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ORDER DISMISSING PETITION FOR
ANNULMENT, &c.

(Filed July 20, 1931.)

75-4.

IN CHANCERY OF NEW JERSEY.

Between

ESTHER EISENBERG,
Complainant,
and
ISRAEL EISENBERG,
Defendant.

On Bill for Main- 10
tenance.

74-110.

IN CHANCERY OF NEW JERSEY.

Between

ISRAEL EISENBERG,
Petitioner,
and
ESTHER KALINER, other-
wise ESTHER EISEN-
BERG,
Defendant.

20

ORDER DISMISSING PETITION FOR ANNULMENT, &c.

This matter coming on to be heard in open court
in the presence of Walter S. Keown, solicitor for
the defendant in the above-entitled suit for main- 30
tenance and for the petitioner in the above-entitled
petition for annulment (Harvey F. Carr, of coun-
sel), and in the presence of Joseph Varbalow,
solicitor for the complainant in the above bill for
maintenance and for the defendant in the above peti-

*Order Dismissing Petition for
Annulment, &c.*

tion for annulment (D. Trueman Stackhouse, of counsel); and the solicitor for the said Israel Eisenberg having stated the intention of the said Israel Eisenberg to withdraw his petition for annulment and admits his liability to his wife for her suitable
10 maintenance, and leaves to the Court to determine on evidence the proper amount; and it appearing by order of this Court, made on the sixth day of January, 1930, the above causes were consolidated in order that the same might be disposed of at the hearing;

It is, on this twentieth day of July, 1931, on motion of Joseph Varbalow, Solicitor for Esther Eisenberg,

20 Ordered that the said order of consolidation of January 6, 1930, be and the same is hereby vacated;

And it is further ordered that the answer of Israel Eisenberg to the said bill of maintenance be and the same is hereby withdrawn except as to the issue of the amount for which Israel Eisenberg is liable;

And it is further ordered that the said petition of annulment be and the same is hereby dismissed with costs to the said Esther Eisenberg, in which shall be included a counsel fee of \$100 to be taxed in the said costs and collected with the other items
30 of the said bill;

And it is further ordered that the said Esther Eisenberg have execution for the collection of the said costs in accordance with the law and the practice of this Court.

E. R. WALKER.

Respectfully advised,

E. B. LEAMING,
Vice-Chancellor.

Petition

PÉTITION.

(Filed Oct. 28, 1931.)

75-4.

IN CHANCERY OF NEW JERSEY.

10

Between

ESTHER EISENBERG,

Complainant,

and

ISRAEL EISENBERG,

*Defendant.*On Bill for Main-
tenance.

74-110.

20

IN CHANCERY OF NEW JERSEY.

Between

ISRAEL EISENBERG,

Petitioner,

and

ESTHER KALINER, other-

wise ESTHER EISEN-

BERG,

*Defendant.*On Petition for An-
nulment.

30

*To the Honorable Edwin Robert Walker, Chancellor
of the State of New Jersey:*The petition of Israel Eisenberg respectfully
shows unto your Honor:1. That such proceedings were had in the above-
stated causes that an order was entered therein on

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the twentieth day of July, 1931, which order contained, in part, the following recital:

10 “And the solicitor for the said Israel Eisen-
berg having stated the intention of the said
Israel Eisenberg to withdraw his petition for
annulment and admits his liability to his wife
for her suitable maintenance, and leaves it to
the Court to determine on evidence the proper
amount;” * * *

following which, in part, the order provided:

20 “And it is further ordered that the said peti-
tion of annulment be and the same is hereby dis-
missed with costs to the said Esther Eisenberg,
in which shall be included a counsel fee of
\$100.00, to be taxed in the said costs and col-
lected with the other items of the said bill.”

2. That prior to the trial your petitioner, through his counsel, stated that he desired to withdraw the petition for annulment, leaving the only issue to be tried, the question of amount of the alimony to be paid to Mrs. Esther Eisenberg, that the Court then stated:

30 “If he (Israel Eisenberg), has brought him-
self within the liability of the Statute, then the
only issue I am here to try is how much is an
appropriate amount for him to supply to her for
her maintenance, and I will so rule.”

3. That the only issue tried was that stated by Vice-Chancellor Leaming to be the appropriate amount for Israel Eisenberg to supply to Esther

Petition

Eisenberg for her maintenance, and that no other issue was so tried.

4. That by inadvertence the words "without prejudice" were omitted from that portion of the order whereby the petition for annulment was dismissed; that the said portion of the order reads as follows: 10

"And it is further ordered that the said petition of annulment be and the same is hereby dismissed with costs to the said Esther Eisenberg, in which shall be included a counsel fee of \$100.00, to be taxed in the said costs and collected with the other items of the said bill."

whereas there should have been inserted after the word "dismissed" the words "without prejudice," so that the order should have read, 20

"And it is further ordered that the said petition of annulment be and the same is hereby dismissed without prejudice with costs to the said Esther Eisenberg, in which shall be included a counsel fee of \$100.00, to be taxed in the said costs and collected with the other items of the said bill."

5. Your petitioner further shows that he is prejudiced as hereinbelow set forth: 30

Your petitioner has instituted a suit in the Court of Common Pleas No. 1 of the City and County of Philadelphia against Esther Kaliner Eisenberg for an annulment of the marriage, on the ground that the contract of marriage between the plaintiff and defendant was entered into and the assent of the

Petition

plaintiff to the said contract of marriage was obtained as the result of artifice and gross fraud on the part of the defendant therein, in that the defendant therein represented to the plaintiff prior to entering into said contract of marriage that she was in sound and perfect health. These representations
10 appear in the application for a marriage license, a copy of which is hereto annexed, hereby made a part hereof, and marked "Exhibit A," the statements contained in said application being under the oath of the applicants, viz., Israel Eisenberg and Esther Kaliner.

The bill filed in Pennsylvania further alleged that the plaintiff therein was ignorant of the existence of the disease; that as soon as he discovered that the defendant was subject to epileptic fits he
20 immediately separated from the defendant, and has not lived with defendant from that time on, and that the answers given by the defendant under oath on the twenty-seventh day of November, 1928, were false and untrue, and known to be such by the defendant, and were made for the purpose of cheating and defrauding the plaintiff, and unlawfully inducing him to enter into the contract of marriage, and that the defendant had been guilty of perjury in making said statements.

30 The bill prays for the annulment of the marriage and is based upon the general equity powers of the Court independently of matrimonial domicile.

A general appearance was entered by the defendant, Esther Eisenberg, through her attorney, Harry Arronson.

Preliminary objections to the bill of complaint

Petition

have been filed in Pennsylvania, and in a petition filed in said court by Esther Kaliner Eisenberg on or about the eighth day of September, 1931, it was set up that:

“3. That prior to the filing of the bill by the plaintiff the aforesaid plaintiff (Israel Eisenberg), filed a petition for annulment in the Chancery Court of the State of New Jersey, No. 74-110, and said proceedings were subsequently on the twentieth day of July, 1931, dismissed by the Vice-Chancellor.”

By bill recently filed in the New Jersey Court of Chancery by Esther Eisenberg against your petitioner, Docket No. 86-547, a copy of which has been furnished your petitioner’s solicitor by D. Truman Stackhouse, Esquire, solicitor for the complainant therein, the proceedings in Pennsylvania are recited, and a copy of the bill of complaint in the Pennsylvania courts annexed thereto.

In the bill of complaint in this court, Docket No. 86-547, paragraph 18 reads as follows:

“18. Complainant avers that the order of July 20, 1931, made by this Honorable Court dismissing the annulment proceeding instituted by the said Israel Eisenberg in this Honorable Court, and the order of the same date wherein it was adjudged by this Honorable Court that the said Israel Eisenberg had, on the 17th day of January, 1929, abandoned this complainant without any justifiable cause was *res judicata* between the parties hereto; but nevertheless the said Israel Eisenberg insists upon maintain-

Petition

ing and prosecuting the said action on the same grounds in the said Court of Common Pleas, No. 1, of the City of Philadelphia.”

6. Your petitioner, therefore, shows that Esther Eisenberg in the New Jersey Chancery suit, Docket
10 No. 86-547, and also in the Pennsylvania suit above-mentioned, intends to make use of the order of July 20, 1931, as *res judicata* of the matters set forth in the petition for annulment, Docket No. 74-110; that unless the said order of July 20, 1931, is amended by making the same conform to the actual facts, by reciting either a dismissal of the petition without prejudice or a voluntary withdrawal of the petition without prejudice, your petitioner will be
20 forever barred from litigating or being heard on an issue which has never previously been adjudicated by this Court.

Your petitioner, therefore, prays that the order entered in this cause, Docket No. 74-110, on July 20, 1931, be amended by striking out the following:

“And it is further ordered that the said petition of annulment be and the same is hereby dismissed with costs to the said Esther Eisenberg, in which shall be included a counsel fee of
30 \$100.00, to be taxed in the said costs and collected with the other items of the said bill;”

and inserting in the place and stead thereof the following:

“And it is further ordered that the said peti-

Petition

tion of annulment be and the same is hereby dismissed without prejudice with costs to the said Esther Eisenberg, in which shall be included a counsel fee of \$100.00, to be taxed in the said costs and collected with the other items of the said bill.”

And your petitioner will ever pray, etc. 10

WALTER S. KEOWN,
Solicitor for and
HARVEY F. CARR,
Of Counsel with Petitioner.

EXHIBIT A.

STATE OF PENNSYLVANIA }
COUNTY OF PHILADELPHIA } SS. 20

We, the undersigned, in accordance with the statements hereinafter contained, the facts set forth wherein we and each of us do solemnly swear are true and correct to the best of our knowledge, and belief, do hereby make application to the Clerk of the Orphans' Court of Philadelphia County, Pennsylvania, for a license to marry.

Israel Eisenberg 30
Esther Kaliner

STATEMENT OF MALE

Full name and surname Israel Eisenberg Color W.
Relationship of parties making this application, if

Petition

any none. Occupation Business. Birthplace Russia. Residence 1009 Park Ave. Collingswood, N. J. Date of Birth 2 Jan. 1890.

That he has once been married before, and marriage was dissolved by death at Phila. Pa. 4 years ago.

Is applicant afflicted with any transmissible disease

10 No.

Name and Surname of Father William Eisenberg

Of Mother Anna Eisenberg

Maiden Name of Mother Anna Gottahd. Residence of father—Dead.

Of Mother—Dead Color of Father W. of Mother W.

Occupation of Father Dead of Mother Dead

Birthplace of Father Russia of Mother Same.

20 Is applicant an embecile, epileptic, of unsound mind, or under guardianship as a person of unsound mind, or under the influence of any intoxicating liquor or narcotic drug No. Has applicant within five years been an inmate of any county asylum or home of indigent persons No. Is applicant physically able to support a family Yes.

Signature of Applicant *Israel Eisenberg*

STATEMENT OF FEMALE

30 Full name and Surname Esther Kaliner Color W. Occupation None Birthplace New York. Residence 2520 N. 32 St. Date of Birth 15 Mch. 1903.

That she has not been married before.

Is Applicant afflicted with any transmissible disease
No.

Petition

Name and Surname of Father Samuel Kaliner of
Mother Bessie Kaliner.

Maiden name of Mother. Bessie Freedman. Resi-
dence of Father, same as above.

of Mother, Same as above. Color of Father W. of
Mother W.

Occupation of Father Business of Mother Same. 10

Birthplace of Father Russia. of Mother Same.

Is Applicant an *embecile*, epileptic, of unsound
mind, or under guardianship as a person of unsound
mind, or under the influence of any intoxicating
liquor or narcotic drug No.

Signature of Applicant *Esther Kaliner*

Sworn and subscribed to before me this 27 day of
Nov. A. D. 1928.

Geo. W. Miller

Assistant Clerk of 20
Orphans' Court.

State of New Jersey, }
County of Camden, } ss.

HARVEY F. CARR, of full age, being duly sworn ac-
cording to law, on his oath says:

I have been and still am associated with Walter
S. Keown, Esquire, solicitor for Israel Eisenberg, 30
and actively participated in the trial of the cases
referred to in the foregoing petition, and that there
has been submitted to me copies of the proceedings
in Pennsylvania as well as a copy of the bill of
complaint filed by Esther Eisenberg against Israel
Eisenberg in the New Jersey Court of Chancery,

Petition

Docket No. 86-547. I, therefore, aver that such of the matters referred to in the said petition as are matters of record are true, to the best of my knowledge, information and belief.

HARVEY F. CARR.

10 Sworn to and subscribed before me this twenty-seventh day of October, 1931.

ELSIE L. BELL,
Notary Public of N. J.

State of New Jersey, }
County of Camden, } ss.

20 ISRAEL EISENBERG, of full age, being duly sworn according to law, on his oath says:

I am the petitioner named in the foregoing petition, that the matters and things therein set forth are true to the best of my knowledge, information and belief, and as to such matters as are matters of record, I am informed as to the truth and accuracy thereof by my Pennsylvania counsel, Abraham Wernick, Esquire, and by my New Jersey solicitor and counsel, Walter S. Keown, Esquire, and Harvey

30 F. Carr, Esquire, respectively.

ISRAEL EISENBERG.

Sworn to and subscribed before me this twenty-seventh day of October, 1931.

MARY E. MORRIS,
Notary Public of N. J.

*Answer to Petition for Amendment of
Decree and Cross-Petition*

A true copy

WALTER S. KEOWN,
*Sol'r for Petitioner,
Israel Eisenberg.*

10

ANSWER TO PETITION FOR AMENDMENT
OF DECREE AND CROSS-PETITION.

(Filed November 16, 1931.)

74-110.

IN CHANCERY OF NEW JERSEY.

20

Between

ISRAEL EISENBERG,
Petitioner,

and

ESTHER KALINER, other-
wise ESTHER EISEN-
BERG,

Defendant.

On Petition for An-
nulment.

Answer to Petition
for Amendment of
Decree and Cross-
Petition.

30

The answer of Esther Eisenberg, the defendant in the above cause, to the petition of Israel Eisenberg and the amendment of decree therein, respectfully shows:

*Answer to Petition for Amendment of
Decree and Cross-Petition*

1. She admits paragraph one of the petition.
2. She admits paragraph two of the petition.
3. She admits paragraph three of the petition,
10 with the qualifications hereinafter set forth.
4. She denies paragraph four of the petition.
- 5a. She admits the first sub-paragraph of para-
graph five of the petition so far as the same is de-
scriptive of the allegations contained in the bill for
the annulment of the marriage between petitioner
and defendant, filed in the Court of Common Pleas
No. 1 of the City of Philadelphia; but denies the al-
20 legations of the bill.
- 5b. She admits the second sub-paragraph of para-
graph five of the petition.
- 5c. As to the third sub-paragraph of paragraph
five of the petition, defendant is advised and believes
that an appearance was entered on her behalf by
her Philadelphia attorney, Henry Arronson, but is
informed that such appearance was a special ap-
30 pearance and not a general appearance.
- 5d. She believes the allegations of the fourth sub-
paragraph of paragraph five of the petition are true.
- 5e. She admits the fifth sub-paragraph of para-
graph five of the petition.

*Answer to Petition for Amendment of
Decree and Cross-Petition*

5f. She admits the sixth sub-paragraph of paragraph five of the petition.

5g. She admits that part of paragraph six in which it is stated that she intends to make use of the order of July 20, 1931, as *res judicata* of the matters set forth in the petition of annulment, 74-110; and as to the balance of the said paragraph she believes it to be true. 10

A. In further answer to the petition, defendant says that shortly after the time of the abandonment of her by her husband, the petitioner herein, she instituted in this court a suit for maintenance under the Statute, all of which will more fully appear in said suit entitled in the name of this defendant as complainant and the said Israel Eisenberg as defendant, 75-4. 20

B. That the said Israel Eisenberg set up in said suit as an alleged defense that the defendant herein was an epileptic at the time of the marriage and had concealed that fact from him and that he was ignorant of the same, and prayed for the annulment of the marriage between the said Israel Eisenberg and this defendant, all of which will appear by the record of the said suit under the title of Israel Eisenberg, petitioner, and Esther Kaliner, otherwise Esther Eisenberg, defendant, 74-110. 30

C. Both matters were bitterly contested on both sides and finally were set down for final hearing on February 5, 1931.

*Answer to Petition for Amendment of
Decree and Cross-Petition*

D. Before the date fixed for final hearing a conference was requested between counsel representing the said Israel Eisenberg and counsel representing this defendant, in which it was then and there stated that the said Israel Eisenberg intended to abandon
10 his petition for annulment and consent to its dismissal and to admit the abandonment by the said Israel Eisenberg of this defendant and that such abandonment was without legal justification and leaving the matter of proper allowance for this defendant's maintenance to be determined by the Court.

E. This defendant was advised by her counsel in this action and objected to such proceeding on the
20 ground that she considered her character and reputation had been greatly prejudiced by the annulment suit, a great deal of newspaper notoriety having been given to the same, and she having been greatly humiliated among her friends and the public generally by the unfounded allegations contained in the petition of the said Israel Eisenberg.

F. Defendant, however, was assured by her counsel that a dismissal of a proceeding in the Court of
30 Chancery was the same as an adjudication in her favor and that they would not consent to any dismissal being made under circumstances by which she could be subjected to any further maintainable suit; and that if the said Israel Eisenberg, through his counsel endeavored to procure a dismissal of his petition in such a manner as to enable him to bring

*Answer to Petition for Amendment of
Decree and Cross-Petition*

another maintainable suit that her counsel would insist upon the annulment matter being heard by the Court.

G. Upon being so assured by her counsel defendant offered no further objection. 10

H. That she heard nothing further of the annulment feature of the proceedings until sometime shortly after the first day of August, 1931, when she saw in a Philadelphia newspaper that she had again been made the subject of an action in Philadelphia based upon the same grounds as were advanced in the New Jersey annulment suit, shortly following which she was served with certain process in the City of Philadelphia, where she resides, which she afterwards ascertained was the annulment proceeding instituted in the Court of Common Pleas No. 1 in the City of Philadelphia, and to which reference is made in the petition for the amendment of the decree in this cause. 20

I. Her counsel, the said D. Trueman Stackhouse, had left for a vacation in Europe on the 29th of July, 1931, and she was unable to consult with him, in addition to which he did not practice in Philadelphia, and she thereupon employed Henry Arronson, Esquire, of the Philadelphia Bar, to represent her in the matter. 30

J. Defendant avers that the omission of the phrase "without prejudice," in the order dismissing

*Answer to Petition for Amendment of
Decree and Cross-Petition*

the annulment petition of July 20, 1931, was not by inadvertence; and further avers that at that time the said Israel Eisenberg had realized the futility of attempting to fasten upon defendant the unjust accusation which he had theretofore made against her and intended at that time to wholly abandon any such proceeding, either in this court or elsewhere.

K. The institution of the annulment suit in Philadelphia is without legal justification or excuse; but was instituted by the said Israel Eisenberg in that form because he feared to have the matter heard in the courts of New Jersey, trusting that by some means, best known to those who are accustomed to dealing with situations of this kind in Philadelphia, he might succeed in the courts of Philadelphia where he could not succeed in the courts of New Jersey; and that the institution of the said Philadelphia suit came purely as an afterthought; but that there was never any intention at the time the annulment suit in New Jersey was dismissed, as it should be dismissed so as to enable the said Israel Eisenberg to institute another suit for the same cause.

L. Defendant avers that the application of the said Israel Eisenberg for the amendment of the order of July 20, 1931, entered in this cause is without merit.

Defendant, however, in the alternative prays by way of cross-petition exhibited herein, that in the

*Answer to Petition for Amendment of
Decree and Cross-Petition*

event that the prayer of the petition be granted that it be granted only upon an entire reopening of the said annulment suit and a complete rehearing thereof by this Court; and prays that in the event of the prayer of the petition being granted that the entire matter be reheard herein.

10

Defendant prays to be hence dismissed with her reasonable costs and charges, and a reasonable counsel fee to be allowed her herein; or in the alternative that a complete rehearing of the said annulment suit be had.

This defendant as cross-petitioner will ever pray,
&c.

D. T. STACKHOUSE,
*Solicitor for Esther Eisenberg,
Defendant and Cross-Petitioner.* 20

State of New Jersey, }
County of Camden, } ss.

ESTHER EISENBERG, of full age, being duly sworn according to law, on her oath, says:

1. I am the defendant and cross-petitioner in the foregoing answer; and that the matters and things therein set forth are true so far as they relate to my acts and so far as they relate to the acts of others I believe them to be true.

ESTHER EISENBERG.

*Answer to Petition for Amendment of
Decree and Cross-Petition*

Sworn and subscribed before me this 2nd day of
November, 1931.

HAROLD R. JAMES,
Notary Public for New Jersey.

10

State of New Jersey, }
County of Camden, } ss.

D. TRUEMAN STACKHOUSE, of full age, being duly
sworn according to law, on his oath, says:

1. I am the party named in the foregoing answer
and cross-petition of Esther Eisenberg and referred
20 to as her counsel.

2. Shortly before the third day of February, 1931,
being one of the days upon which the above cause
was set down for final hearing, a conference was
requested by counsel representing Israel Eisenberg,
the petitioner in the annulment suit and the defen-
dant in the alimony suit, said conference to be with
the Honorable E. B. Leaming, Vice-Chancellor to
whom the said causes were referred.

30

3. I attended the said conference with Joseph
Varbalow with whom I was associated in represent-
ing Mrs. Esther Eisenberg.

4. Present at said conference were the said Vice-
Chancellor, Walter S. Keown, Esquire, solicitor for

*Answer to Petition for Amendment of
Decree and Cross-Petition*

and Harvey F. Carr, of counsel with, the said Israel Eisenberg, the said Joseph Varbalow and myself.

5. At that time the said Harvey F. Carr, who acted as the spokesman on behalf of the said Israel Eisenberg, stated to the Court that it was the intention of the said Israel Eisenberg to abandon his petition for annulment and admit the abandonment by him of the said Esther Eisenberg, and that such abandonment was without legal justification, and go to hearing purely upon the question of the proper amount to be allowed by the Court for her support and maintenance. 10

6. Mr. Varbalow and I offered no objection to this, although in our opinion, since both parties were actors in the causes and we would lose a manifest advantage by the dismissal of the annulment suit, we felt that inasmuch as it was our opinion that such dismissal was in the nature of a final adjudication and decree against the said Israel Eisenberg, that we would have gotten as much by this means as by going to a final hearing upon such annulment issue. 20

7. I afterwards conferred with Mrs. Esther Eisenberg and told her as to what the proposed action was and she vigorously objected to the same, but upon my telling her that it was my opinion that a dismissal of a suit in Chancery was equivalent to an adjudication so far as permitting a complainant to again bring a suit, she was willing to accede to such action. 30

*Answer to Petition for Amendment of
Decree and Cross-Petition*

8. At no time was it indicated to me or the Court that it was intended to dismiss such action without prejudice, and had it been so indicated to me I would have refused to have acceded to such proposition inasmuch as it was my opinion then and still
10 is that we had the right to object to such dismissal and to insist upon proceeding to final hearing in the annulment suit.

9. That the form of the final decree dismissing the petition for annulment could not be agreed upon between counsel and the form thereof was fixed by the said Vice-Chancellor Leaming but was not signed until after the rendition of the opinion in
20 the alimony suit sometime shortly before the 20th day of July, 1931; and on the day and year last aforesaid, after giving the solicitor for the said Israel Eisenberg notice of my intention so to do I submitted to the Vice-Chancellor a form of order in both suits, upon which a hearing was had before him and a copy of the order in the annulment suit was sent to the said Walter S. Keown, solicitor for the said Israel Eisenberg on the 21st day of July, the day following its signature by the Vice-Chancellor;
30 and no objection whatever was made to its form at that time nor has any been made to its form up to the time of exhibition of the petition for its amendment lately filed herein, except the futile motion to amend which was made on the 26th of October, 1931.

D. T. STACKHOUSE.

Conclusions

Sworn and subscribed before me this 2nd day of
November, 1931.

HAROLD R. JAMES,
Notary Public for New Jersey.

CONCLUSIONS.

10

IN CHANCERY OF NEW JERSEY.

Between

ISRAEL EISENBERG,

Complainant,

and

ESTHER EISENBERG,

Defendant.

On Order to Show
Cause.

20

HARVEY F. CARR, Esq., WALTER S. KEOWN, Esq.,
for the complainant.

D. TRUEMAN STACKHOUSE, Esq., for the defendant.

The Court: I shall not dispose of the matter until
I read Mr. Stackhouse's affidavits and look at the
authorities which he has cited.

Mr. Carr: May we have a memorandum of the
authorities and an opportunity to answer them?

30

The Court: I would be glad to receive anything
you have. At present I haven't very much doubt on
the subject, but I am always glad to receive any
authorities which counsel might have.

Conclusions

A court of equity and a court of law differ somewhat on the effect of the final disposition of a case by its dismissal. A court of law will grant a non-suit on motion, the plaintiff may go clear up to the last stages of trial and take a voluntary non-suit, and it is no bar, he can bring a new suit. A
10 court of equity has not been that liberal, but I can see no good reason why they should not be, in the absence of special circumstances. I don't think that any adjudication in a court of law, or in a court of equity, should, in the absence of some special and peculiar circumstances, be treated as a final disposition of the merits of the case and bar a person from being heard on its merits in an appropriate way, and in this case, unless I shall find some authority to deny me the right to amend this decree, or some
20 circumstance of the case which should impel a Court to refuse to amend this decree, my inclination would be, and my present notion is, that the amendment now sought should be allowed. There has been no investigation of any court touching the mental capacity of Mrs. Eisenberg, or her mental condition at the time she was married, or her physical condition, or anything that goes to the validity of the marriage ceremony, and I don't think it was intended upon the part of anyone at the time this de-
30 cree was signed that the language of the decree to the effect that the bill should be dismissed should be an adjudication of that issue. Of course not. Why should it be? There had been no hearing on that issue, it was simply a desire on the part of the solicitors who had filed the suit for annulment to withdraw that suit and not to proceed further with

Conclusions

its trial. No advantage had accrued to the defendant through the proceedings which had been taken up to the time of dismissal. It was an independent suit, it had no relation to the maintenance suit at all except, as I recall it, there was an order of consolidation made for convenience, but it was an independent issue. If the annulment suit should have been determined in advance of the maintenance suit it might have operated as a bar, but it wasn't heard on the merits, it was withdrawn without a hearing, and an order was signed in the language that is ordinarily, in a court of equity, regarded as significant of a dismissal on the merits, and I think it should have been and now should be qualified unless there is some established rule against it. I will examine the affidavits and the authorities and advise counsel of my determination. 10 20

Heard and tentatively determined on November 2nd, 1931.

SUPPLEMENTAL.

I have examined the affidavits and authorities and will advise the amendment sought. The general rule appears to be that unless some advantage has accrued to defendant, complainant should be permitted to dismiss without prejudice. It would be clearly unequitable to bar complainant from any rights he may have on the merits, without any consideration of the merits by any court. 30

Determined November 2nd, 1931.

Order Absolute

ORDER ABSOLUTE.

75-4.

IN CHANCERY OF NEW JERSEY.

10 Between
 ESTHER EISENBERG,
Complainant,
 and
 ISRAEL EISENBERG,
Defendant. } On Bill for Main-
 tenance.

74-110.

IN CHANCERY OF NEW JERSEY.

20 Between
 ISRAEL EISENBERG,
Petitioner,
 and
 ESTHER KALINER, other-
 wise ESTHER EISEN-
 BERG,
Defendant. } On Petition for An-
 nulment.

30

ON PETITION.

ORDER ABSOLUTE.

It appearing to the Court that a duly verified copy of the petition heretofore filed herein, and of the order to show cause heretofore, to wit, on the twenty-eighth day of October, 1931, entered herein,

Order Absolute

have been served on the defendant, Esther Eisenberg, and Walter S. Keown, Esquire, appearing for Israel Eisenberg, the petitioner (with whom is associated Harvey F. Carr, Esquire, of counsel), and D. Trueman Stackhouse, Esquire, appearing for the defendant, Esther Eisenberg, and the Court having heard and considered the arguments of counsel thereon; 10

; and it appearing to the Court that the petitioner is entitled to the relief prayed for in the petition;

It is, on this twenty-third day of November, 1931, on motion of Walter S. Keown, ordered that the order heretofore entered herein on the twentieth day of July, 1931, be, and the same hereby is, amended as follows:

(a) By striking out that portion of the order reading as follows: 20

“And it is further ordered that the said petition of annulment be and the same is hereby dismissed with costs to the said Esther Eisenberg, in which shall be included a counsel fee of \$100—to be taxed in the said costs and collected with the other items of the said bill;”

(b) By substituting in the place and stead thereof the following: 30

“And it is further ordered that the said petition of annulment be and the same is hereby dismissed without prejudice with costs to the said Esther Eisenberg, in which shall be included a counsel fee of \$100 to be taxed in the said costs

Notice of Appeal

and collected with the other items of the said bill;”

With costs to the complainant.

E. R. WALKER.

Respectfully advised,
10 E. B. LEAMING.

NOTICE OF APPEAL.

(Filed Dec. 31, 1931.)

74-110.

IN CHANCERY OF NEW JERSEY.

20

Between

ISRAEL EISENBERG,

Petitioner,

and

ESTHER KALINER, other-
wise ESTHER EISEN-
BERG,

Defendant.

On Petition for An-
nulment.

Notice of Appeal.

30

The defendant hereby appeals from that part of the order made in the above cause, dated November 23, 1931, made by the Chancellor upon the advice of the Vice-Chancellor, E. B. Leaming, which provides

Notice of Appeal

that a portion of the final decree made in this cause should be modified by incorporating therein the following language:

“And it is further ordered that the said petition of annulment be and the same is hereby dismissed without prejudice,”

10

to the Court of Errors and Appeals in the last resort in all causes.

D. T. STACKHOUSE,
*Solicitor for and of Counsel with
Defendant-Appellant.*

Dated December 31, 1931.

I conceive there is good cause for appeal in the 20
above-entitled cause.

D. T. STACKHOUSE,
*Of Counsel with Defendant-
Appellant.*

30

PETITION OF APPEAL.

(Filed Jan. 13, 1932.)

10 NEW JERSEY COURT OF ERRORS AND
APPEALS.

Between	}	On Appeal from Chancery. Petition of Appeal.
ISRAEL EISENBERG,		
<i>Petitioner-Respondent,</i>		
and		
ESTHER KALINER, other-		
20 wise ESTHER EISEN-	}	
BERG,		
<i>Defendant-Appellant.</i>		

*To the Honorable Court of Errors and Appeals in
the last resort in all causes:*

The petition of Esther Eisenberg, the appellant
30 in the above-entitled cause, respectfully shows that:

1. Petitioner finds herself aggrieved by a certain order made in the above cause in the Court of Chancery by the Honorable Edwin Robert Walker, Chancellor of the State of New Jersey, dated November 23, 1931, in a certain cause in said Court of

Petition of Appeal

Chancery, wherein the said Israel Eisenberg was petitioner and this appellant was defendant, in this respect, to wit:

2. That the said order provides that the final decree in said cause should be modified by incorporating therein the following language, viz.: 10

“And it is further ordered that the said petition of annulment be and the same is hereby dismissed without prejudice.”

3. Petitioner appeals from said order on the ground that the same is erroneous in that the only proper method for correcting the said decree is upon motion for a rehearing of the said cause, and that the said order was made upon no sufficient ground, the application therefor stating no ground, 20 or an insufficient one for the making of the said order; and that the said order was improperly granted.

Petitioner, therefore, prays:

I.

That the said order of the said Chancellor may be reversed, set aside and for nothing holden; and 30 that petitioner may have such other relief in the premises as to this Court shall seem proper.

D. T. STACKHOUSE,

*Solicitor for and of Counsel with
Appellant.*

NEW JERSEY COURT OF ERRORS AND
APPEALS.

Between
ISRAEL EISENBERG,
Petitioner-Respondent,

and

ESTHER KALINER, otherwise ESTHER EISENBERG,
Defendant-Appellant.

ON APPEAL FROM CHANCERY.

BRIEF FOR DEFENDANT-APPELLANT.

STATEMENT OF THE CASE.

The parties to this proceeding are husband and wife. The wife, who is the appellant, will be referred to as Mrs. Eisenberg. She filed her bill under the statute against her husband, who will be referred to in this brief as Mr. Eisenberg, upon an allegation of abandonment by him.

The parenthetical references are to the state of the case.

Brief for Defendant-Appellant

Mr. Eisenberg filed a petition for annulment against Mrs. Eisenberg on the ground that she was an epileptic at the time of her marriage and concealed this fact from him. Shortly before the hearing Mr. Eisenberg, through his counsel, indicated his desire to withdraw his petition for annulment, leaving the only issue to be tried the question of the amount of alimony to be paid to Mrs. Eisenberg (p. 4).

Thereupon an order was entered (p. 1) on motion of Mrs. Eisenberg's solicitor, vacating an order theretofore made consolidating the two cases and withdrawing the answer of Mr. Eisenberg to the bill in the maintenance suit except as to the issue of amount, and dismissing the petition for annulment. This order was made on July 20, 1931. Over three months later, on October 28, 1931, a petition was addressed to the Chancellor by Mr. Eisenberg, stating that by inadvertence the words "without prejudice" were omitted from the order dismissing the annulment petition, and praying that the decree be amended by the insertion of such words. The petition further set up that he had instituted suit in one of the Philadelphia courts for the annulment of his marriage on the same grounds as were alleged in the suit in this court (pp. 5, &c.); and that a bill had been filed in this court by Mrs. Eisenberg against Mr. Eisenberg seeking a restraint against the prosecution of the Philadelphia suit (p. 7), the petition praying that the order dismissing Mr. Eisenberg's annulment suit should be amended by inserting the words "without prejudice."

Brief for Defendant-Appellant

It is from the order absolute (p. 26) that this appeal was taken.

GROUNDS FOR APPEAL.

Petitioner, Mrs. Eisenberg, asserts:

1. That the order amending the order of dismissal is erroneous because the only proper method for correcting the decree is upon a motion for a re-hearing.
 2. That the order was made upon no sufficient grounds.
 3. That the order was improperly granted.
-

BRIEF OF THE ARGUMENT.

The only reason for asking this Court to correct the order of dismissal is the statement (p. 5):

“That by inadvertence the words ‘without prejudice’ were omitted from that portion of the order whereby the petition for annulment was dismissed.”

The answer of Mrs. Eisenberg denies this, and her denial is supported by her own affidavit and

Brief for Defendant-Appellant

that of her counsel (p. 19-20). Nevertheless, upon the issue so framed the Vice-Chancellor proceeded, without any hearing on the matter, other than a consideration of the petition, answer and affidavits, to revise the order of dismissal, making use of the following language in his conclusions (p. 24):

“I don't think it was intended upon the part of anyone at the time this decree was signed that the language of the decree to the effect that the bill should be dismissed should be an adjudication of that issue.”

This he did, although there had been no rehearing upon the subject or any opportunity on the part of Mrs. Eisenberg to produce any affidavits in support of the allegations of her answer to the petition.

“Where the error or deficiency is of substance generally a rehearing is necessary or a bill of review, a supplemental bill in the nature thereof or an original bill.

“Motions and petitions of this character are analogous to the common law remedies for the correction or vacation of judgments.”

21 *C. J.* 713.

“An application which states no ground or reason for the modification asked, or an insufficient one, is properly refused.”

34 *C. J.* 247.

The case of *Lynde v. Lynde*, 54 E. 473; 35 A. 641, is a case in which a decree for divorce was made

Brief for Defendant-Appellant

with no reservation touching the question of alimony. The Court amended the decree in that respect, stating:

“The rule recognized by this Court is that, while the Court will not vary or alter an enrolled decree in a material point without a bill of review or rehearing, it will, upon petition, amend its enrolled decree when the amendment is necessary to give full expression to its judgment, and is matter which would, without doubt, have been incorporated in the decree when made, if attention had been called to it.”

We submit, however, that the addition of certain words to a divorce decree looking to the preservation of rights which have already been established is a vastly different thing from seeking, by the interpolation of the phrase “without prejudice,” to avoid the effect of a voluntary dismissal of a suit for annulment, tacitly involving a confession of its being without merit. This, especially in view of the fact that Mr. Eisenberg waited over three months before he made any such application, and then only when he was met with a proceeding which sought to prevent him from urging an unfounded suit in another jurisdiction.

It is difficult to see how the Vice-Chancellor could, without any hearing upon the merits, have concluded that it was not

“intended upon the part of anyone at the time this decree was signed that the language of

Brief for Defendant-Appellant

the decree to the effect that the bill should be dismissed should be an adjudication of that issue.”

As a matter of fact, upon a consideration of the question of fact, the evidence would seem to be quite to the contrary; but, of course, this Court is not concerned with that element except so far as to enable it to decide that under the application as presented there was such a question of fact between the parties as called for a rehearing, to which Mrs. Eisenberg was entitled at that time.

It is respectfully submitted, therefore, that the order absolute (p. 26) should be set aside for the reasons heretofore given.

D. TRUEMAN STACKHOUSE,
*Solicitor for and of Counsel with
Esther Eisenberg, Defendant-
Appellant.*

