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Report of the

Commissioner of the

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Petition of Appeal.

(Filed January 7, 1935)

NEW JERSEY COURT OF ERRORS AND APPEALS.

BETWEEN

GWENDA BROUGHTON PARADISE,
Petitioner-Respondent,

and

JAMES ALVA PARADISE,
Defendant-Appellant.

On Appeal
from Court of
Chancery.

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PETITION OF APPEAL FROM ORDER OF
DECEMBER 31st, 1934.

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TO THE HONORABLE, THE COURT OF
ERRORS AND APPEALS, In the Last Resort in
All Causes:

The petition of JAMES ALVA PARADISE, the appellant in the above entitled cause, respectfully shows that:

(1) Petitioner finds himself aggrieved by an interlocutory order made in the Court of Chancery by his Honor, LUTHER A. CAMPBELL, Chancellor of the State of New Jersey, on the advice of Honorable N. DEMAREST CAMPBELL, one of the Advisory Masters of the said Court of Chancery, bearing date the 31st day of December, 1934, in a cause in said Court of Chancery, wherein said GWENDA BROUGHTON PARADISE was petitioner and the defendant, JAMES ALVA PARADISE, was defendant, in this respect, to wit: That by the said Order, the motion of the defendant, JAMES ALVA PARADISE, to vacate an Order made in said cause on the 15th day of November, 1934, directing the

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Petition of Appeal.

official stenographer to transcribe his stenographic notes of said testimony in said cause and to furnish to the Court the original copy of the same, and to furnish to Patrick Henry Maley, Esq., Solicitor for the said petitioner, a copy of
10 said transcript, and to furnish one copy of said transcript to John M. Mills, Esq., and Harold A. Price, Esq., Solicitors for the intervening defendant, ALICE FITZGERALD, and a copy of said transcript to Chandless, Weller & Selser, Esqs., Solicitors for the defendant, JAMES ALVA PARADISE, and, further, that the cost and expense of the transcribing of said stenographic notes and the furnishing and delivery of said original and
20 copies of said transcript should be at the expense and paid for to the said official stenographer by said defendant, JAMES ALVA PARADISE, and, further, that said defendant, JAMES ALVA PARADISE, should pay to said official stenographer at the time of delivery to his Solicitors of the transcript of any testimony of any proceedings the cost and expense of the same and the cost and expense of furnishing the original and copies of said testimony to the Court and to the Solicitors for said
30 petitioner in said cause and said intervening defendant, was denied; and the said Order of the 31st day of December, 1934, adjudged that the official stenographer be directed to transcribe his stenographic notes of said testimony in said cause and furnish to the Court the original copy of the same and to the solicitors of the petitioner in said cause, a copy of said transcript and further, that the cost and expense for the transcribing of said stenographic notes and the furnishing and delivery of said original and copy of said transcript should be at the expense and paid for to the said
40 official stenographer by said defendant, JAMES ALVA PARADISE, and further, that said defendant,

Petition of Appeal.

JAMES ALVA PARADISE, do pay to said official stenographer at the time of delivery to the Court of the transcript of any testimony of said proceedings, the cost and expense of the same, and the cost and expense of furnishing said copy to the solicitor for said petitioner in said cause, and, further, that in the event the defendant, JAMES ALVA PARADISE, appealed to the Court of Errors and Appeals from the terms and provisions of said Order, then the hearing of further testimony in said cause should be held in abeyance unless said Order should be complied with by said defendant. 10

And petitioner, JAMES ALVA PARADISE, appeals from the Order of the Chancellor which decrees as aforesaid, upon the ground that the same is erroneous in that:

(a) Said Order constituted a modification of an interlocutory order of November 15th, 1934, which said order was made against petitioner, JAMES ALVA PARADISE, without notice to him. 20

(b) Said Order was a modification of an interlocutory order of November 15th, 1934, which said Order was made without the consent of the petitioner herein, JAMES ALVA PARADISE.

(c) Said Order was a modification of an interlocutory order of November 15th, 1934, which said order was made without notice and without the consent of the intervening defendant in said cause, ALICE FITZGERALD. 30

(d) The Court of Chancery is without authority in law or in equity to direct the official stenographer to transcribe his stenographic notes and furnish copies of said transcript at the expense of the petitioner, without his consent.

(e) Said Order was made despite the fact that there had been a compliance in said cause with Chancery Rule No. 266 and a deposit of Ten Dollars (\$10.00) had been paid as the fee of the 40

Petition of Appeal.

stenographer in full satisfaction of the lawful fees of said stenographer.

(f) Said Order was made without any proof being before the Court that there was any good and sufficient reason therefor.

10 (g) Said Order was made although a transcript of such testimony was unnecessary for the prosecution of said cause.

(h) Said Order was a modification of an interlocutory order of November 15th, 1934, which said Order was made on the application of the solicitor of the petitioner in said cause, GWENDA BROUGHTON PARADISE, for a copy of the transcript of the testimony to be had at the expense of the petitioner herein, JAMES ALVA PARADISE, although there was no proof before the Court that the said GWENDA BROUGHTON PARADISE, was without funds to pay the expense of the official stenographer for said transcript so desired by her, and although there was no proof before the Court that a transcript of such testimony was necessary or required by the petitioner in said cause for the prosecution of said suit or in anywise warranted or necessary.

20 (i) Said Order was made against this petitioner requiring him to pay the cost and expense of said transcript although there was no proof before the Court of this petitioner's financial ability to comply with the terms of said Order.

30 (j) Said Order, insofar as it has been made against this petitioner requiring him to pay the cost of said transcript, is impossible to be performed by this petitioner.

(k) Said Order deprives petitioner of his property without due process of law, in violation of petitioner's constitutional rights because it requires him in a suit instituted against him to pay
40 a large sum of money for each day that the trial

Petition of Appeal.

of the above entitled cause may be continued.

(l) Said Order violates this petitioner's constitutional rights in that because of his inability to comply with the terms thereof, he may be deprived of his right to defend the suit brought against him in the above entitled cause.

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(m) Said Order is violative of this petitioner's constitutional rights because this petitioner may be committed to jail for failure to perform its terms.

(n) Said Order operates to require a property qualification on the part of this petitioner as a pre-requisite of his right to defend himself in the suit brought against him in the above entitled cause and thereby denies to him and deprives him of the equal protection of the laws.

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(o) The Court of Chancery is without authority in law or in equity to stay the trial of the suit brought against petitioner herein, in this cause, in the event that he prosecutes this appeal to the Court of Errors and Appeals from the terms and provisions of the Order of December 31st, 1934.

(p) The Court of Chancery is without authority in law or in equity to stay the trial of the suit brought against the petitioner herein, in this cause, unless he complies with the terms and provisions of the Order of December 31st, 1934.

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

CHANDLESS, WELLER & SELSER,
Solicitors for and of Counsel
with Appellant.

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Affidavit of Service.

(Filed January 14, 1935)

NEW JERSEY COURT OF ERRORS AND APPEALS.

BETWEEN,

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GWENDA BROUGHTON PARADISE,
Petitioner-Respondent,

and

JAMES ALVA PARADISE,
Defendant-Appellant.

On Appeal
from Court of
Chancery.

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Affidavit of
Service.

STATE OF NEW JERSEY }
COUNTY OF BERGEN } SS:

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JOHN FRANK, JR., or full age, being duly sworn
on his oath according to lay deposes and says:

(1) I am an attorney-at-law of the State of
New Jersey, associated with Chandless, Weller &
Selser, Esqs., solicitors of the defendant, James
Alva Paradise, in the above entitled matter.

(2) On Monday, January 7th, 1935, I served
upon Patrick Henry Maley, Esq., solicitor for the
petitioner, Gwenda Broughton Paradise, a true
copy of a Petition of Appeal from Order of De-
cember 31st, 1934, made in this case, by leaving
the same with his secretary, Mary Mollahan, at
his office, No. 241 Main Street, Hackensack, New
Jersey.

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JOHN FRANK, JR.

Sworn and subscribed to
before me this 9th day
of January, 1935.

MARJORIE I. OSTMAN,
A Notary Public of N. J.

40

Acknowledgment of Service.

(Filed January 19, 1935)

NEW JERSEY COURT OF ERRORS AND APPEALS.

BETWEEN,

GWENDA BROUGHTON PARADISE,
Petitioner-Respondent,

and

JAMES ALVA PARADISE,
Defendant-Appellant.

10

On Appeal
from Court of
Chancery.

—
Acknowledgement
of Service.

Service of a true copy of Petition of Appeal 20
from Order of December 31st, 1934, in the above
entitled matter is hereby acknowledged this 9th
day of January, 1935.

JOHN M. MILLS,
Solicitor for Intervening Defendant,
Alice Fitzgerald.

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Order For Transcript.

(Filed November 15, 1934)

IN CHANCERY OF NEW JERSEY.

10 BETWEEN

GWENDA BROUGHTON PARADISE,
Petitioner,

and

JAMES ALVA PARADISE,
Defendant.

On Petition
for Divorce.

20

ORDER FOR TRANSCRIPT OF TESTIMONY.

Upon application of Patrick Henry Maley, Esq., Solicitor for the petitioner in the above entitled cause, made in open court on the 15th day of November, 1934, for a copy of the transcript of the testimony taken in said cause on said day, and to be taken in said cause at future hearings until the conclusion of the final hearing in said cause, and

30 It appearing to the satisfaction of the court that there is good and sufficient reason why said application should be granted, and

It appearing that the said petitioner is without funds to pay the expense of the official stenographer for said transcript of the proceedings at said hearings,

40 It is, therefore, on this 15th day of November, 1934, ORDERED that the official stenographer be directed to transcribe his stenographic notes of said testimony in said cause, and to furnish to the court the original copy of the same, and to fur-

Order for Transcript.

nish to Patrick Henry Maley, Esq., solicitor for the said petitioner, a copy of said transcript, and to furnish one copy of said transcript to John M. Mills, Esq., and Harold A. Price, Esq., solicitors for the intervening defendant, Alice Fitzgerald, and a copy of said transcript to Chandless, Weller & Selser, Esqrs., solicitors for the defendant, James Alva Paradise, and 10

It is further ORDERED that said official stenographer shall furnish said original and said copies of said transcript with promptness, and that the cost and expense of the transcribing of said stenographic notes, and the furnishing and delivery of said original and copies of said transcript shall be at the expense and paid for to said official stenographer by said defendant, James Alva Paradise, and 20

It is further ORDERED that said defendant, James Alva Paradise, do pay to said official stenographer, at the time of delivery to his solicitors of the transcript of any testimony of said proceedings, the cost and expense of the same, and the cost and expense of furnishing the original and copies of said testimony to the court, and to the solicitors for said petitioner and said intervening defendant.

LUTHER A. CAMPBELL.
C. 30

RESPECTFULLY ADVISED:

N. DEMAREST CAMPBELL,
A. M.

A TRUE COPY:

N. DEMAREST CAMPBELL,
A. M. 40

Notice of Motion to Vacate Order.

(Filed December 24, 1934)

IN CHANCERY OF NEW JERSEY.

10 BETWEEN

GWENDA BROUGHTON PARADISE,
Petitioner,

and

JAMES ALVA PARADISE,
Defendant.

On Petition
for Divorce.

20

NOTICE OF MOTION TO VACATE ORDER.

TO: Patrick Henry Maley, Esq.,
Solicitor for Petitioner, and
John M. Mills, Solicitor
for Intervening Defendant,
Alice Fitzgerald.

SIRS:

30 PLEASE TAKE NOTICE that we shall apply to the
Chancellor at the Chancery Chambers in the
Court House, Hackensack, New Jersey, on the
24th day of December, 1934, at ten o'clock in the
forenoon, or as soon thereafter as counsel can be
heard, for an order to strike out, vacate and set
aside the certain interlocutory order entitled in
the above entitled matter, bearing date the 15th
day of November, 1934, directing that the official
stenographer transcribe his stenographic notes
of the testimony in said cause, and furnish to the
40 to Patrick Henry Maley, Esq., Solicitor of the

Notice of Motion to Vacate Order.

said petitioner a copy of said transcript, and furnish a copy of said transcript to John M. Mills, Esq., and Henry A. Price, Esqs., solicitors of the intervening defendant, Alice Fitzgerald, and a copy of said transcript to Chandless, Weller & Selser, Esquires, Solicitors for the defendant, James Alva Paradise, at the expense of, and to be paid for by said defendant, James Alva Paradise, on the ground that said order is erroneous, improvidently made and beyond the jurisdiction of the Court in that: 10

a. Said Order was made against said defendant without notice to him.

b. Said Order was made without the consent of said defendant.

c. Said Order was made without notice to and without the consent of the intervening defendant, Alice Fitzgerald. 20

d. The Court of Chancery is without authority in law or in equity to direct the official stenographer to transcribe his stenographic notes and furnish copies of said transcript to each of the parties to said suit at the expense of this defendant, without his consent.

e. Said Order was made despite the fact that there had been a compliance in said cause with Chancery Rule No. 266 and a deposit of Ten Dollars (\$10.00) had been paid as the fee of the stenographer in full satisfaction of the lawful fees of said stenographer. 30

f. Said Order was made without any proof being before the Court that there was any good and sufficient reason therefor.

g. Said Order was made although a transcript of such testimony was unnecessary for the prosecution of said cause.

h. Said Order was made although copies of 40

Notice of Motion to Vacate Order.

said transcript were not desired or required by at least two of the parties to said suit.

10 i. Said Order was made on the application of the Solicitor of Gwenda Broughton Paradise for a copy of the transcript of testimony to be had at the expense of this defendant, although there was no proof before the Court that the said Gwenda Broughton Paradise was without funds to pay the expense of the official stenographer for said transcript so desired by her.

j. Said Order was made against this defendant requiring him to pay the cost and expense of said transcript although there was no proof before the Court of this defendant's financial ability to comply with the terms of said Order.

20 k. Said Order, insofar as it has been made against this defendant requiring him to pay the cost of said transcript, is impossible to be performed by this defendant.

30 l. Said Order deprives defendant of his property without due process of law, in violation of defendant's constitutional rights because it requires him in a suit instituted against him to pay the sum of approximately Two Hundred Dollars (\$200.00) for each day that the trial of the above entitled cause may be continued.

m. Said Order violates this defendant's constitutional rights in that because of his inability to comply with the terms thereof, he may be deprived of his right to defend the suit brought against him in the above entitled cause.

n. Said Order is violative of this defendant's constitutional rights because this defendant may be committed to jail for failure to perform its terms.

40 o. Said Order operates to require a property qualification on the part of this defendant as a

Notice of Motion to Vacate Order.

pre-requisite of his right to defend himself in the suit brought against him in the above entitled cause and thereby denies to him and deprives him of the equal protection of the laws.

CHANDLESS, WELLER & SELSER, 10
Solicitors of Defendant, James
Alva Paradise.

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Affidavit of Defendant.

(Filed December 31, 1934)

IN CHANCERY OF NEW JERSEY.

10 BETWEEN
GWENDA BROUGHTON PARADISE,
Petitioner,
and
JAMES ALVA PARADISE,
Defendant.

On Petition
for Divorce.
—
On Motion to
Vacate Order.

A F F I D A V I T.

20 STATE OF NEW JERSEY }
COUNTY OF BERGEN } ss:

JAMES ALVA PARADISE, being duly sworn on his oath deposes and says:

(1) I am the defendant in the above entitled matter which is a suit for divorce on the ground of extreme cruelty and adultery.

30 (2) On December 7th, 1934, I was served by William Morris, a stenographer of this Court with a copy of an Order made in the above entitled cause dated November 15th, 1934, requiring and commanding me to pay the official stenographer the cost and expense of transcribing his stenographic notes of the testimony taken and to be taken in this cause and to furnish the Court with the original copy of the same and copies thereof to the solicitor of the petitioner, Gwenda Broughton Paradise, and the solicitors of the intervening defendant, Alice Fitzgerald, and to the solicitors of myself.

40 (3) At the same time, the said William Mor-

Affidavit of Defendant.

ris, served upon me a written demand that I pay to him the sum of Two Hundred and four dollars (\$204.00) for the stenographic record of the testimony taken in this case on November 15th, 1934, a copy of which demand is annexed hereto, made part hereof and designed as "Schedule A."

10

(4) This was the first notice or knowledge which I had of the making of the said Order of November 15th, 1934, and said Order was made without my consent, and at all times both myself and my solicitors, Chandless, Weller & Selser, objected to the transcribing of the stenographic notes of the testimony taken and to be taken, at my expense, and I have never at any time used in the defense of the suit brought against me by my wife, the transcript of said testimony so transcribed, and as a matter of fact, have never even seen the same. I have been in constant attendance throughout the trial and have never seen said transcript used by any of the parties.

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(5) I am advised and verily believe that the said Order of November 15th, 1934, was also made without notice to, and without the consent of the intervening defendant, Alice Fitzgerald.

(6) Prior to the commencement of the trial of the above entitled matter, I paid to the solicitor of the petitioner the sum of Ten Dollars (\$10.00) as the fee of the stenographer, which I was advised was in full satisfaction of the lawful fees of said stenographer.

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(7) I have also been advised by the solicitors of the intervening defendant, Alice Fitzgerald, that they do not require the transcript of the testimony for the defense of the intervening defendant.

(8) Testimony has already been taken in the above entitled matter on the petitioner's case for six (6) full days most of which deals with minor

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Affidavit of Defendant.

10 details of our married life since the time of our marriage and the petitioner has not as yet completed her case. I am advised that the intervening defendant has a large number of witnesses to be called in her behalf and that the taking of testimony in regard to her defense will require several days. In order to meet the various incidents concerning which there has already been testimony on behalf of the petitioner, it will be necessary for me to call a large number of witnesses in my own defense so that in all probability the taking of testimony in order to complete the trial of the above entitled matter will require many days, which at the rate of approximately Two Hundred Dollars (\$200.00) a day would mean that
20 the transcript of the stenographic record would cost several thousand dollars.

(9) I am without any financial means with which I can make payment for this stenographic record or for the other expenses of the suit which has been brought against me by the petitioner.

(10) I am a practicing physician in the Borough of Closter, Bergen County, New Jersey, which is a small municipality of about twenty-eight hundred inhabitants. The notoriety and
30 publicity of my wife's charges against me has been highly detrimental to my professional standing and the income derived from my practice.

(11) Since the institution of the suit, I have been required to pay temporary alimony of Thirty-five dollars (\$35.00) per week, together with a temporary counsel fee of Two Hundred Dollars (\$200.00) and costs. My income from my practice and from all other sources since the institution of the suit, has been not more than Two Hundred Dollars (\$200.00) a month out of which it is necessary for me, in order to continue my practice
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Affidavit of Defendant.

to maintain a maid and telephone operator at Forty-seven Dollars (\$47.00) a month; telephone service at about Seven Dollars (\$7.00) per month; water service at about One Dollar and fifty cents (\$1.50) per month; light service at about Nine Dollars (\$9.00) per month; gas service at about 10 Three Dollars (\$3.00) per month; heat for the office at about Thirty Dollars (\$30.00) per month; automobile at about Fifty Dollars (\$50.00) per month, and drugs and incidentals at about Fifty Dollars (\$50.00) per month, which means that the essential expenses for the maintenance of my practice exceed in cost the income therefrom, without considering my own living expenses or the payment of alimony and the other expenses of this suit.

(12) At the present time I am without any 20 property of any kind or character, except a Hudson automobile which I am purchasing on the instalment plan and which is absolutely necessary in order that I may make my professional calls in my practice, the usual physicians office furniture and equipment, some household furniture which has little or no value, practically all of which is ten years old, and my personal effects consist of only the usual clothing.

(13) I have an inactive bank account in the 30 Closter National Bank with a balance which is and has been for the past seven years, the sum of \$3.00.

(14) I have a bank account in the Tenaflly Trust Company of Tenaflly, New Jersey, in which at the present time there is a balance of about Fifteen Dollars (\$15.00). I have no cash on hand or any other bank account.

(15) I have no stocks or bonds except membership 40 in the White Beeches Golf Club, which has a value of One Hundred Dollars (\$100.00) against

Affidavit of Defendant.

which I owe dues for about that amount.

(16) I have the usual physician's accounts due me amounting perhaps to several thousand dollars, ninety-five per cent of which are uncollectible.

10 (17) I have a one-quarter interest in a 285 acre farm in Barnes City, Iowa, which was owned by my father and which passed, by descent, to myself and my brother and sisters upon his death. There is no income from this property, and my interest therein would have a value of approximately Twenty-five Hundred Dollars (\$2,500.00) if there was any market. However, my interest is encumbered to the extent of Three Thousand
20 one hundred twenty dollars (\$3,120.00) by a judgment for that amount with interest and costs thereon. As soon as farm land values pick up, undoubtedly, the judgment creditor will sell my interest.

(18) The petitioner and I owned a home at Closter, New Jersey, where my office is located, but the mortgage thereon, which neither I, or my wife have been able to refinance, and which is at least the value of the property, has been foreclosed and the Sheriff's sale thereof has been ad-
30 journed from time to time. My wife, the petitioner in this suit, has an undivided one-half interest in any equity that there might be in this property. However, both of us are convinced that the equity is without any value and there may be a deficiency judgment against us on the bond.

(19) At the present time I owe in personal debts at least Two Thousand Dollars (\$2,000.00) besides the Iowa judgment.

40 (20) In short, my debts far exceed any property owned by me, and the expense of the mainten-

Affidavit of Defendant.

ance of my practice exceeds my income.

(21) I have endeavored to borrow money to finance the suit which has been brought against me by my wife but have been unable to do so.

JAMES ALVA PARADISE. 10

Sworn and subscribed to
before me this 26th day
of December, 1934.

MARJORIE I. OSTMAN,
A Notary Public of N. J.

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Affidavit of Defendant.

“SCHEDULE A.”

December 5th, 1934.

10 Mr. James Alva Paradise,
High Street,
Closter, New Jersey.

Re: Gwenda Broughton Paradise, Petitioner.
Vs. James Alva Paradise, Defendant.

Dear Sir:

20 As official stenographer attached to the Chancery Court of the State of New Jersey, at Hackensack, Bergen County, New Jersey, where the above entitled cause is being heard before Advisory Master N. Demarest Campbell, I hereby make written demand upon you for the payment of Two Hundred and Four Dollars (\$204.00), being the amount of my bill for the transcribing and furnishing of the testimony given in the above entitled cause November 15th, 1934, pursuant to the Order of the said Advisory Master made on the 15th day of November, 1934.

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Yours very truly,
WILLIAM MORRIS,
Official Stenographer.

Order of December 31st, 1934.

(Filed December 31, 1934)

IN CHANCERY OF NEW JERSEY.
104/137

BETWEEN

GWENDA BROUGHTON PARADISE,
Petitioner,

and

JAMES ALVA PARADISE,
*Defendant.*On Petition
for Divorce.—
On Motion to
Vacate Order.

10

O R D E R .

20

This matter coming on to be heard on the motion of the defendant, James Alva Paradise, to vacate an Order of this Court made on the 15th day of November, 1934, and due notice of said motion having been given to the solicitor of the petitioner, Gwenda Broughton Paradise, and to the solicitor of the intervening defendant, Alice Fitzgerald, and the argument of said motion having been by the Order of this Court continued from December 24th, 1934, and the Court having filed the affidavit of the defendant in support of his motion, and having considered the same and the argument of counsel, and

30

IT APPEARING that the motion of the defendant, James Alva Paradise, to vacate the Order of November 15th, 1934, should be denied, but that said Order should in certain respects be modified and altered, and

IT FURTHER APPEARING that January 10th, 1935, was designated in open Court as the day upon

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Order of December 31st, 1934.

which a further hearing would be had in said cause and that on December 24th, 1934, on the Court's own motion an Order was made directing that no further testimony should be heard in the above entitled cause pending an appeal to the
10 Court of Errors and Appeals by the defendant, James Alva Paradise, from the terms of the said Order of November 15th, 1934, and good cause appearing,

IT IS, ON THIS 31st day of December, 1934, ORDERED that the official stenographer be directed to transcribe his stenographic notes of said testimony in said cause and to furnish to the Court the original copy of the same and to furnish to Patrick Henry Maley, Esq., solicitor of said petitioner, a copy of said transcript, and
20

IT IS FURTHER ORDERED, that said official stenographer shall furnish said original and said copy of said transcript with promptness, and that the cost and expense of the transcribing of said stenographic notes, and the furnishing and delivery of said original and copy of said transcript shall be at the expense and paid for to said official stenographer by said defendant, James Alva Paradise, and

IT IS FURTHER ORDERED, that said defendant, James Alva Paradise pay to said official stenographer at the time of delivery to the Court, of the transcript of any testimony of said proceedings, the cost and expense of the same, and the cost and expense of furnishing said copy to the solicitor for said petitioner, and
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IT IS FURTHER ORDERED, that in the event the defendant, James Alva Paradise, shall appeal to the Court of Errors and Appeals from the terms and provisions of this Order, the hearing of further testimony in said cause shall not proceed on January 10th, 1935, and the taking of further testi-
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Order of December 31st, 1934.

mony shall be held in abeyance until the opening day of the February, 1935, Term of the Court of Errors and Appeals, unless the said Court of Errors and Appeals shall at that time stay the execution of this Order, or unless said appeal shall be abandoned, or unless this Order shall be complied with by said defendant. 10

LUTHER A. CAMPBELL,
C.

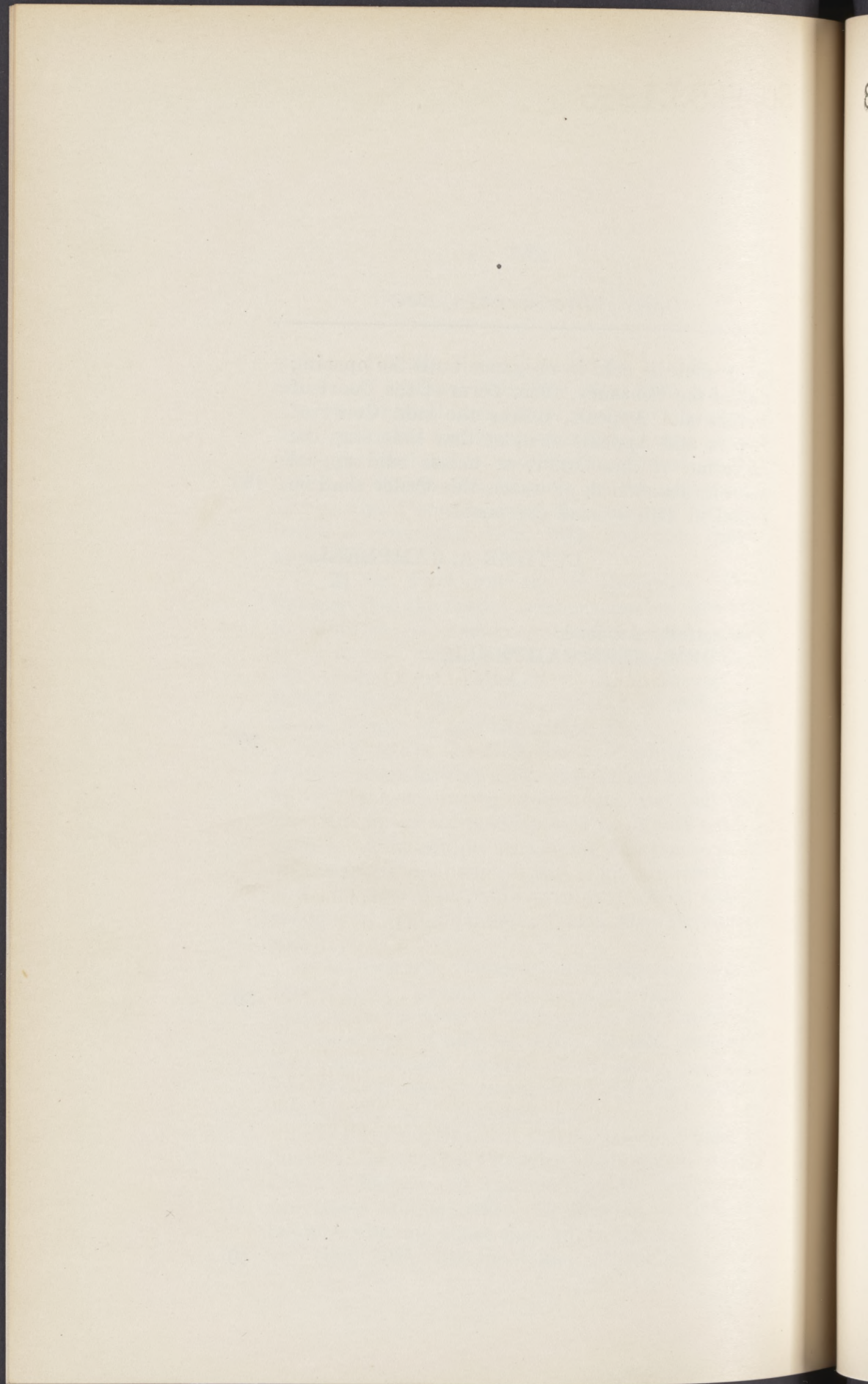
Respectfully Advised:

N. DEMAREST CAMPBELL,
A. M.

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80 FEB.T.1935

NEW JERSEY

Court of Errors and Appeals

Between

GWENDA BROUGHTON PARADISE,
Petitioner-Respondent,

and

JAMES ALVA PARADISE,
Defendant-Appellant.

ON PETITION FOR
DIVORCE

On Appeal from
Interlocutory
Order of
Court of Chancery

BRIEF FOR APPELLANT.

Statement of Facts.

This is an appeal from an interlocutory order of the Court of Chancery, advised by an Advisory Master and entered December 31, 1934.

The appellant is the defendant in a suit for divorce instituted against him by the respondent on the ground of extreme cruelty and adultery (R. p. 14, lines 25-27). The suit for divorce was referred for hearing to an Advisory Master, and on November 15, 1934, an order (R. p. 8) was entered requiring the appellant to pay the cost of transcribing four copies of the testimony taken throughout the trial, which copies were presumably for the use of the Court, the solicitor of the petitioner in the suit for divorce, the solicitor of the intervening defendant, and also the solicitor of the appellant himself.

New Jersey State Library

This order was made without notice to the appellant and without his consent (R. p. 15, lines 11-24).

Subsequently thereto, on December 7, 1934, the appellant was served with a copy of the order, the service on him being made by the stenographer of the Court (R. p. 14, lines 28-31). At the same time he was served with a demand from the stenographer for the sum of \$204 as the cost of transcribing the testimony for the first day of the trial of the divorce suit (Schedule A, R. p. 20).

Prior to this appeal, there had been testimony taken for six full days, all of which was on the petitioner's case, which has not as yet been completed (R. p. 15, lines 38-40). Of course, the testimony of the witnesses in behalf of the appellant and the intervening defendant has not as yet been taken (R. p. 16, lines 1-22). The stenographer's charge of \$204 made under the order of November 15, 1934, covered only the testimony of that day. The appellant has not received any bill from the stenographer for the other five days of testimony, but, naturally, presumes that the charge will be at the same rate.

After the service of the order of November 15, 1934, on the appellant, he gave notice that on December 24, 1934, he would move to vacate the order, setting forth a number of reasons therefor, but relying principally on the fact (a) that he had not received the required notice of the making of the order, (b) that the order was an unnecessary expenditure of money, (c) that the Court of Chancery never had any authority to make such an order, (d) that he was financially unable to comply with the order, and (e) that it deprived him of his constitutional rights (R. p. 10, lines 12-13).

Neither the petitioner in the divorce suit nor the intervening defendant appeared on the motion to vacate the order of November 15, 1934, or filed any

affidavits in answer to appellant's affidavit (R. p. 14). The motion to vacate was continued from December 24, 1934, to December 31, 1934 (R. p. 21, lines 25-31), and the Court on its own motion made an order directing that no further testimony should be heard in the divorce case pending an appeal to the Court of Errors and Appeals (R. p. 21, lines 39-40; p. 22, lines 1-12).

On December 31, 1934, there was still no appearance by either the petitioner in the divorce suit or the intervening defendant on the motion to vacate. However, on that date the Court denied appellant's motion (R. p. 21, lines 35-38), and again on its own motion made a new order (R. pp. 21-23), from the terms of which order this appeal is taken (R. pp. 1-5).

The order of December 31, 1934, differs from the order of November 15, 1934, in that it requires the appellant to pay the cost of transcribing two copies of the testimony to be taken, one copy to be furnished to the Court and the other copy to the solicitor of the petitioner in the divorce suit, thus eliminating two copies of the testimony. The order further provides that if the appellant prosecutes an appeal from the terms of the order, or fails to comply with it, the trial of the suit for divorce brought against him by the respondent herein shall be stayed. This was despite the fact that an order for temporary alimony had been made against appellant (R. p. 16, lines 33-36).

The appellant set out in his petition of appeal a number of grounds of attack on the order in this case. We have combined under Point I, grounds d and e; under Point II, grounds f, g and p; under Point III, grounds a, b and c; under Point IV, ground j, and under Point V, grounds h, i, k, l, m, n and o.

POINT I.

The Court of Chancery was without power to direct that a transcript of testimony be furnished to one of the parties at the expense of another.

In the case of *Lawyers T. & T. Co. v. Comptroller of Treasury*, 85 N. J. Eq. 481, at page 484, the Court says:

“The fees and costs of litigation are creatures of statute, and as there is no enabling act, they cannot be allowed.”

In that case, the Court cited *Lehigh Valley Railroad Co. v. McFarland*, 44 N. J. L. 674, in which this Court traces the history of the allowance of costs and holds that costs are the creature of the statutes and are not recoverable unless by force of a statute, and the allowance of them in any case will depend upon the terms of the statute.

This Court in the case of *Decamp v. Crane*, 21 N. J. Eq. 544, at page 545, says:

“Besides, upon examination it will be found that this practice has a statutory foundation. In the act relating to fees and costs (Nix. Dig. 313), it is enacted that ‘where no fees are by law provided, the same fees shall be allowed to the same officers and persons, as are allowed by law for like services in the Court of Chancery.’ But neither in the provisions of this act relating to this court, nor in that regulating the fees in chancery, is there any allowance which will fairly embrace the present claim. If the Clerk of this court had provided these printed cases, it would seem that this expense might be a legitimate charge. But by the rules of this court the party, and not the clerk, is required to perform this service. Until these rules are changed there can be no charge in the bill for costs thus incurred.”

In the case of *In re Frankish*, 86 N. J. Eq. 280, at page 286, we find the following:

"The lunatic's solicitor presents a bill for a stenographer for \$20 for services for two days, being apparently, the usual \$10 per diem of official court stenographers. In fact, the stenographer is the official stenographer of one of the courts of this State. There is, however, no provisions, statutory or otherwise, for the allowance of such a bill. The Chancery Act (Comp. Stat. p. 408) provides, in Section 98, that it shall be lawful for each vice-chancellor to employ a competent stenographic reporter to take down the evidence of witnesses examined before him for the use of the court and the parties, and section 106 makes the same provision with reference to advisory masters. Sections 103 and 108 provide for the compensation of those official stenographers and how they shall be paid. Where they furnish copies to the court the cost is apportioned between the parties and included in the taxable costs. There is, however, no statute, or other authority, for commissioners in lunacy to employ stenographers to take testimony, and if the parties have the evidence so taken, it must be at their own costs and charges. It may be very convenient to have a stenographic report of the testimony in case the inquisition is sought to be set aside as against the weight of the evidence, as may be done. *In re Lawrence*, 28 N. J. Eq. 331. But, as already remarked, there is no method for taxing stenographer's fees in the bill of costs in these proceedings."

In *Harris v. McMurray*, 92 N. J. Eq. 1, at page 6, the Court, in dealing with search fees, says:

"It is, of course, well settled that no items can be included in a taxed bill of costs without legislative authority therefor."

An examination of the Divorce Act fails to disclose any statutory authorization for the imposition of the cost of the transcript of the testimony on any one of the parties.

Section 106 of the Chancery Act, P. L. 1902, page 544, 1 C. S. 499, provides in relation to Advisory Masters as follows:

"It shall be lawful for such master, when any cause or matter is so referred to him, to employ a competent stenographic reporter to take down the evidence of such witnesses as may be examined before him, for the use of the court and parties in such cause or matter, and to fix, allow and tax the fees of such reporter, for writing out such evidence, and to apportion the same between the parties, and each party shall forthwith pay the part so apportioned to him, which shall be part of the taxable costs in the cause."

Chancery Rule 266, provides as follows:

"In litigated causes of divorce, nullity of marriage, alimony and maintenance, except those sued in forma pauperis, before the designation of a master, the petitioner or complainant shall deposit with the clerk \$60.00, of which \$50.00 is hereby fixed by the Chancellor as the fee of the advisory master, and \$10.00 as the fee of the stenographer appointed by such advisory master to attend and take down the testimony at the hearing, and which sums shall be in lieu and instead of any other fees of the advisory master and attendance fees of the stenographer, respectively, in such case."

The only other statutory provision in relation to stenographers at the trial of a cause in this State,

apparently, is Chapter 145, P. L. 1914, page 256, which reads as follows:

"In all trials or proceedings hereafter had before any court, official, tribunal, board or governing body of this State, where not now otherwise provided for by law, such court, official, tribunal, board or governing body shall, upon request of either party to such trial or proceeding, at the expense of the party so requesting, designate a competent stenographic reporter, who shall be duly sworn, to report verbatim any such trial or proceeding, excepting the arguments of respective counsel.

Said stenographer shall, upon request, transcribe into typewriting the record of such trial or proceeding upon payment to him therefor at the rate of ten cents per folio of one hundred words."

Plainly there is no authority in these statutes granting to the Court of Chancery the right to charge against one of the litigants, the cost of the transcribing of testimony furnished to the other.

In the case of *Main v. Main*, 50 N. J. Eq. 712, which was a suit for divorce brought by the husband against the wife, the Court refused to allow the wife an allowance for amounts paid counsel on the execution of commissions to take depositions on interrogatories, saying at page 717:

"I decline to allow the amounts paid to counsel on executing the commissions or for the expense of the commission. It was taken on interrogatories and no counsel was necessary, and as to the latter, the statute is express. Rev. page 386, Section 44."

In *Verbeeck v. Verbeeck*, 93 N. J. Eq. 17, which is a case in chancery, in which, again, the husband sued the wife for divorce, the Court granted the

wife an allowance to take depositions on commission where it appeared that the same was essential for her defense in the suit brought against her by her husband.

The decision in *Verbeeck v. Verbeeck*, *supra*, is distinguishable from our present case: first, because the wife in that case was the defendant, while in our case the wife brings the appellant into court, and, secondly, because the depositions were shown to be the only means by which the wife could interpose her defense.

There is no decision in New Jersey or any statutory authorization to sustain the order of December 31, 1934.

POINT II.

The Court of Chancery is without authority to unnecessarily order a litigant to expend money.

Aside from the question of whether the Court of Chancery might legally direct one of the parties to a suit, in certain cases, to pay for a stenographic record for the use of another party, and without considering at this time the constitutional rights of such party in respect thereto, it seems elementary that the Court is without authority to needlessly require a litigant to expend his money.

We are not now considering the question of obtaining a record for appeal.

The appellant was sued by his wife for divorce on the ground of extreme cruelty and adultery. It may be true that in some cases of intricate account and involved figures a stenographic record would be advisable for the proper trial of the cause, but the

Court will take judicial notice of the fact that there is nothing intricate or involved either as to the law or the facts in a trial of a suit for divorce. This was undoubtedly the reason which actuated the Chancellor in relieving the Vice-Chancellors from the trial of these suits and a reference of them to Advisory Masters.

Although a suit for divorce may involve the fundamental rights of the parties and be highly important to them, the case itself deals with more or less simple factual or legal questions, most of which could not be determined by the record, but rather by a decision as to the truthfulness of the witnesses to be drawn from observation.

We respectfully call attention to the fact that the trial of one for his life, on the charge of murder, may extend over a long period of time, and usually involves a far greater volume of testimony than any divorce case should entail. Yet, the jurors who are to decide the highly important question of the guilt or innocence of the accused are not afforded a stenographic record from which to make their decision. If our law finds it unnecessary that there be a transcript of the testimony in such a case, the logical conclusion must be that it is unnecessary in a divorce suit.

Chancery Rule 123 provides:

“At the time for which notice is given or designated for hearing, both parties shall attend with their witnesses and other evidence, and the cause shall proceed, as at a trial at law before a jury, by the oral examinations of the witnesses on both sides continuously until all the evidence has been produced and closed.”

Not only does the rule provide that the cause shall proceed as at a trial at law before a jury, but it also prohibits the continuance of hearings without good cause. In this respect the same rule specifies:

“but the Vice Chancellor or Advisory Master may, in his discretion, reserve to either party the right to produce one or more witnesses, who shall be named, to be examined orally, or by deposition at a future date; but such right shall not be granted, unless the Vice Chancellor or Advisory Master be satisfied that due diligence has been used to procure the attendance or deposition of such witnesses before the trial, nor unless it be fairly disclosed what is expected to be proved by such witness, and such evidence shall appear to be material, and shall not be admitted by the other party or parties.”

A fair interpretation of this rule is that the Advisory Master is without authority in the suit brought against the appellant to proceed except as at a trial at law before a jury and without unnecessary continuances. With even a liberal compliance of this rule, a transcript of the stenographic record would not be necessary.

The taking of testimony in this suit for divorce has already consumed six days, and the petitioner has not as yet completed her case (R. p. 15, lines 37-40). The transcript of testimony for the first day cost \$204 (R. p. 20).

This Court has already expressed its opinion in regard to situations such as this. In the case of *Ruckman v. Ruckman*, 33 N. J. Eq. 354, the Court says at page 361:

“Before disposing of the question of costs, the court desires to call attention to the amount and nature of the testimony taken in the cause. The printed book contains

nearly three hundred pages of evidence, not one-tenth of which has any direct bearing upon the real issue between the parties. The remainder consists mainly of inquiries into the private affairs, social status, domestic relations, and general moral or immoral character of the parties—all of it totally irrelevant, and must of it disgusting in its details. The taking of such testimony is an onerous tax upon litigants, and the reading of it an imposition on the Court. No costs therefor will be allowed either party as against the other.”

This Court lays down a similar proposition in the case of *Yard v. Ocean Beach Association*, 49 N. J. Eq., 306, at page 316:

“But, nevertheless, the court cannot overlook the manner in which the examination of witnesses was conducted. The testimony alone occupied upwards of two thousand and seven hundred pages of the printed book, at least one-half of which is either unimportant or irrelevant, or taken from needless prolixity. This is notably true of the cross-examination of the defendant’s witnesses. The direct examination of the defendant occupies twenty-two pages, his cross-examination five hundred and twenty-eight pages. The direct examination of Roome, another of the defendant’s witnesses, occupies eleven pages, his cross-examination one hundred and forty-seven pages. The cross-examination of others of the defendant’s witnesses are similarly extended with needless prolixity.”

To the same effect is the decision of this Court in *Wintermute v. Wilson*, 28 N. J. Eq. 437, at pages 438 and 439.

POINT III.

The Court was without authority to make an order of this character, except upon due application after notice.

The interlocutory order from which the appeal is taken in this case, dealt not with any matter of procedure, but with the basic rights of the appellant. It required him to pay a large sum of money, and in default thereof, deprived him of the right to a speedy trial of the suit brought against him, despite the fact that there has been an order for temporary alimony in the amount of \$35 per week previously made against him.

It is fundamental that such an order could not be made without notice to the appellant.

The practice of the Court of Chancery requires that such an order be made on motion. Chancery Rule 165 specifically provides for five days' notice.

The order of December 31, 1934, is a modification of the order of November 15, 1934. It was not based on any new application on the part of either the petitioner or the intervening defendant. It therefore, must stand or fall on the validity of the order of November 15, 1934.

That order was made without notice to the defendant. Therefore, when the appellant moved to vacate it, the Court should have set it aside as improvidently made. There was no other course for the Court to pursue. It was not within the authority of the Court to make a new order embracing the terms of the old order as an answer to appellant's motion to vacate, unless proper notice of the application for such new order was given to the appellant.

POINT IV.

Equity will not decree the performance of an impossibility.

If the Court of Chancery otherwise had power to make the order of December 31, 1934, that order could not properly be made for the reason that it is impossible of performance.

The only proof before the Court at the time of the making of the order was the affidavit of the appellant (R. p. 14) which showed that the appellant was without the financial means to comply with the order or any part thereof. If the order was within the authority of the Court to make, the appellant could probably be committed to jail for its non-performance under the doctrine of *Aspinwall v. Aspinwall*, 53 N. J. Eq. 684, and *Letts v. Letts*, 85 N. J. Eq. 407.

It is a well-established principle of equity that the Court will not make an order requiring performance by an individual of an act which he is unable to perform (*McAllister v. Atlantic City*, 90 N. J. Eq. 357; *Public Service Corporation v. Hackensack Meadows Co.*, 72 N. J. Eq. 285; *Clark v. N. J. Postal Telegraph Co.*, 82 N. J. Eq. 15; *Pattison v. Skillman*, 43 N. J. Eq. 392; *Foster v. Mansfield, etc. R. R. Co.*, 146 U. S. 88 at p. 101; and text, 21 C. J. 159, Sec. 141).

POINT V.

The order of December 31, 1934, deprives appellant of his constitutional rights.

The order in this case (R. p. 21) requires the appellant to pay a large sum of money, the exact amount of which of course is not at this time ascertainable, as the result of being brought into court, not in a suit instituted by himself, but one brought against him by his wife. And the order to pay is made without there having been any determination of the merits of the issue.

Prior thereto the Court had made an order for temporary alimony in the amount of \$35 a week (R. p. 16, lines 33-36). The continuance of such an order in full force and effect until the determination of the suit for divorce has been held legal by our courts.

But the order of December 31, 1934, provides that unless that order shall be obeyed "the taking of further testimony shall be held in abeyance until the opening day of the February 1935 Term of the Court of Errors and Appeals" (R. p. 22, line 40; p. 23, lines 1-7). Of course, if the Court of Chancery could legally provide that the taking of further testimony should be held in abeyance for one period of time, it could defer the determination of the suit indefinitely. And during the continuance of such stay of the trial, the appellant would be required to make payment of the temporary alimony to his wife, although he was not being afforded an opportunity to be heard in his own behalf on the merits of the controversy.

The United States Supreme Court has condemned this procedure in a number of cases. In

Windsor v. McVeigh, 93 U. S. 274, at page 277, the Court says:

"The order, in effect, denied the respondent a hearing. It is alleged he was in the position of an alien enemy, and could have no locus standi in that forum. If assailed there, he could defend there. The liability and right are inseparable. A different result would be a blot upon our jurisprudence and civilization. We cannot hesitate or doubt on the subject. It would be contrary to the first principles of the social compact and of the right administration of justice. * * * A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights and is not entitled to respect in any other tribunal."

In the case of *Hammond Packing Co. v. Arkansas*, 212 U. S. 322, the United States Supreme Court says, at page 349:

"The ruling in *Hovey v. Elliott* was that to punish for contempt by striking an answer from the files and condemning, as by default, was a denial of due process of law, and therefore repugnant to the Fourteenth Amendment. There the power to strike out and punish was exerted, by the court, in virtue of what it assumed to be its inherent authority, and the occasion which caused the exercise of the assumed authority was the refusal of the defendant to comply with an order to pay into the registry of the court a sum of money which, it was held, had been illegally withdrawn, and the right to which was at issue in the suit. * * * The fundamental guarantee of due process is absolute and not merely relative. The inherent want of power in a court to do what

was done in *Hovey v. Elliott* was in that case deduced from no especial infirmity of the judicial power to reach the result, but upon the broad conception that such power could not be called into play by any department of the Government without transgressing the constitutional safeguard as to due process, at all times dominant and controlling where the Constitution is applicable. Indeed in *Hovey v. Elliott* the impotency of the legislative department to endow the judicial with the capacity to disregard the Constitution was emphasized."

It is hardly necessary for us to again point out that the order in this case was made without notice to the appellant. Such notice was prerequisite to due process of law.

In our present case the order under appeal requires the defendant to pay, according to its terms, although there was never any proof before the Court when the order was made of any of the following essential facts: (a) that the petitioner was unable to purchase the transcript with her own funds; (b) that the appellant was financially able to pay for it; (c) that the transcript was in anywise necessary for the prosecution of the suit; or (d) any determination of the merits of the suit, which would warrant the burden being placed on the appellant in the nature of a penalty. In the absence of this proof, the order certainly undertakes to deprive appellant of his property without due process of law.

Finally, if the Court of Chancery may make an order requiring a defendant in a suit instituted against him, to pay large sums of money as a condition precedent to the right to defend the suit or, which is the same thing, as a condition precedent to the right to have the suit against him, terminated

without delay, then a property qualification is required and he is denied and deprived of the equal protection of the laws.

CONCLUSION.

For the reasons set out above, the interlocutory order of December 31, 1934, should be set aside.

Respectfully submitted,

CHANDLESS, WELLER & SELSER,
Solicitors of Appellant.

JOHN E. SELSER,
of Counsel.

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New Jersey Court of Errors and Appeals

GWENDA BROUGHTON PARADISE,
Petitioner-Respondent,

vs.

JAMES ALVA PARADISE,
Defendant-Appellant.

*On Appeal
from Court
of Chancery.*

BRIEF OF RESPONDENT.

Mrs. Paradise sued her husband for divorce. She alleged adultery and extreme cruelty. Alice Fitzgerald was named in the first count. She is contesting the action. There is a general denial of extreme cruelty. The adultery charge is met with an alibi by defendant, Dr. Paradise.

Mrs. Paradise was awarded \$35.00 a week temporary alimony and \$200.00 counsel fee. Dr. Paradise was ordered to pay the reference fee of \$60.00.

The cause was referred to Advisory Master Campbell for trial. Five full days have been devoted to hearings with the petitioner's case still on. 568 pages of testimony have been taken.

On November 15, 1934 the solicitor of the petitioner, in open court, moved that the testimony be transcribed at the expense of Dr. Paradise. After an argument it was so ordered. From this order defendant Dr. Paradise appealed. He then moved to vacate the order of November 15th. On December 31st a new order was entered ordering the stenographer to transcribe his notes and furnish one copy to the court and one to petitioner's solicitor. Dr. Paradise appeals from this order.

POINT ONE.

The Court had jurisdiction to make the order in question.

In his petition of appeal appellant assigns as error some points ill founded in fact. A point is made that the order of November 15th was made without notice to him. The record shows otherwise. In any event such order is not appealed from. As to the contention that the order was made without his consent suffice it to say his consent is not necessary.

Did the court have jurisdiction to make the order? The answer is found in the Chancery Act, P. L. 1902, p. 544, 1 C. S., Sec. 106, p. 449. That statute reads as follows:

“It shall be lawful for such master, when any cause or matter is so referred to him, to employ a competent stenographic reporter to take down the evidence of such witnesses as may be examined before him, for the use of the court and parties in such cause or matter, and to fix, allow and tax the fees of such reporter, for writing out such evidence, and to apportion the same between the parties, and each party shall *forthwith* pay the part so apportioned to him which shall be part of the taxable costs in the cause.”

This statute gives the Advisory Master complete control over this subject. If it be argued that the appellant has to pay the entire cost the answer is that in matrimonial causes the husband usually bears the burden of litigation. Preliminary counsel fees are allowed; alimony pendente lite, costs of witnesses, etc. Whether this policy is wise is not for us to question.

The statute conferring power, its exercise is discretionary with the court. No appeal lies save for abuse of discretion. Has there been such abuse? We think not. During the course of every trial it is necessary for the court to make certain rulings for the purpose of expediting the cause and insuring to all parties a fair hearing. Much must of necessity be left to the sound discretion of the trial court. This is an important case for all parties. If the petitioner's allegations are true she is entitled to relief. The reputation of Miss Fitzgerald is involved. The professional reputation of Dr. Paradise is at stake. Based on present facts the trial will be a tedious affair. The case is hotly contested. Sharp questions of fact are involved. Can it then be said in this posture of affairs that the trial court must rely on his memory to decide this case? The mere statement of the proposition furnishes the answer.

If it were proper for the trial court to make the order in question it logically follows that it had authority to enforce it.

"Of all parts of a law the most effectual is the vindicatory. For it is but lost labor to say 'do this or avoid that' unless we also declare 'this shall be the consequence of your non-compliance.' " 1 Black. 57.

The court was right in refusing to hold further hearings until the order was complied with.

The appellant says the order imposes a property qualification on the defendant. The answer to this is that every law suit involves certain expenses. Our law does not contemplate or guaranty a free law suit. Appellant founds his argument on a false premise. He assumes the law to be that he is entitled as a matter of right

to a hearing where witnesses testify *viva voce* and that the court must depend on its memory unless the parties consent to have the testimony transcribed.

Since its inception the Court of Chancery has proceeded differently than the courts of law. Blackstone describes the equity procedure as follows:

“This is done by examination of witnesses, and taking their testimony in writing, according to the manner of the civil law. And for that purpose interrogatories are framed, as questions in writing; which, and which only are to be proposed to and asked of the witnesses in the cause * * *. For the purpose of examining witnesses in or near London there is an examiner’s office appointed; but for such as live in the country, a commission to examine witnesses is usually granted to four commissioners, two named of each side, or any three or two of them, to take depositions there * * *. The commissioners are sworn to take the examinations truly and without partiality, and not to divulge them till published in the court of chancery and their clerks are also sworn to secrecy * * *. When all the witnesses are examined, then, and not before, the depositions may be published, by a rule to pass publication; after which they are open for the inspection of all the parties and copies may be taken of them. The cause is then ripe to be set down for hearing * * *.” *Chase’s Blackstone*, pp. 38-839.

This procedure is substantially followed by the Court of Chancery in Rules 93 to 109. See also

1 C. S., Sec. 33, p. 423. By Rule 140 it is provided:

“In the first instance each party shall pay to the examining master the costs of his own examinations and cross examinations.”

This rule was first promulgated in April 1841.

The rule has never been questioned. If the case had not been referred, Dr. Paradise would have had to pay for his own examinations and cross examinations. It being a matrimonial cause he would also have had to pay for the wife's testimony.

Under the old practice the depositions were taken in narrative form by the Master, but later depositions were taken by question and answer, and finally, stenographically. See Rule 105, also Appendix No. 2, to the Chancery Rules.

It thus appears that under the old practice all depositions were taken before an examining master, transcribed, and transmitted to the court. The hearing was then held. Each party in the first instance paid for his own depositions and cross-depositions. In matrimonial causes the husband paid.

When the comparatively modern practice of witnesses testifying *viva voce* before the court was introduced it was not necessary in all cases that the testimony be transcribed.

But by statute power was conferred on the court to order the testimony transcribed as it saw fit. If the court did not need the testimony there was no necessity of having it transcribed. If the court so required, the testimony was to be transcribed. Instead of the hard and fast rule of requiring the parties to pay for their own

examination and cross examination the court could apportion the cost.

We submit that either under the old practice or the statute, the Advisory Master had authority to make the order in question.

A word as to the ex parte affidavit filed by the appellant in support of a motion to vacate the order of November 15th: The defendant's financial condition had already been found by the court when it ordered alimony of \$35 a week and \$200 counsel fee. Further, appellant was able to furnish a *ne exeat* bond in the sum of \$5,000.

No proceedings are pending to punish for contempt. Appellant says he may be jailed. If such dire consequences arise he is not without remedy.

The appellant in his brief says that he is deprived of his constitutional rights. He does not say what those rights are. If it is his view that the Federal and State constitutions guaranty the right to defend a law suit without paying the necessary costs it requires no argument on our part to show the absurdity of such a contention.

Some references are also made in the brief to the length of time and volume of testimony already consumed. The appellant desires this court to believe that he is the aggrieved party in this respect. He has not complied with Rule 19 of this court in making up state of case. Otherwise this court would very readily see who was the sinner and the sinned against. Appellant's counsel has cross examined petitioner's witnesses for hours at a time and if the record is unduly burdened it is the fault of the appellant.

We respectfully submit that the order is right and should be affirmed. We respectfully request that this court fix the counsel fee to be allowed to respondent's solicitor on this appeal.

Respectfully submitted,

PATRICK HENRY MALEY,
Solicitor of Petitioner-Respondent.

JAMES A. MAJOR,
Of Counsel.

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We respectfully request that the order is right
be returned. We respectfully request
that the order be returned to be allowed
and a collection on this appeal.

Respectfully submitted,

PATRICK HENRY MALLON

Attorney at Law, New York

Mass.

10/1/1901

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