Fire Insurance Co., 130 Vt. 636, 298 A.2d (1972), where the policy defined occurrence as in this policy, a man fired a gun into a darkened building and a policeman was shot. The court found that the man did not intend to shoot the policeman and did not know that the policeman would be struck by the bullet and concluded that this was an "occurrence" because the injury was neither expected nor intended.

Believing that the policy does not present a clear and unambiguous statement that the episode here is not covered, we hold that the insurance company may be liable in this policy because the complaint alleges what could be found to be an occurrence. At this stage, it is impossible for the Court to conclude that the insurance company is exonerated from such liability.

ORDER OF COURT

NOW, June 29, 1977, the Petition for Declaratory Judgment is denied. Costs to be paid by American States Insurance Company.

Editor's Note—
This case has been appealed to the Pennsylvania Superior Court, having been docketed in the Harrisburg District of said Court on July 22, 1977, to No. 418, March Term, 1977.

HOOVER v. HOOVER, C. P. Franklin County Branch, No. 147 November Term, 1975

Divorce - Indignities - Sexual Relations - Post Separation Evidence

1. In Pennsylvania, refusal to have sexual intercourse is not sufficient grounds for divorce and does not constitute indignities.

2. Post Separation Evidence of the conduct of the parties is relevant for the purpose of shedding light upon their behavior prior to the separation.

Kenneth E. Hankins, Jr., Esq., Counsel for the Plaintiff

Stephen E. Patterson, Esq., Counsel for the Defendant

OPINION AND ORDER

KELLER, J., April 26, 1977:

This action in divorce was commenced by the filing of a complaint on November 12, 1975, and the same was served personally on the defendant on the same date by Deputy Sheriff Hawthorne. On November 19, 1975, the defendant executed a power of attorney appointing Stephen E. Patterson, Esq. to represent her and the same was filed on the same date. Counsel for the defendant on November 19, 1975, filed a praecipe for a rule on the plaintiff to file a Bill of Particulars, and the said rule was issued and served upon counsel for the plaintiff by counsel for the defendant. On November 21, 1975, defendant's petition for counsel fees and expenses was presented and an order entered on the same date directing that a rule issue upon the respondent to show cause why he should not be required to pay counsel fees and expenses, and staying the proceedings. The rule was issued by the Prothonotary and served by counsel for the defendant upon counsel for the plaintiff. The plaintiff's Bill of Particulars was filed on December 16, 1975. The plaintiff also filed an answer to the petition for counsel fees and expenses on the same date. On January 23, 1976, an order was entered on stipulation of counsel lifting the stay of proceedings.

On January 23, 1976, the plaintiff's counsel moved for the appointment of a Master and Thomas B. Steiger, Esq., was appointed Master by order of court dated January 29, 1976. The Master gave notice to counsel for the plaintiff and counsel for the defendant that a hearing on the matter would be held on March 12, 1976, at 1:00 o'clock P.M. in the hearing room of the Franklin County Court House. Counsel for the plaintiff accepted service of the Master's notice on February 12, 1976, and counsel for the defendant accepted service of the notice on February 16, 1976. The hearing of March 12, 1976, was continued by the Master until March 26, 1976, at 1:30 o'clock p.m. Testimony was taken in the contested divorce action on March 26, 1976 and April 9, 1976. Counsel for the parties submitted briefs on behalf of their respective clients. The testimony taken at the two hearings by an official court reporter was transcribed and filed on June 18, 1976. The Master gave notice to counsel for the parties that he would file his Master's Report on February 8, 1977, and receipt of the notice was acknowledged by each counsel on January 27,

1977. By order of court dated February 9, 1977, the Master's Commission was renewed and extended nunc pro tunc until February 8, 1977. The Master's Report, together with Appendix to the Master's Report was filed in the Office of the Prothonotary on February 8, 1977. The Master recommended that the Court refuse to grant a divorce to the plaintiff and that the costs of the case be assessed against the plaintiff. Counsel for the plaintiff filed sixty-seven (67) exceptions to the Report of the Master on February 21, 1977. The exceptions were argued before the Court en banc on April 7, 1977, and the matter is ripe for disposition.

The complaint in divorce alleges indignities in the following language:

> "The defendant, Leah Bell Hoover, in violation of her marriage vows and the laws of the Commonwealth of Pennsylvania, has offered such indignities to the person of the plaintiff, Earl E. Hoover, the innocent and injured spouse, as to render his condition intolerable and his life burdensome."

If the facts alleged in the Bill of Particulars were proven, a divorce on the grounds of indignities should be granted.

The plaintiff correctly states the general rule that notwithstanding the opportunity afforded the Master to see and hear the witnesses and thus to determine their credibility, his findings of fact are not binding either on the Court of Common Pleas or the appellate court. It is the duty of the reviewing tribunal to consider the evidence afresh and to make its own findings de novo. 3 Freedman, Law of Marriage and Divorce in Pennsylvania, Second Edition, 1267 Sect. 654.

In *Langeland vs. Langeland*, 108 Pa. Super. 375, 379, 380 (1933), the Superior Court stated:

> "The question in a divorce case is not whether there was evidence to support the findings of the master; it is the duty of the court to make its own independent and careful investigation of the evidence to ascertain whether it does in truth establish a legal cause for divorce . . . . True, the master's report is entitled to the fullest consideration because of his personal contact with the witnesses, but it does not come into court with any preponderating weight or authority which must be overcome by the opposing party."

While we will not shirk the responsibility of reviewing this case de novo, we quote with approval from *Wiggens vs Wiggens*, 171 Pa. Super. 298, 300, 301 (1952):

> " 'Although we are not concluded by a Master's findings upon credibility, his juegment upon that vital factor is entitled to the fullest consideration. *Lyons vs Lyons*, 116 Pa. Super. 385, 176 A. 792, and especially in a contested case.' *Bobst vs Bobst*, 357 Pa. 441, 452, 54 A. 2d 898; *Silfies vs Silfies*, 168 Pa. Super. 421, 423, 79 A. 2d 130. And this is especially true where there is scant corroboration of the testimony of the parties."

We have reviewed with great care the 161 pages of testimony; the findings of fact and opinion of the Master; and the exhaustive briefs and the arguments of counsel. We have de novo considered the evidence, the probabilities and improbabilities of the testimony of the witnesses, the inconsistencies, bias and interests inherent and reflected. We have examined the three pictures that were introduced in evidence as exhibits, and note with regret the stipulation of counsel that the items of allegedly damaged clothing and the allegedly damaged rifle were not introduced as evidence and counsel agreed that the Master might comment or make findings of fact as to the condition observed in his report; which virtually binds the Court to the findings of the Master.

The questions to be resolved in this case are essentially ones of fact. The resolution of those facts will be determinative of the question whether the plaintiff has proven by a preponderance of the evidence that the defendant did engage in a course of conduct constituting indignities, and the question whether the plaintiff was an innocent and injured spouse.

We enter the following findings of fact as to the gravamen of the action:

1. The parties were married on October 11, 1945, and finally separated on August 1, 1975; a period of almost thirty years.

2. The sexual demands of the plaintiff and the reluctance of the defendant to always comply with these demands was the primary marital problem of the parties from 1950 to the end of 1974, and frequent quarrels occurred as a resulf of it.

3. The sexual demands of the plaintiff were not unreasonable, except when defendant was recuperating from the eleven operations she underwent during their married life.

4. The defendant did not deny the plaintiff sexual relations for any extended period such as months at a time, but denials did occur for periods of a week or more.

5. The plaintiff, without notice to the defendant, remained away from the marital home for five days following his 1974 annual five day deer hunt. Upon his return to the home the plaintiff was provided with "plenty of sex" (N.T. 24), but then complained defendant urged him ". . . to hurry up and get done." (N.T. 25) However, the plaintiff found his sex life satisfactory through the summer of 1975.

6. Subsequent to the final separation of the parties, the plaintiff had sexual intercourse with the defendant one or more times.

7. Other than the parties' quarrels over their sex life, they argued from time to time from 1950 to 1974 over petty matters such as how the plaintiff did occasional household chores, his household duties and the lawn work. These disputes were trivial in nature.

8. The plaintiff testified to the defendant frequently kicking and scratching him, but he could recall only one specific incident.

9. The plaintiff testified to the defendant's throwing things such as dish clothes at him at times, which we find to be a complaint without great substance.

10. The plaintiff hunted in Tioga County, Penna. each year for five days with relatives. The defendant would complain for a week about these hunting trips. The defendant's complaints never deterred the plaintiff from making his annual hunt.

11. The defendant conceded that one year she requested the plaintiff to hunt near home rather than upstate so he would be available to take their invalid son (now deceased) to a Christmas party because she could no longer handle him.

"For as in absolute governments the king is law, so in free countries the law ought to be king, and there ought to be no other."

— Thomas Paine,
excerpt from "Common Sense"

12. The plaintiff's annual hunting trip and the defendant's annual complaint was not a significant problem in their marriage.

13. On a very few occasions during the marriage, the defendant complained of, or objected to the plaintiff's drinking to excess. Some of these complaints were justified.

14. Subsequent to the final separation of the parties, the plaintiff returned to the marital home and with defendant's permission took possession of cold weather dress and work clothing, and several firearms and three pictures.

15. At the Master's hearings the plaintiff exhibited the items of clothing, the firearms and the pictures. The Master observed that the clothing appeared worn with minor mutilation from scissor cuts at various places, and buttons missing and the .22 rifle had a damaged stock and a jammed action. The sights were off the 30-06 deer rifle. Each of the three pictures had been damaged by the infantile marking of the plaintiff's face so it appeared that he had a black eye.

16. There is no persuasive evidence establishing who damaged the clothing, the firearms or the pictures. Each of the parties had possession of the exhibits and an opportunity to do the damage observed and testified to. Each of the parties denied responsibility for the damage. This evidence will be disregarded.

17. The plaintiff's testimony that the defendant spoke disparagingly of his father - accusing him of drinking to excess and losing the family farm was denied by the defendant. We find the evidence did not establish this alleged indignity.

18. The plaintiff's testimony that the defendant complained about his drinking and spending money when he infrequently attended stag events at his clubs was denied by the defendant, who testified that she attempted to remind him of those events so he would go. We do not find the plaintiff's testimony as to this alleged indignity persuasive.

19. Plaintiff's witnesses failed to corroborate any of the plaintiff's testimony except that defendant once said plaintiff was practically a drunkard and spent a lot of money on drinks.

20. In September 1974, the plaintiff became acquainted through his employment with a Mrs. Carey Hughes, and "took her out for supper and stuff like this, but that's all as far as I went." (N.T. 25)

21. After the plaintiff's return from his first five day separation (see Finding of Fact No. 5), and in January 1975 while he was receiving "plenty of sex" from his wife, the plaintiff told the defendant that he was having an affair with Mrs. Hughes because, "I thought it might help in a way." (N.T. 59)

22. For the first time during the marriage of the parties, they began having arguments and marital problems over the plaintiff's involvement with another woman.

23. Sometime after the plaintiff's December 1974 five day separation, he again left the defendant and the family home and lived at the Carlton Motel in Chambersburg, Penna. for five weeks because of arguments the parties were having about the other woman.

24. The plaintiff testified that he told the defendant he had sexual relations with Mrs. Hughes because, "I wanted to stir her up. I thought it might bring her around, and start seeing things the right way." (N.T. 62) At the Master's hearing, he testified that he had not in fact had relations with Mrs. Hughes.

25. After the plaintiff's return from his five week separation from the defendant, he returned to the marital home where he found a satisfactory sex life through the summer of 1975. During this second reconciliation period the plaintiff told his wife he was going out with Mrs. Hughes one afternoon, and returned late at night after he allegedly took her to get some groceries and a lawn mower.

26. After the final separation on or about August 1, 1975, the plaintiff informed the defendant that he planned to take Mrs. Hughes to the vacation home of the parties in Delaware. The plaintiff and Mrs. Hughes spent a weekend there together.

27. On several occasions the plaintiff urged the defendant to get angry with him, ask him to leave and to give him a divorce because he had another woman.

28. Prior to the final separation, the defendant learned Mrs. Hughes was the other woman and the plaintiff told her he loved her and had to have her.

29. On occasions, prior to the final separation, the plaintiff would return from being with Mrs. Hughes and demand sex of the defendant.

30. Prior to the final separation, and while the parties were having sex relations, the plaintiff once told the defendant that he had spent the preceding night with the other woman and another time told her he was thinking of the other woman during the sex act.

31. During the spring of 1975, the plaintiff stated in the presence of defendant and her sister that the problems were more his fault than hers.

32. Subsequent to the final separation the defendant went to plaintiff's motel room to talk to him. Before the plaintiff ordered her out, she discovered the bathroom door was locked and she observed "plenty of woman's clothes around." (N.T. 110)

33. The plaintiff complained that the defendant converted more than one-half of their joint bank account to her own use. Defendant testified that plaintiff authorized her to write checks against the joint account after she had withdrawn her half of the fund.

CONCLUSIONS OF LAW

1. The plaintiff failed to prove by a preponderance of the evidence that the defendant had engaged in a course of conduct constituting indignities rendering his condition intolerable and his life burdensome.

2. The plaintiff is not an innocent and injured spouse.

3. The plaintiff's action in divorce will be dismissed and the plaintiff ordered to pay the costs.

DISCUSSION

The basic and long-standing complaint of the plaintiff was the defendant's refusal to engage in sexual relations as often as the plaintiff desired. In Pennsylvania, refusal to have sexual intercourse is not sufficient grounds for divorce and does not constitute indignities. In *Schwartzhopf vs Schwartzhopf*, 172 Pa. Super. 441, 442 (1954), the Superior Court held:

> "The appellant contends that the wife frequently objected to sexual relations and lacked the ardor he desired. But refusal to have sexual intercourse is not sufficient ground for divorce. *McCommons Jr. vs. McCommons*, 85 Pa. Super. 323 (1925), *Rausch vs Rausch*, 146 Pa. Super. 342, 22 A. 2d 221 (1941). It does not constitute such indignity to the person as warrants granting a divorce. *Taylor vs Taylor*, 142 Pa. Super. 441, 16 A. 2d 651 (1940); *James vs James*, 126 Pa. Super. 479, 191 A. 191 (1937)."

In the case at bar, the defendant did not absolutely and at all times refuse the plaintiff. In fact, the plaintiff testified to "plenty of sex" after the first five day separation, and had relations with the defendant at least once after the final separation.

On the evidence and on the law, we conclude that the sex life of the plaintiff and the defendant, or the lack of it, does not establish grounds for divorce.

The problems of the parties other than those of a sexual nature, when carefully analyzed, were accurately described by the Master as "isolated and trivial" --"petty things"--"normal squabbles in a marriage that had lasted thirty years." The plaintiff in a divorce action must prove by a preponderance of the evidence that the defendant engaged in a course of conduct--as distinguished from sporadic or isolated acts--which rendered the plaintiff's life burdensome and condition intolerable. We agree with the conclusion of the Master that the plaintiff failed to prove a course of conduct constituting indignities to his person. We also find no evidence that the conduct of the defendant made the plaintiff's life burdensome and condition intolerable.

The Master correctly concluded post-separation evidence of the conduct of the parties is relevant for the purpose of

shedding light upon their behavior prior to the separation. *Bonawitz vs Bonawitz*, Pa. Super. , 369 A. 2d 1310, 1312 (1976); *Jones vs Jones*, 189 Pa. Super. 461, 465, 151 A. 2d 643, 645 (1959); *Boyer vs Boyer*, 183 Pa. Super. 260, 267, 130 A. 2d 265, 269 (1957).

The Master concluded that the plaintiff was not an innocent and injured spouse primarily because the plaintiff returned to the marital bed with the defendant after her conduct allegedly drove him away. While we agree with the ultimate conclusion; it is our opinion that the plaintiff's admitted association with the same woman before and after the separation of the parties, the plaintiff's several separations from the defendant, and the plaintiff's statements to the defendant that he was having an affair with Mrs. Hughes are forcefully persuasive that the plaintiff was not an innocent and injured spouse.

> "It is axiomatic that a husband seeking a divorce on the grounds of indignities must clearly and satisfactorily prove not only that his wife's course of conduct rendered his condition intolerable and his life burdensome, but also that he was the innocent and injured spouse." *Bonawitz vs Bonawitz*, Pa. Super. , 369 A. 2d 1310, 1312 (1976).

In the case at bar, the plaintiff has failed to establish by a preponderance of the evidence his right to a decree in divorce.

ORDER

NOW, this 20th day of April, 1977, the plaintiff's exceptions are dismissed.

The plaintiff's complaint is dismissed.

Costs to be paid by the plaintiff.

Exceptions are granted the plaintiff.

"The administration of justice is the firmest pillar of government."

— George Washington,
Letter to Edmund Randolph, Sept. 27, 1789