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Notice of Appeal.

(Filed June 5th, 1945.)

In Chancery of New Jersey

Between

 THERESA RISKO,
 Complainant-Respondent,
 and
 ANDREW RISKO,
 Defendant-Appellant.

On Bill, etc.
On Appeal
from Court of
Chancery.
Notice of
Appeal.

10

The defendant hereby appeals from the final decree made by the Honorable Luther A. Campbell, Chancellor of our Court of Chancery on the advice of the Honorable Robert D. Grosman, Advisory Master, which final decree is dated April 18, 1945, in which it was ordered that the defendant pay Frank A. Boettner, solicitor for respondent, an additional sum of \$250.00 within 90 days, for services rendered in the Court of Chancery on respondent's original petition and order for contempt, said allowance having been made after remittitur filed in the Court of Errors and Appeals, although respondent's solicitor was already allowed \$50.00 for the same services prior to the appeal, as evidenced by the order dated June 20, 1944 and although the Court of Errors and Appeals allowed solicitor for respondent \$100.00 for services rendered in defending appellant's appeal from the original order of contempt dated June 20, 1944, which appeal was submitted the October term 1944 and decided January 4, 1945;

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Notice of Appeal.

10 And appeals further from that part of the final decree which adjudges that upon failure to pay the \$250.00 aforesaid within the time allowed, the solicitor for the respondent may obtain an order for contempt committing the defendant to jail;

20 And the appellant further appeals from an order dated May 22, 1945, amending the final decree of April 18, 1945, wherein it was provided that the 90 days originally allowed the appellant to pay the counsel fees and costs, be reduced to 14 days from the 22nd day of May 1945 and upon failure to pay the counsel fees and costs within the time allowed in this order, then the solicitor for the respondent may obtain a warrant of commitment.

BENJAMIN M. RATNER,
*Solicitor for and of Counsel
with Defendant-Appellant.*

Dated: June 2, 1945.

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

30 BENJAMIN M. RATNER,
*Solicitor for and of Counsel
with Defendant-Appellant.*

Service of the within notice of appeal is hereby acknowledged this 1st day of June, 1945.

40 FRANK A. BOETTNER,
Solicitor for Complainant-Respondent.

Petition and Grounds of Appeal.

(Filed June 14/45.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between THERESA RISKO, <i>Complainant-Respondent,</i> and ANDREW RISKO, <i>Defendant-Appellant.</i>	}	On Appeal from the Court of Chancery. Petition and Grounds of Appeal.	10
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To the Honorable, the Court of Errors and Appeals in the Last Resort in all Causes :

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The petition of Andrew Risko, the appellant in the above stated cause respectfully shows :

The petitioner finds himself aggrieved by an order made in the Court of Chancery by his Honor Luther A. Campbell, Chancellor of the State of New Jersey, on the advice of his Honor, Robert D. Grosman, Advisory Master, bearing date April 18th, 1945, wherein it was ordered that the defendant-appellant pay Frank A. Boettner, solicitor for respondent an additional sum of \$250.00 within 90 days, for services rendered in the Court of Chancery on respondent's original petition and order for contempt, said allowance having been made after remittitur filed in the Court of Errors and Appeals, although respondent's solicitor was already allowed \$50.00 for the same services prior to the appeal, as evidenced by the order dated June 20th, 1944, and although the Court of Errors

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Petition and Grounds of Appeal.

and Appeals allowed solicitor for respondent \$100.00 for his services rendered in defending appellant's appeal from the original order of contempt dated June 20th, 1944, which appeal was submitted to the Court of Errors and Appeals the
10 October term 1944 and decided January 4th, 1945, and your petitioner finds himself aggrieved thereby because the Chancellor on the advice of the Honorable Robert D. Grosman, Advisory Master, in allowing the additional \$250.00 aforesaid was illegal, without authority in law and contrary to law;

And your appellant finds himself further aggrieved because of an order made the 22nd day of
20 May, 1945, amending the final decree from April 18, 1945, wherein it was provided that the 90 days originally allowed to appellant to pay the counsel fees and costs, be reduced to 14 days from the 22nd day of May, 1945 and upon appellant's failure to pay the counsel fees and costs within the said 14 days, that the appellant be committed to jail, in that said order was illegal, contrary to law and an abuse of judicial discretion.

Your petitioner, therefore, prays that the said orders of the said Chancellor may in these particulars aforesaid be reversed, set aside and for
30 nothing holden and that the record may be remitted to the said Court of Chancery with direction to vacate the order allowing the additional \$250.00 aforesaid and reducing the time allowed for the payment of the original fees of \$50.00 allowed on
40 the original contempt proceedings and \$100.00 al-

Petition.

lowed to respondent's solicitor in defending the appeal and your petitioner may have such other and further relief in the premises as to this Honorable Court shall seem meet.

Dated: June 12, 1945. 10

BENJAMIN M. RANKIN,
*Solicitor for and of Counsel
with Defendant-Appellant.*

Petition.

(Filed June 8/44.) 20

IN CHANCERY OF NEW JERSEY.

131/57.

Between THERESA RISCO, <i>Complainant,</i> and ANDREW RISCO, <i>Defendant.</i>	}	On Bill, Etc. Petition.	30
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To his Honor, Luther A. Campbell, Chancellor of the State of New Jersey:

The petition of Theresa Risko, respectfully shows:

1. She is the complainant in the above entitled cause. 40

Petition.

2. By a certain decree made herein on the 5th day of March, 1940, which decree remains in full force and effect, not having been in any wise modified, it was provided amongst other things that, the defendant pay to the complainant, or her solicitor, the annual sum of \$910.00, payable in equal weekly installments of \$17.50.

3. A certified copy of said decree was served personally upon the said defendant, Andrew Risko, on the 11th day of March, 1940.

4. Said defendant Andrew Risko, notwithstanding the terms and directions of said decree has hitherto refused and neglected and still refuses and neglects to make payments required by the said decree; and there is now due and owing to the complainant for arrears of alimony from the date of said decree to the 5th day of June, 1944, the sum of approximately \$1320.00.

Petitioner prays that the said defendant may be adjudged in contempt of this Honorable Court for his contumacy in refusing and neglecting to perform the terms and directions of the aforesaid decree, in the particulars above stated, and that he be punished accordingly; and that your petitioner may have such further relief as may be equitable and just.

FRANK A. BOETTNER,
*Solicitor for and of Counsel
with Petitioner.*

Petition.

State of New Jersey, }
 County of Essex. } ss.:

THERESA RISKO, of full age being duly sworn according to law, on her oath deposes and says: 10

1. I am the complainant in the above entitled cause.

2. By a certain decree made herein on the 5th day of March, 1940, which decree remains in full force and effect, not having been in any wise modified, it was provided amongst other things that, the defendant pay to me, or my solicitor, the annual sum of \$910.00, payable in equal weekly installments of \$17.50. 20

3. Said defendant Andrew Risko, notwithstanding the terms and directions of said decree has hitherto refused and neglected and still refuses and neglects to make payments required by this said decree; and there is now due and owing to me for arrears of alimony from the date of said decree to the 5th day of June, 1944, the sum of approximately \$1320.00. 30

THERESA RISKO.

Sworn and subscribed to before
 me this 6th day of June, 1944.

Joseph A. Fuerstman,
 An Attorney at Law of N. J.

Order.

(Filed June 20/44.)

IN CHANCERY OF NEW JERSEY.

131/57.

10	Between THERESA RISKO, <div style="text-align: right;"><i>Complainant,</i></div> <div style="text-align: center;">and</div> ANDREW RISKO, <div style="text-align: right;"><i>Defendant.</i></div>	} On Bill, Etc. Order Adjudging Defendant Guilty of Contempt, Etc.
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20 This matter being opened to the court by Frank A. Boettner, solicitor of complainant, in the presence of Benjamin M. Ratner, solicitor of defendant, and it appearing to the Chancellor that, by an order made in this cause, on the Seventh day of June, last past, said defendant was ordered to show cause at the Chancery Chambers, in the City of Newark, why he should not be adjudged guilty of contempt of this court as charged, and punished therefor.

30 And it further appearing that a copy of said order to show cause, together with a copy of the petition and affidavit on which the same was founded, certified as in said order directed, were duly served on said defendant as therein directed, and that said petition and affidavit of said complainant and the answering affidavit of the defendant having been read, and the arguments of counsel heard and considered; and it now appearing that the said Andrew Risko, is guilty of the
40 contempt charged and that he has wilfully violat-

Order.

ed the decree of this court mentioned in the petition.

It is, on this 20th day of June, 1944, by the Chancellor ordered and adjudged that the said Andrew Risko, is guilty of contempt of this court, in that he has wilfully violated the said decree requiring him to pay to the complainant the sum of \$1320.00, being the amount of installments of alimony due and owing at the date of the filing of said petition. 10

And it is further ordered that the said Andrew Risko be committed to the county jail of the County of Essex, or to such other jail in this State where he may be apprehended, and there remain charged with his contempt until he shall pay to complainant or to her solicitor the aforesaid sum of \$1320.00, together with a counsel fee of \$50.00, to the solicitor of complainant and costs of these proceedings to be taxed, unless the Chancellor shall see fit sooner to discharge him. 20

And it is further ordered that no warrant for the apprehension of the said defendant shall issue until the further order of this court, and that, if proof be made to this court, within 14 days following the date hereof, that the said defendant, Andrew Risko, shall have failed and neglected to pay the said sums, the complainant may take an order without notice that a warrant issue for the commitment of the defendant as aforesaid. 30

Respectfully advised,

ROBERT D. GROSMAN,
A. M.

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LUTHER A. CAMPBELL,
C.

Opinion.

(Filed Jan. 4, 1945.)

NEW JERSEY COURT OF ERRORS
AND APPEALS.

10 No. 223 October Term, 1944.

THERESA RISKO, Respondent, and
ANDREW RISKO, Appellant.

Submitted October , 1944—Decided Jan. 4, 1945.

1. One who has not obeyed the orders of the Court of Chancery must make a strong case for modification.
- 20 2. A woman, who has not taken steps for more than three years to secure the enforcement of a decree in her favor, is not entitled to relief from the result of her own acquiescence in less than full performance.
3. One who disobeys a court may be punished for a *quasi* criminal contempt.

On appeal from Court of Chancery.

30 For appellant, Benjamin M. Ratner.
For respondent, Frank A. Boettner.

The opinion of the court was delivered by

BODINE, *J.* By final decree of March 5, 1940, the appellant was directed to pay to his divorced wife \$17.50 a week. This he did not do but paid her \$10 a week. She initiated, in June of 1944, proceedings in order that he might be adjudged in contempt of the court. He was so adjudged and committed to the Essex County jail until he paid all alimony in arrears.

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Opinion.

One of the appeals is from an order refusing to reduce the amount of the alimony. That action should be affirmed.

While a suitor is in contempt the court should not change the order condemned except for good cause shown. The case is barren of such proofs. 10

The other appeal is from the adjudication of contempt. The former wife having accepted a smaller amount of alimony than that fixed by the court over a long period of years was in no position to make a belated demand. She was estopped by her conduct from the relief afforded. See *Dodd v. Una*, 40 N.J.E. 672. The proceedings should not have been regarded as one to give relief *inter partes*, but as one to punish for an alleged disregard of the authority of the court. *State v. Hudson County Electric Co.*, 61 N.J.L. 114. A fine not too large should have been imposed for the use of the State. 20

The orders under appeal will be remanded to the Court of Chancery for action not inconsistent herewith. 30

Endorsed:

“Filed Jan. 4, 1945.

J. A. BROPHY,
Clerk.”

Notice of Motion.

NEW JERSEY COURT OF ERRORS
AND APPEALS.

10	Between THERESA RISKO, <i>Complainant-Respondent,</i> and ANDREW RISKO, <i>Defendant-Appellant.</i>	On appeal from the Court of Chancery. On Application to Expunge Remittitur filed by Appellant and to affirm Remittitur filed by Appellee, or to Fix the Terms of Remittitur. Notice of Motion.
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To Andrew Risko, Appellant, and Benjamin M. Ratner, Esq., of Counsel for Appellant:

20 TAKE NOTICE, that on Tuesday, February 6, 1945, at the hour of 11 o'clock in the forenoon, or as soon thereafter as Counsel can be heard, at the State House, in Trenton, I shall apply to the Court of Errors and Appeals for an order to expunge the Remittitur filed by you as Counsel for Appellant herein in the office of the Clerk of the Court of Errors and Appeals, and for an order affirming the Remittitur filed by me as Counsel for the Appellee herein, on the ground that your

30 form of Remittitur does not correctly express the judgment of the Court of Errors and Appeals in affirming the Order of the Court of Chancery dated June 29, 1944, and in affirming in part and in modifying in part the Order of the Court of Chancery, dated June 20, 1944, the points determined by said honorable Court of Errors and Appeals and the directions of said honorable Court as set forth in the opinion of the Hon. Mr.

40 Justice Joseph L. Bodine, being properly em-

*Letter from J. A. Brophy, Clerk to Benj. M.
Ratner.*

braced in the Remittitur filed by me, or for an order fixing the terms of the Remittitur to be entered herein.

At the same time and place I shall also apply 10
for Counsel fees, for services on the Appeal and on this motion.

Respectfully,

FRANK A. BOETTNER,
*Sol'r for and of Counsel with
Complainant-Appellee.*

**Letter from J. A. Brophy, Clerk to
Benj. M. Ratner.** 20

STATE OF NEW JERSEY.
DEPARTMENT OF STATE.

Trenton, February 13, 1945.

Benj. M. Ratner, Esq.,
9 Clinton Street,
Newark, New Jersey.

Dear Sir: 30

The Court has filed its conclusions in the case of Theresa Risko vs. Andrew Risko.

“The form of remittitur submitted by the respondent will be entered. Counsel fee of \$100 is allowed.”

Very truly yours,

s.

J. A. BROPHY, 40
Clerk.

Respondent's Remittitur.

(Filed Jan. 15, 1945.)

NEW JERSEY COURT OF ERRORS
AND APPEALS.

10

No. 223 October Term, 1944.

Between

THERESA RISKO,
Complainant-Respondent,

and

ANDREW RISKO,
*Defendant-Appellant.*On Bill for
Separate
Maintenance.On Appeal from
Court of Chancery.
Remittitur.

20

This cause having been brought to a hearing, on appeal from the Court of Chancery, at the last October Term of this Court, and Benjamin M. Ratner, of counsel with the Appellant, and Frank A. Boettner, of counsel with the Respondent, having filed briefs herein and the questions brought up by said appeal having been duly considered.

30

It is on this 15th day of January, 1945, on motion of Frank A. Boettner, the counsel with Respondent,

ORDERED, ADJUDGED AND DECREED, that the Order of the Chancellor dated June 29, 1944, denying Appellant's petition for modification of the Decree for Maintenance wherein and whereby said Appellant was ordered to pay Respondent \$17.50 per week, be and the same is hereby in all things affirmed, with costs in this
40 Court and in the Court of Chancery, to be paid by

Respondent's Remittitur.

the Appellant, and that the petition of appeal thereon be dismissed.

And it is further Ordered, Adjudged and Decreed, that the Order of the Chancellor dated June 20, 1944, adjudging the Appellant guilty of contempt of the Court of Chancery for failure to comply with the Order of said Court to pay Respondent the said \$17.50 per week as and for her support and maintenance, be and the same is hereby affirmed, except as to that portion thereof which adjudges that Appellant for said contempt shall be committed to the Essex County Jail until he pay all alimony in arrears, which said portion of said Order will, by the Chancellor be modified to this end that, in lieu thereof, a fine shall be imposed upon the Appellant for the contempt adjudged against him as aforesaid, with costs in this Court and in the Court of Chancery to be paid by Appellant, and that the petition of appeal be otherwise and the same is hereby dismissed.

And it is further Ordered, that the record be remitted to the Court of Chancery to proceed thereon according to the law and the practice of said Court.

On motion of Frank A. Boettner of Counsel with Complainant-Respondent.

Notice.

(Filed Mar. 1945.)

IN CHANCERY OF NEW JERSEY.

131/57.

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Between THERESA RISKO, <div style="text-align: right;"><i>Complainant,</i></div> and ANDREW RISKO, <div style="text-align: right;"><i>Defendant.</i></div>	}	On Bill, Etc. Notice.
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To Andrew Risko, Defendant, and Benjamin M. Ratner, Solicitor of Defendant:

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PLEASE TAKE NOTICE, that on Monday, April 2, 1945, at 10 A. M. (E. W. T.) before the Chancellor of New Jersey, at the Chancery Chambers, 1060 Broad Street, Newark, N. J., I shall move for the entering of a Final Decree against the defendant herein, pursuant to the Remittitur of the New Jersey Court of Errors and Appeals, and for the purpose of fixing the punishment for the contempt of court adjudged against you with relation to your failure to comply with the terms of the Decree of The Court of Chancery of New Jersey, dated the 5th day of March, 1940.

Respectfully,

40

FRANK A. BOETTNER,
Solicitor of Complainant.

Final Decree.

(Filed April 20/45.)

IN CHANCERY OF NEW JERSEY.

131/57.

Between

THERESA RISKO,

Complainant,

and

ANDREW RISKO,

Defendant.

On Bill, Etc.

On Petition and
Order to Show
Cause for
Contempt.Final Decree
Pursuant to
Remittitur from
Court of Errors and
Appeals.

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This matter being opened to the Court by Frank A. Boettner, solicitor of complainant, in the presence of Benjamin M. Ratner, solicitor of defendant, and it appearing to the Chancellor that, by an order made in this cause, on the seventh day of June, last past, said defendant was ordered to show cause at the Chancery Chambers, in the City of Newark, why he should not be adjudged guilty of contempt of this Court as charged, and punished therefor.

20

And it further appearing that a copy of said order to show cause, together with a copy of the petition and affidavit on which the same was founded, certified as in said order directed, were duly served on said defendant as therein directed, and that said petition and affidavit of said complainant and the answering affidavit of the defendant having been read, and arguments of counsel heard and considered; and it now appearing that the said Andrew Risko is guilty of the contempt charged and that he has wilfully violated the decree of this Court mentioned in the petition;

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Final Decree.

It is, on this 18th day of April, 1945, by the Chancellor ORDERED and ADJUDGED that the said Andrew Risko is guilty of contempt of this Court, in that he has wilfully violated the decree of this Court dated March 5, 1940, requiring him
 10 to pay to the complainant the sum of \$17.50 weekly, the said defendant in violation thereof having paid only \$10 weekly, and was as of June 20, 1944, indebted to complainant in the sum of \$1320, which he has failed to pay.

And it is on this 18th day of April, 1945, on motion of Frank A. Boettner, Esq., further ordered that the said Andrew Risko do pay to the complainant the costs of these proceedings in this
 20 Court to be taxed together with a counsel fee of \$250.00 for the proceedings herein in this Court, and the costs and counsel fee of \$100 to be taxed, as allowed by the New Jersey Court of Errors and Appeals, and do also pay to the Clerk of this Court a fine of \$50.00 to the use of the State.

And it is further Ordered that unless the said Andrew Risko shall have paid said full costs and counsel fees as aforesaid within 90 days from the
 30 date hereof, that he be committed to the common jail of the County of Essex, there to remain charged upon his contempt until he shall have paid such fine, counsel fee and costs, unless the Chancellor shall see fit sooner to discharge him, and that a warrant issue accordingly.

Respectfully advised,

40 ROBERT D. GROSMAN,
 A. M.

LUTHER A. CAMPBELL,
 C.

Notice of Motion to Amend Decree.

IN CHANCERY OF NEW JERSEY.

131/57.

Between

 THERESA RISKO,

Complainant,

 and

 ANDREW RISKO,

Defendant.

On Bill, etc.

Notice of Motion to Amend Decree.

10

To: Andrew Risko, Defendant, 42 Napoleon Street, Newark, N. J.

PLEASE TAKE NOTICE that on Friday, May 18, 1945 (E. W. T.) at 10 o'clock A. M., or as soon thereafter as the Court can hear the same, at the Chancery Chambers, 1060 Broad Street, Newark, N. J., I shall apply to the Chancellor, Hon. Robert D. Grosman, Advisory Master, sitting, for an order to reduce or shorten the time for payment of the fine, counsel fees, and costs fixed in Decree of the Court of Chancery, dated April 18, 1945.

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FRANK A. BOETTNER,
Solicitor and of Counsel with
Complainant.

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Order.

(Filed May 22/45.)

IN CHANCERY OF NEW JERSEY.

131/57.

10

Between

THERESA RISKO,

Complainant,

and

ANDREW RISKO,

*Defendant.*On Bill, etc.
Order Amend-
ing Final De-
cree.

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This matter coming on to be heard before the Court, in the presence of Frank A. Boettner, Esq., Solicitor of Complainant and Benjamin M. Ratner, Esq., Solicitor of Defendant, on complainant's notice of application to amend the Final Decree, entered on the 18th day of April, 1945, in respect to the time for the defendant to make payment of the fine, assessed against him for contempt, counsel fee and costs, which was therein fixed at 90 days from the date of said Decree, and it appearing to the Court that the said period was in excess of the time, which should have been reasonably allowed to the defendant, under the circumstances of the case, and a lesser time should have been allowed and would have been ample for the defendant to make the payments, or to stand committed, as in the said Decree provided;

30

Now therefore, it is on this 22nd day of May,
40 1945;

Opinion.

ORDERED, that the said Decree be amended, so as to require payment, of the fine, counsel fee and costs within 48 days from the making of the Decree, or within 14 days from the making of this order.

IT IS FURTHER ORDERED, that a copy of the Final Decree, aforesaid, certified by the Solicitor of Complainant, and a copy of this Order, certified by Solicitor of Complainant, be served upon the Defendant, or his Solicitor, within 5 days from the date hereof.

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LUTHER A. CAMPBELL,
C.

Respectfully Advised.

20

ROBERT D. GROSMAN,
A. M.

Opinion.

IN CHANCERY OF NEW JERSEY.

131-57.

Between THERESA RISKÓ, <i>Complainant,</i> and ANDREW RISKÓ, <i>Defendant.</i>

Memorandum.

30

Not for Official or unofficial Publication.

Frank A. Boettner, Esq., for the Complainant-Respondent.

Benjamin M. Ratner, Esq., for the Defendant-Appellant. 40

Re-Argued: May 22, 1945.

Opinion.

GROSMAN, A. M.

10 This matter comes before me on the complainant's application to enter a decree on a remittitur. The remittitur bears date January 4, 1945 and directs the Chancellor, among other things, to impose a fine upon the defendant-appellant for his contumacy and allows the complainant-respondent costs in the Appellate Court as well as in this court.

20 I will impose a fine of \$50.00 upon the defendant-appellant for his contumacy, to the use of the state and will allow the complainant-respondent's counsel a fee of \$250.00 for his services in defending the appeal. I consider this allowance extremely modest. If the defendant-appellant was a man of means, the allowance would be many times greater.

Submit an order in accordance herewith.

SUPPLEMENTAL MEMORANDUM.

30 Following my disposition of this matter as above set forth, on or about the 18th day of April, 1945, there was left at my chambers "a draft of final decree, pursuant to Remittitur" which contained a blank space in the last paragraph thereof, for the fixing of a period of time within which the defendant-appellant was to make a payment under the terms of said decree. I was under the impression at that time that the defendant-appellant was entirely dependent upon his earnings which, as I recall, amounted to about \$36.00 a week. Accordingly, it was my purpose to allow him ample
40 time, considering his meager income, within which

Opinion.

to pay the required sums. I therefore fixed a period of ninety days from the 18th day of April, 1945 for this purpose. Upon becoming acquainted with this provision, Judge Boettner, solicitor for the complainant-respondent, was very much put out and objected strenuously to the defendant being given this extended period of time in which to pay. He contended that the defendant, in addition to his salary, together with the complainant, owned by the entirety a three-family house producing a substantial income, which income for years has been appropriated by the defendant-appellant to the exclusion of the complainant-respondent. I instructed him to notice Mr. Ratner, the defendant-appellant's solicitor, of an application to shorten the time within which the payments were to be made. On or about the 22nd day of May, 1945, this matter was again argued before me. Thereupon, Mr. Ratner expressed himself as being completely satisfied with the reasonableness of the counsel fee allowed, but insisted that his client be given the full ninety day period within which to make payment. There was no denial by Mr. Ratner of Judge Boettner's allegations concerning the defendant-appellant's ability to pay. Let the defendant-appellant pay the fine and the counsel fee awarded, within two weeks from the date hereof, which will give him forty-eight days from the entry of the decree on remittitur, namely, April 18, 1945, within which to make payment.

Submit an order in accordance herewith.

203 FEB 7. 1946

New Jersey Court of Errors and Appeals

Between

Theresa Risko,
Complainant-Respondent,
and
Andrew Risko,
Defendant-Appellant.

On Appeal
from the
Court of
Chancery

DEFENDANT-APPELLANT'S BRIEF.

Statement of Facts.

This appeal is to review a final decree made in this cause on April 18, 1945 (State of Case, page 17) and particularly that part of the decree allowing complainant-respondent's counsel an additional \$250.00 to be paid within 90 days, for services which he rendered in an appeal previously taken to this Court, which was submitted the October term 1944 and decided January 4, 1945, although on said appeal this Court allowed the solicitor for the complainant-respondent \$100.00 for such services. (State of Case, page 13.)

Defendant-appellant also appeals from an order dated May 22, 1945 which reduces the period of payment from 90 days, as originally allowed in the final decree (State of Case, page 17) to 14 days. (State of Case, page 20.)

POINT 1.**The allowance made by the advisory master was illegal and contrary to law.**

The complainant filed a bill in Chancery for separate maintenance and by final decree dated March 5th, 1940 the appellant was directed to pay his wife \$17.50 a week. This he did not do, but instead paid \$10.00 a week. In June, 1944 proceedings were instituted by the wife to adjudge the husband in contempt for being in arrears in the amount of \$1320.00 and on June 20th, 1944, by an order entered in the Court of Chancery, the husband was adjudged guilty of contempt and was directed to pay the arrearages and a counsel fee of \$50.00 to the solicitor for the wife. (State of Case, page 8.) The appellant appealed from said order of June 20th, 1944 and this Honorable Court, upon review, decided the matter and filed its opinion. (State of Case, page 10.) On February 6th, 1945 solicitor for respondent gave notice that he would apply to this Honorable Court for counsel fees for services rendered on that appeal. (State of Case, page 12.) Thereafter and on February 13th, 1945 this Honorable Court allowed him the sum of \$100.00 for said services. (State of Case, page 13.) On April 18, 1945, on notice to the solicitor for the appellant, a final decree pursuant to the remittitur, was filed and on application by the solicitor for the respondent, the advisory master allowed him an additional fee of \$250.00 for the same services which he had rendered on the appeal (State of Case, page 17)

and so stated in his opinion "and I will allow the complainant-respondent's counsel a fee of \$250.00 for his services in defending the appeal". (State of Case, page 22.)

It is respectfully submitted to this Honorable Court that the allowance of \$250.00 was illegal and contrary to law and it was an attempt to disregard the allowance made by this Honorable Court and an affront to its dignity and authority. The advisory master in his supplemental memorandum (State of Case, page 23) said that the solicitor for the appellant expressed himself as being completely satisfied with the \$250.00 fee allowed. There is no record of such a statement and it is respectfully urged that the advisory master is in error. The fact of the matter is that this allowance was objected to very strenuously, but without success. It is well to note that the notice of appeal and petition and grounds of appeal allege that the allowance made by the advisory master was error, and that the appellant finds himself aggrieved thereby; further that the final decree was not consented to by the solicitor for the appellant. (State of Case, page 17.)

It is respectfully submitted that the \$250.00 additional counsel fee allowed in the final decree of April 18, 1845 should be vacated and the judgment of the court below reversed.

POINT 2.

The order of the advisory master reducing the time for payment was an abuse of legal discretion.

In the final decree of April 18, 1945 the advisory master allowed the appellant 90 days within which to pay the additional counsel fee of \$250.00. On May 18, 1945, on notice to solicitor for the appellant, the court entered an order on May 22, 1945, reducing the time from 90 days to 14 days within which to pay the counsel fee. No testimony was taken nor were any proofs offered to justify a reduction at the time and there was otherwise no justification to impose this obligation upon the appellant.

It is for these reasons that the order of May 22, 1945 should be reversed. (State of Case, page 20.)

It is respectfully urged that both orders should be reversed with costs.

Respectfully submitted,

BENJAMIN M. RATNER,
Solicitor for and of counsel
with defendant-appellant.

BATAVIA TIMES, LAW PRINTERS.
BATAVIA, N. Y.

F. W. BAKER, NEW JERSEY REPRESENTATIVE,
11 COMMERCE ST., NEWARK, N. J. PHONE MARKET 2-2007

203 FEB T. 1946

New Jersey Court of Errors and Appeals

Between

 THERESA RISKO,
 Complainant-Respondent,

 and

 ANDREW RISKO,
 Defendant-Appellant.

On Appeal
from the
Court of
Chancery.

BRIEF OF COMPLAINANT-RESPONDENT.

Preliminary Statement.

The appellant's "Statement of Facts" is inaccurate in postulating that the counsel fee allowed in the order of April 18, 1945, was for all services on appeal; and it is grossly misleading in pretending that the period for the payment of the fees and fine was, by the order of May 22, 1945, reduced from 90 days to 14 days, when in fact the appellant actually had 48 days from the order fixing the fine and fees.

Statement of Facts.

Defendant is appealing from parts of two orders in a maintenance action, one dated April 18, 1945, (State of Case, p. 17) and the other dated May 22, 1945 (S. C., p. 8).

The April 18th order was entered upon a Remittitur (S. C., p. 14) from this Court following an appeal by the defendant from a prior order

in Chancery, which had adjudged the defendant guilty of contempt for disobeying an alimony order. This Remittitur (S. C., p. 15, line 20) provides as follows:

“a fine shall be imposed upon the Appellant for the contempt adjudged against him as aforesaid, with costs in this Court and in the Court of Chancery to be paid by Appellant * * *”

The April 18 order directed the appellant to pay a fine of \$50. to the Clerk in Chancery for the use of the State, and a counsel fee of \$250. for services in Chancery, and \$100. awarded in this Court for services in proceedings concerning the expunging of an improper, and entry of a proper, Remittitur (as shall hereinafter be more fully explained), and allowed the defendant 90 days to make these payments.

The sole effect of the May 22nd order was to reduce the original period to 48 days.

After entry of the May 22nd order the defendant served Notice of Appeal as to parts only of both orders, appealing from the April 18th order only with respect to the \$250. allowance, and from the May 22nd order only with respect to the acceleration of the period of payment.

POINT I.**Defendant should not be heard on either appeal.**

(a) The issue raised by the appeal from the May 22nd order is moot.

Under the April 18th order the defendant would have had at the latest until July 18, 1945, to comply with the order. Under the May 22nd order the defendant would have been obliged to comply about one month sooner. But now that even July 18, 1945 has come and gone and the appellant has had the benefit of more than 90 days, there is nothing substantial for this Court to pass upon, the question whether the appellant was injured by the reduction in time is purely academic.

(b) Defendant-Appellant's failure to pay the fine should forbid his appeal from counsel fees fixed in April 18 order.

The April 18 order provided (1) for the payment of a fine to the Clerk in Chancery for the use of the State, and (2) for the payment of counsel fees for services in this Court (on entry of Remittitur) and in Chancery and (3) it allowed 90 days for payment. So far as this April 18 order is concerned—the only part from which appellant has appealed is that part relating to the counsel fee allowed by the Chancellor. He did not appeal from the fine, nor from the allowance made in this Court, nor from the 90 day provision. The 90 days expired on July 18 last, nevertheless, he has utterly neglected to pay the fine or the counsel fee allowed in this Court. His

failure to pay this fine has been certified to by the Clerk in Chancery by letter to counsel for complainant, as follows:

“COURT OF CHANCERY OF NEW JERSEY

I. GRANT SCOTT
Clerk

Trenton, N. J.
November 19, 1945.

Frank A. Boettner, Esq.
1060 Broad Street,
Newark 2, N. J.

Re: Theresa Risko vs. Andrew Risko
131/57

Dear Sir:

In reply to your letter of November 16, we have no record of having received the fine of \$50.00 as directed to be paid by the defendant under the Order of this Court, dated April 18, 1945.

Yours truly,

I. GRANT SCOTT,
Clerk.”

It is also stated as a fact that appellant has not paid the \$100. allowed counsel by this Court.

Since this proceeding emanates from a Court of Equity, equitable principles will be applied, and there is no principle more firmly imbedded in equitable procedure than the doctrine of “clean hands.” This appellant’s hands are unclean. He had been solemnly adjudged in contempt by the Chancellor. He appealed and this Honorable Court affirmed the decree (S. C., p. 10). The opinion (S. C., p. 11) provided that a fine “not too large” be imposed “for the use of the State.” The Remittitur (S. C., p. 14) so provided. The order of April 18, 1945 (S. C., p. 17) so provided.

He continues to disobey that order, yet he appeals to this Court for relief from another part of the very same order. Shall this defaulting, contumacious appellant, who has failed to purge himself of his contempt or to exhibit any mitigating circumstances, be afforded the privilege of invoking the aid of this selfsame tribunal with respect to the very order he contemns? Should this august tribunal, an agency of the State of New Jersey, shut its eyes to his persistent contempt of that unappealed part of the order which directs him to pay a fine to this State, and give ear to his appeal from an allowance of fees in the same contemned order?

It is respectfully submitted that in good conscience he should be deemed to have forfeited his right to be heard on that order.

POINT II.

The counsel fee allowed by the Chancellor on April 18, 1945 was neither illegal nor excessive.

We have argued that the issue raised by the appeal from the order of May 22, is moot and the appeal thereon should not be heard. We have also argued that since appellant has failed to purge himself of contempt in failing to pay the fine as provided in order of April 18, his appeal from the counsel fee provided in said order should not be heard. We shall now analyze the appellant's argument with respect to the alleged impropriety of the counsel fee.

It should be noted that the Chancellor in the order of April 18, 1945, fixed "a counsel fee of \$250. for the proceedings herein in this Court,"

(S. C., p. 18, l. 20) meaning, of course, in the Court of Chancery. It has not been suggested or argued that the Chancellor had no right to fix a fee for the additional services in Chancery, so the fee question seems thus conclusively disposed of.

But if in spite of the provision as aforesaid, the allowance of \$250. be treated as for services on appeal, (as inadvertently suggested in the opinion of the Advisory Master prepared and filed some time after the Order) it cannot reasonably be indicted as illegal or excessive, when the circumstances as hereinafter set forth are properly understood.

There were then, as now, appeals from two orders, one adjudging the appellant in contempt (for disobedience of an alimony order—and ordering him to pay arrears), and the other denying his petition for reduction in alimony. On these appeals complainant-respondent requested an allowance for counsel fee. And here are the special circumstances above alluded to: Upon the coming down of the opinion (S. C., p. 10) which made no mention of counsel fee, the appellant forthwith hastened precipitately to file a grossly improper Remittitur, which had the immediate effect of delaying the proceedings and necessitating a formal application to this Court for expungement of the said Remittitur and for the entry of a proper one. It cannot be denied that the action of appellant involved counsel for complainant in unnecessary expenditure of much valuable time, effort and expense (Notices, Briefs, Printing, etc.) to remove the effect of the overreaching Remittitur filed by appellant. Counsel was allowed a \$100. counsel fee on that application (to expunge the Remittitur). This is obvious from an examination of the letter from the Clerk of this

Court to appellant's counsel (S. C., p. 13) reading:

“The form of remittitur submitted by respondent will be entered. Counsel fee of \$100 is allowed.”

Thus, though counsel fee was prayed for on the appeal from the contempt, (in which appeal complainant prevailed, except for modification of the penalty to be imposed), no action was taken in this Court on said appeal fee, the fee allowed being for the Remittitur controversy only. The rule is well recognized that on appeals from Chancery in certain types of action of which maintenance is one, where counsel fee is requested and no action is taken by this Court one way or the other, the Chancery Court upon application and notice may make such allowance.

Sobel v. Sobel, 100 N. J. E. 532, 135 A. 893.

Significantly, neither the legality nor the size of the fee were questioned either on the motion, when counsel was allowed \$250. (counsel had applied for \$750), nor upon the entry of the April 18 order, sometime later. The question of time was not discussed on the motion, the learned Advisory Master subsequently fixing 90 days on the signing of the order of his own motion. It was only after the subsequent order of May 22, 1945, which was applied for on Notice, reduced the time to 48 days (or 14 days from May 22), that any objection was voiced concerning fees. This amply appears from the Advisory Master's opinion (S. C., p. 23), where at line 24, speaking as of the time of the application to reduce the 90 day period, he says:

“Thereupon, Mr. Ratner expressed himself as being completely satisfied with the reasonableness of the counsel fee allowed, but insisted that his client be given the full ninety day period within which to make payment.”

Evidently counsel was playing for time, and the 90 days which he never bargained for, suited him nicely; but 48 days was something else again. Corroboration of respondent's contention that there was no objection to the fee until after the second order was signed, is the patent fact that no appeal was taken until after the second order was signed, 34 days after the original order fixing fees. This is indeed significant.

In conclusion, it is respectfully submitted that the appellant's appeal from the April 18 order should not be considered in view of his contumacious failure to pay the fine to the Clerk in Chancery, and the appeal from the May 22 order should not be considered by reason of the fact that the flux of time has rendered the issue moot. Moreover the fee allowed was, according to the plain terms of the Order, for services in Chancery—and whether so or whether for services on appeal—the fee was both proper and reasonable. It is further respectfully submitted that costs and counsel fees be allowed respondent on this appeal.

Respectfully submitted,

FRANK A. BOETTNER,
Of Counsel with
Complainant-Respondent.

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