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Notice of Appeal.

IN CHANCERY OF NEW JERSEY

Between

CELIA SOBEL,
Petitioner-Appellee,

and

ALEXANDER SOBEL,
Defendant-Appellant.

The defendant, Alexander Sobel, hereby appeals from the order made in this Court in the above stated cause on the 26th day of July, 1926, and from the whole and every part thereof to the Court of Errors and Appeals, the last resort in all causes.

Dated, August 13th, 1926.

WEINBERGER & WEINBERGER,
Solicitors of Defendant-Appellant.

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

WEINBERGER & WEINBERGER,
Of Counsel with Defendant-Appellant.

Amended Notice of Appeal.

IN CHANCERY OF NEW JERSEY.

Between

CELIA SOBEL,
Petitioner-Appellee,

and

ALEXANDER SOBEL,
Defendant-Appellant.

The defendant, Alexander Sobel, hereby appeals from the order made by the Chancellor on the advice of Vice Chancellor John Bentley, in the above stated cause on the 26th day of July, 1926, and from the whole and every part thereof to the Court of Errors and Appeals, the last resort in all causes.

Dated, August 20th, 1926.

WEINBERGER & WEINBERGER,
Solicitors of Defendant-Appellant.

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

WEINBERGER & WEINBERGER,
Of Counsel with Defendant-Appellant.

Petition of Appeal.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between CELIA SOBEL, Petitioner-Appellee, and ALEXANDER SOBEL, Defendant-Appellant.	On Appeal From Chancery.

TO THE HONORABLE COURT OF ERRORS AND APPEALS IN THE LAST RESORT IN ALL CAUSES:

The petition of Alexander Sobel, the appellant in the above stated cause, respectfully shows that your petitioner finds himself aggrieved by an order made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date the 26th day of July, 1926, in which cause the said Celia Sobel was petitioner and the said Alexander Sobel was defendant in these respects, to wit, that the said order adjudges that the defendant, Alexander Sobel, is Ordered, Adjudged and Decreed to pay to the petitioner, Celia Sobel, or to her solicitors a counsel fee of One thousand dollars ($1,000.00) for counsel of petitioner for services performed in opposing defendant's appeal to the Court of Errors and Appeals, together with the costs of said application to be taxed.

And your petitioner humbly appeals from said portions of said order and all of said order as

aforesaid, upon the ground that the same is erroneous, and that the Chancellor should not have adjudged that the defendant, Alexander Sobel, be obliged to pay said counsel fee of $1,000.00 to said Celia Sobel, or her solicitors, for the reason that this Honorable Court had no jurisdiction to make such an order.

Your petitioner, therefore, prays that the said order of the said Chancellor may be in the particulars aforesaid reversed, set aside and for nothing holden, and that your petitioner may have such other relief in the premises as to this Honorable Court may seem meet.

WEINBERGER & WEINBERGER,
Solicitors for Defendant-Appellant.

WEINBERGER & WEINBERGER,
Of Counsel.

Answer to Petition of Appeal.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between CELIA SOBEL, Petitioner-Appellee, and ALEXANDER SOBEL, Defendant-Appellant.	On Appeal From Chancery.

The answer of Celia Sobel, the above named appellee, to the petition of appeal of Alexander Sobel, the above named appellant.

This appellee, not admitting truth of all or any of the matters in the said petition of appeal contained, for answer thereto, nevertheless admits that an order was, on the twenty-sixth day of July, 1926, made and entered in the Court of Chancery of New Jersey in the above entitled cause, for the purposes in said petition mentioned, and as therein set forth; but as to the substance and form of said order, this appellee begs leave to refer thereto when the same shall be produced.

This appellee is advised and believes that the said order is agreeable to equity; and she prays that the same may be affirmed, with costs to be taxed in favor of this appellee.

JOHN N. PLATOFF,
Solicitor for and of Counsel with Appellee.

Notice of Motion.

IN CHANCERY OF NEW JERSEY,

49-641.

Between CELIA SOBEL, Petitioner, and ALEXANDER SOBEL, Defendant.	On Petition, etc. Notice.

To Weinberger & Weinberger, Esqs.,
Solicitors of the Defendant.

Take Notice that on June 28th next, before the Court of Chancery at Jersey City, in the County of Hudson, at the hour of ten o'clock in the forenoon or as soon thereafter as counsel can be heard, I shall move the said Court for an order in this cause requiring defendant to pay to petitioner a reasonable sum for her counsel for defending the appeal by defendant from the order made by this court on the thirteenth day of April, 1926, and annexed hereto is the petition and affidavit upon which said motion will be made.

Dated June 21st, 1926.

JOHN N. PLATOFF,
Solicitor of Petitioner.

July 26.
J. C.

Petition for Counsel Fee.

IN CHANCERY OF NEW JERSEY,

49-641.

Between CELIA SOBEL, Petitioner, and ALEXANDER SOBEL, Defendant.	On Petition, etc. Petition for Counsel Fee.

To his Honor Edwin Robert Walker;
Chancellor of the State of New Jersey.

The petition of Celia Sobel, the above named petitioner, respectfully shows:

1. On the thirteenth day of April, 1925, an order was made by the Court of Chancery of New Jersey that the defendant herein pay to your petitioner or to her solicitor the annual sum of Twelve hundred ($1200) Dollars, for her support and maintenance, payable in equal monthly instalments of One hundred ($100) Dollars each, on the first day of each and every month, commencing April 1, 1925.

2. On the eighteenth day of May, 1925, a notice of appeal from the said order and from the whole and every part thereof, to the Court of Errors and Appeals, was filed by the defendant herein.

3. The argument of the said appeal was duly moved before said Court of Errors and Appeals during the October Term of said Court and on the twenty-sixth day of March, 1926, it was ordered, adjudged and decreed by the said Court of Errors

and Appeals that the said order of the Court of Chancery made on the thirteenth day of April, 1925, be and the same was thereby in all things affirmed with costs in the said Court of Errors and Appeals and the Court of Chancery to be paid by said appellant and his said petition of appeal was by said order dismissed.

4. No provision was made by the said Court of Errors and Appeals for a counsel fee to be paid to petitioner for her counsel, in defending the said appeal; and the record in the case has been remitted to the Court of Chancery for further proceedings thereon.

Therefore, your petitioner prays that an order may be made requiring defendant to pay forthwith a reasonable sum for the fees of counsel in defending the said appeal for her.

And your petitioner will ever pray, etc.

JOHN N. PLATOFF,
Solicitor for and of Counsel With Petitioner.

State of New Jersey,
County of Hudson, ss:

Celia Sobel, of full age, being duly sworn, according to law on her oath, deposes and says:

I am the petitioner in the above petition named.

On the thirteenth day of April, 1925, an order was made by the Court of Chancery of New Jersey directing the defendant to pay to me or to my solicitor the annual sum of Twelve hundred ($1200) Dollars, for my support and maintenance, payable in equal monthly installments of One hundred ($100) Dollars each, on the first day of each and every month, commencing April 1, 1925.

On the eighteenth day of May, 1925, a notice of appeal from the said order and from the whole

and every part thereof, to the Court of Errors and Appeals, was filed by the defendant herein.

The argument of the said appeal was duly moved before said Court of Errors and Appeals during the October Term of said Court, and on the twenty-sixth day of March, 1926, it was ordered, adjudged and decreed by the said Court of Errors and Appeals that the said order of the Court of Chancery made on the thirteenth day of April, 1925, be and the same was thereby in all things affirmed, with costs, in the said Court of Errors and Appeals and the Court of Chancery, to be paid by said appellant, and his said petition was by said order, dismissed.

No provision was made by the said Court of Errors and Appeals for a counsel fee to be paid to me for my counsel in defending the said appeal; and the record in the case has been remitted to the Court of Chancery for further proceedings thereon.

Up to the present date, defendant has wholly disregarded the terms and conditions of the said order made in this court on April 13, 1925, awarding me alimony, and has wholly failed to pay me either the sum stipulated in said order as alimony, counsel fee or any sum or sums whatsoever.

Defendant has contributed nothing to my support since February 2, 1922, and I am destitute of means to pay my counsel for defending my said cause on appeal.

I am informed and verily believe that the defendant is a man of great affluence; that he owns two very large and expensive cars and that he is the sole owner and Treasurer of the Zel Cla Construction Company, a corporation of the State of New Jersey, having a capital stock of One

Hundred Thousand Dollars, divided into one thousand shares of common stock, each of the par value of One Hundred Dollars, of which five hundred shares were bought and paid for by the defendant personally; that the said corporation is engaged in the business of constructing apartment houses and owns or has owned in the immediate past, a nine story building in Brooklyn, New York, purchased by the company for One Hundred Thousand Dollars, in excess of the existing liens and encumbrances thereon, and another parcel of real estate in Brooklyn, New York, purchased by the company for approximately Twenty-two Thousand, Five Hundred Dollars in excess of the existing liens and encumbrances; that defendant is the owner of the dwelling in which he resides at 1034 East 22nd Street, Brooklyn, New York, a fashionable and expensive neighborhood of Brooklyn, New York; that he also owns his private garage in which the two automobiles hereinbefore referred to, are stored; that the said automobiles are operated by a chauffeur in the employ of defendant; that defendant also owns or has owned a private yacht; that defendant is engaged in the liquor business and has been so engaged since 1918 and he has amassed a huge fortune in the same, and defendant's means are amply sufficient for him to raise and pay such sums as may be necessary for the purposes aforesaid.

CELIA SOBEL.

Subscribed and sworn to before me this
18th day of June, 1926.
Anna Kattenhouse,
Notary Public of N. J.

Service of a copy of the within notice is hereby acknowledged this 22 day of June, 1926.

WEINBERGER & WEINBERGER,
Solicitors of Defendant.

Order.

IN CHANCERY OF NEW JERSEY,

49-641.

Between CELIA SOBEL, Petitioner, and ALEXANDER SOBEL, Defendant.	On Petition, etc.

This matter being opened to the Court by John N. Platoff, Solicitor for and of Counsel with the petitioner, Celia Sobel, and in the presence of Weinberger & Weinberger, Solicitors for and of Counsel with the defendant, Alexander Sobel; and it appearing that the order made by this Court on the thirteenth day of April, 1925, has been in all things affirmed by the Court of Errors and Appeals and that no provision was made by said Court of Errors and Appeals for Counsel Fee to Counsel of petitioner for services in opposing the defendant's appeal, and that the record of said cause has been duly remitted from the Court of Errors and Appeals to this Court for its further proceedings thereon:

It is thereupon on this 26th day of July, 1926, Ordered that Alexander Sobel, the above named defendant pay to his wife, Celia Sobel, the above named petitioner or to her solicitor, a counsel fee of One Thousand ($1,000) Dollars for counsel of petitioner for services performed in opposing the defendant's appeal to the Court of Errors

and Appeals, together with the costs of this application to be taxed.

A true copy.

THOMAS BARBER,
Clerk.
E. R. WALKER,
C.

Respectfully advised.
John Bently, V. C.
Filed July 26, 1926.

Opinion.

IN CHANCERY OF NEW JERSEY.

49-641.

Between
CELIA SOBEL,
Petitioner,
and
ALEXANDER SOBEL,
Defendant.

On Petition, etc. Opinion.

July 21, 1926.

John N. Platoff, Esq., for the Petitioner.

Weinberger & Weinberger, Esq'rs, for the Defendant.

Opinion.

BENTLEY, V. C.:

On application for counsel fee for services rendered on appeal in the Court of Errors and Appeals.

Alimony was fixed and allowed the petitioner in this court on final decree and affirmed by the Court of Errors and Appeals. During the appeal, application was made by petitioner's counsel to the Court of Errors and Appeals for allowance of counsel fee for the services rendered in the appellate court. The customary motion was made by some member of that court to carry the application to conference, and the motion was adopted by the court. When the opinion of that court was delivered and filed, it disposed of the question presented by the appeal but made no

mention whatsoever of the application by the appellee for counsel fee. In other words, the meritorious question of the appeal was decided but there was no decision on the motion for counsel fee. After the cause had been remitted back to this court notice was given by petitioner's solicitor of the present application.

It is my understanding that an appeal operates to remove the cause appealed from this court into the Court of Errors and Appeals, so that the court of first instance is without power to deal further with the subject-matter, except as dealt with in Ashby v. Yetter, 78 N. J. Eq. 173. During such time, all incidental motions must be made to the Court of Errors and Appeals and not to this court. After the appeal has been heard upon its merits, according to the rules of the appellate court and its judgment has been regularly and correctly entered, and the time within which an application for reargument may be made has expired without such motion and the remittitur has been entered and the cause remanded to the lower court, then the Court of Errors and Appeals is stripped of its jurisdiction and all further relief must be sought in this court. As early as King. v. Ruckman, 22 N. J. Eq. 551, Chief Justice Beasley so declared. In that case a motion was made for a reargument after the case had been heard upon its merits in the Court of Errors and Appeals, judgment entered, and the papers and proceedings remitted to the Court of Chancery. After a review of authorities in many jurisdictions the Chief Justice said that there was no doubt as to the author-

ity of that court to amend its judgment where it was erroneous by reason of fraud, accident or mistake; and then he says:

"But I also think that when such judgment has been rendered after a hearing upon the merits, and has been entered on the minutes in accordance with the views of the court, and the record has been regularly remitted to the inferior court, this court has no further jurisdiction in the case."

To like effect is the opinion of Chancellor Runyon, in Putnam v. Clark, 35 N. J. Eq. 145, where there is an exhaustive review of authorities, including King v. Ruckman (*supra*), and quoting the language set out above. In the Florida case of Lovett v. State, to be found in 16 L. R. A. 313, there is such a collection of authorities and so clear a discussion of them that the editors of that work decided that no further annotation was needed, and it amply supports the views already set out.

The reason for the above discussion is, that defendant's counsel takes the position that his client is entitled to the judgment of the Court of Errors and Appeals to which the subject has been committed by the petitioner, and has a vested right therein of which he cannot be deprived by a second like application now made to this court. He says in his brief:

"For all intents and purposes, there is an undetermined motion still pending in the Court of Errors and Appeals *and now under consideration by that court.*" (Italics mine.)

Of course, in view of what has already been said, it becomes apparent that this is not so. An application for counsel fee in a divorce suit is a mere incident thereof, and if, according to its course of practice, the Court of Errors and Appeals will not recall the entire case it has nothing before it upon which to predicate a decision of the so-called pending question. Should counsel for the petitioner now attempt to further press the application that has not been decided, it requires no vivid imagination to foretell what the answer would be. If there were a motion "still pending" in that court "and now under consideration" by it, of course, no member of the Court of Chancery would presume to forestall, but when the cause was regularly remitted, the motion expired and, hence, does not exist.

Another case in point is that of Weeks v. Lister, 62 N. J. Eq. 813. In that case, application was made for counsel fees and expense of printing after decision upon the merits and the remitting of the record. It is true that this application was not made while the appeal was pending, but the following language of the court, which I here italicize, makes it abundantly apparent that the present application in the case at bar is made with entire propriety to this court:

"The application for counsel fees should first be made in this court. If the court then passes on it, the decision is final, *but if the court does not pass on it,* or if through mere inadvertence the application for counsel fees is not made while the case is before the court, then after the remit-

titur, the Court of Chancery has jurisdiction to grant counsel fees and printing in the Court of Errors and Appeals upon a proper case being presented in these respects."

An examination of the language used shows that it is an application such as the present one that the Court of Errors and Appeals had in mind when it said that if the court "does not pass on it" the Court of Chancery has jurisdiction to grant the prayer, after the remittitur has been entered. It is also true that this particular language was not necessary for a decision of the motion then being considered, but it is a clear intimation from the court of last resort as to a common matter of practice with which its members must have been entirely familiar.

Upon an oral argument of this motion, defendant's counsel undertook to illustrate his position by a hypothetical supposition, viz: that if counsel fee is awarded now on this motion, the Court of Errors and Appeals may subsequently decide similarly the motion made in that court, and thus the defendant will find himself under obligation to pay twice for a single service. This point is not pressed in the brief subsequently filed, and the answers thereto are so obvious that I assume the point is abandoned.

I will allow a counsel fee of $1,000 for the services performed in opposing the defendant's appeal.

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Petition for Alimony Pending Appeal.

NEW JERSEY COURT OF ERRORS AND APPEALS

Between: CELIA SOBEL, Petitioner-Appellee, and ALEXANDER SOBEL, Defendant-Appellant.	On Appeal From Chancery.

To his Honor Edwin Robert Walker;
Chancellor of the State of New Jersey:

The petition of Celia Sobel, the above named petitioner, respectfully shows:

1. On the twenty-third day of July, 1922, petitioner procured a final decree of divorce against the defendant-appellant herein, in the Court of Chancery of New Jersey, on the ground of desertion, after due personal service upon the defendant-appellant in the State of New Jersey.

2. On the thirteenth day of April, 1925, an order was made by the Court of Chancery of New Jersey that the defendant-appellant pay to your petitioner or to her solicitor, the annual sum of Twelve Hundred ($1200) Dollars for her support and maintenance, payable in equal monthly installments of One Hundred ($100) Dollars each, on the first day of each and every month, commencing April 1, 1925.

3. It was also ordered by the said Court that the defendant-appellant do further pay to your petitioner-appellee, or her solicitor, the costs of this suit to be taxed, and also the sum of Three Hundred and Fifty ($350) Dollars which was adjudged and decreed to be a reasonable counsel fee for the counsel of said petitioner-appellee.

4. It was further ordered by the said Court that a copy of the said order awarding petitioner-appellee alimony, counsel fee and costs of suit, be served upon the defendant-appellant, and pursuant to the terms of the said order, a certified copy of the said order was served upon the defendant-appellant personally, in New York City, where defendant-appellant resides, on the eighteenth day of May, 1925, and at the same time, the taxed bill of costs was served upon the said defendant-appellant.

5. Up to the present date, defendant-appellant has wholly disregarded the terms and conditions of the said order, and has wholly failed to pay to petitioner-appellee, either the sum stipulated in the said order as alimony and counsel fee or any sum or sums whatsoever.

6. Defendant-appellant has contributed nothing to the support of your petitioner-appellee, since February 2, 1922, and she is destitute of means to support herself and the children of her marriage to defendant-appellant, whose custody was awarded to petitioner-appellee by the decree of divorce; and your petitioner-appellee is also destitute of means to defend her said cause in this court.

7. Petitioner-appellee is informed and verily believes that defendant-appellant is a man of great affluence; that he owns two very large and expensive cars and that he is the sole owner and Treasurer of the Zel Cla Construction Company a corporation of the State of New Jersey, having a capital stock of One Hundred Thousand Dollars, divided into one thousand shares of common stock, each of the par value of One Hundred Dollars, of which five hundred shares were bought and paid for by the defendant-appellant personally; that the said corporation is engaged in the business of constructing apartment houses and owns or has owned in the immediate past, a nine-story building in Brooklyn, New York, purchased by the company for One Hundred Thousand Dollars, in excess of the existing liens and encumbrances thereon, and another parcel of real estate in Brooklyn, New York, which it purchased at approximately Twenty-two Thousand Five Hundred Dollars in excess of the existing liens and encumbrances; that defendant-appellant is the owner of the dwelling in which he resides at 1034 East 22nd Street, Brooklyn, New York, a fashionable and expensive neighborhood of Brooklyn, New York; that he also owns his private garage in which the two automobiles hereinbefore referred to are stored; that the said automobiles are operated by a chauffeur in the employ of defendant-appellant; that defendant-appellant also owns or has owned a private yacht; that defendant-appellant is engaged in the liquor business and has been so engaged since 1918 and he has amassed a huge fortune in the same, and

petitioner-appellee says that the defendant-appellant's means are amply sufficient for him to raise and pay such sums as may be necessary for the purposes aforesaid.

She prays that an order may be made requiring defendant-appellant to pay her a proper allowance for her support and maintenance and that of the children of the marriage in her custody, until the termination of this suit, and also to pay forthwith a reasonable sum for the fees of counsel in defending this appeal for her; and also that defendant-appellant be compelled to pay forthwith the alimony which has accrued and the counsel fee and costs heretofore awarded by the order of the Court of Chancery dated April 13, 1925, heretofore referred to and for such other relief in the premises as to this honorable court may seem meet.

And your petitioner will ever pray &c.

JOHN N. PLATOFF,
Solicitor and of Counsel with Petitioner.

Affidavit of Celia Sobel.

State of New Jersey,
County of Hudson, ss:

Celia Sobel, of full age, being duly sworn, according to law on her oath, deposes and says:

I am the petitioner-appellee in the above entitled cause.

On the twenty-third day of July, 1922, I pro-

cured a final decree of divorce against the defendant-appellant herein, in the Court of Chancery of New Jersey, on the ground of desertion, after due personal service upon the defendant-appellant in the State of New Jersey.

On the thirteenth day of April, 1925, an order was made by the Court of Chancery that the defendant-appellant, Alexander Sobel, pay to me, or to my solicitor, the annual sum of Twelve Hundred ($1200) Dollars, for my support and maintenance, payable in equal monthly installments of One Hundred ($100) Dollars each, on the first day of each and every month, commencing April 1, 1925.

It was also ordered by the said Court that the defendant-appellant do further pay to me or to my solicitor, the costs of this suit to be taxed, and also the sum of Three Hundred and Fifty ($350) Dollars, which was adjudged and decreed to be a reasonable counsel fee.

It was further ordered by the said Court of Chancery that a copy of the said order awarding me alimony, counsel fee and costs of suit, be served upon the defendant-appellant, and pursuant to the terms of the said order, a certified copy of the said order was served upon the defendant-appellant personally, in New York City, where defendant-appellant resides, on the eighteenth day of May, 1925. At the same time, the bill of taxed costs amounting to $39.14 was served upon the said defendant-appellant.

Up to the present date, the defendant-appellant has wholly disregarded the terms and conditions of the said order and has wholly failed to pay

to me, either the sums stipulated in the said order as alimony and counsel fee or any sum or sums whatsoever.

Prior to the making of the said order by the Court of Chancery, the defendant-appellant had contributed nothing to my support, either by way of alimony or otherwise, since the second day of February, 1922, at which time I received from the defendant-appellant, the sum of Six Thousand ($6,000) Dollars in cash, and in return therefor executed a general release to the defendant-appellant. This release was set aside by the Court of Chancery on April 13th, 1925, at the time of the making of the order for permanent alimony hereinbefore referred to.

The Court found, as a matter of fact, that there was "ample evidence to indicate that this man is living under circumstances pointing to great affluence. His denial thereof is not at all convincing. For example, he undertakes to show that two automobiles he has are old and dilapidated; nevertheless he admits that he is the owner of two very large and expensive cars, one of which, at least, represents the most perfect and expensive class of automobiles. In addition, he is living with and supporting another wife and family, while sending the children of the first marriage to an expensive school and preparing the oldest of them for one of the great universities."

Defendant-appellant is the sole owner and Treasurer of the Zel-Cla Construction Company with a capital stock of One Hundred Thousand ($100,000) Dollars, divided into one thousand (1,000) shares of common stock, each of the par value of One Hundred ($100) Dollars, of which

five hundred (500) shares were bought and paid for by the defendant-appellant personally. The said company is engaged in the business of constructing apartment houses and owns or has owned in the immediate past, a nine-story building in Brooklyn, New York, purchased by the company for One Hundred Thousand ($100,000) Dollars, in excess of the existing liens and encumbrances thereon, and said company also owns another parcel in Brooklyn, which it purchased at approximately Twenty-two Thousand Five Hundred ($22,500) Dollars, in excess of the existing liens and encumbrances.

Defendant-appellant is the owner of the dwelling in which he resides at 1034 East Twenty-second Street, in the Borough of Brooklyn, City and State of New York, a fashionable and expensive neighborhood of the Borough of Brooklyn, in the City and State of New York. Adjoining the said house is defendant-appellant's private garage and as indicated in the opinion of the Court of Chancery, defendant-appellant is the owner of two automobiles, a five-passenger Lincoln sedan and a seven-passenger Locomobile, which are operated by a chauffeur, in the employ of the defendant-appellant.

Defendant-appellant also owns or has owned a private yacht which is used either for business or pleasure purposes.

I know that the defendant-appellant is engaged in the liquor business and I am creditably informed and verily believe that defendant-appellant has been so engaged since 1918. From 1918 to 1922, defendant-appellant owned a truck of

at least two-ton capacity, for the purpose of carrying on his business.

I am creditably informed and verily believe that at the present time defendant-appellant is engaged in the liquor business at Halifax, Canada.

Since being awarded the decree of divorce, I have remained unmarried and as heretofore stated defendant-appellant has contributed nothing to my support since February 2nd, 1922.

I have been compelled to support myself as a finisher of ladies' dresses in the employ of John Bonwit at 133 East 33rd Street, New York City, New York, and have received a wage ranging from Eight Dollars to a maximum of Fifteen Dollars per week, although some weeks I have been unable to work and for a considerable while past, have been compelled to rely upon the charity of my sister, Annie Wittman, who resides at 1502 Crotona Park East, Bronx, New York. At the present time the dressmaking industry is very slack, and I cannot procure more than one or two days' work a week, which gives me an income on the average of about Six Dollars a week.

I have absolutely no other means of support and because of the failure of the defendant-appellant to pay anything toward my support since the decree of divorce I have been deprived of the custody of my children and have been compelled to permit them to remain with the defendant-appellant.

In the early part of June, 1925, the defendant-appellant found that two of our children, Lillian and Nathan, who have been living with him, each required an operation for tonsilitis. For the pur-

pose of simulating poverty, the defendant-appellant represented himself to Dr. Peter A. Keil of 118 Pennsylvania Avenue, Brooklyn, New York, to be one Herman Kazzick, who is the brother-in-law of the defendant-appellant, and not a rich man, and requested the said Dr. Keil to perform the operations at the Clinic of Lutheran Hospital, Brooklyn, and agreed to pay Thirty Dollars for each operation. Defendant-appellant then sent the two children to me, giving them Thirty Dollars cash apiece, and a dollar for their car fares. They told me the circumstances and I went with them to Dr. Keil and had the operations performed. The operations were performed on June 12th, 1925, and for several weeks thereafter the children lived with me and were under my care in the home of my sister, Mrs. Wittman, and from June 11th, 1925, I was compelled to defray the entire cost of their support and maintenance which I was only able to do with the help of my sister. Mr. Sobel contributed nothing to the support of the children during the time which they spent with me. It was only by dint of the utmost sacrifice and through the kindness of my sister, Annie Wittman, who is herself in poor circumstances, that I was able to purchase the barest necessities of life for myself and my children.

During several weeks in the summer, my husband placed the children in summer camps and paid their board and tuition. I was compelled to borrow money in order to defray my railroad fare to visit the children.

CELIA SOBEL.

Subscribed and sworn to before me this
9th day of September, 1925.
Anna Kattenhorn,
Notary Public of New Jersey.

Affidavit of Barnet Epstein.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between: CELIA SOBEL, Petitioner-Appellee, and ALEXANDER SOBEL, Defendant-Appellant.	On Appeal From Chancery. Affidavit.

State of New York,
County of New York, ss:

Barnet Epstein, being duly sworn, deposes and says:

That he is over the age of 21 years.

That on the 18th day of May, 1925, at the Knickerbocker Building, West 42nd Street, Borough of Manhattan, City of New York, he served the annexed order on Alexander Sobel, the defendant in this action, by delivering to and leaving with him true copies thereof. That he knew the person served as aforesaid to be the person mentioned and described in said order as the defendant therein.

BARNET H. EPSTEIN.

Sworn to before me this
22nd day of May, 1925.
Jno. Wollison,
Notary Public,
N. Y. C.

Notice of Motion.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between: CELIA SOBEL, Petitioner-Appellee, and ALEXANDER SOBEL, Defendant-Appellant.	On Appeal From Chancery. Notice of Motion for Alimony Pending Appeal.

To Weinberger & Weinberger, Esqs.,
Solicitors of Defendant-Appellant.

Take Notice that on the twenty-eighth day of October, 1925, next, before the Court of Errors and Appeals, at Trenton, at the hour of eleven o'clock in the forenoon, or as soon thereafter as counsel can be heard, I will move the said Court for an order in this cause requiring defendant-appellant to pay to the petitioner-appellee, a reasonable sum for her support and maintenance pending this appeal; and a reasonable sum to be paid to her counsel for defending this appeal; and the further sum of Six Hundred ($600) Dollars for the alimony which has heretofore accrued under the order of the Court of Chancery dated April 13, 1925; and the sum of $389.14 for the counsel fee and costs awarded to petitioner-appellee in the said Court of Chancery; and upon the argument of said motion the same affidavits will be used as were served upon the solicitors of the defendant-appellant on September 24, 1925.

Dated, October 21, 1925.

JOHN N. PLATOFF,
Solicitor of Petitioner-Appellee.

New Jersey Court of Errors and Appeals

CELIA SOBEL, Plaintiff-Appellee, vs. ALEXANDER SOBEL, Defendant-Appellant.	On Petition, &c.,

BRIEF ON BEHALF OF APPELLANT.

This appeal is from an order advised by the Honorable John Bentley, V. C. sitting for the Chancellor directing the appellant to pay to the appellee a counsel fee in the sum of One thousand ($1,000.00) dollars. The allowance just referred to resulted upon the event of a prior litigation between the parties hereto and narrated in an unofficial report by Kalisch, *J.* in 132 Atl. 603. Upon determination of that phase of the litigation solicitor for the appellant renewed an application for counsel fee before the Chancery Court despite the fact that the original application made by him before the full bench of the Court of Errors and Appeals at the opening of the argument in the case of *Sobel* v. *Sobel, supra* had not been acted upon. The application before the Vice Chancellor was resisted and it was urged among other things that any such appli-

cation at that time improvidently brought for the reason that there was at the time of such application a similar application pending and undetermined before the Court of Errors and Appeals. It was further urged that the application made before the Court of Errors and Appeals was duly argued before that tribunal and that the court had announced that it would take the matter up in conference. On the 26th day of March, 1926 the Court of Errors and Appeals affirmed the opinion of Vice Chancellor Bentley in the case of *Sobel* v. *Sobel, supra* and the record was remitted with an allowance of costs in the Court of Errors and Appeals and in the Court of Chancery against the appellant.

It seems to us that it may well be argued that the determination of March 26th above referred to was for all intents and purposes an adjudication by the Court of Errors and Appeals that the solicitor for the present appellee was not entitled to counsel fee. Indeed, to say the least its failure to decide the matter in any way up to the time that the original petition for such counsel fee was filed in the Court of Chancery was an unmistakable indication that at that time it had not yet relinquished its jurisdiction of the subject matter of counsel fees which had been originally submitted to and argued before it.

In the present appeal counsel for the now appellee relied almost exclusively on the case of *Weeks* v. *Lister*, 62 Equity 813. It is our opinion that the *Weeks* case is in no way analogous to the case at bar. In that case counsel made application for an allowance for counsel fees and printing subsequent to the filing of the remittitur. The court stated that it would not recall the record because the Court of Chancery

had concurrent jurisdiction and that the proper place for the making of such application was the Court of Chancery. In the case at bar however the situation differs in this particular, namely, that appellee's counsel elected to apply to the Court of Errors and Appeals for his allowances. The court thereupon filed the papers presented in support of the application but it has never even to the present time made any disposition of the original application. We contend that this application was an independent matter brought up apart from the main issue and we further contend that the court reserved its decision when it said that it would determine what allowance if any should be made. We think that counsel's application before the Court of Chancery under these circumstances was to say the least irregular especially in view of the fact that he always had his remedy in the Court of Errors and Appeals by asking them for their decision.

In the *Weeks* case it will be noted also that in its per curiam opinion the court merely stated what the practice was, but no-where did it state or intimate that where an application had been made to it and while such application was pending before it that an application involving the same subject matter might be made before the Court of Chancery. Again we reiterate that to all intents and purposes the original motion made by counsel for the present appellee is pending and undetermined before this court. As to this particular matter the remittitur had no application; it was merely dispositive of the main issue and would indicate if any thing that the court merely allowed the costs to be taxed excluding the question of the right to a counsel fee. In addition, should this court now entertain

the question of allowing a counsel fee in this matter we respectfully submit that the allowance, if any, should be moderated. It is our contention that the sum of One thousand ($1,000.00) dollars as allowed by the Court of Chancery is in a high degree excessive. The circumstances of the case we think did not permit the award of any sum and if this court is now to allow a counsel fee we respectfully urge that the amount allowed should be governed by the circumstances of the appellant as detailed in affidavits filed by him in the case of *Sobel* v. *Sobel* , *supra.*

Respectfully submitted,

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HARRY H. WEINBERGER,
Of Counsel.

New Jersey
Court of Errors and Appeals

CELIA SOBEL, *Petitioner-Appellee,* vs. ALEXANDER SOBEL, *Defendant-Appellant.*	On Appeal from Chancery

BRIEF OF PETITIONER-APPELLEE

On July 23, 1922, the petitioner procured a final decree of divorce against the defendant in the Court of Chancery of New Jersey on the ground of desertion. On April 13, 1925, after protracted and difficult litigation, an order was made by the Court of Chancery of New Jersey that the defendant pay to the petitioner, or her solicitor, the annual sum of Twelve Hundred ($1200) Dollars, for her support and maintenance, in equal monthly instalments on the first day of each and every month, commencing April 1, 1925, together with a counsel fee of Three Hundred Fifty ($350) Dollars, and the costs of the suit.

On May 18, 1925, a notice of appeal from the order awarding alimony was filed by the defendant to the Court of Errors and Appeals. During the pendency of that appeal, the defendant having wholly failed to pay any sum to petitioner for her support or otherwise, and the petitioner

being in destitute and necessitous circumstances, an application was made to this Court for alimony pending the appeal and for a reasonable counsel fee, on behalf of the petitioner. A motion to carry the application to conference was adopted by the Court at the October term, 1925.

On March 26, 1926, a decree affirming the order of the Court of Chancery awarding permanent alimony, was entered, with costs in the Court of Errors and Appeals and in the Court of Chancery awarded to the petitioner, and the petition of appeal was dismissed. It was further ordered that the record be remitted to the Court of Chancery for further proceedings thereon. The application for alimony pending the appeal and for counsel fee was not disposed of, and no mention was made thereof in the opinion filed by this Court. After the cause had been remitted to the Court of Chancery, an application was made to that Court for an order requiring the defendant to pay to petitioner a reasonable sum for her counsel for defending the appeal, and on July 26, 1926, the Vice Chancellor made an order awarding to the petitioner the sum of One Thousand ($1,000) Dollars as counsel fee for such services. This is the order appealed from.

POINT I.

After the remittitur has been entered and the cause remanded to the Court of Chancery, the Court of Errors and Appeals is stripped of its jurisdiction, and the Court of Chancery has power to award counsel fee.

The defendant argues that the affirmance by the Court of Errors and Appeals of the order of

the Court of Chancery, without mention of the application for counsel fee is to be construed either as an adjudication that the solicitor for the petitioner was not entitled to counsel fee, or that this Court has not yet relinquished its jurisdiction over the subject matter of the cause, insofar as the application for counsel fee is concerned. These contentions will be disposed of separately.

(A) The complete answer to the first alternative advanced by the defendant is that the record is utterly barren of any adjudication by this Court on the application for counsel fee. No mention is made thereof in the opinion of Justice Kalisch, which is reported in Volume 4 of New Jersey Advanced Reports, at page 647. The omission is more readily construed as a desire on the part of the upper court to leave entirely to the Court of Chancery the question of a reasonable counsel fee, than as a denial of the petitioner's application. Defendant cannot seriously contend that upon the strength of this omission he would be entitled to procure from this Court an order denying counsel fee.

The most reasonable inference to be derived from the omission is that the application for counsel fee was inadvertently overlooked. The application was contained in the motion for alimony pending the appeal (Supplemental State of Case, page 11). Upon the final disposition of the cause there was no necessity for a decision on that motion, and, hence, it is likely that the moving papers were not again scanned. This is the most favorable construction the defendant can hope for, and it brings us to the second alternative.

(B) Undoubtedly, if the Court of Errors and Appeals still retains jurisdiction over the subject matter of the cause insofar as counsel fees are concerned, the application to the Court of Chancery was improper. Whether this Court retains jurisdiction depends upon the effect of the entry of the remittitur and of the remanding of the cause to the lower court.

In *King* vs. *Ruckman,* 22 N. J. E. 551, Chief Justice Beasley declared the usual rule of practice in courts of appellate jurisdiction thus:

> "After final judgment pronounced and entered, and a sending down of the record, there is no known ~~incident~~ instance of this court's again taking cognizance over the case. I have no doubt that this court has the power at any time to amend its judgment, if it is erroneous by reason of the mis-entry of the Clerk, or by reason of any other mistake; or that such judgment may be set aside and treated as a nullity, if it has been procured by fraud, or is the result of misapprehension. But I also think that when such judgment has been rendered after a hearing upon the merits, and has been entered upon the minutes according to the views of the court, and the record has been regularly remitted to the inferior court, this court has no further jurisdiction in the case."

The logical extension of this rule is indicated in *Putnam* vs. *Clark,* 35 N. J. E. 145, wherein the Chancellor said (page 152):

> "But when the record is regularly gone, this court has no jurisdiction to make *any order* in the cause." (Italics ours.)

The divestiture of jurisdiction in legal effect is supplemented by the physical removal of the record from the office of the Clerk of the Court of Errors and Appeals to the office of the Clerk in Chancery, 2 C. S. 1710, Sec. 17. The jurisdiction of an appellate court over a case is generally lost upon the issuance and transmission of the remittitur, and it is certainly lost after the remittitur has been filed in the lower court, 4 C. J. 1244. Consequently, unless the application for alimony pending the appeal and for counsel fee be regarded as a proceeding totally alien and detached from the main proceeding, nothing remains for the Court of Errors and Appeals to act upon.

No multiplication of authorities is required to demonstrate that an application for counsel fee in a matrimonial action is part and parcel of the action in which it is made. A statement asserting the contrary proposition is its own refutation.

Having determined that the remittitur was effective to divest the upper court of jurisdiction over the cause in every respect, the question remains as to whether the lower court thereafter has power to award a counsel fee for services rendered on the appeal in behalf of the wife. This cannot be regarded as an open question in this State. The case of *Weeks* vs. *Lister*, 62 N. J. E. 813, fixed the law on this subject. In that case the solicitor of the respondent made application to the Court of Errors and Appeals for counsel fee and printing upon the trial in the Court of Errors and Appeals, after the remittitur had been

filed, and also requested an amendment of the remittitur for that purpose. It was held that the application should be denied, and that the court had no power to recall the record from the Court of Chancery to make the amendment requested. The court said:

> "The application for counsel fee should first be made in this court. If the court then passes on it, the decision is final, *but if the court does not pass upon it, or if through mere inadvertence the application for counsel fee is not made while the case is before this court, then after the remittitur the Court of Chancery has jurisdiction to grant counsel fee and printing in the Court of Errors and Appeals upon a proper case being presented in these respects.*" (Italics ours.)

Defendant, in the instant case, seeks to distinguish the Weeks case on the ground that, there, no application was made to the Court of Errors and Appeals before the remittitur was filed. But a case more clearly within the language above italicized than the instant case is difficult to conceive. The statement of the defendant in his brief (page 3) that "Nowhere did it state or intimate that where an application had been made to it, and while such application was pending before it, that an application involving the same subject matter might be made before the Court of Chancery" obviously begs the question, since, as we have already determined, no application is pending before the Court of Errors and Appeals once the remittitur is filed.

In *Simpson* vs. *Klipstein,* 90 N. J. E., 197, V. C. Lane said:

"Although there are no decided cases upon the point in this ~~case~~ state, yet I am advised that the Ordinary has in one or more cases awarded fees to counsel for services rendered in the Court of Errors and Appeals on ~~the~~ appeal from the Prerogative Court as well as for services rendered in the Prerogative Court. It has been held in New York that the lower court, may, upon a remittitur from the Court of Appeals carrying costs in the lower court, entertain a motion by the prevailing parties in the Court of Appeals for an additional allowance, which under our practice would be a counsel fee."

Citing *Jermain* vs. *Lake Shore Etc. R. Co.*, 31 Hun, 558; *Parrot* vs. *Sawyer*, 26 Hun, 466; *City of New Orleans* vs. *Administrator*, 138 U. S., 595; 15 C. J., 650, and notes.

It is notable that in some jurisdictions the appellate court refuses, in any case, to grant counsel fee for services on appeal, and leaves the burden of awarding such fee to the trial court on the theory that the trial court is in a better position than the appellate court to determine what constitutes a reasonable counsel fee under all the circumstances.

Craig vs. *Craig*, 115 Virginia, 764.
Dicus vs. *Dicus*, 131 Maryland, 87, 101 Atl., 697.

Other jurisdictions adopting this view are found in 18 A. L. R., 1507.

The Court of Errors and Appeals of New Jersey has not gone so far. It has assumed jurisdiction over the award of counsel fee to the wife

in a matrimonial action (*Disborough* vs. *Disborough,* 51 N. J. Eq., 306). Yet, it is obvious that the Court of Chancery may award a counsel fee for services rendered on the appeal without deviating from the precedents either of this State or of the majority of the jurisdictions of the United States.

POINT II.

The amount of the award is discretionary, and should not be reviewed on appeal, except in cases involving an abuse of discretion.

Under Section 91 of the Chancery Act, 1 C. S., 445, as amended P. L. 1910, p. 427, it is obvious that the allowances made by the Court of Chancery are left entirely in the discretion of the Chancellor or the Vice Chancellor. The practice, as indicated in *McMullin* vs. *Doughty,* 68 N. J. Eq., 776, is for the Vice Chancellor, to whom the case has been referred, to hear the parties on the question of an allowance of counsel fee, and when advising the final decree, to report to the Chancellor what a reasonable fee would be; then, if either party is dissatisfied with the Vice Chancellor's allowance, he may, on notice to the other party, apply to the Chancellor to fix a proper sum. It is submitted that this would have been the safe and proper procedure to follow in the instant case, and that it is not within the scope of this appeal to review the amount of the award.

It will be noted that the State of the Case does not disclose that any objection was ever made by the defendant as to the amount awarded by the Vice Chancellor, prior to this time, and that the petition of appeal sets forth as the sole reason for reversal that the Court of Chancery had no

jurisdiction to make the order. (State of Case, page 4). When the original award was made, defendant made no objection to the amount thereof, and it was agreed at the hearing that the amount was reasonable. Under these circumstances, it would seem that defendant's objection to the amount awarded at this stage of the proceedings comes too late.

Finally, the Court's attention is directed to the fact that, despite the order of April 13, 1925, for alimony and counsel fee, and the affirmance of that order by this Court on March 26, 1926, not one cent has been paid by the defendant to the petitioner, either as alimony or counsel fee. For almost five years, in spite of petitioner's destitute circumstances and his affluence, defendant has contributed nothing to petitioner's support, and has compelled her to rely in great part upon the charity of her relatives. In view of these facts, it is plain that whatever equities there are in the case are on the side of the petitioner.

CONCLUSION

It is respectfully submitted that the order of the Lower Court should be in all things affirmed, and the appeal therefrom dismissed.

Respectfully submitted,

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with Petitioner-Appellee.