New Jersey Court of Errors and Appeals

Between SARAH E. WELCH, *Appellant,* AND JOHN C. WELCH, *Respondent.*	*On petition for Divorce and Decree Dismissing Petition, and Appeal from said Decree.*

BRIEF FOR APPELLANT

The affidavit to the petition in question is as follows:

"STATE OF NEW JERSEY,
COUNTY OF ESSEX, } *ss.*

SARAH E. WELCH, of full age, being duly sworn according to law, on her oath says that she is the petitioner named in the foregoing petition; that she has read the same and knows the contents thereof; that the complaint made in said petition is not made by any collusion between her and the respondent, John C. Welch, in said petition named, for the pur-

pose of dissolving their marriage, but in truth and good faith for the causes set forth in said petition."

(Signed) SARAH E. WELCH.

Sworn to and subscribed before me this 2nd day of June, at Newark, A. D., 1915.

CHARLES E. DOLAN,

Notary Public of New Jersey.
(NOTARY SEAL)

This affidavit is said not to give jurisdiction under the statute (L. 1907, p. 477, sec. 8), which reads as follows:

"The Court of Chancery shall not have jurisdiction of any cause for divorce, or nullity of marriage under this act, unless the petitioner shall make his or her oath or affirmation, which shall be annexed to the petition, that his or her petition is not made by any collusion between him or her and the defendant, but in truth and good faith for the causes set forth in said petition."

I.

An affidavit required by a statute need not follow strictly the statutory words; all that is necessary is a substantial compliance with the statutory requirements. It is not to be presumed that the Legislature designed to prescribe the precise form of the oath, the slightest deviation from the phrase-

ology of which would prove fatal; or that a difference in sound of the words used though not in sense would vitiate the affidavit; it is rather to be presumed that the affiant understood his statements in the affidavit in the statutory sense, and that the affidavit was made in good faith to comply with the law, and not with the design to escape the penalty of perjury by a mere verbal transposition or change.

State vs. *Dayton*, 3 Zab. 49 at 60.

American Soda Fountain Co. vs. *Stolzenbach*, 75 N. J. L. 721 at 723-724.

Criticisms directed to matters of artifice rather than to those of substance ought not to prevail *ib.* It should be the aim of courts to preserve and not to destroy; they should be astute to find means to make acts effectual, according to the honest intent of the parties.

Kelly vs. *Calhoun*, 95 U. S. p. 544.

The matters to which adverse criticism are directed are of form and not of substance; and under such circumstances the requirements of the statute will be held to have been complied with.

Strong vs. *Gaskill*, 59 Atl. 339; on appeal; 24 Vr. 665.

Douglass vs. *Williams*, 48 Atl. 222.

Camden Safe Dep. Co. vs. *Burl. Carpt. Co.*, 33 Atl. Rep. 479.

The facts stated in an affidavit must not vary from those stated in the petition. An affidavit, however, will not be technically construed, but will be held sufficient if in good faith it seemed intended to meet the plaintiff's case.

I. Am. & Eng. Enc. L. (1st Ed.) 313-314.

While there is some authority for the proposition that the statutory language must be strictly followed, the great weight of authority is to the effect that a substantial compliance is sufficient.

2 Corp. Jur. 348, sec. 72. Citing

Lyons vs. *Allen,* 76 N. J. L. 391;

Amer. Soda Fount. Co. vs. *Stolzenbach,* 75 N. J. L. 721;

Brant vs. *Brant,* 71 N. J. Eq. 66.

Where an affidavit is made under a statute, a a full and plain compliance with what the statute substantially requires is all that is necessary, and where that is present non-compliance with certain rules will not vitiate the affidavit.

Moyer vs. *Davidson,* 7 U. C. C. P. 521 (Upper Canada Common Pleas).

In *Lyons* vs. *Allen,* 76 N. J. L. 391, Mr. Justice Parker held that an affidavit to a plea which said that the "contents of the plea are true in substance and in fact instead of saying the plea itself is true, &c., showed no substantial difference, and the plea should be sustained.

A case directly in point is *Brant* vs. *Brant*, 71 N. J. Eq. 66, where an affidavit to a petition for divorce was considered by Chancellor Magie. He says at page 68:

> "Such an affidavit may probably be sufficient if it expresses the matter so required, although not expressed in the precise language of the section (Sec. 5, L. 1902, p. 502) * * * * * One (an affidavit) not in conformity to the language of the act ought not to be passed, unless it contains substantial equivalents thereto."

And he goes on to hold that as the petition contains the complaint, and asserts the causes for which relief is sought as well as asks relief, that an affidavit that "the petition" is not made, &c., is a substantial compliance with the act requiring an affidavit to state that "the complaint in the petition" is not made, &c. The affidavit was held defective on other grounds, and an order of reference was refused.

If the words used are not a substantial compliance with the statute, then the affidavit is amendable.

Sec. 19, p. 480, provides:

> "No proceedings in any suit commenced under this act shall be set aside or otherwise annulled or made void for any defect in matter of form, or for *any mistake or omission not affecting the real merits of the cause,* and the Chancellor may permit either party to amend his or her proceedings in the cause *either in*

matters of form or substance, and proceed to give judgment according to the merits of the case."

Amendments of affidavits have been frequently allowed by our Courts.

Dinsmore vs. *Westcott,* 10 C. E. Gr. 302.

Den vs. *Applegate,* 7 Hals. 322.

In *Roberts* vs. *Moore,* 62 N. J. L. 618-620, a defective affidavit to a plea is held to be amendable, saying:

"It must be noticed that the only defect was in the affidavit annexed to the plea * * * * * * It only needed an amendment or a new affidavit of the truth of the facts stated * * * * * The irregularity being in the affidavit merely did not change the plea, &c. * * and such irregularity could be cured by amendment by leave of the Court or a Judge thereof."

Citing *Gen. Stats.* (1895) p. 2556, sec. 138.

Or further proof might be permitted to show the existence of the necessary facts to give jurisdiction.

Whitehead vs. *Hamilton Rubber Co.,* 53 Eq. 454-458.

St. vs. *Browning,* 3 Dutch 535-536.

Capner vs. *Flem. Min. Co.,* 2 Gr. Ch. 468.

Substantial defects may be amended.

2 Corp. Jur. 369, sec. 123, citing

Fitzpatrick vs. *Flanagan*, 106 U. S. 648.

Defective or insufficient averments in the body of an affidavit may be cured by amendment.

2 Corp. Jur., 370, sec. 128.

It is said in *Sheehan* vs. *Sheehan*, 77 Eq. 411-420, that "collusion" under the Divorce Act of 1907 must be given an ampler definition than "a corrupt bargain to impose a case upon the Court, either by the suppression of evidence or the manufacture thereof;" the definition must also include "any agreement between the parties, as a result of which no defense shall be made."

Judged by this definition, the affidavit which stated that the "complaint in the petition, &c., was not made by collusion, &c., for the purpose of dissolving the marriage, but in truth and good faith for the causes set forth in said petition," surely is sufficient to show that no corrupt bargain was made to impose a case upon the Court, by suppressing evidence, manufacturing evidence, or preventing a defense from being made; and the fact that the words "dissolving the marriage" are used in no way detracts from the force of the oath that the complaint is made in truth and good faith for the causes set forth in the petition.

It may be said that there may be other matters in which collusion may exist besides dissolving the marriage, as for instance, alimony; but on the other hand, all relief which the petition prays is dependent upon the dissolution of the marriage,

and there could be no mental reservation which would evade responsibility by the use of those words.

It is evident from *Ch. Rule,* 206a (Passed 1904 and not changed since the act of 1907) that the words used are considered a substantial compliance with the new Act. It reads:

> "The defendant who exhibits such an answer by way of cross bill or cross petition (for divorce) shall make his or her oath or affirmation which shall be annexed thereto, that his *or her complaint is not made by any collusion between him or her and the defendant for the purpose of dissolving their marriage, but in truth and good faith for the causes set forth in said cross bill or cross petition.*"

Henry vs. *Henry,* 79 Eq. 493-496; 81 Eq. 512.

The fact that the cross-petitioner is already in court under service of process in the original suit, makes no difference, for the affidavit is a jurisdictional requirement additional to the service of process; and a cross-petition is as liable to collusion as is the original one.

If the affidavit to the petition were defective, the defendant could not at this stage of the suit complain, because he was regularly served with process and petition, and made no appearance or answer to the suit within the required time, or in any other way indicated a desire to defend.

> "The essential thing is that the defendant shall have his day in Court, and if he has that,

he cannot complain of the method by which jurisdiction is acquired over him, or of the technical form of the pleading which he has to answer."

Fraser vs. *Fraser,* 77 N. J. Eq. 205-207.

The State, therefore, and the petitioner are the only persons concerned in the proceeding, and the rights of the State will not be prejudiced by amendment to conform with the statute, if it be held that the affidavit in question is not a substantial compliance therewith.

Further citations on substantial compliance with statutory requirements are:

Perry vs. *Thompson,* 16 N. J. L. 72.

Saying: "The court may dispense with the form, though not the substance of the statute."

Gaddis vs. *Durashy,* 13 N. J. L. 324.

Leave to Amend:

Den. Ely vs. *Fen,* 12 N. J. L. 321-369.

Rogers vs. *Rogers,* 3 C. E. Gr. 445.

Respectfully submitted,

MICHAEL J. TANSEY,
Of Counsel with the Petitioner.

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New Jersey Court of Errors and Appeals

PETITION FOR DIVORCE.

Filed, June 3, 1915.

IN CHANCERY OF NEW JERSEY.

Between SARAH E. WELCH, *Appellant,* AND JOHN C. WELCH, *Respondent.*	On Petition for Divorce. On Decree Dismissing Petition and Appeal from said Decree.

STATE OF THE CASE

To His Honor, Edwin Robert Walker, Chancellor:

The petition of Sarah E. Welch, of Keyport, in the County of Monmouth and State of New Jersey, respectfully shows that your petitioner was married on the Twenty-fifth day of March, Nineteen Hundred and Six, at New Monmouth, in the County of Monmouth and State of New Jersey, to John C. Welch, her present husband; since which time she has resided and still resides at Centerville (Postoffice Keyport), in the County of Monmouth, aforesaid.

Your petitioner further shows that her said husband lived with her for about seven years after their marriage and until the month of May, Nineteen Hundred and Thirteen, when he deserted her and resided at various places in the State of New Jersey, as she has understood and believes, and now resides at or near Keyport in said County of Monmouth and State of New Jersey.

And your petitioner further shows that for more than two years last past her said husband has wilfully, continuedly and obstinately deserted her, and during all that time has wholly neglected to make any provision for her support.

And your petitioner further shows that she has had no children by her said husband; that her name by a former marriage was Sarah Elizabeth Lohsen, and that she has now no means of support except from her own exertions.

Your petitioner, therefore, respectfully prays that she may be divorced from her said husband; that she may be allowed to resume her former name of Lohsen, and that she may have such further or other relief as may be equitable and just, and your petitioner will ever pray, etc.

MICHAEL J. TANSEY,
Solicitor for and of Counsel with Petitioner.

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

SARAH E. WELCH, of full age, being duly sworn according to law, on her oath says that she is the petitioner named in the foregoing petition; that she has read the same and known the contents thereof; that the complaint made in said petition is not made by any collusion between her and the respondent, John C. Welch, in said petition named for the purpose of dissolving their marriage, but in truth and good faith for the causes set forth in said petition.

SARAH E. WELCH.

Sworn to and subscribed before me, this 2nd day of June, at Newark, A. D. 1915.

[L. S.] CHARLES E. DOLAN,
Notary Public of New Jersey.

Citation issued and served personally with certified copy of petition on respondent, John C. Welch, by Sheriff, Hudson County, June 14, 1915.

DECREE DISMISSING PETITION.

Filed, September 23, 1915.

IN CHANCERY OF NEW JERSEY.

Between

SARAH E. WELCH,

Petitioner,

AND

JOHN C. WELCH,

Defendant.

On Petition.
DECREE.

The affidavit annexed to the petition for divorce, not conforming with the statute, and no jurisdiction resting in this Court, it is on this 23rd day of September, nineteen hundred and fifteen, Ordered, adjudged and decreed that the petition be dismissed.

E. R. WALKER,
C.

Respectfully advised,

C. S. BIDDLE,
A. M.

NOTICE OF APPEAL.

Filed, November 10, 1915.

IN CHANCERY OF NEW JERSEY.

Between

SARAH E. WELCH,
Petitioner,

AND

JOHN C. WELCH,
Defendant.

On Petition for Divorce and Decree of Dismissal.

NOTICE OF APPEAL.

The Petitioner hereby appeals from the decree of dismissal made in this Court in the above stated cause on the twenty-third day of September, nineteen hundred and fifteen, and the whole and every part thereof to the New Jersey Court of Errors and Appeals in the last resort in all causes.

MICHAEL J. TANSEY,
Solicitor for and of Counsel with Petitioner.

Dated, October 9th, 1915.

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

MICHAEL J. TANSEY,
Of Counsel with Petitioner.

PETITION OF APPEAL.

Filed, November 10, 1915.

NEW JERSEY COURT OF ERRORS AND APPEALS

Between

SARAH E. WELCH,
Petitioner-Appellant,
AND
JOHN C. WELCH,
Defendant-Appellee.

On Petition for Divorce and Decree for Dismissal.

PETITION OF APPEAL.

The Petition of Sarah E. Welch, the appellant in the above stated cause, respectfully shows, that your petitioner finds herself aggrieved by the final decree for dismissal made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor, bearing date September 23, 1915, in a cause therein depending wherein said Sarah E. Welch was petitioner and said John C. Welch was defendant, in this respect, to wit, that the said decree adjudges that the affidavit annexed to the petition for divorce filed in said cause does not conform with the statute and that therefore no jurisdiction rests in said Court in said cause, and that said petition be dismissed.

And your petitioner humbly appeals from the whole and every part of said decree, upon the ground that the same is erroneous, for that the said affidavit annexed to said petition does in fact con-

form with the statute in such case made and provided, and said petition should not be dismissed but the said cause be allowed to proceed, and said decree be set aside.

Your petitioner therefore prays that said decree of said Chancellor may be reversed and set aside and for nothing holden, and that your petitioner may have such relief as may be meet in the premises.

MICHAEL J. TANSEY,
Solicitor for and of Counsel with Petitioner-Appellant.

MICHAEL J. TANSEY,
Of Counsel with Appellant.