Oral Argument
Friday, June 15, 1951
Div. A

IN THE SUPREM

MORRIS GORDON,

Appellant,

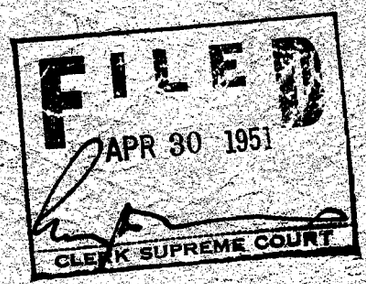
vs.

MIRIAM GORDON,

Appellee.

: ON APPEAL FROM THE CI
: COURT OF THE ELEVENTH
: DICIAL CIRCUIT OF FLO
: IN AND FOR DADE COUNT
: CHANCERY ACTION NO. 1

REPLY BRIEF OF APPELLANT



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IN THE SUPREME COURT OF FLORIDA

MORRIS GORDON,	:	
Appellant,	:	ON APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR DADE COUNTY IN CHANCERY ACTION NO. 103685
vs.	:	
MIRIAM GORDON,	:	
Appellee.	:	

REPLY BRIEF OF APPELLANT

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I N D E X

AUTHORITIES CITED

STATUTES

CASES

I

HISTORY OF THE CASE

The history of this case is set forth in appellant's original brief and is restated in part in appellee's reply brief. No useful purpose can be accomplished by a further historical statement here.

II

STATEMENT OF QUESTIONS INVOLVED

Reference is here made to appellant's original brief for a statement of the questions conceived by appellant to be involved in this appeal, and reference is further made to appellee's reply brief, pages 1-3, for a statement of the questions conceived by appellee to be involved in this appeal. No useful purpose can be accomplished by here restating the questions suggested by appellee since these questions are hereinafter set forth, together with appellant's reply thereto.

III

ARGUMENT

FIRST QUESTION

Appellee asserts that the Chancellor did not commit error in answering in the affirmative the following question:

> "WHEN A FINAL DECREE OF THE CIRCUIT COURT IN DADE COUNTY, FLORIDA, GRANTING AN ABSOLUTE DIVORCE TO A WIFE IS REVERSED ON APPEAL TO THE SUPREME COURT OF FLORIDA, ON THE GROUNDS THAT THE CHANCELLOR ERRED IN REFUSING TO ALLOW THE HUSBAND TO PLEAD AND PROVE A FINAL DECREE OF A FOREIGN JURISDICTION WHICH WAS ENTITLED TO FULL FAITH AND CREDIT, AND THE CAUSE IS REMANDED FOR FURTHER PROCEEDINGS NOT INCONSISTENT

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WITH THE OPINION OF THE SUPREME COURT, DOES THE CHANCELLOR HAVE THE POWER AND AUTHORITY, IN HIS DISCRETION, TO PERMIT THE AMENDMENT OF THE PLEADINGS BY EITHER OF THE PARTIES?"

1. Appellant asserts that the above question is too broadly stated and does not deny that Chancellor has broad discretionary powers in the matter of permitting amendment of pleadings, but appellant avers that the Chancellor committed error, under the circumstances of this case, in permitting appellee to file in this cause her amended bill of complaint (T.V. I - 47) after this case was remanded by this Court with directions to the Chancellor as stated in the Opinion of this Court, for the following reasons, concisely stated:

(a) That the filing of said amended bill of complaint and the further proceedings thereon were inconsistent with the law of the case as established by the Opinion of this Court filed in the first appeal.

(b) That the filing of said amended bill of complaint and the proceedings thereon constituted a trial de novo upon issues of fact theretofore tried and adjudicated.

2. Upon the first appeal having been heard, this Court said, in its Opinion:

> "Consequently, we hold that the learned Chancellor erred in granting appellee's motion to strike the amendment to the appellant's answer and in entering a final decree of divorce in favor of appellee. Full faith and credit should have been accorded the final decree of the Pennsylvania court."

Thereupon, it became the law of the case that upon this suit being remanded to the trial court, the Chancellor should permit the amendment of appellant's answer setting up the final decree of the Pennsylvania court, and the Chancellor should thereupon enter a final

decree giving full faith and credit to the Pennsylvania decree and dismissing the bill of complaint, or receive evidence of the Pennsylvania decree and of the relevant law of Pennsylvania, and upon being satisfied with said proof, give full faith and credit to the Pennsylvania decree by dismissing the bill of complaint. Such further proceedings would have been consistent with the Opinion of this Court, but the Chancellor did not so proceed, but committed error in permitting appellee to file an amended bill of complaint, substantially identical with her original bill, and have a trial de novo of issues theretofore adjudicated at the first trial herein.

The appellant did, in Paragraph 12 of his answer to appellee's first bill of complaint, allege the pendency of the Pennsylvania suit and thereafter, upon the final decree having been entered in the Pennsylvania suit, appellant filed a motion in the trial court and attached thereto the record of the Pennsylvania suit and the final decree therein, and moved the Chancellor to give full faith and credence to the Pennsylvania final decree by dismissing the bill of complaint. Thereafter, as a precautionary measure, against the possibility that said motion to dismiss might be held improper procedure, appellant filed his motion for leave to amend his answer, to allege the Pennsylvania suit and final decree therein. Thus the Chancellor was confronted with both the motion to dismiss and the motion for leave to amend, and upon the hearing of said motions, the Chancellor granted the motion to amend, but denied the motion to dismiss. Thereafter, on the first appeal, appellant assigned as error the denial by the Chancellor of the motion to dismiss. This assignment of error was briefed in appellant's brief on the first appeal and was before this Court for consideration in said appeal. Upon this question, this Court, in its Opinion in the first appeal, said as follows:

> "The Chancellor was correct in denying appellant's motion to dismiss appellee's bill of complaint because a final decree, as well as the law of a foreign jurisdiction, must be pleaded and proved."

Appellant recognizes the general rule that a final decree of a court of a foreign jurisdiction and the law of a foreign jurisdiction must be pleaded and proved in the trial court. However, the exemplified record of the Pennsylvania record, as attached to appellant's said motion to dismiss the original bill of complaint was before this appellate court. The relevant law of Pennsylvania was also fully briefed in appellant's brief in the first appeal and was before this appellate court. Therefore, appellant says that it was within the power of the appellate court to recognize and determine for itself the sufficiency of the proceedings and the final decree of the Pennsylvania court as set out in the said record thereof, and likewise to determine and recognize the law of Pennsylvania relevant thereto, without requiring proof thereof in the trial court. Appellant's contention here is that this appellate court could have and probably did determine for itself the sufficiency of the record of said Pennsylvania suit and final decree and of the relevant law of Pennsylvania, and did thereupon, in effect, direct the Chancellor to give full faith and credence to said record and law and proceed accordingly. Appellant considers that the statement of this Court in its Opinion, that " a final decree, as well as the law of a foreign jurisdiction, must be pleaded and proved," was made in answer to appellant's assignment of error that the Chancellor committed error in denying the motion to dismiss, and is not necessarily to be taken as a direction to the Chancellor, upon the suit being remanded, to permit the pleading and proof of the Pennsylvania decree and relevant law. If such had been the intention of this Court, it would seem that the language of the Opinion would have been not that "full faith and credit should have been accorded the final decree of the Pennsylvania Court", but, rather, that "upon proof of the allegations of said amendment by appellant, full faith and credit should be accorded by the Chancellor to the final decree of the Pennsylvania court." In other words, it may reasonably be inferred from the language

used by this Court in said Opinion that this Court had satisfied itself as to the sufficiency of the record and final decree of the Pennsylvania court and relevant Pennsylvania law, and accordingly, did direct the Chancellor to give full faith and credit to the final decree in the Pennsylvania suit. Nevertheless, if appellant is incorrect in this construction of the Opinion of this Court, upon the case being remanded, it was the duty of the Chancellor to permit the amendment of appellant's answer and the proof of the Pennsylvania suit, decree and relevant law, and thereupon, if satisfied with said proof, to dismiss plaintiff's bill of complaint. All other issues had been adjudicated at the first trial in the trial court.

3. The Chancellor committed error in permitting appellee to file her amended bill of complaint (T.V. I-47). Not only was such proceeding inconsistent with the law of the case as announced in the Opinion of this Court on the first appeal, but also the proceeding enabled appellee to have a trial de novo of all the facts theretofore tried and adjudicated. A comparison of the allegations of the original bill of complaint with the allegations of the amended bill of complaint, and a further comparison of the testimony and evidence adduced at the first trial of this cause with the testimony and evidence adduced at the second trial before the Special Master, David W. Dyer, Esq., after the filing of said amended bill of complaint reveals that both the said bill of complaint and said testimony and evidence are substantially identical. Notwithstanding that appellee, at the first trial, may have been reticent to testify concerning her intimate marital relations with appellant, nevertheless, she had alleged said intimate relations in her first bill of complaint and had abundant opportunity at the first trial to testify and did testify with reference thereto. Substantially nothing new was introduced in this case by appellee's amended bill of complaint at the second trial thereon. In other words, the Chancellor, by permitting appellee to

file her said amended bill of complaint, did permit her to have a new trial upon substantially the same facts and issues proved in the first trial, but with the possibility that a new Master would recommend more favorable relief in her interest than had been recommended by the first Master. Inasmuch as the second Master, on the second trial de novo, recommended more extensive relief than that recommended by the first Master, the rights of the appellant were thereby prejudiced.

4. The appellee contends that the Chancellor did not commit error in permitting her to file her said amended bill of complaint and thus procure a trial de novo, and in support of this contention she cites the case of Federal Land Bank of Columbia v. Brooks, 132 Fla. 506, 190 So. 737 (appellee's brief, page 7), but an examination of the report of said case does not reveal that the issues involved in that suit had already been tried and adjudicated and that the permitted amendment enabled plaintiff to have a trial de novo of these same issues as in the suit at bar.

5. Appellant insists that the case of Martin v. Benson, 112 Fla. 364, 150 So. 603, and the other cases cited in appellant's original brief, page 19, support appellant's position as hereinabove stated for that the amended bill of complaint did not change the settled law in the suit at bar as previously decided by this Court on the first appeal as applied to the facts adjudicated at the first trial, which were substantially the same as the facts adjudicated at the second trial. No new facts were alleged in the amended bill of complaint which had not been alleged in the first bill of complaint and which would serve to change the conclusions of this Court as announced in its Opinion on the first appeal. Reference is made to Ball v. Yates, 158 Fla. 521, 29 So. 2d 729; Palm Beach Estates v. Croker, 106 Fla. 243, 22 So. 697, cited on page 20 of appellant's original brief.

SECOND QUESTION

Appellee asserts that the Chancellor committed no error in answering in the affirmative the following question:

> "WHERE A WIFE CHARGES THAT HER HUSBAND IS GUILTY OF EXTREME CRUELTY BY THE HUSBAND TOWARD THE WIFE, AND THE HUSBAND SETS UP AS A DEFENSE A FINAL DECREE OF THE COURT OF COMMON PLEAS OF CAMBRIA COUNTY, PENNSYLVANIA, DISMISSING A SUIT THEN PENDING, INSTITUTED IN SAID COURT BY THE WIFE FOR DIVORCE ON THE GROUND OF INDIGNITIES TO THE PERSON, WHICH SAID DECREE IS ENTITLED TO FULL FAITH AND CREDIT, AND THE WIFE PROVES ACTS OF PHYSICAL CRUELTY, AND THE SPECIAL MASTER RECOMMENDS A DIVORCE ON THE GROUND OF EXTREME CRUELTY OF A PHYSICAL NATURE, MAY THE CHANCELLOR THEN ENTER A FINAL DECREE FOR DIVORCE ON SUCH GROUND?"

1. Appellant insists that the Chancellor committed error in answering the foregoing question in the affirmative and by entering a final decree granting a divorce to appellee in part upon the ground of extreme cruelty. The question here presented is in effect the same as the fourth question stated and argued in appellant's brief, pages 42-47, and reference is here made thereto.

2. The test of the identity of causes of action for the purpose of determining the question of res adjudicata is the identity of the facts essential to the maintenance of the action (Bagwell v. Bagwell, 153 Fla. 471, 14 So. 2d 843; Gordon v. Gordon, 160 Fla. 838, 36 So. 2d 744. We are concerned here in comparing facts essential to maintain the Pennsylvania cause of action

for divorce on the ground of indignities to the person with the facts essential to maintain the Florida cause of action for divorce on the ground of extreme cruelty. The facts essential to the maintenance of a cause of action in Florida, on the ground of extreme cruelty, are facts of conduct by the defendant of a physical character, or of a mental character, or of a combination of a physical and a mental character. In Florida we have a single cause of action for divorce on the ground of extreme cruelty. We do not have two separate causes of action for divorce, one on the ground of extreme cruelty of a physical character, and the other on the ground of extreme cruelty of a mental character.

> The single cause of action for divorce on the ground of extreme cruelty was established by the Legislature of the State of Florida, by the enactment of Section 65.04, Florida Statutes.

3. The record here (T. V. II - 325-466) shows that the facts essential to the maintenance in Pennsylvania of an action for divorce on the ground of indignities to the person, are facts of conduct of the defendant, either of a physical character, or of a mental character, or of a combination of both, which render plaintiff's condition intolerable and life burdensome.

> This appellate court has held that the facts essential to the maintenance of the Pennsylvania action for divorce on the ground of indignities to the person and the facts essential to the maintenance of the Florida action for divorce on the ground of extreme cruelty, are identical.
>
> Gordon v. Gordon, 160 Fla. 838, 36 So. 2d 774.

4. But appellee says the evidence adduced by her in the trial court shows that appellant committed toward her extreme

cruelty of a physical nature and that the final decree in her Pennsylvania suit is not a bar to a decree for divorce, in the suit at bar, on the ground of extreme cruelty. This contention is not tenable, for that:

> (1) In the first place, appellee did not adduce corroborated evidence of acts on the part of appellant of extreme cruelty of a physical nature. The record shows that she testified that appellant by innuendo accused her of lack of proper care of the child, resulting in his death by drowning, and that he insisted on having sexual relations with her when she was not in the mood therefor and which caused her pain. It does not appear from her testimony that she refused to engage in such relations with appellant, or that she seriously resisted his efforts to have such relations with her, or that he ever forced or compelled her to submit to such relations, or that he ever perpetrated upon her an act of violence. Appellee's charge that appellant's sexual relations with her were brutal in character is merely a conclusion. No facts were testified by appellee which would enable the court to determine whether his acts were brutal or otherwise. It is possible that sexual relations may cause pain and discomfort to a wife and yet the conduct of the husband in having such relations may not be brutal.
>
> (2) In the second place, even assuming, for purposes of this argument, that the record shows testimony on the part of the appellee of acts of conduct on the part of appellant of a physical character, it is not true that this

testimony was corroborated by the testimony of appellee's sister, Esther Jacovitz, whose testimony, at the most, corroborated in a very slight degree appellee's testimony as to appellant's alleged accusations of lack of proper care of the child. It is noted that this witness is the sister of the appellee and that her testimony at the second trial in this cause is at variance with her testimony given by her deposition at the first trial in this cause. It is submitted that her credibility as a witness was seriously impeached. But her testimony did not corroborate appellee's charges of any conduct by appellant of a physical character. This appellate court has frequently held that a divorce may not be granted upon the uncorroborated testimony of a plaintiff. Appellee's charges of conduct on the part of appellant of a physical character are absolutely uncorroborated by other testimony or evidence.

(3) In the third place, even assuming, for the purposes of this argument, that the record shows testimony on the part of appellee of acts of conduct on the part of appellant of a physical character, nevertheless, this fact did not justify the Chancellor in decreeing a divorce to appellee upon the ground of extreme cruelty. The cause of action, in Pennsylvania, for divorce on the ground of indignities, and the cause of action, in Florida, for divorce on the ground of extreme cruelty, may both be maintained and proven on testimony of acts of a physical nature. In this respect the two causes of action are identical with respect to the facts essential for their maintenance.

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5. Appellee would have the Court split and divide the single cause of action for divorce in Florida on the ground of extreme cruelty into two separate causes of action, one for extreme cruelty of a physical character and the other for extreme cruelty of a mental character. Appellee would then have the Court hold that the Florida cause of action for extreme cruelty of a physical character is comparable to the Pennsylvania cause of action for divorce on the ground of cruel and barbarous treatment endangering the life of the injured and innocent spouse, for the reason that the facts essential to the maintenance of both actions are identical and that, therefore, the Pennsylvania decree is not a bar to the final decree in the suit at bar granting a divorce to appellee on the ground of extreme cruelty. This position is not tenable for that:

> (1) There is no separate cause of action in Florida for divorce on the ground of cruelty of a physical character. The legislature, by the enactment of Section 65.04, Florida Statutes, has fixed only one single cause of action on the ground of cruelty. It was not within the power of the Master or the Chancellor to change this legislative act by judicial construction. Therefore, any comparison of causes of action must necessarily be a comparison of the facts essential to the maintenance of an action for extreme cruelty in Florida with either of the Pennsylvania causes of action for indignities or for barbarous treatment.
>
> (2) It does not appear from the record that the alleged conduct of the appellant toward the appellee constituted cruel and barbarous treatment endangering the life of appellee. It is not

alleged in appellee's original bill of complaint or in her amended bill of complaint that the alleged conduct of appellant did endanger the life of the appellee, nor is there any evidence in the record that his conduct toward her did endanger her life. It is apparent, therefore, that upon the testimony of the appellee, she could not succeed in obtaining a divorce in Pennsylvania on the ground of cruel and barbarous treatment which endangered her life. In no place did the appellee testify that the appellant ever treated her with violence or used physical force or compulsion to induce her to submit to sexual relations. It further appears from appellee's own testimony that said relations were unpleasant, sometimes caused her pain and disarranged her menstrual periods and thereby caused her cramps. She did not testify that this pain or that appellant's alleged insistance on sexual relations endangered her life, nor does it otherwise appear that such was the result thereof. Under these circumstances, the alleged conduct of the appellant did not constitute cruel and barbarous treatment which endangered appellee's life, but could constitute indignities to the person of the appellee rendering her condition intolerable and life burdensome, but this Court, upon the first appeal, has held that the facts essential to the maintenance of Florida action for divorce on the ground of extreme cruelty are identical with the Pennsylvania action for divorce on the ground of indignities. Consequently, it follows that the Penn-

sylvania decree must receive full faith and credence and is a bar to the final decree for divorce entered in this cause on June 8, 1950, on the ground of extreme cruelty.

6. The foregoing considered, the Chancellor committed error in entering final decree for divorce on June 8, 1950, on the ground of extreme cruelty and said decree should be reversed.

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THIRD QUESTION

Appellee asserts that the Chancellor committed no error in answering in the affirmative the following question:

> "WHERE IT APPEARS FROM THE TESTIMONY OF THE WIFE IN HER SUIT FOR DIVORCE THAT HER HUSBAND BY INNUENDOES AND INSINUATIONS CHARGED HER WITH LACK OF PROPER CARE OF THEIR MINOR CHILD IMMEDIATELY AFTER THE TRAGIC DEATH OF SAID CHILD BY ACCIDENTAL DROWNING, AND THAT HER HUSBAND, DURING THIS GRIEF STRICKEN PERIOD, INSISTED UPON SEXUAL RELATIONS WITH HER WITHOUT DISPLAY OF AFFECTION, AND WHEN SHE WAS NOT IN THE MOOD THEREFOR, CAUSING HER MENTAL AND PHYSICAL PAIN, AND THAT HER HUSBAND FAILED TO OFFER ANY APOLOGIES FOR HIS BRUTALITY OR RETRACTION OF HIS ACCUSATIONS, BECAUSE OF WHICH THE PARTIES DID NOT THEREAFTER LIVE TOGETHER FOR A PERIOD OF MORE THAN ONE YEAR, MAY THE CHANCELLOR THEN BY FINAL DECREE GRANT A DIVORCE TO THE WIFE ON THE GROUND OF WILLFUL, OBSTINATE AND CONTINUED DESERTION FOR MORE THAN ONE YEAR?"

1. The appellant insists that the Chencellor committed error in answering the foregoing question in the affirmative and by entering his final decree granting a divorce to appellee on the ground of willful, obstinate and continued desertion of her by appellant for one year. This case first came on for hearing before A. Judson Hill, Esq., a prominent and capable attorney of the Dade County Bar, upon appellee's bill of complaint which contained substantially the same allegations as are contained in her amended bill of complaint and in which a divorce on the statutory ground of willful, obstinate and continued desertion was prayed

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by the appellee. There were adduced in evidence before said Special Master substantially the same facts as were adduced before the second Master to whom this case was referred for trial de novo after this case was remanded to the trial court. The testimony of the parties and of many witnesses was heard by the said A. Judson Hill, Esq., as Special Master, and upon consideration thereof, said Master filed his report (T. V. IV, 24-35) in which he reviewed the testimony and evidence before him and in which he stated as follows:

> "Concerning the material allegations of the Bill of Complaint and the Answer of the defendant, the testimony of the plaintiff and the defendant is hopelessly irreconcilable. Notwithstanding the fact that over twenty-five witnesses testified for either the plaintiff or the defendant, the testimony of the greater majority of these witnesses has little, if any, probative value concerning the material allegations of the Bill of Complaint or the Answer. Of the three Statutory charges alleged in the plaintiff's Bill of Complaint, the Master finds that the testimony of the plaintiff and her witnesses has failed to support either the charge of habitual indulgence in violent and ungovernable temper on the part of the defendant toward the plaintiff, or the charge of willful, obstinate and continued desertion of the plaintiff by the defendant. The Master fails to find any credible testimony supporting in even a slight degree either of said charges."

> "There is no suggestion in this case that any actual physical cruelty was ever visited upon the plaintiff by the defendant, or attempted."

> "The defendant's emergency leave of absence having terminated, he was ordered to duty at a Naval establishment in Virginia Beach, Virginia, where he reported for duty and while there, it is the undisputed testimony that the plaintiff advised him that she no longer intended to continue the marital relationship and expected to file suit for divorce. (Tr. 263). Repeated efforts were made by the defendant, after being apprised of his wife's intention, to effect a reconciliation. The defendant was ultimately ordered to duty in the vicinity of San Diego, California, and he reported at that place pursuant to his Orders and remained until he was discharged from the Naval Service in the early part of 1945. The testimony stands undisputed that the plaintiff and defendant separated on January 2, 1945, and

that since that date defendant has not contributed to the support of the plaintiff. The Record conclusively shows that the plaintiff had ample financial means of her own and needed no assistance in that respect from the defendant."

"2. That the plaintiff be awarded such a Decree of Divorce from the defendant on the grounds of extreme cruelty by the defendant toward the plaintiff."

2. The appellee has set forth, on pages 22-24 of her brief, a resume of her testimony before the Special Master at the second trial of the issues in this cause, and has also set forth certain of the findings of the Special Master, as appears in his report filed after said second trial (appellee's brief, pages 25-26). Appellant recognizes that as a rule, this appellate court will accept as true the findings of fact made by the Special Master and Chancellor if there is any creditable evidence to support said findings. Nevertheless, it is to be noted that the charges of the appellee that the appellant insisted upon having sexual relations with her at times when she was not in the mood, and in an inconsiderate manner, sometimes causing her pain, were not corroborated by any other testimony whatsoever. It is true that the testimony of appellee's sister, Esther Jacovitz, did to a small degree corroborate appellee's testimony that appellant charged appellee with want of proper care of the child, resulting in its death by drowning, but said sister's testimony furnished no corroboration of appellee's charges as to her sexual relations with appellant. The testimony of appellee's said sister is entitled to little credence because of her relationship and interest and because of the further fact that her testimony given at the second trial in this cause is in material parts inconsistent with the testimony contained in her deposition received in evidence at the first trial of this cause (T.V. III-491). This Court has very frequently ruled that a decree for divorce should not be granted upon the uncorroborated testimony

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of the plaintiff. It is significant, considering that the appellee was at all times surrounded by friends,members of her family and physicians, after the death of said child, that she did not produce at either of the two trials in this cause abundant testimony corroborating her charges of misconduct on the part of appellant. Appellant insists that appellee's charges of such sexual misconduct on the part of appellant are uncorroborated by creditable testimony and that the Chancellor erred in granting appellee a divorce on the ground of desertion under these circumstances.

3. The appellant testified at the second trial in this cause and his testimony was substantially the same as that offered by him at the first trial of the cause. From his testimony (T.V.II - 273-290, 304, 305, 323), it appears that he became engaged to appellee when he operated a gasoline service station in Johnstown, Pennsylvania; that during the period of his engagement, he sold said business and accepted employment with appellee's father's bottling company; that thereafter, he married appellee at Pittsburgh, Pennsylvania, on May 9, 1941; that after a short honeymoon, the parties returned to Johnstown Pennsylvania, where they lived in certain apartments in said city; that a son was born of the marriage in July, 1942; that appellant went into the Army in January, 1943; that such sexual relations as he had with appellee were by mutual consent; that she complained of no pain from sexual relations; that after his discharge from the Army, he entered the United States Navy; that upon the unfortunate death of the son, he obtained leave and returned to Johnstown; that appellee met him at the station where he put his arms around her and kissed her; that he was very upset and depressed on account of the death of his son; that he did what he could to sympathize with and console the appellee and that he never complained to her or criticized her or charged her with any negligence in the care of the child and that appellee never complained to him of any indif-

ference or lack of consideration on his part; that they journeyed to New York to visit his parents and that appellee seemed to be happy and contented although still suffering from shock and nervousness due to the death of the child; that their sexual relations during this period were by mutual consent; that he then returned to his military service at Virginia Beach, Virginia, from where he telephoned appellee nearly every night; that upon one of these occasions she seemed depressed and stated that she wanted to be free and no longer married to him; that he could not understand her changed attitude toward him and obtained leave to visit her in Johnstown; that upon his arrival in Johnstown, he conferred with appellee and that everything seemed to be all right and that after staying with her for two days, he returned to Virginia Beach; that at this conference, it was mutually agreed that he would obtain living accommodations at Virginia Beach and that appellee would join him there; that he had sexual relations with appellee on the occasion of said visit and that she offered no objection or resistance to such relations and did not complain of any pain resulting therefrom; that he procured living accommodations at Virginia Beach and arranged to meet appellee at Philadelphia, Pennsylvania, and take her back to Virginia Beach with him; that she did not keep this appointment; that he procured a second leave for five days and journeyed back to Johnstown to confer with appellee again concerning their marital relations; that on this occasion she was not at home and he stayed at his sister's home in Johnstown, at which place appellee telephoned him and at a conference which he then had with her, she informed him that she wanted a divorce and that she was finished; that she did not state any reasons for her desire for a divorce, but only that she wanted to be free and did not want to be married; that thereafter, he returned to Virginia Beach; that he was discharged from the Navy in December 1945 and then returned

to Johnstown, Pennsylvania, where he made a further effort to confer with the appellee to effect a reconciliation with her, but she then told him that there was no use of his coming there and that she was not going to talk to him and that anything he wanted to know he could find out through her attorney; that he made a further effort to effect a reconciliation with appellee prior to the first trial in this suit at Miami, Florida; that he desired a reconciliation with appellee, but that she did not want a reconciliation at all. The Court's attention is directed to this testimony on the part of the appellant, to the end that the Court may observe that appellee's charges of misconduct on the part of appellant were denied by the appellant and that he sought to ascertain the reasons for her refusal to live with him as his wife and obtain a divorce from him. Appellee, in her brief, has stated that the appellant in his efforts to become reconciled with her, never begged her for forgiveness for having accused her of neglect resulting in the death of the child or for his sexual conduct toward her and promised not to repeat the same. But the Court will observe that it is appellant's testimony that he never made such charges and that their sexual relations were by mutual consent and that there was, therefore, nothing for her to forgive and nothing for him to promise to refrain from doing.

5. This third question, propounded by the appellee, has been heretofore argued by the appellant under Questions Five and Six of appellant's brief, pages 48-59, and no useful purpose may be served in repeating this argument here. However, it is to be noted that appellee herself testified at the first trial in this cause that although appellant insisted on having sexual relations with her, the relations were not pleasant but did not cause her physical pain (T.V. III-510). Appellee later testified (T.V.II - 253) that said relations caused her cramps at her menstrual period. The gravamen of appellee's case relates particularly to charges of

misconduct on the part of appellant which she alleges took place after the death of the child. It is here to be noted that the parties lived together only approximately six weeks after the death of the child at a time when both were suffering from shock and nervousness due to the death of the child and when appellant was on leave from his military duties.

6. It abundantly appears from the record that the appellant never intended to drive the appellee away or to terminate the marital relation or in any way to cause her to refuse to cohabit with him. To the contrary, the record is replete with testimony of both parties that appellant sought at all times to maintain the marital relation and sought to have the appellee live with him and attempted to provide a home for her and to become reconciled with her, and that he has resisted her efforts to dissolve the marital relationship. Appellant insists that appellee has failed to prove that he has deserted her for a period of one year or that such desertion has been willful and obstinate.

7. It appears from the testimony of the appellee that she believed that the appellant, by innuendo and insinuation, accused her of lack of proper care of their son at the time of his death by drowning, and that she was torn and tender from the birth of the son and that appellant's sexual relations with her sometimes caused her pain and that she suffered from cramps at menstrual periods. It does not appear that appellant definitely accused her of carelessness at the time of the death of the son and it does not appear that she refused to have sexual relations with appellant or that he exercised any force or violence to require her to submit to such relations. It is therefore submitted to the Court that the appellee has failed to prove a strong case against the appellant necessary to support and sustain her claim for divorce on the ground of constructive desertion. It is probable that the pain and cramps which she alleges that she suffered from such sexual relations

were not due to any brutal and violent conduct on the part of appellant. The record of appellee's testimony is substantially as follows:

Appellee testified at the first trial in this cause as follows (T.V. III - 499-500):

"Q. When he insisted upon his rights as a husband, did he cause you any physical pain?

A. It wasn't very pleasant.

Q. Did it cause you any physical pain?

A. I would say it did not cause me any physical pain, but it caused me to become worse.

Q. Now, while he was out in California, did he want you to come to California?

A. He wanted me to join him in California with the baby. I had refused him. I wouldn't go to any of those camps because I knew the living conditions and I refused to take the child into those conditions. Then he asked me to come along, without the child, and I refused him because I wouldn't have my mother watching the child.

(As to defendant's conduct upon his return after the death of the child)

Q. Did this attitude of his shock you?

A. No, it really didn't shock me. I really didn't want him to come home in the beginning, but I didn't want to say anything at that time. It really didn't shock me because I knew what he was before and knew what to expect.

Q. When did you come to the conclusion that the marital status had become such that you couldn't continue any longer?

A. I would say when he came home from Officers' Candidate School and started a disturbance about his working conditions.

Q. You say you separated January 2, 1945?

A. Yes. Before Thanksgiving, I wrote him a letter telling him I couldn't stand it any longer, then he came home and, like I testified before, I didn't want to go through any more aggravation and any more arguments, but he had an idea when he left that I wouldn't give him any satisfaction. I told him I could no longer live with him, - couldn't stand his aggravation and griping. He promised there

wouldn't be any more trouble. In fact, Mr. Rosenhouse has a letter he wrote to me (interrupted)

Test. Vol. 3

Q. Was he considerate in that respect prior to the birth of the child?

A. No. I wouldn't even say that even prior to the birth of the child he was very considerate about sexual relations because we had arguments over that.

Q. Isn't it true that you had no sexual relations within three months prior to the birth of the child?

A. I don't remember.

Q. About how long after the birth of the child was it when you first had sexual relations?

A. Well, he insisted, I would say, around the third month after the birth of the child, but I wouldn't give in.

Q. Did you experience any ill effects after such relations?

A. It wasn't very pleasant, I would say.

By the Master:

Q. Before you became pregnant, Mrs. Gordon, were you and Mr. Gordon entirely congenial in so far as sexual relations were concerned?

A. No, I would say we were not.

Q. His demands were in excess of your normal reaction and that caused arguments?

A. That's right.

Q. And it is your testimony that the situation did not change a great deal thereafter?

A. Yes.

Q. Well, it is true that the last time you met in Johnstown to arrange this settlement, he did make an effort to have you change your mind and resume your marital relations with him.

A. I will admit he wanted me to go back to him but, after all I went through, you know love, when it turns to hate, is very bitter."

Appellee testified at the second trial in this cause as follows (T.V.II, pp. 253, 254, 256, 257, 258):

"Q. (By Mr. Budd) How soon after your return to the Venango Street apartment did Mr. Gordon attempt sexual relations with you?

A. It was a month and a half after -- I'd say a week or two after we returned from my parents' home. It maybe a month and a half after the birth of the child.

Q. Did you object?

A. Well, I objected strictly because I knew that it would affect me in the future -- in future life, and I told him about it, but he persisted in having it, and so rather than argue and fuss, I finally gave in, but to this day it has affected me internally.

Q. What was the nature of that effect?

A. Well, the nature of the effect was that instead of getting the menstrual period every 23 to 26 days, I have a tendency to get it every 18 to 20 days, and have to be under constant Doctor's care.

Q. Now, did your husband make repeated and frequent demands for such relations in this period?

A. Yes, on the average, I'd say, of every other night, or every third night.

Q. Did these sexual relations have any immediate physical effect upon you?

A. It had the physical effect of when I would get my periods, that sometimes I would, as I stated, the first or second day I would have to go to bed because I was torn and ripped internally.

Q. Why did you have to go to bed?

A. Well, I hemorrhaged.

Q. Well, don't all women hemorrhage?

A. This is not a normal flow.

Q. You mean it is abnormal?

A. That's right.

Q. Is it accompanied by the usual pain, or unusual pain?

A. I usually have a terrific cramp."

"Q. Did you and Mr. Gordon retire to a common bedroom that evening?

A. Yes, we did.

Q. After you reached the bedroom, did he exhibit any tenderness towards you at all?

A. No, he didn't. Just wanted me to sympathise with him, and he never gave me any sympathy at all, and he insisted upon having a sexual relationship without any tenderness or any affection at all, and I told him that I was physically and mentally disturbed and upset - that I just wasn't in the mood for it, but he insisted upon it, and during the course of the relationship it was painful for me, and after the relationship it left me jittery and nervous and upset.

Q. You say it was painful for you. Did you tell him it was hurting you?

A. That's right. I said, 'Morrie, please leave me alone. It is paining me, and I am not in the mood for it.'"

"Q. Did he exhibit any tenderness to you prior to these relations?

A. No, he didn't. He never showed any affection or tenderness to me.

Q. Now what was his manner in indulging in sexual relations?

A. Well, it was usually of a brutal manner. It was just getting on top of me and satisfying himself.

Q. Did this method employed by him cause you any physical pain?

A. During the course of it it naturally caused me physical pain because I really wasn't led up to the emotions for it.

Q. Did you tell him what physical pain you were suffering?

A. I usually said, 'Morrie, please let me alone. It is only causing me pain, and will leave me more nervous.'

Q. Did your nervousness increase during this period?

A. Usually after the pain I became very jittery and nervous."

8. Appellee, in her reply brief, has completely ignored the sixth question propounded by appellant as appears on page 53 of appellant's original brief. In the argument of this question, the appellant showed that after his conference with the appellee at Johnstown, Pennsylvania, in November of 1944, it was mutually agreed by and between him and the appellee that he would return to his military service at Norfolk, Virginia, and there obtain living accommodations, and that she would join him in Norfolk and resume cohabitation with him and that they would make a new start in their marital relations; that he did return to Norfolk, where he obtained living accommodations for himself and the appellee and that it was then arranged that he would meet appellee in Philadelphia and from there return with her to Norfolk; that he journeyed to Philadelphia to keep this appointment but that appellee did not appear and thereafter refused to cohabit with him either at Norfolk or elsewhere; and that upon his return to Norfolk from Philadelphia, he wrote her an affectionate letter which is set forth in appellant's original brief, page 55, in which he made as complete and as abject offer of reconciliation with appellee as could be expected from any husband under any circumstances. Notwithstanding this offer of reconciliation, the appellee persisted in her refusal to cohabit with him. If appellant was, at the time said letter was written, guilty of any conduct which could be construed as constructive desertion by him of appellee, and he denies that he was guilty of such conduct, this bona fide, unconditional offer of reconciliation made by him to appellee terminated any desertion of her of which he then was guilty. Therefore, appellant insists that the Chancellor committed error in granting to appellee a divorce from him on the ground of willful, obstinate and continued desertion of her by him for more than one year.

FOURTH QUESTION

Appellee asserts that the Chancellor committed no error in answering in the negative the following question:

> "WHERE A WIFE, BEING THEN A RESIDENT OF PENNSYLVANIA, ON JANUARY 18, 1946, INSTITUTED A SUIT FOR DIVORCE AGAINST HER HUSBAND IN THE COURT OF COMMON PLEAS IN CAMBRIA COUNTY, PENNSYLVANIA, AND SAID SUIT PROGRESSED TO FINAL DECREE ON JUNE 28, 1947, IN WHICH SAID COURT FOUND THAT SHE WAS THEN A RESIDENT OF CAMBRIA COUNTY, PENNSYLVANIA, AND NOT A RESIDENT OF FLORIDA, AND WHERE SAID WIFE, DURING THE PROGRESS OF HER PENNSYLVANIA SUIT, INSTITUTED A SUIT AGAINST HER HUSBAND IN THE CIRCUIT COURT IN AND FOR DADE COUNTY, FLORIDA, ON SEPTEMBER 30, 1946, WAS THE WIFE ESTOPPED FROM ASSERTING THAT SHE WAS AT THE TIME OF THE FILING OF HER BILL OF COMPLAINT AND THEREAFTER A BONA FIDE RESIDENT OF THE STATE OF FLORIDA?"

1. The foregoing fourth question propounded by appellee on page 28 of her brief, and thereafter argued, is substantially the same as the second question propounded by appellant on page 21 of his brief and therein argued. It appears to be unnecessary to reiterate and set forth appellant's argument of this question, but reference is here made to said argument as set forth in appellant's original brief.

2. It is to be remembered that the Pennsylvania suit was instituted by appellee and that in her libel filed in said suit, she alleged that she was a resident of Westmont Borough, Cambria County, Pennsylvania, and that she adduced no evidence at the trial

of said Pennsylvania suit showing change of residence from Pennsylvania to Florida, as she had an opportunity to do, and that said allegation of her residence in Pennsylvania remained unchanged to the date of final decree and was one of the issues in said Pennsylvania suit. Appellant insists that in instituting said suit, appellee was bound in every particular by the final decree therein entered, and was bound by the adjudication of the Pennsylvania court as to her residence in the State of Pennsylvania, not only at the time of the filing of her libel but also at the time the final decree was entered, and did thereby become estopped from asserting in the instant suit that she was a resident of Florida and had been such a resident for at least ninety days prior to the institution of the suit at bar. It is further to be remembered that appellee took no appeal from the final decree in the Pennsylvania suit and was represented therein by her attorneys of record therein at the time the said final decree was entered.

3. It appears, therefore, that throughout the progress of her Pennsylvania suit, the appellee was represented by counsel and was estopped by her conduct in said suit by the averments of her libel filed in said suit as to her residence in Pennsylvania, from adopting an inconsistent position as to her residence in Florida for the purpose of instituting the suit at bar. As between the appellant and the appellee, as parties in said Pennsylvania suit, the final decree in said suit is conclusive as to all charges set forth and facts found or which might have been found in said suit.

> In Brooks v. Laurent, 98 F. 647, the Court said that where a party assumed a certain position in a legal proceeding, and succeeds in maintaining said position, he may not thereafter, simply because his interest has changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position taken by him.

4. The final decree of the Pennsylvania case was entered on June 28, 1947, and not sufficient time did elapse from the date of said decree for appellee to acquire a residence in the State of Florida prior to the filing of her original bill of complaint herein. In fact, she filed her bill of complaint instituting the suit at bar long prior to the date of the entry of the Pennsylvania decree.

In MacQueen v. MacQueen, 131 Fla. 448, 179 So. 725, in which it appears that the defendant entered a special appearance objecting to the jurisdiction of the court and reciting that the parties were married in the State of Alabama and that on August 6, 1932, the defendant obtained in the Circuit Court of Jefferson County, Alabama, a decree of judicial separation from the plaintiff and that the marital domicile of the parties was still in the State of Alabama and that the Florida court as a matter of law had no jurisdiction of the parties or the subject matter of the court, Mr. Justice Chapman, writing the Opinion, said as follows:

> "It is contended that the question of residence cannot be raised in the Florida court because the identical question had been determined by the court of Alabama. The last order made by the courts of Alabama in the cause is dated June 22, 1933, and signed by J. Russell McElroy, circuit judge, in equity sitting. The allegation of the bill of complaint is sufficient to receive evidence on the question of residence on the part of G.E. MacQueen. Considerable time elapsed from the date of the last order entered by the Alabama court and the filing of the bill of complaint in the circuit court of Duval county, Fla., and the intervening period, if the evidence is sufficient, will permit the plaintiff to establish his residence in Florida and thereby authorize the main tenance of the suit at bar."

The last order on decree in appellee's Pennsylvania suit was entered June 28, 1947, and not sufficient time had elapsed for her to have established a residence in Florida for the purposes of the suit at bar.

5. It appears, therefore, that the Chancellor committed error in answering the foregoing question in the negative.

FIFTH QUESTION

Appellee asserts that the Chancellor committed no error in answering in the negative the following question:

> "WHERE A FINAL DECREE OF DIVORCE IS ENTERED IN FAVOR OF A WIFE PENDING AN APPEAL BY THE HUSBAND, THE WIFE MARRIED ANOTHER MAN AND CONCEIVES A CHILD AND THEREAFTER THE SUPREME COURT REVERSES THE DECREE OF DIVORCE, DOES THE WIFE'S REMARRIAGE AND PREGNANCY ESTOP HER FROM SUCCESSFULLY PROGRESSING ORIGINAL CAUSE TO ANOTHER FINAL DECREE OF DIVORCE?"

1. Appellant asserts that the Chancellor did commit error by denying appellant's objections (T.V. I - 36-37) to appellee's motion for leave to file amended bill of complaint setting forth the remarriage, pregnancy and birth of a child, and by his order denying plaintiff's motions to strike said allegations from the amended bill of complaint. This question is similar to the third question stated and argued in appellant's original brief (pages 33-42), to which reference is here made. No useful purpose may be served by repeating in full the argument stated at length in appellant's original brief.

2. Although it is true that the final decree of July 31, 1947 (T.V. IV - 132-133), granting a divorce to the appellee, was final and conclusive at the time it was entered, nevertheless, on September 27, 1947, appellant filed his notice of appeal from said final decree and thereby transferred this cause to this appellate court. At approximately the time when counsel for the respective parties were arguing said appeal in this appellate court in which this suit was then pending, the appellee remarried and thereafter became pregnant before said final decree was reversed and this suit

remanded to the trial court where the Chancellor permitted appellee to file an amended bill of complaint setting forth, among other things, her marriage, pregnancy and birth of a child. This Court has frequently held that an appeal in equity is not a new suit but is to be regarded as a step in the cause.

Rabinowitz v. Houk, 100 Fla. 44, 29 So. 502; Deno v. Smith, 101 Fla. 902, 132 So. 462; Okeechobee County v. Florida National Bank, 145 Fla. 496, 1 So. 2d 263; Hollywood v. Clark, 153 Fla. 501, 15 So. 2d 175.

3. The allegations of said amended bill of complaint as to the remarriage of the appellee, her subsequent pregnancy and the birth of said child presented matters which were entirely irrelevant to and had no probative force upon the issues involved in this suit, and the Chancellor should have stricken said allegations on appellant's motion requesting him so to do.

4. It is true that appellant did not procure a supresedeas order upon the entry of the first appeal in this cause, but the necessity for such order does not appear, in view of the fact that the appeal was but a step in the cause which thereafter continued in this appellate court. The principal purpose of a supersedeas order is to stay further proceedings in the trial court. Where the final decree is for divorce and contains no provisions as to settlement of property rights or for the payment of alimony, there appears to be no necessity for appellant to procure a supersedeas order to restrain appellee from remarrying during the pendency of the cause. The attorneys for appellee had notice of the pendency of said appeal in this court and were here before the Court to argue said appeal when appellee remarried, and notice to her attorneys constituted notice to appellee. Therefore, it must be considered that appellee knew or should have known that said first appeal had been entered and that this suit was then

pending in this Court. Under these circumstances, the appellant and the appellee did not at the time of her remarriage have the status of single persons.

5. The final decree of July 31, 1947, was reversed by this Court upon the first appeal in this cause, and upon such reversal, the cause stood as though no decree had been rendered in the lower court. In other words, upon the reversal of said final decree, said decree was vacated and the parties in this cause continued to have the status of husband and wife. The appellee remarried and became pregnant during the pendency of the first appeal, subject to the outcome of said appeal and the decision of this Court as to the validity of her final decree for divorce for the reversal of said final decree related back to the date of its entry and rendered void the remarriage which she had contracted in the interim, and thereupon, appellee's said remarriage, pregnancy and birth of a child became irrelevant and immaterial facts upon the issues involved in this suit and the allegations thereof contained in appellee's amended bill of complaint should be stricken by the Chancellor.

> In Marshall, etc., Co. v. People's Bank, 88 Fla. 190, 101 So. 358, it was held that where all of the parties are before the Court, a judgment or reversal reverses the entire decree, and thereafter, the cause stands as though no decree had been rendered in the lower court.

6. Appellee's amended bill of complaint contained allegations by which appellee admitted that during the pendency of this suit and after notice of appeal had been filed therein by the appellant and after she knew or should have known of the pendency of this suit and of said appeal by reason of which the final decree of July 31, 1947, might be reversed, she remarried and became pregnant. Appellant insists that by reason of this conduct on the part of appellee, she

came into the trial court, a court of equity, by her amended bill of complaint, with unclean hands and that said amended bill of complaint should have been dismissed by the Chancellor upon appellant's motion demanding such dismissal.

7. The appellee cites in her brief, page 36, and relies upon the case of Chisholm v. Chisholm, 105 Fla. 402, 141 So. 302, but the facts of the Chisholm case are not similar to the facts in this instant suit. In the Chisholm case, the wife, after obtaining a divorce decree, married and cohabited with another before her husband filed motion to vacate the decree. No appeal was taken from the final decree for divorce, and it further appears that Mr. Chisholm's conduct toward his wife was most reprehensible and that he deserted and abandoned her and failed to contribute to her support. In the case at bar, an appeal was taken by the appellant from the final decree for divorce and during the pendency of this appeal, she remarried, became pregnant and gave birth to a child, and it does not appear that the appellant's conduct toward her was reprehensible or that he deserted her and was unwilling to support her if she would consent to live with him. There apparently was justification for Mrs. Chisholm to remarry after the entry of the final decree for divorce where no appeal had been taken from the decree and she had reason to believe that the decree was valid. No such justification appears in the suit at bar where it appears that the appellee remarried with notice and knowledge of the pendency of the appeal from her final decree for divorce and the possibility of the reversal of said decree by this appellate court.

8. In Davis v. State, 96 Tex. Cr. R. 367, 257 S. W. 1099, in which the status of the parties during the pendency of an appeal was under consideration, the Court said:

"Our construction of article 2100, Vernon's Civil Statutes, which provides that the filing of affidavit in lieu of a supersedeas bond, as provided for in the three preceding articles, shall not have the effect of suspending the judgment, but execution shall issue thereon as if no writ of error had been taken, as applied to a judgment merely for divorce, is that it would have no application. A judgment for divorce needs no execution. It fixes finally the status of the parties. To conclude that the perfecting of a writ of error from a decree of divorce by making an affidavit in forma pauperis would leave a final judgment effective so that the parties might proceed thereunder as if the marital relation had been ended and concluded by the judgment - might marry again, etc. - would be to make light of the law authorizing a reversal on such appeal by the writ. Our conclusion is that the filing of the petition for the writ of error, supported by the affidavit mentioned, in the absence of any contest, would so far render the judgment ineffective as that neither party could testify against the other in a criminal case except as provided in article 795, above mentioned, until and unless there be some further showing as to the disposition of the writ of error."

CONCLUSIONS

From appellant's original brief and from his foregoing reply brief, it abundantly appears that the Chancellor committed error in entering in this cause his final decree of June 8, 1950, and by granting a divorce unto appellee, and that said decree should be reversed.

Respectfully submitted,

BLACKWELL, WALKER & GRAY
Attorneys for Appellant

By _____
Of Counsel

AFFIDAVIT OF SERVICE BY MAIL

STATE OF FLORIDA)
) SS.
COUNTY OF DADE)

BEFORE ME, the undersigned authority, personally appeared RAY A. PETERSON, who, being by me first duly sworn, did depose and say that he is of counsel for the appellant in the foregoing cause and that he has caused a true copy of the foregoing reply brief of appellant to be mailed to counsel for appellee herein, as follows:

Robineau, Budd, Levenson & Van Devere,
Attorneys at Law,
Alfred I. duPont Building,
Miami, Florida,

by enclosing such copy in an envelope addressed to said attorneys for appellee as above set forth, and after sealing the same and affixing thereto sufficient postage to carry it to its destination, by depositing same in the regular United States mail box in the First Federal Building, in the City of Miami, Florida, on the 28th day of April, 1951.

Ray A. Peterson

SWORN TO and subscribed before me at Miami, Florida, this 28th day of April, 1951.

Emma L. McEnany
Notary Public, State of
Florida at Large

My Commission expires:
July 4, 1954

BLACKWELL, WALKER & GRAY, MIAMI, FLORIDA