's appeal be dismissed.

HARRIS J. WESTERHOFF,
Solicitor for Complainant-Appellee.

WILLIAM V. ROSENKRANS,
Of Counsel with
Complainant-Appellee.



