Divorce—Desertion.—In an uncontested divorce proceeding the wife testified that her spouse refused to have sexual intercourse without a contraceptive for two years, willfully, obstinately (his justification being that he did not want the burden of a child to support). *Held*: Divorce granted on the ground of desertion. *Kreyling v. Kreyling*, 20 N.J.Misc. 52, 23 A. 2d 800 (Ch. 1942).

In an action for divorce on the grounds of desertion, in New Jersey, the desertion must be obstinate, continued, and willful, for a period of two years.[1] Our courts have held that the obstinate refusal to have sexual intercourse without justifiable cause for two years constitutes such desertion.[2] Our courts, however, require corroborating evidence in all such cases. The mere statement of the parties whether made in or out of court is not sufficient.[3] The testimony adduced in the principal case tended to show that the defendant did not want children and that he thought that his method of birth control was "fool-proof," and that his continued use of contraceptives caused the petitioner to become nervous and to move into a separate room. Testimony to this effect was given by the petitioner's married sister and by her friend. The testimony by her friend was not substantial and went only to show an unsocial attitude on the part of defendant.

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1. R. S. 2:50-2; N.J.S.A. 2:50-2.

2. Raymond v. Raymond, 79 A. 430 (Ch. 1919); Parmly v. Parmly, 90 N.J.Eq. 490, 106 A. 456 (Ch. 1919); Wood v. Wood, 97 N.J.Eq. 1, 128 A. 418 (Ch. 1924); Haskell v. Haskell, 99 N.J.Eq. 399, 131 A. 876 (E. & A. 1925); Becker v. Becker, 113 N.J.Eq. 286, 166 A. 489 (Ch. 1933); Rains v. Rains, 127 N.J.Eq. 328, 12 A. (2d) 857 (E. & A. 1940).
by Mr. Justice Brandeis), 297 U.S. 288, 346, 56 S. Ct. 466, 482, 80 L. Ed. 688, 710 (1936).

Section 94b, New York Vehicle and Traffic Law, as involved in the principal case was repealed by New York Laws, 1941, ch. 872. However, the criticized provisions of the former statute were reenacted, effective Jan. 1, 1942, and are to be found in Sections 94d(d) and 94g(b) of the current Vehicle and Traffic Law.

For a general discussion of the financial responsibility laws of several states see 3 LAW & CONTEMPORARY PROBLEMS 505, 510-517 (1936).

The fact that the corroboration was from a member of the petitioner's family, when considered in the light of the fact that though the petitioner testified that she had consulted a doctor about her physical condition, she did not produce the doctor in court, might have made the court wary in an uncontested divorce case such as this.

The court in this case rested its decision on the case of *Raymond v. Raymond*.[2] In that case, after six years of married life, the wife was still a virgin although capable, apt, and willing, and the corroborating evidence was the physician's testimony as to the virginal status of the petitioner.

The *Raymond* case, *supra,* was a case of novel impression. Prior to that case unjustified refusal of sexual intercourse had not been regarded sufficient ground for divorce.[4] The *Raymond* case has been followed, however, in this state and is now regarded as the established law. The instant case, of course, represents an extension of that doctrine, which may prove dangerous if adopted. Such a claim would enable a married person to perpetuate a fraud upon the court with little or no effort.

The *ratio decendi* of this case is certainly contrary to our cases heretofore granting annulment on the ground of permanent incurable impotency.[5] Our courts have construed impotence in these cases on the part of the man to be inability to copulate rather than inability to beget

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3. Bolmer v. Edsall, 90 N.J.Eq. 299, 106 A. 646 (Ch. 1919); 1 Herr, *Marriage, Divorce and Separation* (1938) sec. 183; Heller v. Heller, 116 N.J.Eq. 543, 174 A. 573, 95 A.L.R. 528 (E. & A. 1934) in which case the court says at page 544: "But the rule is that neither a divorce nor an annulment may be granted upon the uncorroborated testimony or admission of a party to the suit on any element in the proofs necessary to sustain the decree." See *supra,* note 2; Palmer v. Palmer, 22 N.J.Eq. 88 (Ch. 1871).

4. Reid v. Reid, 21 N.J.Eq. 331 (Ch. 1871) where the court said at page 332: "The refusal of sexual intercourse without sufficient reason is a wrong, and cannot be justified. But it is not sufficient to justify either adultery or desertion, or any other unlawful marital dereliction on part of the party deprived of these rights. No authority is produced, and I know of none to sustain such position." Lammertz v. Lammertz, 59 N.J.Eq. 649, 45 A. 271 (E. & A. 1899).

5. R. S. 2:50-1 (c); N.J.S.A. 2:50-1 (c).

children.[6] There is, of course, a strong line of cases granting annulment for fraud where the incurable impotency of one of the parties has been concealed. The court, in this case, turns to them, but this seems hardly justified because these cases rest on the fraud of the offending spouse in not disclosing to the petitioner the fact that he was incapable of performing a paramount duty in the marriage relationship.[7]

The court seems to be dictating to the millions of married people in this state that they must have children whether or not they want them. Although the state is a party to the marriage, we can see no existing right for it to decree that any marriage must produce children. This case is not that of extreme cruelty in exciting but not satisfying the appetite of petitioner which is injurious to her health,[8] and it is doubtful whether cruelty could have been made out. At any rate, it was not charged.

A search of the cases in the United States has not disclosed an instance of relief being given in similar circumstances. In fact, two of our sister states, Connecticut and Delaware, will not even say that an obstinate withholding of sexual intercourse is ground for divorce but insist that the procreation of children "is not the sole duty incident to the marriage contract."[9]

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6. Kirschbaum v. Kirschbaum, 92 N.J.Eq. 7, 111 A. 697 (Ch. 1921).

7. Heller v. Heller, *supra,* note 3; Turney v. Avery, 92 N.J.Eq. 73, 113 A. 710 (Ch. 1921); Carris v. Carris, 24 N.J.Eq. 516 (E. & A. 1873); Crane v. Crane, 62 N.J.Eq. 21, 149 A. 734 (Ch. 1901); Davis v. Davis, 90 N.J.Eq. 158, 106 A. 644 (Ch. 1919).

8. Grobart v. Grobart, 107 N.J.Eq. 446, 152 A. 858 (Ch. 1931), *aff'd* on opinion below in 109 N.J.Eq. 129, 156 A. 420 (E. & A. 1931).

9. The quotation is from Harrington v. Harrington, 8 Harr. (Del.) 333, 192 A. 555 (1937); McCurry v. McCurry, 126 Conn. 175, 10 A. 2d 365 (1939) in which case the court says: "The mere refusal to permit marital relations standing by itself and accompanied by no other fact does not constitute desertion."

Federal Employers' Liability Act—Suit In Federal Court—State Injunction Denied.—Plaintiff was injured in an accident in Ohio where he was resident and where the employer railroad operated a part of its system. He elected to sue under the Federal Employers' Liability Act in the United States District Court for the Eastern District of New York, distant approximately seven hundred miles from the place of the accident. The railroad, alleging that the difficulty and expense in bringing its witnesses from Ohio to New York would be unduly harassing and oppressive to it, applied to the Ohio courts for an injunction to restrain the employee-litigant from proceeding in the federal court. The Ohio state courts denied the injunction. On certiorari to the United States Supreme Court; *Held*: *Affirmed. Baltimore & Ohio R.R. v. Kepner,* 314 U.S. 44, 62 S. Ct. 6, 86 L. Ed. 37 (1941).

It is generally held that state courts have the power to restrain citizens of the state or other persons within the control of their process from prosecuting suits in other states or in foreign countries when the prosecution of such suits is contrary to the equitable doctrine of vexatious litigation.[1] The rule was long ago formulated by the United States Supreme Court, however, that no state court could enjoin proceedings in a federal tribunal. The basis of this rule was twofold: First, that the preservation of federal agencies required immunity from any state intervention, and second, that when a federal court should obtain jurisdiction over a cause it should be permitted to retain that jurisdiction.[2] Nevertheless this rule soon lost its effect when the state equity courts, instead of enjoining federal proceedings directly, restrained the residents or parties themselves.[3]

1. Kern v. The Cleveland, Cin., Chi., and St. Louis Ry. Co., 204 Ind. 595, 185 N.E. 446 (1933); Cleveland, Cin., Chi. and St. Louis Ry. v. Shelly, 96 Ind. App. 273, 170 N.E. 328 (1932). (Injunction restraining suit in a foreign state as distance would cause appellant needless and irreparable damage and give appellee an inequitable and unfair advantage.) Reed's Adm'x v. Illinois Central Railroad, 182 Ky. 455, 206 S.W. 794 (1918). In this case where it was shown the suit was instituted in a foreign state for the purpose of harassing the defendant and putting him to greater expense, the court granted an injunction.

2. Warren, *Federal and State Court Interference,* 43 HARVARD LAW REVIEW 345 (1930).

3. Sandage v. Studebaker Co., 142 Ind. 148, 41 N.E. 380, 34 L.R.A. 363, 51 Am. St. Rep. 165 (1895).

Whatever recognition the federal courts attributed to the practice of state courts enjoining litigants from suing in federal tribunals was clearly repudiated in the principal case by an interpretation of the 1910 amendment to the Federal Employers' Liability Act. This amendment included a venue provision permitting an action to be brought in the district of the residence of the defendant, in the district in which the cause of action arose, or in the district in which the defendant was doing business at the time of commencing of such action.[4] Therefore the action could be instituted only in the state of the railroad's incorporation. With nothing more added to the act than an extention of venue, the majority of the court reasoned that a privilege of venue granted by the legislative body which created the right of action cannot be frustrated by reasons of convenience and expense. True, Congress does have the power to restrict the state courts from enjoining litigants from suing in federal courts,[5] but the court clearly failed to show such an intent present in deciding the instant case; how the general provisions of the act differ from other venue provisions to make federal jurisdiction mandatory is not accounted for in the majority decision. Moreover, if a case involved a burden upon interstate commerce, wherein the public at large might be affected adversely, would the court still maintain that the jurisdiction were mandatory? It is submitted it would not, and yet the problem in the principal case seems as worthy of profound consideration as does a decision in which interstate commerce is involved. Substantial rights should not be taken away except upon clear and cogent reasons.

Other decisions consonant with the main case in result have reasoned that Congress must have realized that by extending the venue provisions of the act, besides aiding the employee-litigant, some inconvenience might result, and thus in effect made the jurisdiction of the federal courts mandatory.[6] The essence of this doctrine of statutory interpretation is that where an act is promulgated for the benefit of an employee-

4. 53 Stat. 1404, 45 U.S.C. 56 (Supp. 1939).

5. McConnell v. Thompson, 213 Ind. 16, 8 N.E. (2d) 986 (1937); Chicago Ry. v. Schendel, 292 F. 326 (1923); Rader v. B. & O. R. Co., 108 F. (2d) 980 (C.C.A. 7th 1940).

6. Chesapeake & Ohio R. Co. v. Vigor, 90 F. 2d 7 (C.C.A. 6th 1937). Here the court recognizing possible hardships, held that it is to be presumed that Congress considered such probable inconvenience and

litigant by providing additional tribunals in which to seek relief, the enacting body must have realized that abuses may result, and no matter the gravity of the abuse, they intended it to be sanctioned. The intent to abrogate a time-honored equity power via such an interpretation appears, it is submitted, to rest upon too tenuous a ground.

Assuming that the equitable power to restrain vexatious litigation does still extend to cases arising under the Federal Employer's Liability Act, did the principal case show cause for relief? Mere inconvenience or expense to a party does not constitute vexatious litigation unless the foreign action also deprives him of some substantial rights of defense.[7] Such factors as a difference in court procedure in the foreign tribunal as the number of jurors, or a material difference in the laws of the forum from those of the home state, more often figure in the determination of vexatious litigation than matters of expense and the transportation of witnesses as was the case here.[8] The railroad claims that because plaintiff is suing in New York, it will have to bring its witnesses from Ohio, a distance of seven hundred miles. But cases hold that transportation of witnesses may only be a matter of inconvenience and not undue hardship.[9] Had the state court in Ohio considered the fact situation instead of interpreting the Federal act it could have reached the same result while retaining its equitable jurisdiction unimpaired.

Although, as some writers claim, the decision in the principal case does lead to practical results by eliminating the embarrassment which the federal courts may have experienced heretofore in ignoring the state court injunctive orders,[10] the determination is unwarranted resting as it does upon unsubstantial legal grounds.

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expense in placing jurisdiction of the action in any district in which the defendant be doing business at the time.

7. Missouri-Kan.-Tex. Ry. v. Ball, 126 Kan. 745, 271 Pac. 313 (1928).

8. Pound, *The Progress of the Law—Equity*, 33 HARVARD LAW REV. 420 (1920).

9. Chicago Ry. v. McGinley, 175 Wis. 565, 185 N.W. 218 (1921). In this case the court was of the opinion that a court of equity was not warranted in issuing an injunction on the ground that a large number of the witnesses resided in this state making necessary the taking of their depositions instead of their oral testimony.

10. 51 YALE LAW JOURNAL 343-348.