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Decree Nisi

(Filed May 1, 1923)

IN CHANCERY OF NEW JERSEY

Between
ELEANOR S. MILES,
Petitioner,
and
WILLIAM R. MILES,
Defendant.

On Petition
for Divorce.
Decree Nisi.

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This cause coming on to be heard in the presence of Andrew Van Blarcom, of counsel with the petitioner, and Auguste Roche, Jr., of counsel with the defendant, on petition, answer and oral proofs taken in open court; whereupon, and upon duly considering the said pleadings and proofs, from all of which it now appears satisfactorily to the Chancellor that the petitioner and defendant were lawfully joined in the bonds of matrimony on or about the Seventh day of June, Nineteen Hundred and Thirteen, and that the said defendant has been guilty of willful, continued and obstinate desertion of the said petitioner for the term of two years, as alleged in the said petition, and that at the time the cause of action for divorce for said desertion arose the said petitioner and the said defendant were bona fide residents of this State, and that they have both continued so to be down to the commencement of this action, and that they have been for the two years

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Decree Nisi

next preceding the commencement of this action bona fide residents of this State; and it further appearing that jurisdiction herein has been acquired by personal service of process upon the defendant in this State:

10 It is thereupon on this first day of May, A.D., Nineteen Hundred and Twenty-three, by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, ORDERED, ADJUDGED AND DECREEED, and the said Chancellor, by virtue of the power and authority of this Court, and of the acts of the Legislature in such case made and provided, doth hereby order, adjudge and decree that the said petitioner, Eleanor S. Miles, and the
20 said defendant, William R. Miles, be divorced from the bond of matrimony for the cause aforesaid, and the said parties, and each of them, be freed and discharged from the obligations thereof, unless sufficient cause be shown to the Court why this decree should not be made absolute within six months from the date hereof.

It is further ordered, adjudged and decreed that the defendant, William R. Miles, do pay to this
30 petitioner, Eleanor S. Miles, or to Riker & Riker, her solicitors, the weekly sum of Sixty Dollars, payable on the first day of each and every week hereafter, except that for a period of six weeks, from August 1st to September 15th of each year (covering the period of time during which the children of the parties are in the custody of the defendant, as hereinafter provided) the weekly payments shall be at the rate of Forty Dollars. These payments to continue until the further order of the Court to the contrary. Said weekly
40 payments being considered and deemed a suitable allowance for the support and maintenance of

Decree Nisi

the petitioner and Sallie Miles and Edward Souther Miles, the infant children of the marriage aforesaid; except that between the dates of August 1st and September 15th of each year the defendant shall support and maintain said children.

And it is further ordered, adjudged and decreed that the said petitioner have the exclusive care, custody and control of said infant children, except that the defendant be permitted to take such children in his custody on Saturday of each week at 10 A. M. and return them to the petitioner on the next day (Sunday, at 5:30 P. M. of each week, and the said defendant shall be permitted to take said children into his custody on the first day of August and to keep them until the fifteenth day of September of each year. The said defendant shall take said children from petitioner's home and return them thereto when they are taken into his custody as above mentioned.

E. R. WALKER,
C.

JOHN E. FOSTER,
V. C.

We hereby approve the above decree nisi as to form.

RIKER & RIKER,
Solicitors for Petitioner.

HARRISON & ROCHE,
Solicitors for Defendant.

Order Amending Decree Nisi

Filed May 22, 1923

IN CHANCERY OF NEW JERSEY

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Between

ELEANOR S. MILES,
Petitioner,

and

WILLIAM R. MILES,
Defendant.

On Petition
for Divorce.

Order
Amending
Decree Nisi.

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This matter being opened to the Court by Auguste Roche, Jr., of counsel with defendant, and it appearing that the following paragraph was inadvertently omitted from the decree nisi, entered herein on the first day of May, 1923; and Andrew Van Blarcom, of counsel with the petitioner, consenting hereto,

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It is on this 22nd day of May, 1923, ordered that the decree nisi, entered herein, on the first day of May, 1923, be and the same is hereby amended as follows, by adding to said decree the following paragraph:

“It is further ORDERED, ADJUDGED AND DECREED, that either party be at liberty to apply upon a future change of circumstances of the parties for a variance or modification of this decree, touching said support, maintenance and custody as shall be just and equitable.”

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Respectfully advised.

J. C. FOSTER,
V. C.

We hereby consent to the making of the foregoing amendment.

RIKER & RIKER,
Solicitors for Petitioner.

Final Decree

Filed November 2, 1923

IN CHANCERY OF NEW JERSEY

Between

ELEANOR S. MILES,
Petitioner,

and

WILLIAM R. MILES,
Defendant.

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On Petition
for Divorce.Final
Decree.

The Court having in this cause by a decree nisi, bearing date and entered on the 1st day of May, A.D. Nineteen hundred and twenty-three, ordered, adjudged and decreed that the petitioner, Eleanor S. Miles, and the defendant, William R. Miles, be divorced from the bonds of matrimony for the cause of desertion, unless sufficient cause be shown to the Court why said decree should not be made absolute within six months from the date thereof; and application being now made to the Court by the petitioner for an order that said decree nisi be made absolute and that a final and absolute decree be entered; and no cause to the contrary being shown or appearing,

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It is thereupon, on this 2nd day of November, A.D. Nineteen hundred and twenty-three, by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, ordered, adjudged and decreed and that said Chancellor, by virtue of the power and authority of this Court, and of the acts of the Legislature in such case made and provided, doth hereby order, adjudge and decree that

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Final Decree

the said decree nisi be made and become absolute, and that the said petitioner Eleanor S. Miles and the said defendant, William R. Miles are divorced from the bonds of matrimony for the cause aforesaid and the marriage between the said petitioner and the said defendant is hereby dissolved accordingly, and the said parties and each of them are and is hereby freed and discharged from the obligations thereof.

E. R. WALKER,
C.

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Petition

infant children the said decree provided as follows:

10 “And it is further ordered, adjudged and decreed that the said petitioner have the exclusive care, custody and control of said infant children, except that the defendant be permitted to take such children in his custody on Saturday of each week at 10 A. M. and return them to the petitioner on the next day (Sunday) at 5:30 P. M. of each week, and the said defendant shall be permitted to take said children into his custody on the first day of August and to keep them until the fifteenth day of September 20 of each year. The said defendant shall take said children from petitioner’s home and return them thereto when they are taken into his custody as above mentioned.”

4. Thereafter, on or about April 1, 1928, it was agreed by and between the parties hereto, through their solicitors, that for the time being the said defendant might take his children on Friday afternoon of each week instead of on Saturday afternoon in each week, as provided in the 30 said decree nisi, and return them the following Monday morning; but that otherwise the said decree should be complied with throughout.

5. In compliance with the said decree nisi the said defendant took his two infant children, on or about August 1, 1928, and returned them into the custody of the said petitioner on Sunday, September 16. On Friday, September 21, the said defendant called for his said infant children in South 40 Orange, New Jersey, and obtained them from

Petition

your petitioner, and thereafter, on Sunday, September 23rd, returned them again to her in South Orange.

6. On Tuesday, September 25th, in the afternoon, the said infant children, Sallie and Edward Souther Miles, rode on their bicycles from school, where they had been, to No. 7 Fairview Avenue, South Orange, where your petitioner had taken an apartment which she was about to occupy with her said children, arriving there about three o'clock in the afternoon. After remaining about ten minutes the two children rode away on their bicycles for the express purpose of calling upon a mutual friend, but they did not carry out that intention, and on the other hand, the said Sallie disappeared from the State of New Jersey and has not been seen by your petitioner since. 10
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7. On the evening of the day of Sallie's disappearance, Tuesday, September 25th, between half-past five and six o'clock, one George Nickle, a business associate of the said William R. Miles, telephoned to the place in South Orange where your petitioner was then boarding and left a message for her with the landlady, Mrs. John Bewley, to the effect that Sallie was in Babylon, Long Island, which is where the said defendant was then living. 30

8. On the following day your petitioner was advised by her solicitor that Sallie was in fact in Babylon, Long Island, in the custody of her father.

9. From time to time thereafter your petitioner 40

Petition

has requested that the said defendant return the said Sallie to her, in accordance with the provisions of the decree nisi hereinabove referred to, but he refused to do so and still refuses to do so.

- 10 Your petitioner prays, therefore, that the defendant may be adjudged in contempt of this honorable Court for failing to comply with its decree hereinabove referred to with reference to his infant daughter Sallie, and that he be punished accordingly; that your petitioner may have such other and further relief as may be equitable and just; and that meanwhile, until the further order of this Court, the said petitioner be not required to comply with the said decree nisi in so far as it
- 20 requires her to surrender the said Edward Souther Miles into the custody of the said William R. Miles.

And your petitioner will ever pray, etc.

ELEANOR S. MILES,
Petitioner.

McCARTER & ENGLISH,
Solrs. for and of Counsel with Petitioner.

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Petition

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

ELEANOR S. MILES, being duly sworn upon her oath according to law, deposes and says:

I am the petitioner named in the foregoing petition. I have read the said petition and the matters and things therein set forth are true. 10

Particularly is it true that I have not seen my daughter, Sallie Miles, since September 25, 1928, when she disappeared after having left me at No. 7 Fairview Avenue, South Orange, to go with her brother to visit a mutual friend. Sallie and Edward left me on their bicycles around three o'clock and although Edward returned to the place where I was boarding about half-past four, I have not seen Sallie since. 20

On the evening of her disappearance, between half-past five and six, I was advised by my landlady, Mrs. John Bewley, that a Mr. Nickle, who I know is associated with my husband in business, telephoned and left a message through her for me to the effect that Sallie was in Babylon, Long Island.

On the following day I was advised by my former solicitor, Mr. Andrew Van Blarcom, that he had been advised by my husband's solicitor, Mr. Frederic W. Schlosstein, that Sallie was in fact with her father at Babylon. Since then, from time to time, I have endeavored to have my husband return Sallie to me but he has not done so and so far as I know she is still in Babylon. 30

ELEANOR SOUTHER MILES.

Sworn to and subscribed before me }
 this 30th day of October, 1928. }

LEAH M. BAILEY,
Notary Public of New Jersey.

(Seal)

Order to Show Cause

Filed October 30, 1928

IN CHANCERY OF NEW JERSEY

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Between

ELEANOR S. MILES,
Petitioner,

and

WILLIAM R. MILES,
*Defendant.*On Petition
for Divorce.Order to
Show Cause.

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This matter being opened to the Court by McCarter & English, solicitors for the petitioner above named, and upon reading and filing the duly verified petition of the said petitioner setting forth that the defendant herein, William R. Miles, has failed and neglected to comply with the provisions of the decree nisi entered herein on May 1, 1923, and the Court having considered the matters therein set forth,

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IT IS, on this 30th day of October, 1928 on motion of Messrs. McCarter & English, solicitors as aforesaid, ORDERED that William R. Miles, the defendant herein, do show cause before this Court on Wednesday, the 7th day of November, 1928, at 10 o'clock in the forenoon, or as soon thereafter as counsel can be heard, at the Chancery Chambers, 1060 Broad Street, Newark, New Jersey, why the prayer of the petitioner should not be granted; and that a copy of the said petition and of this order, which may be uncertified, be

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Order in Contempt

served upon the said defendant within three days from the date hereof.

E. R. WALKER,
C.

Respectfully advised,

JOHN H. BACKES,
V. C.

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Order in Contempt

Filed November 14, 1928

IN CHANCERY OF NEW JERSEY

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Between

ELEANOR S. MILES,
Petitioner,

and

WILLIAM R. MILES,
Defendant.

On Petition
for Divorce.
On Petition,
&c.

Order in
Contempt.

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This matter being opened to the Court by Messrs. McCarter & English, of counsel with the petitioner herein, and Frederic W. Schlosstein, of counsel with the defendant, and it appearing to the Court that by an order made herein on the 30th day of October, 1928, the said defendant, William R. Miles, was ordered to show cause before this Court on November 7th, 1928, at the

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Order in Contempt

Chancery Chambers, 1060 Broad Street, Newark, N. J., why he should not be adjudged in contempt of this Court in failing to comply with its decree nisi made and entered herein on May 1, 1923, which thereafter was made final by the decree of this Court dated November 2, 1923, with particular reference to the custody of his infant daughter, Sallie, and punished accordingly; and it further appearing that a copy of the said order, together with a copy of the petition and affidavit of the said petitioner, upon which the said order was founded, was duly served upon the said defendant by leaving the same at his office, No. 128 Maiden Lane, New York City, and also by serving the same upon his solicitor, Frederic W. Schlosstein, and the petition and affidavit of the said petitioner being read, and the argument of counsel having been heard and considered, and it appearing that the said William R. Miles has violated the decree of this Court of May 1, 1923, with reference to the custody of his infant daughter, Sallie, as therein provided, and the Court having directed the said defendant, through his solicitor, Frederic W. Schlosstein, that unless within two days of November 7th he should return his infant daughter, Sallie, to the home of the said petitioner, Eleanor S. Miles, No. 7 Fairview Avenue, South Orange, N. J., in accordance with the provisions of the decree of this Court dated May 1, 1923, an order would be made herein adjudging him in contempt of this Court, and it appearing by affidavit that the said William R. Miles has failed to return his said infant daughter, Sallie, to the home of the said petitioner as hereinabove directed, and is guilty of the contempt charged, it is thereupon, on this 14th day of November, 1928, by the Chancellor,

Order in Contempt

ORDERED AND ADJUDGED, that the said William R. Miles is guilty of contempt of this Court in refusing and neglecting to perform the decree of this Court of May 1, 1923, with reference to the custody of his infant daughter, Sallie, as therein provided, and it is further 10

ORDERED, that the said William R. Miles be committed to the said common jail of the said County of Essex, or to such other jail where he may be apprehended, and there to remain charged upon his contempt until the further order of this Court, and that a writ issue for this purpose accordingly; and it is further

ORDERED, that the said defendant do pay the costs of this application to be taxed, in which shall be included a counsel fee of One hundred (\$100) Dollars to be paid to Messrs. McCarter & English, solicitors of the said petitioner. 20

E. R. WALKER,
C.

Respectfully advised,
MAJA BERRY, V. C. 30

Notice of Appeal

Filed November 22, 1928

IN CHANCERY OF NEW JERSEY

10

Between

ELEANOR S. MILES,
Petitioner,

and

WILLIAM R. MILES,
Defendant.

On Petition
for Divorce.

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The defendant, William R. Miles, hereby appeals from the order made in the above entitled cause on November 14, 1928, and from the whole and every part thereof, to the Court of Errors and Appeals in the Last Resort in All Causes.

Dated, November 19, 1928.

FREDERIC W. SCHLOSSTEIN,
Solicitor for and of Counsel with Defendant.

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I conceive there is a good cause of appeal in the above entitled cause.

FREDERIC W. SCHLOSSTEIN,
Solicitor for Defendant.

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Acknowledgment of Service

Filed November 24, 1928

NEW JERSEY COURT OF ERRORS AND
APPEALS

Between ELEANOR S. MILES, <i>Petitioner-Respondent,</i> and WILLIAM R. MILES, <i>Defendant-Appellant.</i>	}	On Appeal from the Court of Chancery.	10
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Service of a true copy of the petition of appeal
 is hereby acknowledged this 22nd day of Novem-
 ber, 1928. 20

McCARTER & ENGLISH,
Solicitors for and of Counsel with
Petitioner-Respondent.

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Amended Notice of Appeal

Filed December 12, 1928

IN CHANCERY OF NEW JERSEY

10 Between
ELEANOR S. MILES,
Petitioner,
and
WILLIAM R. MILES,
Defendant. } On Petition
for Divorce.

20 The defendant, William R. Miles, hereby appeals from the order made in the above entitled cause on November 14, 1928, by the Chancellor, on the advice of Vice-Chancellor Maja Leon Berry, and from the whole and every part thereof, to the Court of Errors and Appeals in the Last Resort in All Causes.

Dated, December 7, 1928.

30 FREDERIC W. SCHLOSSTEIN,
Solicitors for and of Counsel with Defendant.

I conceive there is a good cause of appeal in the above entitled cause.

FREDERIC W. SCHLOSSTEIN,
Solicitor for Defendant.

40 Service of the within amended notice of appeal is hereby acknowledged this 8th day of December, 1928.

McCARTER & ENGLISH,
Solicitors for Petitioner.

Petition of Appeal

Filed November 22, 1928

**NEW JERSEY COURT OF ERRORS AND
APPEALS**

Between ELEANOR S. MILES, <i>Petitioner-Respondent,</i> and WILLIAM R. MILES, <i>Defendant-Appellant.</i>	}	On Appeal from the Court of Chancery	10
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To the Honorable the Court of Errors and Appeals in the Last Resort in All Causes: 20

The petition of William R. Miles, the appellant in the above entitled cause, respectfully shows that:

Petitioner finds himself aggrieved by an order made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor, bearing date the fourteenth day of November, 1928, in a certain cause in said Court of Chancery, wherein the said Eleanor S. Miles was petitioner and the said William R. Miles was defendant, in this respect, to wit: That the said order adjudges that William R. Miles is guilty of contempt of that Court in refusing and neglecting to perform the decree of that Court of May 1, 1923, with reference to the custody of his infant daughter, Sally, as therein provided, and adjudges that the said William R. Miles be committed to the jail of the 30 40

Petition of Appeal

County of Essex, there to remain upon his contempt until the further order of the Court.

10 And your petitioner appeals from the decree of the Chancellor which decrees as aforesaid, on the ground that the same is erroneous in that petitioner has not refused and neglected to perform the decree of the Court of Chancery of May 1, 1923, above referred to.

Upon the grounds that the same is erroneous in that the Court of Chancery found that there was an obligation on petitioner to return his infant daughter, Sally, although petitioner had not taken his infant daughter, Sally, in accordance with the decree of May 1, 1923.

20 Upon the grounds that the same is erroneous in that the copy of the order to show cause of October 30, 1928, was not served upon the petitioner personally.

Upon the grounds that the same is erroneous in that petitioner was not permitted to show any facts or produce any evidence to show his inability to comply with the decree.

30 Upon the grounds that the same is erroneous in that the order appealed from was based on the *ex parte* affidavits on which the order to show cause was secured.

Upon the grounds that the same is erroneous in that no testimony was taken in open court and petitioner was not afforded the opportunity of cross examination.

40 Upon the grounds that the same is erroneous in that the proceedings to punish the alleged contempt should have been made the subject of an independent proceeding and not a step in the cause pending in the Court of Chancery.

Upon the grounds that the same is erroneous in

Petition of Appeal

that petitioner was not served within the State of New Jersey.

Upon the grounds that the same is erroneous in that the Court of Chancery had no jurisdiction to try the alleged contempt.

Upon the grounds that the same is erroneous in that the petitioner was not afforded the opportunity to produce evidence tending to show justification for his actions. 10

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

FREDERIC W. SCHLOSSTEIN, 20
Solicitor for and of Counsel with Appellant.

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Answer to Petition of Appeal

Filed December 14, 1928

NEW JERSEY COURT OF ERRORS AND
APPEALS

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Between

ELEANOR S. MILES,
Petitioner-Respondent,

and

WILLIAM R. MILES,
*Defendant-Appellant.*On Appeal
from the
Court of
Chancery.

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This petitioner-respondent not acknowledging all or any of the matters which in the said petition of appeal are contained to be true, for answer thereto, nevertheless, says and admits, that an order was, on the 14th day of November, 1928, made and entered in the Court of Chancery in the cause for that purpose mentioned in the said petition, as is therein stated; but as to the substance and form thereof, this petitioner-respondent

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prays to refer thereto when the same shall be produced. And this petitioner-respondent 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 adjudged to this petitioner-respondent.

McCARTER & ENGLISH,
*Solicitors for and of Counsel with
the Petitioner-Respondent.*

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Service of the within answer to petition of appeal is hereby acknowledged as of time this 12th day of December, 1928.

FREDERIC W. SCHLOSSTEIN,
Solicitor for Defendant-Appellant.

New Jersey Court of Errors and Appeals

Between

ELEANOR S. MILES,
Petitioner-Respondent,

and

WILLIAM R. MILES,
Defendant-Appellant.

10

BRIEF FOR DEFENDANT-APPELLANT

Facts

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On May 1, 1923, a decree nisi was entered in this cause by which it was decreed that petitioner have the exclusive care, custody and control of the infant children of the marriage of petitioner and defendant, except that the defendant be permitted to take such children in his custody on Saturday of each week at 10 A. M. and return them to the petitioner on the next day (Sunday) at 5:30 P. M. of each week, the said defendant to take the children from petitioner's home and return them thereto when they are taken into defendant's custody as above mentioned.

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On November 2, 1923, the decree nisi was made absolute.

On Tuesday, September 25, 1928, it was alleged by petitioner that Sally Miles, one of the infant children, left petitioner to go to the defendant at Babylon, Long Island.

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On November 14, 1928, defendant was adjudged guilty of contempt of court, because of defendant's failure to return the said Sally Miles to petitioner, from which defendant has appealed.

LAW

10 **I. The defendant has not refused and neglected to perform the decree of the Court of Chancery of May 1, 1923.**

20 The decree nisi provides that the defendant shall take the children from petitioner's home and return them thereto when they are taken into his custody as mentioned in the said decree nisi. The facts in this case are that the defendant did not take his daughter Sally in accordance with the terms of any decree nisi.

30 The facts are that Sally Miles left the home of the petitioner herself, and went herself to the defendant's home. There was no taking by the defendant and consequently no obligation on the defendant to return Sally to petitioner's home, and consequently no refusal to perform the decree of the Court of Chancery of May 1, 1923, and the order adjudging the defendant guilty of contempt in refusing and neglecting to perform this decree, is erroneous.

II. The Court was without jurisdiction to adjudicate the defendant in contempt unless a copy of the Petition and Order to Show Cause of October 30, 1928, was served personally on the defendant.

40 The rule is that upon proceedings of this nature,

nothing but personal monition will avail in bringing a respondent within the jurisdiction of a court for punishment.

Rap. Contempt, paragraphs 98, 104.

III. The Order Appealed From is erroneous in that defendant was not permitted to produce any evidence to show his inability to comply with the Decree. 10

On the return of the Order to Show Cause, namely, November 7, 1928, the learned Vice-Chancellor refused to hear or consider any testimony to show the inability of the defendant to return the said Sally Miles and directed that the said child be returned within two days. 20

It is well settled that a defendant in a contempt proceeding may always produce facts to show his inability to perform the decree alleged to have been violated.

IV. No copy of the Order of November 7, 1928, was served on the defendant, and the Court was without jurisdiction to punish for contempt for its alleged violation. 30

On November 7, 1928, which was the return of the Order to Show Cause of November 2, 1928, the Court directed the defendant, orally, through his solicitor, to return the said infant daughter, Sally, to the home of petitioner, within two days.

No Order to this effect was filed in the cause 40

and no copy of this Order was served personally upon the defendant.

The Court was without jurisdiction to adjudge the defendant in contempt and to punish the defendant for the said contempt, unless the Order of November 7, 1928, was served upon the defendant personally.

V. The Order Appealed From is erroneous in that it was based on the ex parte affidavits on which the Order to Show Cause was secured.

The *ex parte* affidavits were not legal evidence on which to base the Order adjudging the defendant in contempt and ordering him committed to the common jail of the County of Essex until the further order of the Court.

In the case of *Staley v. South Jersey Realty Co.*, 83 N. J. E. page 300, the distinction was drawn between criminal contempt and civil contempt. The test laid down in that case to determine whether a contempt was criminal or civil, was the following: "Does the imprisoned man carry the keys to his prison in his own pocket?"

The nature of the contempt in this case was criminal. The defendant was not ordered committed until he returned the infant daughter, Sally, to the petitioner, but he was ordered apprehended until the further order of the Court.

The character of the punishment determines it a criminal contempt and in a criminal contempt the *ex parte* affidavits fail to supply the legal evidence required.

VI. The Order Appealed From is erroneous in that it was an order made in the cause of Eleanor S. Miles, petitioner, and William R. Miles, defendant.

The nature of the complaint was such that it was necessary that the proceedings to punish for contempt be made the subject of an independent proceeding, and not a step in that cause. 10

Applying the test set forth in the last paragraph, the contempt was criminal, and it is well settled that proceedings to punish criminal contempt must be made the subject of an independent proceeding.

VII. The Order Appealed From is erroneous in law for the reason that the defendant was not served with proper notice within the State of New Jersey. 20

In the case of *Della Brown*, petitioner, and *John Brown*, defendant, reported in 96 N. J. E. page 428, it was held that for a party to a *habeas corpus* proceeding to remove the person who is the subject of the writ out of the jurisdiction of the Court, is an obstruction of the course of justice, and as such, a criminal contempt, and that proceedings to punish such contempt is not a step in the cause itself, but should be the subject of an independent proceeding, proper notice of which must be served upon the defendant within the State of New Jersey, in order to clothe that court with jurisdiction to try the contempt. 30

While the case at bar is not, strictly speaking, a case on *habeas corpus*, it, nevertheless, is a pro- 40

ceeding concerning the custody of an infant child of the petitioner and defendant, who were husband and wife.

10 Chancellor Walker, in his Opinion in the case of *Brown v. Brown*, says: "This court having jurisdiction of the cause, and of the parties, it was a contempt in the defendant to remove or cause to be removed out of this state the subject matter of the litigation, namely, the child. And this is a criminal contempt, namely, one against the power, authority and dignity of the Court—one which is an offence against organized society itself."

20 Applying this test to the alleged contempt in this case, it is clearly criminal contempt, and under the case of *Brown v. Brown*, must be made the subject of an independent proceeding, and the defendant must be served personally with process within the State of New Jersey.

CONCLUSION

30 It is, therefore, respectfully submitted that the Order of the Court of Chancery of November 14, 1928, be reversed.

FREDERIC W. SCHLOSSTEIN,
Solicitor for the Defendant-Appellant.

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